

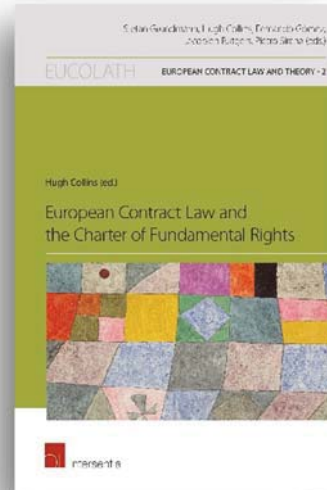


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# THE CONSTITUTIONAL TRANSFORMATION OF PRIVATE LAW PILLARS THROUGH THE CJEU

Hans-W. MICKLITZ\*

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## 1. PREMISES

The person, contract, tort, property and remedies<sup>1</sup> form the ‘pillars’ of each and every private law system, whatever its origin might be, continental civil law or common law, and however it might appear, traditional private law or regulatory private law.<sup>2</sup> These pillars are subject to a deep transformation, that should be termed ‘constitutional’ and that is captured in Duncan Kennedy’s distinction between the three globalisations of law and their impact on legal thought.<sup>3</sup> The focus in this chapter is placed on European law and on the European Union (EU). EU law and the Court of Justice of the European Union (CJEU) are the drivers behind the transformation. This focus is justified because the EU is not a state, because the EU has no European constitution and no European Civil Code, and because the CJEU is neither a constitutional court nor a supreme court. In other words, the EU is a very particular and unique entity containing a little bit of everything that makes for a state and a sovereign legal order. Thus, I claim that the ‘constitutional’ transformation of the pillars of private law through the EU and the CJEU differs in form and in substance from seemingly comparable processes in at least some of the Member States. Personally, I take as plausible the notion of the experimental character of the EU as a new state formation. This perspective views the EU legal (dis)order as a new format for a legal order, with a court that, owing to its particular position in the multi-level structure of the EU, enjoys a degree of freedom and discretion that allows the Court to break boundaries that national courts (whether their position is constitutional or otherwise) tend to defend. However, such an understanding implies equally that my findings are tentative and premature.

This chapter rests on previous research. I have written extensively on private law as economic law, on the EU as a market state, on the experimental character

<sup>1</sup> In the meaning of concepts, the understanding of what a contract etc. is, see L. AZOULAI, ‘The Europeanisation of Legal Concepts’ in U. NEERGAARD and R. NIELSEN (eds.), *European Legal Method in a Multi-Layered Legal Order*, DJØF Publishing, Copenhagen 2012.

<sup>2</sup> This suggests that there is a kind of common understanding around the world as to the meaning of the 5 (6?) pillars. For the purpose of this chapter I will not go deeper into the differences; see H.-W. MICKLITZ, ‘On the Intellectual History of Freedom of Contract and Regulation’ (2015) 4 *Penn State Journal of Law & Int’l Affairs* 100–131.

<sup>3</sup> D. KENNEDY, ‘Three Globalisations of Law and Legal Thought: 1850–2000’ in D. TRUBEK and A. SANTOS (eds.), *The New Law and Economic Development: A Critical Appraisal*, Cambridge University Press, Cambridge 2006, pp. 19–73.

of the EU, on the constitutionalisation of private law at the Member State and the EU level. What I am trying to develop in this chapter could be read as a follow-up to my hypothesis whereby constitutionalised European private law principles exist which hold the fragmented body of European private law together.<sup>4</sup> First, I would like to sketch and to summarise the major premises of my argument, without which the constitutional transformation of the pillars of private law is difficult, if not impossible, to understand. The purpose is to highlight why thinking of EU private law as a new form of fragmented economic law, and why the EU legal (dis)order conceived as a laboratory, is crucial for getting to grips with ‘constitutionalisation’ of the pillars of private law that is driven by the CJEU. Secondly, I will clarify the parameters of my analysis, namely, the three transformations of law that have been triggered by the different waves of globalisation and how they fit into the short life of the EU. Thirdly, I turn to my tentative account of the private law pillars, what I understand by ‘pillars’, how they change over the three transformations and why the transformations can and must be termed ‘constitutional’. In that sense I am using Duncan Kennedy’s seminal article as a tool box from which I take the distinction between the three waves of globalisation, but my interest lies in the transformations of law that these three waves of globalisation trigger and how these transformations interact with constitutionalisation. Once the premises are defined and the parameters of the analysis are established, I turn to a deeper analysis of four pillars of private law in section 3: the person, contract, property and remedies, always distinguishing the three transformations in private law from the constitutionalisation of private law. For reasons of time and space, I have left out a discussion of the categories of values and tort, although we will note that they also belong to the pillars of European private law.

### 1.1. SCOPE AND REACH OF PRIVATE LAW AS FRAGMENTED ECONOMIC LAW

Private law is meant to regulate the economy; private law may be viewed as *Wirtschaftsrecht* or as *droit économique*. From the perspective of the common law, however, the notions of *Wirtschaftsrecht/droit économique* may not make as much sense. From the perspective of regulating the economy, private law is more than freedom of contract, private autonomy or *liberté de la volonté*, for it rests on both contract and regulation. Whilst this is true for each and every

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<sup>4</sup> H.-W. MICKLITZ, ‘Introduction’ in H.-W. MICKLITZ (ed.), *Constitutionalisation of European Private Law*, Collected Course of the European Academy of Law, European University Institute, Oxford University Press, Oxford 2014, p. 1.

private law order, in the EU, regulation predominates over freedom of contract. Such an understanding enlarges the scope and reach of private law considerably. From a more traditional understanding, regulatory private law is not regarded as part of a contract and tort. ‘Regulation’ or more broadly ‘regulated private law’ is understood as public administrative law and should be analysed separately. However, I claim that, without taking the regulatory dimension of private law into account, private law is stripped of its economic regulatory essence.<sup>5</sup>

Regulation dates back to the late nineteenth century, but took a different form during the welfare state and later, within and as an immanent part of European integration. From such a perspective, private law becomes ever more fragmented as a result of subject-related (employment law, consumer law) and sector-related regulation (telecommunication, postal services, energy [electricity and gas], transport, financial services), as well as through the insertion of competition in domains formerly dominated by public monopolies.<sup>6</sup> The result is a private law that is difficult to structure and which loses coherence. It looks ‘messy’ and very different from the understanding of private law in the nineteenth century as a ‘system.’<sup>7</sup> The widening of the scope of private law<sup>8</sup> towards fragmented economic law matters, because the rules and the judgments to which I will refer mostly deal with fragmented regulatory private law.

## 1.2. EU ‘MARKET STATE’ AND THE EUROPEAN LABORATORY

It is plain that the role and function of the nation state, in recent decades in particular, is undergoing a deep change. There is agreement on the phenomenon; there is even agreement that the post-nation state is about to lose much of its territorial power to regulate the (national) economy and the companies

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<sup>5</sup> For Germany, see L. RAISER, *Die Zukunft des Privatrechts*, De Gruyter, Berlin 1971. For France, see G. FARJAT, *Droit économique*, Presses Universitaires de France (PUF), coll. Themis, Paris 1971 (2<sup>nd</sup> rev. ed., 1982); further, H. COLLINS, *Regulating Contracts*, Oxford University Press, Oxford 1999. There is more to say on the relationship between traditional private law and regulatory private law, esp. on the degree to which constitutionalisation of regulatory private law spills over into traditional private law. However, as European private law remains the focus of my analysis, I will leave the analysis for a different occasion.

<sup>6</sup> H.-W. MICKLITZ, ‘The Visible Hand of European Private Law’ in P. EECKHOUT and T. TRIDIMAS (eds.) (2009) *28 Yearbook of European Law* 3–60.

<sup>7</sup> Maybe even a self-sufficient system of deduction; see on the difference between system and order, the contributions in J. DICKSON and P. ELEFThERIADIS (eds.), *The Philosophical Foundations of European Union Law*, Oxford University Press, Oxford 2012.

<sup>8</sup> Not only European private law, but private law per se, as can be observed in a historical perspective. The EU, however, has accelerated the process and changed the form and substance of regulation: H.-W. MICKLITZ, ‘Monistic Ideology vs Pluralistic Reality – on the Search of a Normative Design for European Private Law’ in L. NIGLIA (ed.) *Pluralism and European Private Law*, Hart Publishing, Oxford 2013, pp. 29–51.

operating from within its territory. The range of positions is broad, ranging from claims for an adjustment of the nation state to the changing international economic environment to the assignment of a new understanding of statecraft and statutory functions. I build on Bobbitt's concept of the market state for which the European Union could serve as a blueprint.<sup>9</sup> In a negative, though increasingly prominent understanding, the EU market state is being understood as a variation of the 'nation state' that stands for a neoliberal understanding of the economy that dismantles the national social welfare states.<sup>10</sup> In a more positive reading, the EU market state is understood as a post-modern concept of the nation state<sup>11</sup> that yields a genuine European understanding of justice and offers simultaneously the potential to put the social welfare ideology to an acid test. There is an added value in the market state paradigm that is crucial for an understanding of constitutionalisation, namely, its imperfect character that permits us to understand the European legal order (read as counterpart to 'system') as a huge laboratory in which the new forms of government and judicial governance are being tested and subjected to experiment.<sup>12</sup> This brings me seemingly close to Charles Sabel and Jonathan Zeitlin who have advanced the claims for experimentalist governance and experimentalist democracy.<sup>13</sup>

### 1.3. CONSTITUTIONALISATION AND CONSTITUTIONAL PRINCIPLES OF PRIVATE LAW

Constitutionalisation of private law has become a fashionable topic of research. However, sometimes it is not clear what it implies. Gutman speaks of 'The Constitutional Foundations of European Contract Law'.<sup>14</sup> Her analysis is bound

<sup>9</sup> With D. PATTERSON, 'From the Nation State to the Market State: The Evolution of EU Private Law' in B. VAN VOOREN, ST. BLOCKMANS and J. WOUTERS (eds.), *The EU's Role in Global Governance: The Legal Dimension*, Oxford University Press, Oxford 2013, pp. 59–78.

<sup>10</sup> See the recent writings of M. BARTL, G. DAVIES, CH. JOERGES, F. SCHARPF, A. SOMEK and W. STREECK, just to name a couple of prominent representatives. The *European Law Journal (ELJ)* is about to turn into the major forum that unites leftist writers who had set their hope on a European welfare state and are deeply disappointed.

<sup>11</sup> For a deeper analysis of the post-nation state, see D. PATTERSON, 'Postmodernism' in D. PATTERSON, *A Companion to Philosophy of Law and Legal Theory*, 2<sup>nd</sup> ed., Wiley-Blackwell, Oxford 2010, p. 381.

<sup>12</sup> H.-W. MICKLITZ, 'The European Union Project, Review Article' in J. DICKSON and P. ELEFTHERIADIS (eds.), *The Philosophical Foundations of European Union Law, Yearbook of European Law*, Oxford University Press, Oxford 2013, pp. 538–554.

<sup>13</sup> With regard to EU private law, see O. GERSTENBERG, 'Constitutional Reasoning in Private Law: The Role of the CJEU in Adjudicating Unfair Terms in Consumer Contracts' (2015) 21 *ELJ* 599–621; C. SABEL and J. ZEITLIN, *Experimentalist Governance in the European Union: Towards A New Architecture*, Oxford University Press, Oxford 2012.

<sup>14</sup> See the homonymous title of her book, Oxford University Press, Oxford 2014.

to the distribution of competences between the EU and the Member States. Whilst this might be a widespread understanding especially in countries that have a constitution, my starting point of analysis for the constitutionalisation of private law is different.<sup>15</sup> I would like to distinguish between three different phenomena.<sup>16</sup> The first targets the claim that private law is self-constituting (*Selbstkonstituierung*) – such as F. Böhm’s idea of the private law society.<sup>17</sup> E.-J. Mestmäcker used the ordoliberal pool of ideas to explain the creation of a European economic constitution<sup>18</sup> – *ordo* stands for *Ordnung* or competitive order, liberal for the freedom granted to private parties and the ordo-liberal European Economic Constitution for a model in which the Member States remain responsible for social regulation. The second phenomenon concerns changing the substance of private law to make it ‘more just’ (what M. Weber calls materialisation)<sup>19</sup> by means of fundamental and human rights; advocates had hoped that human rights and fundamental rights could be a means to fight and to outflank neoliberalism. The third condenses the discussion of private law beyond the state, where the counterpart to the nation state constitution is missing and where all sorts of theories of transnational law are attempting to embed private law in a transnational ‘constitutional’ setting, through self-constitution or through internationally recognised human and fundamental rights.<sup>20</sup>

In my understanding of the EU as a laboratory, the self-constitution of private law and the constitutionalisation of private law through fundamental and human rights come together.<sup>21</sup> That is why I am not following Kennedy, who seems to

<sup>15</sup> Implicit to this understanding is the idea of private law as a self-standing order that is not dependent on its establishment through codification via public legislation. However, this is not the right occasion to go deeper into the discussion; see H.-W. MICKLITZ, ‘The EU as a Federal Order of Competences and the Private Law’ in L. AZOULAI (ed.), *The Question of Competence in the European Union*, Oxford University Press, Oxford 2014, pp. 125–152.

<sup>16</sup> H.-W. MICKLITZ, ‘The Threefold Phenomena of Constitutionalization in Private Law, Liber Amicorum Michael Joachim Bonell’, forthcoming 2016; the contribution derives from a larger project: S. GRUNDMANN, M. RENNER and H.-W. MICKLITZ (eds.), *Privatrechtstheorie*, vol. 2, Mohr Siebeck, Tübingen 2015. An English version is under preparation. The contribution is based on ch. 8 of the book.

<sup>17</sup> *Privatrechtsgesellschaft und Marktwirtschaft* (1966) 17 *ORDO* 75–151.

<sup>18</sup> E.-J. MESTMÄCKER, ‘Auf dem Wege zu einer Ordnungspolitik für Europa’ in E.-J. MESTMÄCKER, H. MÖLLER and H.P. SCHWARTZ (eds.), *Eine Ordnungspolitik für Europa. Festschrift für Hans v.d. Groebe*, Nomos, Baden-Baden 1987, pp. 9–49.

