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The ECJ as a Constitutional and a Private Law Court

A Methodological Comparison

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“[In European private law], there is the need of a coherent overall framework into which single decisions may be integrated constructively.”

*Ernst Steindorff*¹

Summary

It is common ground that in the EU the role of adjudication has always been, and continues to be, more important than in the Member States as the degree of political consensus is much more limited at European level. Therefore, issues which could be decided politically in the Member States had to be solved legally in the European context. At the same time, the authority and legitimacy of European court decisions is more fragile than that of national ones – not only as the EU crucially depends on the collaboration of national administrations and courts for the effective implementation and enforcement of its legal system, but also because the legitimacy of the EU itself as a political entity is more fragile than that of European Nation States, most of which are firmly rooted in democratic traditions and enjoy a considerable degree of political stability.

These weaknesses notwithstanding, legal integration in the EC has been a long success story reconstructed by Joseph Weiler and others. Judicial activism led to important progress of the integration process not only in the foundationary period, but also in the years of political stagnation after the 1967 crisis and after the relance of the integration process following the Single Market project 1985. This kind of activism primarily relates to the constitutional foundations of the EC: the structural constitution (i.e. the relationship of European and national law including the famous doctrines of direct effect, supremacy, state liability), the substantive constitution (mainly composed of the basic market freedoms, competition law, and the protection of human rights) and the institutional constitution (setting forth the competencies and the rules of interaction of the various European institutions). In these fields, the ECJ has successfully developed the treaties into a full and mostly coherent constitutional system. On the whole, these developments have met the acceptance of Member States and enjoy a sufficient degree of legitimacy. This is probably so because they are primarily related to the initial project of market integration through the abolition of national restrictions and the establishment of a system of undistorted

1 E. Steindorff, *EG-Vertrag und Privatrecht*, (Baden-Baden: Nomos, 1996), at 471.

competition – on which there was an initial consensus of all Member States and which has in most cases led to economic benefits for a majority of them. In the case of human rights protection, this only replicated a more or less common standard reflecting common historical and cultural heritage and achievements.

Yet, in other areas – specifically in areas covered by European secondary legislation, which the ECJ is bound to administer so to speak as an ordinary court – European adjudication has proven to be far less successful. This is particularly true for the field of European private law which is a relative newcomer to legal harmonisation policy. European private law is characterised by selective European acts limited in scope which aim in most cases at consumer protection and which have to co-exist with a more or less coherent and encompassing body of national law (“islands and archipelagos in an ocean”). In this constellation, numerous problems exist: First, one finds problems of access and effectiveness of justice, as the most frequent preliminary reference procedure usually lasts more than 2 years and only provides interpretations of European law, without resolving the case – which frequently leads to a “ping-pong” game between European and national courts to the detriment of the parties which has lasted in some cases more than 10 years. Moreover, we are confronted with quality problems, as it becomes ever more apparent that the ECJ judges cannot deal convincingly, without a meaningful degree of specialisation, with all legal matters ranging from constitutional to company and tax law. More generally, the usual methodological style of the ECJ, a combination between legal formalism and *effet utile*-oriented interpretation, is not suited to private law, whose essential task is to balance opposed interests among the parties in a just way. This is particularly so as the overall effects of the combined application of European and national law – which alone determines the outcome of a case – is almost never considered by the ECJ which limits itself to the interpretation of European law only. But there are more structural problems related to the specific characteristics of the field. Due to the fragmentation of European sources, decisions on European acts in private law often concern their scope of applicability and do not lead, unlike in national law, to an ever more precise and coherent systematisation of the field. Specifically, the ECJ is not well suited to decide on dispositive law issues, which typically do not reflect public policy matters, but consists of a balancing of party interests. This requires significant knowledge of the social and economic context of specific types of transactions – knowledge which the ECJ frequently lacks. Taken together, these problems render the effectiveness and legitimacy of European adjudication in private law thin in many instances.

A way out from this dilemma is not easy to design in general terms. However, basic provisos may still be formulated: The ECJ should handle private

law with caution and more often resort to judicial self restraint. It should be aware of the fact that it is not the suitable court to do the fine-tuning in private law systems and to deliver private law justice (mostly commutative and only exceptionally distributive justice). Correspondingly, it should limit itself to implementing basic European principles such as market freedoms and human rights, and to instigating and monitoring learning and rationalisation processes in national law (a “procedural” function). Moreover, it should systematically reflect the consequences of its decisions resulting from the combined application of European and national law. In short, one might say that it is by behaving like a constitutional court for private law that the ECJ might replicate its constitutional law success story there.

I. Introduction

The notion of judicial governance addresses the prominent phenomenon of courts assuming tasks which are, under the classic separation of powers doctrine, reserved to the executive and legislative power.² Yet, the phenomenon of activist courts does not amount to an anomaly, but instead reflects the very nature of adjudication. This is so for both methodological and social reasons. Methodologically, there is no clear borderline between the application of the law and its creative development; the application of general norms to specific fact patterns always adds new meaning to them. Socially, adjudication is always embedded in a wider societal context and is, therefore, always influenced by the political, economic and social circumstances under which it operates and which influence the minds of jurists and inform their decisions. Such influence is not undesirable, but is instead indispensable in order to adapt the law to its changing social environment. Thus, there is no clear borderline between judicial and political governance. Accordingly, modern governance theory is right in assessing both of them from the perspective of the general theoretical criteria of effectiveness and legitimacy.³

2 See, for example, M. Cappelletti, *Giudici legislatori?* (Milan: Giuffrè, 1984); M. Shapiro & A. Stone Sweet, *On Law, Politics, and Judicialisation*, (Oxford: OUP, 2002); for a recent view from the European Court of Justice itself, see K. Schiemann, Judicial governance – a judge’s perspective, in: A. Furrer (ed.), *Europäisches Privatrecht im rechtswissenschaftlichen Diskurs* (Bern: Stämpfli, 2006), at 1.

3 F. Scharpf, *Regieren in Europa*, (Frankfurt aM: Hofmann & Campe, 1999); *idem.*, Notes Toward a Theory of Multilevel Governing in Europe, MPIfG Discussion Paper 2000 No. 5.

Whereas the role of judicial governance is clearly less significant than political governance in the Member States, this is not necessarily so in the European context where judicial activism has reached a novel, historically unknown, dimension.⁴ Here, the role of adjudication has always been much more important than in the Member States, as the degree of political consensus is much more limited. Thus, issues which could be decided politically have had – and often still have – to be solved legally in the European context.⁵ In filling this “decision-making gap”, the ECJ has famously implemented a strongly European agenda and become the motor of the integration process even in years of political stagnation, by gradually developing the European treaties into a federal, or as many prefer to say today, multi-level constitution.⁶ As impressively reconstructed by Joseph Weiler and others,⁷ judicial constitution-building has extended to the structural constitution (*i.e.*, the relationship of European and national law, including the famous doctrines of direct effect, supremacy and state liability), the substantive constitution (mainly composed of the free trade provisions converted into the basic market freedoms by the Court, competition law, and the protection of human rights invented by the Court), and the institutional constitution (setting forth the competencies and the rules of interaction of the various European institutions). On the whole, despite the occasional resistance of national high or constitutional courts in the fields of competences and human rights,⁸ these instances of judicial governance have met the acceptance of Member States and the legal community.⁹ This is probably so because they are primarily related to the initial European project of market integration through the abolition of national restrictions and the establishment of a system of undistorted competition – on which there has always been the firm consensus of all the Member States and which has in

4 See, generally, J.H.H. Weiler, “The Community System: The Dual Character of Supranationalism”, (1981) 1 *YEL* at 267; *idem*, “A Quiet Revolution: The ECJ and its Interlocutors”, (1994) 25 *Comparative Political Studies* at 510.

5 C.-D. Ehlermann, “The European Community, Its Laws and Lawyers”, (1992) 29 *CMLR* at 213.

6 E. Stein, “Lawyers, Judges, and the Making of a Transnational Constitution”, (1981) 75 *AJIL* at 1.

7 J.H.H. Weiler, *The Constitution of Europe: Do the new clothes have an emperor? and other essays on European integration*, (Cambridge: Cambridge University Press, 1999).

8 See, for example, Ch. Schmid, *Multi-Level Constitutionalism and Constitutional Conflicts. Interconnecting the National, European and International Economic Constitutions in the Banana Dispute*, 311 pp., Ph.D.-Thesis, EUI Florence, 2002.

9 See, generally, A.-M. Slaughter, A. Stone Sweet & J.H.H. Weiler (eds.), *The European Courts and national courts: doctrine and jurisprudence* (Oxford: Hart Publishing, 1998).

most cases led to economic benefits for a majority of them. In the case of human rights protection, this only replicated a more or less common standard which reflected the common historical and cultural heritage, and achievements such as the ECHR, and thus did not meet with strong criticism.

