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European Regulatory Private Law – The Paradigms Tested

Edited by Hans-W. Micklitz /
Yane Svetiev / Guido Comparato



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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).

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Abstract

The working paper collects the research presented in the second annual external workshop of the ERPL Project that took place on 16 and 17 May 2013 at the EUI in Florence. The second year of the project was devoted to the collection of empirical evidence in the various sub-projects, as well as in further elaboration of the theoretical and conceptual parameters that frame the project research. The theoretical parts of the working paper collects contributions on the relation between private autonomy and regulation (in Part I) as well as on the transformation of private law, including the drivers of the transformation in the public/private divide that in turn affects the purview of private law, as well as the transformation in the form and function of contract law and tortious liability (in Part III). The empirical part of the working paper contains contributions investigating the topics of remedies, standardisation of services, and telecommunications, analysed from the perspective of the parameters of hybridization, convergence and self-sufficiency, as elaborated in the previous working paper of the project LAW 2012/31 ERPL-01.

Keywords

European private law, regulation, autonomy, transformation, self-sufficiency

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Introduction

This working paper collects the research contributions presented in the second annual external workshop of the ERPL Project that took place on 16 and 17 May 2013 at the EUI in Florence. The second year was devoted to the collection of empirical evidence in the various sub-projects, as well as in further elaboration of the theoretical and conceptual parameters that frame the project research.

The first section of the working paper contains a contribution on regulated autonomy by Guido Comparato which examines the relationship between private autonomy and regulation in the context of European Union law and more precisely in the case-law of the Court of Justice. It suggests that, with a view to the construction of the internal market, autonomy has been regulated under EU law in a twofold way. Thus, while on the one hand EU law provides for an extension of private autonomy for actors, on the other hand it simultaneously imposes a set of conditions on that extended autonomy. Such conditions have the function of building and regulating the internal market. The result of this combination of both extending autonomy, as well as regulating it, is termed *regulated autonomy*.

The second section of the paper contains a summarised version of some of the empirical results in the fields studied in the project. This includes a contribution on remedies and hybridisation by Betül Kas, which shows how the law of the European Union shapes Member States' procedural and substantive law, resulting in the elaboration of hybrid remedies for the protection of EU law rights in domestic settings. The field of standardisation of services is discussed in the contribution by Barend van Leeuwen through the perspective of 'convergence'. The contribution suggests that 'the triangular relationship between free movement of services, European standardisation and private law will not work unless there is a degree of compatibility between each of the three components'. Finally, Marta Cantero Gamito's contribution provides a study of the telecommunications sector from the perspective of self-sufficiency of sectoral regulation. Her contribution analyses the institutional design of the telecom and electronic communications sector, suggesting that it is based on executive federalism whereby the Commission holds strong supervisory powers, while at the same time it relies on a collaborative approach (including the Body of European Regulators of Electronic Communications – BEREC) aiming at the removal of divergences in the performance of different national authorities.

The final section includes papers that provide some preliminary steps towards addressing the overall project question of the transformation of private law from autonomy to functionalism in competition and regulation. In a first contribution, Rónán Condon focuses on the issue of the transformation of liability, and in particular state liability in the context of an increasing regulatory role for the State. The contribution examines the role that new EU liability doctrines, such as the one elaborated in the seminal case *Francovich*, can influence and shape that process. In the last paper, Hans-W. Micklitz and Yane Svetiev address the topic of the transformation of private law from autonomy to functionalism in regulation and competition providing possible tools for the analysing that transformation emerging from the literature from two seminars organised at the EUI within the scope of the project, one on Autonomy and Regulation and another one on the Transformation of Private Law. The first part of that contribution examines the drivers of transformation that have been identified in the literature, including changes in the economy (transnational integration and changing patterns of production), in technology, as well as in civil society (self-organisation beyond politics). This part departs from and focuses principally on developments within the EU. The second part examines how the issue of transformation of private law has been dealt with in the American literature, reinterpreting this literature more explicitly through the prism of the drivers of transformation identified in the first part.

SECTION I: FOUNDATIONS

PRIVATE AUTONOMY AND REGULATION IN THE EU CASE-LAW

Guido Comparato

Regulation and Autonomy

The modern design of private law in modern states revolves around two concepts, apparently opposite to each other and therefore possibly hard to reconcile, on the one hand autonomy and on the other hand regulation. Private autonomy, in its traditional understanding, embodies the freedom of individuals to determine their legal relationships according to their free will and reveals itself in a series of well-established private law principles such as, most notably, freedom of contract. It is therefore at least ideally linked to the overarching idea of personal and economic freedom and as such represents a basic fundamental principle in the modern legal systems of those countries which are considered to belong to the Western legal tradition. On the other hand, regulation is an expression of the opposite idea of heteronomy, and consists in the overcoming of the individual will by the unilateral determination of legitimated public powers, although recent developments in regulation, corresponding to the evolution of the very nature of administration over the years, hint to an intensification of the delegation of powers to an increasing number of subjects with regulatory competences. Such practices have clearly blurred the distinction between private and public law to a large extent, therefore posing new challenges to the legal analyst.

As such, the two concepts of autonomy and regulation are traditionally regarded in contrast to each other and are therefore seen as the core elements of two different fields of the legal system: private and public law. Private law, in this reading, is the realm of the free choice of the individual, while any encroachment of that freedom can be determined only by the intervention of a legitimate power, as described by public law. Such interventions by state powers are dictated by reasons of public interest, although the notion of public interest is (sometimes dangerously) undetermined and vague enough to comprehend a vast number of very diverse things. This can even cover the need to ensure that all individuals enjoy freedom and have sufficient autonomy, which might lead to, at first look, quite bizarre but only seemingly contradictory situations in which both legislative and judicial limitations on freedom of contract are justified by the need to empower the autonomy of the individual.¹ Inasmuch as it gets delimited, nonetheless, autonomy is not just the prey of regulation, but it becomes a regulatory instrument of itself, as it ensures that the action of the private party conforms to the objectives of the legal order.

These latter considerations hint to the fact that, even if understanding regulation and autonomy as necessarily opposed principles might be a rational conceptualization as a starting point, this might also not be entirely appropriate to grasp the complexity of modern legal systems, since those two concepts rather appear to be strongly interlinked in several ways. This interlink emerges more clearly where the state assumes a more active role in the social and economic structure of the society, instead of posing just the external limits of the action of otherwise free individuals. A restrained interventionist approach characterizes the traditional norms of private law which invalidate legal acts concluded for

¹ See for instance the German Suretyship-case, BVerfG NJW 1994, 36.

instance against good morals. Those are limits which even a libertarian and non-interventionist state could accept to pose, besides of its role of enforcer of the agreements freely reached by individuals.

Regulation, however, goes beyond that approach and assumes different connotations derived from the particular social and economic rationality which permeates public actions, allowing for the configuration of different instrumental purposes such as alleviation of market failures, distributive justice, restrictions to private powers, welfare goals and so on, which become goals for contract law as well.² Rather than purely external limits, it poses the conditions for the exercise of autonomy. The regulatory state, the welfare state, the ordoliberal state, the market-state to name just a few are all models of state administration which rely on regulation to achieve their social and economic goals and may all require a more rigorous intersection of regulation and autonomy, meant not only to completely strike down autonomy whenever this conflicts with the external limits posed by the state (in private law terms, this determines the extreme consequence of the nullity of the act, which is indeed the traditional remedy posed by civil law for agreements which conflict with mandatory rules) but more pervasively to steer it towards the achievement of the particular goal of the regulator. As the scholarship which inquired the link between autonomy and regulation in the national context already identified years ago,³ the traditional legal consequence of the infringement of a limit posed by private law is the exclusion of legal effects of the act (which is often just ‘not satisfactory’ for the economic public order),⁴ while regulation can be more pervasive and, rather than just eliminating legal effects, it rather conforms them or even directly attributes rights to individuals. This appears as a stronger regulatory practice than just granting legal validity to an expression of private autonomy provided that this is compatible with the overall interest of the state and denying it when it is not.

From this point of view, although it is certainly correct to affirm that absolute freedom of contract has never existed in legal history so that autonomy has always been somehow ‘regulated’, the kind of relationship which has emerged between autonomy and regulation since the emergence of the mentioned models of the state is peculiar, more recent, and could be even regarded as a transformation of the role or even nature of private law in modern societies. Such a transformation of private law, which is closely linked to a more fundamental transformation of public law and possibly the state,⁵ poses challenges and can even unsettle the scholar, as it does away with categories and distinctions which also have a valuable safeguard function, making new conceptualisations compulsory.

In order to express the complementary nature of autonomy and regulation in this context, the term regulated autonomy is adopted here. The notion builds upon a series of other terminologies and concepts which are known in legal literature, but is used here in a more general meaning. More fundamentally, regulated autonomy is the result of regulatory interventions on private autonomy, which are not exclusively meant to limit this latter, but rather to empower and at the same time steer it towards a particular public goal, making it a regulatory tool itself.

These dynamics appear clearly in the regulation of those economic sectors which have undergone a process of liberalisation in the last decades in Europe, whereby new regulations (should) affect activities which were earlier attributed to the administration rather than to private subjects. Needless to say, the concrete manifestations of regulated autonomy might be as diverse as those of private autonomy, and substantively change in different regulatory contexts. For instance, an ordoliberal state aims at protecting autonomy but at the same time infringes upon it whenever this might lead to the

² H. Collins, *Regulating Contracts* (Oxford, University Press, 1999) 8.

³ P. Barcellona, *Intervento statale e autonomia privata nella disciplina dei rapporti economici* (Milan, Giuffrè, 1969) 54.

⁴ G. Ripert, ‘L’ordre économique et la liberté contractuelle’ in *Recueil d’études sur les sources du droit en l’honneur de François Gény, II, Les sources générales des systèmes juridiques actuelles* (Paris, Librairie du Recueil Sirey, 1934) 350, 353.

⁵ The topic of transformation is discussed by H.-W. Micklitz and Y. Svetiev, ‘The transformations of private law’, in this working paper.

creation of a private power, elaborating a system of competition law; the welfare-state accepts that in order for everyone to enjoy a set of freedoms and social rights acknowledged by the state the autonomy of some individuals might be strongly limited; the market-state intends to expand the room of the market, but must counterbalance this with a series of duties posed on those individuals that perform functions once reserved to the public authority. While these issues have emerged and discussed in various countries throughout the whole last century, today's clearest instance of such development is offered peculiarly in the context of the European Union.

As such, interventions on regulated autonomy are more invasive of traditional public law limits on private autonomy. While these latter, as already pointed out, involve traditionally a yes/no regulatory answer, which admits or denies the legal validity of an expression of private autonomy regulated autonomy means a more subtle steering action, whereby the contract – and by consequence the economic behaviour of the parties – is conformed rather than censured.

If autonomy is also traditionally considered as an expression of freedom, it is evident that regulation might be perilous in that respect. It is not a coincidence and it cannot be omitted that the capacity of the state to intrude and regulate private contracts with regulatory measures was most clearly recognised in those civil codifications inspired by state-centred ideologies,⁶ and that beliefs as to the importance of the state influenced, at least among other cultural influences, the leading reflexions on the limits of private autonomy⁷ in open contrast to liberal scholarly elaborations distrustful of economic steering by the state.⁸ In the historical development of the past century, the political flavour of the state action repeatedly and drastically changed, without a noticeable alteration in the structure of the legal instruments elaborated to legitimize state functionalization of private autonomy. In this sense, literature has already highlighted the risks connected to a debate as to the functionalization of individual autonomy, as it might offer the technical justifications for repression of individual freedoms in the name of general issues whose concrete determination would in the end be almost fully attributed to the discretion of the regulator. Facing this non-trivial risk and, in other terms, in order to ensure a balance between the otherwise opposed elements of autonomy and heteronomy, it is necessary that regulated autonomy as it is elaborated here incorporates further elements. An analysis of the judicial elaboration of the concept in the European courts reveals that those elements currently already include – at least potentially – the need that the intrusion on autonomy is justified and proportionate, as well as respectful of fundamental rights. Admittedly, these are categories which derive, and so far have been discussed, mainly in the realm of public law, while private law has been traditionally isolated from them, protected exactly by the principle of private autonomy, so that in practice the individual is allowed to do what is precluded of the state. It is neither necessary nor useful to mention once again the theoretical discussion as to the impossibility of clearly distinguish between public and private law, here it rather suffices to mention that such distinction is attenuated in the context of European law, as a consequence of the very hybrid nature of that regulatory system, which does not restrain from addressing directly private parties. In that context, the distinction has been nuanced to the level that the classical division between public and private seems to continuously flow into just a distinction between vertical and horizontal relationships, even if such a conversion may pose delicate questions of legitimacy and convenience.⁹ In this sense, some typically administrative and public law categories such as effectiveness, balancing and proportionality have been identified as emerging general

⁶ Notably, article 1339 of the Italian civil code of 1942 'Le clausole, i prezzi di beni o di servizi, imposti dalla legge o da norme corporative sono di diritto inseriti nel contratto, anche in sostituzione delle clausole difformi apposte dalle parti'.

⁷ See for instance, E. Betti, *Teoria generale del negozio giuridico* (Torino) 1943.

⁸ See G. Stolfi, *Teoria generale del negozio giuridico* (Padova) 1947.

⁹ M. Claes, 'The European Union, its Member States and their Citizens', in *The Involvement of EU Law in Private Law Relationships*, D. Leczykiewicz and S. Weatherill (eds) (Oxford, Hart Publishing, 2012) 29-52.

principles of European civil law, which concur in ‘framing’ the principle of autonomy.¹⁰ Traces of this development are therefore visible and can be descriptively identified in the case-law of the Court of Justice of the European Union. The normative and doctrinal elaboration should put a major emphasis on those aspects: to make one example, in particular fundamental rights, in this light, could be conceptualized instead of as pure external limits, as concomitant constitutive goals.

A detailed analysis of these elements in the concept of regulated autonomy cannot be conducted here and must be left for another occasion, together with an analysis of the national scholarly discussion and a more accurate doctrinal elaboration of the concept. However, it is nonetheless important to highlight that these dynamics can be detected, even if they are not explicitly uttered, in the judicial treatment of private autonomy and regulation by the Court of Justice of the European Union. It is at the same time important to highlight that the transformation of private autonomy to regulated autonomy is not a process which is taking place solely in European Union and is not therefore a distinctive feature of the EU legal order only. As it has been touched upon earlier, the link between regulation and autonomy is an aspect which can be found in nation-states earlier and independently of EU law as well as in other jurisdictions outside Europe. Supposing a strong opposition between regulatory practices at both sides of the Atlantic, in particular, could easily be an excessive and possibly ideological representation.¹¹ In the European context and in comparison with the member states, nonetheless, the law produced by the European Union is most clearly linked to the idea of regulated autonomy, more than the law of the member states, for the very reason that the EU, as a regulatory system, has taken over the competence of most of those specific areas of the economic system that are considered as in a particular need of regulation. In the European Union, at any rate, another and crucial reason for functionalization of autonomy is added: the creation of a well-functioning internal market. It can be affirmed that historically the purpose of establishing internal markets has been always present also in the development of unified national systems of private law, but the degree of functionalization of autonomy required by a liberal bourgeois state was certainly different from the one requested by contemporary regulatory states.

This contribution therefore limits itself to sketching out the contours of regulated autonomy in the European Union as it has been developed in a series of decisions of the Court of Justice. In so doing, the contribution deals only with one – though crucial – aspect of regulated autonomy, i.e. its *quasi*-constitutional dimension in the normative architecture of Europe and how it stands in relation to the general objectives of the Union as well as fundamental rights.

Extension and limitation

As touched upon, the most characteristic feature of regulated autonomy in the law of the European Union is the co-existence in it of two elements, extension and limitation, which represent the projection of the categories of autonomy and regulation in the context of the European internal market. While most literature as well as political and social debates about European law focuses alternatively on one of those two elements, highlighting either the liberal connotation or the intrusive character on individual freedoms of that law, it is submitted here that those two readings need to be integrated in order to illustrate the whole picture. The recognition of personal and economic freedoms is not absolute but has a necessary complement in the regulation of those freedoms. In private law categories, that autonomy that individuals enjoy under the granted freedoms requires particular regulations, not only to be counter-balanced, but also to be constituted.

¹⁰ N Reich, *General Principles of EU Civil Law* (Cambridge: Intersentia, 2014)

¹¹ See the considerations in D Caruso, ‘Black Lists and Private Autonomy in EU Contract Law’, in *The Involvement of EU Law in Private Law Relationships*, D. Leczykiewicz and S. Weatherill (eds) 291-316, 298-301.

There are various ways in which it can be spoken of an extension of private autonomy. The first extension of autonomy is brought about through its stretching beyond the national borders:¹² the recognition of the four freedoms entail the possibility for parties to enter in economic transactions with a much wider number of individuals around Europe. In this sense, a direct link is established between the four freedom and freedom of contract, and, as a scholar of the internal-market may characterize it, 'If a party wishes to enter the market of a certain Member State, that is another way of saying that he or she wishes to conclude contracts with persons within that market'.¹³ In any case, not only the four freedoms have this goal, but even much of the projects of directives and regulations with the clearest implications for private law are justified by the need of giving businesses and consumers in Europe a better chance to contract across borders, as it most remarkably was the case of the proposed Common European Sales Law. More importantly, however, extension has involved so far an elimination of rules constraining private economic freedom, allowing individuals to engage in activities that were earlier precluded or limited. In this sense, the first extension-aspect of regulated autonomy in the EU mostly consists in 'liberalisation', that is to say the recognition of the possibility for the private to perform activities that were previously reserved to the public sector. Examples of these activities are very numerous and inhomogeneous: communications, energy, transport, financial services and even, more recently, health care. It is self-evident that while those sectors become liberalised they also need to be regulated for a series of different reasons.

In this sense, while they have been liberalised, those sectors have become more or less deeply regulated, although it is matter of political debate whether those rules are so far adequate for that purpose. While this kind of regulation is sectorial, it has a few common features, such as, for instance, the demand to establish independent authorities in the liberalised fields or to establish ADR mechanisms to solve possible disputes arising in that area especially b2c relations. Regulation, however, does not limit itself to the institutional organisation of those activities, and rather strongly impacts private law relationships. Examples are numerous and include provisions that cover the scope of the relevant manifestations of the traditional concept of private autonomy, notably the person with whom to contract (the case of access to universal services) the contents of the contract, even including its economic contents. Incidentally it can also be noticed that even an apparently restrictive measure may have on the contrary a deregulatory effect, as might be the case with black-lists of prohibited contract terms, such as those laid down in the annex of the Unfair Terms directive. According to a view,¹⁴ these might one day even engender oppositions based on efficiency concerns and consequently lead to the establishment of a more liberal legal framework than the *status quo ante*. But even without considering future political developments, it is clear that laying down mandatory rules might be an appropriate market-design tool to define *a contrario* a wider sphere of legitimate activities, while the imposition of duties on one parties might have the effect of including in the market categories of subjects who would otherwise be excluded, extending the autonomy of these latter, as in the case of non-discrimination. For these reasons too, it is necessary to consider mandatory rules not as the simple rejection of autonomy, but rather as just one side of the coin of regulated autonomy.

It would also be erroneous to assume that the primary role of EU law in the internal market has been the deregulation of each and every sector. The Court of Justice in particular has not always been keen to interpret the market freedoms as to produce a full liberalization of particular activities which are the

¹² P.-C. Müller-Graff, 'Basic Freedoms – Extending Party Autonomy across Borders' in *Party Autonomy and the role of Information in the Internal Market*, S. Grundmann, W. Kerber, S. Weatherill (eds) (Berlin, Walter de Gruyter, 2001) 133-150.

¹³ G. Davies, 'Freedom of Contract and the Horizontal Effect of Free Movement Law', in *The Involvement of EU Law in Private Law Relationships*, D. Leczykiewicz and S. Weatherill (eds) 53.

¹⁴ D. Caruso, 'Black Lists and Private Autonomy in EU Contract Law', in *The Involvement of EU Law in Private Law Relationships*, D. Leczykiewicz and S. Weatherill (eds) (Oxford, Hart Publishing, 2012) 291-316.

object of strict regulation in Member States due to their public relevance or nature and which are therefore protected by the public interest proviso.¹⁵

Similar developments are so relevant that they could be considered hardly justifiable if they were not anchored in a particular legal and even constitutional framework, in which this kind of regulated autonomy is, if not recognised, at least protected under super-primary rules. Such recognition too represents a form of extension since, at least theoretically, it safeguards autonomy at the constitutional level. In reality, such quasi-constitutionalisation leads to the necessity of counter-balancing that principle with other fundamental rights, which, in concrete, has an opposite effect than the one that some advocates of constitutionalisation of private autonomy might aspire to. For the purposes of the paper, therefore, the attention will now turn to the evolution of the concept in the jurisprudence of the Court of Justice which has contributed to vest regulated autonomy with a *quasi*-constitutional status.¹⁶

Evolution of a concept in the CJEU case-law

The constitutionalisation of private autonomy has already taken place in several countries, even if with substantial differences, and the constitutional status of autonomy has been discussed also with regard to the legal architecture of the European Union.¹⁷ The term ‘constitutionalisation’ can indeed encompass such a high number of solutions that in the end it even appears as misleading. So for example, the idea that private autonomy is a principle which should be protected *from* the State being laid down in national constitutions is a liberal one, which in the conceptualization of the German Ordoliberal School nonetheless admits strong intrusions by the state when this is necessary to avoid the concentration of private power. But it is exactly in Germany that constitutionalisation of autonomy was judicially acknowledged in a completely different fashion, as protection of private autonomy *by* the State in light of the principle of social state. When discussing the issue in the context of European Union law, it is therefore not enough to refer to the more or less recognised link between private autonomy and the constitutional freedoms – recognised most clearly very recently by the Court of Justice in the *Sky Österreich* case – but is also necessary to highlight what kind of autonomy this is and in which terms this is linked to the overarching constitutional dimension. The hypothesis here is that at the European level private autonomy gets quasi-constitutionalised in order to be extended, both in its merely geographical dimension and in its economic function, but that in this way it can be legitimately counter-balanced by a series of regulatory limitations which are realised with the intent to promote a well-functioning internal market. Its inclusion at the super-primary level, covered by the freedom to pursue a business and on a same footing with market freedoms and fundamental rights, does not really amount to a consecration, but rather makes it a principle which necessarily has to be not only counter-balanced by fundamental freedoms and rights, but more importantly construed in light of those freedoms and rights. The jurisprudence of the Court of Justice of the European Union, incoherent as it may be over a long period of time, offers nonetheless sufficient elements to read this development in the terms mentioned. As such, the concrete qualification of regulated autonomy seems to diverge from constitutionalised private autonomy both in, to mention but a few, its ordoliberal and welfarist reconstruction at the national level.

This is not to say that the European legal concepts are radically new in respect to national law, quite to the contrary, while a few general principles of EU law are original and got then implemented in national law, when it comes to typically private law concepts, those which are employed at the

¹⁵ N Reich, *General Principles of EU Civil Law* 25.

¹⁶ This part builds on the analysis presented in G. Comparato and H.-W. Micklitz, ‘Regulated Autonomy between Market Freedoms and Fundamental Rights in the Case Law of the CJEU’, in *General Principles of EU Law and European Private Law*, U. Bernitz, X. Groussot, F. Schulyok (ed.) (Alphen aan den Rijn: Kluwer, 2013) 121.

¹⁷ For instance, D. Coester-Waltjen, ‘Constitutional Aspects of Party Autonomy and Its Limits – The Perspective of Law’ in *Party Autonomy and the role of Information in the Internal Market* in S. Grundmann, W. Kerber, S. Weatherill (eds) 41.

European level are mostly drawn from the experience of the Member States, as the case of the categories of the ‘general principles of civil law’ almost incidentally introduced by the CJEU¹⁸ and passionately debated by scholars¹⁹ exemplifies. When these are re-transferred to the Member States, however, those have already undergone a functionalization, as they have been interpreted with a view to make them comply with the regulatory framework and the policy objectives of the European Communities first and the Union later. Against this background, European private law appears to distance itself from its national counterparts in being function-oriented and therefore developing its own set of principles and methodologies.²⁰ Instances for this process will be offered and highlighted. It must be recalled that autonomy is a dynamic concept whose concrete contents and contours might easily vary. If regulated autonomy is the functionalization of private autonomy in light of regulatory aims, it is self-evident that the concept changes as also those regulatory aims evolve. Again, European law offers the clearest instance for this, as in the history of European integration the number and nature of competences and policies of the supranational institutions have changed over the years. This is mostly the reason why, in a large period of time of sixty years, different forms or even generations of regulatory interventions on autonomy can be recognised. In all circumstances, for sure the same basic dynamic of extension-restriction can be identified, even if expressed in different ways.

Marketization

Regulated autonomy in Europe has mostly been an instrument for the construction of the common market first and the internal market later. In this sense, it makes sense to speak of a marketization of private autonomy, which also emerges if one considers the way in which this concept has been linked to the constitutional framework, i.e. associating it to market freedoms, which to a certain extent contrasts to those national contexts in which the principle rather assumed a stronger political and personalistic flavour. The establishment of the common market, which involved first a negative and then a positive phase, presupposes a coordination of the individual economic activities through a control on their private agreement in the same way in which it requires abolishment of barriers of trade and levies. In particular, the Court soon started addressing the issue from a constitutional perspective, already for the reason that the referring courts from Member States lamenting violations of the private autonomy of businesses referred to the constitutional nature of that concept in their national jurisdiction. More specifically, the typical manifestations of private autonomy got covered by the freedom to pursue a trade or profession, which, as the Court would articulate in a clearer way only later in the case *Jean Neu* ‘includes, as a specific expression of that freedom, the freedom to choose whom to do business with’²¹ and, more explicitly in the much later *Sky Österreich* case, ‘covers the freedom to exercise an economic or commercial activity, the freedom of contract and free competition’.²² This development appears most clearly in the *Nold* case of 1974,²³ originated when a

¹⁸ *Société thermale d'Eugénie-les-Bains v. Ministère de l'Économie, des Finances et de l'Industrie*, 2007 I-06415, C-277/05 (18/7/2007); *Annelore Hamilton v. Volksbank Filder eG*, 2008 I-02383, C-412/06 (10/4/2008); *Annelore Hamilton v. Volksbank Filder eG*, 2008 I-02383, C-412/06 (10/4/2008); *E. Friz GmbH v. Carsten von der Heyden*, 2010 I-02947, C-215/08 (15/4/2010).

¹⁹ Among others, S. Weatherill, ‘The “principles of civil law” as a basis for interpreting the legislative acquis’ 6(1) *European Review of Contract Law* (2010) 74; A.S. Hartkamp, ‘The General Principles of EU Law and Private Law’, 75 *RechtsZ* 241 (2011); M.W. Hesselink, ‘The General Principles of Civil Law: their Nature, Roles and Legitimacy’ in *The Involvement of EU Law in Private Law Relationships*, D. Leczykiewicz and S. Weatherill (eds) 131-180.

²⁰ N Reich, *General Principles of EU Civil Law* 214.

²¹ *Jean Neu and others v. Secrétaire d'Etat à l'Agriculture et à la Viticulture*, 1991 I-03617, joined cases C-90/90 and C-91/90 (10/7/1991) para. 13.

²² *Sky Österreich GmbH v. Österreichischer Rundfunk*, Case C-283/11 (22/1/2013) para. 42.

German undertaking complained that European measures, in particular a decision of the Commission, authorizing the terms of business of a new coal dealing company was violating its economic freedom protected in Articles 2(1) (personal freedom, considered as protecting private autonomy) and 14 (property) of the German Constitution. While the question was referred in terms which reveal a traditional liberal understanding of autonomy as a negative freedom *from* the State – or looking at it in a slightly different sense: an ordoliberal one, since it was lamented that the administration did authorize a restrictive terms therefore not hampering the restriction of competition by a ‘private power’ – the Court of Justice, following the eloquent opinion of its Advocate General Trabucchi, rejected the argument sustaining that, if that claim were accepted, then the Communities would have no power at all to regulate the market, which was on the contrary the objective of the decision.

At the same time, while the European judges recognised the link between some manifestations of autonomy and freedom of trade, they singled out the reasons which can justify restrictions of that freedom. This argument became widespread and was almost literally followed in all successive judgments of the Court on freedom of trade: after recalling that fundamental rights are part of the general principles of law which are binding in European law, the European judges considered that even ‘if rights of ownership are protected by the constitutional laws of all the Member States and if similar guarantees are given in respect of their right freely to choose and practice their trade or profession, the rights thereby guaranteed, far from constituting unfettered prerogatives, must be viewed in the light of the social function of the property and activities protected thereunder. For this reason, rights of this nature are protected by law subject always to limitations laid down in accordance with the public interest. Within the community legal order it likewise seems legitimate that these rights should, if necessary, be subject to certain limits justified by the overall objectives pursued by the Community, on condition that the substance of these rights is left untouched’.²⁴ It can be noticed in the formula employed by the Court that this is expressed in terms which are corresponding to the constitutional tradition of the Member States: in particular the reference to the need to read freedom of trade ‘in the light of the social function of the property’ takes its roots in a well-established achievement of European post-War constitutionalism, already expressed several times by national constitutional courts. Again, however, the concrete meaning of that social function – which was already interpreted in very different ways in the constitutional jurisprudence of the Member States – assumes a particular flavour, as it coincides with the ‘overall objectives pursued by the Community’. In the following years, the Court of Justice relied strongly on this formula, more often than not accepting the legitimacy of any regulatory intervention of the European institutions as long as this was justified by the need to reach one of the policy objectives of the Union. The extension of private autonomy is carried out at the highest possible level: its constitutional dimension is recognised, but this does not involve its supremacy but rather implies the need for it to be read on an equal footing – guided just by a test of proportionality – to a series of regulatory goals which, on the other hand, may legitimize a restriction – or rather a functionalization – of individual freedom of contract. The developments of the freedom of trade as taken by the Court of Justice from the national level and functionalised in light of the common market are well-known, and led directly to the inclusion in the Charter of Fundamental Rights of a freedom to conduct a business,²⁵ which became the protagonist of much of the most remarkable developments in the judicial treatment of private autonomy in the European Union.

(Contd.) _____

23 *J. Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities*, 1974 00491, Case 4/73 (14/5/1974).

²⁴ *Nold*, para.14.

²⁵ On the right to conduct a business, D. Leczykiewicz, ‘Horizontal Effect of Fundamental Rights: In Search of Social Justice or Private Autonomy in EU Law?’ 171 and P. Oliver, ‘What Purpose Does Article 16 of the Charter Serve?’, 281, both in *General Principles of EU Law and European Private Law*, U. Bernitz, X. Groussot, F. Schulyok (ed.) (Alphen aan den Rijn: Kluwer, 2013).

The marketization of autonomy, that is to say the construction of private autonomy in light of the overall objective of building up a common or later an internal market, does not fully coincide with the liberal and ordoliberal understandings of the role of the state vis-à-vis the economy, since it admits a stronger regulatory function than in the traditional liberal or even ordoliberal understanding: it ensures competition is one of the objectives of the European regulator and therefore represents a legitimate means of steering of regulated autonomy, but at the same time implies more than that, and comprises, as later cases such as *Hauer*²⁶ show, in general the ‘common organisation of the market’.²⁷ Such a strong economic flavour and re-reading of the principle of autonomy and even of freedom of trade then have a direct impact in the evolution of analogous concepts employed at the national level: in this sense, even the principle that economic activities have to be read in light of the ‘social function’, started to be construed in national law taking into account the development of the concept at the European level. In this sense, the constitutionalisation of regulated autonomy at the European level differs from the economic liberal and ordoliberal approach, but even in a more dramatic way from the welfarist constitutionalisation of autonomy, as it has been performed in particular by the German constitutional court. It is self-evident that marketization would entail huge risks if it led to emphasize the economic character of autonomy over other aspects, and the interpreter would be left without appropriate doctrinal instruments to prevent a drift towards a full victory of economic rationality over other rationalities. To avoid this non-hypothetical risk, regulated autonomy must be read in light not only of market freedoms but also of fundamental non-economic rights.

Social Fundamental Rights

The impact of fundamental rights in the development of European private law has been extensively discussed in the literature, and cases such as *Schmidberger*²⁸ and *Omega*²⁹ account for well-known instances of the role that fundamental-rights-reasoning can have on national rules and, indirectly on contract law. In cases such these as the scholars have highlighted, the four freedoms must be counterbalanced by fundamental rights, which have been considered to lie on the same hierarchical level. The equal footing of the two possible opposed principles also means, nonetheless, that the fundamental rights do not always prevail, and indeed the case-law of the Court also lists examples of the other situation in which the four freedoms take the upper hand, with cases such as *Viking*³⁰ and *Laval*³¹ being only the most famous and controversial, as they involve social fundamental rights.

While the Court is famous for employing fundamental rights in its reasoning, and the most visible developments in that respect can be seen in the famous *Kadi* case,³² in the realm of private law this development has been more nuanced. First of all, it can be noted that, as famous cases like *Omega* and

²⁶ *Liselotte Hauer v Land Rheinland-Pfalz*, 1979 03727, Case 44/79 (13/12/1979).

²⁷ Opinion of Advocate General Capotorti, Case C-44/79 (8/11/1979) 3755.

²⁸ *Eugen Schmidberger, Internationale Transporte und Planzüge v. Republik Österreich*, 2003 I-05659, Case C-112/00 (12/6/2003).

²⁹ *Omega Spielhallen- und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn*, 2004 I-09609, Case C-36/02 (14/10/2004).

³⁰ *International Transport Workers’ Federation and Finnish Seamen’s Union v. Viking Line ABP and OÜ Viking Line Eesti*, 2007 I-10779, Case C-438/05 (11/12/2007).

³¹ *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet*, 2007 I-11767, Case C-341/05 (18/12/2007).

³² *Yassin Abdullah Kadi and Al Barakat International Foundation v. Council of the European Union and Commission of the European Communities*, 2008 I-06351, Case C-415/05 (3/9/2008).

less famous ones like *Mesopotamia/Roj TV*³³ reveal, the Court might have now developed a less interventionist approach which tends to respect fundamental rights as they are qualified at national level and recognised at the European one as well, ‘translating’ nationally protected interests into European values³⁴ and trying to avoid interference between European legislation and national constitutional interests.

Included in the protection offered by the freedom to pursue a business, private autonomy needs to be calibrated against other occasionally conflicting fundamental rights. *Spain and Finland v. the European Parliament and Council*³⁵ offers an example of this. The case had for its object the European regulations on the working time of persons performing mobile road transport activities, which was considered by Spain and Finland as being in violation of the principle of freedom to pursue a business in as much as they disproportionately limited the autonomy of self-employed drivers. The directive in object had certainly the scope of building a common normative framework for the market of road transport in Europe, but in doing this it pursued also further objectives which are not inherently connected to the one of market building, in particular pursuing road safety and health. All these objectives are combined, as in the reasoning of the court the directive contributes ‘to realizing the objectives of road safety and alignment of conditions of competition’.³⁶ In particular Spain sustained that the conditions of employed workers, for which stronger intrusions on autonomy might be justified, should be distinguished from the one of self-employed, for which on the contrary European rules appear as excessively intrusive. In judging the directive legitimate, the Court referred again to the traditional formula according to which ‘freedoms are not absolute rights, however, but must be considered in relation to their social function. Consequently, restrictions may be imposed on their exercise provided that the restrictions correspond to objectives of general interest and do not constitute in relation to the aim pursued a disproportionate and intolerable interference, impairing the very substance of the rights guaranteed’.³⁷ As the Treaties offer autonomous bases to qualify the protection of public health as a legitimate policy aim of the Union – primarily Art 168 and 9 TFEU – the balancing was not explicitly uttered in terms of a balancing between opposite fundamental rights.

Considering cases dealing with more typical private law issues, references to fundamental rights are scarcer in the jurisprudence of the Court. This might certainly be due to the fact that only since the Treaty of Lisbon the European legal order has a clear list of explicitly formulated and legally binding fundamental rights at its disposition, but there appears to be more substantive explanations as well. In a first sense, this might be a question of competences. Looking at how the judiciary employs fundamental rights in private law cases, it appears that these are used to achieve ‘just’ results, in a way contributing to elaborating a social contract law; but the European architecture is to a large extent still dependent on the traditional distinction of competences which allocates social issues at the level of the member states. This could be confirmed by the fact that even after the entering into force of the Charter, the situation does not seem to have changed a lot, and the Court still seems to instil constitutional values in typically private law cases (differently than, for instance, in labour law or even non-discrimination law cases) in a disguised way. The clearest instance of this appears to be the recent and already famous *Aziz* case,³⁸ in which the Court, interpreting the unfair terms directive, dealt with a

³³ *Mesopotamia Broadcast A/S METV and Roj TV A/S v. Bundesrepublik Deutschland*, Joined cases C-244/10 and C-245/10 (22/9/2011).