<sup>19</sup> M. WEBER, *Wirtschaft und Gesellschaft*, esp. ch. VII on *Rechtssoziologie* (legal sociology) p. 1 (1921 ed.).

<sup>20</sup> See for a stock taking of the different theoretical approaches Cahier à Thème, *Les Grandes Théories du Droit Transnational*, H.-W. MICKLITZ (ed.), with contributions from K. TUORI, B. KINGSBURY, N. KRISCH and R.B. STEWART, H. MUIR WATT, CH. JOERGES and F. ROEDEL, F. CAFAGGI, R. ZIMMERMANN, G.-P. CALLIESS and M. RENNER, A. FISCHER-LESCANO and G. TEUBNER, P. SCHIFF BERMAN, (2013) 1–2 *Revue Internationale de Droit Economique* 1–256.

<sup>21</sup> I see a strong link to H. COLLINS, although he is referring to the making of European private law only, whilst I would call this a ‘constitutive’ exercise: *The European Civil Code: The Way Forward*, Cambridge University Press, Cambridge 2008.

associate constitutionalisation with the third wave of globalisation. The whole building of the European legal order could be understood as a constitutionalisation process, private law being the second pillar outside the Treaty.<sup>22</sup> However, due to the particular character of the European legal order, ‘constitutionalisation’ of private law can hardly be compared to the constitutionalisation of private law within the Member States, such as in Germany or in Italy. The differences are crystallising in the search for the constitutional principles of European private law.

I have proposed a combination of the ‘constitutional traditions common to the Member States’ with the ‘general principles of civil law’, in order to establish a mechanism that allows us to distil out of the wide array of possible ‘principles of civil law’ those that deserve to be given a ‘constitutional’ status.<sup>23</sup> This necessity results from the CJEU’s decision to grant both primary and secondary Union law supremacy over Member States’ law. ‘Supremacy’ should not be confounded with ‘constitutional’. That is why judgments of the CJEU in the fragmented field of European private law could not be regarded, automatically, as ‘constitutional’. Whenever the Court refers to fundamental and human rights, two questions have to be separated from each other, namely, whether a reference renders the judgment into a ‘constitutional’ judgment and whether it enshrines or generates a constitutional ‘principle’.<sup>24</sup> We might assume that the ‘pillars’ of private law – i.e. the concepts that underpin the pillars – are *constitutive* for a society and, in that sense, they are of ‘*constitutional*’ importance. We might also assume that the pillars mirror changing ‘principles’, although this does not explain what is meant by principles.

There is more. Does a fragmented, even constitutionalised, private law need ‘principles’? Principles suggest that there is a kind of safety net for all the fragmented European private law rules, which are and which could be held together. Such a reading even comes close to the idea of ‘coherence’. Is this correct? Is it needed? Is it possible? Could it be that the principles we are looking for are much more procedural in design (form) than substantive in nature (substance),

<sup>22</sup> There is an abundant literature on the European legal order as a constitutional order, on the European Economic Constitution and later on the European constitution with a small ‘c’; N. WALKER, ‘Big “C” or small “c”?’ (2006) 12 *ELJ* 12–14.

<sup>23</sup> See MICKLITZ, ‘Introduction’, n. 4 above.

<sup>24</sup> Rather cautious, F. DELLA NEGRA, ‘The Uncertain Development of the Case Law on Consumer Protection in Mortgage Enforcement Proceedings: Sánchez Morcillo and Kušionová’ (2015) 52 *CMLR (Common Market Law Review)* 1–24; more outspoken, V. TRSTENJAK, ‘The Influence of Human Rights and Basic Rights in Private Law’, XIX International Congress of Comparative Law, Vienna, 20–26 July 2014, in V. TRSTENJAK and P. WEINGERL (eds.) *The Influence of Human Rights and Basic Rights in Private Law*, Springer, Switzerland 2016, who equates constitutional with references to fundamental and human rights.



with a view to aiming to ‘managing difference’ (Kennedy)?<sup>25</sup> If this is true, what then remains for human and fundamental rights, which are invoked by their rights holders to claim substantive protection? Or is the substance integrated into the procedure, which is the predominant approach of the European Court of Human Rights (ECtHR) with regard to the right to be heard under Article 6? I cannot provide an answer yet. This contribution, however, might help to develop the debate further.

#### 1.4. EUROPEAN COURTS AND CJEU CASE LAW

Why do courts (and not parliaments) hold such a prominent position in the constitutionalisation of the pillars of private law? Why are constitutional courts at the forefront of developments – and even more difficult to answer – why are European courts the drivers of development? As said before, the analysis is focusing on the constitutionalisation of European private law, so there is no need and no interest in going into the role of courts at the national level. Without much ado I subscribe to Ronald Dworkin’s analysis and explanation as to why judges have turned into the super-heroes of our times,<sup>26</sup> which has been taken up by Duncan Kennedy in ‘The Three Globalisations’ of law. Again, however, I have to insist on the particularities of the European legal order and the key role of the CJEU in the overall constitutionalisation process, the constitutionalisation of the European legal order and the constitutionalisation of private law. This does not mean that there are no other potential actors who promote this constitutionalisation, such as the Member States, the European Commission, the European Council, the European Parliament that have enlarged the competences of the EU and have approved though sometimes grudgingly<sup>27</sup> the dominant role of the CJEU as the driver behind the constitutionalisation of the EU, let alone the potential building of a private legal order bottom up through the parties themselves.<sup>28</sup> However, in European private law, the role and importance of the CJEU is far more important, both because there is no legal basis in the Treaty to harmonise private law and because there is no equivalent in the European legal order to what I call traditional private law.

<sup>25</sup> Y. SVETIEV, ‘European Regulatory Private Law: From Conflicts to Platforms’ in K. PURNHAGEN and P. ROTT (eds.), *Varieties of European Economic Law and Regulation: Liber Amicorum Hans Micklitz*, Springer, Switzerland 2014, p. 153.

<sup>26</sup> ‘R. Dworkin: Law as Integrity’ available at: <<http://theoryofjurisprudence.blogspot.it/2007/12/ronald-dworkin-law-as-integrity.html>> accessed 24.09.2016; see also L. FULLER’s 8 desiderata in the *Morality of the Law*, Yale University Press, New Haven 1964.

<sup>27</sup> B. DE WITTE and H.-W. MICKLITZ (eds.), *The ECJ and the Autonomy of the Member States*, Intersentia, Antwerp 2012.

<sup>28</sup> COLLINS, n. 21 above.

The following aspects are of outstanding importance in understanding the positioning of the CJEU: the institutional architecture of the EU, which grants the CJEU adjudicative power concerning the interpretation of EU law, but not the power to decide the case at issue.<sup>29</sup> This distribution of responsibilities, which is by and large respected by the CJEU, strengthens an understanding of the CJEU as an experimentalist court,<sup>30</sup> which does not have to bear the direct consequences of the outcome of its judgments. This is left to the Member States' courts or the Member States' governments, who have to apply a CJEU judgment to the case at issue. Such an understanding fits nicely with Komesar's theory of institutional choice.<sup>31</sup> The preliminary reference procedure opens up an alternative path of adjudication, in particular in circumstances where access to national courts might be possible but not feasible for all sorts of political reasons or where there is no access at all.

However, neither explanation helps us understand why and how the CJEU acts and should act as a constitutional court rather than as a private law court of last resort. Ch. Schmid<sup>32</sup> underlines the inability of the CJEU to develop out of the incoherent and piecemeal European private law finely tuned doctrines of private law and advocates a constitutional 'substantive core and procedural halo' approach.<sup>33</sup> Whilst I am unsure whether I still believe in the feasibility of a systematic and coherent private law doctrine,<sup>34</sup> I certainly agree with Schmid's strong emphasis on developing constitutional 'meta-principles'. This might well be the only remaining opportunity for constitutional courts to hold 'the ever more fragmented private law' together and this might also be the deeper reason why constitutional courts are the only ones that can do so, because private law

<sup>29</sup> H.-W. MICKLITZ, *The Politics of Judicial Co-operation in the EU – the Case of Sunday trading, Equal Treatment and Good Faith*, Cambridge University Press, Cambridge 2005.

<sup>30</sup> S. FRERICHS, *Judicial Governance in der europäischen Rechtsgemeinschaft*, Nomos, Baden-Baden 2008.

<sup>31</sup> N. KOMESAR, 'The Logic of the Law and the Essence of Economics: Reflections on Forty Years in the Wilderness' (2013) *Wisconsin Law Review* 265–338.

<sup>32</sup> CH. SCHMID, 'The ECJ as a Constitutional Court and a Private Law Court: A Methodological Comparison', ZERP-DP 4/2006 <[www.sv.uio.no/arena/english/research/projects/cidel/old/Reports/Report106/8\\_Schmid.pdf](http://www.sv.uio.no/arena/english/research/projects/cidel/old/Reports/Report106/8_Schmid.pdf)> accessed 23.09.2016.

<sup>33</sup> Ibid, 228: 'Against this background, it would be wise were the ECJ to act not as an ordinary private law court, but as a constitutional court in private law. This would mean that it should apply something similar to its constitutional law "substantive core and procedural halo" approach, described above, to private law, too. To this end, it should – in a first step – not only challenge "nation state failures", in particular, the violation of freedom and equality rights and the shifting of externalities of one's own action to neighbours ("beggar my neighbour politics"), but also challenge self-evident irrational or inefficient instances of national governance which harm national citizens in their status as European citizens.'

<sup>34</sup> H.-W. MICKLITZ, 'A Comment on Party Autonomy and Consumer Regulation in the European Community – A Plea for Consistency' in S. GRUNDMANN, W. KERBER and S. WEATHERILL (eds.), *Party Autonomy and the Role of Information in the Internal Market*, de Gruyter, Berlin 2001, pp. 197–204.

courts are too much bound to the search for coherence and consistency (in continental and in the common law).

The object of my studies is European private law understood as fragmented economic law.<sup>35</sup> In theory, my approach requires the inclusion of the case law of the ECtHR. It is well known that the ECtHR increasingly intervenes into the private law of its Member States, which is not always well regarded. The ECtHR applies the right to be heard, into which ‘substantive’ issues are then integrated. This comes close to what the CJEU is doing when it applies the Brussels Convention or the Brussels Regulation to private law litigation with respect to non EU-Member States.<sup>36</sup> However interesting an analysis of the Strasbourg Court might be, for the time being I limit myself to evidence concerning the ongoing constitutionalisation and the suggested restructuring of the pillars of private law to CJEU case law (as far as it exists).<sup>37</sup>

## 2. PARAMETERS

Let us accept Kennedy’s categories whereby he distinguishes between three waves of globalisation of legal thought.<sup>38</sup> They help to circumscribe the appearance of the transformations and the reasons behind the transformation. That is why the transformations and not the waves of globalisation are my parameters. I will only use ‘globalisation’ when I deliberately refer to Kennedy’s different states, in particular in explaining the key elements and in applying them to the EU. Whenever it comes to the effects of globalisation in the law, I use ‘transformation’ as the key word.

The three phases of transformation of law should not be confounded with constitutionalisation. That is why the three transformations mirrored in the pillars of private law and the changing patterns of constitutionalisation must

<sup>35</sup> The ERC project on European Regulatory Private Law is based on my article on the visible hand (see n. 6 above); see for details of the project and the diverse publications <<https://blogs.eui.eu/erc-erpl/>>.

<sup>36</sup> N. JÄÄSKINEN and A. WARD, ‘The External Reach of EU Private Law in the Light of L’Oréal versus eBay and Google and Google Spain’ in M. CREMONA and H.-W. MICKLITZ (eds.), *Private Law in the External Relations of the EU*, Oxford University Press, Oxford 2016, pp. 33–58.

<sup>37</sup> H.-W. MICKLITZ and B. KAS, *Overview of Cases before the CJEU on European Consumer Contract Law (2009–2013) pt I (2014) 10 ERCL (European Review of Contract Law) 1–63; pt II (2014) 10 ECRL 189–257*. Betül Kas regularly updates the overview on the CJEU case law in the *ERCL*.

<sup>38</sup> I will neither discuss the impact of his paper nor critique the distinction since 2006, but see C.P. WELLS, ‘Thoughts on Duncan Kennedy’s Third Globalization’, Boston College Law School Faculty Papers, 04.01.2012.

be kept separated from each other. This is done in section 3 via the distinction between ‘transformation’ and ‘constitutionalisation’ (see below).

## 2.1. THREE GLOBALISATIONS OF LEGAL THOUGHT IN THE EU

Kennedy distinguishes three phases of globalisation in legal thought that shaped and are still shaping our understanding of private law. Legal thought is reflected in legal consciousness.<sup>39</sup> It is, therefore, a bottom-up approach:

‘the first globalisation occurred during the second half of the nineteenth century and was over by WWI. What was globalized was a mode of legal consciousness ... the late 19<sup>th</sup> century mainstream saw law as “a system”, having a strong international structural coherence based on the three traits of exhaustive elaboration of the distinction between private and public, “individualism” and commitment to legal interpretative formalism.’<sup>40</sup>

Towards the end of the nineteenth century, the ‘social question’ – what Duncan Kennedy simply coined ‘The Social’ – became more important. States had to deal with the political claims of the workers (today we use the more distinguished term ‘employees’). If these claims did not aim at the abolition of the capitalistic economic order entirely, they targeted improvements of working conditions, which were also reflected in demands for balanced labour contracts; later, with the rise of the consumer society, they were also reflected in demands for balanced consumer contracts. The first and second globalisation can easily be shaped and clearly combined with categories along the line of distinctions and values that we all understand and share, even if we disagree as to their ‘weight’. The third globalisation is said to be characterised by ‘neoformalism’. Neoformalism<sup>41</sup> is ‘neo’ as it transfers Classical Legal Thought, meaning private law thinking, to the public sector, to policies and institutions without taking into account that ‘policy analysis’ is structurally bound to a particular policy subject and/or to a particular object (e.g. a sector of the economy) and that coherence

<sup>39</sup> For how I used the same methodology to analyse the development of legal thought in France, Germany, the UK and the EU, see H.-W. MICKLITZ, ‘The (Un)-Systematics of (Private) Law as an Element of European Legal Culture’ in G. HELLERINGER and K. PURNHAGEN (eds.), *Towards a European Legal Culture*, Beck/Hart/Nomos, Munich/Oxford/Baden-Baden 2014, pp. 81–115.

