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Facoltà di
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THE MAKING OF EUROPEAN PRIVATE LAW: CHANGES AND CHALLENGES

edited by
LUISA ANTONIOLLI
PAOLA IAMICELI

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To our students, and to the precious gift of learning together

TABLE OF CONTENTS

Page

Luisa Antoniolli and Paola Iamiceli
The Making of European Private Law: a view from the class-room 1

Sjef van Erp
The future of private law between sustainability challenges and the digital revolution. «Managed retreat» and digital assets as examples 17

Chantal Mak
Human rights in European private law 37

Sybe Alexander de Vries
Addressing the blurring public/private divide in the EU's digital single market 63

Reiner Schulze
European contract law – The recent changes to concepts and structures 87

Fernando Gómez Pomar
The 2019 EU Directives and online contracting: a balance 107

Henrique Sousa Antunes
Non-contractual liability applicable to artificial intelligence: towards a corrective reading of the European intervention 133

Ana Afonso
The right to housing and the residential tenancy regulation: should more be done at a European level? 175

Luisa Antoniolli and Paola Iamiceli
Concluding remarks. The new European private law: which way forward? 199

Appendix
CEILS Roundtables on 'The Making of European Private Law' 223

THE MAKING OF EUROPEAN PRIVATE LAW: A VIEW FROM THE CLASSROOM

Luisa Antoniolli and Paola Iamiceli[*]

TABLE OF CONTENTS: *1. The origin of the book: novelty and features of CEILS and teaching methods. 2. The role of European private law teaching in a transnational LLB programme. 3. European private law at the crossroad between comparative and EU law. 4. The roundtables: methodological choices. 5. The topics of the roundtables: reasons and* fil rouge*. 5.1. The book structure. 6. Teaching European private law in the 21st century: trends and challenges.*

1. The origin of the book: novelty and features of CEILS and teaching methods

Teaching is a collective venture. It implies the establishment of a learning relationship in which knowledge and skills are built through experiences based on mutual learning[1]. Such experiences involve stu-

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As part of the book design, the structure of both the introductory and the concluding chapters has been jointly devised and developed by the two editors; within this shared work, Paola Iamiceli has individually written the Introduction and Luisa Antoniolli the Concluding remarks.

We are extremely grateful to Vincenzo Tudisco for his invaluable support in editing the book's chapters.

[1] E.L. BOYER, *Scholarship reconsidered. Priorities of the professoriate*, The Carnegie Foundation for the Advancement of Teaching, Princeton, 1990, p. 24 («good teaching means that faculty, as scholars, are also learners. (…) While well-prepared lectures surely have a place, teaching, at its best, means not only transmitting knowledge, but *transforming* and *extending* it as well. Through reading, through classroom discussion, and surely through comments and questions posed by students, professors themselves will be pushed in creative directions»).

dents and professors, generating links well beyond the classroom, as this book will show.

Not only research feeds teaching, but teaching feeds research[2]. Students' questions challenge research results and provide hints for new paths in legal analysis. The same occurs when the classroom opens up to the stimuli coming from guest speakers, who bring in their own teaching and learning experience from other research backgrounds and diverse educational traditions. Standing at the crossroad between research and education, this book is based on a Roundtable Series developed across two courses respectively on *Foundations of Private Law from a EU Perspective* and *Comparative Private Law*, both mandatory course of the *Comparative European International Legal Studies* (hereinafter CEILS) Programme of the Trento Faculty of Law. It reflects the dialogue among the Authors, the students and other scholars taking part in the roundtables on key issues of European private law.

Student engagement and multicultural pluralism are at the core of the CEILS Programme. Since the very beginning, students are made aware of the richness of legal culture based upon a multitude of legal traditions, often influencing each other. They are exposed to the complexity of a multilevel system of sources of law, in which hierarchy is less and less relevant and the norm is more and more the result of a combined application of national, international and supranational sources of law, including general principles and rules, some of which based on customs, technical standards and social norms[3].

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[2] E.L. BOYER, *op. cit.*, p. 15 seq. («Basic research has come to be viewed as the first and most essential form of scholarly activity, with other functions flowing from it. Scholars are academics who conduct research, publish, and then perhaps convey their knowledge to students or apply what they have learned. The latter functions grow *out of* scholarship, they are not to be considered a part of it. But knowledge is not necessarily developed in such a linear manner. The arrow of causality can, and frequently dies, point in *both* directions. Theory surely leads to practice. But practice also leads to theory. And teaching, at its best, shapes both research and practice»).

[3] N. LIPARI, *Trattato di diritto privato europeo*, Padova, 2003, p. 9 seq.; F. CAFAGGI, *The many features of transnational private rule making: the unexplored relationships between jura mercatorum, customs, and global regulatory law*, in *University of Pennsylvania Journal of International Law*, 2015, p. 101 seq.; R. BROWNSWORD ET AL.

Unlike in the conventional approach, where the comparative, transnational and international dimensions are *added* at a later stage upon the core layer of a nationally-driven education programme, CEILS students are from the start purposely guided across these dimensions in order to learn how they relate to each other and how the relevant norm may be designed, identified, interpreted in a world in which national and supranational norms co-exist[4]. This approach does not exclude that a student may later specialise in a given national legal system (including one that is different from the one of his or her country of origin). Still, as a *transnational lawyer*, he or she will be able to contextualise that system in a wider picture, building new links between the intra-systemic dimension and the supra-systemic one. Moreover, this student will be urged to compare national rules with those of other legal systems, to better understand the reasons behind policy choices and to exercise his or her critical thinking to look for alternatives to existing options.

Some methodological consequences stem from this approach to legal education. First, a single code or a single legislative text may no longer provide a sufficient structure to design the teaching activity: a functional and problem-based approach is needed in order to provide students with the basic instruments to face legal issues within a multi-level system of sources of law. Second, general principles and foundational rules become particularly relevant, helping the students to interpret complexity and to learn how to search for more specific legal contents, when needed. Third, comparative methodology becomes an essential component of legal education: awareness of pluralism in legal traditions necessarily leads to the need for methods aimed at a deeper knowledge of law through comparative understanding of legal models, as embedded in different legal cultures and developed along centuries.

(eds.), *Contract and Regulation. A Handbook on New Methods of Law Making in Private Law*, Cheltenham (UK), 2017.

[4] On these three dimensions, see S. VAN ERP, *Teaching Law in Europe: from an intra-systemic, via a trans-systemic, to a supra-systemic approach*, in A.W. HERINGA, B. AKKERMANS, *Educating European Lawyers*, Cambridge, 2011, p. 79 seq.