³⁴ L Azoulay, ‘The European Court of Justice and the duty to respect sensitive national interests’ in M. Dawson, B. De Witte and E. Muir (eds), *Judicial activism at the European Court of Justice : causes, responses and solutions* (Cheltenham: Edward Elgar, 2013) 167-187, 180.

³⁵ *Kingdom of Spain and Republic of Finland v. European Parliament and Council of the European Union*, 2004 I-07789, Joined cases C-184/02 and C-223/02 (9/9/2004).

³⁶ *Spain and Finland v. European Parliament and Council*, para. 41.

³⁷ *Spain and Finland v. European Parliament and Council*, para. 52.

³⁸ *Mohamed Aziz v. Caixa d’Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)*, Case C-145/11 (14/3/2013).

worryingly prominent social problem linked to the consequences of financial crisis in several European countries, i.e. the eviction of insolvent consumers from their homes. Even in the astonishing lack to any reference to the constitutional value of a right to housing, the Court stated that its interpretation ‘applies all the more strongly where, as in the main proceedings, the mortgaged property is the family home of the consumer whose rights have been infringed, since that means of consumer protection is limited to payment of damages and interest and does not make it possible to prevent the definitive and irreversible loss of that dwelling’.³⁹

If on the one hand these references show how humble the Court is in explicitly reading private autonomy in light of a welfarist principle through the employment of social fundamental rights in a manner similar to the German Constitutional Court, on the other hand it shows that ‘marketization’ may not be the only feature of regulated autonomy. Also non-market policy objectives may contribute to the functionalization of a private autonomy which, if on the one hand is expanded in the larger internal market, on the other hand necessitates stronger regulatory approach. Admittedly, this is in a far less developed phase than marketization is, probably due to the above-mentioned matter of division of competences as well as other institutional issues concerning the applicability of the Charter in its social part. In particular, under the pressure of solving the problems linked to the economic crisis, there might be however room for surprising developments in this area. A clear sign of this is the opinion of the Advocate General in a case originating from Slovakia involving, again, unfair terms in consumer credit agreements and public auctions. The Advocate General, in more explicit terms than the ones employed by the Court in the *Aziz* case, noticed that ‘where the property concerned by the procedure at issue is the consumer’s home, there must be specific guarantees. Failure to provide such guarantees may prove problematic from a fundamental rights perspective. Indeed, the loss of a family home is one of the most extreme forms of interference with the rights of the consumer. As respect for the home is a right guaranteed under Article 7 of the Charter of Fundamental Rights of the European Union, in the light of which Directive 93/13 must be interpreted, any person at risk of an interference of this magnitude should be able to have the proportionality of such a measure reviewed by an independent judicial body’.⁴⁰

Regulating the Information Society

Even the provisions contained in the Charter of Fundamental Rights can be therefore employed as regulatory tools. If their employment to instil in private law relationships considerations of social justice such as the protection of the dwelling is less developed than it is with regard to other policy objectives, fundamental rights might also be employed to structure the market in particular sectors. This would suggest that in their relation to private autonomy fundamental rights should not be understood as mere external limits but as more pervasive elements. As the focus of this paper is limited to the constitutional development of regulated autonomy in Europe, the clearest example of this tendency is offered in the area of the so called information society. This represents not only a technological development with huge social consequences, but certainly also a new and pivotal aspect of the internal market. The Commission itself recognised the information society as the new frontier of the internal market,⁴¹ identifying the policy instruments to build and regulate that sector of the market with the goal of promoting ‘a competitive environment’, characterised by the liberalization of the infrastructure of the telecommunications sector, standardization and interoperability, and also through the design of new intellectual property rights measures.⁴² The impact of such measures on private

³⁹ *Mohamed Aziz*, para. 79.

⁴⁰ Opinion of Advocate General Wahl in case C-482/12, para. 82, delivered on 21 November 2013.

⁴¹ Commission, *A single market for 21st century Europe*, COM(2007) 724, 20.11.2007, 2.3.

⁴² Commission, *Europe’s way to the information society: an action plan*, COM(94) 347 final, 19.7.1994

autonomy is enormous and the recent case-law of the Court of Justice on the point highlights the role of regulated autonomy in this field.

The series of cases on copyright law including cases such as *Promusicae*,⁴³ *Scarlet*⁴⁴ and *Netlog*⁴⁵ is well-known as it has, rightly, attracted the attention of private law and fundamental rights scholars. The constitutionalization of the legal discourse on copyright law is certainly co-determined by the reference contained in the Charter of Fundamental Rights, which explicitly mentions the need to protect intellectual property⁴⁶ and therefore makes it on the one hand necessary to frame in constitutional terms any exception or limitation to that principle, but on the other hand permits a clearer judicial balancing of different rights and policy objectives in the information society.

While the recognition of the freedom to pursue a business, inasmuch as it constitutionalizes at least partially the economic individual autonomy, could be read as the triumph of a liberal understanding of the economic freedoms, the cases in the area of the information society on the contrary reveal how that principle might be employed against other economic rights with the double function of both protecting individual rights and shaping the information market. Already the first instance is quite striking, since the traditional preconception, reinforced by the case-law described here, about the relation between private autonomy and freedom of trade would lead to think that these stand necessarily in contrast to other fundamental rights, especially social rights. That tension indeed characterised the series of cases dealt with by the Court of Justice of which some examples have been shown here, whose outcome has nonetheless been non-univocal, since the starting point employed by the court was not the preference for the economic or the social right, but rather the specific function of those rights in the particular context of the European internal market. The same functionalist approach – which takes its starting point in the hierarchical equivalence of market freedoms and fundamental rights and then solves that contrasts in light of their function in the market⁴⁷ – has led to quite diverse results in the magmatic area of the information society, which is a market which to a large extent still needs to be structured and which also represent an area in which rapid technological evolution – by itself already one of the triggers of the transformation of private law in recent years – make it on the one side very easy for fundamental rights to be infringed and on the other hand exposes regulatory measures to a high risk of quick obsolescence. In as much as it increases the powers of the judiciary, constitutionalization might even be thought of as a possibly efficient regulatory technique itself.

In this sense, the judicial treatment of the freedom to conduct a business, to which the category of private autonomy is usually associated, has led to distinct outcomes in a series of cases also in the area of intellectual property law. In *Scarlet* and soon later in *Netlog* the European Court employed freedom to conduct a business ‘in support’ of personal rights such as the date of the users, sustaining that obliging an internet services provider to install a particular, possibly expensive and ineffective, technology to prevent copyright violations limiting the rights of the users would amount to an infringement of the economic freedoms of the provider. Combining different policy goals – framed in terms of constitutional rights – such as protection of intellectual property, freedom of trade and protection of user data, the decision leads to affirm that the protection of copyright cannot go as far as

⁴³ *Productores de Música de España (Promusicae) v. Telefónica de España SAU*, 2008 I-00271, Case C-275/06 (29/1/2008).

⁴⁴ *Scarlet Extended SA v. Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)*, Case C-70/10 (24/11/2011).

⁴⁵ *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v. Netlog NV*, Case C-360/10 (16/2/2012).

⁴⁶ Charter of Fundamental Rights, Article 17.2.

⁴⁷ In this sense, the function of fundamental freedoms is not even to protect freedom of contract per se but rather just to open up the market; see J.W. Rutgers, ‘The European Economic Constitution, Freedom of Contract and the DCFR’ 2 *European Review of Contract Law* 95, 104 (2009) referring to the Opinion of Advocate General Poiares Maduro, Case 158/04 and 159/04 (30/03/06). This contributes to the impression that the nature of private autonomy in the internal market remains ‘elusive’: S. Weatherill, ‘The Elusive Character of Private Autonomy in EU Law’, in in *The Involvement of EU Law in Private Law Relationships*, D. Leczykiewicz and S. Weatherill (eds) 9-27.

giving copyright holders the right to demand internet services providers to disclose users' data, which therefore enjoy a particular protection.

Further analysing the use of fundamental rights in judicial discourse, it can be noticed that the decision was certainly facilitated by the fact that the norms of the directive already sanction that the measures set up by Member States to ensure the enforcement of intellectual property rights shall be 'fair and equitable and shall not be unnecessarily complicated or costly',⁴⁸ so that evaluating those requirement is already attributed to the competence of the judge even without the necessity of framing the problem in constitutional terms.⁴⁹ For our purposes another aspect related to constitutionalisation is nonetheless worth noting: while the referring court qualified the problem as a conflict between intellectual property protection on the one side and personal data protection on the other side (covered by the articles of the European Convention on Human Rights on the right to respect for personal life and freedom of expression), the Court autonomously went a step further, referring to the Charter of Fundamental Rights and introducing in its balancing a new element, indeed freedom to conduct a business, so that the balancing now requires to consider 'on the one hand, the protection of the intellectual property right enjoyed by copyright holders, and, on the other hand, that of the freedom to conduct business enjoyed by operators such as ISPs'.⁵⁰

It was therefore the Court by its own motion that, acknowledging the impact of the issues at stake on freedom of trade, attributed to the case a more evident market-structuring function. This inclusion leads to consider the role of private autonomy as a regulatory medium to ensure the balancing of different policies and rights: the question does not just concern the degree to which personal users data should be protected, but also what is the role of private autonomy in this context, i.e. to what extent a private subject can be charged with and made responsible to achieve policy objectives. In the concrete situation, what is the room of autonomy of the internet service provider and how should it be expected to act to ensure that either intellectual property or user data are protected. In including the freedom to pursue a business which, as already said, is the constitutional coverage of private autonomy, the Court appears to have identified this pivotal aspect of the case. Protecting the autonomy of the internet service provider, the Court reaches the result of also protecting something else, which is users' data.

The most outspoken conceptualization of the role of private autonomy in this context will nonetheless come a few years later, in a case arising in another field of the information society, i.e. TV broadcasting. The EU had already been active in the area of TV broadcasting since several years, issuing firstly the well-known Television without frontiers Directive⁵¹ and later, repealing the former, the new Audiovisual Media Services Directive.⁵² These directives were already the focus of other judgments which are also relevant in the fundamental rights perspective such as, for instance, the *Mesopotamia* case which led the Court to consider, again, what is the place of human dignity in the common market, and more concretely if infringements of the understanding of human dignity in a Member State may legitimately limit the freedom of broadcasting information in the whole of Europe – a freedom which clearly extends broadcasters' autonomy – which was a question eventually answered in the affirmative by the Court consistently with the approach taken in *Omega*.

It is however only in 2013 that the Court of Justice expressly took into account the role of private autonomy in a judgment involving the broadcasting directive and conceptualized its relation with the Charter of Fundamental Rights and the policy objectives of the Union in the clearest terms. The *Sky* case concerns the right of TV broadcasters to produce short news reports of events of public interest

⁴⁸ Directive 2004/48/EC, Article 3.

⁴⁹ See V. Kosta, *Fundamental rights in internal market legislation*, EUI thesis, 2013.

⁵⁰ *Scarlet*, para 49.

⁵¹ Directive 89/552/EEC.

⁵² Directive 2010/13/EU.

using audio-visual material of other broadcasters. The directive reads that ‘for the purpose of short news reports, any broadcaster established in the Union has access on a fair, reasonable and non-discriminatory basis to events of high interest to the public which are transmitted on an exclusive basis by a broadcaster under their jurisdiction’,⁵³ and such right is established out of a particular policy objective which is also strictly enshrined in fundamental rights: ‘to safeguard the fundamental freedom to receive information and to ensure that the interests of viewers in the Union are fully and properly protected’.⁵⁴ This right created nonetheless controversy since the directive also provides that the right should be granted for free, something which was considered unacceptable by the TV broadcaster Sky, which lamented that such a rule was too intrusive of its economic freedom. The Court nonetheless rejected Sky’s claim, on the basis of the argument that European rules were meant to give application to fundamental rights which have to prevail over the contractual freedom which is covered, as the Court explicitly notes, by the freedom to conduct a business. The limitation on contract freedom is justified ‘In the light, first, of the importance of safeguarding the fundamental freedom to receive information and the freedom and pluralism of the media guaranteed by Article 11 of the Charter and, second, of the protection of the freedom to conduct a business as guaranteed by Article 16 of the Charter, the European Union legislature was entitled to adopt rules such as those laid down in Article 15 of Directive 2010/13, which limit the freedom to conduct a business, and to give priority, in the necessary balancing of the rights and interests at issue, to public access to information over contractual freedom’.⁵⁵

The tendency of the Court to make balancing and evaluate autonomy in light of the particular economic sector and context in which this operates emerges also in its judgment from the Court’s attention to the economic reality of the audio-visual market, considering for instance that remuneration is excluded by the European rules only for the realization of reports for general news programmes, but not also for entertainment programmes, ‘which have a much greater economic impact than general news programmes’.⁵⁶

Here, the dynamics of regulated autonomy emerge very clearly. In the first place, private autonomy is directly linked to a constitutional provision expressed in market-oriented terms – the freedom to conduct a business – but as such it is made object of a series of limitations in light of other fundamental rights and, as a result of that construction, it becomes an instrument of regulation of the market. The rule of the directive which strongly impacts on private autonomy has indeed the clear function of creating an internal market of the information characterized by pluralism and competition so that, in order to do this, it grants that all operators in the Union have equal access on a fair and non-discriminatory basis. At the same time, the rules on the right to produce short news reports represent the recognition in this area of a universal service obligation, which is a key element in the construction of liberalised market such as the one discussed here: operators have, at certain conditions, to ensure that some services which have a particular relevance or even a constitutional dimension, such as in this case the right to receive information, are granted to all users/citizens even when this appears to be economically non-profitable. In doing so, these rules impact on even the most typical area in which traditional private law grants (almost) full freedom to parties, that is the determination of the economic content of the agreement, which is now on the contrary affected by regulatory measures. Such is a counter-balance to the extension of autonomy granted by the establishment of a liberalised internal market which goes to the core of the balance extension/limitation of regulated autonomy.

⁵³ Directive 2010/13/EU, Article 15.

⁵⁴ Directive 2010/13/EU, Recital 55.

⁵⁵ *Sky Österreich*, para 66.

⁵⁶ *Sky Österreich*, para 62.

Conclusion

The contextual extension and limitation of the room of contractual freedom of individuals, to which new economic possibilities are offered but who at the same time have to accept strong intrusions to their economic liberty in order to conform to the objectives – both economic and, yet to a quite different extent, non-economic – of the legal order, is denoted in this paper as a regulated autonomy. The term ‘regulated’ refers to the idea of autonomy not only as something which gets limited but that also serves as a regulatory tool. The analysis here has focused entirely on the law of the European Union and more specifically on its interpretation by the Court of Justice of the European Union. This is not to say that regulated autonomy is exclusively a European Union concept, and quite to the contrary, national scholarship during most of the past century has investigated the impact of the steering function of the state on personal autonomy and the concept of functionalization of private law. In some private law codifications, tool which were meant to open up the inner rationality of private law to the needs of market regulation were already explicitly included. As it was not suggested here that regulated autonomy is an EU invention, this was not the place for analysing the development of that idea at the national level. What characterizes European regulated autonomy is nonetheless the peculiarity of its regulatory framework and the policy objectives that this pursues. European rules have a strong impact on private law relations, even when these are not meant to primarily address them, but those measures are meant to achieve a distinctive set of policy objectives, which have certainly undergone transformation during the years, but that in general could be summarized as the creation of an internal market. To achieve this goal, private autonomy gets on the one hand extended, as regulation is meant to construct and enlarge a market in which all operators have an equal access on a non-discriminatory base, but on the other hand gets subjected to a series of measures which in a traditional private law perspective are qualified as limitations of it, and which notably include a growing necessity to respect fundamental rights which, in this context, appear as both objectives and means of regulation. While these can be identified as the general features of regulated autonomy, its more concrete characteristics need to be addressed and analysed in each and every sector of the market in which it operates.

To introduce the concept and highlight its institutional significance, as a link between private law and the institutional system, this contribution has looked in particular at the constitutional dimension of regulated autonomy. To be sure, the idea that private autonomy should be constitutionalised, which has already led to noteworthy outcomes in a number of European and non-European countries, must be read in its specific economic and ideological dimension, or, more correctly, in its several possible ideological dimensions. This short overview of the case-law of the Court of Justice reveals that even if private autonomy is not constitutionalised in explicit terms, the Court has nonetheless already granted at least a certain degree of constitutional anchorage to the concept, which has mostly happened through the freedom to conduct a business. Such quasi-constitutional qualification reveals on the one hand the linkage of a concept – private autonomy – which has strong political and moral underpinnings to an explicitly market-oriented dimension – the right to conduct business – but at the same time justifies the possibility to functionalize that concept not only to achieve the traditional policy objectives of the Union, but also to infuse fundamental rights in private law reasoning. These developments can lead to diverse conceptualizations of the relation between private autonomy and market regulation, one of which has been here attempted under the denomination of regulated autonomy.

SECTION II: EMPIRICAL EVIDENCE

A Socio-Legal Study on the Operation of Hybrid Collective Remedies in the Area of European Social Regulation

Betül Kas

Introduction

The aim of this research project is to investigate the interplay between the European and the national level in shaping collective remedies within the area of European social regulation. This progress report will set out the conceptual background of the research project, the methodological approach chosen and the current stage of research. However, the report will refrain from analyzing the detailed empirical findings collected until now.

Traditionally, under the principles of procedural and remedial autonomy, the European legal order left it to the Member States to designate the appropriate institutions and to define the appropriate remedies for the enforcement of European law, provided that they comply with the principles of effectiveness and equivalence. The standard formula in secondary Union law required that Member States introduce effective, proportionate and deterrent national remedies for the enforcement of rights granted under the respective instrument. However, it was argued that the principle of procedural autonomy has 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. Also the Court of Justice of the European Union took a prominent role in intervening into the procedural autonomy of the Member States and in creating new remedies.¹ Consequently, the trend of restricting the freedom of the Member States to construct their judicial and administrative enforcement mechanisms takes a rather patchy and fragmented approach, with the degree of interference depending on the substantive area at stake.

For many years, it seemed that the European Commission was not prepared to intervene in the regulation of collective judicial enforcement beyond injunctive relief. The process was slow and initially restricted to the areas of competition and consumer law. In 2005, the Commission adopted a Green Paper on antitrust damages actions² and in 2008, a White Paper, which included policy suggestions on antitrust-specific collective redress.³ In the same year, the Commission also published a Green Paper on consumer collective redress⁴, followed by public consultation 'Towards a more coherent European approach to collective redress' in 2011.⁵ On 2 February 2012 the European Parliament adopted the resolution 'Towards a Coherent European Approach to Collective Redress', in

¹ 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); 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); M. Bobek, "Why there is no Principle of 'Procedural Autonomy' of the Member States", in *The ECJ and the Autonomy of the Member States*, ed. B. de Witte and H.W. Micklitz (Cambridge, Antwerp, Portland: Intersentia, 2011), 305.

² COM(2005) 672, 19.12.2005.

³ COM(2008) 165, 2.4.2008.

⁴ COM(2008) 794, 27.11.2008.

⁵ COM(2010) 135 final, 31.3.2010.

which it called for any proposal in the field of collective redress to take the form of a horizontal framework including a common set of principles providing uniform access to justice via collective redress within the Union and specifically but not exclusively dealing with the infringement of consumer rights. The resolution stressed the need to take due account of the legal traditions and legal orders of the individual Member States and enhance the coordination of good practices between Member States.⁶ On 11 June 2013 the Commission adopted Recommendation 2013/396/EU on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union law.⁷ The recommendation covers all the situations where the breach of rules established at Union level has caused or is likely to cause prejudice to natural and legal person. It aims to ensure a coherent horizontal approach to collective redress in the European Union without harmonizing Member States' systems. While the principles set out in the recommendation are non-binding, it should be remembered that in *Alassini*⁸, the CJEU rendered the seven principles of Recommendation 98/257 applicable to the bodies responsible for out-of-court settlement of consumer disputes⁹ obligatory in case of compulsory ADR-procedures.¹⁰

Consequently, the European influence on collective judicial enforcement mechanisms is constituted by a patchy mix of binding and non-binding, horizontal and vertical, rules and principles at different levels. The Member States are required to fill the gaps left by the European regulatory framework in such a way as to ensure the effective judicial protection of rights granted under Union law. The research project argues that the interplay between the European and the national level in the shaping of collective remedies leads to hybridization. Hybridity means that the legal character of the respective collective remedy is neither European nor national but merges elements of both legal orders.¹¹ In order to examine the outlook and the implications of hybrid collective remedies, the research project will reconstruct three specific case-studies. They are constituted by three preliminary ruling procedures in the area of European social regulation, in which the Court of Justice of the European Union in co-operation with the national actors and courts established a hybrid collective remedy.

The conceptual background

The traditional view: Procedural autonomy

The traditional view on the enforcement of European law is the following: The European enforcement system is based on the concept of '*executive federalism*', meaning that the substantive rules adopted by the European Union are applied and enforced by the national courts and the national public authorities.¹² This decentralized enforcement structure is crucial for the European enforcement system as the protection offered by the centralised enforcement instruments, constituted by the infringement procedure under Articles 258 TFEU and the annulment procedure under Article 263 TFEU, is

⁶ 2011/2089(INI).

⁷ OJ 2013, L 201, p. 60.

⁸ C-317-320/08, Rosalba Alassini et al. v. Telecom Italia[2010] ECR I-02213.

⁹ OJ 1998, L 115, p. 31.

¹⁰ H.W. Micklitz, Brauchen Konsumenten und Unternehmen eine neue Architektur des Verbraucherrechts? Gutachten A zum 69. Juristentag, 2012, A 94.

¹¹ H.W. Micklitz, "A SELF-SUFFICIENT EUROPEAN PRIVATE LAW – A VIABLE CONCEPT?" (EUI Working Paper 2012), p. 22.

¹² 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.

considered to be limited.¹³ 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, the national legal systems lay down the detailed procedural rules for the enforcement of European law, subject to the principles of equivalence and effectiveness.¹⁴ The principle 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. The procedural autonomy of the Member States, to which the Court of Justice of the European Union still formally holds tight, can be seen as a source of policy diversity. Similarly to the principle of subsidiarity¹⁵, it allows 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.¹⁶ 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.”¹⁷

The tool of the Court of Justice of the European Union to restrict the procedural autonomy of the Member States is not so much the principle of equivalence or non-discrimination but the principle of 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. Accordingly, Article 19 (1) TEU provides that “*Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.*” 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. 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

¹³ M. Dougan, *National Remedies before the Court of Justice : Issues of Harmonisation and Differentiation* (Oxford; Portland, Or. : Hart Publishing, 2004), 1-2.

¹⁴ 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.

¹⁵ 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.*”

¹⁶ 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).

¹⁷ 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).

evolving. However, the definite meaning of what constitutes an *adequate* remedy and whether it has to be understood as a substantive or procedural concept remains open.¹⁸

A new conceptualization: Hybridity

The aim of the research project is to provide for a conceptualization of the interplay between the European and the national level in enforcement matters. It thereby departs from the procedural autonomy of the Member States and investigates how the national level interacts with the European level by filling out the gaps and spaces left by the European regulatory framework. The hypothesized conceptualization of the relationship between the European and the national level is that of “hybridity”.¹⁹ The overall research project suggest that hybridity constitutes a 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 legal order. The process of hybridization is currently under-theorized in legal research. Kaarlo Tuori argues that “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.”²⁰ According to him, legal hybrids are merely temporary creatures, awaiting their extinction through novel ways of legal conceptualizing.

The notion of cultural hybridity has emerged particularly in postcolonial theory as culture arising out of interactions between “colonizers” and “the colonized”. Homi Bhabha argued that colonizers and the colonized are mutually dependent in constructing a shared culture by cultural collisions and interchanges. In the attempt to assert colonial power in order to create anglicized subjects, the cultural traces that are disapproved by the colonizers are not repressed but repeated as something different, being a mutation, i.e. a hybrid. Hybridity contradicts the attempt to fix and control indigenous cultures and the illusion of cultural isolation or purity.²¹ Consequently, colonialism was not seen as a unilateral business with a West-to-the-rest attitude, but the relationship between colonizers and colonized is described as a co-operative interaction, highlighting intercultural exchanges and leading to the construction of a new culture and new identities. Those hybridization processes could not only be seen as a by-product of colonialism, but as a necessary element to ensure stability within the empire.²² Also from a legal history perspective, hybridity is described as a form of co-existence of old local law and colonial law, scaling from a mere side-by-side co-existence to mutual interpenetrations.²³

Applying theories on hybridity to the enforcement of European law, the research project argues that the interaction of the European and the national level leads to hybrid remedies, i.e. the legal character of the respective remedy constitutes a mix of European and national elements. The influence exercised by the European level leads to a destruction of the national patterns, which have to be reconstructed in the light of the *effet utile* of European law. Those hybridization processes hypothetically lead to a “unity in diversity” in the sense that the different national legal systems are not homogenized but each

¹⁸ N. Reich, Individueller und kollektiver Rechtsschutz im EU-Verbraucherrecht-Von der „Nationalisierung“ zur „Konstitutionalisierung“ von Rechtsbehelfen, Vortrag vor der Juristischen Gesellschaft Hannover, 2012.

¹⁹ N. Reich, ‘Horizontal Liability in EC Law: Hybridization of Remedies for Compensation in Case of Breaches of EC Rights’, *Common Market Law Review* 44 (2007), 705, at 708-713.

²⁰ K. Tuori, ‘On Legal Hybrids’, in *A Self-Sufficient European Private Law – A Viable Concept?* (EUI Working Paper 2012), p. 67.

²¹ Homi K. Bhabha, *The Location of Culture* (New York: Routledge, 1994).

²² Catherine Hall, “William Knibb and the constitution of the new Black subject,” in *Empire and Others. British Encounters with Indigenous Peoples, 1600-1850*, ed. Martin Daunton and Rick Halpern (Philadelphia: University of Pennsylvania Press, 1999). 303. See also for more elaborate use of identity creation: Catherine Hall, *Civilising Subjects. Metropole and Colony in the English Imagination, 1830-1867* (Cambridge: Polity Press, 2002).

²³ 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.

national legal order determines individually how it fills the gaps left by the European regulatory framework. In this regard, the research project will investigate the processes that give shape to hybrid remedies and verify whether the concept of hybridity has an explanatory ability to define current trends.

The delimitation of the research field and the methodological approach

European social regulation and collective problems

The focus of the research project is to investigate the interplay between the European and the national level in shaping collective remedies within the area of “European social regulation”. Particularly, the three case-studies cover the areas of environmental law, anti-discrimination law and consumer law. In this sense, the term “European social regulation” will be used in a broad sense in order to distinguish it from the area of “European economic integration”. Social conflicts often bear a strong collective dimension: As the individual, who is the European right-holder, might often not be willing to take legal action for various reasons (not necessarily only related to costs), the enforcement of social regulation requires reliance on administrative mechanisms (i.e. enforcement via public authorities) or judicial collective mechanisms (i.e. enforcement via private parties organized in a collective form as in an association or represented by a third party). While the Member States are encouraged to establish public authorities at national level and the concept of collective judicial enforcement is supported, secondary legislation generally contains limited guidance on collective remedies and wide variations exist among the Member States and the different legal areas.²⁴

The identification of three preliminary ruling procedures

The empirical part of the paper will consist of the reconstruction of three preliminary references by national courts to the Court of Justice of the European Union under Article 267 TFEU. Even though the three cases-studies chosen, namely *Janecek*²⁵, *Feryn*²⁶ and *Invitel*²⁷, concern specific areas of European law, being environmental law, anti-discrimination law and consumer law respectively, it will be argued that one can discern common patterns and draw general conclusions for the interaction of the European and the national level in the shaping of collective remedies. In the three case-studies, we are faced with a phenomenon that private or public actors rely on European law before the national courts in order to strike down national barriers that obstruct the protection of the collective interest. This phenomenon takes often the form of a strategic litigation, where the applicants pursue their own national interests in co-operation with the personal ambitions of a lawyer. They rely on the obligations of national courts under European law and ultimately on the preliminary ruling procedure as provided for in Article 267 TFEU, which constitutes a unique method of co-operation between the national courts and the Court of Justice. However, the dialogue between the Court of Justice and the national courts is not always a smooth process. Clashes might arise between the national conceptions about the organisation and functioning of the administration of justice and the European aim to ensure the *effet utile* of the respective substantive area at stake.

C-237/07 Janecek

²⁴ 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).

²⁵ Case C-237/07, *Janecek v Freistaat Bayern* [2008] ECR I-6221.

²⁶ Case C-54/07, *CGKR v Firma Feryn NV* [2008] ECR I-5187.

²⁷ C-472/10, *Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt* [2012] ECR I-0032.

The *Janecek* case dealt with the question whether on the basis of Article 7(3) of the Directive 96/62/EC 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 European air quality standard is exceeded. Mr Janecek, who is the applicant in the proceedings, has been straw man for an environmental organization, whose own possibilities to bring a legal action before the German courts were considered even more limited. 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. 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. 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. 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 Court of Justice of the European Union held that any 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.

C-54/07 Feryn

The *Feryn* case arose under the Race Equality Directive 2000/43/EC and deals with the Belgian public equality body initiating judicial proceedings against a private company because of a public statement by that company that it will not recruit any Moroccans. The crux of the case is that there has been never an identifiable victim, whose application has been rejected by the company. Initially, the Belgian public equality body, whose history can be traced back to 1989, was empowered to file only criminal complaints in case of a violation of the Federal Racial Equality Act from the 30th of July 1981. The implementation of the Race Equality Directive led to an immense advance of the powers of the equality body. Leaving it to the public prosecutor to struggle with the presumption of innocence in criminal proceedings, the equality body was enabled to act as an enforcement body by initiating civil proceedings and benefiting not only from the reversal of the burden of proof but also from rather strong civil remedies introduced into Belgian law. The broad enforcement powers of the equality body were strengthened by the Court of Justice. In line with the *effet utile* of the Directive, the Court of Justice established that the existence of direct discrimination is not dependent on the identification of a complainant who claims to have been the victim. Consequently, the Court of Justice overcame the individualistic nature of the European right to equal treatment enshrined in the European Race Directive and infused the Directive with a collective element.

C-472/10 Invitel

In the *Intitel* case, due to numerous consumer complaints, the Hungarian Consumer Protection Office initiated a public interest action against the fixed-line telephone network operator Invitel. Invitel had introduced into its general business conditions a price amendment clause providing for 'money order fees' to be applied in the event of payment by money order without any provision specifying the method of calculation of those fees. The Consumer Protection Office requested the Hungarian court for a finding that the term in question is void and for refund of these costs and expenses. It was questionable whether in accordance with Directive 93/13/EEC on unfair terms, the declaration of the invalidity of an unfair term, as a result of an action for injunction in the public interest, may produce effects with regard to all consumers (including those who were not party to the proceedings) and whether the national courts must also, in future and of its own motion, draw all the consequences which are provided in national law in case of the unfairness of a term. Generally, judgments are binding *inter partes* only. Accordingly, in most Member States, a ruling on a collective action for an injunction is mandatory only with respect to the case and the parties in question, i.e. the qualified entity which brought the action and the business which is the subject of the injunction. The Court of Justice held that the effective implementation of the Directive's consumer protection objective

requires that terms of the general business conditions of consumer contracts which are declared to be unfair in an action for an injunction brought against a business, may not be binding on all consumers who have concluded with that business a contract to which the same general business conditions apply.

The socio-legal method of reconstruction

From a methodological viewpoint, the research will be conducted via the “*reconstruction*” of those case-studies within their socio-political, national and European context. This method has been employed by Micklitz in “The Politics of Judicial Co-operation in the EU” regarding three case-studies on Sunday trading, on equal treatment of men and women and on good faith in contract law in order to reveal the interests of national courts, national litigants and the Court of Justice in employing European law. This method requires to set out the history of the case from cradle to grave, “starting with the factual legal-political background to the litigation, the way in which the case first reached the national courts, the arguments brought forward and the efforts made to bring the case to the ECJ, the handling of the case before the ECJ, its reception in the national and/or European academic environment, and whether and to what extent the ECJ’s ruling was or was not implemented by the national courts.”²⁸

A qualitative approach was used by conducting interviews with the key actors involved in the legal proceedings on the national and European level, thereby avoiding the sole reliance on written documents. The interviews have been conducted in a flexible way via open and spontaneously formed questions, trying to stimulate a normal conversation. This entails the benefit of receiving comprehensive data on all important facets of the case. The interviews have been subsequently analysed with the support of the sociologist, Thomas Roethe, by using the method of *objective hermeneutics*. The method of *objective hermeneutics* is a sociological tool of text interpretation, i.e. sequences of the written text of the interview. Starting from the presumption that every human act is guided by an invisible social structure, it is supposed that this underlying social structure can be revealed through reconstructing the latent structural meaning sentence by sentence, being confirmed by repetition throughout the text. This is done by analysing the objective meaning structures of the text, focusing particular on linguistic and interactive aspects. The method of objective hermeneutics therefore allows reconstructing the reasons for decisions both by individuals and organizations.

It is foreseen that the combined analysis of the primary legal material, European and national legal literature and the qualitative data in form of the interviews will reveal the processes and patterns of the interplay between the national and the European level in dealing with collective problems and therefore allow testing the hypothesis of hybrid collective remedies.

Conclusion

Safeguarding collective social rights is problematic if both the European system of legal protection and the national legal system build on individually enforceable rights. However, national private and public (activist) actors can rely on the preliminary ruling procedure and the co-operation of the Court of Justice to infuse the European and national legal order with collective elements. In the *Janecek* case, from a European perspective, by empowering “natural and legal persons” to enforce the quality standards before the national courts, the Court of Justice introduced a new enforcement mechanism into the European Air Quality Directive, which previously relied solely on the Commission taking enforcement action via the infringement procedure. From the perspective of the German legal system, the Court of Justice thereby struck down the traditional individualistic nature of the German system of judicial protection, which is assigning the protection of the collective good to the administration. In

²⁸ Hans -W. Micklitz “The Politics of Judicial Co-operation in the EU” (2009; Cambridge University Press) p. 41.

the *Feryn* case, the Court of Justice overcame the individualistic nature of the European right to equal treatment enshrined in the European Race Directive by learning from the Belgian legal system. Interestingly, the European-wide applicable *substantive* concept of “direct discrimination” got infused with a collective element by the Belgian *procedural rules*. From the perspective of the Belgian legal system, the proceedings prompted the acceptance of the Belgian courts that the protection of the public interest in discrimination matters is not only effectuated through criminal proceedings anymore but also has a role to play in civil law proceedings. In the *Invitel* case, the Court of Justice clarified the relationship between individual and collective legal actions. Despite that it is common to the rules of procedure of most of the Member States that a judicial decision on the unfairness of a term in response to an actual contract dispute does not necessarily prevent the continued use of that term, because such a decision has legal effect only between the parties, the Court of Justice found that the *erga omnes* effect of a finding of unfairness on individual contracts corresponds to the *effet utile* of the Unfair Terms Directive. The implications of these case-studies for testing and developing the hypothesis of hybrid collective remedies has to be further developed.

FREE MOVEMENT OF SERVICES, EUROPEAN STANDARDISATION AND PRIVATE LAW

Barend van Leeuwen*

Introduction

The potential of free movement of services in the European Union (“EU”) is significant. Services amount to approximately 70% of the GDP in the EU. Both service providers and service recipients increasingly move across borders. At the same time, the full potential of the internal market for services has not yet been achieved. Therefore, the EU adopted the Services Directive 2006¹ with a view to stimulate and facilitate free movement of services.

Free movement of goods has always been the more successful brother of free movement of services. One of the regulatory strategies which have been used to increase free movement of goods within the EU is European standardisation. After the Court of Justice of the European Union (“CJEU”)’s judgment in *Cassis de Dijon*², standardisation of the sizes and materials of products greatly improved the effectiveness of the internal market for goods. The EU adopted this regulatory strategy with the New Approach³. Product safety directives would provide the essential requirements which goods had to comply with, whilst the technical details were left to European standardisation. These directives provided that goods which complied with the requirements of a particular European standard would be in conformity with the directives and could be lawfully brought on the market. The result is that standardisation proved a highly successful regulatory strategy.

As a consequence, it is not surprising that the EU also turned to standardisation as a regulatory tool to increase free movement of services. Uniform services standards would potentially make free movement of services within the EU more attractive. The Services Directive 2006 contains an article which expressly obliges the European Commission (“the Commission”) and the Member States to stimulate European standardisation initiatives in the services sector.⁴ However, there are some important difference between goods and services. Services standards attempt to define a uniform definition of the required quality of a service, which is less technical than defining the sizes and materials of a product. Moreover, European standardisation of services involves the standardisation of the human interaction between service provider and service recipient. Such interaction does not take place in the technical production of goods. Regulating such interaction makes it more likely for standardisation to interact with existing legal regulation, such as regulation on training and qualifications of service providers. Furthermore, the making of a European quality standard for services implies that there can be a common European definition of the concept of quality.