<sup>40</sup> KENNEDY, n. 3 above, p. 25.

<sup>41</sup> I do not think that neoformalism can be linked to neoliberalism, at least not in the way Kennedy uses neoformalism, in particular through his claim of ‘managing difference’. In so far the critique that Kennedy forgets about the role and function of the ‘market’ seems to be overstated, see J. DEAUTELS-STEIN and D. KENNEDY, ‘Foreword: Theorizing Contemporary Legal Thought’ (2015) 78 *Law and Contemporary Problems*, i.

or something similar can be achieved, if at all, only in narrow policy fields that are kept distinct from overarching influences from other policy fields. This fits nicely with Luhmann<sup>42</sup> and Teubner who stress, constantly, the irreversibility of the differentiation and fragmentation of society or with Tuori who has coined the term of the ‘many constitutions of the European Union.’<sup>43</sup> Duncan Kennedy stresses the rise of transcendent values (in particular anti-discrimination) and the key role of courts as the legal heroes of our times. Roughly speaking, the first globalisation – Classical Legal Thought – covers the period from 1850–1914; the second globalisation – the Rise of ‘The Social’ – 1900–1968;<sup>44</sup> and the third globalisation – neoformalism – 1945–2000.<sup>45</sup>

Kennedy’s genealogy of the three globalisations does not really fit the EU. Historically, the EU was established in the middle of the second globalisation (according to my understanding, though already in the period of the third globalisation according to Duncan Kennedy). ‘The Social’ had to be taken into account right from its beginning. The foundational treaty from the 1950s relied on a separation of responsibilities, market building at the EU level and ‘The Social’ at the Member State level. Within less than 60 years – 1957 until today – the EU had to go through, maybe better to catch up with, the three stages of globalisation. The relatively quiet formative years 1957–1986, market building, resemble developments in the nineteenth century along the line of Classical Legal Thought. The rise of ‘The Social’ started with the adoption of the Single European Act in 1986, an attempt by the Member States to ‘catch up’ at the EU level with the development of the welfare (nation) states that go back to the beginning of the twentieth century and ended in half-hearted attempts to transform the EU into a Social Union.<sup>46</sup> However, ‘The Social’ did not really find

<sup>42</sup> N. LUHMANN, *Wirtschaft der Gesellschaft*, Suhrkamp Verlag, Frankfurt am Main 1994, p. 344: ‘Nie kann der Sündenfall der Ausdifferenzierung selbst zurückgenommen werden. Man kehrt nicht ins Paradies zurück.’

<sup>43</sup> K. TUORI, *European Constitutionalism*, Cambridge University Press, Cambridge 2015, although Tuori does not exclude the possibility of coherence, and what it might mean in a positive legal order without commitments to transcendental values.

<sup>44</sup> I disagree. With regard to the rise of ‘The Social’ the break-even point in Europe may still be found in the encyclical of Pope Leo XIII *Rerum Novarum* from 1891 (*neue Dinge*, new things). It has given rise to a ‘new vision’ of the state which had to compensate for the missing social structures (rural families, guilds) in the industrial age. I would equally argue that the start of the third globalisation goes hand in hand with the financialisation of the economy after the collapse of Bretton Woods. But these are ‘finesses’ that are not important for the overall argument.

<sup>45</sup> For the sake of the argument it is not necessary to discuss whether the timelines are ‘correct’. Such classifications are always debatable.

<sup>46</sup> Relatively optimistic, K. TUORI, ‘European Social Constitution between Solidarity and Access Justice’ in PURNHAGEN and ROTT, n. 25 above, pp. 371–400; much more critical, D. SCHIEK, *Economic and Social Integration: The Challenge for EU Constitutional Law*, Edward Elgar, Cheltenham 2012.

its way into in the EU legal order. Ironically, the timid rise of ‘The Social’ at the EU level in the mid-1980s went hand in hand with a decline or transformation of ‘The Social’ at the Member State level.<sup>47</sup> Thus, by necessity, ‘The Social’ at the EU level would have a different outlook. In my understanding, the EU cannot do more than lay down minimum standards in order to guarantee what I have called ‘access justice’ (*Zugangsgerechtigkeit*).<sup>48</sup> It remains, then, for the Member States to go beyond that floor level.<sup>49</sup> The third stage of globalisation – ‘policy analysis’, ‘neoformalism’ and ‘adjudication’ – gained pace in the aftermath of the Single European Act with the shift from modelling a federal Europe to crafting Europe through governance.

The second globalisation (‘The Social’) and the third globalisation (neoformalism) coincide by and large in time. The CJEU turned into the intellectual, the political and the judicial ‘hero’ of the EU, though some might claim that the projects of judicial and political integration were separating.<sup>50</sup> However, I cannot identify any other institutional player, neither at the Member State nor at the EU level, who is willing to tackle all the issues left open by national and European parliaments that the third globalisation yields and that are inundating constitutional courts. Courts have to decide, for there is no competence of judicial self-restraint in the EU. Even if constitutional courts in general and European courts in particular refuse to engage in what is called here ‘constitutionalisation’, the problems resulting from insufficiencies in municipal laws (continental and common law) remain.

## 2.2. EUROPEAN PRIVATE LAW PILLARS AND THE THREE TRANSFORMATIONS

In light of the three waves of globalisation, the overall process of transformation of the pillars of private law through EU law and the CJEU is captured in the following chart. The chosen ‘catchwords’ in each field are carefully selected and

<sup>47</sup> See for an explanation of the extremely different reactions in the Member States, S. STEINMO, *The Evolution of the Modern States*, Cambridge University Press, Cambridge 2010; for the impact on the EU (Euro) crisis, see the writings of F.W. Scharpf and W. Streek.

<sup>48</sup> Social justice and access justice in private law, in H.-W. MICKLITZ (ed.), *The Many Faces of Social Justice in Private Law*, Edward Elgar, Cheltenham 2011, pp. 3–60.

<sup>49</sup> I cannot discuss whether and to what extent the Euro-crisis has undermined such a distinction, esp. through taking away from the Member States the possibility to devalue their currency as a means to cope with the differences in productivity.

<sup>50</sup> M. HÖPPNER and A. SCHÄFER, *Embeddedness and Regional Integration: Waiting for Polanyi in a Hayekian Setting* (2013) Summer 66 *Int’l Organisation* 429–455 with many references from the controversial discussions in law and political science.

are meant to indicate a genuine mode of constitutionalisation. Analytically, transformation and constitutionalisation have to be kept distinct, but it will have to be shown that the particular form of constitutionalisation cannot be understood without its particular grounding in the respective transformation.

In line with my understanding of private law as economic law (*Privatrecht als Wirtschaftsrecht*) I regard the person, contract and property<sup>51</sup> as the three pillars on which each and every private law order rests. Tort is a natural complement as it lays down non-contractual rights and duties.<sup>52</sup> The integration of ‘remedies’ might come as a surprise, in particular for a continental lawyer. Continental private law systems distinguish sharply between substance and procedure, the substance codified in the *Code Civil*, the *Codice Civile*, the *Wetboek* or the *Bürgerliches Gesetzbuch*, the procedure equally codified in an ‘Act of Parliament on Procedural Law’. Legal education still keeps the two areas distinct. The curriculum for undergraduates exhaustively concentrates on ‘substance’; educational training in legal (judicial) procedure is procedural. The common law has a more holistic approach. This might explain why neither in French, nor in Italian nor in German, is there an appropriate translation for ‘remedies’. In his seminal article Walter van Gerven<sup>53</sup> speaks of rights, remedies and procedures, in order to make the European understanding – which is a true common law legacy – more accessible for continental lawyers.

### 2.3. HOW THE ARGUMENT FLOWS

In the light of the foregoing, I will focus on person, contract, property and remedies. Categories and catchwords indicating the move from one stage to the next stage of transformation and its ongoing constitutionalisation are as helpful as they are dangerous. They are helpful in that they permit the labelling of developments of legal consciousness and legal thought. They are dangerous in that they imply a certain simplification and might overstate new phenomena to the detriment of the inertia of old phenomena. The separation between the

<sup>51</sup> I set aside the difficulties in defining property; esp. with regard to the different understandings in the common law and the continental legal systems, see S. VAN ERP and B. AKKERMANS, *Property Law, Ius Commune Casebooks for the Common Law of Europe*, Hart Publishing, Oxford 2012.

<sup>52</sup> Complement in this way: The idea of fault as an excess of the will, so closely related to contract. Our obligations are either an act of self-determination (contract) or imposed on us to protect the self-determination of others (within a liberal framework). Otherwise, one is left to fend for oneself in Classical Legal Thought, in the face of fortuna; see F. EWALD, *L'Etat Providence*, Grasset, Paris 1986. Responsibility as personal rather than a social phenomenon.

<sup>53</sup> W. VAN GERVEN, ‘On Rights, Remedies and Procedures’ (2001) 38 *CMLR* 501.

three waves of globalisation and the new forms of transformation is not as clear as the table suggests. One last disclaimer is needed. I will not deal with values and tort.

Values as a category are self-explanatory. I will stay away from going deeper into values in private law systems, how they have been transformed over the last 150 years in contract law and to what extent they have been constitutionalised. It might suffice to recall that each wave of transformation can be associated with one particular ‘value’. The European integration process gradually yields its own model of justice – a model which I call ‘access justice’/ *Zugangsgerechtigkeit* (justice *through* access, *not* access *to* justice), i.e. it is for the European Union to grant access justice to those who are excluded from the market or to those who have difficulties making use of the market freedoms.<sup>54</sup> ‘Access justice’/ *Zugangsgerechtigkeit* is not to be equated with social justice in the meaning it has developed over the nineteenth and twentieth centuries in nation states.

I will equally leave out tort law, although the waves of transformation have left deep traces on the way in which liability is conceived of, and on the degree to which tort has been constitutionalised.<sup>55</sup> In the first transformation, Classical Legal Thought is to be associated with liability for negligence. The second transformation questions fault as a central category. The move from manual production to industrialisation promoted strict liability, which disconnects compensation claims from strict proof of negligent behaviour.<sup>56</sup> The third transformation raises challenges to negligence-based tort liability, in particular through the emergence of new risks<sup>57</sup> and the way in which companies with transnational operations organise their supply chains, upstream and downstream, or through networks of firms that contribute to the production process.<sup>58</sup>

<sup>54</sup> H.-W. MICKLITZ (ed.), *The Many Concepts of Social Justice in European Private Law*, Edward Elgar, Cheltenham 2011.

<sup>55</sup> See my introduction to ch. 15 RISIKO, ‘Delikt und Haftung’ in GRUNDMANN, MICKLITZ and RENNER (eds.), n. 16 above, pp. 1142–1160.

<sup>56</sup> This is masterfully analysed by L. JOSSERAND, ‘L’évolution de la responsabilité’ (conférence donnée aux Facultés de Droit de Lisbonne, de Coimbra, de Belgrade, de Bucarest, d’Orades, de Bruxelles, à l’institut français de Madrid, aux centres juridiques de L’Institut des Hautes Études marocaines à Rabat et à Casablanca) *Évolutions et Actualités Conférences de Droit Civil*, Receuil Sirey, Paris 1936, p. 29-5.

<sup>57</sup> U. BECK, *Die Risikogesellschaft*, Suhrkamp, Frankfurt am Main 1986.

<sup>58</sup> The most advanced concept of what they call ‘Organisationshaftung’ – organisational liability – has been presented by G. BRÜGGEMEIER and Z. YAN, *Entwurf für ein chinesisches Haftungsrecht*, Mohr Siebeck, Tübingen 2009, which is unfortunately not available in English, but which however, should be understood as a counterpart to the 19th-century model of tort law in the Draft Common Frame of Reference which sticks to negligence as the basis for triggering liability, setting the transformation of the economy totally aside.



The *Francovich* doctrine could be understood as laying down the foundations for network liability.<sup>59</sup> I will leave it for another occasion yet to go deeper into ‘tort’ as a private law pillar.<sup>60</sup>

#### 2.4. THREE TRANSFORMATIONS IN PRIVATE LAW AND CONSTITUTIONALISATION OF PRIVATE LAW

In the following, I will analyse the four pillars one by one, starting each and every analysis with an overall hypothesis that I will try to verify or to falsify. The analysis of the four pillars follows the same structure. I will start by demonstrating how the three transformations of law affect the four pillars. I am collecting evidence to underpin my argument that there is a transformation that can be observed. In that sense it is an empirical, bottom-up examination, using the methodology of legal consciousness. I will proceed along the line of the catchwords that I have condensed in Table 1.

**Table 1. Private law pillars and the three ‘transformations’**

	First Transformation	Second Transformation	Third Transformation
Values	Corrective justice	Social justice	Access justice
Person	Person	Social rights	Identity-based rights
Contract	Formal rationality	Social contracts	Procedural contracts
Tort	Negligence liability	Strict liability	Network liability
Property	Absolute rights	Social property rights	Political property rights
Remedies	Promise	Effectiveness	Managing differences

The more difficult question to answer is why, how and to what extent the transformations encompass/yield a constitutional dimension, more concretely a new form of constitutionalising private law pillars. Thus, I will build on how I understand and define constitutionalisation. I focus on the European Union and European Union law and I place the third transformation at the forefront of my analysis. The reasons for this is not only time and space but my deep

<sup>59</sup> Using K. LADEUR’s, ‘The Evolution of General Administrative Law and the Emergence of Postmodern Administrative Law’, Osgoode CLPE Research Paper No. 16/2011, distinction between the society of firms, organisations and networks, which roughly complies with Kennedy’s 3 globalisations; see my contribution ‘The ECJ between the Individual Citizen and the Member States – A Plea for a Judge-made European Law on Remedies’ in DE WITTE and MICKLITZ, n. 27 above, pp. 349–400.