Indeed, as often said, history is an essential component of comparative law[5].

Moving from this perspective, this book aims to share with the academic community, including both scholars and students (both current and former ones), the outcomes of an extremely insightful teaching experience, built through the involvement of legal scholars with different research and educational backgrounds. The «roundtable format» has inspired vivid discussions about key issues in the field of European and comparative private law. This book is meant not only to reflect that richness, but also to ideally continue that dialogue involving new students and other scholars. We are extremely grateful to all the colleagues who contributed to this venture, including those who, inspiring our conversations and enriching the debate within the roundtables, could not participate in this book project.

2. The role of European private law teaching in a transnational LLB programme

When legal education is brought beyond the boundaries of a given national legal order, a question arises about whether this move towards «internationalisation» concerns only certain areas of law, or covers all of them, including those apparently having an intrinsically national connotation. A comparative study developed a few years ago in nineteen countries around the globe shows that, whereas the «internationalisation» of legal education has significantly grown in all examined countries, this change has rarely concerned areas such as property law, family law and even tort law[6]. When, in another scholarly work, the possibility of a «cosmopolitan» dimension of private law is questioned,

[5] R. SACCO, P. ROSSI, *Introduzione al diritto comparato*, Padova, 2015 (sixth ed.), p. 12.

[6] «For obvious reasons», as added by the editors; see C. JAMIN, W. VAN CAENEGEM, *The Internationalisation of Legal Education: General Report for the Vienna Congress of the International Academy of Comparative Law, 20-26 July 2014*, in C. JAMIN, W. VAN CAENEGEM (eds.), *The Internationalisation of Legal Education*, Cham (Switzerland), 2016, p. 10 seq.

the attention is drawn on the role played by constitutional principles as the foundations of private law and the possibility to identify a sufficiently solid constitutional basis for private law beyond the boundaries of national charters and ground-norms[7].

Yet, moving from a relatively more limited perspective, the European dimension of legal education strongly characterised the rise of the first universities between the XI and the XIV century, when the main sources of private law were the «plurality of thousands local customs», and law professors provided students with «those conceptual categories, those ordering principles able to bringing order to the incomplete magma of social and economic facts» [8]. Based on the shared roots of Roman law, as revisited through the developments of *jus commune* by medieval scholarship, European legal culture represented an «authentic order» within the plurality of norms and customs[9].

In a totally different institutional context, dominated for centuries by national legal orders as the exclusive source of private law systems within Europe, the European dimension of private law today represents a reality that may no longer be ignored in legal education. This is due to both (*i*) the adoption by the European Union of regulatory instruments of hard and soft law in almost all areas of private law, and (*ii*) to the growth of European legal culture (even beyond the changing political boundaries of the EU) as reflected in the several bodies of general principles and reference frameworks developed by scholars and legal practitioners in different areas of European private law[10]. This adds to the impact that, in different ways, the Charter of Fundamental Rights of the EU (hereinafter, CFR) and the European Convention of Human Rights (hereinafter, ECHR) have progressively made upon national private

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[7] H. COLLINS, *Cosmopolitanism and Transnational Private Law*, in *European Contract Law Review*, 2012, p. 311 seq.

[8] Free translation from P. GROSSI, *Il messaggio giuridico dell'Europa e la sua vitalità: ieri, oggi e domani*, in *Contratto e impresa. Europa*, 2003, p. 681 seq., part. p. 683.

[9] P. GROSSI, *L'Europa del diritto*, Bari, 2016, p. 45.

[10] A. HARTKAMP, *European Law and National Private Law. Effect of EU Law and European Human Rights Law on Legal Relationships between Individuals*, Cambridge, 2016, p. 3 seq.

law, especially through the general principles as interpreted and developed by the jurisprudence of the European courts[11].

Over the past decades, the European dimension has gained more and more relevance in private law and private law education. Not only entire areas of private law are dominated by EU hard law (e.g. data protection and consumer protection), but also those, for which the general frame of references continues to be based on national legal systems, are deeply affected by the European harmonisation processes, either directly or indirectly.

In fact, there is almost no area in which this influence has not been felt, often imposing radical changes in the use of legal concepts rooted in a long-standing tradition: new personhood rights have emerged within the European context[12]; changes have been directly or indirectly stimulated in family law and the law of minors[13]; the divide between individual and collective goods has been reshaped[14]; the *numerus clausus* principle, as applied to property rights, has not been formally challenged, but its «preservation» has triggered new forms of contamination among national property regimes across Member States[15]; freedom of testation has been influenced by the freedom of movement within the EU[16]; strict liability has become a cornerstone of national tort law, due to the need to ensure effective consumer protection against

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[11] K. LENAERTS, *The Role of the EU Charter in the Member States*, in M. BOBEK, J. ADAMS-PRASSL (eds.), *The EU Charter of Fundamental Rights in the Members States*, Oxford, 2020, p. 19 seq.; F. CAFAGGI (ed.), *Judicial Cooperation in European Private Law*, Cheltenham, 2017; F. CASAROSA, M. MORARU (eds.), *The practice of judicial interaction in the field of fundamental rights*, Cheltenham (UK), 2022.

[12] See the contribution by S. van Erp in this book.

[13] See, e.g., the European Parliament resolution of 2017 on international adoptions or, in another area, the judgment of the Court of Justice (Judgment of 5 June 2018, *Coman and Others*, C-673/16, EU:C:2018:385) on the issue of recognition of civil unions of same-sex couples.

[14] See, e.g., the Directive 2004/35/EC on environmental liability with regard to the prevention and remedying of environmental damage.

[15] See the Succession Regulation (EU) 2012/650, part. Article 31.

[16] See again (EU) Regulation 2021/650 and the ruling of the CJEU, Judgment of 12 October 2017, *Kubicka*, C-218/16, EU:C:2017:755.

the circulation of unsafe products[17]; and finally, while the EU legislator continues to affirm that EU harmonisation does not affect traditional areas of contract law, such as formation and invalidity, in fact contract nullity has been radically influenced by the application of consumer protection directives, with a pivotal role for the Court of Justice in this field[18].