However, alongside the ECJ's function of a motor of integration and of a constitutional court, its role as an ordinary court has, since 1985, become increasingly important. The Single Market Programme entailed the introduction of qualified-majority voting and of new institutional arrangements. These changes ended the former institutional *lourdeur* of the EC's political branch and enabled the proliferation of European legislation in many fields of economic and social regulation. Given its central role as the guardian of all European law, these new fields had and have to be administered by the ECJ as well. The example chosen for analysis here is private law, which is a relative newcomer among European legal disciplines and has developed only slowly since 1985, though at greater speed in recent years. In this field, European adjudication has proven to be far less successful than in constitutional law, and raises serious problems of effectiveness and legitimacy.¹⁰

This contribution aims to explain this phenomenon by comparing judicial governance in European constitutional and private law (Section II). Specifically, we will distinguish differences regarding the systematic state of the legislation (1), interpretative meta-principles and legal method (2), and the effects on private parties in terms of judicial protection (3). As a result, it will be shown that in general constitutional and private law adjudication displays meaningful differences which necessitate a completely new alternative approach. Yet this approach may be borrowed, albeit in an adapted form, from a specific line of constitutional adjudication which is based on reflexive balancing (III).

¹⁰ See, generally, Ch. Joerges, "Rethinking European Law's Supremacy", EUI Working Paper Law No. 2005/12; *idem*, "Der Europäisierungsprozess als Herausforderung des Privatrechts: Plädoyer für eine neue Rechts-Disziplin", ZERP-Diskussionspapier 1/2006; Ch. Jetzlsperger, "Legitimacy through Jurisprudence", EUI Working Paper Law No. 2003/12.

II. A Comparison between Constitutional and Private Law Adjudication

1. *Systematic State of the Legislation*

Generally, the term “system” refers to the idealist-type features of unity and order.¹¹ Unity may be understood as completeness, order as coherence, *i.e.*, the absence of contradictions. The legal system of a polity – which may be divided into sub-systems including private and constitutional law – constitutes the methodological paradigm, as it were, for the enactment of law by the legislator and its interpretation by courts: The external system is based on the abstract ordering concepts of a legal text (for example, contract or tort), reflects its structure and serves the meaningful order of the legal material.¹² Continental codifications are often perceived of as realisations *par excellence* of an external system, but it is important to note that an external system underlies any legal instrument. The teleological complement of the external system is the internal system. This is based on the idea of consistency with fundamental values and principles, and thus constitutes a teleological order, whose most abstract components are general principles of law.¹³ In private law, the most important ones are autonomy and solidarity, from which more precise principles may be derived in a “genealogic tree-kind” of fashion.¹⁴ The existence of internal coherence is the most important precondition for courts to treat equal things equally – and thus to realise the ultimate aim of all law, that of justice.

It lies in the very nature of law as a social medium exposed to constant social change that a legal system designed by the legislator is never fully complete, and always needs to be concretised and complemented by the courts, so as to provide answers to specific cases. Normally, however, systems or sub-systems designed by the legislator possess at least a certain degree of completeness. By this, we do not mean completeness at the level of norms (which would indeed mean that each factual situation would be covered by a norm) but of principles. This follows from the fact that national systems typically cover entire areas of law, for example, contract or tort in a private law codifi-

11 On the following, see the classic accounts by C.-W. Canaris, *Systemdenken und Systembegriff in der Jurisprudenz*, 2nd ed., (Berlin: Duncker & Humblot, 1983), at 19 *et seq.*, and F. Bydlinski, *System und Prinzipien des Privatrechts*, (Vienna, New York: Springer, 1996), at 1 *et seq.*

12 The distinction between external and internal systems goes back to Ph. Heck, *Begriffsbildung und Interessenjurisprudenz*, (Tübingen: Mohr, 1932).

13 Canaris, *supra*, at 40 *et seq.*

14 Canaris, *supra*, at 52 *et seq.*

cation, without any deliberate exemptions in scope. In these areas, courts may uncover encompassing sets of guiding principles beneath the existing norms. When dealing with new situations not directly regulated by existing norms, courts can thus complete the legislator's "master plan", *i.e.*, develop their reasoning on the basis of the existing principles which are balanced against each other. By doing so, the legal system is, in turn, "woven tighter" by each and every decision. It is precisely this feature which is critical in European law. On account of its relative incompleteness, European law always needs to be complemented by national law in order to function effectively. However, there are significant differences between single fields in terms of completeness, in particular, between constitutional and private law.

a) *Constitutional Law*

It is true that the EC Treaty was, and, even after many reforms, still is, incomplete and sketchy on many issues. However, a basic systematic structure existed in most fields, which enabled the Court to develop them gradually by means of relatively coherent reasoning. In the substantive constitution, the provisions on free trade were developed from commands directed to Member States, firstly, into subjective rights which excluded discrimination, then into prohibitions of limitations and positive action commands, and finally were even extended horizontally, *i.e.*, among private parties. Yet, in all these phases, the Court was able to follow a relatively coherent overall logic which it could often borrow from the similar methodological developments of national human rights.¹⁵

Only at first glance does the structural constitution constitute an exception. Thus, the crucial questions of direct effect and supremacy were not settled in the Treaties, but were solved by the ECJ distinguishing the EC treaties from traditional public international law instruments – under which supremacy is also the rule, but is not generally effective without direct effect, which constitutes a rare exception there. Thus, notwithstanding the politically revolutionary character of doing so, in methodologically terms, the ECJ just had to convert the public international law exception into a new European law rule. Combined with the universally recognised principles of *venire factum proprium* in the Roman law tradition which is similar to estoppel in the Common Law, the same reasoning could be applied to justify direct effect of directives.¹⁶

15 Ch. Schmid, *Die Instrumentalisierung des Privatrechts durch die EU*, (typescript, Munich, 2004), 125 *et seq.*, 159 *et seq.*, 202 *et seq.*, & 273 *et seq.*

16 Ch. Schmid, *supra* 15, 118 *et seq.*, 145 *et seq.*, 198 *et seq.*, 253 *et seq.*

Against this background, the methodologically most revolutionary instance of law-making in the field of constitutional law was probably the state liability doctrine which the ECJ deduced from nothing more than “the system of the Treaty”.¹⁷ Admittedly, this doctrine has models in the national law of all European countries, encompasses a much more limited field than, say, contract law, and is therefore easier to design systematically. But still, also due to the limited number of cases referred, the ECJ was not able to elaborate the doctrine into a complete sub-system. Instead, among the elements for a liability claim, only the violation of a right guaranteed in EC law has been defined exhaustively at European level, whereas both the causality and the scope of the recoverable damage still need to be defined to a certain extent by national law, which is resorted to for the purpose of gap filling.¹⁸ However, the ECJ controls whether the national provisions enable the effective implementation of European provisos, and by doing so, demands selective changes of national law (mainly the inapplication of provisions, or parts thereof, which might hamper the effective implementation of European law). Taken together, state liability law in Europe constitutes a complex mixture of European and national law. However, its ever more elaborate development by means of European adjudication is possible and is not excluded on grounds of competence. Moreover, on account of the somewhat general character of its own previous rulings, the ECJ is not bound to give answers to marginal details, but may pick and choose key issues and decide on the intensity of European intervention according to its own overall conception (“master plan”) of the field.¹⁹

All in all, constitutional law adjudication may in most cases be based on a sufficiently elaborate systematic structure which allows the ECJ to develop and gradually refine a coherent system according to a relatively consistent overall concept.

b) *Private law*

The situation is quite different in European private law, the bulk of which sails under the consumer law flag.²⁰ European consumer law directives cover not

17 Case C-6/90 and C 9/90, *Francovich*, ECR 1991, 5537. See, for example, in English R. Caranta, “Judicial Protection against Member States: A New *Jus Commune* takes Shape”, (1995) 32 *CMLR* at 703.

18 See, for details, W. Wurmnest, *Grundzüge eines europäischen Haftungsrechts* (Tübingen: Mohr, 2003), at 43 *et seq.*

19 In this sense, see M. Herdegen & Th. Rensmann, “Die neuen Konturen der gemeinschaftlichen Staatshaftung“, (1997) 161 *ZHR* at 522.

20 For an overview, see S. Weatherill, “Consumer Policy”, in: P. Craig & G. de Búrca

only many different types of transactions, such as doorstep sales,²¹ consumer credit,²² distance sales,²³ package tours,²⁴ and time-sharing rights,²⁵ as well as single fields of tort law, such as product liability.²⁶ Also, there are two important directives with a larger scope of application, namely, the unfair terms directive,²⁷ and the consumer sales directive.²⁸

Moreover, there are private law acts based on other treaty objectives, such as the late payment directive²⁹ (internal market and Small and Medium sized Enterprises), the commercial agents directive,³⁰ and a set of banking and insurance law provisions. Beyond this, there are plans of a wider and more systematically coherent contract law instrument, which is currently being elaborated as a soft law “common framework of reference” and might one day become the core of a European Civil Code – but these plans have not, of course, affected standing law up until now. To sum up, there is, to date, still only a limited coverage of contract law, which is mainly covered by European consumer law instruments, which resemble, so to speak, European islands or, per-

(eds.), *The Evolution of EU Law*, (Oxford: OUP, 2000), at 693.