<sup>60</sup> I hope to benefit from R. CONDON’s PhD research at the EUI, which shall be defended in the course of 2016 and which will go deeper into the design of network liability and the role of the *Francovich* doctrine.

conviction that it is at the third level of transformation where the particularities of the EU, its fragmented character, its quasi-statutory format, its notorious experimentalism, its multi-level governance deliver the most promising and most fascinating evidence for studying the constitutional transformation of the pillars of private law. At the very end of the chapter, I will come back to the overall difficulty regarding how to distinguish between constitutional and non-constitutional transformations.

### 3. PERSON

The overall hypothesis is the move from the classical person to social class to identity-based rights.<sup>61</sup> In this respect, the CJEU case law is rather well developed and indicates a clear orientation towards fragmented right holders, in which a new constitutionalised ‘person’ emerges: the *mandataire*.

#### 3.1. TRANSFORMATIONS: FROM PERSONS TO IDENTITY-BASED RIGHTS

Elsewhere I have laid down the theoretical foundations of the transformation of the person through the confrontation of Demogue’s ground-breaking article on the ‘legal subject’ with Kennedy’s concept of ‘identity based rights.’<sup>62</sup> Whilst Demogue struggles with the well-known phenomenon on how to identify the holder of social rights – a running theme throughout the twentieth century – Kennedy recognises in the third globalisation a new layer in the genealogy of the person:

‘Contemporary legal consciousness organizes rights claimants according to their plural cross cutting identities. Identity represents at once: an extension of and a total transformation of the categories – social class and minority – through which the social jurists disintegrated the *Savignian* “people”, is typically the descendent of the social

<sup>61</sup> It would go beyond the chapter to lay down the changing person in its private and societal relations. Social class is certainly a part of the second globalisation, but it is not so much social class as ‘the individual understood as a social category’, with identity-based rights being ‘the individual understood as a self choosing actor with regard to his identity’. So, non-traditional individualism à la U. Beck’s analysis in *Risk Society*, whereby in the first modernity, the individual was embedded in relations, whereas individual rights were about the individual’s relations to the whole, i.e. society; individual as distinct from political society, but not to the exclusion of moral law, just social obligation limited by law/moral dichotomy. In ‘The Social’, *pace* Durkheim, morals are to be understood as social facts, therefore, a social responsibility vis-à-vis the individual. Today, it is now about the individual’s relations with himself as reflexive. A type of individualism as solipsism perhaps.

<sup>62</sup> R. DEMOGUE, ‘The Legal Subject, the Social Class and Identity Based Rights in a European Perspective’ in L. AZOULAI, S. BARBOU DES PLACES and E. PATOUT (eds.), *The Category of the Person in EU Law*, Hart Publishing, Oxford 2016.

preoccupation not with dominant but with subordinated or discriminated or persecuted identities, is the basis of a claim against the “majority” or the “dominant culture”, and is in fact a true lingua franca, just as applicable to the law of the market. On the side of the typical beneficiaries of identity discourse are “weak parties” now even the “poor” understood as an identity rather than as a class. On the side of “strong parties” such as employers, creditors, sellers, there has been a sustained effort to reconfigure property and contract rights as parallel to minoritarian identity/rights.<sup>63</sup>

This account speaks for itself and might be shared by many people, both empirically and theoretically. Individuals can easily change their roles, from producers to consumers, from citizens to travellers. They have many identities and each of our respective identities can be connected to a particular right. Children have rights and the elderly have rights, consumers and women have rights.<sup>64</sup> Identity-based rights may be established through statute or through contract. One might even observe a tendency towards the contractualisation of identity, most spectacularly in the debate around a gender-based identity,<sup>65</sup> but also with regard to investor rights,<sup>66</sup> in which the investor may classify herself and become subject to a different set of rights.

Identity-based rights always start from an element of *weakness*.<sup>67</sup> This is true even for property right owners who claim compensation for the infringement of their rights by third world countries with the help of the

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<sup>63</sup> I have taken the liberty of putting his own words together, cutting out here and there bits and pieces, to make it more readable. But all words are ‘his’ words and all are on p. 66.

<sup>64</sup> K. CARR, *Deconstructing and Reconstructing Family Law through the European Legal Order*, PhD EUI 2014, p. 118: ‘It is important to state from the outset, and as we will see this becomes a fundamental element in terms of the resolution of peripheral family law cases, that this third globalisation is founded on an identity-based notion of rights. We can think about rights for women and as illustrated, for consumers and other “vulnerable” groups. This relates to our discourse in terms of the reconstruction of the path to asserting one’s rights. For example during the first globalisation we can safely say that the path to be followed was one based on a formalistic consensus of wills – full stop. The social, in making some moves towards the integration of social justice made room for collective considerations and utilitarian approaches to the settlement of disputes. Here, however, we see an identity-based notion of rights i.e. I am a woman and a consumer and therefore I possess certain rights, not I possess rights per se. This differs from the Social in that it reintegrates the social into the legal system at the level of arguments about constitutional rights and balancing policy and identity’.

<sup>65</sup> See F. SWENNEN, ‘Contractualisation of Family Law – La Contractualisation du Droit de la Famille’, XIXth International Congress of Comparative Law, Vienna 2014, II.A.4, on file with author.

<sup>66</sup> The so-called MiFID Directive 2004/39 [2004] OJ L145/1 has introduced different types of investors, professional, semi-professional and inexperienced.

<sup>67</sup> This is/will be challenged by feminists, critical race scholars and critics generally. The typical response is: woman/gay/black people, but also the employees.

World Trade Organization. Sociologically speaking, the rise of identity-based rights goes hand in hand with the victimisation of the ‘individual’, with the fragmentation of societal roles (not classes and stratifications) and sectors of the economy (consumer and customer), and with the transformation of the person as a normative legal category. In the nineteenth century, the person as an autonomous self-responsible person formed the core of the normative legal system. In the twenty-first century, the individual appears as the holder of a whole bunch of identity-based human and fundamental rights that he or she can invoke according to current needs, where he or she may claim the enforcement of individual rights or where he or she defines himself or herself as member of a particular group of weaker parties, affected by particular economic, social or political circumstances.<sup>68</sup>

Contrary to the political and legal debates in the EU Member States in the early twentieth century, the brief rise of ‘the EU Social’ did not significantly impact the working classes and worker rights. ‘The Social’ in the EU takes a very peculiar form, embracing not so much ‘The Social’ in the meaning given to it by Kennedy in the second globalisation, but covering different policy fields with a social dimension, such as anti-discrimination law, environmental and consumer law. The different policy fields, united more or less under the umbrella of ‘The Social’, show many characteristics of the third *globalisation*, so it is possible that the policy field is linked to the second wave, but the instruments to implement the policy are taken from the third *transformation*: (1) policy building in ever more fragmented areas of society and the economy; (2) neoformalism through institution building – one of the major characteristics of the promotion of divergent policies<sup>69</sup> and through the promotion of genuine European values – wrapped into categories that are familiar in the national context of anti-discrimination, environmental protection and consumer protection, though they gain a different twist through Europeanisation. In these policy fields, the person appears to hold all sorts of identities exactly in the way Duncan Kennedy describes it. EU anti-discrimination law, EU environmental law and EU consumer law define identities: the discriminated men and women, the discriminated minorities, the citizens harmed through air pollution, water pollution, the consumer subjected to unfair commercial practices, unfair contracts, the travellers affected by delayed or cancelled flights. Each of the three fields defines its own scope of application *ratio materiae* but also *ratio personae*.

<sup>68</sup> See the contributions from G. COMMANDÉ, A. COLOMBI CIACCHI, M. BELL, O. CHEREDNYCHENKO, CH. GODT and CH. MAK in MICKLITZ, n. 4 above, with a word of a warning from H. COLLINS on the risk of proliferation.

<sup>69</sup> See A. OTTOW, *Market and Competition Authorities*, Oxford University Press, Oxford 2015.

### 3.2. CONSTITUTIONALISATION: THE ‘MANDATAIRE’

Owing to the dense parallelism and overlapping of developments in the EU, it is more difficult to assign a particular person to a particular stage of transformation in European law. I would like to distinguish between two stages in the formation of the European person, the formative stage – which comes close to the logic behind the first transformation – and the ongoing stage – in which the second and the third transformations are coming together. The first could attribute the status of *mandataire* to the European person in the meaning of Demogue, the second equating the European person with the *identity-based rights holder* in the meaning of Duncan Kennedy. Each of the two demonstrates a particular form of constitutionalisation.

The person as *mandataire* is *constitutive* for the building of the European legal order. The story of the formation of a genuine legal order via the CJEU has been told endless times, perhaps most excitingly by E. Stein.<sup>70</sup> Less attention has been devoted to the facts behind *van Gend & Loos* and *Costa v. Enel*. More often than not private parties tied together through a contract were deriving individual enforceable rights from a supranational treaty in order to challenge national statutory restrictions that impede free trade (the conclusion of contracts) in the then Common Market.<sup>71</sup> The European legal order could only develop through the decisive move from person to *mandataire*. I will call this a *constitutional* move. The trans-border dimension of contracting allows for an instrumentalisation of ‘contract’ as a device to shape a legal order.<sup>72</sup> The CJEU instrumentalises the *mandataire* for its self-defined objective (the genuine European legal order), whether or not the person behind the *mandataire* gets what he or she wants. The final decision is left to the national courts.

The second and third waves of globalisation that the EU underwent between 1986 and today have yielded ever more fragmented identity-based rights. Here, the constitutionalisation of private law takes two forms: the first occurs via the upgrading of identity-based rights to a higher level of value by reference to human rights and fundamental rights. The mushrooming of human rights and fundamental rights nationally, in Europe and internationally renders it possible to give more or less each and every right ‘a human right or a fundamental right touch’. The second occurs via adjudication through the CJEU as a constitutional

<sup>70</sup> E. STEIN, ‘Lawyers, Judges, and the Making of a Transnational Constitution’ (1981) 75 *AJIL* (*American Journal of Int’l Law*) 1–27.

<sup>71</sup> M. MADURO and L. AZOULAI (eds.), *The Past and the Future of EU Law – the Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty*, Hart Publishing, Oxford 2010.

<sup>72</sup> This is behind the statement of G. DAVIES ‘Freedom of Contract and the Horizontal Effect of Free Movement Law’ in S. WEATHERILL and D. LECZYKIEWICZ (eds.), *The Involvement of EU Law in Private Law Relationships*, Hart Publishing, Oxford 2013, p. 53.

court operating in the three (and more) policy fields as a key actor for managing ‘difference’. It is for the CJEU to develop this dimension of constitutionalisation by using increased references to the Charter of Fundamental Rights. The legal question is whether and to what extent these secondary EU rules grant ‘rights’ to these ‘people’. The technique of interpretation that the CJEU applies had already been foreshadowed by Demogue, Jhering, and Jellinek and transferred by Norbert Reich to the EU legal order.<sup>73</sup>

The ‘people’ live in constantly changing identities, from environmentalist to a person discriminated against by reason of their gender, and from there to a cheated consumer or customer. The CJEU connects and must connect – because this is the regulatory logic – the identity of the person to the particular policy field from which the respective rights have to be deduced. The person should not be understood as an individualised individual; ‘the person’ can easily represent a group of concerned private investors, such as in *Mohamed Aziz*,<sup>74</sup> or of energy customers, such as in *RWE*.<sup>75</sup> Her identity and the relevant policy field merge into one. This is already indicated in the way the identity-based right holders are named – the consumer relates to consumer protection, the environmentalist to environmental protection – the discriminated to anti-discrimination. One may wonder whether identity-based rights herald the end of the abstract person as one of the basic features of the Western European legal culture.<sup>76</sup>

Decision-making through adjudication is no more than a means to manage differences: differences in the respective policy field itself in weighing consumer rights and the rights of the supplier or service provider, differences between policy fields (e.g. weighing environmental protection rights against consumer protection rights), but also managing differences between identity-based rights where the holder of the rights has merged with the policy field into an indivisible conglomerate (the collective and the societal dimension) and the real persons standing behind the identity-based right and claiming justice with respect to their case (personalism).<sup>77</sup> *Mohamed Aziz* might be taken as

<sup>73</sup> However, without discussing DEMOGUE, instead focusing on JELLINEK, see n. 62 above.

<sup>74</sup> Case C-415/11, *Aziz v. Caixa d’Estalvis de Catalunya, Tarragona i Manresa*, judgment of 14 March 2013.

<sup>75</sup> Case C-92/11, *RWE Vertrieb AG v. Verbraucherzentrale Nordrhein-Westfalen*, judgment of 21 March 2013.

<sup>76</sup> F. WIEACKER, *Privatrechtsgeschichte der Neuzeit*, 2<sup>nd</sup> ed., Vandenhoeck & Ruprecht, Göttingen 1967. The separation of subject and object; the conceptualisation of the human relation in the ‘vis-à-vis’ and not in the ‘we’, which go back to Christianity and Judaism. The person has always, since the late Middle Ages, been a central aspect of the Western legal mind, our understanding of what it is to be a person and her relationship to ‘society’ (and before that providence) has changed. That might be a counter-argument. So, the latest iteration of the legal person understands her differently.