The making of European private law is a dynamic process: private national law changes (often as a result of European harmonisation); European law changes, too[19]. The expansion of the European mandate beyond the purely economic dimension of the single market and the recognition of the CFR as having the same legal force of the treaties, have opened up new spaces for European private law, particularly in the area of personal rights. The major role assumed by the EU as rule-setter in the area of digital law has placed the definition of a legal frame of reference in this field beyond the boundaries of national private law. This frame has become crucial for the protection of fundamental rights, and for the allocation of contractual and property rights linked to the use of digital technologies[20], with liability regimes[21]. The same move is more recently occurring in the field of sustainability, with an increasing attention to the role of contract law as a means for ensuring sustainability commitments along the supply chain, and the use of tort law as a means for collective redress in favour of workers, local communities and society at large[22]. Surprisingly (or maybe not), both in the field of artificial intelligence and in that one of sustainability, fault-based regimes gain back their central role in tort systems, which raises new

[17] See the Product Liability Directive (85/374/EEC), on whose pending reform the contribution by H. Sousa Antunes in this book provides a critical analysis.

[18] See, among the latest decisions, Judgment of 15 June 2023, *Bank M. SA*, C-520/21, EU:C:2023:478.

[19] See, 25 years after the publication of J.H.H. WEILER, *The Transformation of Europe*, in *Yale Law Journal*, 100, 1991, pp. 2403-2483, M. POIARES MADURO, M. WIND (eds.), *The Transformation of Europe Twenty-Five Years On*, Cambridge, 2017 (v. part. H. MICKLITZ, *The transformation of private law*, *ibidem*, p. 289 seq.).

[20] See the contribution of S. van Erp in this book.

[21] See the chapter of H. Sousa Antunes in this book.

[22] See Proposal for a Directive on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 (COM/2022/71 final).

questions on the dynamics of European private law-making and its impact on national private law systems[23].

Embedding these changes within legal education is imperative. The purpose is to make students aware about the complexity of private law construction within a multi-level system, in which national legal traditions feed EU law and EU law integrates national private law[24]. The result is not a homogeneous set of rules, as a plurality of legal traditions and approaches persists. Private lawyers need to cope with this complexity and be prepared for future changes and challenges.

3. European private law at the crossroad between comparative and EU law

That the first and most important function of comparative law is to foster a deeper knowledge of legal systems is a well-established thesis in comparative law scholarship[25]. It certainly applies to private law education and to legal curricula aimed not only to let student learn how persons, property, tort, contracts, etc., are regulated in a given legal system, but also to challenge these rules through a comparative analysis. Learning how certain objectives (e.g. making a binding promise) may be achieved, through different instruments with different effects, stimulates critical thinking and a deeper understanding of legal instruments.

When the European dimension of private law is apparent, the function of comparative law becomes even stronger. Being at the core of tens of scholarly statements of European general principles in the field of private law, it certainly inspires and sometimes steers law-making in the harmonisation process driven by EU institutions through the use of directives and (more and more) regulations[26]. To some extent, it also influences the transposition process by Member States, stimulating in-

[23] See the chapter of H. Sousa Antunes in this book.

[24] W. VAN GERVEN, *Bringing (Private) Laws Closer to Each Other at the European Level*, in F. CAFAGGI (ed.), *The Institutional Framework of European Private Law*, Oxford, 2006, p. 37 seq., part. p. 65 seq.

[25] R. SACCO, P. ROSSI, *op. cit.*, p. 9.

[26] See on this aspect the contribution by S. de Vries in this book.

teraction and mutual influence among national approaches with due respect for national specificities. The European legislator needs full understanding of the possibly different impact generated by the same EU rule or principle at the national level in light of a comparative assessment.

In a different way, comparative law impacts on the judicial dialogue between national courts and the Court of Justice of the European Union. Preliminary references highlight the relevance of EU law interpretation in light of the specific legal context of the referring court; in turn, preliminary rulings, though aimed at providing a uniform interpretation of EU law across Member States, may not be understood without considering the distinct features of the legal system of the referring court and the conclusions reached by the CJEU in the same field with regard to references presented by national courts from other MSs. In most cases, a question arises on whether and how a certain ruling may be applied in Member States that are different from the one of the referring court. Comparative law is an essential tool to address this analysis and students learning about the role of the Court of Justice in the making of European private law will be able to fully comprehend these mechanisms only through a solid comparative law methodology.

4. The roundtables: methodological choices

Roundtables are relatively common in conferences and media events, less common within university courses, where, by contrast, guest speakers are often invited to provide lectures as single speakers.

The main objective of a roundtable included in a university course is to foster a dialogue not only among speakers but also with students. Stimulating students' engagement through roundtables exposes learners to multiple perspectives and facilitates critical thinking.

The roundtables, on which this book is based, have been designed across two linked courses offered, respectively, in the first and second year of the CEILS Programme. This choice has favoured a certain continuity in the student's learning experience, allowing for a sort of inter-

generational dialogue among students, too. This dialogue will continue, also thanks to this book initiative.

Through the participation in the Roundtable series, students of European and comparative private law have been enabled to engage in an open discussion with prominent scholars and test their ability to use the knowledge and skills acquired during the courses to better understand, through an authentically plural and comparative experience, the current and prospective changes in European private law.

Cutting-edge issues have been chosen to stimulate multiple contributions and discussion. At the core of this choice stand the critical challenges posed by global phenomena, such as the digital revolution, the health global crises, and climate change.

The Roundtable series, now at its sixth edition, has hosted scholars from different countries and legal traditions. Not all of them could take part in this book initiative, but all of them provided invaluable insights for students and the scholarly debate, only partially reflected in this book.

5. The topics of the roundtables: reasons and fil rouge

The main objective pursued through the Roundtable series presented in this book has been to provide participants with an opportunity to discuss from a comparative law perspective current and future directions in European private law. Special attention has been given to major phenomena affecting society, such as the digital revolution, the health global crises, climate change and sustainability. Their impact on the existing private law architecture within the European Union context and on its constitutional foundations, including the protection of fundamental rights, has been at the core of the Roundtable discussion.

Indeed, revolutions and crises have led to major changes in private law taxonomies and concepts at the EU and national level. And both revolutions and crises have posed new challenges for the essential need to protect fundamental rights, while boosting innovation and economic development.

The digital revolution has radically changed the relationship between personhood and resources, subject and object of a given entitlement; it has introduced new forms of control over tangible and intangible goods, requiring new legal infrastructures and a new balance between economic and non-economic rights, individual and collective ones; new forms of contracting, new modes of expressing own personality and taking part in public debate, but also new forms of discrimination, new exploitation, new torts.

Similarly, health and climate crises have called for a new balance between individual and collective interests, challenging the very notion of private rights as a space of freedom within the boundaries imposed by law. The conventional taxonomy of private law, in property, contracts, torts law, needs to be revised, embedding a new balance between individual and collective interests. The proportionality principle, more commonly applied in public law contexts, becomes an essential instrument to strike this balance also in private law.