In addition to these cultural and practical difficulties with services standardisation, there is also a legal problem. Although the EU encourages European standardisation of services, it has not provided a legal framework which provides that services which comply with a European standard can be lawfully brought on the market. The New Approach for goods has not been followed for services – there are no

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¹ Directive 2006/123/EC of the European Parliament and Council on services in the internal market.

² Case 120/78, *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein*, [1979] ECR 649.

³ 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.

⁴ Article 26 of the Services Directive 2006 refers to certification, labelling, co-operation between professional bodies, independent assessments and standardisation.

directives on services safety which refer to European standards for the specific requirements with which a service has to comply. Consequently, there is no automatic link between a European standardisation process and the legal effect of a European services standard.

This is where private law enters into the arena. In the absence of a European framework to provide binding legal effect to European services standards, private law could play a role in making the standards binding in law. In effect, what happens is that private law is being employed to make a European services standard binding and to facilitate free movement of services. In combination with European standardisation of services, private law becomes a regulatory tool to improve the EU internal market for services. For example, this could mean that European standards are being incorporated or applied in services contracts. Alternatively, European standards could be used to determine the standard of care expected from a service provider in tort. Finally, European standards could be used for the certification of service providers. The result of this application of European services standards in private law could be that the same standards would be used in all Member States. As a consequence, the combination of European standardisation and private law provides a mechanism to create a degree of convergence of services standards throughout the EU. This process would in turn improve the internal market for services.

The process described above assumes that European standardisation and private law both positively contribute to free movement of services. It is assumed that the triangular relationship between free movement of services, European standardisation and private law works well. However, this assumption has to be tested both at the theoretical level and at the empirical level. In this paper, I will discuss some of the more theoretical problems. I will start by providing a more detailed description of the theoretical framework behind the process. The theory of convergence will be introduced. My next step will then be to test each of the three bilateral relationships in the triangle. First, I will discuss the relationship between free movement of services and European standardisation. Second, the relationship between European standardisation and private law will be discussed. Third, I will complete the triangle by discussing the relation between free movement of services and private law. Some of the results of empirical research have been incorporated in the discussion. The paper will conclude with some preliminary conclusions on the validity of the theoretical framework.

The theoretical framework: convergence in private law through European standardisation

The process described in the introduction sets out a strategy for the improvement of the internal market for services. It is based on the following theoretical framework:

1. European harmonisation of private law has been criticised on the basis that the introduction of European, or foreign, concepts in national private law will not lead to effective convergence in private law. Significant differences in legal culture and interpretation will remain and cannot be overcome by European harmonisation of legislation. Although the wording of a particular rule might in theory be similar in all Member States, in practice the application of the rule will be very different in the individual Member States. The result of European harmonisation of laws will be divergence rather than convergence. The most prominent supporters of the “no convergence” theory have been Pierre Legrand⁵ and Gunther Teubner.⁶ Teubner has described the introduction of European concepts in national private law as “legal irritants”.
2. The aim of convergence in private law through European harmonisation has been to improve the functioning of the EU internal market. It is based on the assumption, which is held by the Commission, that differences in national private law can be obstacles to the effective exercise of the right to free movement. The introduction of common legal rules would then remove these

⁵ Most clearly, in Pierre Legrand, “The Impossibility of Legal Transplants”, (1997) *Maastricht J. Eur. & Comp. L.* 111.

⁶ Gunther Teubner, “Good Faith in British Law or How Unifying Law Ends up in New Divergences”, (1998) *Modern Law Review* 11.

obstacles. The proposal for a Common European Sales Law (“CESL”)⁷ could be considered to introduce the ultimate form of convergence: although the application of CESL would be voluntary, parties are encouraged to choose common European rules which would effectively remove a transaction from the national private law framework.

3. If European harmonisation of legislation does not result in effective convergence in private law in practice, other strategies for convergence should be considered. Top-down convergence through European harmonisation of legislation could be contrasted with bottom-up convergence through soft coordination. Walter van Gerven has been the main proponent of what he has called the “open method of convergence”.⁸ Rather than introducing similar legal rules through harmonisation, convergence in private law could be realised through coordination, for example through judicial dialogue and consistent interpretation. Co- and self-regulation would be other alternatives strategies to realise bottom-up convergence in private law.
4. Standardisation could be one of the strategies to increase bottom-up convergence in private law. It is expressly referred to in Article 26 of the Services Directive 2006 as a tool to improve the quality and compatibility of services. European quality standards would create a minimum level-playing field for services throughout the EU. However, standardisation is a form of pure self-regulation. It cannot on itself create binding legal effect. Therefore, private law is instrumentalised as the regulatory tool to give binding legal effect to the European quality standards. This could be through contract law, tort law or certification. The end-result would be that the standards which would be legally enforced in private law relations in the Member States would derive from a common European source. This would lead to converged quality standards for services in private law.
5. In essence, this bottom-up strategy for convergence in private law is a two-stage process. First of all, a European services standard has to be agreed through the European standardisation organisation Comité Européen de Normalisation (“CEN”). The national standardisation organisations send representatives to Brussels to agree on a European services standard. Once the European standard has been formally adopted, it still has to be applied in private law. Both of these two stages have to be successful before a process of convergence in private law through standardisation can be successful. If no European services standards were adopted, no convergence in private law would take place. And if European services standards were made, but they were not subsequently applied in private law, then no convergence in private law would occur either. Consequently, the test to decide whether or not a process of convergence in private law through European standardisation is taking place is: (i) firstly, to see whether European services standards are being made and (ii) secondly, whether these standards are being (effectively) applied in private law relations (contract/tort/certification). In the end, the process would result in a safer and more effective internal market for services.

Before the possible obstacles to this process of convergence are discussed, it is necessary to briefly describe the European standardisation process. Standardisation is a purely self-regulatory process. CEN is the European standardisation organisation which facilitates and coordinates European standardisation initiatives. However, it never initiates European standardisation processes itself. The initiative for European standardisation processes has to come either from the services sector itself – a private initiative from the “stakeholders” in a particular sector – through one of the national standardisation organisations, or directly from the Commission. The Commission has been given the legal competence to issue a mandate to CEN and ask CEN to start working on a particular European

⁷ 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.

⁸ 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.

standard.⁹ This standard would then often be adopted in combination with a legislative process – without the services standard playing any concrete role in the legal framework. Even if the Commission takes the initiative for a European services standard, the process will remain completely self-regulatory. The standard will be developed by the stakeholders themselves. The Commission can take a supervisory role, but will take no part in the decision-making process on the substance of the standard.¹⁰

When a proposal for a European standard has been submitted, each national standardisation organisation has to consult with stakeholders in the particular field of the standard to determine whether the stakeholders are interested in working on a European standard. A European standardisation process can only be started if a qualified majority of the national standardisation organisations have voted in favour of a European standardisation process, and if there are sufficient national standardisation organisations which are willing to actively participate in the making of the standard.¹¹ If the proposal is accepted, one of the national standardisation organisations will be responsible for the secretariat of the standardisation process. A European committee will be formed, which consists of representatives of national “mirror committees” which closely follow and scrutinise the work of the European committee. Participation in the national mirror committees is open to all parties who are willing to participate and to pay the costs of participation. Standardisation organisations are non-profit organisations, but the stakeholders have to pay the costs of the organisation and administration of a standardisation process.

Once the European committee has agreed on the final version of the European standard, the national standardisation organisations have to vote again on whether the standard should be formally adopted. If the proposal is accepted, by the same qualified majority, the standard becomes a formal European standard which has to be implemented as a national standard by the national standardisation organisations. It is clear that a European standardisation process involves an interesting interaction between the European level and the national level. Although the substance of a European standard is agreed by the European committee, the votes on the proposal and the final version are controlled by the national level. This enables stakeholders to enforce and protect national interests through the national mirror committees. It also reduces the supranational nature of the European standardisation process.¹²

After the adoption of the European standard, the standard becomes a national standard in the Member States. The precise legal status of the standard is different across the Member States,¹³ but the common feature in all Member States is that a European services standard does not obtain any automatic binding effect in law. This is where private law can be employed to promote the European services standard from a self-regulatory soft law instrument to a legally binding standard. But before I discuss the interaction between European standardisation and private law, I have to discuss to what extent the relationship between European standardisation of services and free movement of services can be considered to be based on friendship or animosity.

⁹ Article 10 of Regulation 1025/2012 of the European Parliament and of the Council on European standardisation.

¹⁰ Interview with CEN (Brussels) on 4th April 2013.

¹¹ 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.

¹² Interview with ASI (Vienna) on 12th November 2012.

¹³ Harm Schepel, *The Constitution of Private Governance* (Oxford, Hart Publishing, 2005), 101-143.

Free movement of services and European standardisation

European standardisation of services is included as a regulatory tool in the Services Directive 2006 because it is assumed that standardisation of services will positively contribute to the functioning of the internal market. The adoption of minimum standards throughout the EU would make the quality of services more transparent. As such, it would be easier for consumers to decide whether or not receive services in another Member State. Similarly, it would be easier for regulators – whether public or private – to assess the quality of service providers who wish to provide services in another Member State. The standard would be a benchmark of a common European definition of the required quality of a particular service.

It is important to emphasise that a European service standard would only set minimum standards. In no way would a European standard aim for some kind of maximum harmonisation. It would still be possible for individual Member States to go over and beyond the requirements of the European standard.¹⁴ In combination with the non-binding nature of the European standard, it would only provide soft coordination of the minimum level of care required of service providers.

As has already been mentioned above, the interaction between free movement of goods and European standardisation had been very successful. The adoption of European standards for goods enabled producers across the EU to decide on common materials and sizes of products. This standardisation process was reinforced and constitutionalised by the EU with the adoption of the New Approach. As a result, the European standardisation process provided an answer to the CJEU's deregulatory judgment in *Cassis de Dijon*. It limited the regulatory necessity of national product requirements. However, making European services standards does not only involve an attempt to regulate the sizes and materials of products, it also involves a definition of the concept of quality of a service. This implies that a common European definition of quality can be established, even though quality is a very culturally – and sometimes even personally – defined concept.¹⁵

More importantly, defining the required quality of a service is not necessarily facilitating free movement. Quality regulation is a different species from technical product standards. Quality comprises many different elements, such as the training of the provider, the use of products, the facilities and materials used by the service provider, information requirements and after-care requirements. Even if a European services standard only included minimum standards, minimum requirements for training, for example, could constitute obstacles to free movement. This risk becomes even more realistic if the quality standards are defined by a particular services sector itself. Although the overall aim of the standard could be to create a level-playing field in the internal market, stakeholders might equally be driven by protectionist motives to participate in a European standardisation process.¹⁶

The possible difficulties with European services standards and free movement of services can best be illustrated by two recent examples of standardisation processes in the services sector. Given that the focus of my research is on European standardisation in the healthcare and tourism sectors, I will take two examples from these sectors.

¹⁴ Interview with CEN (Brussels) on 4th April 2012.

¹⁵ Hans-W. Micklitz, “*Services Standards: Defining the Core Consumer Elements and their Minimum Requirements*”, Study Commissioned by ANEC, Brussels, April 2007, p 10.

¹⁶ Interview with DG Enterprise and DG MARKT of the European Commission (Brussels) on 30th November 2012.

A European standard for tourist guide services

In 2008, CEN published a European standard on tourism services and the requirements for the provision of professional tourist guide training and qualification programmes.¹⁷ Tourist guides are trained guides who guide groups of tourists through a specific city. They are not tour managers who travel with a group of tourists, but they are based in a particular city in which they offer their services. They are usually self-employed. In many of the Mediterranean Member States the profession of tourist guide is regulated by (public) law and tourist guides are required to obtain a specific qualification by law. In other Member States certification by a private body or organisation is required before certain tourist guide services can be provided. The differences in national regulation of tourist guides have led to case law before the CJEU. In the late 80s and early 90s, the Commission brought a series of infringement proceedings against France, Italy, Spain and Greece.¹⁸ In each of these cases the training requirements which were imposed on tourist guides were in breach of free movement of services, in that they imposed requirements which were more difficult to satisfy by foreign tourist guides. The judgments resulted in a restricted wave of liberalisation in these Member States. In addition, the adoption of the Services Directive 2006 prompted significant adjustments to national legislation on tourist guide qualifications.¹⁹

The decision of national and European tourist guide federations to start working on a standard for tourist guides might actually have been a response to the liberalisation of their profession as a result of the CJEU's judgments and the Services Directive 2006.²⁰ The standard barely deals with the actual service requirements imposed on tourist guides. Instead, it is almost exclusively focussed on what training tourist guides should have had. This background to the standardisation initiative immediately emphasises the possible tension with free movement of services. Unsurprisingly, therefore, the final standard contains a provision which could potentially be a restriction to right to freely provide services in the EU.²¹

In addition to various theoretical training requirements, the European standard provides that tourist guides must have followed practical training in the city in which they want to work as a tourist guide.²² This practical training comprises 40% of the total training requirements, which means that they must have spent at least 240 hours in the city in which they want to provide tourist guide services as part of their training. This requirement is obviously easier to satisfy for potential tourist guides who already live near the area in which they want to work. While it is perfectly logical that tourist guides must have spent some time in the area in which they provide their services – reading about a city is quite a different experience from seeing a city in real time – a requirement of 240 hours is substantial. The requirement could be considered to be disproportionate to the legitimate aim of making sure that tourist guides have actually seen what they are talking about before they offer their services. This practical training requirement for tourist guides has come to the attention of the Commission. In fact, it has been one of the reasons why the Commission believes that it is necessary to conduct further research on the question to what extent European services standardisation actually contributes to free movement of services.²³ The reasons for stakeholders to propose European services standardisation

¹⁷ EN 15565:2008: Tourism services - Requirements for the provision of professional tourist guide training and qualification programmes

¹⁸ Case C-154/89, *Commission v France (tourist guides)*, [1991] ECR I-659; Case C-180/89, *Commission v Italy (tourist guides)*, [1991] ECR I-709; Case-375/92, *Commission v Spain (tourist guides)*, [1994] ECR I-923; Case C-198/89 *Commission v Greece (tourist guides)*, [1991] ECR I-727.

¹⁹ Vassilis Hatzopoulos, *Regulating Services in the European Union*, (Oxford, Oxford University Press, 2012), 190.

²⁰ Interview with DG Enterprise and DG MARKT of the European Commission (Brussels) on 30th November 2012.

²¹ Ibid.

²² Article 8 of EN 15565:2008.

²³ Interview with DG Enterprise and DG MARKT, European Commission (Brussels) on 30th November 2012.

processes might have very little to do with improving the internal market for services. As such, the Commission believes that it is necessary to decide on the usefulness of European standardisation as a regulatory tool to facilitate free movement of services.

A European standard for aesthetic surgery services

Cosmetic surgery services have become very fashionable in the EU. The market for cosmetic surgery services is truly European and many customers travel across borders to receive cosmetic surgery services in a different Member State from the one in which they are resident. Customers who receive cosmetic surgery services are not patients – there is nothing urgent about the treatment they receive, and the treatment is for exclusively cosmetic purposes. As a result, customers looking for cosmetic surgery services behave like “real” consumers. The prices of the treatment are a decisive factor in deciding where to go.²⁴ At the same time, the market for cosmetic surgery market is not very well regulated and many different service providers are competing for customers. Plastic surgeons are well qualified to perform cosmetic surgery, but they are not the only ones who offer cosmetic surgery services. In addition, general doctors, dermatologists and ENT-surgeons all compete on the market. In the United Kingdom, nurses are allowed to perform certain cosmetic treatments.²⁵ Furthermore, certain producers of cosmetic products have even started to provide cosmetic surgery services themselves. Most Member States have not strictly defined which treatments can be performed by which doctors. France is one of the few Member States with a very clear legal framework – in France cosmetic surgery services can only be performed under the supervision of a plastic surgeon.²⁶ In some Member States, certain general doctors are calling themselves “cosmetic surgeons”, which is not a protected title.²⁷ Consumers assume that doctors who call themselves surgeons have received specialist training in surgery, but this is often not the case. For all these reasons, the cosmetic surgery services market suffers from a lack of transparency and regulation.

Plastic surgeons coming from a number of Member States have now taken the initiative to develop a European standard for cosmetic surgery services. The reputation of plastic surgeons suffers from what they consider as the intrusion of non-qualified doctors and nurses on the market. From that perspective, the reason to start the European standardisation process can be compared to the tourist guide initiative – it is a counter-reaction to liberalisation of the market.²⁸ However, the plastic surgeons are not against cross-border healthcare services per se. Moreover, they also recognise that due to a lack of (State) regulation they are faced with a reality that the market is full of differently qualified service providers.²⁹ Since they consider that consumers are too much led by prices, they consider that self-regulation is necessary to protect consumers and improve the safety of cosmetic surgery services. As with all CEN standardisation processes, the process is open to all stakeholders. As a consequence, plastic surgeons have to sit around the table with cosmetic surgeons, general doctors, nurses and producers of cosmetic products. Despite the sharply different interests at stake, an attempt is made to agree on some basic principles to improve consumer safety.

The European standardisation process is currently in its final stages. The focus of the standard is on which treatments can be performed by which doctors, and where particular treatments have to take place. Again, the draft standard contains a provision which is potentially restrictive of free movement of services. It provides that certain invasive treatments have to be performed in an operation room,

²⁴ Interview with Chairman of Dutch Mirror Committee for Aesthetic Surgery Services (Goes) on 29th December 2012.

²⁵ Interview with ASI (Vienna) on 12th November 2012.

²⁶ Decree 2005-776.

²⁷ Interview with Chairman of Dutch Mirror Committee for Aesthetic Surgery Services (Goes) on 29th December 2012.

²⁸ Interview with UEMS and CPMS (Warsaw) on 19th February 2013.

²⁹ Interview with Chairman of Dutch Mirror Committee for Aesthetic Surgery Services (Goes) on 29th December 2012.

while other non-invasive treatment can be performed in a general consultation room.³⁰ The effect of these provisions is that doctors operating on the cosmetic market are at the very least required to have a fixed location when they provide their services. At the moment, there are doctors who move across the EU without having a fixed location. It is even possible that they offer their services at the customer's home. The standard seeks to prevent this by providing the type of room in which a particular treatment should take place. This means that certain service providers would possibly have to hire a treatment or operation room. Although it is easy to see how this should contribute to consumer safety, and as such could possibly justify a restriction to free movement, there might be proportionality issues which would have to be seriously considered.

In conclusion, the two examples given above illustrate the possible difficulties with the interaction between European standardisation of services and free movement of services. The regulation of quality of care often involves the imposition of requirements on service providers which are not necessarily facilitating free movement. On top of these considerations, it should be added that there have simply been very few initiatives for European services standards so far. The European standardisation process is not yet very well known for services.³¹ Despite various studies on the benefits of European services standards,³² very few European services standards have actually been adopted. Therefore, European standardisation and free movement of services are yet to become the true friends that many believe they could be.

European standardisation and private law

Convergence in private law through European standardisation assumes that it is possible to make a link from European standardisation to private law – that private law can be instrumental in turning the self-regulatory standard created through European standardisation into a legally binding standard. In the introduction, I have referred to three different private law tools: (i) contract, (ii) tort and (iii) certification. Although each of these options would provide a slightly different route to convergence, the end-result of each of them would be that a European services standard would be used to determine the standard and quality of care required of a service provider in private law relations. Therefore, I will not discuss each private law tool separately, but rather discuss two problems which are common to all three tools. I will illustrate the problems by reference to the healthcare sector.

Legitimacy considerations and private law

The link between contract law and healthcare services might not be immediately obvious. Traditionally, healthcare was a public service which was regulated by legislation imposed by the State. Nevertheless, in the last decades, many Member States have introduced elements of liberalisation and privatisation into their healthcare systems.³³ As a result, contracts have become a common regulatory tool in the healthcare sector. Privatisation of healthcare services has resulted in the need for contracts between healthcare providers and patients. Moreover, in many of the healthcare systems of the Member States, public authorities and health insurers have to buy the provision of healthcare services for their citizens or customers. Again, they use contracts as their regulatory tool. Finally, the individual contract – the insurance policy – between insurers and insured persons is likely to include a

³⁰ Articles 5-6 of prEN 16372: Aesthetic Surgery Services.

³¹ Interview with CEN (Brussels) on 4th April 2012.

³² Most recently, the Technopolis Group report, *Study on the implementation of service standards and their impact on service providers and users*, January 2012: <ftp://ftp.cen.eu/CEN/Sectors/List/Services/Technopolis20120124.pdf> (accessed on 15th November 2013)

³³ 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), 231-254.

provision on the right to healthcare services, and the standard of care which can be expected from the healthcare provider.

Essentially, a European services standard can be applied in three ways in such healthcare contracts:

1. Compliance with a European services standard can be made an express term of the contract: “The service provider will comply with the requirements imposed by the European services standard”.
2. The contract can provide that the service provider will comply with existing quality standards in the sector: “The service provider will provide his services in accordance with current quality standards in the sector”. The European services standard could then be one of the standards which could be referred to in determining the required standard of care.
3. The contract itself could be silent about quality standards, but it could be implied that that European services standard has to be complied with – the European services would become an implied term of the contract.

In the first scenario, few problems with the application of the European standard will occur. Although there might be problems with certain terms or parts of the European standard, and courts might be required to assess the fairness of individual terms, courts are at least required to look at the European standard. In the other examples, they have a discretion to decide whether or not the European standard should be applied in the contract. In the exercise of their discretion, courts will employ certain criteria to decide whether or not the European standard should be given binding force in law.

From a procedural point of view, the criteria which will be used to decide whether or not to give binding force to a European standard will not be European criteria. The national private law orders of the Member States will have developed their own criteria to decide whether or not a private self-regulatory instrument should be given binding force in law.³⁴ The differences in national criteria could potentially act as an obstacle to convergence in the EU, since courts in some Member States could be more willing to apply European standards than courts in other Member States.

From a substantive point of view, the criteria which are used often involve questions about the legitimacy of the standard-making process. Was the process to make the standard transparent? Was it possible for all parties concerned to have an input in the standard-making process? Was the standard really made in the public rather than the private interest? Have all key stakeholders in a particular sector participated in the standard-making process? Is the standard publicly available and accessible? These questions could potentially cause problems for the European standardisation process.

Firstly, the European standardisation process is completely confidential. The meetings of the national mirror committees and the European committee are private. As van Gestel and Micklitz have put it, they meet in “closed club houses”.³⁵ All the documentation related to the meetings is strictly confidential and cannot be disclosed to members of the public. The only moment when the European standardisation process opens its doors to the public is when the draft standard is published. For a short period of time, the draft European standard has to be published on the website of the national standardisation organisations. Interested individuals or organisations can provide comments on the draft standard, which the national mirror committees must take into account. However, this is the only public dialogue in the European standardisation process. This confidentiality remains after the publication of the standard. The European standard becomes a product which has to be bought through the national standardisation organisations. It is not freely available. Courts may have problems with giving binding legal force to a standard which is not publicly available. How could service providers be obliged to comply with a standard which they might never have seen before? Furthermore, from a

³⁴ See, for an example in the healthcare sector, a decision of the Dutch Supreme Court: HR 2 maart 2001, *NJ* 2001, 649 (*Trombose-arrest*)

³⁵ Rob van Gestel and Hans-W. Micklitz, “European Integration through Standardisation: How Judicial Review is Breaking Down the Club House of Private Standardisation Bodies”, (2013) 50 *CMLRev* 145-182.

practical point of view, parties which are involved in litigation might be less likely to refer to a European services standard. The result would be that the European standard would be less likely to be applied in private law disputes. Similarly, certain private regulators, such as health insurers, would be less likely to expressly apply European standards in a contract.³⁶

Secondly, the European standardisation process is open to all parties concerned. There are no objective criteria to decide which parties are concerned. It is the responsibility of the national standardisation organisations to contact all parties which could potentially be interested to participate in the standardisation process. Moreover, there are no formal obligations on which parties should definitely participate in the standardisation process. Although the new Standardisation Regulation 2012 provides that non-governmental organisations, consumer organisations, environmental organisations and public authorities should be encouraged to participate,³⁷ this obligation does not seem to be legally enforceable. As a result, a European standardisation process can be started and completed without the participation of some of the key players in a particular sector. The non-participation of certain parties could again be a reason for courts to refuse to apply the European standard in private law, because a standard should carry weight across the whole sector.

European minimum standards and the new Member States

Another potential problem with the application of European standards in private law is the fact that European services standards provide minimum quality standards. As such, they do not exhaustively regulate the required quality of a particular service. The aim is to provide a level-playing field in the internal market, which would encourage both service providers and service recipients to make use of their right to free movement. From an internal market point of view, this is probably more flexible than maximum harmonisation. However, the problem with minimum quality standards is that certain Member States might not be willing to lower their standards in private law to a common European standard, if they consider that the current national standards are significantly higher than what the result would be of a European standardisation process.

The initiative for a European standard for cleft lip surgery provides a good example of this. The European Cleft Organisation (“ECO”) submitted a proposal to CEN for a European standard on cleft lip surgery. ECO is an organisation for patients born with cleft lips in Europe. One of its primary aims is to improve the care for babies born with cleft lips in the new Member States. ECO regularly organise training programmes, in particular in Bulgaria and Romania. These Member States would also be greatly helped by the development of a European standard which would lay down the minimum level of care to which babies and their families should be entitled in the EU.

Despite the widespread recognition that cleft care should be improved in some of the new Member States, ECO’s proposal was rejected by a number of old Member States. The required qualified majority support for the standard was not reached.³⁸ As a result, the standardisation process was not even started. One of the reasons of some Member States for rejecting the proposal was that it would not be in their interest to work on a European minimum standard, because they would continue to provide medical care of a higher level.³⁹ Moreover, they were frightened that the creation of a European standard would be an incentive for public authorities and health insurers to cut on funding

³⁶ Interview with with CZ Health Insurer (Tilburg) on 23rd August 2012.

³⁷ Articles 5-7 of Regulation 1025/2012 of the European Parliament and of the Council on European standardisation.

³⁸ Voting Results: “*Creation of a new CEN Project Committee on 'Healthcare services for cleft lip and/or palate'*”, CENBT/8561, Brussels, April 2011.

³⁹ “Formal responses by the Proposer”, document published on by ECO after the presentations in Brussels on 8th November 2011, p 5: [http://www.ecoonline.org/media/documents/concerns_and_responses_-_FINAL\[1\].pdf](http://www.ecoonline.org/media/documents/concerns_and_responses_-_FINAL[1].pdf) (accessed on 15th November 2013).

for cleft care, with the possible outcome that a European standard would lead to lower quality of care at the national level.

Like all participants in European standardisation processes, the stakeholders in the old Member States would have been required to contribute to the costs of the European standardisation process. But why would they contribute to the creation of a European standard which would be lower than their national standard? This illustrates a potential problem with self-regulation in the public interest – especially when in this example the public interest would extend far beyond the boundaries of the individual Member States, and would not even include the own Member State. The European standardisation process would effectively become some kind of development aid. Doctors in the old Member States are certainly willing to share national standards, but they are not going to pay for a European standard which would not be used in their own Member States anyway.⁴⁰ Finally, it should also be noted that cross-border movement of patients was not an issue in this example. Because of the limited financial resources and the fact that babies with clefts need long-term treatment plans, cross-border movement for treatment becomes virtually impossible.⁴¹ Perhaps this was one of the reasons for the old Member States to refuse to engage with the problems in the new Member States through a European standardisation process.

From the perspective of convergence, it could be argued that it does not matter that some old Member States will continue to subscribe to higher national quality standards. In any event, the adoption of a European services standard would mean that the standards in the private law systems of the new Member States would be raised. A process of convergence would take place in the direction of the old Member States. This might be true once a European services standard has been adopted. However, the problem with this strategy for convergence is that the old Member States are also necessary in the standard-making process. If they continue to refuse to get involved in European standardisation process because they do not see the need for European minimum standards, this will mean that no European standards can be adopted. A small minority of some of the bigger old Member States is able to reject proposals for European services standards. As a result, a process of convergence in private law through European standardisation cannot take place, since there would be no European services standards which could be applied in private law.

To conclude, it is clear that legitimacy concerns about European standardisation could act as an obstacle to the application of European standards in private law. This is a less of a problem for European standardisation of goods, which has become a quasi-legislative process with the New Approach. The binding effect of the European product standards in law follows more or less automatically from the European standardisation process itself. However, European services standards rely on voluntary application in public or private law. As such, requirements imposed by private law will provide an indirect incentive to improve the legitimacy and transparency of the European standardisation process. At the same time, the minimum nature of European services standards can be problematic in areas in which certain Member States do not want to give up their national private law standards.

Free movement of services and private law

Finally, the relationship between free movement of services and private law should shortly be discussed. I will approach this relation from the perspective of horizontal direct effect of the free movement provisions and the impact of horizontal direct effect on private law.

The traditional approach towards free movement law was that the free movement provisions were intended to regulate State conduct, and that they could be used to eliminate obstacles to free

⁴⁰ Interview with NEN (Delft) on 12th April 2012.

⁴¹ Interview with ECO (Skype) on 14th March 2012.

movement created by the State.⁴² Competition law would be the tool to regulate private conduct. However, under the pressure of globalisation, the role of the State as the exclusive regulator of the internal market has decreased. Private parties have come to assume a much more important role in the regulation of the internal market. Activities which were regulated by public authorities in one Member State could be regulated by private parties in another Member State. Moreover, some of the regulatory conduct of private parties could not be caught by competition law. As a consequence, the application of the free movement provisions had to be extended to private parties to ensure the effectiveness and uniformity of EU law.⁴³

The CJEU laid down the foundations for the application of the free movement provisions to private parties in *Walrave and Koch*.⁴⁴ In this case, the CJEU held that private conduct which was intended to provide collective regulation on the basis of the legal autonomy of the private regulator in question would be caught by the free movement provisions. After the judgment in *Angonese*,⁴⁵ it appears that collective regulation is no longer required. All what is required is that the private party is able to effectively restrict the free movement rights of other private parties. The free movement provisions will be applied to private parties on the basis of the effect of their actions. Making a formal distinction between public regulators and private parties has become irrelevant.

The extension of the application of the free movement provisions has implications both for standard-making bodies and for private parties who apply European standards in private law. Private regulation through contract or through certification could be challenged under the free movement provisions. In the recent case of *Fra.bo*,⁴⁶ the CJEU held that the provision on free movement of goods was applicable to a German private certification institute. Although it could be argued that a decisive factor in this case was that German legislation had provided that goods certified by this institute could be lawfully brought on the German market, the judgment opens the door to the application of the free movement provisions to certification organisations in general.⁴⁷

Standard-making bodies

Organisations such as CEN and national standardisation organisations are definitely engaged in collective regulation on the basis of their legal autonomy. As such, it is likely that the free movement provisions are applicable to them. However, in the context of European services standardisation, it is unlikely that cases will be brought directly against standard-making bodies. Although CEN facilitates and administers the European standardisation process, the simple adoption of a European services standard does not achieve an important regulatory effect in law. The regulatory effect in law, and the possible restriction to free movement, derives from the fact that another private party voluntarily decides to apply the European services standard, for example in contracts or in certification activities. This is an important difference from European standardisation of goods, since the legal effect of European product standards is directly linked to the European standardisation process. The intervention of private law is not necessary for the European product standard to have a regulatory

⁴² Joined Cases C-177/82 and C-178/82, *Criminal Proceedings against Jan van de Haar en Kaveka de Meern BV*, [1984] ECR 1797.

⁴³ Stefaan van den Bogaert, "Horizontality: the Court Attacks?", in Catherine Barnard and Joanne Scott, (eds.), *The Law of the Single European Market: Unpacking the Premises*, (Hart Publishing, Oxford, 2002), 123-152.

⁴⁴ Case C-36/74, *Walrave and Koch v Association Union cycliste internationale and others*, [1974] ECR 1405.

⁴⁵ Case C-281/98, *Angonese v Casa di Risparmio di Bolzano SpA*, [2000] ECR I-04139.

⁴⁶ Case C-171/11, *Fra.bo SpA v Deutsche Vereinigung des Gas- und Wasserfaches eV (DVGW) – Technisch-Wissenschaftlicher Verein*, judgment of 12 July 2012.

⁴⁷ For a more detailed discussion, see Barend van Leeuwen, "From Status to Impact, and the Role of National Legislation: the Application of Article 34 TFEU to a Private Certification Organisation in *Fra.bo*", (2013) 3 *European Journal of Risk Regulation*, 405-408.

impact. For European services standards, it is more likely that cases will be brought directly against private parties which apply a European standard in their regulatory conduct.

Private regulators applying a European services standard

To illustrate how private law disputes can lead to a challenge based on free movement law, I will give two (fictional) examples:

1. A Dutch health insurer offers its customers the possibility, for a monthly supplement, to be insured for a limited number of cosmetic interventions. For this purpose, the health insurer concludes contracts with a number of private cosmetic clinics in the Netherlands and Belgium. These contracts expressly provide that the clinics will comply with the requirements imposed by the European standard for Aesthetic Surgery Services. Mrs Houben lives in Rotterdam, but she would like to get some Botox treatment from COSMOBILE, a private clinic based in Belgium which occasionally sends its cosmetic surgeons to the homes of their customers to treat them at their homes. Under the contract with the health insurer, they are not allowed to do this as it would be in breach of the European standard. COSMOBILE claims that this contractual provision constitutes a breach of its right to freely provide services and refuses to comply with it. It sends a “mobile doctor” to Mrs Houben to treat her at her home and sends an invoice to the health insurer. The health insurer refuses to reimburse COSMOBILE for the treatment and COSMOBILE brings an action for payment against the insurer.
2. An English private certification organisation certifies tourist guides who want to provide tourist guide services in the UK. The European standard for tourist guide training requirements is used as the basis of its certification activities. It refuses to certify Mr Von Amsberg, a German tourist guide who wishes to provide his services in Oxford, because he has not spent 240 hours in Oxford as part of his practical training. Mr Von Amsberg studied Classics in Oxford forty years ago and believes that this requirement is an obstruction to the exercise of his right to freely provide services in the UK. He brings an appeal against the refusal to provide him with a certificate claiming that the 240 hours requirement is incompatible with free movement law.

In both examples, private parties are applying a European services standard which they have probably – the possibility that they have participated in the European standardisation process cannot be excluded – not made themselves. The legal action is based on the decision of the private parties to apply the standard in private law, and on the subsequent regulatory impact of the application of the standard. The parties will have to bear responsibility for their choice to provide binding effect to the standard in law.

What implications does the extension of the application of the free movement provisions to private parties have for the theory of convergence in private law through European standardisation? In principle, the fact that the regulatory actions of private parties can be scrutinised under EU law should not have a detrimental impact. At the same time, it means that the regulatory actions can be more closely scrutinised under the free movement provisions. Furthermore, there is a close link to the relationship between European standardisation and free movement of services. The horizontal direct effect of the free movement provisions means that an indirect obligation is imposed on the stakeholders which are participating in the European standardisation process to comply with free movement law. If they do not do so, this might mean that private parties are less likely to apply the standard in private law relations, as they could be held responsible for possible breaches of free movement law in the provisions of the European standard.

Conclusion

The process of convergence in private law through European standardisation is a two-stage process which involves European standard-making and the application of European standards in private law.

In this paper, I have attempted to show that the triangular relationship between free movement of services, European standardisation and private law will not work unless there is a degree of compatibility between each of the three components. At the moment, each of the bilateral relationships in the triangle faces certain problems which affect the overall validity of the theoretical framework. This might mean that certain improvements will have to be made to the European standardisation process. I will conclude with a number of short proposals:

1. The European Commission should closely monitor European services standardisation processes. This might mean that the Commission has to get more actively involved in European standardisation processes. The Commission should make stakeholders aware that the provisions of a European standard have to comply with the free movement provisions. The stakeholders participating in European standardisation processes should be made aware of the implications of a European services standard in free movement law.
2. European services standards should be developed in such a way that they can most easily and effectively be applied in private law. This means that it is in the interests of the participants to make sure that all interested parties in a particular sector have an input in the process. Even more importantly, if the transparency of the European standardisation process is not improved, this will have a detrimental impact on the application of European standards in private law.
3. The application of the standards in private law should act as a legitimacy test of European services standards. This test will be undertaken either by national courts in deciding whether or not to give binding effect to European standards, or by the services sector itself – the market – in deciding whether or not to incorporate European standards in contracts or in certification activities. A consistent refusal by national courts or by stakeholders to apply European services standards would provide a clear message to CEN and to national standardisation organisations that structural changes have to be made to the European standardisation process.

EU SOFT-LAW, INTERNAL MARKET AND PRIVATE RELATIONSHIPS: THE RISE OF EXECUTIVE POWER IN THE EU AND THE IMPLEMENTATION OF THE EU REGULATORY FRAMEWORK FOR ELECTRONIC COMMUNICATIONS AS A PARADIGM

Marta Cantero Gamito

Introduction

As a result of liberalization and the Internal Market aspiration, the bulk of the rules concerning telecommunications derive from the European Union. Under EU Law, Member States were required to set up National Regulatory Agencies (NRAs), which perform a key role in the implementation and enforcement process of the European legal framework. In this process, the European Union has shown an enforcement deficit as a result of the National Procedural Autonomy. However, even though the implementation and enforcement of the EU rules depends on the Member States, there is a slowly and growing influence by the European Union in the national regulatory activities.¹

Thus, this paper will focus on how the executive powers of the EU deeply rooted on the integration process and the construction of the Internal Market are encroaching on national competences on the sly. To this end, this paper aims at displaying the institutional design of the telecommunications sector in decision-making and the implementation of the EU rules under a particular case of study.