<sup>77</sup> See G. TEUBNER, ‘Societal Constitutionalism: Alternatives to State-Centered Constitutional Theory?’ in C. JOERGES, I.-J. SAND and G. TEUBNER (eds.) *Constitutionalism and Transnational Governance*, Oxford University Press, Oxford 2004, pp. 3–28.

an example.<sup>78</sup> Mr Mohamed Aziz belongs to the group of the ‘poor’ cheated house owners who have signed up to mortgage contracts that allowed for expeditious eviction. In that sense, the ‘poor’ house owners form a collective identity which is given rights through the CJEU. These rights have gradually gained the status of human and fundamental rights. The bulk of the case law before the CJEU has generated a new microcosm<sup>79</sup> – the distribution of rights and responsibilities of banks and house owners around Europe in the aftermath of the 2008 crisis. However, there is Mr Mohamed Aziz himself who wants to stay in his house despite his inability to pay the mortgage. What can be observed is that the ‘individual’ vanishes behind the collective dimension of the conflict – the ‘weak’ against the ‘strong’. Though being the hero in the fight against injustice, Mr Mohamed Aziz is depersonalised and de-subjectified at the same time. The EU legal order, as well as the political class (the European Commission, the European Parliament, the national governments, the national legislators), focus on the societal dimension, so that the individual being is merged with the policy issues that he has brought to the judicial and political fora. It is the irony of identity-based rights that owing to the merger with the policy objectives from which they derive their rights, the holders of these rights, ‘the real persons behind the right’, are literally ‘vanishing’.

Do they also vanish legally? Are we observing the emergence of a constitutionalised private legal order without a ‘real’ person, despite the fact that identity-based rights are a mandatory prerequisite for the shaping of such an order? Or has there never been a real person in that Classical Legal Thought was already based on the existence of a normative fiction of the person? But was ‘The Social’ not meant to bring the real person with her needs to the forefront of political, legal and judicial attention? National courts alone cannot bear the burden of re-establishing the individual; this seems to be the lesson to be drawn from all the public interest litigation. In managing difference, the judicial heroes appear as if they are regulatory agencies rather than problem solvers who decide a ‘case’. Is this what Ch. Schmid meant? Or is there a new move needed, to make identity-based rights ‘real’ via the recognition of the right to be treated as a worker, consumer, as a weaker party, as a property right holder, etc.?

#### 4. CONTRACT

European private law demonstrates the move towards a new form of a socially orientated contract that reflects the access justice paradigm and that already

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<sup>78</sup> H.-W. MICKLITZ, ‘Unfair Contract Terms – Public Interest Litigation before European Courts Case C-415/11 Mohamed Aziz’ in V. COLAERT and E. TERRY (eds.), *Landmark Cases of EU Consumer Law – in Honour of Jules Stuyck*, Intersentia, Antwerp 2013, pp. 615–634.

<sup>79</sup> I. DOMURATH, H.-W. MICKLITZ and G. COMPARATO (eds.), ‘The Over-indebtedness of European Consumers – a View from Six Countries’, EUI Working Paper EUI-ERC 2014/08.

enshrines a strong procedural dimension. The focus will be placed on anti-discrimination and consumer law, although the transition might also be traced in B2B relations.

#### 4.1. TRANSFORMATIONS: FROM SOCIAL TO PROCEDURAL CONTRACTS

The impact of the three transformations can be identified in the concept of contract. The move from formal rationality to material rationality in contract law has yielded an abundant literature on what can be grouped under the notion of 'social contract law'. The debate started in the late nineteenth century with the rise of labour contracts and the fight between employers and trade unions over their content, in particular, the need for minimum rights and duties to the benefit of employees. With the emerging consumer society in the 1960s in the US and the 1970s in Europe, the debate gained new ground. There have been attempts in French, German and Italian legal theory to use theories of labour contracts as a basis to understand consumer contracts.<sup>80</sup> The focus has been on how to justify and legitimise statutory intervention into freedom of contract/freedom to contract.

The development of EU law and EU legal theories on labour and consumer contracts took a different path, which is linked to the design of 'The Social' in a supranational entity such as the European Union. The timid attempts to build or to transform the EU into a social welfare state or, at least, to integrate social elements into labour law and consumer law were a limited success. Theoretical justifications and normative quests largely remained an academic exercise, at least when compared to developed social welfare state models such as the Nordic countries or Austria, France and Germany. Usually the theoretical patterns were taken from the nation state context; the changing role of the state and the particular character of the EU as a market state were not taken into account. And even if it was taken into account, there was limited preparedness to draw out the implications of the EU as a market state and as a laboratory and to take the differences between the nation state and the post-nation state seriously.<sup>81</sup>

This does not mean that labour contracts were not subject to the second and third transformation. However, the most prominent and successful policy field

<sup>80</sup> M. MIAILLE, *Une Introduction to Critique au Droit Civil*, Maspero, Paris 1976; N. REICH, *Markt und Recht*, Luchterhand Verlag, Neuwied 1976.

<sup>81</sup> The broad array of contributions in D. KOCHENOV, G. DE BURCA and A. WILLIAMS (eds.), *Europe's Justice Deficit?*, Hart Publishing, Oxford 2015 do not clearly distinguish between the different patterns of justice at the national and the EU level.



turned out to be anti-discrimination policy. It needed, this is Duncan Kennedy's argument, a further move in the globalisation process, from the second to the third wave, to break down the rather well-shielded realm of national family laws which stabilised gender discrimination. Richard Münch,<sup>82</sup> one of the few sociologists who studied the European integration process over recent decades, goes as far as to argue that anti-discrimination policy constitutes a genuine European value. In fact, hand in hand with the CJEU, the EU played a key role in challenging gender discrimination in many types of labour contracts<sup>83</sup> and, indeed, beyond labour contracts. The anti-discrimination principle cuts across the boundaries of the economy and society.

The second major domain of EU socially-minded contract law making is consumer law. Once again, there is a difference between the consumer protection policy of the Member States during the heyday of the social welfare paradigm and the consumer policy of the EU – with a much lower emphasis on protection and much higher demand for instrumentalising the consumer and the transnational consumer contract to contribute to the shaping of the internal market. In the aftermath of the Single European Act, the EU managed to adopt a first generation of consumer law directives and regulations, which regulates the modalities of contract conclusion, provides for the control of standard terms and commercial practices and lays down rules on particular types of consumer contracts, such as package tours, time sharing and consumer sales. It was only gradually that it became clear that European consumer law differs from Member States' consumer *protection* law.<sup>84</sup> While the form resembles national consumer law, the substance is gradually changing.<sup>85</sup> Viewed through the lenses of Duncan Kennedy, it is the third wave of globalisation which shines through and which gains more ground in the 1980s and 1990s.

In the second generation of European consumer law, the impact of the third wave of globalisation can be identified more clearly. This is what I term, tentatively, the move from the *social* to *procedural* contract, in line with the move from formal to material (Weber) to procedural rationality (Luhmann, Teubner).

<sup>82</sup> R. MÜNCH, *Die Konstruktion der Europäischen Gesellschaft, Zur Dialektik von transnationaler Integration und nationaler Desintegration*, Campus, 2008, shortened version in English, *European Governmentality, the Liberal Drift of Multi-level Governance*, Routledge, Abingdon 2010.

<sup>83</sup> BELL in MICKLITZ, n. 4 above.

<sup>84</sup> 'Die Austreibung des Schutzes aus dem Verbraucherrecht und die Wiederkehr des Sozialen im Zivilrecht – eine bittersüße Polemik' in *Festschrift für E.-J. Säcker zum 70. Geburtstag*, 2011, pp. 125–139, in English 'The Expulsion of the Concept of Protection from the Consumer Law and the Return of Social Elements in the Civil Law – A Bittersweet Polemic', EUI Working Paper 2012/03, (2012) 35 *Journal of Consumer Policy* 283–296.

<sup>85</sup> Y. SVETIEV, 'From Conflict to Platforms' in K. PURNHAGEN and P. ROTT (eds.), *Varieties of European Economic Law and Regulation, Liber Amicorum for Hans Micklitz*, Springer, Cham/Heidelberg/New York 2014, pp. 153–178.

It can be felt already in the first generation of EU consumer law, highlighted in the decision to leave offer and acceptance untouched but to heavily regulate the pre- and the post-contractual stage.<sup>86</sup> Prior to contract conclusion, the EU has adopted a whole series of information duties in which contract and commercial practice come together; whereas, in the post-contractual phase, the EU requires effective remedies. Read together, these measures downplay the centrality of consensus. In this sense, it might be possible to interpret consumer policy as proceduralising contract law. The EU regulates all important aspects of the contract except the conclusion of the contract. The most obvious development is the involvement of the EU in regulating sectoral markets, which in contract law categories is a move from sales to services. Since the adoption of the Single European Act, the EU has focused on liberalising and privatising former state monopolies. It needed the third generation of sector-related EU rules before the consumer-customer attracted political attention. Today, there is a whole set of EU rules shielding the consumer-customer against potential harmful effects of the liberalisation and (partial) privatisation of former state monopolies in the field of telecommunications, postal services, energy, public transport, and banking and finance.

Why proceduralised contracts? By examining regulated markets, one observes a fragmented body of EU rules, including in the field of contract law. Sector-specific contract law rules pay tribute to the specific rationality governing the respective sector. They regulate<sup>87</sup> the contract from cradle to grave. There are no established rules of law pertaining to, for example, a telecommunication or energy contract. The rules and their meaning can only be comprehended if they are embedded into the process of the making of the rules downwards from the directives and regulations through informal rule-making in the regulatory agencies and the management of the conflict resolution.

The CJEU has often adjudicated anti-discrimination issues and decided on the first generation of consumer law. What is true for facts behind claims to market access is equally true for anti-discrimination claims. Most of the cases involve a contractual dimension. The parties to the contract feel discriminated against owing to unequal treatment resulting from unequal pay or from multiple protean dimensions of indirect discrimination. Whilst the focus in CJEU judgments is quite often on the 'person', the women or the men or transsexuals, the economic dimension of the discrimination is enshrined in the contract rules themselves. This is simply the other side of identity-based rights. In consumer law there is an abundant case law that arose following the collapse of Lehman

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<sup>86</sup> On the procedural character on the unfair terms control, see DELLA NEGRA, n. 24 above.

<sup>87</sup> From the making of the rules in the sector up to its enforcement via agencies and alternative dispute settlement bodies, see M. CANTERO GAMITO, *The Private Law Dimension of the EU Regulatory Framework for Electronic Communications: Evidence of the Self-Sufficiency of European Private Law*, EUI PhD 2015.

Brothers and the Euro-crisis. In more than 40 preliminary references, the CJEU had to adjudicate on standard contract terms in consumer credit contracts, consumer sales contracts and mortgage contracts. The ever denser set of CJEU rulings allows for the development of an autonomous understanding of the control over standard terms. Similar to the case law on anti-discrimination in labour contracts, the question is whether and to what extent the CJEU is about to constitutionalise consumer contracts. Labelling the move of the CJEU towards the protection of employees, of the discriminated or of consumers, as giving voice to 'The Social', does not give the full picture. This is owing to the different function 'The Social' plays in the EU in comparison to Member States. My own reading very much stresses the difference between the distributive function – social justice – and the access function – what I call access justice. The EU is setting minimum standards of access justice. It remains for the Member States to go beyond that minimum.

#### 4.2. CONSTITUTIONALISATIONS: OPEN AND HIDDEN FORMS

I would like to distinguish between open and hidden forms of constitutionalisation. Open forms are those wherein the CJEU directly refers to human rights or fundamental rights in anti-discrimination and consumer law; hidden forms are those in which there is no direct reference but where I understand the interventions of the CJEU as of constitutive and constitutional importance for the European legal order. Combined with Ch. Schmid's distinction between the CJEU as a supreme court in private law and a constitutional court, it helps to draw a line between 'normal' types of conflicts that have to be resolved in the realms of private law litigation and 'constitutional' types of conflicts that have an impact on the notion and the concept of contract.

The most visible form of constitutionalisation takes place in the field of anti-discrimination law.<sup>88</sup> Here the CJEU has played and still plays a key role. In the early days of the EU, the CJEU did not invoke human rights, but used Article 141 of the TFEU as a tool to constitutionalise gender discrimination, first in direct forms of discrimination through unequal pay, later through indirect forms of discrimination. By means of the four directives and the Charter of Fundamental Rights, anti-discrimination has turned into a value system that governs the EU legal order and that is no longer limited to labour contracts. The key difficulty is how to distil from the mass of decisions dealing with all sorts of discrimination those contractual rights that could and should be granted a 'constitutional status'.

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<sup>88</sup> N. REICH, *General Principles of EU Civil Law*, Intersentia, Antwerp 2014, p. 59.

Such contractual obligations would thus no longer be subject to change through legislation. The far-reaching implications of such consequences on the political and democratic systems of (Member) States are widely discussed. *Test-Achats* documents the willingness of the CJEU to use primary Community law (not yet the Charter) in order to set aside residual forms of gender discrimination in insurance contracts.

In consumer law, *Mohamed Aziz* triggered an entirely new development. Mr Aziz was evicted from his home as he did not pay his mortgage. The case reached the CJEU via the preliminary reference procedure. At stake were the contract terms in the loan agreement that allowed the creditor to engage in enforcement proceedings, in which the potential unfairness of the contract terms could no longer be invoked. Neither the CJEU nor the Advocate General refers to Article 34(3) of the Charter on Fundamental Rights, which could have been used as a basis to establish a right to 'housing.' However, the CJEU and the Advocate General were ready by indirect means to give housing a particular quasi-constitutional standing. Since *Aziz*, the constitutionalisation process has gained pace, in particular through the preparedness of the CJEU to address openly the constitutional dimension of consumer contract laws in *Sánchez Morcillo* and *Kušionová*.<sup>89</sup> However, unlike anti-discrimination law, the number of available judgments in which the CJEU addresses explicitly the human rights or fundamental rights dimension is still rather limited. Therefore, it is difficult to draw general conclusions. There is no counterpart to *Test-Achats*. It is far from clear how far the CJEU would go in declaring EU consumer directives and regulations as infringing the Charter of Fundamental Rights. The much-debated Consumer Rights Directive, 2011/83/EU, with its mix of upgrading and downgrading consumer rights, has not brought about any clarification.<sup>90</sup> It is plain that each and every consumer right, and each and every mandatory term in secondary Community law cannot be shielded against legislative change.

The notion of *hidden* constitutionalisation in consumer law builds on the idea that the concept of contract is constitutive, foundational and, therefore, constitutional in a legal order that reaches beyond the state. The most amazing developments are taking place at the pre-contractual and the post-contractual stage. I would like to place emphasis on the case law that deals with the relationship between pre-contractual duties and commercial practices (advertising and

<sup>89</sup> F. DELLA NEGRA, 'The Uncertain Development of the Case Law on Consumer Protection in Mortgage Enforcement Proceedings: Sánchez Morcillo and Kušionová' (2015) 52 *CMLR* 1–24.