In order to face these phenomena, different approaches may be considered. At least in principle, the private law architecture could remain solidly anchored on its consolidated bases, while radical changes could be made only within discrete areas of law (digital private law, sustainability private law, and the like). But, in this perspective, an issue remains about how to set these different areas within a consistent general architecture. Alternatively, a more pervasive but softer change could be made, affecting the core concepts of private law in a way that make them consistent with old and new types of resources (e.g., those generated by digitalisation), and with old and new forms of balancing[27].

It is worth highlighting that, due to their global dimension and their impact on the future European society and market, both the digital revolution and the sustainability crisis have triggered major initiatives at the EU level, deeply influencing European and consequently national private law. In this regard, the possible tensions between the old and the new architecture intersect the multi-level approach of European private law and, therefore, the possible tensions between national and supranational sources.

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[27] See the contribution of S. van Erp in this book.

In this complex setting, a question arises about the best regulatory approach and the optimal level of harmonisation, whether full or minimum, with wider or narrower room for private actors as standard-setters[28]. A key role is played by general principles and ground norms, established both at the national and, even more importantly, at the supranational level. The role of the CFR has grown enormously in law-making and case law and, in certain areas, it has boosted a principle-based harmonisation across Member States, even where national legislators have been more reluctant to incorporate fundamental rights in their transposing legislation. Not only direct effect of EU principles has been acknowledged by the EU Court, but also their horizontal dimension within private law relationships has gained ground in the European legal framework[29].

Moving from this perspective, the Authors have examined some of the major changes occurring in current European private law, questioning whether and to what extent new paradigms are needed to reconcile innovation, economic growth and fundamental rights. The recent EU initiatives in the field of digitalisation of markets, goods, services, transactions, are the main case studies for this analysis, covering some of the main challenges posed in the field of property, contract and tort law[30]. Moreover, the extent to which European private law is open to embed fundamental rights into its paradigms has been also examined in areas in which EU legal intervention has been rather limited or absent, such as housing[31].

5.1. The book structure

Moving along the lines presented above, the book structure reflects an ideal dialogue among the Authors, starting from the general architec-

[28] See the contribution of S. de Vries in this book.

[29] See the contributions of C. Mak and S. de Vries. in this book.

[30] Main reference is to the contributions of S. van Erp, S. de Vries, R. Schulze, F. Gomez Pomar and H. Sousa Antunes.

[31] So in the contributions of C. Mak and A. Afonso.

ture of private law discourse[32] and progressing through more specific challenges brought by the digital and climate revolutions: first, in major areas of private law, such as contracts[33] and torts[34]; second, in more specific sectors, such as housing[35].

In the first part, the Authors discuss whether a new approach to European private law-making is needed, moving towards a less individualistic approach and a new balance between autonomy and heteronomy. More precisely, it is questioned whether such move could be fulfilled through a «differential» approach, therefore calling for open-ended notions (such as the one of «access») as a flexible layer added to existing law, rather than through more radical changes of current taxonomies (e.g., those concerning concepts such as «ownership», «freehold» and «title»)[36]. From a comparable perspective, the role of human rights is also considered as a basis for a reconsideration of European private law architecture, embedding the «constitutional» dimension provided by the ECHR and the CFR[37]. Not only private law paradigms may be revisited in light of fundamental rights, but also, and conversely, European private law may contribute to societal transformations and the fulfilment of fundamental needs of individuals and groups[38]. To what extent does direct and horizontal application of fundamental rights contribute to this aim? How do fundamental rights and fundamental freedoms (such as freedom of movement) interact and foster new developments in European private law through a stronger focus on general interests and a more blurred divide between public and private? The role of the Court of Justice and that of EU law (primary legislation and regulations, more than directives) are specifically examined in this book, together with their impact on private actors, such as businesses and other private in-

[32] See the contributions by S. van Erp, C. Mak and S. de Vries.

[33] See the contributions by R. Schulze and F. Gomez Pomar.

[34] See the contribution by H. Sousa Antunes.

[35] See the contribution by A. Afonso.

[36] See the contribution by S. van Erp, observing that «To think outside of the box of existing law and break open our (legal) minds, overcome path dependency and avoid tunnel vision we do not have to be revolutionaries».

[37] See the contribution by C. Mak.

[38] This is one of the theses presented by C. Mak in this book.

stitutions whose action is particularly relevant in setting and applying the rules of the internal market[39].

In the second part of the book, the impact of these structural changes is examined in more specific areas of European private law. In particular, the Authors analyse the extent to which the digital revolution has influenced EU and MSs' contract law beyond the specific scope of application of EU directives and regulations, and whether the latter, though far from being the basis of a EU Civil Code, have somehow changed the role of national civil codes even when, as it is often the case, transposition has occurred out of their perimeter[40]. Although significant changes have been made in European contract law as a result of the EU Digital Market Strategy, to what extent have these changes addressed the many challenges posed by digitalisation? First and foremost, those posed to vulnerable consumers, more and more exposed to moral hazards and adverse selection problems linked with new forms of information and power asymmetry in the digital market. Moreover, how does digital market regulation interact with contract law and to what extent can effective consumer protection be guaranteed[41]? A critical view of existing and forthcoming EU legislation is provided not only in the field of contract law but also in the area of torts, today deeply influenced by AI regulation. Almost forty years after the product liability directive, a new balance is searched for among innovation, safety and effective consumer protection. Moving from a fundamental right perspective, both strengths and weaknesses in current legislative proposals are examined through the lens of the precautionary principle: is the fault-based regime envisaged by the proposed Directive on AI liability consistent with the purpose of effective consumer protection? Could alternative and more effective options be viable in the form of compensations funds[42]?

The debate among Authors presented in this book shows that the role of fundamental rights in the making of European private law is be-

[39] This is one of the theses presented by C. Mak in this book.

[40] See the contribution by R. Schulze in this book.

[41] These are some of the issues addressed by F. Gomez Pomar in his chapter.

[42] For an extended analysis of these issues, see the contribution of H. Sousa Antunes in this book.

coming crucial, with a deeper focus on the social dimension of European legal culture. To what extent, within the competence of EU institutions, can this approach extend the scope of EU intervention in new areas of private law, such as tenancy law? This is explored at the end of this book, where a soft law instrument is proposed as a possibly effective means of harmonisation in this field[43]. Indeed, while some Member States have introduced a right to housing in their constitutions and fundamental laws and a similar acknowledgment features in the European Social Charter, it can be questioned whether and how European private law could contribute to strike a better balance between landlords' and tenants' (fundamental) rights beyond the boundaries of existing consumer directives, whose impact has already been relevant in the context of the recent financial crisis[44].