- 21 Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises, 1985 O.J. (L 372) 31.
- 22 Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit, 1987 O.J. (L 042) 48 (as modified by Directives 90/88/EEC, 1990 O.J. (L 061) 14, and 98/7/EEC, 1998 O.J. (L 101) 17.
- 23 Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts, 1997 O.J. (L 144) 19.
- 24 Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours, 1990 O.J. (L 158) 59.
- 25 Directive 94/47/EC of the European Parliament and the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis, 1994 O.J. (L 280) 83.
- 26 Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, 1988 O.J. (L 307) 54 (amended by Directive 1999/34/EC of the European Parliament and of the Council of 10 May 1999, 1999 O.J. (L 283) 20).
- 27 Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, 1993 O.J. (L 095) 29.
- 28 Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, 1999 O.J. (L 171) 12.
- 29 Directive 2000/35/EC of the European Parliament and of the Council of 29 June 2000 on combating late payment in commercial transactions, 2000 O.J. (L 200) 35.
- 30 Directive 86/653/EEC of 18 December 1986 on the co-ordination of the laws of the Member States relating to self-employed commercial agents, 1986 O.J. (L 382) 17.

haps, archipelagos, in an ocean of national law.

From a system based-perspective, there are several problems in this situation: first, there are coherence problems among different European sources, which include the “one-sided teleology” of European instruments (aa) as well as coherence problems in the interplay of European and national sources (bb).

aa) *Internal coherence problems*

First, there are technical problems of coherence within EC law.³¹ In fact, there are lots of gaps, frictions and exemptions within single instruments, which are caused by their sectoral regulatory approach and political compromise. For example, the product liability directive defines its central notions of defect and damage only in a fragmentary way. The same is true for issues of causality, concurring liability and the scope of recoverable damage. But there are more artificial limitations, such as Article 9 para. 1 lit. b) of the Product Liability Directive which lays down a lower threshold for the awarding of damages, which entails that courts must also always examine a case according to national law – as denying a claim below the lower threshold would amount to a denial of justice.

More coherence problems are created by the different use of identical terminology. Thus, as mentioned above, the notion of damage is defined only vaguely in the Product Liability and the Commercial Agents’ Directives, but not even that vague definition is uniform. In this context, the AG has, in the *Leitner*³² Case, implicitly invoked the *topos* of the “interpretative unity of EC law”. This postulate is not, however, tenable, as identical notions may be, and frequently are, used with different objectives, in particular, when they are used in primary and secondary law. More pressing than the terminology problem is the often missing co-ordination among related European instruments which may be applicable to similar fact patterns. Such friction may be of a technical or, additionally, of a conceptual nature. Thus, without any justification being given by the European legislator, there are different time-frames and modes of calculation of these for the revocation of a contract according to the Door step, the Time-sharing and the Distance Sales Directives. This problem is aggravated by the finding in the *Travel Vac*³³ Decision, according to which several directives may be applicable cumulatively. The laudable tentative of the Ger-

31 On the following, see Ch. Schmid, *supra* 15, 597 *et seq.*

32 Case C-168/00, *Leitner*, ECR 2002, I-2631 = NJW 2002, 1244 with comment K. Tonner & B. Lindner, (2002) NJW at 1475.

33 Case C-423/97, *Travel Vac*, ECR 1999, I-2195.

man legislator to harmonise these time-frames in § 355 para. 3 BGB under the so-called minimum harmonisation principle (according to which a national legislator may unilaterally opt for a higher degree of consumer protection) has been dismissed by the ECJ in the *Heininger*³⁴ decision, which excludes the prescription of revocation rights in the event that the consumer was not properly informed about it. This decision is, unfortunately, in line with the general strategy of abolishing minimum harmonisation clauses which the Commission has espoused in its recent strategy papers and in the Directive on Distance Sales of Financial Services.³⁵ Whilst the gain in terms of uniform market conditions will be limited on account of the fragmented state of European legislation, the loss of “coherence resources” by the national legislator in the implementation stage will be considerable.

Whereas the coherence problems just mentioned have a more technical nature, there are even more serious conflicts caused by conceptual contradictions, in particular, by what may be called the one-sided teleology of European instruments. To explain this problem, one needs to establish a basic comparison between the concept of classic (national) and European private law. Classic private law is based on three fundamental concepts: freedom and equality of all citizens, and justice as the key criterion to govern legal relationships – which, in private law, predominantly means commutative, not distributive justice.³⁶ Freedom and equality require that every human being be capable of participating in legal relationships at his or her will and on equal terms. Capacity is no longer restricted, and there is no longer privileged treatment of certain individuals or social classes – in short, private law takes on a universal character. In its strong version, commutative justice means that the exchange of performances in contract law and the redress of damages in tort law should be equivalent; in its weaker and perhaps more important version, it means that private law relationships should be governed only by criteria which originates in the relationship between the parties themselves – and not by reference to external political, social or economic goals. To sum up, classic private law is funda-

34 Case C-481/99, *Heininger*, ECR 2001, I-234. For an instructive comment, see M. Franzen, “‘Heininger’ und die Folgen: ein Lehrstück zum Gemeinschaftsprivatrecht”, (2003) JZ at 321; in English: G.-P. Calliess, “The Limits of Eclecticism in Consumer Law: National Struggles and the Hope for a coherent European Contract Law. A Comment on the ECJ’s and the German Federal Highcourts’s ‘Heininger’-decisions”, *GermanLawJournal.com* 3 (2002) No. 8.

35 Directive No. 2002/65/EEC, OJ EC 2002 (L 271) 16.

36 On commutative and distributive justice in modern private law, see C.-W. Canaris, *Die Bedeutung der iustitia distributiva im deutschen Vertragsrecht* (Munich: Beck, 1997); H. Collins, “Distributive justice through contracts”, (1992) 45 *Current Legal Problems* at 49.

mentally about the balancing of interests between two or several parties.

By contrast, the conceptual basis of European private law always resides in integration policies – consumer policy being the most frequent case – which are not primarily governed by the interests of the parties, but by some collective interest of integration. From the outset, such a one-sided teleological concept (which the ECJ usually hastens to realise in its case law) is an ill-suited basis for a Court to balance the interests of two or more parties in a just way. Things are worse when two collective interests concepts collide, as may, for example, happen with the Late Payment Directive,³⁷ which aims to support SME, and the consumer directives which contain consumer protection instruments – which typically act against traders including SME. In the provisions of the Late Payment Directive such conflicts are counteracted by the exemption of consumer transactions from its scope of application. However, through a minimum harmonisation clause, it does allow for stricter national standards of protection of SME. This has, for example, enabled German law to extend its scope of application to all kinds of transactions, including consumer transactions.³⁸ These contradictory minimum harmonisation clauses constitute nothing less than the declaration of bankruptcy of a private law which wants to protect everyone against everyone, instead of focussing on its principal task of balancing competing interests in a way which is fair and just. As a result, the one-sided teleology of this legislation renders coherent jurisprudence difficult from the outset.

bb) Coherence problems in the interplay of European and national sources

(1) General observations

Even more serious coherence problems exist in the interplay of European and national sources.³⁹ This vertical conflict of laws scenario leads to a European-national multilevel arrangement that no longer deserves to be called a system. Instead, the gaze of the person applying the law must, to alter Karl Engisch's famous formulation, continually shift back and forth between the various strata of law in order to disclose possible overlaps between national law and Community law – often hard to find, given that they are systematically designed differently.⁴⁰ The ordering function of the *external system* is lost here. It is

37 OJ EC 2000 (L 200) 35.

38 For details, see A. Colombi Ciacchi, “Die EG-Richtlinie über den Zahlungsverzug und ihre Umsetzung durch das Schuldrechtsmodernisierungsgesetz”, (2002) *EWS* at 306.

39 On the following, see Schmid, *supra* 15, 622 *et seq.*

40 Similarly, in the light of the lack of foreseeability of EC law interventions into na-

thus quite likely that possibly relevant European provisions are simply overlooked in practice. In contrast to the relationship between national special private laws and general private law, the concurrent norms are not associated with each other conceptually or systematically. Nor are whole areas of law which normally have a relatively clearly-definable scope of application regulated by special laws,⁴¹ in contrast to the interplay of substantive uniform law such as the 1980 United Nations Sales Law Convention (CISG) and national law. Instead, Community law and national law co-exist in the closest possible contact within the same regulatory area.

It is in the nature of things that this co-existence entails severe disruptions of the *internal system* of (national) private law. When superimposed by Community law, national legal systems become permeated by European norms which are underlain with differing teleologies or general principles of law, and, accordingly, often act as foreign bodies therein. Complicated contradictions in valuations and unforeseen constraints to co-ordination *in casu* are the unavoidable consequence of this situation.⁴² The rule of interpretation of national law in conformity with EC directives means that co-ordination problems of this nature can arise within national law, too, namely, between harmonized and non-harmonized parts. It is particularly hard to grasp and deal with these when, as usually happens, European and national mixtures appear within the same statute or even within the same provision. Indeed, it usually cannot be seen in the national law – and often not even from the more easily accessible secondary literature – which provisions or parts of them have a transposing function.⁴³

The more-or-less random encounter of unco-ordinated strata of law differentiates the European multilevel system from continental systems and even

tional legal system, which is particularly strong in private law, Thomas Wilhelmson refers to a “Jack-in-the-box effect” of Community law; see Th. Wilhelmson, “Private Law in the EU: Harmonized or Fragmented Europeanization?”, (2002) 10 *Eur. R. Private L.* at 77.