<sup>90</sup> Directive 2011/83/EU, OJ 2011, L 304/64. See E. TERRY, 'Distance selling and doorstep selling after the adoption of the Consumer Rights Directive – more patchwork?' (2012) 3 *Revue des Affaires Européennes* 525–539.

sales promotion). Three trends deserve highlighting: the fading line between advertising and a contractual offer, secondly, the ‘merger’ of commercial practices and standard terms respectively and, thirdly, the merger of individual and collective terms. The scope of Article 13 of the Brussels Convention (Article 15 of the Brussels I Regulation) has given rise to extensive case law with regard to whether and to what extent sending sweepstake competitions to consumers can be regarded as a ‘contract’ allowing him or her to sue the company in his or her place of domicile. The issue has been referred on several occasions to the CJEU. In *Gabriel*,<sup>91</sup> the CJEU held that winning a prize and ordering goods means that a contract is concluded, whereas in *Engler* it made clear<sup>92</sup> that winning a prize without ordering goods means that no contract is concluded. At first sight the CJEU takes a clear stand: if the consumer has filled out the coupon and orders the products, a contract is concluded and Article 13 of the Brussels Convention/ Article 15 of the Brussels I Regulation applies. If the consumer has received the sweepstake but has not responded to the offer to order products or if the trader has not made such an offer to place an order, Articles 13 or 15 do not apply owing to the lack of reciprocal obligation. From a marketing point of view the situation is relatively similar in both scenarios. The consumer must react: either to order the product or to order the prize. The distinction of the CJEU seems artificial, as the applicability of Articles 13 or 15 depends on the prior sales of goods. The CJEU had to respond a third time to a similar question, this time in relation to the Brussels I Regulation. According to *Ilsinger*,<sup>93</sup> sweepstake competitions can be regarded as a contract even when they are independent of the sale of goods. The CJEU observed that Article 15(1) of Regulation 44/2001<sup>94</sup> is not identical to Article 13 of the Brussels Convention: Article 15(1) is drafted in more general terms. However, as to the requirement that a ‘contract’ exists between vendor and consumer, Article 15 of the Regulation has to be interpreted like Article 13 of the Convention. The Court first looks at its *Gabriel* and *Engler* case law and then makes an important differentiation. There can indeed be a contract when the vendor has declared that she is willing, without conditions, to pay the prize at issue to consumers who request it. It is for the national court to determine whether that requirement is fulfilled in the dispute at hand.

In a conventional understanding, commercial practices and standard terms belong to different categories. Commercial practices (Directives 2005/29 and 2006/114)<sup>95</sup> are to be regarded as market regulation, enforced via public authorities (in the vast majority of the Member States) making sure that

<sup>91</sup> Case C-96/00, *Rudolf Gabriel v. Schlank & Schick* [2002] ECR I-6367.

<sup>92</sup> Case C-27/02, *Petra Engler v. Janus Versand GmbH* [2005] ECR I-481.

<sup>93</sup> Case C-180/06, *Renate Ilsinger v. Martin Dreschers* [2009] ECR I-3961.

<sup>94</sup> Regulation 2001/44/EC [2001] OJ L12/1.

<sup>95</sup> Directive 2005/29/EC [2005] OJ L149/22 and Directive 2006/114 [2006] OJ L376/21.

competition between companies is not unduly aggressive and unfair. Standard terms contracts (Directive 93/13)<sup>96</sup> are to be regarded as a means to ensure fairness in contractual relations, between businesses and consumers, but also to a more limited extent between businesses.<sup>97</sup> The CJEU, however, systematically blurs the line between the two fields of law. Both directives within the context have large open-ended clauses. On the one hand, there are non-binding terms, which contradict the principle of unfairness as laid down in Article 3 Directive 93/13/EEC. On the other hand, there is the law of unfair commercial practices. The scope of Directive 2005/29/EC is quite broad.<sup>98</sup> It covers even individualised advertising addressing one single consumer only.<sup>99</sup> Thus, Directive 2005/29/EC mutates into a catch-all mechanism, which covers advertising, sales promotion and standard contract terms.

According to Article 3(2), Directive 2005/29/EC is ‘without prejudice to contract law and, in particular, to the rules on the validity, formation or effect of a contract’.<sup>100</sup> But the CJEU has also emphasised in *Pereničova* that ‘a finding that a commercial practice is unfair is one element among others on which the competent court may base its assessment of the unfairness of contractual terms under Article 4(1) of Directive 93/13’,<sup>101</sup> provided there is an unfair commercial practice and the scope of application of the Unfair Contract Terms Directive is relevant. The individual consumer can be helped only if the unfair commercial practice itself can be referred to in order to evaluate the unfairness of a contract clause. In *Pereničova*, the Advocate General and the CJEU worked out precisely

<sup>96</sup> Directive 93/13/EC [1993] OJ L95/29.

<sup>97</sup> Directive 93/13 applies to B2C only; however, there are EU rules in competition law and insurance law that affect the relationship between businesses.

<sup>98</sup> AG Trstenjak in Case C-453/10, *Pereničová and Vladislav Perenič*, judgment of 15 March 2015, para. 91: ‘A number of situations will serve to illustrate the close link between the two directives: as regards the circumstances in the main proceedings, for example, it is conceivable that the unfairness of a commercial practice consists in the very use in consumer contracts of unfair terms within the meaning of Directive 93/13. (43) The trader’s use of such terms is likely to be seen as a misleading act, since false information is provided or the consumer is unclear as to the actual scale of the contractual rights and obligations, especially with regard to rights and obligations arising from the clauses which are unfair and so invalid for the consumer. A similar assessment is likely to be made of a situation in which the trader words vital terms in language which is not plain or intelligible in order to withhold essential information from the consumer. Conversely, it is also conceivable, however, that false and thus misleading information in a contractual term within the meaning of Directive 2005/29 is the very reason for its unfair nature. This is also the situation which the referring court clearly suspects in the main action and which will need to be examined in the following’.

<sup>99</sup> See P. ROTT, ‘Der “Durchschnittsverbraucher” – ein Auslaufmodell angesichts personalisierten Marketings’ (2015) 5 *Journal of Economic and Consumer Law* 163.

<sup>100</sup> *Pereničova*, n. 98 above, para. 44.

<sup>101</sup> *Ibid*, para. 43.

how this interaction should occur. The Advocate General and the CJEU overcame the dividing line between the two fields of law by highlighting that the control of unfair terms also applies where the author drafted the clause with a view to its *possible* use: ‘It is therefore not necessary for general use to be actually or certainly planned’.<sup>102</sup> By this manoeuvre, the control of unfair terms shifts to an earlier stage of the examination, thus paving the way for the inclusion of commercial acts, as far as the latter meet the formal requirements of being treated as ‘contract terms’.

What are the consequences? Can contract clauses be effective even if they have to be classified as unfair or misleading commercial practices? An important distinction must be drawn between the potential impact of unfair commercial practices on *individual* contracts, in which the validity of one term might depend on a coherent interpretation of the two areas of the law, and the potential impact of unfair commercial practices on *collective* actions. The CJEU has not yet had to decide the applicability of Article 4(1) of Directive 93/13/EEC to collective actions. It has insisted on restricting the scope of the *contra proferentem* rule to individual litigation,<sup>103</sup> without, however, noticing the necessity of achieving a consistent interpretation in individual and collective litigation. In light of the well-known tendency of the CJEU to develop a common approach to different fields of law, it might not be far-fetched to assume that the CJEU might be ready to aim at consistency also in the rules governing the control of contract terms by individual or via collective actions. This would mean, in particular, that the reach and application of Article 4 of Directive 93/13/EEC should extend to collective litigation.<sup>104</sup> *Sinués*<sup>105</sup> points exactly in such a direction. Advocate General Szpunar confirms the compatibility of a Spanish rule that suspends an individual action until the final decision is reached in an action for an injunction.

## 5. PROPERTY

Property is a wonderful blueprint for analysing the transformation process under the three waves of globalisation. Its absolute character has undergone deep changes with the rise of ‘The Social’. The primary venue for developments at the

<sup>102</sup> Case C-472/10, *Invitel*, judgment 6 December 2011, para. 65 (AG Opinion), para. 37 (ECJ) with reference to Case C-372/99, *Commission v. Italy* [2002] ECR I-819, recital 14.

<sup>103</sup> Case C-70/03, *Commission v. Spain* [2004] ECR I-7999.

<sup>104</sup> I have proposed to overcome the antinomies between individual concrete and collective abstract terms in merging the 2 into a concept of general-concrete fairness test; H-W. MICKLITZ, N. REICH and P. ROTT, *Understanding EU Consumer Law*, Intersentia, Antwerp 2009, para. 3.20.

<sup>105</sup> Case C-381 and C-385/14, *Jorge Sales Sinués v. Caixabank SA*, judgment of 14 January 2016 (AG Szpunar).

European level, however, seems to be the ECtHR, whereas the CJEU promotes the development of property rights as political rights.

### 5.1. TRANSFORMATIONS: MAJOR DIFFERENCES BETWEEN MEMBER STATES AND THE EU

The waves of transformation can easily be reconstructed in the way property has been conceptualised, though this has occurred to a very different degree at the nation state level in comparison to the European Union level. In Classical Legal Thought ‘property’ is regarded as an absolute right that entitles the right holder to exclude others.<sup>106</sup> Whilst this overall position still holds true and is defended forcefully by many legal scholars, the rise of ‘The Social’ has yielded a new understanding of property. On the one hand, the absolute character of the right to property has been relativised. This is most outspoken in German law, where property is submitted to a kind of social compatibility test, in German ‘*Sozialbindung des Eigentums*’ – perhaps something like social obligations of private property ownership. On the other hand, inspired by the move towards ‘The Social’, legislatures and more prominently courts in numerous Member States have extended the notion of property in order to include social property rights, in particular pension rights, that are granted by public law and based on joint contributions from the employer and the employee.<sup>107</sup>

The situation is very different at the EU level. As is well known, the Treaty does not deal with private law matters. However, according to Article 345 of the TFEU, ‘The Treaties shall in no way prejudice the rules in Member States governing the system of property ownership’. This leaves the regulation of property in the hands of the Member States. CJEU case law on Article 345 of the TFEU is very limited and mostly relates to expropriation. Since 2000, the right to property is governed by Article 17 of the Charter on Fundamental Rights. Property is protected, but very much in line with the development in major countries around the world, since it is or can be submitted to (social) restrictions. The EU legal order has barred the EU legislature from taking measures to harmonise property law, though maybe one should add to *openly* harmonise property law. This is one reason among others why the Draft Common Frame of Reference (but not the Common European Sales Law) failed, contrary to what the drafters intended, to harmonise the notion of property within the scope of contract and non-contractual relations.<sup>108</sup>

<sup>106</sup> R.J. SMITH, *Property Law*, Pearson, Harlow 2009, p. 3.

<sup>107</sup> G. BRÜGGEMEIER, G. COMANDÉ and A. CIACCHI (eds.), *Fundamental Rights and Private Law in the European Union*, 2 vols., Cambridge University Press, Cambridge 2010.

<sup>108</sup> See Draft Common Frame of Reference, Annex I under ‘property’, but see recital 27 of CESL, Proposal for a Regulation of the European Parliament and of the Council on a Common



Secondary Union law on consumer contract law, in particular, has led to a form of ‘hidden’ or ‘indirect’ harmonisation in that the different regulations and directives presuppose the existence of ‘property’, though linked to the modalities of contract conclusion, of contract or of contractual and tortious remedies. To give one example from the Product Liability Directive, Directive 85/374,<sup>109</sup> Article 9 states: ‘For the purpose of Article 1, “damage” means: (b) damage to, or destruction of, any item of *property* other than the defective product itself’. Numerous other examples can easily be found, for example in the Timeshare Directive 2008/122 or in the Mortgage Directive 2014/17.<sup>110</sup> ‘Property’ is, however, nowhere defined. Thus, the EU legislature circumvents the deeper problem that results from divergent understandings of property in national legal orders, not only between common law and continental law, but also between the different continental interpretations of property.<sup>111</sup> It would be a valuable exercise to distil from the different EU directives and the relevant CJEU case law the reconceptualisation of property. This would also permit us to understand whether and to what extent the subject matter – the respective consumer contract law directive or the Product Liability Directive – provides for an EU understanding of property in terms of the Classical Legal Thought or in terms of ‘The Social’ or in terms of ‘neoformalism’.

The situation is different with regard to intellectual property rights. In the Treaty of Rome intellectual property rights appear as one possible reason to justify restrictions on trade in goods under Article 36 of the TFEU. The question was whether Article 345 of the TFEU covers property rights as well. This somewhat ambiguous starting position has enabled the CJEU to draw a distinction between the status of intellectual property rights and the exercise of intellectual property rights.<sup>112</sup> Long before the insertion of an explicit competence on intellectual property rights in the Treaty of Lisbon (Article 118), the EU adopted a whole series of regulations and directives dealing with trade marks, copyrights, enforcement of IP and data protection rights, biotechnological inventions and topographies of semiconductor products. Contrary to Article 345 of the TFEU, there is a growing case law of the CJEU that allows us to locate the development of European intellectual property rights law through regulations and directives into the three waves of transformation.

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European Sales Law /\* COM/2011/0635 final – 2011/0284 (COD), which delegates questions of ownership to the European international private law rules.

<sup>109</sup> Directive 93/13/EC [1993] OJ L210/29.

<sup>110</sup> Directive 2008/122/EC [2009] OJ L33/10 and Directive 2014/17/EU [2014] OJ L60/34.

<sup>111</sup> S. VAN ERP/B. Akkermans above n. 51; now CH. VON BAR, *Gemeineuropäisches Sachenrecht*, vol. 1, Ch. Beck, Munich 2015.

<sup>112</sup> H.-W. MICKLITZ and S. WEATHERILL, *European Economic Law: Casebook*, Dartmouth, London 1997, p. 303, with references from the CJEU.