6. Teaching European private law in the 21st century: trends and challenges

Teaching European private law is today even a more critical venture. Far from the horizon of a European Civil Code perspective, the current challenge is to examine whether and to what extent old taxonomies are sufficiently resilient to play new roles. Boosting innovation, while ensuring protection of fundamental rights through an adequate balancing based on the proportionality principle, is among the challenges faced in current times.

Entering the classroom, these challenges call for a problem-based approach to legal education. The multi-level structure of private law, as developed in the current European and global context, requires combining national private law with the European dimension. A comparative law approach is needed to fully understand the transformations of private law concepts in the plurality of legal traditions in which those concepts have been developed. A stronger connection between legal research and legal education may certainly help the new generation of

[43] See, in particular, the contribution by A. Afonso in this book.

[44] Both C. Mak's and A. Afonso's contributions provide interesting hints in this regard.

lawyers to better design the future of European private law and somehow reconcile innovation, growth, fundamental rights and justice.

THE FUTURE OF PRIVATE LAW BETWEEN SUSTAINABILITY CHALLENGES AND THE DIGITAL REVOLUTION

«MANAGED RETREAT» AND DIGITAL ASSETS AS EXAMPLES

Sjef van Erp[*]

TABLE OF CONTENTS: *1. «Differential law» as a new approach to private law? 2. Managed retreat. 3. Digital assets. 4. Three principles of differential law. 5. Concluding remarks.*

ABSTRACT: *Traditional property law is challenged by both the digitalisation of our society (thus creating a mixed real/virtual world) and the changing physical environment in which live (the ever clearer impact of climate change). It seems as if both provoke different questions, but upon further reflection both require a fundamental rethinking of our existing property law. The result is a 'differential law', which accepts a clear difference between traditional property law concepts and new notions such as 'access' to resources.*

1. «Differential law» as a new approach to private law?

A major difficulty when faced with the problems and questions which are provoked by today's major societal problems, such as climate change and the Digital Revolution, concerns the question whether, in an attempt to solve these problems, existing law, legal values, principles, ground rules, policy choices, concepts and notions can still be applied adequately and effectively. Trying to combat climate change will, unavoidably, lead to a limitation on our freedom how to live and use our property. A legal ideology stating that your freedom to do with your property whatever you want in whatever way is absolute, unless and until you are limited by the law and that you can only be expropriated

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for a public cause and under strict conditions is hard to reconcile with an urgent need to increase control over the use of limited resources[1]. The latter requires a legal system that is more based on heteronomy than autonomy and thus follows a far less individualistic common interest ideology. Interesting developments can already be seen when looking at a report published in 2018 by the European Climate Adaptation Platform (Climate ADAPT) in which 10 case studies are presented as to how Europe is adapting to climate change[2]. Our climate has become a common cause and climate change can only happen if a society acts as a whole and an individualistic freedom of ownership attitude gives way to a more general interest oriented approach. To illustrate the need to think «out-of-the-box» an example from the area of IT and law might be useful, focusing on ownership of data. In an English case the UK Court of Appeal ruled that e-mails on a server could not be the object of any property rights, given the existing case law and prevailing categorisation of legal objects[3]. The Netherlands Commercial Court, in proceedings where English is the leading language, ruled in a comparable case that the Netherlands Civil Code does not accept ownership of data[4]. Again, because the existing law regarding ownership (for the Netherlands: code provisions) did not include data. In both cases a final, and it must be admitted: workable, solution was found by applying

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[1] This traditional approach is still reflected in the text of the French Civil Code, articles 544 and 545, building upon Article 17 of the French Declaration of Human and Civic Rights of 26 AUGUST 1789, stating: «Since the right to Property is inviolable and sacred, no one may be deprived thereof, unless public necessity, legally ascertained, obviously requires it, and just and prior indemnity has been paid».

[2] CLIMATE-ADAPT, *How Europe is adapting to climate change*, Luxemburg, European Environment Agency, 2018. More examples can be found on their website: *https://climate-adapt.eea.europa.eu/* (last accessed on 6 September 2023).

[3] Fairstar Heavy Transport NV v Adkins & Anor [2013] EWCA Civ 886 (19 July 2013), [2013] 2 CLC 272, [2014] BUS LR D2, [2014] EMLR 12, [2014] FSR 8, [2013] EWCA Civ 886, [2014] Bus LR D2, *http://www.bailii.org/ew/cases/EWCA/Civ/2013/886.html* (last accessed on 6 September 2023).

[4] Diamedica Therapeutics v. Pharmaceutical Research Associates Group, District Court of Amsterdam (Netherlands Commercial Court), 21 April 2023, *https://uitspraken.rechtspraak.nl/#!/details?id=ECLI:NL:RBAMS:2023:2540* (last accessed on 6 September 2023).

contract law and accepting a claim for performance. However, this does not solve the problem what the object of the contract then is and whether data might be such a new legal object that we need to consider formulating new values, principles, rules etc. Obviously the object of the contract is data, but how can data be an object of contract law if it cannot be an object of any property entitlement: What do you then «transfer» from one party to another?

To think outside of the box of existing law and break open our (legal) minds, overcome path dependency and avoid tunnel vision we do not have to be revolutionaries. What we see happening is, as I described elsewhere, a revolutionary evolution by accepting that what we call «ownership» may be very context specific and depend upon the object involved, the subject asserting any entitlement to such object and the subjects against whom such entitlement is claimed[5]. At the same time what that «entitlement» is depends upon precisely what the object is, who the subjects involved are, but also which general interests play a role (such as, in a sustainability setting, protection of the environment and its living beings or, in a data setting, privacy protection) and – as we are talking about a climate that might undergo sudden irreversible changes and data which can be copied infinitely – on which moment in time we need to crystallise that entitlement[6]. In the Liber Amicorum for Denis Philippe I sketched this new differential law, a law that differentiates between the object concerned, the subject asserting an entitlement and the subjects against whom such entitlement is claimed which in its turn all have an impact on the entitlement itself, as follows, referring to how the law should react to our new digital reality:

> What I essentially argue is that we must first see if existing private law can also be applied, and, if not, whether it can be adapted to our changing needs. Only if this is not possible, should we start looking for new, more innovative, solutions. In other words: correcting or supplementing the law only after it has been decided that adapting it does not provide us with workable results. Or, as English lawyers would say: Equity fol-

[5] S. VAN ERP, *Fluidity of ownership and the tragedy of hierarchy. A sign of a revolutionary evolution?*, in *European Property Law Journal*, 2015, pp. 56-80.