41 See Ch. Schmid, *Das Zusammenspiel von Einheitlichem UN-Kaufrecht und nationalem Recht*, (Berlin: Duncker & Humblot, 1996).

42 Thus penetratingly put by P. Hommelhoff, “Zivilrecht unter dem Einfluß europäischer Rechtsangleichung”, (1992) 192 *Archiv für die civilistische Praxis* at 71 & 102; Ch. Joerges, “Die Europäisierung des Privatrechts als Rationalisierungsprozeß und als Streit der Disziplinen”, (1995) 5 *Zeitschrift für Europäisches Privatrecht* 181 at 199.

43 German law, in official notes, only indicates those sections of a statute which have the function of implementing European directives. Thus, a note on the new German sales law just says that the present section (§§ 433-480 BGB) serves to implement the consumer sales directive. This is far too little specific to serve as guidance for the interpretation of single provisions or parts thereof. See, on this topic, M. Lutter, “Die Auslegung angeglichenen Rechts“, (1992) *Juristenzeitung* at 593.

from the Common Law. Whilst, famously, the latter also consists of fragmentary, overlapping “strata of law” (*common law* in the narrower sense, *equity* and *statutes* from various periods),⁴⁴ new statutes are normally conceptually and systematically harmonized with old law by the legislator, and new case law regularly develops consistently out of the old. In contrast, in the European multilevel system, a consistent co-ordination of various sources can no longer be established within a single system or by its courts, alone. Instead, following Kelsen’s famous quotation from the Bible, European private law and the lawyers dealing with it have to “serve several masters”,⁴⁵ whose spheres of influence are monitored by independent courts. Furthermore, the interplay of Community law and national law is inadequately “processed” by case law. As we know, there are only two European Courts, of which only the ECJ deals with European private law, and not even in concentrated fashion. Whereas disruptive elements of national special legislation are “compatibilized” relatively quickly with the overall system through case law and jurisprudential writings, in European private law to date, there are simply too few court decisions to accomplish this.

Last but not least, due to the limited coverage of private law and the problems of internal coherence just mentioned, ECJ decisions involve little systematic gain. The vast majority of them concern the delimitation of the scope of application of European instruments, without a final decision on the merits of the case being taken. To quote just one example, in the *Easy Car Decision*,⁴⁶ the ECJ decided that car hire contracts were no services contracts in the sense of Art. 3 para. 2 of the Distance Sales Directive (with the main effect that the revocation right contained in this directive did not apply), but that the case was to be left to national law. Similar questions could be asked about a high number of other types of contracts. Yet, the answers to this question do not develop the system very much, they do not concern the basic task of private law, *i.e.*, that of refining and concretising the balancing of competing party interests. In short, such procedures not only entail no meaningful systematic gains, but also delay the rendering of justice to the parties.

44 On the co-existence of sources of law, see, for example G. Calabresi, *A Common Law for the Age of Statutes*, (Cambridge/Ms.: Harvard University Press, 1982).

45 The impossibility for a legal system to serve two masters was addressed by Hans Kelsen with his famous Bible quotation from Matthew VI, 24 (to be found in: H. Kelsen, *Reine Rechtslehre* 330 (2nd ed. 1960, Vienna: Manz).

46 Case C-336/03, ECJ of 10/3/2005.

(2) *Specific co-ordination problems*

Alongside these general problems, one may describe a set of specific co-ordination problems between European and national law in more detail.⁴⁷ From the outset, the interplay of European and national law is burdened by the unclear relationship among directive-conforming interpretation of national law and the direct applicability of directives.⁴⁸ In principle, it has long been recognised that among private parties, there is no direct “horizontal” effect of directives, but that only the directive-conforming interpretation of national law within the limits of national interpretation rules (the wording being the most important limitation) is possible; in the event that these limits are exceeded, there is a state liability claim. However, the ECJ has frequently asked national courts for *interprétation conforme* even where they did not have the interpretative leeway to do so. One may read in this sense cases such as *von Colson*,⁴⁹ *Marleasing*,⁵⁰ *Faccini Dori*,⁵¹ *Ruiz Bernaldez*⁵² and *Océano*.⁵³ To complicate the picture further, the ECJ has, in some other constellations, accepted direct horizontal effect, namely, in the case of unfair competition provisions⁵⁴ and statal prohibitions which render the performance of a contract impossible.⁵⁵ This uncertainty is all the more regrettable as private citizens may risk the sanctions foreseen for the violation of national law when relying on the direct application of European directive provisions.

Another co-ordination problem lies in the division of the jurisdiction of European and national courts in interpretation and gap filling, in particular, in the “concretisation” of general clauses.⁵⁶ Whereas no limits of ECJ jurisdiction

47 Ch. Schmid, *supra* 15, 622 *et seq.*

48 Ch. Schmid, *supra* 15, 623 *et seq.*

49 Case 14/83, *von Colson*, ECR 1984, 1891.

50 Case 106/89, *Marleasing*, ECR 1990, I-4135.

51 Case 91/92, *Faccini Dori*, ECR 1994, I-1281.

52 Case C-129/94, *Ruiz Bernaldez*, I-1829.

53 Cases C-240/98 - C-244/98, *Océano*, ECR 2000, I-4941. For more details on these cases, see Ch. Schmid, *supra* 15, 626 *et seq.*

54 Case C-194/94, *CIA Security*, ECR 1996, I-2201.

55 See Case 150/88, *Glockengasse*, ECR 1989, 3891; Case C-443/98, *Unilever*, ECR 2000, I-7535. On this line of cases see J. Gundel, “Neue Grenzfällen für die Direktwirkung nicht umgesetzter EG-Richtlinien unter Privaten”, (2001) *EuZW* at 143, and Ch. Schmid, *supra* 15, 634 *et seq.*

56 See, on this topic, W.-H. Roth, *Generalklauseln im Europäischen Privatrecht*, (FS Drobnig, Tübingen: Mohr, 1998) at 137; J. Basedow, *Der Bundesgerichtshof, seine Rechtsanwälte und die Verantwortung für das europäische Privatrecht*, (FS Brandner, Köln: Dr. Otto Schmidt) at 651; O. Remien, “Die Vorlagepflicht bei Auslegung unbestimmter Rechtsbegriffe”, (2002) 66 *RabelsZ* at 503; I. Wolff, *Die Verteilung der*

are foreseen in the Treaty, they have nevertheless been recommended in the literature, and, in some cases, have even been accepted by the ECJ. For example, the unfairness of contractual clauses was exhaustively scrutinised by the ECJ in the *Oceano*⁵⁷ and the *Cofidis*⁵⁸ Cases, but left to national courts in the *Freiburger Kommunalbauten*⁵⁹ Case – probably also in the light of the ECJ’s lack of capacity to deal with the potential flood of submissions of this kind. However, it is not clear how the different cases may be meaningfully distinguished. Instead, it seems that the issue of the “concretisation competence” should not be separated from the “content of concretisation”, *i.e.*, the specific substantive law answer.

Alongside general clauses, there are also problems of cumulative application and pre-emption in the interplay of European and national private law.⁶⁰ The dilemma in these cases lies in the fact that, on the one hand, concurring national norms may negatively affect the effectiveness of European norms by stipulating additional conditions, while, on the other, European norms are, in the first place, generally incapable of deploying effectiveness without being appropriately co-ordinated and supplemented by national norms. Issues of cumulative application or pre-emption may be stipulated by conflict of laws norms contained in European directives – a prominent case being minimum harmonisation clauses – failing which they need to be developed on a case-to-case basis by the ECJ. To quote a prominent example, problems of cumulative application of European and national sources had to be solved by the ECJ in a series of Product Liability Cases. In comparison to most consumer contract law directives, the 1985 Product Liability Directive⁶¹ does not contain a minimum harmonisation clause, though most commentators read such a clause into it on account of its framework character and the large number of gaps.⁶² However,

Konkretisierungskompetenz für Generalklauseln in privatrechtsgestaltenden Richtlinien, (Baden-Baden: Nomos 2002); P. Rott, “What is the role of the ECJ in EC Private Law?” (2005) 1 *Hanse Law Review* at 5.

57 Cases C-240/98 - C-244/98, *Océano*, ECR 2000, I-4941.

58 Case C-473/00, *Cofidis*, ECR 2002, I-10875. In this case, the ECJ ruled that a French prescription period of 2 years for claims against abusive clauses hindered the effective application of the directive. Therefore, the case involved not only the general clause on unfairness but also the principle of effectiveness, specifically the effective implementation of European law provisions in national law.