At first sight, it appears that the European law of intellectual property rights fits into Classical Legal Thought, into the formal establishment of a European legal order, based on (intellectual) property. However, this does not seem to be correct. Already the distinction between status and exercise of intellectual property rights goes beyond such an understanding. The CJEU's case law aimed to establish an internal market in which national property rights cannot be used to partition national markets artificially and shield them against competition. Whilst this policy could be interpreted, though in a somewhat simplified way, as a foundational market building exercise very much in line with Classical Legal Thought transferred to the EU, the strong engagement of the EU legislature into expanding intellectual property rights calls for a different explanation. Here, the link to the third transformation is more obvious. The proliferation and expansion of IP rights, promoted and forced on developing countries by Western global players – the USA and the EU – could be seen as one of the characteristics of the third transformation and, as such, the EU's expansion in this sphere both naturally follows from and confirms the third transformation.

## 5.2. CONSTITUTIONALISATION: POLITICISED MULTI-LEVEL

Quite a number of Member States have given 'property' a constitutional status.<sup>113</sup> Owing to the lack of directives and regulations, constitutionalising property remained in the hands of the national courts. At the European level, it seems possible to distinguish between four types of case law according to their legal source: first, constitutionalisation of property rights via the CJEU within and outside harmonising measures; secondly, constitutionalisation via Article 17 of the Charter which has upgraded property and recognised it as a fundamental right; thirdly, constitutionalisation via the ECtHR; and fourthly, constitutionalisation of intellectual property rights, the only area where there is sufficient CJEU case law that could be used to distil 'principles'.<sup>114</sup> Setting aside the differences between the legal sources of constitutionalisation and focusing on the substance of the constitutionalisation of property, there seems to be a clear divide between national constitutional courts/ECtHR on the one hand, and the CJEU on the other. National constitutional courts and the ECtHR are ready

<sup>113</sup> See V. TRSTENJAK, 'The Influence of Human Rights and Basic Rights in Private Law' in V. TRSTENJAK and P. WEINGERL (eds.), *The Influence of Human Rights and Basic Rights in Private Law*, Springer, Switzerland 2016, and BRÜGGEMEIER, COMANDÉ and CIACCHI, n. 107 above.

<sup>114</sup> See TRSTENJAK, *ibid*; CH. GODT, in MICKLITZ, n. 4 above.

to limit the absolute character of property rights through the integration of ‘The Social’, whereas the CJEU, to the contrary, tends to proceduralise property rights, thereby turning property into a political right to participation.

Whilst this could be called a general tendency for the overall period of ‘The Social’, the promotion of national legislative measures to diminish social rights in the aftermath of the 2008 Euro-crisis paints a more ambiguous picture.<sup>115</sup> In the light of the reluctance of national courts to protect social property rights, victims of austerity policies sought support before the ECtHR. To date, four cases from Greece, Portugal, Hungary and Latvia, have reached the Court in Strasbourg.<sup>116</sup> In the first three instances the plaintiffs question the legality of cuts to their pension rights; in the Latvian case changes of the law on maternity and sickness insurance form the core of the conflict. Only the Hungarian plaintiffs were successful. The Court criticised in harsh language the 98 per cent tax on severance payments. One might wonder to what extent the plaintiffs are ‘weak parties’ that deserve protection or whether these rights are privileges of a rather small group in society. Duncan Kennedy’s finding that everybody can turn herself into a weak party springs to mind.

More far-reaching proposals to tie the overall crisis management of the Troika to the purported respect for social human rights remained unfulfilled.<sup>117</sup> Such a new policy would require difficult decisions between groups in society in order to determine those who are ‘really’ in need and those that can ‘bear’ economic losses. The different outcome of the four ECtHR judgments and the differentiation between the four cases seem to fit into such a picture. A crisis management that takes social human rights fully into account points towards the third transformation and the overall – highly debated question – whether human rights could serve as a universal order that even trumps national sovereignty. The Greek, Portuguese and Hungarian parliaments would no longer be free to decide where to cut and whom to choose as a target group. Social human rights

<sup>115</sup> See the contributions in C. KILPATRICK and B. DE WITTE (eds.), ‘Social Rights in Times of Crisis in the Eurozone: The Role of Fundamental Rights’ Challenges’, EUI Working Paper 2014/05.

<sup>116</sup> A. NANNERY, ‘The “Social-Euro Crisis” Cases of the European Court of Human Rights in the European Sovereign Debt Crisis’, LLM EUI Florence 2016, who refers to *Koufaki and ADEDY v. Greece*, nos. 57665/12 and 57657/12, § 6–7, 7 May 2013, ECLI:CE:ECHR:2013:0507DEC005766512; *Da Conceição Mateus v. Portugal and Santos Januário v. Portugal*, nos. 57725/12 and 62235/12, 8 October 2013, ECLI:CE:ECHR:2013:1008DEC006223512; *N.K.M. v. Hungary and R.Sz. v. Hungary*, no. 66529/11, 14 May 2013, ECLI:CE:ECHR:2013:0514JUD006652911; *Sulcs v. Latvia*, no. 42923/10, 6 December 2011, ECLI:CE:ECHR:2011:1206DEC004292310.

<sup>117</sup> O. DE SCHUTTER and M. SALOMON, *Legal Brief prepared for the Special Committee of the Hellenic Parliament on the Audit of the Greek Debt*, 15 June 2015; O. DE SCHUTTER and M. SALOMON, *Economic Policy Conditionality, Socio-economic Rights and International Legal Responsibility: the Case of Greece 2010–15*, available at: <<http://cadtm.org/Legal-Brief-Prepared-for-the>> accessed 23.09.2016.

would not only limit national sovereignty of the ‘takers’ but also of the ‘givers’. The result would be an international property rights management that defines how ‘property’ should be conceived in a globalised world, largely exercised by the judiciary.<sup>118</sup>

There is perhaps one particular type of case before the Court in Luxembourg that could be read and understood as defending ‘The Social’ through the advocacy of fundamental rights. This is again the case law that was triggered by *Mohammed Aziz*. Here, the Court is involved in post-crisis management and refers to the right to housing in order to smooth the potential impact of the Euro-crisis on mortgage debtors. There is definitely a ‘social’ element in the case law insofar as the CJEU restricts the absolute right of the banks to evict from their homes those who are not able to pay their debts.<sup>119</sup> The CJEU is reminding European society at large of the hundreds of thousands of home owners and creditors whose existence is jeopardised and who could and should not be regarded as inevitable ‘collateral damage’. While this finding might sound promising to those who would like to see the CJEU turning into a social court, it should not be forgotten that the CJEU case law is far from consistent. *Alemo-Herron*, though rather unique, stands for a totally different position, where the CJEU defended in crude language freedom of contract, using fundamental rights language to test the compatibility of Member States’ legislation beyond the minimum level of harmonisation.<sup>120</sup>

However, there is more to say about the social or non-social character of the CJEU case law. *Mohamed Aziz* read together with *Centros* demonstrates how the CJEU is transforming ‘property’ rights into ‘political’ rights. Here the link to the third transformation becomes clear. Let us assume that Mr Aziz enjoys a property right under the Charter of Fundamental Rights that allows him and his family to remain in the family home without paying their mortgage repayments. Let us further assume that the Danish citizens, who were granted the right to establish a company in the UK, are equally granted a kind of ‘proprietary right’. Where is the link between the two and where is the move towards the ‘political’<sup>121</sup>

<sup>118</sup> KENNEDY (n. 3 above) rejects the idea of a universal order. In that context, see A. LEHAVI, ‘Unbundling Harmonization: Public versus Private Law Strategies to Globalize Property’ (2015) 15 *Chicago Journal of Int’l Law* 452 who argues that a global system of private law property doctrines might require a deeper commitment to fundamental changes than public property.

<sup>119</sup> CH. MAK, ‘On Beauty and Being Fair – The Interaction of National and Supranational Judiciaries in the Development of a European Law on Remedies’ in PURNHAGEN and ROTT, n. 25 above, p. 823.

<sup>120</sup> On the case, see S. WEATHERILL, ‘Use and Abuse of the EU’s Charter of Fundamental Rights: on the Improper Veneration of “Freedom of Contract”’ (2014) *ERCL* 167; M. BARTL and C. LEONE, ‘Minimum Harmonisation after Alemo-Herron, The Janus Face of EU Fundamental Rights Review’ (2015) 11 *EuConst (European Constitutional Law Review)* 140–154.

<sup>121</sup> I tried to develop this dimension 10 years ago in *Politics of Judicial Co-operation*, n. 29 above, p. 479.

and to the third transformation? What matters in light of the paradigms set out at the beginning of this chapter is the transnational dimension to property rights. The conceptualisation of property reaches beyond the boundaries of a particular national legal order. The CJEU addresses first and foremost the national authorities in Spain and other bail-out countries: the national courts but also the governments and to some extent even the EU institutions themselves. The CJEU cannot decide the case, it only triggers a procedure, a process, in the home countries of the plaintiffs, where the claimants are given a voice in the political concert. In that sense *Centros* and *Aziz* stand in a long line of CJEU case law where individual rights promote the transnationalisation of the nation state.<sup>122</sup> This is exactly the kind of laboratory that is characteristic of the European legal order and the European ‘market’ state.

## 6. REMEDIES

With respect to remedies, unlike with the other pillars, an explanation is needed about how competences are shared in the Treaty and how the EU legislature, with the support of the CJEU, managed to interfere with remedies. The shift in perspective paves the way for highlighting the considerable shift in the design of remedies in the second and third transformation, from effectiveness to managing differences in a multi-level supranational entity like the EU.

The European legal order is based on a clear division of responsibilities, in which the EU has been granted greater competences to regulate the internal market and any other policy field provided the Member States have delegated their competence to the EU. The principle of enumerated powers was confirmed in the Treaty of Lisbon. However, the responsibility of the Member States to enforce EU law has never been explicit in the Treaties. This does not mean that the Member States are totally free. In *Rewe* and *Comet* the CJEU confirmed the procedural autonomy of Member States in enforcing EU law provided they meet the principle of equivalence and effectiveness.<sup>123</sup> There is an abundant case law in which the CJEU has given shape to the two principles. Some argue that the principles are no more than a chimera, filled with holes like a Swiss cheese.<sup>124</sup> It is certainly true that, in particular, the principle of effectiveness has given rise to the EU’s shaping of the boundaries of procedural autonomy. The adoption of the

<sup>122</sup> N. REICH, *Bürgerrechte in der Europäischen Union*, Nomos, Baden-Baden 1999.

<sup>123</sup> Case C-45/75, *Rewe-Zentrale des Lebensmittel-Großhandels GmbH v. Hauptzollamt Landau/Pfalz* [1976] ECR 181; Case C-45/76 *Comet BV v. Produktschap voor Siergewassen* [1976] ECR 2043.

<sup>124</sup> See the outspoken M. BOBEK, ‘Why There is No Principle of “Procedural Autonomy” of the Member States’ in MICKLITZ and DE WITTE, n. 27 above, p. 305.

Charter of Fundamental Rights with its emphasis on effective judicial protection in Article 47 might even accelerate the pace of EU intrusion into the foundations of the Treaty insofar as there is clearly a constitutional dimension, provided one accepts the rhetoric of the CJEU which understands the EU legal order as a 'constitutional order'. Article 47 has to be read together with Articles 6 and 13 of the ECHR.

With the exception of competition law, EU rules on the enforcement of private law, whether traditional or regulatory, can only be found in secondary community law. Competition law holds a prominent position. Article 103 of the TFEU provides a basis for concentrating enforcement in the hands of the Commission.<sup>125</sup> As the EU has no genuine competences in traditional private law matters, regulatory private law is based on the internal market competence. In this regard, the CJEU has developed the principle of the so-called annex competence. Therefore the EU may touch upon 'remedies' provided there is an inherent link to the particular substance in question. These bits and pieces<sup>126</sup> make it hard to identify common denominators in the shaping of rights, remedies and procedure, to use van Gerven's terminology. It will have to be shown that the CJEU is gradually developing genuine European remedies that do not fit into a traditional understanding of private law remedies.

## 6.1. THE TRANSFORMATIONS: FROM EFFECTIVENESS TO DELIBERATION

EU law has given private law a decisive position that fits nicely into the characteristics of the second and third transformation. This is true both with regard to the principle of effectiveness and the principle of equivalence. The principle of effectiveness gains ground with the rise of 'The Social'. A goal-orientated policy that aims at improving 'social justice' requires remedies that are suitable for the achievement of the politically agreed objectives. That is why the principle of effectiveness can turn into an extremely powerful tool in the hands of courts and judges as the self-proclaimed heroes of the post-nation state. It is more or less open-ended as it is bound only to the policy (consumer protection, anti-discrimination) which is normally rather vaguely defined.<sup>127</sup> What is a

<sup>125</sup> On the competence and the design in light of the Damage Directive, see H.-W. MICKLITZ, 'Why is the Regulation of Enforcement through the EU so Difficult' in M. MARQUIS and G. MONTI (eds.), *Shaping Private Anti-Trust Enforcement in Europe*, Hart Publishing, Oxford 2016.

<sup>126</sup> As to the language, see D. CURTIN, 'The Constitutional Structure of the Union: A Europe of Bits and Pieces' (1993) 30 *CMLR* 17–69.