[6] S. VAN ERP, *Covid-19 apps, Corona vaccination apps and data "ownership"*, in *China-EU Law Journal*, 2022, pp. 45-65.

> lows the Law, first analyse a problem according to the old common law, then revert to Equity. Roman lawyers do not really put it in the same way, but still would, I assume, agree, when I read Digest 1.1.8.: “Nam et ipsum ius honorarium viva vox est iuris civilis.”, in English: “For indeed the jus honorarium itself is the living voice of the jus civile”. A differential law, whether it be called “data law”, “sustainability law”, or not, should do precisely that[7].

Differential law is therefore law meant to react to a rapidly changing society and the environment in which that society exists. Existing law evolved from a centuries long development, but somehow petrified with the enactment of Civil Codes during the 19th century, and the nearly parallel development of *stare decisis* in English law. This meant that the most important legal objects were not just only physical things, but more particularly land and buildings. The main legal subject was the well-established citizen (*citoyen*) who lived on and from that land and those buildings as a free man, equal to all other free well-established men (according to the principles of *égalité* and *liberté* from the French Revolution). Having a duty towards society (*fraternité*, another leading statement by the French revolutionaries) was more an ethical appeal to a *citoyen*’s conscience than an actual principle that was reflected in the law. The entitlement of the subject to this object was called ownership. The French Civil Code used the term *propriété* (which gradually proved

[7] S. VAN ERP, *Differential Law: Towards a two-tier approach regarding data*, in A. STROWEL, G. MINNE (eds.), *L’Influence du Droit Européen en Droit Économique*, Liber Amicorum Denis Philippe, Volume 1, Brussels, 2022, pp. 783-798, p. 798. Cf. also, more focusing on questions of sustainability, S. VAN ERP, *Het goederenrecht als gedifferentieerd rechtssysteem*, in B. AKKERMANS, B. HOOPS, E. VAN DER SIJDE, B. VERHEYE (eds.), *Privaatrecht 2050. De weg naar ecologische duurzaamheid*, Brugge, 2022, pp. 179-192. We should not ignore that terms like «data law» or «sustainability law» are as such basically no more than an empty shell, a rhetorical starting-point for further analysis. Cf. F.H. EASTERBROOK, *Cyberspace and the Law of the Horse*, in *University of Chicago Legal Forum*, 1996, pp. 207-216 and L. LESSIG, *The Law of the Horse. What Cyberlaw Might Teach*, in *Harvard Law Review*, 1999, pp. 501-549. In footnote 1 Lessig explains the reference to the «law of the horse» further: «The reference is to an argument by Gerhard Casper, who when he was dean at the University of Chicago, boasted that the law school did not offer a course in “the law of the horse”. The phrase originally comes from Karl Llewellyn, who contrasted the U.C.C. to the “rules for idiosyncratic transactions between amateurs”».

to be more the expression of a notion than a concept), and the German Civil Code used the term *Eigentum* (a concept, to be applied strictly and narrowly)[8]. That ownership could have a social function had somehow disappeared over the horizon. The dire consequences of ignoring *fraternité* as a principle of law equally important to *égalité* and *liberté* became apparent first during the Industrial Revolution, with its miserable working and housing conditions for labourers, and allowing child labour. It became evident from a political perspective, because of the Russian Revolution of 1917, that the law had to become more social, otherwise also Western Europe would have to face an in strength growing Marxist movement as an emergent radical force against an otherwise unyielding civil and ecclesiastical establishment. The outcome of this process towards making the law more social and just was that, finally, *fraternité* was also recognised as a legal principle. The dangers of the pre-existing closed system of thought about social relations became even more apparent during the interbellum between the First and the Second World War, a period that ended in October 1929 with the Dow Jones losing first a quarter, then a half of its value, which slide continued until the summer of 1932 when the Dow Jones was 89% below its peak a few years before[9]. Germany suffered under hyper-inflation. A deep economic crisis followed and another World War. Private law as we know it is written for a politically stable society, with a well-functioning economy and accompanying financial system, not chal-

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[8] Remarkably enough in the 19th century the Netherlands adopted the French model in its Civil Code of 1838, but in the middle of the 20th century changed to the German model in the new Civil Code, thus creating a property law system that changed from a notion-based to a concept-based approach. The result can be seen when reading the in earlier in footnote 4 mentioned decision by the Netherlands Commercial Court on the non-acceptance of data «ownership». It is interesting to see that this change can be traced back to the impact of a particular vision on private law as developed by the legal scholar who prepared the first drafts of the new Civil Code: the well-known Professor of Civil Law, also a legal historian and comparativist, Eduard Maurits Meijers. See E.M. MEIJERS, *Algemene leer van het burgerlijk recht, Deel 1, De algemene begrippen van het burgerlijk recht*, Leiden, 1948.

[9] See G. RICHARDSON, A. KOMAI, M. GOU, D. PARK, *Stock Market Crash of 1929*, *https://www.federalreservehistory.org/essays/stock-market-crash-of-1929* (last accessed on 6 September 2023).

lenged by major upheavals or crisis. War, social unrest, a financial system that is running out of control, or other crises that are not resolved or at least faced, all result in a decline of trust towards state institutions and destroy the basis for a well-functioning private law. When countries are damaged by war, suffering under the consequences of climate change, when consequently people start migrating or when growing parts of a population feel locked out because they can no longer cope with living in a hybrid (both real and virtual) world where Artificial Intelligence will be playing an ever increasing role, private law with its principles of human equality, liberty and fraternity no longer functions properly. Or, if it still functions, only to a degree that may benefit some, such as black market traders, oligarchs or monopolists and political autocrats, but no longer others. Such a loss of confidence in the law is a threat to the heart of our democratic institutions and our societies and should be avoided.

Let me focus on the two major problem areas mentioned earlier: climate change and the Digital Revolution. Both pose questions to traditional private law, which seem too difficult for a short-term and adequate reply. Although the process towards providing possible responses (legislation, case law, legal scholarship) has begun, we should not forget that the answers must be given under exceptional time pressure considering the rapid changes. In this contribution I will explain this by looking at two more specific phenomena: the need to prepare ourselves for a managed retreat when climate change leads to an immediate danger for whole communities and relocation becomes unavoidable, and the unavoidable acceptance and necessary legal inclusion of digital assets in our perception as to what can be a legal object. I will argue that a differential law will need open-ended (thus «differential») notions, an example of which is «access», to supplement and replace old terms as «ownership», «freehold» and «title». We may also need, inspired by the developments in English law, maxims of differential law and I will attempt to begin formulating these. But first I will begin by explaining what «managed retreat» means and why «digital assets» are as such already an accepted term, albeit without a stable legal content.