59 Case C-237/02, *Freiburger Kommunalbauten*, ECR I-3403.

60 Ch. Schmid, *supra* 15, 655 *et seq.*

61 Directive 85/374/EEC, OJEC 1985 (L 210) 29.

62 See G. Brüggemeier, “Produkthaftung und Produktsicherheit”, (1988) 152 *Zeitschrift für das gesamte Handelsrecht* 511, at 531 & 534; G. Howells, “Product Liability – A History of Harmonisation”, in: A. Hartkamp *et al.* (eds.), *Towards a European Civil*

in three cases decided on 25/4/2002,⁶³ the ECJ found that no minimum harmonisation principle could be read into the directive in the light of its paramount goal of establishing uniform regulation of product liability – so as to prevent market distortions when undertakings in one Member State are forced to pay more to the victims of dangerous products than in others.⁶⁴

The inverse constellation of pre-emption is constituted by the fragmentation of national law, when national norms with a wide scope of application collide with European norms with a narrow scope of application.⁶⁵ Such fragmentations may lead to European enclaves in national law when the national legislator introduces European segments into national provisions – as happened in the German transposition of the Unfair Terms Directive in § 310 para. 3 BGB and the Consumer Sales Directive in §§ 474-479 BGB. The alternative of an “over-obligatory” implementation of European norms (extending them on a voluntary basis to the wider scope of application of national norms) leads to the difficult and controversial question of whether the ECJ is competent to decide even upon national segments of the implementation norm (which go beyond the scope of application of the provisions of the directive) if cases are referred to it (which is of course not prescribed by Art. 234 TEC). The Court has, with one exception,⁶⁶ affirmed this question in its jurisprudence.⁶⁷

Finally, all these co-ordination problems are rendered worse by a particular instance of judicial self restraint of the ECJ. Indeed, when answering reference questions brought to it by national courts in the procedure under Article 234 TEC, its interpretive perspective is strictly limited to European measures, without considering their (25 different!) private law surroundings and the effect that the combined application of European and national law may have in a specific case. It is, of course, true that the ECJ has no competence to interpret national law. However, when interpreting European law, it could very well take into account its national law surroundings and their interpretation by national courts, even though this would render its task much more difficult. This would actually be the only possibility for this court to engage in system-

Code, (Demeter: Kluwer, 3rd ed., 2004).

63 Case C-183/99, *González Sánchez*, ECR 2002, I-3901; Cases C-52/00, *Commission vs. France*, ECR 2002, I-3827 and C-154/00, *Commission vs. Greece*, ECR 2002, I-3879.

64 This jurisprudence has been confirmed recently in Case C-402/03, *Skov*, of 10/1/2006, nyr.

65 See Ch. Schmid, *supra* 15, 667 *et seq.*

66 Case 346/93, *Kleinworth Benson*, ECR 1995, I-615.

67 See C-306/99, *Banque Internationale pour l’Afrique Occidentale SA (BIAO)*, ECR 2003, I-1; this decision has been taken against the well motivated contrary opinion by AG Jacobs (no. 40-71).

building in the European multilevel regime in private law – which does not deserve the term “system” in its present state.

c) *Conclusion*

Whereas every decision in European constitutional law may reinforce the overall system and “weave its patches ever tighter”, this potential is barely existent in private law. Its division into the European and national sources which make up a multi-level regime, coherence problems within European sources as well as in the interplay between European and national sources render the gradual formation of a system and, consequently, system-oriented adjudication, hardly possible. This is plausibly shown by the fact that most ECJ cases in private law concern the delimitation of the scope of application of European directives, *i.e.*, decisions which do not generate meaningful systematic gains.

2. *Judicial Method and Interpretative Meta-principles*

Other important differences attach to the field of judicial method. For present purposes, this may be divided into two phenomena: first, the interpretative tools in use; second, the “background agenda” pursued by a court which may be rephrased as “interpretative metaprinciples”.

Regarding the first category, the ECJ essentially resorts to traditional methods of interpretation also used in the Member States, but attaches a somewhat different weight to them.⁶⁸ Grammatical, systematical, and historical interpretation are, of course, used, but teleological interpretation is often the most important method. It is geared towards the famous “*effet utile*” principle according to which the Court seeks to achieve the maximum of practical effectiveness of European law. Inspired by the model of the French *Conseil d’Etat*, the ECJ’s way of argumentation is usually quite succinct and formalistic, and leaves little space for discussion – drawing, as it were, on the legal formalist fallacy that the answers to all legal questions are already contained in the text of the law, and only need to be identified and applied by the interpreter.⁶⁹ Apparently, the ECJ never openly reflects on the political dimension of its deci-

68 See J. Bengoetxea, *The Legal Reasoning of the European Court of Justice*, (Oxford: Clarendon Press, 1993); K.-H. Ladeur, “Methodology and European Law – an Methodology Change so as to Cope with the Multiplicity of the Law?”, in: M. van Hoecke (ed.), *Epistemology and Methodology of Comparative Law*, (Oxford: Hart, 2004) at 91 *et seq.*; specifically on European private law, see A. Flessner, “Juristische Methode und europäisches Privatrecht”, (2002) *JZ* at 14.

69 See, for a survey, F. Schauer, “Formalism”, (1988) *97 Yale L.J.* at 509.

sions, let alone their political, social and economic consequences.⁷⁰ This, again, reflects a widespread formalist conviction according to which the legitimacy of law is threatened if it does not draw a clear borderline from politics. And yet, this borderline is, itself, a fallacy as the political dimension of adjudication has always been, and still is, undeniable. Thus, denying it may be politically understandable, but is, to say the least, methodologically dishonest.

Notwithstanding this silence of/on the part of the Court, it is by examining the development of its jurisprudence over years that one may find meta-principles at an abstract level, which reflect the Court's more general agenda. As such principles are never explicated, it is unclear to what extent the Court pursues them actively and reflectedly, or whether they instead constitute a secret master plan ("*geheimer Entwurf*" in the words of Franz Wieacker⁷¹) which may remain hidden, even to the judges themselves, by the official formalistic methodology, and becomes visible only in a scientific reconstruction of the decade-long evolution of the case law.

a) *Constitutional law*

The building up of a European constitutional system was enabled by coherent meta-principles, in other words, a sound overall design of the structural and substantive constitution. In the former, the guiding principle may be labelled "approximation towards a federal system". Yet, to achieve this, an explicit choice in favour of, let alone a political debate on, a federal Europe was not necessary and never took place.⁷² Instead, the "federalisation" of Europe was simply achieved by the effective application of direct effect and supremacy combined with the judicial device of the preliminary reference procedure. This led to the effective implementation of European law before national courts by interested private parties – whereas, under traditional international law, no comparable tools existed, and the non-compliance of a Member State could only be found by a judicial body *ex post* and, at best, give rise to liability.

The ECJ's approach in the substantive constitution is more complex. The two most important baselines are, on the one hand, an activist, expansionist approach, and, on the other, a more reticent, "procedural-balancing" one.

70 On consequence-oriented interpretation in general, see M. Deckert, *Folgenorientierung in der Rechtsanwendung*, (München: Beck, 1995); K.-H. Ladeur, "Methodendiskussion und gesellschaftlicher Wandel", (2000) 64 *RabelsZ* at 60.

71 F. Wieacker, *Industriegesellschaft und Privatrechtsordnung*, (Neudruck: Fischer: Mannheim, 1974).

72 On the following, see J.H.H. Weiler, "The Transformation of Europe", (1991/1992) 100 *Yale L.J.* at 2423.

These will now be sketched out in the area of the basic freedoms.

aa) Constitutional activism

The complement of the federalisation of the structural constitution through direct effect and supremacy was the upgrading of the free trade provisions into subjective rights. These became constitutional-like basic freedoms and covered not only all forms of discrimination but also simple restrictions, and were finally extended horizontally among private parties. The interpretation of the Treaty provisions on competition law similarly elevated them to basic tenets of an economic constitution. This prohibited not only private distortions of competition, but – in its so-called “public turn” which started in the late 1980ies – also extended to distortions brought about by the state – *i.e.*, by monopolies, exclusivity rights or the tolerance or even promotion of private anti-competitive behaviour.⁷³ Whereas the Court generally followed an expansionist agenda, both in the structural and the substantive constitution, there have also been occasional steps backward, which are, however, mainly about correcting former excessive expansions – as, for example, the famous limitation of the scope of application of the free movement of goods (Article 28 TEC) in the *Keck*⁷⁴ decision, or, in competition law, the rule of reason doctrine, which excludes certain agreements from the scope of Article 81 para. 1 TEC, thus rendering an individual or block exemption under Article 81 para. 3 TEC superfluous.⁷⁵

bb) Substantive core and procedural “halo”

A second methodological metaprinciple in the jurisprudence on the basic freedoms may be called rational balancing. It applies when the basic freedoms conflict with national provisions without protectionist orientation (such as the classic tariffs and quantitative restrictions), but serve a different regulatory objective, typically non-trade issues, and may, nevertheless, negatively affect the

73 See, for example, A. Gardner, “The Velvet Revolution: Article 90 and the Triumph of the Free Market in Europe’s Regulated Sectors”, (1995) *ECLR* at 78; D.J. Gerber, “The Transformation of European Community Competition Law?”, (1994) 35 *Harvard Int. L.J.* at 97; C.-D. Ehlermann, “Managing Monopolies: The Role of the State in Controlling Market Dominance in the EC”, (1993) 2 *ECLR* at 61; J. Schwarze, “Der Staat als Adressat des Europäischen Wettbewerbsrechts”, in: *idem* (Hrsg.), *Europäisches Wettbewerbsrecht im Wandel*, (Baden-Baden: Nomos, 2001) 69.