<sup>127</sup> See the telling analysis of H.-P. SCHWINTOWSKI, 'Informationspflichten und effet utile – Auf der Suche nach einem effektiven und effizienten europäischen Sanktionssystem' in R. SCHULZE, M. EBERS and H.C. GRIGOLEIT (eds.), *Informationspflichten und Vertragsschluss im Acquis Communautaire*, Mohr Siebeck, Tübingen 2003, p. 267.

transparent contract? What is a ‘just’ contract? The largely recognised and widely discussed move of the legislature from ‘rules’ to ‘principles’ enhances the power of the judiciary. This is even more so in the European context, where political compromises in the legislative procedure are hidden in sometimes contradictory recitals in the preamble to the piece of legislation. However, the principle of effectiveness reaches beyond ‘The Social’ and touches upon all policy fields that enshrine a private law dimension, including the area of regulated markets. The differentiation of policy fields, consumer policy, anti-discrimination policy, but also telecommunication policy, energy policy, transport policy, banking and finance policy, each institutionally coupled to a Directorate, a Commissioner and the cabinets behind him or her, demonstrates that the principle of effectiveness cannot have the same core meaning across the various policy fields but is bound to a particular sectoral rationality.<sup>128</sup>

The principle of equivalence introduced a new layer into the world of rights, remedies and procedure, as early as 1976 when *Rewe* and *Comet* were decided.<sup>129</sup> Here the CJEU refers to the multi-level structure of the European legal order. One might understand the principle of equivalence as originating from the prohibition on discriminating against EU law. The available rights, remedies and procedures in the Member States serve as the comparator for the enforcement of EU law. Such a perspective does not exist in national legal systems. Rights, remedies and procedures in various policy fields might be compared with each other, but not across national borders. Thus, whilst the multi-level dimension is constitutive for the European legal order, the early move of the CJEU towards testing equivalence fits nicely into the perspective of the third transformation, in particular adjudication through the CJEU as a constitutional court, operating across various levels (EU and national) and various policy fields as the key actor for ‘managing differences’ between rights, remedies and procedure in the EU and the Member States.<sup>130</sup>

## 6.2. CONSTITUTIONALISATION: BREAKING PRIVATE LAW BOUNDARIES

Managing difference does not only imply the need for balancing,<sup>131</sup> but also to integrate into the means of enforcement the multi-level structure of the

<sup>128</sup> As to ‘rationality’, see A. FISCHER-LESCANO and G. TEUBNER, ‘Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law’ (2004) 25 *Michigan Journal of Int’l Law* 999–1046.

<sup>129</sup> See n. 123 above.

<sup>130</sup> M. AMSTUTZ, ‘In-Between Worlds: Marleasing and the Emergence of Interlegality in Legal Reasoning’ (2005) 11 *ELJ* 766–784.

<sup>131</sup> See the contribution of D. KENNEDY and N. REICH in R. BROWNSWORD and others (eds.), *The Foundations of European Private Law*, Hart Publishing, Oxford 2011.

EU. Broken down to the level of private law, it becomes increasingly evident that the CJEU is opening up established boxes and distinctions, overcoming the differences between substance and procedure, questioning public and private, linking the effects of collective remedies to individual contracts, going beyond privity and integrating those that are affected by private law relations, third parties outside contractual relations, the positioning of the contract in a broader network, the economic role of supply chains and their effect on contractual relations. Managing difference in such a broad understanding yields proceduralisation as the outstanding feature. It is here where the case law of the CJEU gains constitutional importance.

The case law that I am going to analyse originates from various policy fields: consumer protection rules, environmental protection and anti-discrimination. All cases result from preliminary reference procedures and all cases have a particular factual and legal background. However, putting the bits and pieces of the widespread judgments together reveals a kind of a 'structure', or more cautiously worded 'generalities', which are constitutive for the European private law order. In less metaphorical terms, the bits and pieces are the substance and subject-related directives and the sometimes remote judgments of the CJEU: on consumer sales (*Putz/Weber*),<sup>132</sup> on unfair contract terms (*Mohamed Aziz*), on financial services (*Bankinter*),<sup>133</sup> on anti-discrimination (*Feryn*),<sup>134</sup> on emission standards of cars (*Janecek*)<sup>135</sup> and on property rights (*Scarlet*).<sup>136</sup> It is tempting to limit the importance to the respective policy field, be it consumer sales or emission standards. Such an approach necessarily runs the risk of getting lost in details and frictions between national and EU law. This should be left to legal doctrinal analysis. The CJEU should not enter into too many doctrinal details and should focus instead much more on its role as a constitutional court. My argument is this: distilling from the cases that are spread over the various policy fields, the elements that are constitutive for opening up a new perspective that transcends established boxes, reveals the constitutional importance of the respective judgments, notwithstanding the question whether and to what extent it is doctrinally possible to transfer the *Janecek* doctrine from environmental law to financial services.<sup>137</sup> Therefore, I attribute to the judgments a landmark status.

<sup>132</sup> Case C-65/09 and C-87/09, *Gebr. Weber GmbH v. Jürgen Wittmer and Ingrid Putz v. Medianess Electronics GmbH* [2011] ECR I-5257.

<sup>133</sup> Case C-604/11, *Genil v. Bankinter*, judgment of 30 May 2013.

<sup>134</sup> Case C-54/07, *Centrum voor gelijkheid van kansen en voor racismebestrijding v. Firma Feryn NV* [2008] ECR I-5187.

<sup>135</sup> Case C-237/07, *Janecek v. Freistaat Bayern* [2008] ECR I-6221.

<sup>136</sup> Case C-70/10, *Scarlet Extended v. SABAM* [2011] ECR I-11959.

<sup>137</sup> K. PURNHAGEN and P. VERBRUGGEN in J. KEßLER, H.-W. MICKLITZ and N. REICH (eds.), *Institutionelle Finanzmarktaufsicht und Verbraucherschutz: Eine rechtsvergleichende Untersuchung der Regelungssysteme in Deutschland, Italien, Schweden, dem Vereinigten Königreich und der Europäischen Gemeinschaft*, Nomos, Baden-Baden 2010.



A consensus on the public/private divide is gradually vanishing. What does this mean with regard to rights, remedies and procedures? In order to understand the move, it is necessary to go back to the EU's logic of regulating markets. Financial services may serve as a blueprint here. MiFID I and MiFID II not only demonstrate how the EU is getting an ever tighter grip on financial products through granting supervisory and monitoring powers to national and European agencies, but also the development in financial services law indicates clearly how the deeper regulatory intervention affects and shapes private law relations.<sup>138</sup> The focal point of the debate is business conduct rules and their classification as either private or public or even both. For insiders in the field, the problem is well known. In *Bankinter*, however, the CJEU had for the first time the opportunity to initiate a debate as to whether EU financial rules laid down in MiFID I and MiFID II require the Member States to provide adequate remedies that are suitable for the enforcement of potential rights that are granted to private investors. Much is open here, doctrinally speaking. The crucial move is the holistic perspective of enforcement, breaking down the clear distinction between regulating markets through public agencies and regulating contracts through private law.<sup>139</sup> Strangely enough *Janecek* fits into that picture. Here, the CJEU granted a private individual who suffered from the failure to observe car emission standards in the city of Munich the right to claim an action plan that was apt to bring the emission gradually into line with EU law requirements. EU law in regulated markets is full of obligations imposed on Member States and regulated agencies to develop surveillance and monitoring plans in order to make sure that the objectives – usually a combination of market integration and social regulation (broadly understood) – are fully respected. Therefore *Janecek* inserts a new layer of enforcement, one where private parties push public authorities into action. Dutch courts have used the same line of argument to grant environmental organisations standing against the Dutch state to take appropriate action against climate change.<sup>140</sup> However, the potential reaches far beyond the relationship between private parties and public authorities. Provided private parties are to be regarded as direct addressees of fundamental and social rights, individual claimants might be entitled to claim an action plan from a

<sup>138</sup> See F. DELLA NEGRA, 'The Effects of the ESMA's Powers on Domestic Contract Law', on file with author, forthcoming.

<sup>139</sup> In that sense, see S. GRUNDMANN, 'The Bankinter Case on MiFID Regulation and Contract Law' (2013) 9(3) *ERCL* 267–280.

<sup>140</sup> J. SAURER and K. PURNHAGEN, 'Klimawandel vor Gericht – Der Rechtsstreit der Nichtregierungsorganisation "Urgenda" gegen die Niederlande und seine Bedeutung für Deutschland' (2016) 14 *ZUR (Zeitschrift für Umweltrecht)* 16; with regard to the link to *Janecek*, see K. PURNHAGEN, 'Towards a Regime of Emission Litigation based on Science' (2015) 6 *European Journal of Risk Regulation* 443.

multi-national company. That is why it becomes imaginable that car owners might sue Volkswagen in order to obtain from the company a monitoring plan that enables the car owners to understand what the company will do to remedy its environmentally defective software.<sup>141</sup>

The connection between substance and procedure is a general characteristic of CJEU judgments in private law, most obviously in decisions on jurisdiction under the Brussels Convention and the Brussels Regulation.<sup>142</sup> Whilst the decision on the competent court is in theory disconnected from the decision on the applicable law, there is ample evidence that the CJEU enshrines in the procedural test considerations of substantive law. The connection is inbuilt structurally into Directive 2009/22 on injunctions<sup>143</sup> (as recognised in *Invitel*)<sup>144</sup> and it is most obvious in the recent developments of the case law in the Unfair Contract Terms Directive – not only *Aziz* but also in the *ex officio* doctrine. *Aziz* links declaratory and enforcement proceedings together. The party to a contract must have the right and the opportunity to be heard as to the substance of the matter before a national court, before the other party is allowed to register a self-created contractual title.<sup>145</sup> Can this statement be generalised even beyond the interplay of declaratory and enforcement proceedings? It seems reasonable to argue that prescription rules may have a similar affect as enforcement proceedings as the EU right to restitution is restricted.<sup>146</sup> Combined with the *ex officio* doctrine, the interconnection becomes even closer. National courts have to survey and monitor the interplay between substance and procedure in order to ensure that it is respected.

At first sight, it looks as if secondary community legislation adheres to privity of contracts. The only exception seems to be the provision of the Unfair Contract Terms Directive that permits a linking of the effects of an action for injunction to the validity of contract terms in individual contracts. *Invitel* provided the first occasion of the CJEU to discuss the *erga omnes* effect of the action for injunction. Advocate General Trstenjak held the right to be heard was infringed; however, the Court did not take up the issue in its final judgment. A reference of a Polish court is pending before the CJEU, which is meant to seek

<sup>141</sup> See A. BECKERS, 'Was Versprechen wert sind, Der VW-Skandal zeigt: Freiwillige Verhaltensregeln von Unternehmen sollten rechtlich verbindlich werden' *Süddeutsche Zeitung* (21.12.2015) pointing to the potential legal implications resulting from the Code of Conduct that VW has signed.

<sup>142</sup> JÄÄSKINEN and WARD, n. 36 above.

<sup>143</sup> See M. OGORZALEK, *The Action for Injunction in EU Consumer Law*, EUI PhD 2014.

<sup>144</sup> *Invitel*, n. 102 above.

<sup>145</sup> *Aziz*, n. 74 above, para. 59; under reference to the ECJ, Case C-432/05, *Unibet* [2007] ECR I-2271, para. 77.

<sup>146</sup> H.-W. MICKLITZ and N. REICH, 'The Court and the Sleeping Beauty, The Revival of the Unfair Contract Terms Directive (UCTD)' (2014) 51 *CMLR* 771, 796–798.

clarification.<sup>147</sup> More closely linked to privity of contract are *Putz/Weber* and *Scarlet*. In *Putz/Weber*, the CJEU introduced economic reasoning into the right of the consumer to claim compensation for the costs that the repair of defective tiles in his kitchen produced. Thereby, the CJEU stretches the boundaries of the bilateral contract and integrates the perspective of those potential addressees who remain outside the contract. *Putz/Weber* takes ‘The Social’ type reasoning and then balances this against the liberal national law and does so by means of an identity-centred approach, i.e. consumer. This is a multi-level dimension, experimentation or laboratory idea.

In *Scarlet* an even more far-reaching broadening can be observed, though in a much more outspoken way and directly related to Articles 8, 11, 16 and 17 of the Charter of Fundamental Rights.<sup>148</sup> The scope of the assessment of whether or not to grant an injunction to the copyright holder (SABAM – a Belgian association representing authors, composers and artists) against the internet service provider (Scarlet) to put an end to potential infringements committed by Scarlet’s customers is extended to three parties, each of them referring to its own fundamental right: SABAM to Article 17, Scarlet to Article 16 and the customers to Articles 8 and 11.<sup>149</sup> Via the constitutionalisation of private rights, the CJEU breaks down privity and balances out the different rights and obligations against each other. The CJEU has gone as far as obliging Scarlet and its customers to take the interests of SABAM into account when negotiating a contract. The Court then reserves its right to conduct a judicial review of the outcome of the negotiation.

## 7. A CLARIFICATION

The ever stronger impact of constitutionalisation might yield the impression that constitutional law and constitutional principles are omnipresent and that we are not far away from a ‘total constitution.’<sup>150</sup> A clarification is needed.

<sup>147</sup> Poland belongs to the few countries where an *erga omnes* effect is part of the legal system, although the effects are not clear. This might be the reason for the reference.

<sup>148</sup> C. GODT, ‘Intellectual Property and European Fundamental Rights’ in MICKLITZ, n. 4 above, pp. 210–235.

<sup>149</sup> See esp. B. VAN LEEUWEN, ‘The Impact of Primary EU Law on Private Law: Intellectual Property Law’ in H.-W. MICKLITZ and C. SIEBURGH (eds.), *Primary EU Law and Private Law Concepts*, Intersentia, Antwerp, forthcoming 2017; also M. LEISTNER, ‘Europe’s Copyright Law Decade: Recent Case Law of the European Court of Justice and Policy Perspectives’ (2014) 51 *CMLR* 559.

<sup>150</sup> M. KUMM, ‘Who Is Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law’ (2006) 7 *German LJ* 341.

The EU and the European laboratory should not be equated with a federal state. The CJEU creates ‘space’<sup>151</sup> for private actors through opening the notion of a person, through breaking boxes between contract and commercial practices, through introducing a political dimension into property rights, through developing new remedies in a multi-level governance structure. It is the interplay between private regulation and constitutional transformation beyond the nation state that makes EU law and European private law such a fascinating topic for research.

What needs to be done is to contrast the European constitutionalisation of European regulatory private law with the constitutionalisation of (traditional) private law in the Member States. More needs to be done.

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<sup>151</sup> S. SASSEN, *Territory, Authority, Rights: From Medieval to Global Assemblages*, Princeton University Press, New Jersey 2008.