The Internal Market harmonization has been the driver for the rise of the “Euro executive power” in many fields covered by EU competences but it is also extending up to other spheres traditionally belonging to the Member States, for instance, private relationships.

The first part of this contribution includes the evolution of the Regulatory Framework for Electronic Communications. Here, the paper shows how the primary aims of the Regulatory Framework are shifting from liberalization and competition to harmonization of the Internal Market and Consumer protection. The liberalization of the telecommunications sector should have led to its “deregulation” and the system to be governed by general competition and general contract law only.² However, further liberalization measures are not (for the time being) envisaged within the development of the legal regime and sector-specific legislation is still being adopted.

Secondly, this paper shows a real case of analysis, what I have termed the “*OPTA case*”. This is an implementation case which concerns the application of an EU Commission’s Recommendation. The examination of this case discloses the intricacies of a highly bureaucratic procedure (the so-called Article 7a procedure) whose *raison d’être* is consolidating the Internal Market for electronic communications (*finalité*) through a consistent implementation of the European Regulatory Framework vis-à-vis national law and the judiciary.

Methodologically, the paper has been created under a “bottom-up” approach via an observation process carried out during my second year of research. The empirical evidence is, thereby, derived from the performance of a set of interviews with key players of the telecommunications market.

¹ Ottow, A. (2012) ‘Europeanization of the Supervision of Competitive Markets’, *European Public Law*, 18(1), pp. 191–221. See also Cseres, K. (2013): Integrate or Separate Institutional Design for the Enforcement of Competition Law and Consumer Law. In *Amsterdam Centre for European Law and Governance Working Paper Series* (2013-01).

² Recital 5 of the 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: “the aim is progressively to reduce ex-ante sector specific rules as competition in the markets develops and, ultimately, for electronic communications to be governed by competition law only (...)”.

Therefore, I have interviewed to staff members from the National Regulatory Authorities (NRAs), Head of Units from the European Commission, people involved in the Body of European Regulators for Electronic Communications (BEREC), practitioners, the Government and the industry,³ mainly in relation to the procedure examined as a case-study.

The interviews were formal and recorded. All the interviews have been entirely transcribed and thoroughly analyzed and interpreted. Along this hermeneutic journey, I have been guided by a sociologist in order to get a better understanding of the information provided for with the interviews. As they were open-ended interviews, they give me a very comprehensive understanding of the analyzed institutions, their nature, their functioning and their interaction with each other. The content of this paper has been, thereby, shaped by the outcome of the interviews taking account of sensitive or fraught issues that account for where the practical problems reside. On the other hand, the information gathered as a result of the empirical research has been displayed following an *integrated approach*; i.e. the text is a coupled combination of parts of the interviews and its interpretation with relation to the formal goals and aims of the EU Regulatory Framework. As a result, the body of my paper is based on both, the provisions contained in the EU rules concerning telecommunications and the trends suggested by the empirical observation and the socio-legal analysis. However, provided that it is an on-going research, most of the empirical material has not been used in this short contribution, since it will be subject of further analysis in my PhD dissertation.

The evolution of the telecommunications sector in the areas analyzed in this paper provides a comprehensive picture of the transformations operated at the level of decision-making and its impact in the regulation of private law relations in the national context.

Setting the Scene. Visible Side: EU Regulatory Framework and Private Law

European Regulatory Framework

The legislator has pursued a functional approach which has originated regulated sectors to become functionally independent and it has led to the *sectoralization* of network services. Thus, although the different sectors (gas, electricity, transport, telecommunications, etc.) have followed parallel paths, their regulation has been carried out through a *sector-specific approach*, resulting in different sectorial regulations.

Liberalization, harmonization of the Internal Market and the application of competition rules have been the cornerstones underpinning the market-opening process and the reform of the sector in order to accomplish with the general EU policy goal for telecommunications: ‘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’.⁴ The vast number of rules comprising each heavily regulated vertical regime comprises different issues, from the liberalization of the sector, to particular provisions concerning contractual matters.

³ In this regard, I would like to thank all the people who has been interviewed to make this paper possible. All the participants have been very open and frankly and they have provided me with a inestimable help and information. Nonetheless, the opinions expressed in this paper are the result of the personal opinion and interpretation of its author. I would also like to acknowledge the help of Dr. Thomas Roethe (German Sociologist) who has helped me conducting and empirical research and interpreting the material.

⁴ 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.

All the enacted rules contained in three different generations of rules (telecom packages) compose what has been termed the ‘EU Regulatory Framework for Electronic Communications’, which provides the basis for the national legislation in the field. To date, three series (generations) of rules have come to light.

The First package (1980s-2002)

The process of liberalization in the telecommunications sector was initiated by the European Commission in 1987, with the adoption of the Green Paper on Telecommunications,⁵ which brought the full liberalization of the sector in 1998.⁶ The creation of a *market* was on top of the initiative of the liberalization aspiration.⁷ The market was opened to competition under Article 86 EC Treaty (now Article 106 TFEU). At this point, the European legislator was mainly focused on liberalizing the sector and enhancing competition.

According to the 1987 Green Paper, there were several reasons originating the review process: the speed of technological diversification, an expanding range of new forms of access to sources of information, an explosive growth in communications requirements, and the major importance of scale effects through multinational participants. Further, the EU Commission also declared that the measures taken by the US and Japan affected the authorities concerned and it forced the review process as well.⁸ The main purpose of the regulatory adjustment was to create competition and, thus, more cost-efficient services. Additionally, it would stimulate investment and innovation. A final reason was that the Commission regarded at telecommunications as a sector of vital importance in economic activity and as ‘the most critical area for influencing the “nervous system” of modern society’.⁹

At that stage, some European companies understood the opportunities provided by the global market and they were eager to compete in international trade on an equal basis. The UK was the pioneer in the liberalization process and, in 1984, privatized British Telecommunications. Not all Member States, however, agreed with the liberalization policy, and the need to reach a consensus entailed a more than a decade of Directives and incentives to Member States to undertake the review process.¹⁰

The separation of the regulatory and operational functions of the incumbent was a crucial aspect for the liberalization purpose. These functions were formerly performed by the same entity, the incumbent operator. Since this would hinder the introduction of competition, entailing a risk of distortion and discrimination for the new entrants, the EU rules envisaged the creation of bodies independent of the telecommunications organizations for regulatory functions.¹¹ Thus, as a matter of institutional choice, the reforms included the establishment of what afterwards would be called “National Regulatory Authorities” (NRAs) in order to implement liberalization policies and to perform regulatory functions.¹²

⁵ 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.

⁶ 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).

⁷ Mr. Reinald Krüger (Head of Unit ‘Regulatory Coordination and Markets’ –DG CONNECT– European Commission), Speech at the Florence School of Regulation, 15.10.2012.

⁸ 1987 Green Paper, *supra* n. 5, p. 2.

⁹ *Ibid.*, p. 1.

¹⁰ Melody, W.H. (2012), ‘Viewpoint: The Closing of the Liberalization Era in European Telecommunication’, *Competition and Regulation in Network Industries*, Volume 13, No. 3, pp. 218-235 (see, p. 221).

¹¹ Article 7, Directive 90/388/EEC of 28 June 1990 on competition in the markets for telecommunications services, OJ L 192, 24.07.1990, pp. 10-16.

¹² National Regulatory Authorities and their role is deeply analyzed below.

Later on, in 1997, with the aim of co-operation between the different NRAs, an Independent Regulators Group (IRG) was created. The IRG was formed by NRAs with the purpose of serving as a meeting point or forum where to share experiences and points of views among its members on issues concerning the development of the telecommunications market in Europe as a result of liberalization.

The Second package (2002-2009)

The rapid development of the sector forced the European Commission to review the first package shortly after its implementation. This new package (2002) was primarily aimed at the convergence of the Regulatory Framework in order to foster the industry's development via technologically neutral and (more) flexible rules.¹³ The idea was to put an end to the vertical approach in the regulation of the different services and networks provided within the telecommunications market (for instance, all networks used for the transmission of radio and television programmes). Thus, due to the emergence of a broad range of communications services, the convergence of the ICT (Information and Communications Technology) sector was sought under a renewed *common approach*.¹⁴

Once the liberalization machinery had been rolled-out, the second goal was the development of a common market for telecommunications across the European Union. Accordingly, the legal basis for the adoption of this second set of rules was Article 95 EC (now 114 TFEU), aimed at the harmonization of the Internal Market, and consumer protection (Article 153 EC, now Article 169 TFEU). Nonetheless, the second package did not lead to the replacement of all the former rules from the first package. Consequently, this meant a basic dualism: harmonization, on the one hand, and liberalization, on the other.¹⁵

The new package, consistent with the goal of harmonization –and following the mandate of the Framework Directive to contribute to the development of the Internal Market by cooperating with each other and, unlikely to the IRG, with the Commission–,¹⁶ also included the creation of a European body, the European Regulators Group (ERG).¹⁷ The idea of its creation was not only to advise the Commission, but also to create a sort of “European network of NRAs”. Thus, the purpose was to bring together the regulators of electronic communications and to encourage them to take a European perspective when performing their regulatory activities. Shortly after, the ERG started to constitute into study groups and to issue binding guidelines which served as benchmark exercises on the different regulatory topics. Accordingly, the ERG was created to enhance co-operation and co-ordination between the Commission and the different NRAs by ensuring the proper and uniform implementation of the EU rules in order to ensure a more consistent approach. Although it operated in parallel with the IRG, its main role was to advise and assist the Commission in consolidating the Internal Market for electronic communications networks and services.¹⁸

The Third package (2009-to date)

Around two decades after the first package was launched, some Member States had successfully developed competition in their telecommunications markets, whereas others were still more laggard. This situation, linked to the incorporation of the EU Member States, the Significant Market Power (SMP) of national incumbents and the restricted powers of NRAs, implied a deceleration in the

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 p. 48).

¹⁴ For a further analysis see Melody (2012) *supra* n. 12, pp. 223-226.

¹⁵ Braun & Capito, op. cit. *supra* n. 14.

¹⁶ Article 7(2) and Recital 36 of the 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.

¹⁷ Decision of the European Commission of July 29, 2002 establishing the European Regulators Group for Electronic Communications Networks and Services (OJ L 200, 30.7.2002, pp. 38-40).

¹⁸ *Ibid.* Article 3.

implementation of the second package. The process flowed slower than expected and it required the rules to be amended and adapted to the new circumstances.

The different directives from the 2002 package (Framework, Authorisation, Access, Universal Service and E-Privacy) contained review clauses providing a procedure whereby the Commission would review their functioning no later than three years after its transposition. Thus, the 2006 Review gave rise to the 2009 package or “third generation”. According to the Commission, the 2009 package was enacted to ‘substantially strengthen competition and consumer rights on Europe’s telecoms markets, facilitate high-speed internet broadband connections to all Europeans’.¹⁹ Although competition had generally developed, this trend was fragmented and there were some countries and markets where competition was still lacking. Therefore, the revised rules were still (very much) based on *ex-ante* regulation.

The ERG was replaced by the Body of European Regulators for Electronic Communications (BEREC).²⁰ This would provide a forum of discussion between the Commission and the NRAs in order to foster the Internal Market for telecommunications services. Roughly speaking, BEREC is the body in charge of ensuring a consistent application of the EU regulatory framework for electronic communications.²¹ BEREC is, therefore, established as a meeting point for the co-operation of regulators and, in general, Member States must ensure that the goals of BEREC of promoting greater regulatory coordination and coherence are actively supported by the NRAs.²²

Current scenario

The 2009 Amendment to the Framework Directive (Recital 5) states that ‘the aim is progressively to reduce ex-ante sector specific rules as competition in the markets develops and, ultimately, for electronic communications to be governed by competition law only’. Yet this does not seem to be the practical path that evidence suggests that it actually follows. Actually, the “de-regulation” of the sector has not yielded a decline in the legislation concerned; rather, the creation of the Internal Market for telecommunications has entailed its “re-regulation” and it has actually led to “overregulation”.²³ In this regard, it has been pointed out that the new agenda did not include any new liberalization measure, any reference to the expansion of competition among providers or to any orientation concerning the benefits of liberalization within its policy objectives.²⁴ This means that competition is no longer on top of the agenda and that further steps in this regard are not (at this moment) foreseen.²⁵ Today there have been some developments but there still are: persisting bottlenecks, competition law cannot redress resulting market failures, and artificial barriers to market integration. These factors are the reason why market regulation is still needed.

This may entail that although competition is effectively achieved in some telecommunications markets, regulation will continue to be adopted even once markets are competitive because there are greater policy aspirations. The policy aims in the telecommunications sector are found in the 101 actions grouped in the 7 pillars of the Digital Agenda. The Pillar I is the Digital Single Market. Single Market presides, thereby, the actions taken under the Digital Agenda’s initiatives. It might be one of the reasons why, despite having achieved full competition in the telecommunications markets, the telecommunications legal regime will remain as such; i.e. being a sector-related regime. Furthermore,

¹⁹ Press Release, MEMO/09/491, Brussels, 5 November 2009.

²⁰ This Body was set up by the 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. The BEREC is deeply analyzed below.

²¹ Article 1 BEREC Regulation.

²² Article 3(3b) Framework Directive.

²³ Thus, for example, there are more than a hundred of different directives, decisions, regulations, recommendations and resolutions concerning telecommunications.

²⁴ Melody (2012), *supra* n. 10, pp. 226-227.

²⁵ *Ibid.*

due to the existence of deregulatory failures²⁶ and despite its envisaged potential integration within competition law, the sectorial approach towards the regulation of telecommunications seems to survive not being by now –in practice– part of a broader horizontal approach.

Actually, the current state of affairs is that there is a forth package being discussed in the European Parliament. On this occasion, the legal package is not made out of Directives, but of a Regulation²⁷ and a Commission's Recommendation.²⁸ By so doing, the EU is moving from the regulation via Directives to adopt legislation in the form of a Regulation (and, therefore, directly applicable) whose main aim is the removal of the barriers and the process of building a genuine Single Market for telecoms. Hence, the proposal takes Article 114 TFEU as the legal basis for enacting this "one-size-fits-all" solution, which is currently being debated in the European Parliament.

Telecommunications and Private Law

The liberalization of the telecommunications market has implied its displacement towards the private law domain. The relationship between providers and end-users is now governed by private law. However, since these services constitute economic activities of particular importance to citizens, they are subject to public intervention. Its nature as regulated markets services entails, therefore, a particular configuration of the contracts for the provision of these services. Here, contract law has been used as a *regulatory tool* aimed at achieving the liberalization of the market and a genuinely competitive European market for telecoms²⁹. Hence, the implemented regime pursues 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.³⁰ That is the reason why the EU Regulatory Framework encompasses many provisions which have an impact in the contractual relationship provider-recipient. In this regard, as Taggart pointed out: '[t]he State is not really doing less; it is doing it differently and often less visibly'.³¹

The purpose of the liberalization was to create competition and, thus, more cost-efficient services. To this end, the EU Regulatory Framework also introduces a set of mechanisms aimed at the facilitation of the access to the incumbent's network by new entrants; i.e. not only social, but also economic regulation. Consequently, there is also an impact for private law in the relationship between undertakings (B2B dimension). For instance, when it comes to relationships between operators (B2B dimension), the rules establish certain rights and obligations to meet in their contracts. This is the result of the *market-based approach* pursued by the European Union. Within this approach, the main idea is *access*, given that access regime allow alternative operators to access to the Significant Market Power (SMP) operators' networks enabling competition. The goals in the wholesale and in the retail

²⁶ Currently, a process of deregulation in Poland has failed (http://europa.eu/rapid/press-release_IP-13-100_en.htm). The European Commission has called the Polish telecoms regulator (UKE) to withdraw its proposal to deregulate conditions under which other operators can access Polish telecom company Telekomunikacja Polska's (TP) broadband network in 11 communes of Poland since –in the Commission's view–, it could have a negative effect on competition in Poland.

²⁷ Regulation of the European Parliament and of the Council laying down measures concerning the European single market for electronic communications and to achieve a Connected Continent - COM(2013) 627.

²⁸ Commission recommendation on consistent non-discrimination obligations and costing methodologies to promote competition and enhance the broadband investment environment - C(2013) 5761.

²⁹ On the idea of contract as a regulatory tool see Micklitz, H.-W. (2005) 'The concept of competitive contract law', *Penn State International Law Review*, The Dickinson School of Law of the University of Pennsylvania (2) 393, 549–586; and Micklitz, H.-W. (2008), *Regulatory Strategies on Services Contracts in EC Law*. EUI LAW Working Paper No. 2008/06. Available at SSRN: <http://ssrn.com/abstract=1093643>.

³⁰ 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.

³¹ Taggart, M. (2005), 'From 'Parliamentary Powers' to Privatization: The Chequered History of Delegated Legislation in the Twentieth Century', *University of Toronto Law Journal*, vol. 55, pp. 575–627 (see in particular p. 615).

markets are closely connected. They follow common approaches, since the achievement of full competition in telecommunications is a mediate goal to enhance consumer's welfare.

At European level, the Regulatory Framework harmonises the way in which Member States regulate access to, and interconnection of, electronic communications networks and associated facilities.³² By way of example, the Access Directive sets up the 'rights and obligations for operators and for undertakings seeking interconnection and/or access to their networks or associated facilities'.³³

The imposition of such access obligations corresponds to National Regulatory Authorities.³⁴ Thus, between the different functions of these regulatory agencies, they shall conduct market analyses in order to detect whether specific markets are not competitive and, where appropriate, impose regulatory remedies on the operators which have Significant Market Power (SMP). The remedies at the wholesale level are: transparency obligation,³⁵ non-discrimination obligation,³⁶ accounting separation obligation,³⁷ obligation of access to essential facilities,³⁸ price control and cost accounting obligations.³⁹ In addition, the 2009 Amendment to the Access Directive includes two new remedies: imposition of functional separation of vertically integrated undertakings under specific circumstances (*ultima ratio*),⁴⁰ and the procedure to follow when a vertically integrated undertaking decides to carry out a voluntary separation.⁴¹ In case any of the wholesale remedies proves to be effective, NRAs are also allowed to impose regulatory obligations at the retail level.⁴² With the aim of protecting end-users interests whilst promoting effective competition, these obligations on the retail market may consist on the applications of appropriate retail price caps, measures to control individual tariffs, or measures to orient tariffs towards costs or prices on comparable markets.⁴³ These remedies necessarily involve an impact in the contractual relationships among undertakings.

Implementation of the EU Regulatory Framework. A Case of Study

As aforementioned, the EU Regulatory Framework for Telecommunication includes provisions which have an impact in private law matters. When it comes to contracts between telecoms operators, NRAs exert price control over the prices that the incumbent charges to alternative operators for the use of the network, for instance. A problematic matter of competence is represented by the delegation of substantive competence to "specialized institutions".⁴⁴ The establishment of NRAs in the telecoms sector is a clear example of the partial integration or integration by sectors that Pescatore speaks about.⁴⁵ But in order to get a clear understanding on this it is required to look at the functional

³² Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities; Article 1(1).

³³ *Ibid.* Article 1(2).

³⁴ *Ibid.*

³⁵ *Ibid.* Article 9.

³⁶ *Ibid.* Article 10.

³⁷ *Ibid.* Article 11.

³⁸ *Ibid.* Article 12.

³⁹ *Ibid.* Article 13.

⁴⁰ Article 13a as introduced by the Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and 2002/20/EC on the authorisation of electronic communications networks and services ("Better Regulation Directive").

⁴¹ Article 13b as introduced by the Directive 2009/140/EC (Better Regulation Directive).

⁴² 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), Article 17(1)

⁴³ *Ibid.* Article 17(2) USD.

⁴⁴ Pescatore, p. 27.

⁴⁵ *Ibid.*

competence of such institutions as well as the interplay between the EU, the Member States and the established administrative structures. This might be the result of the nature of the *prerogatives* reserved to the European Commission with regard to the control mechanisms which grant it with certain powers aimed at the “adjustment” of the national measures; e.g. via Consultation procedures.⁴⁶ The rationale of such procedures responds to the political and legal imperatives set out at EU level.⁴⁷ A closer look to the implementation of the EU Regulatory Framework for Electronic Communications reveals a subtle increasing power of the EU Commission’s role at the functional level when it comes to the achievement of the regulatory goals; i.e. consistent application of the legal framework and harmonization of the Internal Market. The following case-study illustrates this phenomenon.

The case analyzed (what I have termed “OPTA case”) concerns to the implementation of a Commission’s Recommendation on the methodology employed for the calculation of termination rates costs.⁴⁸ This case is a good example to illustrate the implementation process of EU’s decisions on the Member States with implications for private law (price control in B2B contracts).

A B2B case: Article 7 procedure and OPTA Case. Operators in play

Article 7 procedure

Before going into details, it would be appropriate to briefly explain the consultation mechanism which is analyzed in practice taking the example of a real implementation case between OPTA (former Dutch NRA)⁴⁹ and the European Commission. In order to ensure a proper application of the EU rules, a control mechanism was put in place; the so-called Article 7 of the Framework Directive procedure. This procedure establishes a consultation and notification mechanism through which NRAs are required to adopt a *collaborative approach* informing the European Commission and the other NRAs when it comes to measures which may have an impact to the Internal Market. In practice, there are two different Article 7 procedures: Article 7 (‘Consolidating the internal market for electronic communications’) when performing Market Definition⁵⁰ and Market Analysis procedures;⁵¹ and Article 7a (‘Procedure for the consistent application of remedies’) which takes place when obligations are imposed to operators with Significant Market Power.

Particularly, as it stands today, the procedure of Article 7 (‘Consolidating the internal market for electronic communications’) establishes that the NRA concerned shall notify the European Commission when adopting a proposed measure for a particular market.⁵² The case is, then, assessed

⁴⁶ Article 7 and 7a of the Framework Directive. In this regard, see also Curtin, *Executive Power of the European Union. Law, Practices and the Living Constitution*, Oxford University Press, 2009

⁴⁷ Pescatore, p. 45.

⁴⁸ Commission Recommendation (2009/396/EC) of 7 May 2009 on the Regulatory Treatment of Fixed and Mobile Termination Rates in the EU (OJ L 20.5.2009, pp. 67-74).

⁴⁹ OPTA (*Onafhankelijke Post en Telecommunicatie Autoriteit*, “Independent Post and Telecommunications Authority”, in English) has been replaced by a single “super watchdog” body: the Netherlands Authority for Consumers and Markets (“ACM”) after the merger of the Netherlands Competition Authority (NMa), the Netherlands Consumer Authority, and the Independent Post and Telecommunications Authority of the Netherlands (OPTA). ACM became operational as of 1st April 2013.

⁵⁰ Article 15 of the Framework Directive.

⁵¹ Article 16 of the Framework Directive.

⁵² The markets where competition is considered not to be effective and where national regulators are expected to carry out market analysis are enlisted in the Commission Recommendation 2007/879/EC on relevant product and service markets within the electronic communications sector susceptible to ex-ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services. These markets are: Access to the fixed telephone network; Call origination on the fixed telephone network; Call termination on individual fixed telephone networks; Wholesale access to the local loop; Wholesale broadband access; Wholesale terminating segments of leased lines; Voice call termination on individual mobile networks.

by the Commission, which may require the regulator for clarification or to provide more details within a period of three days. The European Commission will have to conclude the assessment in a period of one month. In case the Commission does not express “serious doubts” on the compatibility of the draft measure with the EU Regulatory Framework, it may provide comments and the NRA involved will have to take into consideration those comments when adopting the measure concerned. In case that the European Commission raises “serious doubts” concerning proposed measure, there will be an extension of two additional months of the investigation procedure, leading to the opening of what is called “Phase II”. During this stage, the NRA can provide further evidence and BEREC gives an Opinion on the Regulator’s proposal, which cannot be adopted during the proceedings. The final stage involves three possible scenarios: 1) the European Commission may withdraw its serious doubts, in which case the regulator may adopt the measure; 2) the Commission can make comments and the regulator must take utmost account of them when implementing the draft measure; 3) the Commission may require the regulator to withdraw its proposed measure.⁵³ In any event, the regulator may also withdraw its draft measure at any time during either phase.

With the 2009 review of the Regulatory Framework, the European Commission extended its investigation powers also on remedies, not only in market definition and market analysis. Accordingly, the Better Regulation Directive introduced Article 7a into the Framework Directive. Compared to Article 7, this new provision establishes a more complex procedure where the BEREC is required to intervene and cooperate with the regulator national to modify the proposal by making concrete recommendations. The process can be summarized as follows:

Phase I: ‘Communication of draft regulatory measures’. This Phase may take up to 1 month period during which other NRAs and the BEREC may provide comments on the proposed measure, as well as the European Commission which may agree (providing comments or not) or raise “serious doubts”.

Phase IIa: ‘Regulatory Dialogue’. This Phase may take up to 3 months preventing the adoption of the draft measure (standstill period).⁵⁴ Within the first six weeks, the BEREC may issue an Opinion expressing an evaluation of the Commission’s serious doubts. In that case, there is a process of cooperation between the actors involved (the BEREC, the Commission and the NRA). This stage may finalize in 3 different ways: a) the NRA withdraws its proposal; b) the NRA amends its proposal taking utmost account of the Commission’s serious doubts and BEREC’s Opinion; or c) the NRA maintain its proposal.

Phase IIb: ‘Commission say on remedies’. If the NRA decides not to withdraw from its proposal, as well as in case that the BEREC does not share the Commission’s serious doubts or it has no Opinion, it goes to the European Commission. In this case, the Commission has 1 month to, first, issue a Recommendation requiring the withdrawal or the amendment of the Regulator’s proposal or, second, withdraw its serious doubts. In any case, the Commission is not entitled to veto the imposition of remedies. Therefore, the ultimate decision about modifying the proposal or maintain it unchanged remains with the national regulator.

Finally, within 1 month after the Commission’s position, the national regulator has to inform the Commission and the BEREC about the final measures taken, and where the Commission’s Recommendation has not been followed, the NRA shall provide a reasoned justification.

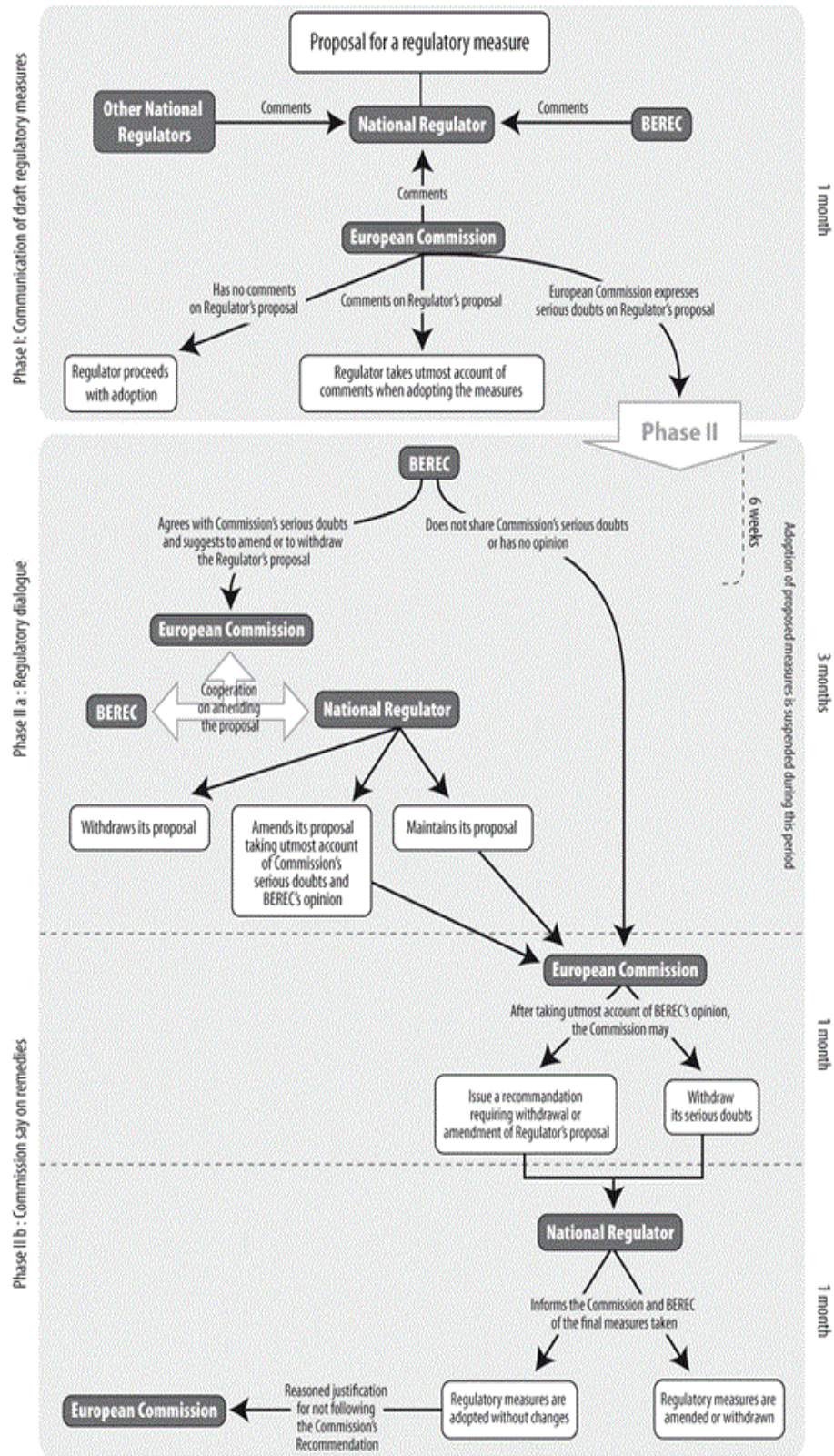
The following chart illustrates the whole process of Article 7a:

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Nonetheless, However, if a NRA detects consistent market failure on another market/s, it is allowed to regulate it, but it will have to justify its decision.

⁵³ Under the Article 7 procedure, the Commission is empowered to “veto” draft measures, where such measures seek: to define markets other than those defined in the Commission Recommendation; or to designate or not operators with significant market power and such draft measures would affect trade between Member States, and the Commission considers that the draft measure would create a barrier to the single European market or has serious doubts as to its compatibility with Community law.

⁵⁴ Article 7a(1) of the Framework Directive as introduced by the Directive 2009/140/EC (Better Regulation Directive).



Article 7a procedure. Source: European Commission

What is the Article 7a procedure in practice? The consultation procedure of Article 7a is about the subsidiarity principle in so far as market analysis –the cornerstone of the regulatory model for telecommunications– is carried out at the national level by the National Regulatory Authorities. It results in a supervisory mechanism which is ‘*controlled to a large extent by the Commission and now, with the recent addition, the BEREC*’.⁵⁵ Through this mechanism, the European Commission attempts to achieve consistency in the application of the EU Regulatory Framework in concert with the BEREC and the different NRAs.

Article 7a in practice: OPTA and the European Commission

This case illustrates the functioning of Article 7a procedure in a real situation which involves the participation of a NRA (OPTA), the European Commission, the BEREC, groups of interest (in this case the telecommunications operators) and the judiciary in the regulatory process. It has resulted in a highly controversial case by a NRA (OPTA) *vis-à-vis* the European Commission on the implementation of a Commission’s Recommendation.

NRAs are required to take the *utmost account* of the policy objectives contained in Article 8 of the Framework Directive, namely: promotion of competition, contribution to the development of the Internal Market, and promotion of the interests of the citizens of the European Union. The European Framework requires NRAs (whence OPTA), among other tasks, to investigate market termination.⁵⁶ In 2009, the European Commission issued a Recommendation on termination rates.⁵⁷ Without elaborating the technical details, termination rates are the rates which telecoms networks charge each other to deliver calls between their respective networks; i.e. how much mobile phone operators can charge to connect calls on each other’s networks. These costs are ultimately included in call prices paid by consumers and businesses. The 2009 Commission’s Recommendation establishes that termination rates (fixed and mobile) should be calculated on the basis of the effectively costs incurred by an efficient operator using the *pure* Bottom-up Long Run Incremental Cost (BULRIC) methodology for its calculation. This method imposed a stricter costs measurement method. Thus, unlikely to the previous method used (BULRIC+), under the *pure* BULRIC methodology there are some of the costs which result not included in the tariff.

On 2010 (July, the 7th), OPTA published its market analysis including its decision in relation to: (a) the review of the wholesale market for voice call termination on individual public telephone networks provided at a fixed location; and (b) the review of the wholesale market for voice call termination on individual mobile networks in the Netherlands. This decision included conditions establishing price control for mobile and fixed termination rates in line with Article 13 of the Access Directive. The methodology used by OPTA in that decision, consistent with the Commission’s Recommendation, was based on the *pure* BULRIC cost standard, because it was considered to be the best way to regulate for the highest consumer welfare.⁵⁸

This decision gave rise to a judicial procedure before the Dutch Trade and Industry Appeals Tribunal (*College van Beroep voor het bedrijfsleven*, the “CBb”) following the appeal of a number of telecommunications operators in the Netherlands⁵⁹ against OPTA’s decision. Several issues were raised within the appeal. One of them is that the OPTA’s decision to set the price controls on the basis

⁵⁵ Mr. Reinald Krüger (Head of Unit ‘Regulatory Coordination and Markets’ –DG CONNECT– European Commission), Speech at the Florence School of Regulation, 15.10.2012.

⁵⁶ Article 15 of the Framework Directive and the the Commission Recommendation 2007/879/EC on Relevant Markets.

⁵⁷ Commission Recommendation (2009/396/EC) of 7 May 2009 on the Regulatory Treatment of Fixed and Mobile Termination Rates in the EU (OJ L 20.5.2009, pp. 67-74).

⁵⁸ Interview with an Economic Expert at OPTA, Florence 18.10.2012.

⁵⁹ T-Mobile Nederland B.V., Vodafone Libertel B.V., Koninklijke KPN N.B., KPN B.V., Telfort B.V., and Lycamobile Netherlands B.V.

of the *pure* BULRIC cost standard. It implied that operators were no longer allowed to include certain costs in their tariffs.⁶⁰

The CBB's Judgment was released on 31st August 2011. In very broad terms, the Court, upholding the appeal, argued that despite the Commission's Recommendation on termination rates, conditions remained unchanged and, therefore, there was no reason to change the methodology for cost calculation from *plus* to *pure* BULRIC. As a result, the Court required OPTA to take a new decision setting the relevant rates on the basis of BULRIC+ methodology.⁶¹ As summarized by the BEREC, "*according to the CBB, Dutch national law does not oblige OPTA to adopt precisely the measure which maximizes consumer benefits regardless of the consequences for the regulated operators. In this regard, the CBB stated that it is necessary to assess the proportionality of the measure*".⁶² In addition, according to the Court, in the interpretation of Article 6a.7(2) of the Dutch Telecommunications Act (*Telecommunicatiewet*), OPTA "*does provide no support for an interpretation to the effect that a form of price regulation might be imposed which goes beyond a price measure that can already be considered cost-oriented*".⁶³

Pursuant to Article 7a consultation procedure, in January 2012, OPTA notifies the European Commission the new decision complying with the Court's Judgment and setting the rate following the BULRIC+ methodology. Since this measure departs from the 2009 Commission's Recommendation on termination rates, OPTA justifies this deviation on the basis of the legally binding nature of the CBB Judgment as the highest appeal body in the Netherlands. During Phase I, the European Commission raised serious doubts and sent a *serious doubts letter* to OPTA on the 13th February 2012 opening Phase II investigation.⁶⁴ In that letter, the Commission expressed doubts concerning the compatibility of the measure with the European Regulatory Framework and provided reasons why it believed that the draft measure not only would create a barrier to the internal market, but it also stated that it would involve an increase in the retail prices originating a decline in the consumer welfare.⁶⁵ In particular, the Commission considered that the measure did not comply with the requirements of Article 16(4) of the Framework Directive, and Article 8(4) of the Access Directive in conjunction with Article 8 of the Framework Directive. In this regard, the European Commission acknowledges that NRAs are allowed to deviate from the Commission's Recommendation but, in that event, the deviation should be *duly justified* in light of the policy objectives and regulatory principles of the Regulatory Framework. In the eyes of the European Commission, OPTA did not provide any economic

⁶⁰ Interview with an Economic Expert at OPTA, Florence 18.10.2012.: "*When we take a decision, we have to formally consult the draft decision and, then, they (the operators) react to it and said: 'we don't agree with it'. That's what always saying and then there should be lower prices, because there are lower costs. Then, you as a company you're a not happy, it is logical and... So, there is a consultation phase and after that we have a final decision and, then, they have, of course, the right of defense... and they have a right to go to the Court and fight the decision and they did that successfully*".