74 Cases C-267 and C-268/91, *Keck und Mithouard*, ECR I-1993, 6097, N. 16.

75 See, comprehensively, Th. Ackermann, Art. 85 para. 1 EGV und die rule of reason (Cologne: Heymanns, 1997).

freedom rights and thus be qualified as a measure of equivalent effect. Technically, such cases are either about an exemption from the scope of application of the freedom rights or the application of the proportionality test. In substance, one may find a two-tier structure in such cases. At the first level, there is the mandatory hard core of the freedom rights which corrects “nation state failures”, such as protectionism or other forms of discrimination or excessive limitation of the legal position of foreigners.⁷⁶ Beyond this substantive core, there is a kind of procedural “halo” within which the basic freedoms no longer determine the content of national regulation, but only mandate a rational balancing process within which Member States are supposed to give good reasons if they want to uphold regulations which negatively affect a European freedom right. Rational balancing understood in this sense favours innovation, rationalisation and deliberation of adequate solutions. This trend may be detected in a long line of case law reaching from *Cassis* to more recent cases, such as *Altmark Trans*.⁷⁷

In private law, the most famous case one may read along these lines is probably the *Centros*⁷⁸ judgment. In this case, a Danish couple was allowed, by drawing on the freedom of establishment, to escape Danish social capital requirements on private limited companies by establishing an English company and then founding a Danish branch from which all the commercial activity of the company was carried out. As the ECJ implied – both in this and in later cases – that a company is subject to the law of its place of incorporation (*Gründungstheorie*), these cases were frequently read as an example of beneficial regulatory competition close to a “European Delaware effect” in which the most efficient company law would win the race.⁷⁹ But there is a slightly different alternative interpretation:⁸⁰ the ECJ did not deny Denmark’s right to enact mandatory corporate regulation. However, Denmark was required to give good reasons to explain why its restrictions on the establishment of a branch of Eng-

76 For this reading, see Ch. Joerges, “The Impact of European Integration on Private Law: Reductionist Perceptions, True Conflicts and a New Constitutionalist Perspective”, (1997) 3 *ELJ* at 378 & 390.

77 Case C-280/00, *Altmark Trans*, ECR 2003, I-587. On this line of cases, see Ch. Joerges, “The Challenges of Europeanization in the Realm of Private Law: A Plea for a New Legal Discipline”, (2004) 14 *Duke J. of Comparative and International Law* at 149 & 183 *et seq.*

78 Case C-212/97, *Centros*, ECR 1999, I-1459.

79 See, for example, H. Eidenmüller, “Wettbewerb der Gesellschaftsrechte in Europa”, (2002) *Zeitschrift für Wirtschaftsrecht (ZIP)* at 2233.

80 See Ch. Joerges, “Zur Legitimität der Europäisierung des Privatrechts. Überlegungen zu einem Recht-Fertigungs-Recht für das Mehrebenensystem der EU”, EUI Working Paper LAW 2003/2, 30 *et seq.*

lish-style private limited companies, including the provisions on minimum capital, were conducive to its alleged regulatory objective of creditor protection. As Denmark did not refuse the registration of a branch of English-style private limited companies in general, but did so only in the present case in which the company had no commercial activity at its place of incorporation (a fact which is completely irrelevant to creditor protection in Denmark), its approach was found to be inconsistent and therefore in breach of the proportionality principle. As a result, the Danish regulation was not forbidden unconditionally, but only because it lacked an adequate and reasonable justification. All in all, the meta-principle called the substantive core and procedural “halo” here seems to enable a well-tuned and balanced co-ordination of European and national law.

b) *Private law*

Moving back to the field of private law, whilst there are few specificities regarding the use of methods of interpretation, the search for meta-principles is more difficult. At an abstract level, classic private law in the continental tradition may be ascribed to the meta-principle of the realisation of a constitution of free and equal citizens, which, in Germany, even pre-dated the political constitution. Due to the instrumentalist character of European private law, not even that abstract meta-principle may be claimed to exist to the same degree at European level. Instead, the basic, perhaps frustrating, thesis to be expounded here is that no general vision of the ECJ being capable of materialising in interpretative meta-principles exists. What remains is a kind of “schematic *effet utile*” (aa) which has been counteracted in the more recent past by tendencies of formalistic self restraint which may even go against the *effet utile* of single European instruments (bb). These incertitudes are complemented by the often bad technical quality of private law decisions (cc).

aa) “Schematic *effect utile*” means that the Court tries to maximise the practical effectiveness of EC law, without adequately reflecting upon its systematic embeddedness in its national law environment and the overall objective of private law justice. This phenomenon reflects what has been referred to above as the one-sided teleology of European legislation and perpetuates it at the level of interpretation. This tendency may be shown with the Court’s consumer model. Given its preponderance within European private law, consumer protection might be expected to provide an overarching interpretative meta-principle. However, it may be shown that the Court does not pursue a coherent consumer model. This thesis may be illustrated by referring to its interpretation

of consumers' information rights.⁸¹ Clearly, there is absolutely nothing wrong with information rights in themselves. As both economic analysis and contract practice show, information asymmetries among professional traders and consumers are a frequent type of market failure, which information rights are able to correct in many cases.⁸² In line with this basic finding, information rights constitute the most prominent and frequent regulatory tool in European consumer law. This seems to be inspired by the model of an inadequately informed consumer who is able to take rational decisions only after adequate information. Thus, to quote but one example, in the recent *Cofidis* case,⁸³ the ECJ quashed national time-limits which restrict the exercise of consumer protection rights on the grounds that consumers *may* ignore their rights completely, but needed to be protected all the same.

Conversely, as regards national information rights, these are often found by the ECJ to be inconsistent with the four market freedoms on proportionality grounds.⁸⁴ In particular, in the field of misleading advertising, national information rights requiring clear and unambiguous information are treated restrictively. In what boils down to an unrealistic assumption about market behaviour, consumers are, for example, supposed to recognise objectively incorrect manipulative advertising statements⁸⁵ and foreign-language labels which are similar to well-known domestic products.⁸⁶ In this jurisprudence, we seem to face the different model of a well-informed and intelligent consumer. As a result, consumer information requirements are widely construed in *European* consumer contract law, whereas *national* consumer protection-based limitations on the basic freedoms in *national* unfair competition law are construed narrowly. However, this distinction is by no means justifiable under private law, as – in the words of Stefan Grundmann – one should not require a lower degree of attention from a consumer entering into contractual negotiations than from a consumer reading advertisements in his armchair.⁸⁷

81 The following analysis draws on Ch. Schmid, “The Instrumentalist Conception of the *Acquis Communautaire* in Consumer Law and its Implications on a European Contract Law Code”, (2005) 1 ERCL at 211-227.

82 See, generally, H. Fleischer, *Informationsasymmetrie im Vertragsrecht*, (Munich: Beck, 2000).

83 Case C-473/00 *Cofidis*, ECR 2002, I-10875.

84 On the relationship of contract law and the market freedoms, see O. Remien, *Zwingendes Vertragsrecht und Grundfreiheiten des EGV*, (Tübingen: Mohr, 2003).

85 Case C-470/93, *Mars*, ECR 1995, I-1923. In this decision, the ECJ argued that a consumer would not confuse the (larger) size of a “10% more” advertisement on a chocolate package with the actual (smaller) increase in quantity.

86 Case C-369/89, *Piagème*, ECR 1991, I-2971.

87 S. Grundmann, *Europäisches Schuldvertragsrecht*, (Berlin/New York: De Gruyter,

The background of this jurisprudence seems to be that national consumer protection instruments, including information obligations, have been recognised as valid limitations of the basic freedoms in the famous *Cassis de Dijon*⁸⁸ jurisprudence. Therefore, a wide recognition of national information rights would reduce the *effet utile* of the market freedoms. At the end of the day, the different treatment of national and European information rights shows that the ECJ's true concern is not a uniform model of a consumer, and not even consumer protection as such, but the optimisation of Community law *irrespective* of its contents and objectives. Thus, a coherent vision of consumer information, in particular, and private law, in general, is sacrificed to a "schematic *effet utile*" concept. Obviously, such a concept prevents private law from adequately fulfilling its core task of realising justice between the parties.

Moreover, the fact that, within the "schematic *effet utile*" orientation of the ECJ, the national law surroundings of EC law are not considered may ultimately lead to the paradoxical result that the combined application of EC and national law in a given specific case does not promote the *effet utile* of the applicable European legislation. A pertinent example of this constellation is provided by the 2002 Product Liability cases already referred to above, in which the Court had to ascertain whether a minimum harmonisation clause should be read into the directive or not. As previously mentioned, most commentators read such a clause into it on account of its framework character and the large number of gaps.⁸⁹ This is fully plausible as the fragmentary texture of the directive cannot reasonably be expected to do justice to this complex and socially highly-sensitive matter which is governed by different national regulatory traditions.⁹⁰ However, as also mentioned, in the three cases decided on 25 April 2002,⁹¹ the ECJ found that no minimum harmonisation principle could be read into the directive in the light of its paramount goal of establishing uniform liability conditions for European enterprises so as to prevent market dis-

1999) 270, note 106. For a similar critique, see H. Fleischer, "Vertragsschlußbezogene Informationspflichten im Gemeinschaftsprivatrecht", (2000) *Zeitschrift für Europäisches Privatrecht* 791.