2. Managed retreat

The debate about climate change seems to oscillate between for some total denial and for others complete panic. Both approaches do not seem to be realistic and are certainly not productive when it comes to realistically evaluating what is happening and how to act in response. Climates have always changed, but in this era the process goes considerably faster than in previous periods of time and it is difficult to deny that human intervention does play at least some role here. At the same time we are not all close to extinction of the human species as if we were all jumping off the cliff. We should react, but not be terrified, and this is how the law should respond. Denial is not an option, but we need to change our attitude in light of the ever scarcer resources of the planet on which we live and be prepared for what might be coming towards us, to avoid the situation that we react only after disaster struck. It is better, as recently the people of the Swiss village of Brienz understood, to leave your house and move before a rock wall comes down than wait until it actually happens, taking away the hope that it will not happen. The law, therefore, should facilitate pre-disaster measures to avoid that only a post-disaster response remains[10].

Reacting to climate change has resulted in a legal debate about such questions as whether consumers should not be entitled anymore to replacement of a broken good when the damage can be repaired. Repair then is the first and foremost solution, replacement only necessary if really unavoidable. To achieve this we must introduce a hard and fast rule that entitlement to repair of a good is the primary remedy and only in exceptional circumstances will it be allowed to demand a wholly new product. Perhaps we should also start protecting the purchase of a refurbished good as if it were a wholly new product, so as to give consumers of refurbished goods the same rights as any consumer who buys a completely new good. Beside these matters, which traditionally belong to contract law, we can also look at the developments from a property law angle. Should ownership of land and buildings be really «abso-

[10] Cf. D. FARBER, *Climate Change and Disaster Law*, in C.P. CARLARNE, K.R. GRAY, R. TARASOFSKY (eds.), *The Oxford Handbook of International Climate Change Law*, Oxford, 2016, pp. 588-606.

lute», thus not allowing positive duties to install, for example, solar panels on a roof or a heat pump? These are all measures to prevent further depletion of resources.

Depletion, however, is already happening and we have no other option but to also face the consequences. Avoidance alone, by lowering CO2, will most likely not be enough. If that proves to be the more realistic scenario, the reaction can be threefold. We can start (1) protecting ourselves by building dams, dykes, water reservoirs (either to retain the water for periods of drought or as an extra overflow in cases of flooding), (2) accommodate (e.g. by isolating houses) and (3) managed retreat. The latter implies, in most cases, that all other measures failed, although a consequence of building dams, dykes and water reservoirs can also be that managed retreat will become unavoidable. Examples of the latter are artificial lakes created to have a sufficient water level for producing hydro-electric energy[11]. Managed retreat already happened in places in the United States, but is becoming part of government policy in island states in Oceania and New Zealand[12]. The smaller islands are in danger of being totally submerged when the sea level starts rising further, and already led the island of Vanuatu to ask for an advisory opinion to the International Court of Justice in The Hague regarding the

[11] A famous example in Italy is Lake Resia, with in its middle the flooded village of Curon. Only its bell tower of 1357 remained rising above the water, albeit until more recently the water level went down and the village appeared again. The human tragedy that resulted was described in MARCO BALZANO's famous novel *Resto Qui* (I want to stay here).

[12] A.R. SIDERS, *Managed Retreat in the United States*, in *One Earth*, Vol. 1, Issue 2, 2019, pp. 216-225. New Zealand is preparing a Climate Change Adaptation Act that will deal with managed retreat. More information can be found on the website of the New Zealand Ministry for the Environment: *https://environment.govt.nz/what-government-is-doing/areas-of-work/rma/resource-management-system-reform/pathway-to-reform/* (last accessed on 6 September 2023). The Climate Adaptation Initiative of Columbia University provides several online resources about managed retreat: *https://adaptation.ei.columbia.edu/content/managed-retreat-resources* (last accessed on 6 September 2023); see also the Managed Retreat Toolkit by Georgetown University's Climate Center: *https://www.georgetownclimate.org/adaptation/toolkits/managed-retreat-toolkit/introduction.html* (last accessed on 6 September 2023).

global responsibility of states[13]. In a Resolution adopted by the General Assembly of the United Nations in its 77th session the following questions were put before the ICJ:

> (a) What are the obligations of States under international law to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases for States and for present and future generations; (b) What are the legal consequences under these obligations for States where they, by their acts and omissions, have caused significant harm to the climate system and other parts of the environment, with respect to: (i) States, including, in particular, small island developing States, which due to their geographical circumstances and level of development, are injured or specially affected by or are particularly vulnerable to the adverse effects of climate change? (ii) Peoples and individuals of the present and future generations affected by the adverse effects of climate change[14]?

Hopefully, the Advisory Opinion may prove to become a globally accepted legal framework for how to handle, among other climate change responses, managed retreat.

Given the considerable impact of managed retreat, it is important that its legal status is clearly defined so a government has authority and power to act within a given legal structure, thus following the democratic principle of the rule of law. In a New Zealand government paper the following definition is given:

> Managed retreat is an approach to reduce or eliminate exposure to intolerable risk. It enables people to relocate assets, activities and sites of cultural significance (to Māori and non-Māori), away from areas at risk from climate change and natural hazards[15].

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[13] See for more information: *https://www.vanuatuicj.com/* (last accessed on 6 September 2023).

[14] See for the full text of the Resolution adopted by the General Assembly of the United Nations on 29 March 2023: *https://www.vanuatuicj.com/resolution* (last accessed on 6 September 2023).

[15] Ministry for the Environment, *Aotearoa New Zealand's first national adaptation plan* (Wellington, 2022), p. 80 to which on that same page is added: «For communities in areas of high risk, managed retreat is an adaptation option. It is usually not

Managed retreat is generally seen as a part of «climate adaptation», also in the New Zealand report[16]. However, given the enormous, and for communities and people potentially near disastrous consequences, I would say that we are beyond the stage of adaptation and are entering the stage of (preventive) disaster control. That qualification is important, as it may have an impact on the financial aspects of any government decision taken and possible rights for citizens to due compensation and financial support. Governments may be held liable for not acting (as in the Dutch Urgenda case), but also for acting[17]. The latter is a legal problem as it raises the question whether a legitimate governmental act can still give rise to a claim for compensation or financial support. The liability aspects I will leave aside, as this contribution is focusing on the property aspects of managed retreat and digital assets, except for the question whether a government could not only be justified, but even obliged to expropriate in the interests of those expropriated because the general interest is not in conflict with their private interests, but on the contrary it is precisely their safety and future prosperity that constitutes the general interest. Also in the latter case a government is liable to pay compensation.