⁶¹ Actually, the CBB itself set the price cap for Mobile Termination Rates at 0.056 €/min as of 7 July 2010, 0.042 €/min as of 1 January 2011, 0.027 €/min as of 1 September 2011, and 0.024 €/min as of 1 September 2012 on the basis of the *plus* BULRIC methodology and OPTA's own calculations.

⁶² BEREC Opinion in Phase II investigation pursuant to Article 7a of Directive 2002/21/EC as amended by Directive 2009/140/EC Case NL/2012/1284 – Call termination on individual public telephone networks provided at a fixed location in the Netherlands Case NL/2012/1285 – Voice call termination on individual mobile networks in the Netherlands, BoR(12)23.

⁶³ CBB Judgment, 4.8.3.4.

⁶⁴ Interview with an Economic Expert at OPTA, Florence 18.10.2012: "The process of notification requires that you have to notify again to the Commission. So, we came with the Commission and said: "ok, we are going to do this, we have a Court decision, we cannot do anything else than this, so this is what we are going to do". And, then, the Commission got very annoyed, because they got serious doubts about what we were doing there with regard to the economic analysis underlying your decision".

⁶⁵ Commission Recommendation of 13 June 2012, in accordance with Article 7a of 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") in Case NL/2012/1284: call termination on individual public telephone networks provided at a fixed location in the Netherlands and in Case NL/2012/1285: voice call termination on individual mobile networks in the Netherlands; C(2012) 3770.

justification of the departure from the *pure* BULRIC methodology that guarantees that the BULRIC+ methodology would equally promote efficiency and sustainable competition, as well as maximize consumer benefit in the Dutch market.⁶⁶ In addition, the European Commission considered that it would create barriers to the Internal Market because mobile termination rates set via the *pure* BULRIC level would contribute to a level playing field at EU level, by eliminating competition distortions between fixed and mobile networks.⁶⁷

This *serious doubts letter* initiated the Phase II investigation during which (3 months period) the draft measure cannot be adopted (standstill period).⁶⁸ However, in the case concerned, the revised mobile termination rates based on the BULRIC+ methodology were already in effect in the Netherlands, as a direct effect of the CBB's Judgment. During this Phase, the BEREC is required to issue an Opinion on the serious doubts letter indicating its position. To this end, and following the mandate enshrined in Article 7a(3) of the Framework Directive, an specific Expert Working Group within the BEREC was established.⁶⁹

This EWG held its first meeting in London the 20th February 2012. OPTA was invited to provide further clarifications and explanations. It followed several questions which were sent to OPTA who replied by the 28th February. A second video-conference meeting took place one week later, the 7th March, for supplementary clarifications. By the 15th March, on the basis of a comprehensive economic analysis, the EWG had drafted an Opinion which was referred to the BEREC's Board of Regulators for comments. On the 23th March a final Opinion was adopted by the majority of the Board of Regulators. In that decision, the BEREC finds that the serious doubts raised by the European Commission were *justified* and it agrees that: 1) OPTA has not provided an economic justification for the use of the BULRIC+ methodology as the appropriate measure "to promote efficiency and sustainable competition and maximize consumer benefits set out in Recital 20 to the Access Directive" and; 2) the proposed measure may create a barrier to the Internal Market. Nonetheless, as for the BEREC's position on whether the measures should be amended or withdrawn, it did not consider appropriate to impose on OPTA a particular way to proceed due to the legally binding nature of the Judgment by the CBB.⁷⁰

Although OPTA may share the view of BEREC and the European Commission as regard the application of the *pure* BULRIC methodology, it is impossible to do otherwise because '*there was only one outcome possible and it was to follow the Court*'.⁷¹ Formally, it results in a complex situation because OPTA has to apply the Court's decision. On the other hand, it is not a problem of compatibility of Dutch Law with EU Law, because the concerned provision existed as from 2004 and the European Commission never raised questions concerning the law, only about the specific reasoning of the Court.⁷² That means that the Commission is not claiming the lack of compliance of Dutch law with EU law, but the Court's ruling, as long as it ordered OPTA to set the price on the basis of the BULRIC+ methodology contrary to the Commission's Recommendation.

⁶⁶ European Commission serious doubts letter.

⁶⁷ European Commission serious doubts letter.

⁶⁸ Article 7a(1) of the Framework Directive as amended by Directive 2009/140/EC.

⁶⁹ The EWG was charged with the task of drafting an opinion containing a summary of the notification and the serious doubts, the experts' analysis, and clear conclusions concerning the compatibility of the proposed regulatory measure with the EU Regulatory Framework, as well as the provision of possible alternative proposals (if any).

⁷⁰ BEREC Opinion in Phase II investigation pursuant to Article 7a of Directive 2002/21/EC as amended by Directive 2009/140/EC Case NL/2012/1284 – Call termination on individual public telephone networks provided at a fixed location in the Netherlands Case NL/2012/1285 – Voice call termination on individual mobile networks in the Netherlands, BoR(12)23: "*BEREC therefore considers that the Commission's serious doubts, as narrowly expressed in its letter to OPTA of 13 February 2012 (i.e. without explicitly addressing the legally binding nature of the CBB's judgment for OPTA), are justified*".

⁷¹ Interview with an Economic Expert at OPTA, Florence 18.10.2012.

⁷² Interview with an Economic Expert at OPTA, Florence 18.10.2012.

This situation perfectly reflects a clear decoupling between the CBB's Judgment and the EU understanding, which puts on the table the debate on the nature of the EU soft-law; i.e. the binding effect of the 2009 Commission's Recommendation on termination rates in this case. In this regard, NRAs (OPTA in the case concerned) are requested to take "utmost account" of the Commission comments. *Utmost account* comes into play in order to modulate the relationship among the different participating institutions. As a matter of fact, the CBB decided that its conclusions are not affected by the Commission's Recommendation and that NRAs have to take utmost account does not involve that OPTA cannot deviate from the (non-binding) Recommendation, especially if it implies the breaching of the national law.⁷³ In the words of the Dutch Court, '*that Article 19(1) of the Framework Directive requires Member States to ensure that national regulatory authorities, when carrying out their duties, try their utmost to use the recommendations of the Commission, it does not affect the obligation of OPTA to deviate from the –non-binding– call termination recommendation because they would otherwise act in violation of provisions of national law*'.⁷⁴ That is the only reference made to "utmost account" throughout the Judgment. Utmost account, then, would imply that '*you do not have to follow it exactly, but you have to take account of it*'.⁷⁵ However, the Court did not go deeper into the nature of the Recommendation and did not clarify what "utmost account" actually involves either. Actually, it could have been the perfect breeding ground for referring the case to the Court of Justice of the European Union (CJEU) asking for the clarification on the scope of "utmost account" and its definition, as well as to the binding force of soft-law measures; i.e. EU Commission's Recommendations.

This has resulted to a complex situation because the European Commission is not allowed to compel the national Court to do it otherwise. Besides, although NRAs are supposed to be independent, OPTA would not have been allowed to adopt the decision establishing the *pure* BULRIC methodology in so far as the Court would annul it again. Neither could OPTA appeal the Court's decision due to the fact that, in the Netherlands, there is no higher appeal body as a result of the choice for efficient procedures. Otherwise, OPTA would have appealed the CBB's ruling.⁷⁶ The result was, then, a "deadlock situation" which could have been overcome if the Court would have asked to the CJEU for its opinion on the interpretation of the status of the Commission's Recommendation.⁷⁷ In the same vein, the European Commission also considers that the Dutch Court should have referred the case to the CJEU.⁷⁸ In addition, if the case would not have been decided by the highest Court, the European Commission would have used the *Amicus Curiae* formula in order '*to help the Dutch regulator in front of the national court*'.⁷⁹

⁷³ Interview with an Economic Expert at OPTA, Florence 18.10.2012.: '*And the Commission formally –and that's also what the Court acknowledges– is that, formally, its Recommendation is not a binding measure, is not binding to OPTA, that measure. That's also why the Court says: 'ok, if it is not binding, it is just a Recommendation, is not binding'. So, OPTA is not bind to follow that Recommendation, but the law –in the way as the Court explains it– is binding. So...*'.

⁷⁴ CBB's Judgement 4.8.3.6.

⁷⁵ Interview with an Economic Expert at OPTA, Florence 18.10.2012.

⁷⁶ Interview with an Economic Expert at OPTA, Florence 18.10.2012.

⁷⁷ Interview with an Economic Expert at OPTA, Florence 18.10.2012.: '*Another solution for this situation is to appeal this Court asks the European Court for their opinion. That would be, in these types of cases, would be very appropriate, the thing to do for the Dutch Court, but they did not do that. So, yeah, that is their decision and we cannot influence that, but, of course, if you have these difficult interpretations of the status of a Recommendation I would say "I would ask the European Court for that", but that's my personal opinion*'.

⁷⁸ Mr. Reinald Krüger (Head of Unit 'Regulatory Coordination and Markets' –DG CONNECT– European Commission), Speech at the Florence School of Regulation, 15.10.2012: '*That would normally the case when you speak to others judges in other Member States, they would tell you: Mmm, that should have normally been referred to Luxembourg. And that was not the case*'.

⁷⁹ Mr. Reinald Krüger (Head of Unit 'Regulatory Coordination and Markets' –DG CONNECT– European Commission), Speech at the Florence School of Regulation, 15.10.2012.

Network Approach. Law-Making vis-à-vis Implementation: A Thin Line

By and large, like communications technologies, the Regulatory Framework for telecommunications services has evolved over the time giving rise to different generations of EU rules in line with the (also changing) policy goals. Thus, while the primary goal was to opening-up markets, the harmonization aim is becoming prominent and it is overshadowing the transition to competition. Hence, although regulatory convergence (*ex-ante/ex-post*) was expected, reality shows how the sector-related regime is increasingly deviating from pure market regulation (encompassing also social regulation; e.g. universal service) and –when it comes to private law provisions– from general contract law, leading to the creation of specific rules aimed at promoting competition (e.g. access and interconnection) giving rise to the governing of private relationships in line with the EU’s mandates.

The liberalization of the telecommunications sector has favored the emergence of a particular *ecosystem*. Within its multiple “species”, the telecommunications ecosystem presents outstanding elements, namely the European Commission, the BEREC and the different National Regulatory Authorities. This system, and the interactions among its elements, is built under a *network of cooperation*. In the sense that Ladeur describes,⁸⁰ within this network, there are no hierarchical relationships; rather the network tries to give shape to the multiple relationships (heterarchical) which take place among its different members. The observation process shows how the Internal Market approach, which –in turn– is the ultimate goal of the EU Regulatory Framework, is the main reason that has paved the way for the evolutionary development of the network. As we have seen, the telecommunications sector is now more committed with the harmonization of the Internal Market rather than liberalization.

At the national level, the interplay between the EU provisions and national law is articulated by the decisive role performed by NRAs. Thus, the particular institutional design of the telecommunications legal regime has inevitably implied the transformation of the traditional private law approach when it comes to decision-making. 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 a result of the “inevitable delegation”,⁸¹ the legislative power does not correspond only to a concrete actor (individually considered, the legislature), but it now lies also on the hands of different players. Altogether, the BEREC, the different NRAs and the European Commission are linked by an *interdependence relationship* which is modulated by the two-ways formula of “utmost account”, which in the absence of any legal definition, each side –inevitably– reads it differently.

The examination of a real case (OPTA case) has disclosed the intricacies of the highly bureaucratic Article 7a procedure. The case reveals the lack of capacity of the EU to implement EU rules according to the EU’s aspirations. For that reason, it has set up of a proper institutional framework made out of national players (NRAs), European *fora* (BEREC) and implementing procedures (Article 7 Framework Directive) which ensure the application of the Regulatory Framework according to the EU understanding and in line with its policy goals.

As a result, the UE’s lack of specific competence in the field of private law seems to be filled via the establishment of a “multilayered institutional structure” (network approach).⁸² There is no hierarchy

⁸⁰ Ladeur, K.-H. (2010), “The Emergence of Global Administrative Law and the Evolution of General Administrative Law”. See also Ladeur, K.-H. (2010), “The State in International Law” in C. Joerges & J. Falke (eds.), *The Social Embeddedness of Transnational Markets*, Oxford, Hart Publishing.

⁸¹ Here we have to recall Taggart, M. (2005), ‘From ‘Parliamentary Powers’ to Privatization: The Chequered History of Delegated Legislation in the Twentieth Century’, *University of Toronto Law Journal*, vol. 55, pp. 575-627 (see in particular p. 615).

⁸² Svetiev, Y. (2012), *W(h)ither Private Law in the face of the Regulatory Deluge*, in: Hans-W. Micklitz & Yane Svetiev (eds.), *A Self-Sufficient European Private Law - A Viable Concept?*, *EUI Working Papers Law No. 2012/31*, pp. 26-44.

between the EU and the national level or any transfer of powers; rather, the “network” is underpinned by a system of supervision aimed at the achievement a consistent application of the EU provisions, giving the Commission police powers to achieve the policy goals. This transnationally “networked” institutional setting⁸³ is aimed at the creation of a governance network which becomes into the new private law-maker. This perfectly marries with the legal basis employed to regulate telecommunications services (Article 95 EC, now Article 114 TFEU aimed at the harmonization of the Internal Market). Provided that the European Regulatory Framework encompasses contract law provisions, the use of Article 114 TFEU as the legal basis has given rise to a process “private law creation via harmonization of the Internal Market”. In so doing, the EU is following a *functionalist approach* (Internal Market as a *finalité* and as an objective) which also touches upon contract/consumer law (integration through private law).⁸⁴ All of this is shaped within the own Regulatory Framework for electronic communications displaying specific features of a *self-contained* system.⁸⁵

To conclude, decision-making at EU level takes place in a wide range of forms. In the telecoms sector, it occurs via an institutional design based on a system of executive federalism where the Commission holds strong supervisory powers which prevent the distorted application of the EU rules relying on a collaborative approach which aims at the removal of divergences among the performance of the different national regulatory authorities. Interestingly, what it is also at stake in the case analyzed is the role of EU soft-law. In any case, this paper has illustrated how the division of roles policy/law-making *vis-à-vis* execution/implementation gets blurred when it comes to the supervisory powers of the Commission who tries to give shape not only to the implementation of the measures adopted at EU level, but also to its (*consistent*) application.

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See also Hancher, L. & Larouche, P., (2011) The Coming of Age of EU Regulation of Network Industries and Services of General Economic Interest. In G. de B. P. Craig, ed. *The Evolution of EU Law*. New York: Oxford University Press, pp. 743-779.

⁸³ Here we have to recall Ladeur K-H, (2010), The State in International Law, in Joerges/Falke (eds.), *Karl Polanyi, Globalisation and the Potential of Law in Transnational Markets*, Hart Publishing Oxford, pp. 397-418. See also Svetiev, Y. (2012), *supra* n.82.

⁸⁴ Schmid, C. (2005), The Instrumentalist Conception of the *Acquis Communautaire* in Consumer Law and its Implications on a European Contract Law Code, *European Review of Contract Law*, vol. 1(2) pp. 211-227.

⁸⁵ See Micklitz, H.-W. & Svetiev, Y. (eds.), A Self-Sufficient European Private Law - A Viable Concept?, EUI Working Papers Law No. 2012/31, pp. 26-44.

SECTION III: TRANSFORMATIONS

FRANCOVICH: LIABILITY FOR SYSTEMIC REGULATORY FAILURE

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On one view *Francovich* state liability arose in an *ad hoc* fashion from the jurisprudence of the CJEU to solve a particular problem: the asymmetry caused by the unwillingness of the CJEU to allow horizontal direct effect in *Dori*.¹ It was meant to be an exceptional remedy in cases where the State failed to implement directives which granted rights to individuals under European law. It is hybrid because the EU has no competence in private law, and in consequence there is no harmonised law of remedies.² Nevertheless, relying on a balancing exercise between the effectiveness of European law and the procedural autonomy of national law, *Francovich* and subsequent jurisprudence is fashioning a jurisprudence which has implications for national private law.³ At first blush, its ‘logic’ is that of *ubi ius, ibi remedium* but how this plays out in practice is far more subtle than the simple formula would lead us to believe. The precise balancing obtained at CJEU level has been categorised by Tridimas as a mixture of ‘outcome cases’, ‘guidance cases’, and ‘deference cases’.⁴ The doctrine has been met with strong criticism because it fragments national law and the political choices that undergird doctrine, not to mention the division of competences between the EU and member states.⁵

In this short paper these issues will not be examined. Instead, it is argued that as the jurisprudence set in motion by *Francovich* works itself out, there are profound implications for national private law. This is particularly the case in common law jurisdictions which do not embrace a concept of systemic fault. By virtue of its *ad hoc* emergence its means of conceptualizing the relationship between the State and private tortfeasors has largely been ignored.⁶ The disputes it treats which tend to be on the border between public law rights (or constitutional rights if one prefers) and private remedies tend to cut across national limitations on doctrines such as vicarious liability, non-delegable duties and tricky

¹ *Dori v. Recreb srl*, Case C-91/92, [1994] ECR I-3325.

² The traditional position per *Rewe* (1976)/*Rewe* (1981) is set out concisely by Kilpatrick in C Kilpatrick ‘The Future of Remedies in Europe’ in C Kilpatrick & others (eds.) *The Future of Remedies in Europe* (2000 Hart Publishing). ‘Rights or substantive issues concerning EC law were for the Court of Justice while remedies and procedural issues concerning the enforcement of EC law rights were for the national legal orders and the national courts.’ (3)

³ T Tridimas refers to *Francovich* as ‘the apex of the principle of effectiveness and a culmination of a gradual trend towards the transformation of primacy from an abstract principle of constitutional law to a specific obligation on national courts to provide full and effective protection of Community rights.’ in T Tridimas ‘State Liability in Damages: Vingt Ans Apres’ (1).

⁴ T Tridimas ‘State Liability in Damages: Vingt ans Apres’. ‘The Court may give an answer so specific that it leaves the referring court no margin for manoeuvre and provides it with a ready-made solution to the dispute (outcome cases); it may, alternatively, provide the referring court with guidelines as to how to resolve the dispute (guidance cases); or it may answer the question in such general terms that, in effect, it defers to the national judiciary on the point in issue (deference cases).’ (4)

⁵ C Harlow ‘*Francovich* and the Disobedient State’ (1996) E.L.J 199. C Harlow ‘A Common European Law of Remedies?’ in C Kilpatrick (n 2).

⁶ C Harlow goes far, however, in conceptualizing how *Francovich* fits into this relationship. See C Harlow *State Liability* (OUP Oxford 2004) Ch. 4.

questions about the liability of peripheral parties.⁷ These limitations often shield the State from liability. The personal liability of office holders tends to be diminished with liability increasingly being based on systemic regulatory failure.⁸ It is not torts by individuals that are important but the failure of the State *per se* in its positive obligations. If this failure can be described as sufficiently serious, liability should follow. As *Francovich* moves outward from non-implementation cases to those of misapplication of European law these tensions are increased. *Francovich* becomes, therefore, an engine for creative jurisprudence which reconfigures the relationship between the State and private parties by extending conceptually and practically the scope of state responsibility.

By these lights, the *Paul* decision and the more recent *COS.MET* (hereafter *Cosmet*) will be examined. To set the scene for this examination, first the ‘logic’ of *Francovich* will be explained. This will focus on its cross-cutting nature. The argument will proceed to briefly the link between the activist jurisprudence of the CJEU and the situation of the EU as a regulatory State, before suggesting that *Francovich* will continue to be a fertile ground for innovative remedies.

***The Emergence of a ‘Eurotort’: Expansive Potential, Inherent Limitations*⁹**

The principle of Community law laid down in *Francovich* ‘that the Member States are obliged to make good loss and damage caused to individuals by breaches of Community law for which they can be held responsible’ was distilled into a three stage test in *Brasserie du Pecheur and Factortame*.¹⁰ Tridimas refers to *Francovich* as the ‘apex’ of European law because it is a logical out-working of the principle of primacy¹¹:

The judgment in *Francovich* marked the apex of the principle of effectiveness and the culmination of a gradual trend towards the transformation of primacy from an abstract principle of constitutional law to a specific obligation on national courts to provide full and effective protection of Community rights. [citations omitted]¹²

The remedy developed, therefore, as an adjunct to the directly effective individual rights resulting from the Treaty declared as far back as *Van Gend en Loos*. In this sense, it is part of the ‘constitutionalization’ of the Treaty.¹³ The relevant concept that underpins the relationships between rights and remedies is *ubi ius, ibi remedium*. This is buttressed by a rule of law argument most explicitly stated by Advocate General Tesouro. AG Tesouro argued that over time limitations of the *neminem laedere* principle in respect of legislative and other activities of the State have diminished as the balance of interest between those of the State and the individual has changed.¹⁴ He reasoned that:

⁷ C Harlow borrowing from Allison’s analysis of Fuller’s conception of ‘polycentric disputes’ argues that the question of state liability poses particularly difficult policy questions. See C Harlow *State Liability: Tort Law and Beyond* (OUP 2004) ch. 2; JWF Allison ‘Fuller’s Analysis of Polycentric Disputes and the Limits of Adjudication’ (1994) 53 Cambridge LJ 367; and J Stapleton ‘Duty of Care: Peripheral Parties and Alternative Opportunities for Deterrence’ (1995) 111 LQR 301.

⁸ This seems at first glance similar to the approach of French Administrative Courts with regard to *faute de service*.

⁹ I borrow the term Eurotort from P Giliker ‘English Tort Law and the Challenge of Francovich Liability: 20 Years on (2012) L.Q.R. 541.

¹⁰ *Francovich v Italy Joined Cases C-6 & C-9/90 [1991] ECR I-5357* para 37; *Brasserie du Pecheur v Germany and R v Secretary of State for Transport, ex pa Factortame Ltd Joined Cases C-46 & C-48/93 [1996] ECR I-1029*.

¹¹ Unlike the other general principles, the *Francovich* state liability doctrine does not derive from the law of the Member States but is an outworking of the principle of effectiveness see T Tridimas ‘The Principle of Effectiveness’ in T Tridimas ‘The General Principles of European Law’ (Oxford OUP 1999).

¹² T Tridimas *State Liability in Damages: Vingt Ans Apres*.

¹³ T Tridimas *The General Principles of European Law* (Oxford OUP 2006), 5.

¹⁴ AG Tesouro para. 12.

In particular, the emergence of the *State governed by the rule of law* has resulted in an increasing shift of emphasis at least in the more advanced legal systems, from the conduct of the perpetrator of the damage to the rights of the injured party, as in the case of liability generally.¹⁵

This does not mean, of course, that the interests of the State are ignored but merely that the balance has tilted in favour of the protection of individual rights. *A fortiori*, a stronger protection of individual rights is favoured also at the European level.¹⁶ This development has, of course, a harmonizing tendency because the change of emphasis between immunity and liability although largely favouring a greater scope for recovery has been struck differently in the main jurisdictions. Some jurisdictions such as the UK have proceeded cautiously and incrementally, whereas others such as France have been more generous in formulating rules of recovery.¹⁷ In any event, the *Francovich* and post-*Francovich* jurisprudence has sought to establish a baseline of recovery throughout the Community on the basis of the rule of law. If we go deeper into this rule of law ‘logic’, however, we find the germ of an idea that the State is the guarantor of individual rights and has a positive role to ensure that these rights are vindicated. When rights and remedies are combined according to the principle *ubi ius, ibi remedium*, therefore, the potential for liability in frontier areas of liability is greatly enlarged, as will be demonstrated below. This ‘logic’ tends to cut across policy arguments against recovery in tort law and enlarges the scope of vicarious liability, and what has been described as the liability of peripheral parties. This ‘logic’ comes with a *proviso* however. These are not a *carte blanche* for unbridled judicial activism because through the definition of the criteria in the *Francovich* test, balancing of rights against other policy concerns can re-emerge. It simply inverts the exercise, placing rights before policy – a change of emphasis that AG Tesouro’s opinion indicates.

That the protection of individual rights is at the forefront of analysis is clear, but this is a particularly nuanced form of rights protection. Engstrom refers to this rights-based rhetoric as ‘functional subjectivation’.¹⁸ That is, rights exist to give effect to European law rather than being based on protective interests as per tort law notably in the UK and Germany.¹⁹ There remains a tension between private law as a law of protected interests and *effet utile* as is evident in *Paul* and is discussed below. The functionalization of the remedy towards the ends of European law makes it difficult to classify *Francovich* as a constitutional tort in a traditional understanding of the term.²⁰ The fact that it follows this functional logic, however, means such a remedy is consonant with the wider regulatory functionalization of European private law.²¹ However, Tridimas cautions against a focus on this

¹⁵ Ibid.

¹⁶ Ibid para. 13: ‘The fact that the Member States, even though subject to conditions limiting the scope of liability in different ways, may be called upon to answer for loss or damage caused by legislative activity of the public authorities suggests in itself that it is unreasonable that they should invariably and in any event not be liable for infringements of Community law which have an effect on the financial situation of individuals affected by those infringements.’

¹⁷ I think it is accurate to state that the approach favoured in the UK rests on Lord Diplock’s more cautious formulation of how the common law of torts should develop in *Dorset v Home Office* [1970] AC 1004. This cautious approach has been supplemented, however, by the Human Rights Act which is a new basis of formulating tort claims. However, there is a tendency in the UK to conceptually differentiate the Human Rights Act from tort law. This is only partially correct, however, as some development of tort law has occurred which has been inspired by the Human Rights Act. This has resulted in a patchwork law of torts and has been deplored by a number of scholars see D Nolan ‘The Liability of Public Authorities for Failing to Confer Benefits’ (2011) L.Q.R 260.

¹⁸ M Ruffert also uses this phrase in his ‘Rights and Remedies in European Community Law: A Comparative View’ (1997) 34 CML Rev. 307.

¹⁹ The protected interests analysis of tort law is an interpretation of English tort law which unlike German tort law does not list protected interests. See C Von Dam *European Tort Law* (OUP Oxford 2005).

²⁰ See Lee for a discussion of this point: IB Lee ‘In Search of a Theory of State Liability in the European Union’ Harvard Jean Monnet Working Paper 9/99.

²¹ H-W. Micklitz ‘The Visible Hand of European Regulatory Private Law: The Transformation of European Private Law from Autonomy to Functionalism in Competition and Regulation’ EUI Working Paper EUI Working Papers LAW 2008/14.

expediency in *Francovich* as representing but a partial picture.²² The protection of rights is to be taken seriously in a dynamic constitution.

Thus, an autonomous ‘Eurotort’ which is meant, according to its described end, to ensure the effectiveness of European law by providing a compensatory remedy in the case of a breach of Treaty rights, which include rights derived from secondary legislation, has emerged. It is a ‘Eurotort’ in the sense that it is an extra-contractual remedy for breach of Community law distinct from national bases of recovery. In this sense, it is a new cause of action which individuals can invoke before their national courts. However, because the criteria are not self-explanatory and are under-determined, they require to be applied to concrete cases by national courts. In consequence, its development will be influenced by existing national tort law as courts grapple to find analogies to embed this form of recovery.²³

The criteria enumerated include that the ‘rule of law infringed must be intended to confer rights on individuals’, that ‘the breach must be sufficiently serious’, and finally that there ‘must be a direct causal link between the breach of the obligation resting on the State and damage sustained by the injured party’.²⁴ In those cases outwith simple non-implementation of European law, the notion of ‘sufficiently serious breach’ translates into a ‘test’ to determine whether the Member State concerned ‘manifestly and gravely disregarded the limits of its discretion’.²⁵ This test depended on criteria stated at paragraph 56 of the *Brasserie* judgment:

The factors which the competence court may take into consideration include the clarity and precision of the rule breached, the measure of discretion left by that rule to the national or Community authorities, whether the infringement and the damage caused was intentional or involuntary, whether any error of law was excusable or inexcusable, the fact the position taken by a Community institution may have contributed by the omission, and the adoption or retention of national measures or practices contrary to Community law.²⁶

The relevant criteria were established in *Brasserie du Pecheur* and are, it is submitted, flexible rules of thumb which require application to diverse factual nexuses.²⁷ In short, although it is clear that ‘sufficiently serious breach’ does not amount to a concept of negligence or fault recognised the national laws of member states, it is unclear what exactly the concept imports.²⁸ Indeed, although not fault according to a recognisable national standard, the emphasis on conduct as a relevant factor tends to blur the lines somewhat. This has been the case from the very first important cases. This fact that the conduct of the member state is a necessary but not sufficient condition to determining whether a breach is ‘sufficiently serious’ means that the distinction between *Francovich* liability and national conceptions of negligence or fault remains to be seen.²⁹ This is not particularly troublesome in simple cases of non-implementation of European law where *Francovich* liability seems to be applied as if it were a strict liability standard but poses problems in mis-application cases.

²² T Tridimas (n) 500-501.

²³ For a good illustration of the difficulties this may cause see P Giliker (n 9).

²⁴ Cases C-46/93 & C-48/93 *Brasserie du Pecheur & Factortame*. para 51.

²⁵ Ibid para 55.

²⁶ Ibid.

²⁷ Like the negligence concept itself it is argued that the concept of ‘sufficiently serious breach’ simply guides judges in their decision-making. It does not present a ready answer i.e. cannot be applied deductively save for the simple case of non-implementation. In misapplication cases the answer is rarely as apparent.

²⁸ *Brasserie du Pecheur* paras. 77-78. The Court made clear that the remedy does not depend on the concept of fault although ‘certain objective and subjective factors connected with the concept of fault under a national legal system may well be relevant for the purposes of determining whether or not a given breach of Community law is serious (...)’.

²⁹ It is argued that some element of fault is required but I would not go as far as Lee who argues that ‘sufficiently serious breach’ is fault by another name. See Lee (n 20).

It is argued that the more the case-law develops the more the application of the concept will gain consistency and refinement. This approach, it is submitted, indicates that these criteria which rest on notions such as manifest and grave disregard of discretion and on the notion of conferral of a right are sufficiently open textured to allow for a great deal of casuistry, and the case-law at least at the European level indicates that this is the correct interpretation.³⁰ The formulation of such an open-ended rule, it is submitted, can create the potential for feedback and gradual mutual learning and adaptation between courts. It allows for remodelling of national law and in addition provides for its supervision by the CJEU. In some jurisdictions such as the UK, or Ireland *Francovich* has deep implications because it introduces recovery for economic loss against the State in principle. In other words, the recovery is not strictly delimited by existing judgments or policy arguments. It is an alternative way to frame cases that would otherwise fall under the head of negligence. The latter is unsuited to the types of problems that are faced by citizens in the regulatory state because of its dependence on the guiding distinction between acts and omissions, and more deeply between misfeasance and nonfeasance. In practice when combined with the post-1990s jurisprudence on breach of statutory duty this all but debars actions against regulatory authorities except for on the basis of misfeasance in public office or where incremental development of the law has fashioned out discrete bases for recovery especially in cases that combine a Human Rights Act dimension.³¹ The common law jurisdictions are not alone in this reticence when it comes to recovery especially against financial authorities with higher standards of fault required in a variety of European jurisdictions.³² *Francovich* is shorn of these complications and may fill a gap in protection against omissions in the regulatory state.

The foregoing demonstrated in brief that the conditions of liability are highly malleable and may come to be determined in greater specificity in the case-law. This makes the judgments pliable to a sort of incremental refinement notwithstanding the high-sounding rhetoric of individual rights protection which suggests a type of self-evident deductive enterprise. Whether the balance struck is faithful to the logic that the *Francovich* unfurled, namely the rule of law championed by AG Tesaurò, and decried by Harlow, will be explored further below.

Regulatory State

The CJEU through the *Francovich* case-law is confronted with problems which can be best characterised as those of a regulatory state. The regulatory state is explained by Majone as a shift from the positive state of direct governmental control of services and goods provision to privatisation, liberalisation and de- and re-regulation.³³ This is combined with the Europeanisation of regulation of what often were former state monopolies but as we will see, extends beyond these areas into such

³⁰ The CJEU at paragraph 56 leaves the national courts a wide scope to mould the facts to the rule: 'The factors which the competent court may take into consideration include the clarity and precision of the rule breached, the measure of discretion left by that rule to the national or Community authorities, whether the infringement and the damage caused was intentional or involuntary, whether any error of law was excusable or inexcusable, the fact that the position taken by a Community institution may have contributed towards the omission, and the adoption or retention of national measures or practices contrary to Community law.'

³¹ See D Fairgrieve *State Liability in Tort: A Comparative Study* (Oxford OUP 2003).

³² For a detailed summary see D Nolan (n 17).

³³ G Majone 'From the Positive to the Regulatory State: Causes and Consequences of Changes in the Mode of Governance.' (1997) *Journal of Public Policy* Vol. 17 No. 2 139. 'The failure of regulation by public ownership explains the shift to an alternative mode of control whereby public utilities and other industries deemed to affect the public interest are left in private hands, but are subject to rules developed and enforced by specialised agencies. Such bodies are usually established by statute as independent administrative authorities – independent in the sense that they are allowed to operate outside the line of hierarchical control by the departments of central government. Thus, the causal link between privatisation and statutory regulation provides an important, if partial, explanation of the growth of the regulatory state.' (144) The other driver is the Europeanisation of regulation, as Majone goes on to explain at p. 145-146.

sectors as financial services which are increasingly submitted to harmonised basic rules. The State often ‘delegates’ rule-making to private bodies, but retains a tightly controlled market supervision regime. The general content of these regulatory regimes are harmonised and often include supervisory obligations. This is linked to a greater thesis about the transformation of the role of the State which is beyond the scope of this short paper.³⁴

To effect these minimum rules regulatory agencies concerned with market building and consumer protection are established. In most cases, these Regulatory Agencies are given the task of market authorisation and surveillance in broadly formulated rules. To the extent that these consumer protection inspired rules can be conceived as individual rights, *Francovich* liability is relevant because it is based on the *ubi ius ibi remedium* concept.³⁵ Yet it is not only in this frontier context, shall we say, that *Francovich* liability plays a role. It may be also used in the more traditional context of an infringement of market freedoms. In both cases, new remedial solutions are emerging which answer to the logic of effectiveness but which have profound implications for the balance between individual rights and state civil responsibility. The *Francovich* doctrine leads to what Harlow describes as ‘leapfrogging claims’ because with their increased regulatory roles, the State is at the end of a long chain of liability.³⁶

The argument is this: to the extent that the new regulatory functions of the State can be converted into individual rights, they provide the warrant for extending civil liability into areas of previously restricted or no recovery. The responsibility of the State is reconceived according to European law as being *prima facie* responsibility for the application of European law. The relevant question is: as the State transforms its role into that of market surveillance to what extent can it be held responsible for the tortious consequences of its acts or omissions? Second, to what extent can it be held liable for the acts and omissions of others?

We can contrast in this respect the case of *COS.MET* with that of *Paul*. In *Cos.met* one witnesses the attribution of liability to the State for the acts of an employee. However, as it will become apparent the acts were contrary to the instructions of the relevant Ministry of State. In *Paul*, the Court is reluctant to attribute to the State liability for the acts of a third party. This is not how *Paul* is framed. It is about the primary liability of the financial supervisory authority for failure in its duties. However, both cases deal with the attribution of liability to the State for the torts which can be describes at the edge of the normal scope of tort responsibility. In this respect, *Paul* is a classic case of the liability of a peripheral party to a tort. In *COS.MET*, the case resembles a form of vicarious liability. However, to call *COS.MET* a case of vicarious liability is somewhat misleading, again it is about the scope of the primary liability of the State where another party is at fault/breaches European law. In both cases, liability is attributed to the State in circumstances where the acts of another party are the proximate cause of loss.

COS.MET

The *Cos.met* case turned on Directive 98/37/EC which sets out health and safety requirements regarding, *inter alia*, machinery and safety components within the European Union.³⁷ This directive was transposed into Finnish law by Government Decision 1314/1994. The claimant in this case was an

³⁴ H Micklitz & D Patterson ‘From the Nation State to the Market: The Evolution of EU Private Law’ EUI Working Paper LAW 2012/15.

³⁵ They have a dual function usually, market access (as a feature of market building) and market supervision with economic and social regulatory dimensions.

³⁶ As Harlow (n 6) argues ‘The steady expansion of state power has come together with the trend in modern tort law that I have been describing to replace personal liability by an impersonal set of non-delegable obligations vested in systems, corporations, and institutions.’ (23)

³⁷ C-470/03 A.G.M.-COS.MET Srl v Finland.

Italian importer of machinery to Finland. In particular, the case centred on the defectiveness or otherwise of a vehicle lift. In essence, the European Committee for Standardisation (CEN), a private body, define the applicable standard for vehicle lifts in Europe. The role of CEN is to define minimum standards that apply across the European Union and relate to, *inter alia*, product safety.³⁸ The rationale behind uniformity in standards is to reduce technical barriers to trade which come from divergent standards across member states, and relates therefore to the achievement of the Internal market.³⁹ These standards are supported by a strong market access case-law.⁴⁰ CEN was entrusted these tasks under the New Approach to harmonisation which can be described as a delegation of authority in rule-making from member states to the European level.⁴¹ These standards enjoy a presumption of conformity with national health and safety requirements. The State has a market surveillance task. In this sense, it chimes with the regulatory state.