88 Case 120/78, *Rewe/Bundesmonopolverwaltung für Branntwein*, ECR 1979, 649.

89 See G. Brüggemeier, "Produkthaftung und Produktsicherheit", (1988) 152 *Zeitschrift für das Gesamte Handelsrecht* 511 at 531, 534; G. Howells, "Product Liability – A History of Harmonisation", in: A. Hartkamp *et al.* (eds), *Towards a European Civil Code*, (Demeter: Kluwer, 3rd ed., 2005).

90 See H. Koch, "Internationale Produkthaftung und Grenzen der Rechtsangleichung durch die EG-Richtlinie", (1988) 152 *Zeitschrift für das Gesamte Handelsrecht* 537.

91 Case C-183/99, *González Sánchez*, ECR 2002, I-3901; Cases C-52/00, *Commission vs. France*, ECR 2002, I-3827 and C-154/00, *Commission vs. Greece*, ECR 2002, I-3879.

tortions.⁹² In doing so, the ECJ deprived a Spanish plaintiff, whose health had been seriously affected by the transfusion of infected blood in a public hospital, of a claim for damages against the hospital existing under a Spanish product liability statute.⁹³ The reason for this was that – unlike under Spanish law, which followed US law in this respect – the victim can only sue the producer of the defective product, but in general another member in the commercial chain – such as the hospital which had not produced the infected blood itself in this case. This jurisprudence is very unfortunate in that it sacrifices national consumer protection without even apportioning any visible gain for European industries. Indeed, the narrow scope of application of the European directive and its many gaps render its *effet utile* to provide European undertakings with a uniform product liability regime absolutely illusory.⁹⁴ As a result, the ECJ has,

92 The rejection of this jurisprudence seems to be quasi unanimous among European commentators: See G. Viney, “L’Interprétation par la CJCE de la Directive du 25 Juillet 1985 sur la Responsabilité du Fait des Produits Défectueux”, (2002) I 177 *La Semaine Juridique* at 1945; J. Calais-Auloy, “Menace européenne sur la jurisprudence française concernant l’obligation de sécurité du vendeur professionnel”, (2002) 31 *Recueil Le Dalloz* at 1458; A. Palmieri and R. Pardolesi, “Difetti del prodotto e del diritto privato europeo”, (2002) *Il Foro Italiano IV* at 296; Ch. Joerges, “Zur Legitimität der Europäisierung des Privatrechts. Überlegungen zu einem Recht-Fertigungs-Recht für das Mehrebenensystem der EU”, EUI Working Paper LAW 2003/2 (Florence: European University Institute, 2003) 30 *et seq.*; M.-E. Arbour, “Compensation for Damage Caused by Defective Drugs: European Private Law between Safety Requirements and Free-Market Values”, (2004) 10 *European Law Journal* 87. A more positive assessment seems to underlie the comment by R. Schaub, “Abschied vom nationalen Produkthaftungsrecht? Anspruch und Wirklichkeit der EG-Produkthaftung”, (2003) *Zeitschrift für Europäisches Privatrecht* 562, and P. Rott, “Produkthaftung und Vollharmonisierung - der Rat kartet nach”, 2003/4 *RIW*, Editorial.

93 Case C-183/99, *González Sánchez*, ECR 2002, I-3901.

94 See the telling comment by a leading German practitioner: J. Schmidt-Salzer and H. Hollmann, *Kommentar EG-Richtlinie Produkthaftung, vol. 1* (Heidelberg: Recht und Wirtschaft, 1986) Einl. IV, 135 *et seq.*, note 73 *et seq.*, 79: “Given the billions and billions of products that are sold annually within the Internal Market, the argument that the various liability rules influence the flow of trade, is economically absurd. The differences in liability laws are ultimately too slight and product liability claims arise relatively seldom. All evidence relating to the share, within the employer’s liability insurance, of the so-called conventional damages relating to the product itself (excluding 1. US loss 2. damage to property of non-consumers and 3. economic loss), clearly demonstrates that it concerns a quantité négligeable when compared to the overall volume of goods (...) The aforementioned examples substantiate that an enterprise (...) would simply act in a negligent way if it based its decisions and calculations on the flow of trade on the liability rules of the EC directive.” [translation by Patrick O’Callaghan] - Paradoxically, it seems to be exactly the ineffectiveness of the directive which has made it an attractive model for legislators worldwide, who want to

in this case, petrified a nearly 20 year old piece of legislation already infused with massive shortcomings. In doing so, it prevents Member States from adequately fulfilling their responsibilities of providing industry and consumers with a socially and economically adequate and consistent product liability law.

bb) Alongside what is called schematic *effet utile* here, the ECJ has, in recent years, also practised, with no clear distinction from from *effet utile* “expansionism” being possible, a kind of formalistic self-restraint. This is certainly motivated by the idea of limiting the number of references in private law. In addition, the conviction may also exist on the part of the court that the responsibility for private law systems remains with the national legislator, whilst the European input is still limited to selective interventions.

A pertinent example for this tendency of self-restraint is provided by AG Légers opinion in the so-called *Heininger* follow-up cases of *Schulte* and *Crailsheimer Volksbank*.⁹⁵ In *Heininger*, the ECJ had acknowledged the applicability of the Doorstep Sales Directive to real credit transactions, which gives buyers the right to revoke the credit agreement. The economically crucial issue here concerned the destiny of the contract on the purchase of the house and the provision of a mortgage following the cancellation of the credit agreement. The German Federal Highcourt found that the latter did not affect the former (no “*verbundene Geschäfte*”).⁹⁶ This rather formalistic and wholesale *obiter dictum* was convincingly criticised in the literature.⁹⁷ Indeed, if confined to the credit contract, the right of cancellation is not worth a great deal, as the consumer’s debt for the purchase of the house remains; the only effective remedy would be to transfer the house to the bank in return for the credit, as is actually possible in German law in such interconnected transactions. In addition, the banks involved had often financed up to 100 per cent of the selling price, thereby giving the investors the impression that the price was market-oriented and that the whole deal had been checked by the banks and had been approved as economically reasonable – which comes very close to the requirements formulated in other court decisions for the assumption of “interconnected transactions” in the above sense. Against this background, the BGH decision certainly amounted to a tremendous relief for the involved banks, as they would other-

boast a high consumer protection standard without effectively limiting their industries. See M. Reimann, “Product Liability in a Global Context: the Hollow Victory of the European Model”, (2003) *European Review of Private Law* 128.

95 Cases C-350/03 and C-229/04 nyr, see <http://www.curia.eu.int>.

96 ZIP 2002, 1075 with annotations P. Ulmer (2002) *Zeitschrift für Wirtschaftsrecht (ZIP)*, 1080.

97 See, in particular, J. Hoffmann, “Haustürwiderruf bei Realkredit und verbundenes Grundstücksgeschäft“, (2002) *ZIP*, 1066.

wise have received thousands of hardly marketable flats in return for their credits. However, effective consumer protection had not been achieved in this case. This dubious jurisprudence of the BGH has, however, been accepted by AG Léger.⁹⁸ In his opinions, he emphasises that Article 7 of the Directive, according to which “the legal effects of such renunciation shall be governed by national laws” is unambiguous and leaves no scope for interpretation. The concept of practical effect would not be used by the Court on every occasion, but only when the provision in question is open to several interpretations. As a result the BGH can, according to the AG, freely decide on national law consequences, and apparently is not even bound by the two usual minimum provisos for national implementation of EC law, the non-discrimination and the effectiveness principles. However, this result is not acceptable in this commentator’s view. First, the argument of AG Léger is not convincing, as there are numerous cases in which the ECJ went far beyond the wording of European provisions – for examples, it is sufficient to think of the Direct Effect and the State Liability doctrines. What is more important, the present “consumer trap” – *i.e.*, the danger for the consumer of incurring substantial financial losses with the exercise of consumer protection rights – is incompatible not only with the *effet utile* of the Doorstep Sales Directive, but also with both European and national constitutional principles. This does, in effect, constitute a nation state failure which legitimizes European intervention. Fortunately enough, in its recent judgment, the ECJ has, against its AG, paid heed to these arguments and found the German provisions and case law to be in violation of the directive – only, however, to the extent that the information obligations laid down by the directive have not been respected.⁹⁹ Even though the ECJ has thus avoided the worst consequences for consumers, similar instances of adverse self-restraint may still be found in other cases such as *Rabobank*.¹⁰⁰

cc) The incertitude about *effet utile*-oriented activism and self-restraint is complemented by the often poor technical quality of private law decisions. Indeed, the latter is often even worse than that of constitutional law decisions, in which the ECJ has gained a high degree of expertise since the beginning of the Community. This assessment is first motivated by the limited, or mainly non-existent, systematic gains of private law decisions and by the ECJ’s refusal to take the national law context into account. Beyond this, however, it is becoming increasingly clear that judges are also quite simply overtaxed by the universal competence of the Court in all areas of Community law – from customs

98 Cases C-350/03 and C-229/04, see <http://www.curia.eu.int>.

99 Cases C-350/03, judgment of 25/10/2005.

100 Case C-104/96, *Rabobank*, ECR 1997, I-7211. For a critique, see Ch. Schmid, *supra* 15, 674 *et seq.*

law *via* constitutional law to private law. One pertinent example from private law of a manifest judicial error is the *Dietzinger*¹⁰¹ Case. Here, the ECJ had to delimit the scope of the Doorstep Sales Directive. By doing so, the Court interpreted the so-called principle of “accessoriness” (the cogent nexus between the debt to be guaranteed and the validity of the guarantee contract) in a teleologically absurd way:¹⁰² the son would only have been allowed to revoke the guarantee agreement concluded by himself under doorstep conditions if the father had engaged into the main contract under doorstep conditions as well – as if an insane surety could only invoke the invalidity of the guarantee contract if the principal debtor was insane, too.¹⁰³ No comment.

c) *Conclusion*

All in all, the ECJ’s methodological approach in private law lacks coherent orientation towards any interpretative meta-principle. Its usual preference for *effet utile*-oriented decisions is increasingly coupled with formalistic judicial self-restraint, with no clear distinction between the two approaches. Consequently, legal certainty suffers as ECJ decisions are difficult to predict. This incertitude is further exacerbated by the often bad/poor technical quality of private law decisions. On all these grounds, European court decisions in private law may be said to enjoy little methodological legitimacy.