Directives such as Directive 98/37/EC establish the relevant standards as minima, and *Francovich* to the extent that it is applicable is the private enforcement side of ensuring Member States adhere to these standards. The ability of Member States to question the relevant standard is circumscribed. In particular, there is a procedure whereby member state authorities may withdraw machinery from the market pursuant to Article 7(1) of the Directive in circumstances where the relevant authority determines that the machinery when used ‘in accordance with their intended purpose are liable to endanger the safety of persons, and, where appropriate, domestic animals or property...’⁴² In an unusual twist to the case, the Finish Ministry of Social Affairs and Health (the Ministry) did not invoke this market surveillance provision and eventually allowed the vehicle lift in question into the Finish market. The legal controversy concerned what happened in Finland before the vehicle was approved.

To wit, the approval of the vehicle lift was not without controversy. A Mr Lehtinen, an official of the Ministry, drafted a report in November 2000 indicating that the relevant vehicle lift failed to meet the CEN standard. He advised the Ministry to take as decision to restrict or prohibit the sale and use of the vehicle lifts in question.⁴³ In December 2000, Mr Lehtinen reiterated his position in a memorandum to the Ministry but added that a new locking system proposed by AGM.COSMET complied with the relevant standard. A meeting followed at which the Ministry agreed that the new standard was sufficient but a decision to grant entry to the market now depended on a certificate examination by an authorised body. It was also decided that the decision to be taken by the Ministry would not be made public.⁴⁴ By the end of December it was proposed that the machinery be placed on the market. The Head of the Ministry decided that he had insufficient evidence to place the machinery on the market at this point.

³⁸ These are voluntary standards, and viewed as minimum specifications which products must comply. C Joerges, H Schepel, E Vos ‘The Law’s Problems with the Involvement of Non-Governmental Actors in Europe’s Legislative Processes: The Case of Standardisation under the ‘New Approach’ EUI Working Paper LAW No. 99/9 defines the ‘New Approach’ as covering ‘...entire sectors rather than single products, and limits themselves to laying down rather general ‘essential requirements’ of health and safety. The task of harmonising technical specifications is now left to private European standards associations. Products manufactured according to these harmonised standards enjoy a ‘presumption of conformity’ with the essential requirements.’ (8)

³⁹ As J Pelkmans put it as far back as 1987: ‘The elimination of technical barriers to trade in the EC is one of the most important routes to achieve a unified, genuinely free Internal Market in the Community.’ (249) J Pelkmans ‘The New Approach to Technical Harmonization and Standardization’ (1987) *Journal of Common Market Studies* 15(3) 249.

⁴⁰ *Procureur du Roi v Dassonville* Case 8/74 [1974] ECR 837.

⁴¹ Joerges (n 38). Although the author takes issue with the ‘delegation’ categorization as potentially misleading.

⁴² Directive 38/97/EC. Cited at para. 8 *Cos.met*.

⁴³ Para 23.

⁴⁴ Para 25.

On the 17 January 2001 Mr Lehtinen with the permission of his immediate supervisor appeared on national television and represented, *inter alia*, that the vehicle lift could present an immediate danger to workers who would be working beneath the load.⁴⁵ On the 29 January 2001, a trade association sent a letter to the Ministry reporting serious defects allegedly found in machinery of the AGM range.⁴⁶ Mr Lehtinen had been present at a meeting of the trade association.⁴⁷ However, despite these allegations in February another more senior official in the Ministry took the view that the evidence did not justify a prohibition on the machinery.⁴⁸ Within a week Mr Lehtinen had been removed from the case on the basis that because he had spoken publically expressing a point of view contrary to the official position of the Ministry he had acted contrary to the Ministry's instructions and its communication policy.⁴⁹ This did not stop Mr Lehtinen, it appears. On the day after his removal from the case, 17 February 2001, an article appeared in a region newspaper based allegedly on an interview with Mr Lehtinen entitled 'Expert warns against treacherous vehicle lifts'.⁵⁰ It stated also that the Head of the Ministry regarded these as Mr Lehtinen's personal views.

In June 2001 the Ministry took the decision not to apply market supervision measures against the manufacturer or importer of the vehicle lifts and clarified that the previous issues were resolved or were in the course of resolution.⁵¹ Subsequent to this decision the Ministry brought disciplinary proceedings against Mr Lehtinen on the basis of his press releases and media interviews which were considered a breach of the Ministry's communications policy. Mr Lehtinen, a whistleblower, was reined in. This did not satisfy AGM.COSMET, however, which brought a claim before the Finnish courts 'seeking an order that the Finnish State and Mr Lehtinen jointly compensate it for the damage allegedly suffered, in particular a loss of turnover in Finland and elsewhere in Europe.'⁵² In essence, this was a case of pure economic loss where the claimant was seeking recompense for a reduction in turnover caused by the statements of Mr Lehtinen. The Finish Court referred the matter to the CJEU. Mr Lehtinen and the Ministry were joint defendants. The question referred by the Finnish court was whether the *Dassonville* criteria applied, the case-law on measures having an equivalent effect to quantitative restrictions, owing to the fact that the impugned actions were not those of the Finnish state but of an official who was acting without authorisation.

In those Member States that have a *personal* view of the law of torts, this would amount to a claim against Mr Lehtinen for his breach of European law, and against the Ministry in vicarious liability. Thus, the question would revolve around the primary liability of subordinate and secondary liability of the Ministry (vicarious liability).⁵³ For a common lawyer, in particular, the interesting point from a vicarious liability perspective here is that the primary-secondary link seems less important than it would at national level. Although the breach of European law of the subordinate, Mr Lehtinen, triggered the liability of the State, this occurred outside of his employment duties. He was acting in a manner that did not have the support of the Ministry, and furthermore the Ministry made an effort to distance itself from his representations. The relevant question is whether his acts can be attributed to the Ministry, and whether these amount to a breach of the relevant Directive or Article 28.

⁴⁵ Para 27.

⁴⁶ Para 28.

⁴⁷ Ibid.

⁴⁸ Para 29.

⁴⁹ Para 30.

⁵⁰ Para 31.

⁵¹ 'the manufacturer [had] corrected, as regards new equipment, and the importer [was] endeavouring to correct, as regards equipment in service, the technical faults identified.' (para. 34 Cos.met)

⁵² Para 37.

⁵³ In France this could be brought as a claim on the basis of a *faute de service*.

Normally in such circumstances it would be necessary to establish the personal liability of a subordinate before attribution can occur. This was not considered central by the Court, which indicated that the personal liability of Mr Lehtinen is a matter for national law to determine.⁵⁴ The focus is, rather, on the State and the delimitation of its responsibility as opposed to the link between the wrongful act of an individual and the attribution of that act to the state. Thus, even if Mr Lehtinen cannot be held personally liable this is not important. The important question of attribution is whether his words and actions can be attributed to the State assuming, as the court did in the case, that this amounts to a breach of A28 and the Directive. This is unsurprising because the Court, given the lack of horizontal direct effect in this area, must approach the question of vicarious liability from a different angle: the scope of state liability rather than the scope of employment.

In this vein, the Court first examined the issue of attribution favouring an objective test of attribution which depends ‘on how those statements may have been perceived by the persons to whom they were addressed.’⁵⁵ The question then becomes one of whether ‘the persons to whom the statements are addressed can reasonably suppose, in the given context, that they are positions taken by the official with the authority of his office.’⁵⁶ At para. 58 the Court listed a number of factors that the national court should take into account when making this assessment. If this can be shown, then they are potentially an infringement of Article 28 amounting to restriction on trade.

If an analogy can be made with national vicarious liability, it is certainly a ‘master’s tort’ conception of liability.⁵⁷ The focus is not, however, on the justification for attribution but is rather a strict liability rule which ignores the practical limitations on the State’s ability to censor whistleblowers. In effect, the State has an obligation not to infringe European law, and this obligation extends to civil responsibility where it fails to fulfil this obligation. This obligation is interpreted as a strict liability standard because the acts of the subordinate ran counter to the official position of the Ministry in circumstances where the Ministry made a sterling effort to distance themselves from his representations. In *COS.MET*, therefore, fault is unimportant. The State did not have discretion in any event such that the matter of sufficiently serious breach was dealt with expeditiously by the Court.⁵⁸ This substitutes national law concepts of personal responsibility and in its place creates a type of liability for systemic failure in discharging the State’s obligations. If this is so, it is entirely under-theorized by the Court. This may be the case because to adequately theorize the matter, one would have to explain how infringement by private parties can come within the scope of the free movement of goods provisions. The Court was not prepared to go this far. Instead, the focus was squarely on the State and the identification of the acts of an agent of the state with the responsibility of the State in terms of Article 28. Hence, the case is really one of liability for omissions. The State failed in its duty to ensure that there was no obstacle to trade. It is systemic liability because it elides personal liability of the agent with that of the organization i.e. the State.

The imperative behind the judgment was ensuring market access but in a type of liability that would not be accepted in a number of jurisdictions.⁵⁹ This is because it relies on a circumvention of vicarious liability (common law), and recovery in economic loss without any policy discussion as to its

⁵⁴ The Court formulated the possibility of personal liability negatively, but it was clearly not required by Community law: ‘Community law does not preclude an individual other than a Member State from being held liable, in addition to the Member State itself, for damage caused to individuals by measures which that individual has taken in breach of Community law (...).’ (para. 98)

⁵⁵ Para. 56.

⁵⁶ Para. 57.

⁵⁷ See R Stevens ‘Vicarious Liability or Vicarious Action?’ (2007) 130 Law Quarterly Review 30-34; G Williams ‘Vicarious Liability: Tort of the Master or the Servant?’ (1956) Law Quarterly Review (1956) 522.

⁵⁸ Para. 60.

⁵⁹ Whether the balance struck between market access and market surveillance was the correct one is a separate question see N Reich ‘AGM-COS.MET or: Who is Protected by EC Safety Regulation?’ (2008) E.L. Rev. 33(1), 85-100.

appropriateness. This was achieved by conferring subjective rights on individuals on the basis of the Directive in combination with a reading of Article 28 of the Treaty. These rights were combined with a remedy against the State premised on the idea that the State has primary obligations that extend to the acts of its agents, with a test which is rigorously applied. It might be too far to suggest that this is a type of non-delegable duty imposed on the state; but if facts such as those in the instant case can be accommodated by the test of attribution, the suggestion is not too far off the mark.

PAUL

In Paul depositors sued the Bundesaufsichtsamt [the Federal Banking Supervisory Office] on the basis that the Authority failed in its supervisory duties.⁶⁰ There was a further claim in state liability based on the non-transposition of main directive relevant to proceedings. At national law, the depositors were precluded by a statutory immunity from bringing an action against the Authority. The relevant national law, paragraph 6(4) of the Kreditwesengesetz [Law on Credit Institutions] provided that the the Federal Banking Supervisory Office ‘shall exercise the functions assigned to it under this Law and other Laws only in the public interest.’ This precluded liability in respect of individuals. The question placed before the Court was whether this law had to be disapplied in light of European law, namely, whether the directives in issue conferred a right on individuals to compensation where the regulator failed in its supervisory duties.

The Court accepted the submissions of a number of member states which argued that the most relevant directive, Directive 94/19, amounted to a measure of minimum harmonisation and that the 20,000 EUR laid down in the Directive constituted the extent of reparation required under European law.⁶¹ It was open to Member States to provide reparation that exceeded that sum but this was not required by European law. The second question sought to find from a number of directives a conferred right that the supervisory authority take prudential supervisory measures which can result in liability for misconduct.⁶² In respect of the second question, the main argument against recovery devolved on the following points:

1. That the directives in question were aimed at minimum or ‘essential’ harmonisation only⁶³;
2. It does not follow from the fact that directives in question impose on member states a number of supervisory obligations that this gives rise to individual rights:
 - There is no express grant of rights on the face of the directives
 - That supervisory liability does not appear necessary to achieve the objectives of the directives, namely, minimum harmonisation
 - The complexity of banking supervision i.e. the protection of a plurality of interests and the stability of the financial system
 - The fact that Directive 94/19 introduced a deposit guarantee scheme means that additional compensation is not required by EU law.⁶⁴

It is submitted that Paul is a mis-step or missed opportunity in terms of the development of Francovich liability. It seems that the logic of European subjective rights is conflated with the German *schutznorm* theorie. In German administrative law the concept of locus standi requires the existence/conferral of a subjective right. This is conferred by statute and the matter for interpretation is whether the statute grants a protective right i.e. the *schutznorm*. The manner in which conferral of a right was interpreted

⁶⁰ *Peter Paul* Case C-222/06 [2004] ECR I-9425.

⁶¹ This was partly supplemented by reference to the 24th Recital of the relevant directive.

⁶² Namely Directives 77/780, 89/299 and 89/646.

⁶³ Para. 37 Paul.

⁶⁴ Paras. 40, 41, 43, 44, and 45 respectively.

up to that point was, however, wider. Its basis in *effet utile* guaranteed this. It is argued the Court at the very least comes close to eliding these two approaches. In this respect what is pertinent in Paul is that the Court seemed to accede to the argument that because no remedy was expressly provided for in the Directive, this was an argument against the conferral of a right.⁶⁵ Second, the minimum harmonisation aim of the Directive took precedence over the protection of depositor and in this respect the case has echoes of the reasoning in the Three Rivers decision.⁶⁶ This is despite that the Court accepted that that the directives were intended to protect depositors.⁶⁷ Tison makes the point clearly:

This seems to depart from previous case law of the ECJ, which suggested that the first condition for Francovich liability should be read more flexibly: until now, the Court seemed to be satisfied with the demonstration that the EU rules are intended to protect the interests of private individuals, without it being required that the said rules confer by themselves enforceable rights.⁶⁸

Reich argues that in Paul ‘To some extent, EC law takes over a modified German *Schutznorm*- or *Normzwecktheorie* which, however, is interpreted in a strictly objective sense depending on the need for protection and not the subjective intention of the tortfeasor.’⁶⁹ However the extent to which this modified *schutznorm theorie* is consistent with the more flexible approach adopted in other cases is highly debatable.

The main problem with this approach is that it takes Francovich away from its rule of law logic by restrictively interpreting the first criterion. It is not the last word, however. As AG Stix-Hackl stated ‘It must be noted here that the fact that the alleged breach relates to the failure to take supervisory measures does not of itself militate against a finding of State liability.’⁷⁰ Therefore, inasmuch as Paul forestalls recovery against financial regulators it cannot be considered the last word on the matter in a rapidly developing environment. The rule of law logic remains intact, if a little bruised from the narrow approach taken to conferral of a right. If in future more extensive harmonisation were to occur, the arguments in Paul could be revisited.

There is, in fact, a more adequate way of dealing with the matter. If the matter were to be dealt with on the criterion of sufficiently serious breach, this would be more consistent with the general approach taken in the case-law. The degree of discretion afforded to national authorities is large in respect of Banking Supervision. There is, therefore, no guarantee that recovery would occur. What would change, in the spirit of AG Tesauro’s opinion in Brasserie, is the balance between rights and policy reasons for limiting recovery. Tison suggests that this is, in fact, consistent with the aims of prudential supervision:

Submitting prudential supervisors to liability rules therefore is not in itself incompatible with the interests pursued by prudential regulation, as it does not automatically shift the cost of banking failures to the state, but only sanctions negligent or unreasonable behaviour from the part of the supervisory authority.⁷¹

⁶⁵ See para. 41 ‘In that regard, it should first be observed that Directives 77/780, 89/299 and 89/646 do not contain any express rule granting such rights to depositors.

⁶⁶ *Three Rivers District Council v Governor and Company of the Bank of England* [2001] UKHL 16; 2001 WL 239757.

⁶⁷ Paul (n 60) Para. 38-39.

⁶⁸ M Tison ‘Do not attack the Watchdog: Banking Supervisor’s Liability after Peter Paul’, Financial Law Institute Working Paper Series WP 2005-02, 26, citing T Tridimas ‘Liability for Breach of Community law: Growing up or Mellowing Down?’ (2001) Common Market Law Review, 328.

⁶⁹ N Reich ‘Rights without Duties? Reflections on the State of Liability Law in the Multilevel Governance System of the Community: Is there a Need for a More Coherent Approach in European Private Law? 13.

⁷⁰ See AG Stix-Hackl, para 93.

⁷¹ Tison (n 68) 29.

If one can go beyond the hurdle of conferral of right by an interpretation of the criterion more in line with general European law's emphasis on rights protection, the question would be then notwithstanding the large discretion allowed to national regulators, can carelessness be excused? This desire to vindicate the *prima facie* rights of individuals would have to be measured against the negative consequences that flow from holding the State liable given the complexity of its regulatory tasks. These include the argument that this provides a perverse incentive on banks, and secondly that it in the end will shift losses to the State undermining the aim of prudential supervision itself.⁷² But these arguments can then be ventilated in national courts, and much like in the tradition of a common law court the facts of the case will be the levers on which the case will turn. In the background will be the supervision of the CJEU. The ability of the member states to strike a balance which is deaf to the rights claims of individuals will be curtailed. This does, of course, mean that the individual will succeed but a rebalancing of priorities will have occurred.

Conclusion

What is apparent is a type of public law liability which gradually reshapes the relationship between rights and policy. In this respect *Paul* is an obstacle which retards its emergence. *Cos.met* on the other hand shows that notwithstanding *Paul*, the area is ripe for future development. From a tort law perspective, because the emphasis is on the failure of the State to do a certain act, the positive obligations side threatens to destabilize the tort law of those jurisdictions which place an emphasis on limiting tort law to acts rather than omissions.

At a deeper level what is apparent is realignment of the responsibility of the State which has an expansionist tendency. This arises out of the context of an increasing regulatory role for the State. This reformulation of tort law towards rights tends to turn the tort law into a question of balancing policy discretion with individual rights and can be seen as adding a layer of complexity to the law. There are strong opponents to the mixing of public and private in this manner. Its focus on systemic failure can act as an *agent moteur* for expansion. The question which this raises is whether *Francovich* is the future direction of tort law in Europe: a public law tort law premised on failure to fulfil constitutional obligations? Can regulatory systemic failures be recoded into the language of rights protection?

⁷² Tison (n 68). In his article he enumerates the numerous arguments against recovery. See for an economic analysis RJ Dijkstra & MG Faure 'Compensating Victims of Bankrupted Financial Institutions: a Law and Economics Analysis (2011) J.F.R & C. 156.

THE TRANSFORMATION(S) OF PRIVATE LAW

Hans-W. Micklitz and Yane Svetiev

Introduction

The overall title of the European Regulatory Private Law project posits a “transformation of European private law from autonomy to functionalism in competition and regulation”. If indeed this process transforms the underlying basis of private law rules (autonomy vs. functionalism), it should also change the role that private law plays in social and economic ordering and both the form and substance of private law rules and even institutions. One key objective of the ERPL project is to trace this process in the individual empirical fields. This inquiry involves both identifying the underlying drivers of this transformation and the resulting forms of normativity and enforcement institutions that may displace the traditional national sources of private law.

To explore the above themes within the scope of the ERPL project two seminars were organised at the EUI Law Department, one focusing on the theme of “Autonomy and Regulation” and another one on the “Transformation of Private Law”, both of which sought to draw on literature exposing the conceptual foundations of the processes that are said to change our understanding of private law.

For the purposes of the second workshop and for this working paper, we decided to write two papers that largely draw on the literature examined during these seminars. The aim is to tease out some conceptual tools that would ultimately be useful in providing a frame for analyzing the hypothesized process of transformation through the various empirical sub-projects.

The two papers presented under the common title of “The transformation(s) of private law” have a slightly different focus. The first paper is written largely from an internal EU perspective, in that it departs from “within” ongoing debates about European private law and focuses in particular on the continued relevance of the public/private distinction and the factors that have transformed the way that the division between public and private has been perceived over time within legal discourse.¹ The transformation drivers that identified during the course of the seminar were changes in economic relationships (due to economic integration or changes in the pattern of production), technological change, as well as changes in the forms of organization of civil society beyond organized politics. These drivers, we posit, operate simultaneously to both transform the state and its capacity to supply private law rules and institutions and, in turn, they lead to the emergence of alternative spaces for norm creation and enforcement.

The second contribution takes, by contrast, more of an outside perspective. Rather than focusing on the literature from within EU debates, it explores how the question of the transformation of private law has been explored in other relevant literatures, including the extensive US contract law literature (where similar arguments about the growing irrelevance of existing codifications of private law have been made and supported by empirical evidence, such as in the work of Lisa Bernstein, Robert Scott, as well as the joint work of Ronald Gilson, Charles Sabel and Robert Scott). This contribution also draws on literatures from other disciplinary traditions that focus on the maintenance of cooperation

¹ The shifts in the public/private distinction and its continued relevance for the making of private law were explored in HW Micklitz, ‘Rethinking the public/private divide’, in M Maduro, K Tuori, S Sankari (eds) *Transnational Law: Rethinking European Law and Legal Thinking* (Cambridge, Cambridge University Press, forthcoming 2014) and this contribution goes further in exploring that theme. See also earlier “The public/private divide in European law”, in H-W. Micklitz and F. Cafaggi (eds) *European Private Law After the Common Frame of Reference* (Cheltenham, Edward Elgar, 2010).

through making and enforcing norms in communities without the aid of state legal institutions (such as the work of Elinor Ostrom and her collaborators on small group self—management of resources or of Eric Brousseau and his collaborators on internet group governance). This contribution seeks to identify common themes and conceptual tools or categories that would be useful in analyzing the transformation process through the empirical material gathered in the project in the EU context. Moreover, this contribution also aims to offer further food for thought on the question whether or not the processes that give shape to European Regulatory Private Law are driven from within the EU or whether they reflect broader trends and external drivers.²

As already indicated, these preliminary contributions provide conceptual tools and first analytical steps. We aim to use them in order to develop a fuller account of the hypothesized transformation of European private law from autonomy to functionalism in regulation and competition.

Part I - The parameters of formation/transformation/re-formation

Introduction

This paper provides an analysis of the key driving forces behind the transformation of the state, which in turn affect the state's capabilities of acting as a law-maker and law-enforcer, particularly in the private domain. The drivers identified include changes in economy (in this essay principally considered as the effects of the increasing complexity of production and of international economic integration), changes in technology, as well as changes in civil society (the capacity and modalities of public participation in rule-making beyond organized politics).

The starting point of the analysis provided in this part of the contribution is the formation/transformation/re-formation of the state, from state-nation, to nation-state and to the market state.³ Of particular importance for the analysis of these processes are the works of *H. Arendt, G.-P. Calliess/P. Zumbansen, Ch. Joerges/J. Falke, D. Kennedy, K.-H. Ladeur, R. Münch, H. Muir Watt, S. Sassen, D. Patterson, M. Taggart*.⁴ The key perspective is the changing patterns of the state and for the sake of the argument we have distinguished between the nation state, the welfare state, the market and the post market state. This rough distinction does not meet hard historical standards but it might suffice to make the argument. We will not go deeper into the state-nation as additional research is needed to get a clearer picture and to avoid romanticism.⁵

We begin with a set of different transformation drivers, including the variation of the state, in turn affected by changes in the economy, the technology and the public beyond politics. We will associate to each of the four levels one leading hypothesis which shall highlight the respective stage of the then dominating public/private law divide. When put together the picture of the public/private becomes ever clearer – the rising power of the administrative state and the growing leeway allowed to private parties, forcefully reflected by the key role of standardisation for the building of a market economy.

² See Y Svetiev, 'W(h)ither private law in face of the regulatory deluge', in HW Micklitz and Y Svetiev (eds) *Self-Sufficient European regulatory private law: A viable concept?*, EUI Law Working Paper 2012-31, (<http://hdl.handle.net/1814/24534>).

³ Micklitz/Patterson, 'From the Nation State to the Market State: The Evolution of EU Private Law', EUI-Law Working Paper 2012/12 (ERPL-02), in B. van Vooren/St. Blockmans/J. Wouters (eds.) *The EU's Role in Global Governance: The Legal Dimension*, OUP 2013, 59-78

⁴ Cahier à Thème, *Les Grandes Théories du Droit Transnational*, avec contributions du K. Tuori, B. Kingsbury/N. Krisch/R.B. Stewart, H. Muir Watt, Ch. Joerges/F. Roedel, F. Cafaggi, R. Zimmermann, G.-P. Calliess/M. Renner, A. Fischer-Lescano/G. Teubner, P. Schiff Berman, RIDE 2013, Numéro 1-2, 1-256

⁵ E.g. M. Koskeniemi, (2011) "Empire and International Law: The Real Spanish Contribution", *University of Toronto Law Journal*, 61: 1.

<i>Formation transformation re-formation</i>	State	Economy Market	technology	public beyond politics
State-nation 18 th century	Ius gentium	Mercantilism Trading state (Handelsstaat)	Local knowledge	
Nation state 19 th century 1800-	building of a state (constitution) society of individuals multilateralisation	establishment of the (national) market (private legal order)	Industrial age Technical standardisation	Technical experts Trade unions
Nation State 20 th Century Welfare State	rise of 'The Social' rise of the executive politics govern the market society of organisations	Re-embedding of the (national) market	Standardisation of health and safety	Experts and political amateurs Countervailing power Environmental and consumer organisations
Market state End of 20 th century	market governs politics internationalisation society of networks (agencies)	Globalisation Dis-embedding of national markets Independent financial market sectorialisation	International standardisation Standardising financial norms	Law without politics (social norms) rise of the individual
Post market state The 21 st century	Authoritarian democracy universalisation	Re-embedding the global/national market	Information technology	Paparazzi democracy Self- organisation Private public responsibilities

The building of the nation state and the public/private divide

On the European continent and in America the late 18th early 19th century were marked as the era of nation and state building.⁶ The United Kingdom preceded the development by at least 100 years as state building there goes back to the 17th century. France stood at the forefront of the development in Europe, the elaboration of the French and the American constitutions was carried out contemporaneously. However, unlike in the US, in France the adoption of a constitution went hand in hand with the adoption of a national private legal order, the Code Civil. It is here that a decisive

⁶ Muir Watt, Private International Law Beyond the Schism, <http://spire.sciences-po.fr/hdl/2441/53r60a8s3kup1vc9k70p9ikj1/resources/hmw-pilagg-paper-final.pdf>

bifurcation took place, on the one hand the public legal order, the establishment of constitutional institutions and constitutional rights, on the other a private legal order, based on three essential pillars; equal rights for every natural subject – the abolishment of a feudal legal order, on freedom of contract and *l'autonomie de la volonté* – based on the free will of each natural subject, on the protection of property rights – thereafter each subject was allowed to become a private owner of private property. This was the starting point for the establishment of a market, in which the parties in a 'society of individuals'⁷ should and could engage in economic transactions. The feudal household as the producer of basic needs gradually lost importance. The basic needs in particular for the citizens living in the cities was increasingly to be met via the market.

The establishment of nation states governed by constitutions and of national markets governed by national private legal orders yielded the necessity to establish a new system of interaction between nation states and market participants across borders. Nation state building and national private law building leads also to the birth of international public law and international private law. It has to be recalled, however, that *Savigny* did not conceptualise international private law as a law between nation states, but as between princedoms.⁸ *Savigny* argued forcefully against the elaboration of a national civil legal order in Germany. He established the so-called historical school (*Historische Schule*), seeking the basis of the law in the *Volksgeist* and the *ius commune*. It needed a decisive twist from princedoms to nations to apply *Savigny's* concept of international private law to the emerging order of nation states in the end of the 19th century. Thus far, private international law building preceded public international law.

The next major stage in the elaboration of the public/private divide resulted from the industrial age and in particular the beginnings of the regulatory state, first in the UK later on the continent. Whilst we will not insinuate that the nation states of the early 19th century did not intervene into the market, it was the industrial age that yielded greater regulatory activities, meant to shape the developing industrial production or to address what might today be called market failures. The regulatory state should not be confounded with the welfare state, although the regulatory state of the end of the 19th century started to adopt rules to protect the workers against health and safety at work and to guarantee basic protection in case of an accident and later a pension system.

The most visible institutional change occurred in the relationship between the executive and business. Before the industrial age, the executive disposed of the necessary knowledge to take market related decisions. Industrialisation shifted the balance towards business. The executive had to realize that the new technologies (examples might include the telephone, industrial production via machines, the invention of chemical substances etc.) required expertise that was not available and that could not be generated within state bodies. The executive had to co-operate with business. The first laws were adopted in which national legislators refrained from legislating on technical details but involved business into the elaboration of technical rules that became the benchmark for assessing the legality of business behaviour.⁹ Pressure vessels and their standardisation in the beginning 20th century stood at the forefront of the development of technical standards and legal rules referring to technical standards.

The increasing role of technical standards in the running of the marketplace changed the relationship between the state and market participants fundamentally. Standardisation increased the importance of the executive to the detriment of the legislative branch, through the mechanism of delegated powers. Parliaments had to recognise already in the early 20th century their inability to define technical details

⁷ Ladeur, K.-H. (2010), "The Emergence of Global Administrative Law and the Evolution of General Administrative Law", unpublished manuscript, mimeo.

⁸ This is an often neglected aspect that Muir Watt draws to our attention, see *ibid*

⁹ Peter Marburger, *Die Regeln der Technik im Recht*, Mohr Siebeck, Tübingen, 1979.

via legislative means.¹⁰ The shift of power from the legislative to the executive also entailed the integration of private competence made available by business and industry into public-law making. The foundation of the major standard bodies, in the UK the BSI (1901),¹¹ in Germany (1917) the DIN,¹² ANSI (1919)¹³ and in France AFNOR (1926),¹⁴ as private associations, bears witness to the importance business and industry attributed to generating private knowledge, including for regulatory purposes.

The rise of new technologies deprived the state from the possibility to define legal standards out of its own competence. Using *H. Arendt's* distinction, the state first absorbed the public in that the legislative power and the discourse around the concrete shaping of a law shifted from the public to the political/constitutional sphere. However, as the state=the political is not competent (knowledgeable) to realise this task, it has to rely on the market. The public is doubly barred, first via the equation of state=political, second via the re-delegation of competence to the market which excludes the public. This deficit is somewhat remedied via the gradually increasing participation of trade unions and later consumer organisations in the standard making process during the latter parts of the 20th century. Participation, however, requires technical expertise. So participation of the public is bound to technical knowledge. The equation knowledge=expertise=participation facilitates a gradual de-politicisation of delegated law making, a process whose origins go back to the industrial age.¹⁵ It apparently ignores that technical standards are usually a composite of technical knowledge and political assessment.¹⁶ But the political dimension of technical standards becomes apparent in transborder business transactions, when different technical concepts clash and hinder transborder trade. Barriers to trade are no invention of the EU or the GATT legal regimes, they existed already in the growing exchange of the newly industrialised products at the turn of the 19th/20th century.¹⁷

The intermingling of the public/private in the national welfare state

The building of the welfare state is inherently bound to the rise of 'The Social'.¹⁸ Its origin goes back to the period after the First World War. France took the lead; Germany remained stuck in conceptual considerations rather than concrete action. In Europe, the rise of the Welfare State, as well as the idea and the ideology of understanding the nation state as the responsible actor in providing for social distributive justice in the society is bound to the period of the 1960s/1970s, after Europe had recovered politically and economically from the Second World War.¹⁹ These were the high-days of political planning, of political programming and of using law as a means to an end, no longer of guaranteeing individual and political freedoms against the *Leviathan*, but to claim social rights, social protection, redistribution of chances and gains *from* the nation state. The national constitutions were submitted to

¹⁰ Reconstruction of M. Taggart, (2005), 'From 'Parliamentary Powers' to Privatization: The Chequered History of Delegated Legislation in the Twentieth Century', University of Toronto Law Journal, vol. 55, pp. 575-627

¹¹ <https://www.bsigroup.com/>

¹² <http://www.din.de/cmd?level=tpl-home&languageid=en>

¹³ <http://www.ansi.org/>

¹⁴ <http://www.afnor.org/en>

¹⁵ M. Bach, *Europa ohne Gesellschaft*, Wiesbaden 2008.

¹⁶ Ch. Joerges/J. Falke/H.-W. Micklitz/G. Brüggemeier, *Sicherheit von Konsumgütern und die Entwicklung der Europäischen Gemeinschaft*, (Englische Fassung: *European Product Safety, Internal Market Policy and the New Approach to Technical Harmonisation and Standards*), European University Institute Working Papers in Law, now in *Hanse Law Review* 2010 <http://www.hanselawreview.org/pdf10/HanseLRVol6No02.pdf>

¹⁷ See on the way in which the German government was concerned to pave the way for German exports in this particular period, C. Torp, *Die Herausforderung der Globalisierung. Wirtschaft und Politik in Deutschland 1860-1914* [Challenges of Globalization. Economy and Politics in Germany 1860-1914]. Göttingen: Vandenhoeck & Ruprecht, 2005.

¹⁸ D. Kennedy, (2002) "Two Globalization of Law and Legal Thought: 1850-1968", *Suffolk UL Review* 36: 631.

¹⁹ Thosten Kingreen, *Das Sozialstaatsprinzip im europäischen Verfassungsverbund*, Mohr Siebeck, 2003.

a constant change of rules that all flew in the same direction, legitimising regulatory intervention for the establishment of a just society. A huge amount of new laws and regulations ensued during this period. These laws were no longer limited to establish markets, to free the market actors from medieval restrictions, they were meant to *shape* markets in view of a particular political perspective. The unleashed liberal markets were politically and socially re-embedded. This was possible because the markets still remained national markets, where the nation states had power and jurisdiction. Politics was meant to govern the market, the public and the private got ever more deeply intermingled.

The transformation from the liberal nation state to the national welfare state required an institutional change within the state, but also in the relation between the state, the market participants and the public beyond politics. Ladeur suggests that the society of individuals turned into the 'society of organisations'.²⁰ The rise of the welfare state led to a further considerable extension of executive power. Planning and programming in new public policy fields, such as construction, environmental protection, health and safety regulation adapted to the consumer society, required new expertise within the administration, but also new institutional settings in which the administration could get together with the market participants and the public. The rise of the welfare state and the rise of the administration are inherently linked together. The welfare state could not have been built without the administration, which grew both quantitatively and qualitatively.²¹

The international legal order remained unaffected at least on the surface. GATT, IMF, WIPO, just as much as the UN and its sub-institutions, did not change the key institutional outlook. This means that the international legal order was based on territorial nation states, enshrined in international public law and national private legal orders.²² The rise of 'The Social' did not affect the order of territorial nation states in its public dimension. Just as in the EU, the UN or even the GATT departed from a clear division between responsibilities, so that international legal orders only affected markets but not the welfare state' social dimension.²³ Of course the distinction was never so clear-cut, but changes brought about by international legal regimes took place largely outside the hard-core areas of 'The Social', such as labour law and social security. A visible sign of the institutional change at the international level were the establishment of new international bodies, dealing with the new policy fields, such as the United Nations Environmental Programme (UNEP) in 1972 and the proposed but later failed UN-CTC, which was meant to establish a similar entity for consumer protection.²⁴ Less visible was the impact of these developments on the international private law regime. *Savigny's* concept, as transferred to the nation state level, was built on the freedom of the parties to choose the applicable jurisdiction and the applicable law. The growing number of mandatory rules in contractual relations, via labour and consumer law, led to the need to find ways and mechanisms for the interaction of national private legal orders, particularly in cases where the standards of social protection differ between jurisdictions. International private law was reconceptualised as a regime of private legal orders where autonomy and freedom of contract had to be counterbalanced by restrictions and constraints.²⁵ The rising new fields of policies in which the administrations were the key actors were much more difficult to master in the arena of private international law. It has to be recalled that a couple of decades ago, national administrations were not allowed to communicate across borders, the

²⁰ Eileen Milner, *Managing Information and Knowledge in the Public Sector*, 65, 164 et seq. (Routledge 2002), further references in Ladeur, *ibid*.

²¹ See generally, Taggart, *ibid*.

²² A. Afilalo/D. Patterson, *The New Global Trading Order: The Evolving State and the Future of Trade* (Cambridge, CUP, 2008).

²³ For the EU, see the Spaak-report, for the international economic order, see Afilalo/Patterson, above.

²⁴ The UN-CTC existed provisionally for some time and played a key role in the development of the UN Guidelines for Consumer Protection.