3. *The effects on private parties*

Further differences between constitutional and private law exist with regard to the factual consequences of decisions on private parties. In both fields, access to justice problems, in particular, the now excessive length of the reference procedure of about 2 years, needs to be criticised. The importance of the famous slogan “justice delayed is justice denied” can hardly be overstated. Yet, even against this negative background, one may find meaningful differences with regard to the effect of constitutional and private law decisions on private parties.

101 C-45/96, ECR 1998, I-1199.

102 See S. Lorenz, “Richtlinienkonforme Auslegung, Mindestharmonisierung und der ‘Krieg der Senate’”, (1998) *NJW* at 2937.

103 For this trenchant comparison, see J. Drexler, “Der Bürge als deutscher und europäischer Verbraucher”, (1998) 46 *JZ* at 1057.

a) *Constitutional law*

The majority of both private and constitutional law cases originate from preliminary reference procedures, though other forms of actions, such as treaty infringement procedures against a Member State by the Commission, or nullity actions of national governments against European law acts, have also played an important role. The most famous constitutional law cases – to name but *van Gend*,¹⁰⁴ *Costa vs. Enel*,¹⁰⁵, *Simmenthal*,¹⁰⁶ *Cassis de Dijon*¹⁰⁷ – result from the burdens imposed by national law on individuals, which were then attacked by the affected individuals on grounds of European law, in particular, on the four market freedoms. It is this particular feature which explains that access to justice problems seems to be somewhat less urgent and less severe here. In fact, in the most frequent instance of import duties or quantitative restrictions, these are typical public law burdens, which are motivated by rationales of distributive justice. Such burdens do not generally entail direct gains or advantages for other individuals, which are repealed once the burden is abolished. In the main, there are, if any, only indirect disadvantages, such as the loss of market shares when the products of a foreign competitor may be imported on better conditions. Thus, in many, if not most, constitutional law cases, private parties may only win, *i.e.*, enhance their legal position as compared with national law. In the worst case, EU law does not trump national law, which continues to be applied – with which the parties had to reckon, anyway. Clearly, this statement is not valid in all fields of constitutional law. For example, in competition law, whose basic tenets in Article 81f. TEC belong to the EU's economic constitutional law, the blockage of agreements among undertakings or mergers through pending procedures may entail considerable financial losses and thus lead to a factual denial of justice, too.

b) *Private law*

The situation in private law is similar to that in competition law. However, access to justice problems may have more serious effects there. Typical private law cases deal with issues of commutative justice, which is essentially about the equivalence of claims (performance, damages, restitution, *etc.*) among the parties to a private law relationship, with contract and tort being the two principal categories. In this situation, the gain of one party usually equals the loss

104 Case 26/62, ECR 1963, 1.

105 Case 6/64, *Costa vs. ENEL*, ECR 1964, 586.

106 Case 106/77, *Simmenthal II*, ECR 1978, 629.

107 Case 120/78, *Rewe/Bundesmonopolverwaltung für Branntwein* ECR 1979, 649.

of the other. It follows that both parties are normally negatively affected by the delay of decisions. Indeed, the winner or loser is only known after the end of the procedure, and no party is able to rely on the results of the transaction beforehand. As a result, speedy conflict solution, which is an essential element and advantage of most Western European economies, is threatened, as the number and influence of ECJ decisions in private law increases.

This situation is aggravated by what may be called the “ping-pong game” among European and national courts, which is the unavoidable consequence of the preliminary reference procedure. Under this procedure, the ECJ, similar to an expert witness, does not decide entire cases, but only makes a finding on those European law issues referred to it by the national court, after which the final decision must again be taken by the national court. The *Heininger* saga, referred to above, constitutes a particularly bad example of what may happen in this interplay of European and national courts. This case was pursued on three instances in national law – first instance, appeal¹⁰⁸ and appeal on the grounds of law [revision] at the Federal Highcourt [BGH]). Whereas the Court of First Instance and the Court of Appeal did not check whether the contract was concluded in a doorstep situation, as the Doorstep Sales Directive had, in their view, been displaced by the Consumer Credit Directive, the Federal Highcourt was not sure about that result under European law and referred that question to the ECJ.¹⁰⁹ The latter, however, assumed that the Doorstep Sales Directive had to be applied¹¹⁰ after which the Federal Highcourt annulled the lower court’s decision¹¹¹ and referred the matter back to the Court of Appeal.¹¹² Here, for the first time, it was examined whether there had actually been a doorstep situation – and this question was answered in the negative sense. As a result, the whole procedure had become a castle in the air, the courts had *in extensu* dealt with a hypothetical question which turned out to be completely irrelevant for the solution of the case, and the parties had to wait for more than five years for a final decision!

As a conclusion, it may therefore be stated that adverse effects on private parties arising out of delays and co-ordination problems among European and national courts are particularly worrying in private law.

108 See (1998) *WM* 1723, (1999) *WM* 728.

109 BGH (2000) *NJW* 521 *et seq.*

110 Case C-481/99, *Heininger*, ECR 2001, I-234.

111 See (2002) *ZIP* 1075 with annotations P. Ulmer (2002) *ZIP*, 1080.

112 OLG München, (2002) *BKR* 912.

4. *Overall conclusion*

Taken together, this analysis shows that the current type of adjudication in European private law is generally defective. This is so on account of its fragmentary and inconsistent systematic structures and on account of the coordination problems among European and national sources, which do not provide the necessary preconditions for judicial system-building, the lack of a coherent interpretative meta-principle on the part of the ECJ (which oscillates between *effet utile* maximisation and formalistic judicial self-restraint) and, finally, pressing access to justice problems, which are mainly due to the excessive length and the “ping-pong” character of the preliminary reference procedure as well as the often poor technical quality of ECJ decisions in private law.

III. An Alternative Constitutional Metaprinciple for Judicial Governance in European Private Law

In the face of the problems outlined above, it becomes clear that a completely new approach to judicial governance in European private law is necessary. This new approach should first be guided by the insight that the ECJ cannot be the appropriate actor for doctrinal fine-tuning in the European multilevel system. As we have seen, due to the fragmentary state of European private law and its self-imposed limitation of not considering the national law context of European provisions, the ECJ is not capable of system-building and system-oriented adjudication. This becomes particularly clear from the fact that most ECJ decisions are (only) about delimiting the scope of application of European instruments, from which very little systematic gain may be derived. Also, it should be considered that doctrinal fine-tuning – with the result that each case might be resolved exhaustively and uniformly at European level – may cause legitimacy problems, in that the persisting social, political and economic differences between the Member States could not be taken into account adequately.

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. Thus, contrary to the opinion of AG Léger in the *Schulte* and *Krailheimer Volksbank* Cases, the possibility that a consumer may incur his or her financial ruin by exercising a European consumer protection right (!), *i.e.*, the revocation right laid down in the Doorstep Sales Directive, constitutes an instance of nation state failure which should trigger European intervention. Equally, the interventions against unfair national procedural requirements in the *Océano and Cofidis* Cases may be justified on account of common European standards of due process, which belong, as it were, to the European constitutional *acquis*.

However, beyond this substantive hard core, the ECJ should leave doctrinal fine-tuning (which involves connecting single decisions to an overall system) to national courts, and limit itself to “procedural framework-setting”, which includes instigating and monitoring learning and rationalisation processes in national law. This approach should, at the very least, prevail and, indeed, continue to prevail as long as the current fragmented state of European private law persists and judicial system-building is hardly possible. In this sense, one may welcome instances of judicial self-restraint, such as the *Dietzinger* case. Even though the Court’s technical reasoning in this case was, as shown, very much worthy of criticism, it is plausible that the credit markets on the one hand, and the public and private law instruments protecting sureties and creditors on the other, are still so different that completely uniform adjudication might lead to socially inadequate, and therefore illegitimate, results. Equally, the decision in the *Freiburger Kommunalbauten* Case, in which the determination of abusive standard terms in contracts lacking any European implications was left to national courts is fully plausible from this constitutional perspective approach. However, single “hits” of a convincing approach by the ECJ are not sufficient. It would, instead, be necessary for the ECJ to become aware of the differences of European constitutional and private law and tune its general approach accordingly. In summary, it is by behaving like a constitutional court for private law that the ECJ might replicate its constitutional law success story in that field.

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