²⁵ Sonderanknüpfungslehre, Ch. Joerges, *Zum Funktionswandel des Internationalen Kollisionsrechts*, Mohr Siebeck, 1971.

interaction and exchange typically took place via diplomatic channels.²⁶ If any, more informal mechanisms of exchange had to be established outside the established institutional settings. This is was the beginning of the 'Weltinnenpolitik'.²⁷

The intermingling between public and private, within the nation state and beyond the nation state in the international arena becomes even clearer in the changing role of technical standardisation during the high days of the social welfare state. Standardisation might serve as blueprint for other areas of society in which the institutional change, 'the society of organisations', a composite of public and private bodies and actors could be studied. During the first half of the 20th century, standardisation was focusing on technical harmonisation of measurements, units and procedures. But the limits to more policy-loaded standardisation faded away with the development of the consumer society, which was largely a society of increased choice in consumer products (if not services). Two categories of products document how technical standards entered policy fields, namely the regulation of *foodstuff* – the Codex Alimentarius Commission was established as early as 1962 – as well as *electrical appliances*, which became subject to the 1973 low voltage directive and which influenced the elaboration of the GATT/TBT 1974 Agreement. It is no coincidence that health and safety regulation stood at the forefront of giving the internal market a social outlook after the adoption of the Single European Act in 1986 as well as the world trade order after the establishment of the WTO/SPS in the 1994 Uruguay Round. The regulatory technique of delegated powers, from legislators (nation states) to administrative bodies, who then develop - in cooperation with business and industry - appropriate rules gained substantial ground. New patterns of co-operation had to be found. The result in the society of organisations, is that the public (but in fact the executive) was relying on business and industry, no longer merely on technical expertise - as in the industrial age - but also on scientific expertise in the regulation of pharmaceuticals, pesticides, chemicals, electrical appliances and so on.

This neatly brings us to the question: What about the public beyond politics? If we understand courts as public fora in which citizens can express critique and discontent for political decisions, such as is the case in Germany with the German Constitutional Court²⁸ and to some extent in the EU with the CJEU, often regarded by social groups and private individuals as a means of last resort to defend their constitutionalised economic, social and consumer rights,²⁹ we have to recognise that courts were unable to take over such a public role beyond established politics, at least in the field of standardisation which became ever more prominent in the social welfare state era. This does not mean that courts at different levels and in different countries could switch into that role and counterbalance the power shift away from the public to politics, however, in the field of standardisation where the vanishing of the public/private divide is most apparent, appropriate mechanisms of judicial review were and are lacking.³⁰

The rise of the welfare state and the power shift from the legislature to the executive and to market participants is accompanied by the growing importance of non-governmental organisations in particular in the new policy fields, such as consumer protection and environmental protection. These organisations raised their voice outside the constitutionally and internationally foreseen fora,

²⁶ A-M. Slaughter, *The New World Order* (Princeton University Press, 2005).

²⁷ U. Beck, *Die Risikogesellschaft*, edition Suhrkamp, 1986

²⁸ J. Habermas, *Staatsbürgerschaft und nationale Identität*. In: (ders.): *Faktizität und Geltung*. Suhrkamp, Frankfurt a.M. 1992, M. Jaestedt/O.Lepsius/Ch. Möllers/Ch. Schönberger, *Das entgrenzte Gericht – Eine kritische Bilanz nach sechzig Jahren Bundesverfassungsgericht*, Suhrkamp 2011.

²⁹ S. Sciarra, *Labour law and the Court: national judges and the European Court of Justice*, Hart Publishing 2001, D. Keleman, *Eurolegalism The Transformation of Law and Regulation in the European Union*, Harvard University Press, 2011.

³⁰ M. Taggart, above with regard to the Commonwealth, *A Simple Common Lawyer Essays in Honour of Michael Taggart* Edited by David Dyzenhaus, Murray Hunt and Grant Huscroft, Hart Publishing, 2009, H. Schepel, *The Constitution of Private Governance - Product Standards in the Regulation of Integrating Markets*. Hart Publishing 2005,.

criticising the input as well as the output legitimacy³¹ of standardisation beyond technicalities. They were requesting access to the standard-making process and participation in standard-making, thereby claiming precedence of politics over market requirements. Over time, however, non-governmental organisations were integrated (even coopted?) into the standard-making process, nationally in the standards bodies, in Europe via ANEC in CEN/CENELEC and internationally into ISO/IEC via COPOLCO and in the Codex Alimentarius Commission, just to name few key institutions. In Ladeur's society of organisations, administrations, business and industry, NGOs were united in one and the same body. This process has triggered far-reaching theories on new international forms of constitutionalisation in Europe and beyond.³² The dividing line between the public (the administrations as representatives of states and high politics), the private (business and industry representing the market) and the public beyond politics (NGOs) fades away in this picture. Seen through the lenses of *H. Arendt*, we might say that the market has absorbed politics (administrations) and the public beyond politics (the NGOs).

Precedence of the private over the public in the market state

The emergence of the market-state is placed toward the end of the 20th century, when global economies started to integrate and give way to a more diffuse, interlinked market-states whose ethos focused on neoliberal preservation of the market and the maximization of opportunity, rather than top-down welfare entitlements. Europe's expansion into market-state regulatory territory is cotemporaneous with these developments.³³ Economic globalisation affects the degree to which nation states are politically and economically able to shape 'their' markets and to maintain 'their' welfare state paradigm. To take a recent example, the constant struggle of EU Member States in the aftermath of the global financial crisis to save Ireland, Portugal, Greece, Spain, Cyprus, Italy from default provide ample evidence that it is the market that requires action from EU Member States from one crisis summit to the next. This is not to say that globalisation automatically deconstructs the welfare state. The degree to which citizens might benefit from social welfare depends on the standards set in the Member States.³⁴ The cleavage between the rich and the poor, in Europe largely between the North and the South, becomes ever clearer. However, what is equally true for all nation states is that globalisation of the economy disembeds the social welfare state. It shifts the focus from the state to the market and triggers a deepening of the intermingling between public and private, but this time in the opposite direction.

In essence, it may be argued that the gradual loss of expertise and knowledge which accompanies the nation state building since the industrial age and which gained pace in the welfare state through the increased powers of the market participants in shaping health and safety, has now turned into a general pattern that affects the state's autonomy vis-à-vis the market. Contrary to the political decision in the liberal state to separate markets and politics, to grant autonomy to the market and the market participants, in the era of the market state the market has freed itself from the political concession and is claiming autonomy from politics which is (or may?) be counterbalanced by the public reaching beyond politics. The consequence is a legitimacy crisis.³⁵

³¹ With regard to this distinction see F. Scharpf, *Governing in Europe: effective and democratic?*, (Oxford, OUP, 1999).

³² Ch. Joerges/J. Neyer (1997), "Transforming strategic interaction into deliberative problem-solving: European comitology in the foodstuffs sector", *Journal of European Public Policy*, vol. 4: 609-625; C. Joerges, (2002), "'Deliberative Supranationalism'—Two Defences", *European Law Journal* 8: 133-151, but also Cohen/Sabel, (1997) "Directly-Deliberative Polyarchy", *European Law Journal* 3:313

³³ Micklitz/Patterson, *ibid.*

³⁴ S. Steinmö, *The Evolution of the Modern States: Sweden, Japan and the United States*, (Cambridge, CUP, 2010).

³⁵ F. Scharpf *ibid.*

The decisive step in the market state transformation results from the ‘Autonomisierung’ – literally autonomisation or ‘gaining autonomy’ – and from the ‘Verselbständigung’ – literally independentisation or ‘gaining independence’ – of financial markets, a process commonly referred to as ‘financialisation’.³⁶ The first step in this process was the decision of the Western nation states in 1973 to modify the Bretton Woods agreement and to reallocate exchange rate policy to the market.³⁷ The former concept of politically determined *stable currency exchange rates* as agreed upon in Bretton Woods was replaced through the *expectation of a stable system* of currency exchange rates. The second step constituted the ‘invention’ of financial derivatives, an independent form of money (capital), separate from the market of commodities (Gütermarkt) and from currency in circulation. If I understand it correctly the so-called *Black-Scholes* differential equation developed already in 1973 was the break-even-point and the formula, which underscored *Milton Friedman*’s credo on ‘The Need for Futures Markets in Currencies’.³⁸ While in the early 1970s financial derivatives hardly existed, today they are by far the largest market world-wide. Capital can be ‘produced’ via financial derivatives, independent from the currency in circulation and borrowing has become a riskless enterprise through securitisation and debt-making spreading an additional source of money making.³⁹ Despite *Lehman Brothers* the process has not come to a halt and it drives states’ currency policy and financial markets policies.

In the welfare state era, the internationalization of standard setting in health and safety took place within the established body of international organizations. In the market state era, ‘financialisation’ is entrusted into the hands of a body which is little known to the public at large and which has no clear legal status. The *International Organization of Securities Commissions* IOSCO became the key player behind the curtain.⁴⁰ A. Marcacci gives the following account: “Currently, IOSCO has 115 ordinary members (most of them are public financial market regulators), eleven associate members (such as regulators non dealing with regulated capital markets), and seventy-five affiliate members (usually stock and futures exchanges or dealers associations) from all around the world.”⁴¹ It covers more than ninety-five percent of the world’s securities and futures markets,⁴² and it is not only the key global institution producing international standards for financial regulation,⁴³ but it also has wider global responsibilities by being one of the three members of the Joint Forum of International Financial Regulators, alongside the Basel Committee on Banking Supervision and the International Association of Insurance Supervisors, established in 1996.” IOSCO allowed for the transformation of the financial markets through securitization of debts via financial derivatives. It was apparently here that it was

³⁶ While there is no commonly agreed definition of “financialisation”, the term is used according to the meaning in G. Epstein’s book, *Financialization and the World Economy* (Cheltenham, Edward Elgar, 2006). Epstein has stated “By *financialization*, we mean the increasing importance of financial markets, financial motives and financial actors in the operations of the economy. This is but one of many different meanings that scholars ascribe to this relatively new term. The origins of the term are obscure, though it is being used with increasing frequency because of its obvious heightened relevance in modern capitalist economies. Indeed, in the last few months, a new international network has sprung up to study financialization.” (G. Epstein, “Financialization, Rentier Interests, and Central Bank Policy”, Paper prepared for PERI Conference on “Financialization of the World Economy”, December 7-8, 2001, available at <http://www.peri.umass.edu/341/>) In German it can not be equated with Finanzkapital (Hilferding), Finanzialisierung is a genuine word that bears either positive or negative connotations depending on who uses it, how and in which context.

³⁷ B. Eichengreen, *Global Imbalances and the Lessons from Bretton Woods*, (Cambridge, MIT Press, 2007).

³⁸ M. Freedman, “The Futures Market In Foreign Currency”, prepared for the International Monetary Market of the Chicago Mercantile Exchange, Chicago, 1973, 6-12.

³⁹ It is said that financial derivatives multiply, thus create, money by securitizing (i.e., insuring) debts. Thus derivatives, on the one hand, create money, while on the other hand, dim the risks enshrined in the creation of money.

⁴⁰ Antonio Marcacci, *The EU and IOSCO: an ever closer cooperation?* EUI-Law Working Paper 2013/02 (ERPL-04), <http://hdl.handle.net/1814/26458>, provides an analysis of the role of the EU in paving the way for securitisation.

⁴¹ See: <https://www.iosco.org/lists/index.cfm?section=general>

⁴² See: <https://www.iosco.org/about/index.cfm?section=background>

⁴³ See C. Brummer, (2009) “Post-American Securities Regulation”, *California Law Review*, 98: 327.

decided to transform mortgages into tradable financial products.⁴⁴ Public-private rules merged in an indistinguishable amalgam of public and private responsibilities, elaborated in a relatively intransparent procedure at the heart of the international legal framework for the financial markets.

IOSCO is the perfect example of the states' transformation to become responsive to the needs of the market. It is a "non-body" with no clear institutional and legal status. The decisive criterion for membership appears to be expertise generated in national agencies. Consultation takes place in a closed shop system, to which financial sector actors have access, but not consumers or other stakeholders or their representatives. Even researching IOSCO is a challenging task. The rules agreed upon in this forum are not legally binding, but they have made their way into the legal financial systems of the Member States. The EU is an affiliate member only, which means it is not even on an equal footing with the Member States. However, *Marcacci* has amply demonstrated the growing political influence of the EU in this body, which allowed the EU to shape European capital markets according to the requirements agreed upon in IOSCO.

Economic integration and globalisation is not limited to the financial markets, but also affects the market of commodities, products and services. Beginning with the liberalisation and privatisation of former public services starting from the late 1970s and 1980s, first in the US and UK, then also in the EU, the key markets for services beyond the financial market, such as telecommunication, energy, transport, health and safety (pharmaceuticals, chemicals, pesticides) but also sports, may be viewed sectorally, whereby the making of the rules, the substantive standards and the enforcement mechanisms all follow a particular rationality⁴⁵ enshrined in that market sector, which cuts across the boundaries of public and private responsibilities as well as boundaries between the national, European and international level. These sectoral regimes could be compared with 'silos', in which networks are established, networks between agencies, networks between agencies and industry/business, to some extent public interest groups, networks in which the distinction between public and private, between national and international is withering away.⁴⁶

The rule makers in the silos are not parliaments nor do international organisations provide the rule-making setting, even if such institutions operate with a political mandate and a traditional basis of legitimation. As with IOSCO, in each of the other 'silos' it is possible to identify 'institutions' with an unclear legal status, with a shaky traditional basis of legitimation, institutions in which national administrations in co-operation with the respective business and industry representatives, with sometimes greater, sometimes lesser participation of public interest groups, develop market access and market management rules, often in the form of 'technical standards'.⁴⁷ A well-established means in democratic constitutions to legitimate such rule-making is the legislative tool of delegated powers. The enforcers of the rules are typically (independent) agencies, which have mushroomed in the networked sector markets. In each sector we find agencies with specialised competences, being responsible not only for the workability of the market (in a technical sense), but also increasingly for considering and even balancing the collective interests of market participants, such as business and customers. In these market surveillance activities, the well-established distinction between public responsibilities and

⁴⁴ This is a 1993 resolution: <http://www.iosco.org/library/resolutions/pdf/IOSCORES10.pdf> This is a 1996 resolution: <http://www.iosco.org/library/resolutions/pdf/IOSCORES13.pdf>; This is a 2006 resolution: <http://www.iosco.org/library/resolutions/pdf/IOSCORES25.pdf>

⁴⁵ A. Fischer-Lescano/G. Teubner, (2004) "Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law", *Michigan Journal of International Law* 25: 999.

⁴⁶ Y. Svetiev (2012), *W(h)ither Private Law in the face of the Regulatory Deluge*, in: Hans-W. Micklitz & Yane Svetiev (eds.), *A Self-Sufficient European Private Law - A Viable Concept?*, EUI Working Papers Law No. 2012/31

⁴⁷ A. Marcacci, *ibid.*

private responsibilities vanishes away.⁴⁸ In the liberal state logic, private individuals would have to look after their own interests and defend them in court if necessary. In the silos, particular litigation or dispute resolution mechanisms are established, usually in form of ADR mechanism for b2b and b2c disputes, often in separate, though silo-related bodies.⁴⁹ Sector related agencies look after the collective interests of the customers and sometimes even go as far as combining sanctions against business infringing the market conduct rules with collective compensation schemes for customers.⁵⁰

One question is where is the public beyond politics in these new rule-making and rule-enforcement settings? The role of non-governmental organisations as the holder of the public beyond politics, as the countervailing power against the predominance of economic considerations, to which so much scrutiny was attributed in the last decades of the 20th century, has ironically suffered from its grand success. Today each silo is maintaining its own ‘NGO-zoo’, in the words of one experienced activist from a consumer-environmental organisation.⁵¹ Those who advocate for the integration of NGOs into the rule making via standardisation at the international, EU and national level underline the opportunities to increase the legitimacy of the respective bodies. Those who take a critical stand refer to the dark side for NGOs becoming an integral part of the de-politicisation process.⁵² NGOs often lack the technical/scientific/financial expertise to be taken seriously in some of these settings. Therefore their input is often limited to the political side of the rule making, where the NGOs often conflict with administrations and eventually with states.

The overall development might help to understand why courts can play such a crucial role in the current environment, far beyond guarantors of an institutional balance between different statutory powers. The rise of the individual forcefully announced by Durkheim already in the early 20th century led to the emergence of the concept of individual rights, which should and could be enforced via the courts. One characteristic of current court litigation is that individual litigation often bears a collective dimension. This is particularly clear in the preliminary reference procedures that reach the CJEU in Luxembourg. However, neither in the newly established independent financial market nor in the other sectoral market-silos does judicial litigation play a prominent role. Most of the conflicts are solved through extra-judicial conflict resolution mechanism, such as the agencies, ADR mechanisms or even arbitration. Only in rare cases, the parties to a conflict engage courts and it is here where the courts seem ready to embark on new ground, by imposing public responsibilities on private parties.

A number of important developments occurred before the CJEU. *Loic Azoulai*⁵³ has convincingly shown that in the aftermath of the (now infamous) cases of *Viking* and *Laval* private parties as far as they are addressees of market freedoms may also become addressees of social rights. Thereby the exercise of economic freedoms would be bound(ed) by the limits of social rights. The key question is: who are the private parties who could become addressees of economic freedoms. So far the CJEU has only extended the horizontal direct effect of fundamental rights to collective entities. One might wonder, however, whether and to what extent the case-law could be extended to the area of universal services, where secondary Community law requires the Member States to nominate a supplier of last

⁴⁸ Eg, A. Ottow, (2012). “Europeanization of the Supervision of Competitive Markets”, *European Public Law*, 18(1): 191; P. Verbruggen, *Enforcing Transnational Private Regulation: A Comparative Analysis of Case Studies in Advertising and Food Safety*, Phd Thesis, EUI Florence 2013.

⁴⁹ Eg, Ch. Hodges/I. Benöhr/N. Creutzfeldt-Banda, *Consumer ADR in Europe*, (Oxford, Hart Publishing, 2012).

⁵⁰ Ch. Hodges, *The Reform of Class Actions and Representative Actions in European Legal Systems, A new Framework for Collective Redress in Europe*, Hart Publishing, 2008

⁵¹ Ch. v. Weizsäcker, member of the Scientific Committee on Consumer and Nutrition Policy at the Federal Ministry of Nutrition, Agriculture and Consumer Protection from 2002-2008.

⁵² J. Vogel, *Das Gespenst des Kapitals*, Sequentia 2010.

⁵³ *The Court of Justice and the Social Market Economy: The Emergence of an Ideal and the Conditions for its Realization*, (2008) 45 CMLR 133

resort who provides access to public services. In short, the CJEU may be ready to take full account of the changing responsibilities resulting from the market state paradigm.

From a more theoretical perspective, clarification is needed of when and under what conditions a conflict can be confined to the sectoral silo, as opposed to when the pressure in the silo becomes so high that only external conflict resolution (in court) can bring the sectorial order back into balance.⁵⁴ One possibility is to use the distinction between standard and emergency or serious situations.⁵⁵ Only when the conflict passes a certain threshold beyond mere ‘business as usual’, courts become involved in dispute resolution.

Post market state – the revival of the public/private distinction?

It is already difficult to circumscribe and analyse the ongoing transformation in the market state area. Unsurprisingly then, it is even more difficult to ‘predict the future’, or to trace the elements that point towards the future. That is why the following is more tentative and speculative than analytical.

What would the post market state look like? There is already emergent a strong normative claim toward the re-establishment of the authority of the nation state against the dominance of supranational decision-making at the EU and/or the international level. This strain of arguments aims at the restoration of the national democracies and rule making and rule adoption in national parliaments, the revival of politics and the claim of political supremacy over market autonomy.⁵⁶ It is directed against the EU with its weak input and supposedly strong output legitimacy. But given the transformation of the global economy which *has* happened and which cannot be turned back so easily – it is difficult to see how the nation states can get easily get out of the overindebtedness or even state default trap to reassert themselves - I would see more potential in the European Union turning into a lead player in the reshaping of the financial market or to use Polanyian language, the re-embedding of the financial market into a legal-political frame.⁵⁷

The EU could play a similar role in the area of financial markets to the one it plays in the promotion of human rights⁵⁸ and environmental protection in its external relations. In recent years, the CJEU has strengthened the hand of the European Commission and the EU in defending higher human rights and higher environmental standards against international pressure, in particular from the US. For this argument, it suffices to recall the *Kadi*-Judgment⁵⁹ and the judgment in *Air Transport Association of America* on emission trading.⁶⁰ With some imagination one might read the *Kadi* logic into the *TNT* judgment of the CJEU⁶¹, where the Court strongly argued that international commercial law rules must be ‘equivalent’ to the EU rules, thereby ‘defending’ higher liability standards within Europe. Along this line of argument it is imaginable to propose measures aimed at strengthening a more investor-

⁵⁴ cf R. Cooter, (1996) “Decentralized law for a Complex Economy: The Structural Approach to Adjudicating the New Law Merchant”, University of Pennsylvania Law Review, 144:1643.

⁵⁵ cf H-W. Micklitz, Administrative Enforcement of Private Law, in R. Brownsword/H.-W. Micklitz/L. Niglia/St. Weatherill (eds.), Foundations of European Private Law, (Oxford, Hart Publishing, 2011), 563-591.

⁵⁶ F. W. Scharpf, Monetary Union, Fiscal Crisis and the Preemption of Democracy; LEQS Paper No. 36/2011. May 2011 De Grouve, The Governance of a Fragile Euro-Zone, CEPS No. 346, May 2011

⁵⁷ S. Picciotto, Dis-embedding and Regulation: The Paradox of International Finance, in Ch. Joerges/J. Falke (eds.), Karl Polanyi Globalisation and the Potential of Law in Transnational Markets, Hart Publishing, 2011, 157

⁵⁸ M. Cremona/B. de Witte (eds.), EU Foreign Relations Law – Constitutional Fundamentals, Hart Publishing, 2008.

⁵⁹ ECJ C-402/05P and C-415/05 P 2008 ECR I-6351

⁶⁰ ECJ, 21.12.2011, Case C-366/10 American Airlines Association vs. Secretary of State for Energy and Climate Change (K), ECR 2011 I-13755.

⁶¹ 4.5.2010, Case C-533/08 TNT v. AXA, 2010 ECR 2010 I-4107 at 49

creditor orientated financial architecture for Europe, which could set a benchmark beyond the Internal Market.⁶²

The EU playing the ‘good guy’ and even succeeding in advocating for a major change in the global financial market does not, of course, solve the legitimacy issue. In the best of worlds, it would increase the output legitimacy of the EU. However, the reembedded financial market would then be the result of another authoritarian-bureaucratic-transnational decision-making process. In a society and an economy beyond the nation state there are not only growing spaces giving autonomy to companies, but also enhanced economic and social responsibilities. The responsibility logic, justified by the Fundamental Freedoms and expanded by the Charter of Fundamental Rights, represents an essential part of the EU law, which is formally secured by references to it in the recitals of the directives. *Habermas* created the philosophical and legal-theoretical bases for a horizontal mutual linking of moral and positive law beyond the state.⁶³ The conceptual consequences have still to be developed.

The public beyond politics in the emergent landscape may be found in what *A. Trechsel* terms the ‘paparazzi democracy’, where any citizen can get to the stage of politics, digitally equipped to control decision makers and even to curb their autonomy.⁶⁴ Information technology provides for means of participation and power control instruments that were unthinkable before the invention of the Internet.⁶⁵ More generally the new information technologies allow for the self-organisation of people around the globe. The question is whether the space thereby created can be called public or whether it is not in a new way at least also a private space in according to *H. Arendt*.

Conclusion

From the analysis of the different drivers of transformation that affect both the state, its capacity to engage in law-making and provide enforcement institutions, as well as the resulting private law it becomes clear that re-thinking the public/private divide resembles an endless task. The vanishing public/private divide triggers a process of re-establishing the public as against the private, of re-defining the responsibilities of the public and the forms of private ordering, which then lead again to an intermingling of the public/private. What we then get is an understanding of the public/private divide as no more than a snapshot of the times.

⁶² They built on the regulatory parallel between product safety and financial products regulation. In product safety, like in human rights and environmental protection the EU has played an ever more important role worldwide. Drawing a parallel between dangerous consumer products and toxic financial products would fit into the image the EU has given itself at the international arena

⁶³ J. Habermas, *Ach Europa, Zur Verfassung Europas*, edition Suhrkamp 2011

⁶⁴ A. Trechsel, (2013) *Towards a Paparazzi Democracy*, Paper presented at Harvard Law School, on file with the author.

⁶⁵ G. Lastowka, *Virtual Justice, The New Laws of Online Worlds*, (New Haven, Yale University Press, 2010).

Part II – How to trace the transformation(s) of private law

This contribution provides an overview of the literature that can provide some conceptual categories and analytical tools for the tracing of the process of transformation of private law in the EU context from autonomy to functionalism in competition and regulation. As indicated in Part I, a defining moment for current private law practice and scholarship was the state's incorporation of private law both through the supply of private law rules, as well as of institutions for the enforcement of those rules. Under (1) we explore some of the reasons for the state's incorporation of private law are discussed. To the extent that much contemporary writing emphasizes the tendency for private law-making and law-enforcement to escape state control, we point to literature that has expressed scepticism about the relevance of the state incorporation of private law for private transacting behaviour (2). Some of this literature points to private legal regimes that govern transactions and resolve disputes for particular trading communities as evidence that there are preferred alternatives to the state supplied rules and institutions of private law. In light of such evidence, we examine the possible reasons for such opting out (3), and we ask whether such private regimes provide a template for a new kind of private law by examining the extent to which they are stable and reproducible to other contexts (4). As we will suggest, the drivers of transformation identified in Part I destabilize private legal regimes in similar ways in which they disrupt state-supplied private law. By way of one preliminary conclusion of this analysis, to the extent that there is a transformation of private law in the course of EU integration, it seems that neither a "grand" codification based on the national codifications of an earlier time, nor a multiplication of private legal regimes provide an adequate conception of the new European private law.

State incorporation of private law

As already noted in the earlier part to this contribution, a key process that frames both the common conception of private law and private law scholarship is the process through which the state became the key supplier (or at least endorser) of rules as well as institutions for the resolution of private disputes by enforcing those rules. There are a number of possible reasons for the state's absorption of the law that governs private relationships and those could be classified according to the political, economic, symbolic, systemic and pedagogic objectives for State incorporation.

First, the political objectives of the state's promulgation or endorsement of private law have to do with both the establishment and the reinforcement of the political authority of the state. State authority is reinforced not only from the mere act of the state's provision of private law rules (even if merely facilitative), but also in particular by the state acting as the principal (or even the only) supplier of dispute resolution and enforcement facilities. This in turn reduces the reliance on self-enforcement tools by private parties and may be treated as an aspect of the state monopoly on the use of coercive means of norm-enforcement. Moreover, the authority of the state is enhanced when state courts act as impartial tribunals that resolve disputes between private parties, according to state-sanctioned rules and are also in full control of the means of enforcement, particularly as compared to the prior legal and enforcement mechanisms based on status and power.

Secondly, the economic objectives of the state, through market-building, are also aided by the state's supply of private law rules and dispute resolution services. As both Saskia Sassen⁶⁶ and James Scott⁶⁷ have demonstrated, states were instrumental in the building of markets and, as such, it could be said that market integration was a key objective to which state-supplied private law could contribute when compared to the fragmentation or localism that would result from continued reliance on purely local transactional regimes and sources of transactional trust. Thus, long before the EU's claimed

⁶⁶ S. Sassen, *Territory, Authority, Rights: From Medieval to Global Assemblages* (Princeton University Press, 2008).

⁶⁷ J. Scott, *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed* (Yale University Press, 1999).

instrumentalisation of private law, the supply of state private law could be viewed as one aspect of the removal of local obstacles to trade, which in turn bolstered the state itself.

Thirdly, as Micklitz has argued, private law has come to be seen as an aspect of state symbolism as well.⁶⁸ The symbolic consequences of national private law flowed precisely from the removal of fragmentation. The unification of territory and the build-up of the symbolism of the “nation” was embodied not only in the idea of a common culture or language, but also in common rules for the ordering of citizens’ daily lives. Unified private law could be viewed as another aspect of that unity that could be legitimated by the state as a reflection of the common customs of the national community.⁶⁹

Finally, there are also systemic and pedagogic objectives that the state can pursue by seeking to endorse and schematise private law rules and institutions in a way that makes the law “teachable” to the citizenry. The systematisation objective of state-incorporation of private law creates a mutually reinforcing interaction between the state and legal scholarship. Again, as Scott illustrates with reference to the emergence of forestry science⁷⁰, the intersection of state and commercial interests led to the emergence and consolidation of scientific fields and scholarly disciplines that were of interest also to the state. The coherence and systematisation of the state-supplied private law is one of the sources of legitimacy for the law and for its supplier and it was precisely legal scholarship that could strive to produce such coherence or to systematise the law either *ex ante* or *ex post*.⁷¹

Through the eyes of the state as an embodiment of a political, national or cultural community, unity and coherence in the law that governs private party interactions can be seen to go hand in hand. Moreover, systematisation and coherence can also be done for pedagogic purposes: a systematised law is easier to teach, both to law students and presumably to the population at large, thus enhancing the fiction that the laws under which they live are known or at least knowable to the governed. The symbiosis between the state and legal scholarships is notable in Letto-Vanamo’s retelling of the German story, where the legal scholars were instrumental in the production of the BGB and the debates that led up to it. But this symbiosis can also be detected in less obvious settings, such as in the US, through Langdell’s efforts (originally at Harvard Law School) to establish law as a science, by identifying common legal principles and rules deduced from cases of various US state jurisdictions, synthesizing and systematizing them and leading to the bottom up emergence of a “national” curriculum in the fundamental private law subjects, such as contract, property and tort. Later on, even legal realist scholars such as Karl Llewellyn or Grant Gilmore would become key actors in the “codification” of the uniform sales law in Article 2 of the UCC as one of a number of academically driven exercises in producing model uniform laws for adoption by US state jurisdictions.

Scepticism about state supplied private law and institutions

Perhaps unsurprisingly, the process of state incorporation has resulted in the perceived dominance of state-supplied private law rules and enforcement institutions, particularly from the “internal” perspective of the legal profession as well as legal academia. Given that dominance, there has been a (perhaps surprising) convergence in the literature stemming from different disciplinary traditions describing the emergence (or persistence) of rules and institutions used to govern private relationships and resolve disputes in such relationships quite independent from state-supplied ones. Such scholarly

⁶⁸ See Micklitz’s contribution in H-W. Micklitz & Y. Svetiev (eds.), *A Self-Sufficient European Private Law - A Viable Concept?*, EUI Working Papers Law No. 2012/31

⁶⁹ But see J Cohen and C Sabel, (2005) ‘Extra Republicam Nulla Justitia?’, *Philosophy and Public Affairs* 34:147, 149.

⁷⁰ Scott, above.

⁷¹ See P. Letto-Vanamo, *Fragmentation and Coherence of Law – A Historical Approach*, in Letto-Vanamo/Smits (eds), *Coherence and Fragmentation in European Private Law* (Munich, Sellier, 2012) 151.

contributions paint a more general picture of private law either not falling within or escaping from state control and being enforced outside state-supplied institutions.

Some of this rethinking of the importance of state supplied private law has come from within legal scholarship, some has been inspired by work done in other disciplines. Among the external criticisms we might include anthropologists' studies of the maintenance of order, for example in colonial settings where positivist law was often transplanted by colonial rulers and yet despite this creation of a formal legal order, other forms of norm enforcement and dispute resolution persisted and were relatively more important. As Tamanaha explains, by reference to the literature on colonial and post-colonial law, while the lawyers' law in such settings often "had transplanted origins, and covered economic or government affairs or other instrumental uses of law", other areas were covered by "customary or religious law". Moreover the priority accorded to state law was only notional as "state legal institutions were relatively weak" and had a rather limited presence compared to that of other normative systems.⁷²

There were also criticism's of the significance of both state endorsed rules in the governance of private transactions and of scholarly efforts at systematising such law. In "The Death of Contract", Gilmore criticised the contract law principles of the Langdellian scholars as an "ivory tower abstraction" that lived in law schools and not the law courts.⁷³ Along similar lines, Llewellyn argued "that the rules and precepts and principles which have hitherto tended to keep the limelight should be displaced and treated with severe reference to their bearing upon that area of contact - in order that paper rules may be revealed for what they are, and rules with real behavior correspondences come into due importance".⁷⁴ While sceptical of the idea of contract law as a logically coherent system, these legal realist critics nonetheless believed that courts were important dispute resolution institutions for private disputes and, as such, important sources of private law norms and stabilizers of normative expectations.⁷⁵ On this view, courts simply needed better information in performing their socially useful function than mere reliance on the (supposedly) logically coherent principles and abstractions extracted by classical legal scholars.

More recent US literature, again from within private law scholarship, also put into doubt the significance of courts or, to be more precise, the ability to make courts better informed of the surrounding context so that they can act as effective dispute resolution mechanisms in governing private relationships. Thus, the work of Scott and Bernstein identifies groupings of traders (even in ordinary commodity markets) that have apparently sought to escape Article 2 of the UCC on the Sale of Goods altogether: by opting out and creating separate and largely self-sufficient legal regimes they demonstrate a preference of not relying on state endorsed law or state dispute resolution institutions at all. Such work followed in the footsteps of the more sociological and socio-legal work of authors like Macauley⁷⁶ and Macneil⁷⁷, who had pointed to the importance of informal norms and accommodation mechanisms – as opposed to legal rules and institutions - in governing the parties' conduct in contractual relationships. Given such observations, Scott has pithily summarized the challenge as follows: "the central task in developing a plausible normative theory of contract law is to specify the

⁷² Brian Tamanaha, *Understanding Legal Pluralism: Past to Present, Local to Global*, *Sydney Law Review*, vol. 30: 375, 384-85 (2008).

⁷³ Grant Gilmore, *The Death of Contract* (Ohio State UP, 1974).

⁷⁴ Karl Llewellyn, *A Realistic Jurisprudence – The Next Step*, *Columbia Law Review* vol. 30: 431, 464(1930).

⁷⁵ Robert Gordon, *Death of Contract*, Book Review, *Wisconsin Law Review* 1216, 1221-22, 1223 n.36 [1974].

⁷⁶ Stewart Macauley, "Non-contractual relations in business: A preliminary study", *American Sociological Review* 28: 55 (1963).

⁷⁷ Ian Macneil, "Contracts: adjustment of long-term economic relations under classical, neoclassical, and relational contract law", *Northwestern UL Review* 72: 854 (1977).

appropriate role of the state in regulating incomplete contracts”⁷⁸ In arguing for a minimalist role of the state both in supplying private law rules and in filling contractual gaps *ex post* (presumably through courts), the work of these contract law scholars has also been buttressed by the work from various disciplinary traditions pointing to the creation of private order without state or even formal law.⁷⁹

Along similar lines, though through a different lens and responding to yet another set of developments, Teubner identified transnational legal phenomena, resulting from economic globalisation, that allow actors operating across national borders to escape local legal rules and institutions sometimes to go to other national institutions (through choice of law provisions) and sometimes to escape traditional legal institutions altogether, such as *lex mercatoria*, arbitration or the creative use of corporate forms by multinational corporations.

The sum total of such contributions is to suggest that both communities that are deeply locally embedded and ones that are transnational could produce private order with relative success even without reference to or aid from state law or legal institutions. Such conclusions from various disciplinary and jurisdictional traditions leads us to at least two kinds of questions. One set of questions would focus on the extent to which the state-endorsed private law ever was a principal or even important source of default rules and enforcement institutions for private relationships. The symbolic and pedagogical purposes of state incorporation of private law identified above can be promoted even if such rules and institutions remain substantially irrelevant to private party arrangements. Was the private law then an overlay of rules that obscured all of the other modalities of structuring cooperation and resolving disputes? A second set of questions would focus on whether there are factors that have over time produced tendencies to change the form, role and function of private law or that have eroded its significance in structuring cooperation and resolving disputes.

If we switch from a focus on private to a focus on public or administrative law, the literature discloses a transformation in the state and its modes of intervention in the performance of its regulatory functions. Perhaps paradoxically in light of the foregoing analysis, such transformations when observed from an administrative/regulatory law perspective seem to suggest an increasingly important role to be played by private law even in the traditional spheres of state regulatory activity.

First, numerous authors have noted the growing appreciation of the limits of regulatory rule-making and a consequent shift away from detailed rules being made by directly democratically elected legislatures.⁸⁰ While Ladeur focuses on the administrative act in civilian jurisdictions, Taggart traces a similar developments in common law jurisdictions. In the UK, for example, where parliament is said to be supreme and sovereign, filling out the key details of legislation has increasingly over time been left to the administration (a phenomenon the beginnings of which were noted as early as the 1930s). As Taggart points out, such outsourcing was not limited to organs of the public administration, but increasingly involved private parties either as sources of input in the rule-making or, more importantly, as a kind of delegated rule-maker themselves, reflected in the emergence of concepts such as self-regulation, private regulation or regulation by contract.

Secondly, this development has been noted even in the regulated sectors of the economy, where the nature and importance of the public services supplied, as well as the relative absence of competitive forces as a discipline on market participants has traditionally suggested the replacement of private law

⁷⁸ Robert Scott, *The Case for Formalism in Relational Contract*, *Northwestern University Law Review*, vol. 94: 847, 847, 852 (2000).

⁷⁹ Robert Ellickson, *Order Without Law: How Neighbours Settle Disputes* (Cambridge, Harvard UP, 1991), but also Elinor Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action* (Cambridge, CUP 1990); Elinor Ostrom, “A General Framework for Analyzing Sustainability of Social-Ecological Systems”, *Science* Vol. 325 no. 5939, pp. 419-422 (2009).

⁸⁰ Ladeur, above.

by direct administrative controls. Writing about these sectors, Kearney and Merrill describe a “great transformation in regulatory law”. They characterize this “great transformation” in the US context as a shift away from direct controls over operators through tariff regulation (aimed at achieving public policy objectives such as equality and non-discrimination against certain users or localities) towards vertical disintegration of operators, the aim of promoting or strengthening of competition. Such a transformation should be characterized by growing reliance on competitive forces or competition law as a discipline on suppliers and on private law (contract, tort and property) mechanisms to govern relationships between suppliers and users.

Thus, there has been an interesting conjunction in the literatures examining the significance of traditional private law and of state intervention. On the one hand, state intervention is increasingly said to be outsourced and the processes of privatization and liberalization of markets expected to replace direct regulatory interventions even in the more sensitive services sectors with relationships governed by private law. On the other hand, much of the literature exploring the relevance and direction of private law itself questions the importance of traditional state-supplied private law and institutions. This literature comes under the broad umbrella of “private law beyond the state”⁸¹, which discloses two dimensions of escape – private law beyond state institutions (i.e. even in the domestic context) and private law beyond the boundaries and jurisdiction of any one state (i.e. in the transnational context). Our purpose is to explore how the factors identified in the first section influence the form and function of private law and to speculate on the form that private law might take as a result.

Reasons for opting out or staying out of state-endorsed rules?

As a starting point, we might begin with the process of “re-privatisation” of private law, as described, for example, in Bernstein’s analysis of various private legal regimes of traders, who “opt out” of the publicly provided law and institutions. Presumably, the reason that they decide to opt out of the state supplied law and institutions lies in her assessment that the “institutions that create and administer” the “private legal system work extraordinarily well” allowing transactors to “maintain remarkably cooperative contracting relationships”.⁸²

Taking for the time being this assessment of the relative success of the private legal regime, the first question we might ask is what could be the reasons that such a legal regime could operate better than a state supplied one. One explanation might stem from peculiarities of the community that engages in cotton trading that Bernstein studied that enables these traders to operate such a private legal system which is an institutionally preferred solution to the state supplied private law. At the same time, given the proliferation of private trading (or “silo” regimes to use the metaphor introduced) regimes that distance themselves from traditional public rule-making and rule-enforcing institutions described in the earlier part of this contribution, it could also be that the reasons are not peculiar to the cotton and diamond trading communities described by Bernstein. Specifically, trading communities might prefer private law regimes that are more proximate to them and self-sufficient.

Proximity

A key factor that could make such private legal systems a relative institutional success is the proximity or closeness to the transactors and the types of problems they encounter in transacting on a daily basis. We could say that the private law rules and institutions are more tailored to the transacting context and there seems to be some evidence of such a preference from Bernstein’s work.

⁸¹ Michaels/Jansen, “Private law beyond the state? Europeanization, globalization, privatization”, *American Journal of Comparative Law* 843-890 (2006).

⁸² Bernstein, L, ‘Private Commercial Law in the Cotton Industry, Creating Cooperation Through Rules, Norms and Institutions’ 99 *Michigan Law Review* vol 99: 1724 (2001), pp. 1725, 1786.

Both the procedural and substantive rules that are applied by the arbitrators are tailored to the context in which traders operate: the proximity of the PLS to the traders reinforces its self-sufficiency. To take for example procedural rules, such as limitation periods or discovery rules; they reflect the traders' need to resolve disputes quickly and their preference for some type of performance over other remedies, as well as not to reveal firm-specific information. This is also reflected in the rules on remedies and their calculation. The substantive rules are of a bright-line variety, thus avoiding broad standards such as reasonableness or suitability, again made possible by their tailoring to the industry context⁸³: the repetitive and predictable nature of the transactions, the fact that even unpredictable events that might affect the crop (such as the weather or other factors) or a specific trader's ability to perform are both foreseeable and commonly observable to all participants in the trade.

Since the participants are also themselves the rule-makers in such a community, it means that the revision of the rules in light of their unsuitability or in light of changing circumstances can occur more or less immediately, in real-time or at least with minimum delay. This does not mean that there are no disagreements about the rules in such a community, but presumably such disagreements can be more easily proceduralised and contained given the tailoring of rules to problems and given another closely related feature of the PLS: namely that it is self-sufficient and its rules need not be applied to other trading contexts.

Self-sufficiency

The proximity of the PLS to the transactors also leads to its relative self-sufficiency. The efforts made to keep the rules current, to communicate the content of the rules to the participants and make them understand both the normative expectations created and how they are applied by the DR bodies allows this self-sufficient private legal system to operate largely in the background and yet to be an effective forum in cases of an impasse. On the limited set of issues that would not be easily verifiable to an independent arbitral tribunal, such as the grading of the quality of the cotton,⁸⁴ it is the integrity and reputation of the supplier that is crucial, not only in supplying the contracted-for grade but also in acting cooperatively to find timely and adequate resolution in cases where they are unable to do so.

This does not mean that trading communities have a preference for purely informal rules and enforcement mechanisms.⁸⁵ The private legal system (PLS) described by Bernstein is not purely informal; it is made up of formal rules as well as dispute resolution institutions supplied by the relevant associations of traders. These institutions deliver formal decisions, which can more easily be made available and circulated to all the participants in the trade, given their salience to their daily activities and livelihoods.⁸⁶ Such decisions create certain normative expectations and the institutions themselves are proactive in communicating the decisions, outcomes and normative expectations generated by the PLS.

While the enforcement of the dispute resolution (DR) awards delivered by these institutions is generally also possible through the public system as arbitration awards, this is generally unnecessary. It is unnecessary because of the operation of informal forms of social pressure through ostracism or exclusion from the trading associations, which is sufficient for the losing party to comply. The prospect of continued maintenance of both social and economic relationships induces actors to both avoid going back on the commitments undertaken, to act cooperatively in resolving problems that arise, and to comply with the decisions of the formal DR bodies.

⁸³ Id, p. 1736 ("given the amount of detail in the trade rules, cases involving contractual gaps are uncommon").

⁸⁴ Id, 1745.

⁸⁵ See Svetiev, Y, Dimensions of Self-Sufficiency, EUI-Law Working Paper 2013/05 (ERPL-05), <http://hdl.handle.net/1814/27196>

⁸⁶ Galf-Peter Callies and Moritz Renner, Between Law and Social Norms: The Evolution of Global Governance, *Ratio Juris* vol. 22: 260-280 (2009).

As Bernstein acknowledges, it is the informal and social mechanisms of cooperation and control, whereby actors seek to avoid gossip, ostracism and exclusion and to maintain their reputation as good and reliable traders, which plays the dominant “enforcement” role in the private legal system of the Southern cotton traders. Moreover, the suggestion is that the formal legal institutions cannot substitute the role played by the informal reputation mechanisms. In other words, the formal institutions of dispute resolution operate in the background, or alternatively the social forces that maintain cooperation can truly be said to operate in the shadow of the formal regime. The number of cases in which parties resort to the dispute resolutions is exceedingly small by comparison to the large number of transactions entered into.⁸⁷ The formal PLS institutions are also apparently supported by their embeddedness in the industry: the adjudicators are themselves drawn from the community, thus not only are they intimately familiar with the transactions and issues that arise within them, but they are also subject to the gaze and social sanctions of the community to which they belong, rather than any procedural rules of conduct or formal appeal.

A state-supplied “cotton code”?

Taking into consideration the description of the workings of the private legal system and taking for the moment for granted Bernstein’s assessment that it provides a successful and effective legal regime, we might ask could the functions of the PLS be performed by the state supplied private law system?⁸⁸ Based on the foregoing analysis, the likely answer is that such a state-supplied code would not be able to replicate all the beneficial aspects of the private system for a few reasons.

If the state supplied private law aims to be transversal, i.e. to apply across different sectors, the rules would not be able to be closely tailored to the transacting problems and needs of the particular community. To take one example, in some sectors traders might prefer performance, as they do in the cotton sector, in others, traders might prefer to obtain damages, since they can easily obtain alternative sources. Similarly if non-performance and harm in an industry is apparent quickly, short limitation periods will work and be preferred and not otherwise. One way in which legislators may typically deal with these problems is to draft broadly-based standards, which is precisely what unsettles normative expectations, opens up greater scope for interpretation such that resort to the courts becomes attractive to take advantage of the interpretive uncertainties.

Moreover if state law-makers attempt to differentiate and enact special rules, such as a cotton traders’ private law code, a key constraint is the distance of state actors from rule-making, as well as the dispute resolution process to enforce the rules. If the rules are to be enacted by legislators and implemented through courts, given that they are not participants in the trading regime, they could be subject to strategic behaviour through lobbying and through partial disclosures, whereby actors might seek to affect the content of the rules or the way they are applied to their own advantage in a way that may be impossible or untenable in the transactors’ own interdependent social and economic world of high mutual observability.

For similar reasons, state supplied private law is unlikely to be as widely disseminated and understood among the participants. In the cotton trade, as described by Bernstein, traders do not need lawyers to understand the rules, nor to write them. Therefore, processes of “translation” are completely avoided.⁸⁹ This is also what allows the background rules to be nimble: participants in the trade can relatively quickly respond to identified inadequacies in the rules and then seek to disseminate quickly and stabilise new normative expectations within the community.

⁸⁷ Bernstein, above, 1762.

⁸⁸ Consider, for example Dagan’s suggestion that state supplied private law can be replicated sectorally, or on an industry or functionality basis. Dagan, H, *Autonomy, Pluralism and Contract Law Theory*, *Law and Contemporary Problems*, vol. 76(2): 19-38 (2013).

⁸⁹ I. Lianos, ‘Lost in Translation’, (2009) 62 *Current Legal Problems* 346.

Given the nature of the industry and the deep enmeshment of all participants in the trade, in social relations, in dispute resolution, the combined effect of the informal cooperation mechanisms and the background formal system is to make as much of the conduct observable to everyone and to avoid misunderstandings. In the regime as described, all the different mechanisms of sustaining cooperative behaviour, as classified by Elster⁹⁰, work simultaneously and in mutually supportive ways. Making non-cooperative conduct observable to both the social and economic world a trader inhabits means that it can trigger social norm enforcement (through social condemnation and opprobrium), as well as withdrawal of cooperation due to quasi-moral norms of reciprocity or as punishment for defection affecting the deviating actor's incentives through future economic gains. Moreover, the entanglement of the social and economic worlds, as well as the historical practice of passing on the trade within the family means that these norms become internalised as actor preferences to act honourably, or to act reciprocally, or to not go back on their word or deliver poorer quality cotton (it matters little how it is characterised) at least vis-à-vis those they perceive to share such norms with. In other words, the code of norms becomes inseparable from their identity.

Stability, reproducibility and the drivers of transformation

From the perspective of the transformation of private law, one question that arises is whether given the apparent success, such a PLS could offer a template for the elaboration of a hybrid private-regulatory law (particularly in light of the description of the “silos” in the previous section with their own rules, as well as DR mechanisms). Some authors in the American literature⁹¹ but also beyond,⁹² see these kinds of PLS as models or templates for the contextualization of private contract law to different transactional settings. There are two possible objections to this argument. The first is to question whether the success of PLS in governing transactions and creating normative expectations as reported by authors such as Bernstein is more apparent than real, or whether it fails to take into account externalities and dysfunctions obscured from view. The second possible objection is to take the claim that these regimes are successful for granted, but to ask whether a PLS, such as the one described by Bernstein, would be stable and whether it would be reproducible in other settings. For the time being we take up this second line of inquiry, particularly through the lens of the effect of the “drivers of transformation” identified above on the PLS.

On the issue of stability, Bernstein observes that the cotton industry regime she details is quite long standing, that it has existed “for over a century”⁹³, or “since the mid-1800s” in that time “surviving widespread social change ... and substantial changes in the background legal regime”⁹⁴. As such, it would be fair to say that it is not that the cotton traders have “opted out” of the regnant UCC state-supplied regime⁹⁵, but that in fact they never opted in. This also suggests that a state supplied regime made up largely of default rules can allow the emergence or maintenance of such a regime, assuming it does not create a sufficient temptation for traders to try to strategically use the court's distance which seems to be another kind of defection that the tight community need not worry about.

The longevity of the system is evidence in favour of its stability and resilience. Yet Bernstein herself identifies a number of potential destabilising forces to the PLS in the cotton industry and shows how

⁹⁰ Jon Elster, ‘Norms’ in Peter Hedström and Peter Bearman (eds), *The Oxford Handbook of Analytical Sociology* (OUP 2009) 197.

⁹¹ See Scott, above.

⁹² Eg, Teubner, “After Privatization: The Many Autonomies of Private Law”, *Current Legal Problems* (1998) 51, p. 393, at 394 (“transform private law itself into the constitutional law of diverse private governance regimes, which will amount to its far-reaching fragmentation and hybridization”). See also, Svetiev, *W(h)ither Private Law*, above.

⁹³ Bernstein, above, p. 1786.

⁹⁴ *Id.*, 1725.

⁹⁵ *Id.*, 1724.

the (self-sufficient) system can aim and manage to contain such forces by (re)integrate them into the regime.

Economic integration: incorporating external actors

The presence of external actors in the trading relationships suggests that the regime is not entirely self-sufficient, which is what makes the formal and informal norm enforcement mechanisms mutually supportive, and this is an obvious threat to the stability of the PLS. One example of such regime non-self-sufficiency can stem from the financing of transactions, when such financing comes from external sources. Yet in the cotton trading regime described by Bernstein, financing also depends on the commercial reputation of the trader within the community. Thus Bernstein suggests that the lion share of transactions was “financed by one of three banks”, with merchant banking being “personal” and bankers aiming to “become intimately connected with the merchant’s character, background, experience and conservatism”⁹⁶. Not only is there any incorporation of financial actors into the system, but also there is an internal “implicit” industry bankruptcy regime which increases the likelihood that “intra-industry debts” would “eventually be repaid”, further embedding the actors (including financial actors) in the system and reducing incentives for end-game opportunism.⁹⁷

Traders also engage with other actors external to the regime in a world of increasing integration, both within and beyond the boundaries of one nation state. Again, to maintain self-sufficiency various attempts and strategies are reported to incorporate such external actors by extending the regime.

One such strategy is to limit trade with external actors to be conducted through a domestic agent who is embedded and part of the self-sufficient legal regime. This has benefits for external actors since they can themselves tap into the rich information base available, including about the capabilities and reputations of local actors.⁹⁸ This can extend both the formal and at least some informal mechanisms (transmission of reputation information) to external actors.

While trading with more distant partners may mean that social and communal bonds will be considerably weaker, the institutions of the self-sufficient legal regime can respond in ways that seek to replicate such bonds more widely. Thus, Bernstein reports that the cotton associations have “sponsored a variety of activities designed to re-create and maintain the types of interconnected business and personal relationships”, including sponsoring events that stimulate personal interaction not only among traders, but also their families, in that way broadening and extending the sources of reputation information and gossip networks which act as informal support for trade.⁹⁹

When the group becomes larger and more distant and disparate, however, it becomes more difficult for trust-relevant information to spread purely through direct mutual observation and informal mechanisms such as gossip or ostracism. Thus, the cotton associations develop also “more formal methods for transmitting reputation information” such as circulars to members and information bureaus¹⁰⁰. These are supported by an “active trade press” which covers industry events, including based on information from the banks about their industry customers.¹⁰¹

⁹⁶ Id, 1747-48.

⁹⁷ Id, 1738-39 n.72.

⁹⁸ Id, 1766 n.173.

⁹⁹ Compare this to the literature on the importance of epistemic communities as a source of convergence in various fields of EU law. Eg, van Waarden, F. and M. Drahoš, ‘Courts and (Epistemic) Communities in the Convergence of Competition Policies’, *Journal of European Public Policy*, vol. 9: 913 (2002); Vauchez, A., ‘Euro-lawyering, Transnational Social Fields and European Polity-Building’ in A. Vauchez and B. de Witte (eds) *Lawyering Europe European Law as a Transnational Social Field* (Oxford, Hart, 2013).

¹⁰⁰ Id, 1752.

¹⁰¹ Id, 1753.

If we move from the purely local, to the increasingly globalized context of the contemporary cotton trade, the picture becomes far more complex. Authors who have examined in detail the transformation of the cotton trade going into the 21st century have underscored the importance of the governance of quality standards in the context of economic globalization and technological change.¹⁰²

Managing technological change

Technology can have different types of influences on the group of traders and on the viability and stability of a PLS.

Some effects are already apparent in the above discussion. Changes in transportation technology that lower costs can make it viable to trade with more distant parties. At the same time changes in dissemination and transportation technologies can make it possible for reputation and other trust relevant information to be more readily disseminated to such parties.

Moreover, some even more disrupting influences of technological change on the PLS are already hinted at by Bernstein. Thus, she notes the potential disrupting effects on the PLS of the introduction of an instrument, which objectively grades the quality of the cotton ("high volume instrument"). Given the high level of subjectivity of the quality grading of the cotton makes quality one of the least contractible features in these transactions, which is precisely what necessitates reliance on the informal trust mechanisms through the value of the reputation or the use of ostracism. The availability of any type of technology which provides an objective assessment of quality makes it possible to extend the group of traders substantially, making informal trust and reputation less relevant at least in this dimension of the contracting relationship.

Technological change disrupts the self-sufficiency of the regime in other ways as well. It introduces other actors (the producers, operators and servicers of the new technologies), as well as other issues that have to be provided for either in formal contracting documents or in the background default rules of contract or tort law. In the concrete example, the reliability of the machine grading technology is one obvious issue, as well as the allocation of the responsibility for losses in cases of grading failure. Here again, the strategy may be to either integrate these issues and actors into the PLS rules or alternatively to rely on publicly supplied defaults.

Technological change can influence the chosen forms of business organisation as well. Thus, Bernstein reports that the quality grading instrument in the cotton industry was originally employable only for large-scale transactions, which might induce changes in the forms of business organisation. The private regime based on private rules and informal mechanisms emerged in a context of small family run or privately held firms, often passed on from one generation to the next, where learning the trade, the normative expectations of the community were coterminous with the development of one's identity so that firms could be more or less identified with individuals. More complex institutional or organisational arrangements make purely informal personal bonds quite difficult due to problems of delegation within organisations, and the consequent problem of the attribution or characterisation of conduct of individual actors.¹⁰³ Are the employees of such firms subject to the same social pressures and incentives as their owners? A tendency towards larger firms may increase the relevance of the interaction of the corporate law regime with whatever private law system, and that reliance on

¹⁰² See Quark, A. *Global Rivalries: Standards Wars and the Transnational Cotton Trade* (University of Chicago Press 2013), p. 29 ("These tasks for the governance of quality standards must be conducted regardless of whether trade in cotton occurs within a face-to-face market or clear across the globe. However, these tasks and the social relationships that they embody can take distinct form in different locations, at different historical moments, and in relation to the changing economic organization of trade.")

¹⁰³ See Svetiev, Y., *The Limits of Informal Law: Enforcement, Norm-generation and Learning in the International Competition Network*, in *Informal International Law-Making*, Joost Pauwelyn, Jan Wouters & Ramses Wessel, eds. (Oxford, Oxford UP, 2012).

corporations can have its own consequences for the form and function of the private law of transactions. Similarly, if the technology becomes cheaper and more widely available the trend could be reversed, which means any rules developed to deal with this problem would come under pressure to accommodate further changes.

Changes in technology can trigger other changes in production methods, such as the employment of “just in time inventory methods”¹⁰⁴, which de-emphasise reliance on inventories. At the same time puts additional stress on relationships with suppliers making seamless supply of the correct inputs even more important and reducing the relational flexibility that can be extended to them. This could result in pressures to integrate or consolidate, or as Deffains and Winn report, the development of direct channels of communication as between different firms’ production systems, leading to other private law issues, such as those related to electronic contracting.¹⁰⁵

In the absence of personal bond trust in such settings, can state-supplied private law institutions supply such trust as an alternative? Here again, Deffains and Winn’s account suggests some scepticism. They recount the EU’s efforts at the establishment of an electronic signatures regime as a mode of resolving the trust problems in electronic and distance contracting and the fact that this project was largely judged to be a failure. By the time the technical knowledge was gathered, a solution developed and translated into rules acceptable to all participant jurisdictions, the technology and the privately supplied mechanisms of trust had already advanced further. Again it seems that private parties had no reason to opt-into this state-supplied regime and stayed out of it.

This effect of technological change on the conduct of transactions in markets and the consequent ability of the state to supply either facilitative or mandatory rules to govern or regulate such transactions is nowhere more evident than in the capital or financial market. In seeking to distinguish the contemporary situation from earlier stages of relative capital mobility, Sassen identifies as a key factor “the transformative impact of the new information and communication technologies, particularly computer-based technologies”¹⁰⁶. The key effects of such digitization include the “accelerated growth of finance”, the “electronic linking of markets”, the “sharp rise in innovations”, all of which combine to produce an “increased complexity of operations” and to facilitate the further “linking of different financial markets.”¹⁰⁷ In particular, digitization technologies introduce in financial markets properties such as instantaneous transmission, interconnectivity and speed. The digitization of financial instruments in turn can lead to decentralised access by a much larger number of participating investors.¹⁰⁸ Such processes pose challenges for the state, by both reducing the effectiveness of its macroeconomic policy levers,¹⁰⁹ but also on its ability to facilitate and regulate the transactions themselves, so as to either tax them, let alone to offer protections to weaker or less knowledgeable parties. But at the same time, the effect of such technologies is to disembed financial actors from the private trading orders, such as the one described by Bernstein. Some of the dysfunctions in financial markets of recent years might reflect precisely this growing self-sufficiency or disembedding of the sector (for which the concentration of financial actors in a few key centres around the globe, as described by Sassen, is an apt metaphor).

¹⁰⁴ Bernstein, above, p. 1786 n.233.

¹⁰⁵ Deffains B/Winn J, The effects of electronic commerce technologies on business contracting behaviors in Brousseau E, Marzouki M, Méadel C (eds), *Governance, Regulations and Powers on the Internet* (Cambridge, Cambridge UP, 2012).

¹⁰⁶ Sassen S, *Territory-Authority-Rights: From Medieval to Global Assemblages* (Princeton UP, 2006), p. 249.

¹⁰⁷ Ibid.

¹⁰⁸ Id. at 252-253.

¹⁰⁹ Id. at 261 (control over domestic lending, money supply or interest and exchange rates).

Civil society

Civil society – or the safeguarding of the public interest beyond organised mass politics - can also both support certain templates of private law-making and enforcement and put transformative pressures on them. One key effect of civil society is on the inclusion (or exclusion) of actors, values/perspectives and considerations both in private legal regimes and in state political processes for law-making or judicial processes of law enforcement.

In the PLS reported by Bernstein, for example, civil society organisations or groups can from one point of view be seen as a supportive force buttressing the private legal regime. In the most close-knit version of the private legal regime, civil society, economic life and intimate relations are closely interlinked so as to be almost indistinguishable. If the informal forces of social trust have to extend beyond the highly observable context of the close-knit community living in the same street or town, civil society organisations and engagement formats can provide the opportunity to extend the intermingled social and economic worlds of the transactors to other domains in their lives. Thus festivals, clubs (including for “wives” and families), even trade-related media can be spaces that supply heightened mutual observability, in turn enhancing social norms and reciprocity-based enforcement mechanisms for the norms of the private regime. The civil society organisations provide spaces and formats where information can be shared about transactions and transactors and where gossip or ostracism can be meted out against defectors.

On another view, however, civil society can also disrupt these regimes to the extent that civil society groups that buttress the PLS are based on exclusionary notions of social identity and solidarity. Explaining the significance of an “annual civic cotton carnival”, Bernstein cites sources that the carnival was sustained by the “business and social elite” many of whom were “cotton men”. However, it became subject to “charges of class and racial elitism”, and gradually these kinds of clubs and events dissolved in the aftermath of the civil rights movement in the American south, as they came to be seen as the “embodiment” of the region’s “social, economic and racial divisions”.

This brings us to the theme of inclusion and exclusion. Both organized politics and civil society beyond organized politics can exclude certain groups, interests and perspectives from the processes of rule-making and rule-enforcement, as well as provide channels for the incorporation of those excluded voices.

It is worth noting that in the cotton private legal regime described by Bernstein, it is not the relative equality of bargaining power that ensures a relatively laissez faire regime functions apparently smoothly for all involved: there are considerable differences in size as well as situational bargaining power (through hold up opportunities) that could be exploited by contracting parties. Instead it is all of the mechanisms of making conduct widely observable, together with some broadly defined commonality of interest in keeping the economic and social world going that are crucial and avoid the need for excessive protective intervention through mandatory rules¹¹⁰. Yet both the PLS and the civil society associations that undergird it embody the region’s social, economic and racial divisions. It may well be that the regime works because it systematically excludes certain groups and perhaps also perpetuates their discrimination or even exploitation.

Similar effects of civil society can be seen in the transformation of the state supplied private law, from (the ideology of) the largely facilitative, default rule based contract law to one that must become more attuned to concrete problems in contracting relationships, including information, power and economic asymmetries. Civil society movements in western democracies, such as the consumer movement to take one prominent example, emphasized the disparity of power or information in contracting relationships also focused on the ways in which those relationships were different and in need of

¹¹⁰ See in this context also James’ description of the highly localised property use and ownership regimes in traditional, or better yet non-Western societies. James, above.

special rules, which are more protective and intrusive. Such movements sought changes in state law to their aid. The extent to which such efforts were a success in substance rather than form is a question of a large and voluminous literature on both sides of the Atlantic, but as Bernstein has elsewhere argued formal mandatory protective ex ante rules or ex post remedies that favour weaker parties in themselves may not be sufficient, as they either raise prices for them or can otherwise lead to their exclusion as contracting parties.¹¹¹ Whether civil society movements could have sought to instead protect weaker members of society by embedding them into limited regimes of high observability and a broad identification of a common framework objective is also a difficult counterfactual question; in the context of the mass political mobilisation of the time, producing a change in the law seemed like a more immediate and immediately tangible result.¹¹²

Civil society, group identities and bonds of social trust

Exclusive civil society organisations that stem from or match onto existing trader groups can bolster group identity and bonds of social trust. Bernstein's collocutors often refer to trust and honour in their business transactions as an indelible characteristic of the "southern *man*" and cotton trader. In doing so, the collocutors invoke the idea of the common cultural basis of trust and of social norms, which also can support the argument that private law norms themselves are a reflection of pre-existing common community norms and bonds. As outlined in the first section of the paper, this belief has held considerable sway and has been used throughout the period of the consolidation of the nation states, leading to sustained efforts at homogenisation as a key aspect of community building, despite the considerable evidence of trading, exchange and cooperation in more pluralistic environments.¹¹³

Note however that it is difficult in a context such as a cotton-trading regime in a particular locality, as the one described by Bernstein, to say which came first, commerce or cultural and social bonds¹¹⁴. It seems just as plausible that whatever social bonds existed, even if minimal or weak to start off with, were developed and strengthened by the intermingling of the social and economic worlds of the transactors,¹¹⁵ giving them helpful learned heuristics and habits even for going through life, helpfully restricting their autonomy and choice, including the option of pursuing opportunistic conduct.¹¹⁶

Maintaining the self-sufficiency of the regime, apart from the apparent exclusion of the un- or underrepresented groups in the locality, can also have negative effects for the transactors themselves because this implicates the exclusion of other relevant knowledge or opportunities for collaboration: a self-sufficient regime may also be self-limiting in the face of competitive pressures. As Van Hoecke argues "the higher the systemic autonomy, the lower the autonomy as to content". By opting out of outside knowledge or restricting such interaction, transactors can become exceedingly good at current

¹¹¹ Lisa Bernstein, Social Norms and Default Rules Analysis, *Southern California Interdisciplinary Law Journal*, vol. 3: 59, 79-81 (1994).

¹¹² In the EU setting, the possibility of protection by embedding was further constrained by the fact that the protection of social interests, such as that of consumers, was pursued through harmonisation legislation which had the objective of removing the obstacles to a single market, while simultaneously bolstering the legitimacy of EU action. As a result, civil society organisations apparently followed EU legislative action, rather than the other way around.

¹¹³ Teubner, G 'Global Bukowina: Legal Pluralism in the World Society', in G Teubner (ed) *Global Law Without a State* (Dartmouth, Aldershot, 1997).

¹¹⁴ cf Putnam, R. et al, *Making Democracy Work: Civic Traditions in Modern Italy* (Princeton UP, 1993).

¹¹⁵ On the idea of the emergence of bonds of trust and reciprocity in the course of transacting, see the contributions of R. Gilson, C. Sabel, R. Scott, 'Contracting for Innovation: Vertical Disintegration and Interfirm Collaboration', *Columbia Law Review* 109: 431 (2009) and also Gilson, et al, Braiding: the interaction of formal and informal contracting in theory, practice, and doctrine, *Columbia Law Review*, 110: 1337 (2010).

¹¹⁶ Granovetter M., Economic Action and Social Structure: The Problem of Embeddedness, *American Journal of Sociology*, vol. 91: 481-510 (1985).

practices, but have no knowledge to confront radically different environments as suggested by the literature on disruption in business strategy.¹¹⁷

It seems clear that having an exclusive private law system aggravates this effect, but perhaps an even more important question is whether a more generalist private law, such as the state supplied one, would help such groups disrupt themselves? On the one hand, it provides them access to knowledge, such as through court precedents or generalist lawyers, about transactional practices in other sectors. On the other hand, this is not real-time information and it is translated through the eyes and needs of lawyers and the timetables of courts, therefore its salience would be questionable, particularly if we assume that transactors seek to keep transactions running seamlessly, rather than turning them into legal disputes. This may lead us to think about the role of other actors, including the role of civil society or even the state administration in this process of dissemination of good or just alternative practices, but this is a question for another day.

The drivers of transformation and the net effect

The foregoing problems and issues created by the drivers of change turn out to be potent forces of instability in the trading relationships supported by the private legal regime. Similar factors have been explored in the literature on Internet governance that focuses on the creation and regulation of groups, including groups of traders, via the Internet.¹¹⁸

Tying it to the themes explored above, we could say that the Internet radically reduces cost of interacting and transacting even with parties at great distances from each other, who might be completely unknown to each other and share no pre-existing community bonds of trust. Such interactions among private parties pose the question about the form and function of private law in governing those interactions: do we need either a social basis or a state-supplied private law to be able to transact in such an environment.

The tentative answer appears to be that neither is strictly necessary. The literature on Internet governance suggests that communities can be created even among very disparate members, starting from health support fora focused on specific illnesses¹¹⁹ to social production collectives¹²⁰ and the internet can provide a platform for the organisation of civil society groups across national borders and with explicitly political ambitions.¹²¹ From a private law perspective, it is relevant that such groups – even when their objective is not economic – endeavour to create and communicate normative expectations, by engaging in joint rule-making and rule-revision. In such processes of private rule-making, classical democratic criteria, such as majority voting, do not appear to be universally applied; in fact it seems they are rarely used, opting instead for mechanisms of repeated deliberation that aims to bring almost everyone on-board (what Calieff and Zumbansen might call a “rough consensus”¹²²). Moreover, both in rule-making and in dispute resolution, even if a formal group administrator has the

¹¹⁷ Clayton Christensen, *The Innovator's Dilemma: When New Technologies Cause Great Firms to Fail* (Harper 1997).

¹¹⁸ Interestingly enough, in the context of the failure of the project of the formation of a European civil code, the one deliverable that the Commission has put on the table is an (optional) code to govern Internet sales transactions, notwithstanding the previous experience of the regulation of electronic signatures recounted by Deffains and Winn, whereby the change in technology and bottom up mechanisms of trust superceded the EU legislation by the time it was promulgated.

¹¹⁹ Akrich M/Méadel C, *Policing exchanges as self-description in internet groups*, in Brousseau E, Marzouki M, Méadel C (eds), *Governance, Regulations and Powers on the Internet* (Cambridge 2012).

¹²⁰ Yochai Benkler, *The Wealth of Networks: How Social Production Transforms Markets and Freedom* (New Haven, Yale UP 2006).

¹²¹ Aguiton C/Cardon D, *The coordination of international civil society and uses of the Internet* in Brousseau et al.

¹²² Gralf-Peter Calieff and Peer Zumbansen, *Rough Consensus and Running Code: A Theory of Transnational Private Law* (Hart 2010) (adopting a metaphor of the Internet Engineering Taskforce to describe its own principle of decision-making in problem solving).

technological capacity to impose a solution hierarchically, such opportunities are not exercised as they are perceived to be illegitimate, perhaps because such administrators are not invested with any special mark of authority and perhaps because the costs of further communication and deliberation appear to be low. There being neither pre-existing identity nor authority, Akrich and Meadel suggest that it is precisely the process of rule-making and rule-revision about their interactions that gives such communities their identity, even if their membership is inherently highly heterogeneous. Moreover, such communities appear to be effective at the goals that they identify for each other, whether it be the production of social value (such as Wikipedia),¹²³ or – even if sometimes dystopically – in communicating information and influencing the behaviour of participants.

We might well ask what is it that ensures members' compliance with the rules elaborated in such groups given the absence of formal enforcement mechanisms? One answer that appears from various accounts of online governance suggests that the high observability of interactions via the online platforms plays a role, which means that different forms of opprobrium and ostracism can be created.¹²⁴ At the same time, given that members are not consigned to such groups either by birth or some other mark of identity, exit is easy. When there exist many potential transactors or other parties with whom to engage, there is less incentive to try to make things work in the current group. Precisely such tendencies towards exit and further tailoring can also produce excessive fragmentation, as shown by Elkin-Koren in her study of content licensing approaches for user-generated content on the Internet.¹²⁵ She also astutely notes the problems and limitations associated with such fragmentation in "private law", including lowering interoperability, lessening access to disruptive information and inhibiting the pedagogic function of a coherent legal regime.

Conclusions

This contribution provides a review of some of the literature that examines processes of norm-making and norm-enforcement within different communities that largely operate independent of State structures or institutions. Some of the contributions suggest that notwithstanding the efforts of state legislators and legal scholars to produce magnificent legal edifices, sometimes these can turn out to have few if any normative consequences for the ordering and governance of private relationships. Both in transnational but also in domestic contexts, parties can frequently opt out of the state-supplied private dispute resolution fora because they can write rules and resolve disputes more effectively or more expeditiously otherwise.

To speculate towards an extension to the European setting, at least two consequences may follow from this broad overview of the literature.

The first consequence is for the likely future of European private law. Namely, we might not be particularly optimistic about the likely future normative relevance of a legislatively endorsed code, drafted at great distance from transactors, by a group of legal academics seeking to identify commonalities from the already highly abstracted private law regimes of the Member States. Scholars like Legrand might say that such a task is impossible without doing violence to the variety in national traditions or the common law more specifically. But scholars of transacting behaviour might also say that the result could turn out to be irrelevant. The fact that in its latest reincarnation the proposal has been termed an optional instrument perhaps simply reflects nothing else than a deep concession that

¹²³ Benkler, above.

¹²⁴ See Akrich/Méadel, above.

¹²⁵ Elkin-Koren N, Governing access to user-generated content: the changing nature of private ordering in digital networks in Brousseau et al., above.

state-supplied private law is always, in some sense, optional. The EU legislator might find that not many decide to opt in if the law does not correspond to their problems.

The second consequence may be about the EU and its role in the Europeanisation of private law. Excluding the unsuccessful codification exercise above, the EU interventions have been piecemeal and instrumentally-motivated, giving the EU *acquis* the famous “Jack-in-the-box” quality, as described by Wilhelmsson.¹²⁶ Whatever the original motivations of such interventions, they have had unforeseen and unforeseeable ripple effects, producing various experiments of a hybrid nature in both dispute resolution mechanisms and procedures and in the embedding of private regime rule-making into alternative (in the sense of non-legislative) but still publicly-minded structures or processes. As argued in the first part, however, many of these structures and processes are relatively opaque not only to the EU citizen, but also to scrutiny by civil society and by the scholarly community. Codification efforts may only further obscure this profound diversity and on-going experimentation. It seems there is little need for *ex ante* coherence in the form of further codifications and a burning need for *ex post* coherence by way of monitoring.

These contributions provide some preliminary thoughts and analytical categories that might be useful for the analysis and tracing of the process of transformation of private law and the drivers for that process, which is the question to which we intend to turn next by reference to the empirical material gathered in the project.

¹²⁶ Thomas Wilhelmsson, Jack-in-the-Box Theory of European Community Law, in *Dialectic of Law and Reality: Readings in Finnish Legal Theory* 437 (Lars D. Erikson et al. eds., 1999).



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