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considered in isolation from other options, especially when planning for future rather than current impacts of climate change. In some cases, retreat may be a last resort, and in all cases the costs and benefits will need to be carefully weighed».

[16] See also the website by the European Climate Adaptation *Platform Climate-ADAPT*, a partnership between the European Commission and the European Environment Agency (*https://climate-adapt.eea.europa.eu/en/metadata/adaptation-options/retreat-from-high-risk-areas*, last accessed on 6 September 2023). Here the following definition of «managed retreat» can be found: «This measure refers to the strategic retreat or relocation of settlements, private households, infrastructures and productive activities from a risk to a non-risk location where they are resettled permanently. Retreat can be applied in pre- and post-disaster settings to reduce exposure to natural hazards when it is not possible to implement structural measures or their costs are too high». To which is added: «Managed retreat highly influences and is strongly impacted by private property rights. Therefore, the permanent movement of individuals is adopted as an extreme measure of risk management».

[17] On the Dutch Urgenda case (State of the Netherlands v. Stitching Urgenda), in which the Netherlands Supreme Court held the Dutch government obliged to fulfil internationally agreed sustainability goals see *https://www.rechtspraak.nl/Bekende-rechtszaken/klimaatzaak-urgenda* (all documents available in Dutch and English).

To clarify what I mean let me briefly sketch the possible consequences of managed retreat. When immovable property is flooded owners of that property do not lose their right of ownership. It depends for a considerable part on whether the original owner still has access to his property. That access can be temporarily or permanently lost. In case of a river that floods access is temporarily lost, but after the water reclines the owner again can exercise his right to possession. The situation changes when the flooding is permanent and access becomes difficult, not to say impossible[18]. If the flooding is part of a government plan, the owners will be expropriated in the general interest. In a situation where the flooding is the result of climate change and a government did not put any policy in place to combat climate change and prevent flooding, it could be argued that the government de facto also expropriates, however by not acting. There could be very good reasons for a government not to act, for example when it gives priority to acting elsewhere, but does this justify that a particular group in society should bear the consequences? If such a de facto (or passive) expropriation equals (active) expropriation in the general interest then also this form of expropriation must result in fair compensation[19]. A follow-up question is when a government, faced with the near impossible task to stop climate change as a result of global warming, would be entitled to expropriate as a preventive measure in order to protect a citizen's – constitutionally and in international treaties protected – property rights as much as possible. Such preventive expropriation could be seen as a positive element in a negative package of abstention from taking adequate measures.

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[18] Although, what does «impossible» mean in a setting of climate change? Artificial lakes may become dry again, as might happen in the United States with Lake Mead at the Hoover dam on the Colorado River. The water level of Lake Mead became lower and lower, because of increasing water demand and drought. The lake is of crucial importance for providing water to several states and the city of Las Vegas. The water level is now rising again, because water is released into it from another lake (Lake Powell). See for more information about Lake Mead: *https://www.nps.gov/lake/learn/nature/storage-capacity-of-lake-mead.htm* (last accessed on 6 September 2023).

[19] Cf. B. HOOPS, *The legitimate justification of expropriation: a comparative law and governance analysis by the example of third-party transfers for economic development*, Claremont (Cape Town), 2017.

Where people lose access to their property, and hence may lose their right of ownership, they will have to live elsewhere. If that is happening, we see what might be called internal migration, to distinguish it from external migration: people are moving within a country's borders, not coming from outside. Yet, the problems are the same. Where can they live? If whole communities have to be relocated they unavoidably will enter land that belongs to other citizens. Also these other citizens are entitled to protection of their property and their right of ownership. However, as we are considering a situation that is the outcome of a scheme of disaster prevention, ownership cannot be a mere individual right that only protects this one person. Ownership also has a social aspect, which brings some authors to the conclusion that an inherent part of ownership is its limitation by positive, social duties[20]. An example can be found in the Netherlands after the Second World War when home owners were obliged to make vacant rooms in a house available to others who lost their homes. In such a situation those who are being accommodated are given their constitutionally protected right to housing and family life, which is expressed by giving them access to a house that belongs to someone else, whereas the owner is limited in his right of access in the general interest.

Summarising the above, it can be said that ownership is gradually more looking like access to a resource than an absolute right as it was long seen in the more classical Civil Law Tradition[21]. In the next paragraph I will discuss how the Digital Revolution has had a fundamental impact on how we look at ownership. We will see, again, that ownership is no longer at the heart of both attribution and distribution of rights, but access.

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[20] Cf. for South America A. PARISE, *Ownership paradigms in American civil law jurisdictions: manifestations of the shifts in the legislation of Louisiana, Chile, and Argentina (16th-20th centuries)*, Leiden, 2017.

[21] Cf. D. KENNEDY, *The rise and fall of classical legal thought: with a new preface by the author, "thirty years later"*, Washington (DC), 2006.

3. Digital assets

From a legal-historic perspective we recognised as legal objects first physical things (initially the focus was on land, later movables were included), but also services, intangibles (monetary claims) and rights protecting the ideas which emanated from the creative human mind (intellectual property). The past 20 years we see an incredible and far-reaching development towards a «virtual» world in which data are the heart of the matter. The enormous difficulty with data is that they are an expression of information and that the law only recognised information as a to be protected object under very specific circumstances, such as when that information was strictly confidential (for example because of an advocate-client relationship) or was part of a company's assets (trade secrets). As such information in the shape of data was, therefore, already considered to be a possible legal object. This can also be seen when looking at land registration. The essence of a land registry has always been that its ledgers provide accurate information about, among other aspects, the size of a parcel, any buildings on that parcel and who is entitled to which rights. Given the specific nature of that information, the ledgers are data carriers. However, land registries originally were hand written and copying those data took time and effort. What we now see is that data are digital, stored on servers with an ever increasing capacity, which are also interconnected through the Internet. It is this digitalisation and interconnectedness that has resulted in a completely different approach to how information is gathered, processed and used. It was particularly the processing that created grave concerns from a privacy viewpoint, now even more because of the mode of processing, which becomes increasingly driven by Artificial Intelligence.

Whether we like it or not, within two decades data developed into a legal object, although it still proves to be difficult to classify this object and develop a coherent system of rights in data. The «data ownership» debate showed that for some the word «ownership» had a very positive connotation, as it meant that the person who was the subject around whom the data centred («data subject») was in control. For others it immediately had a negative meaning, as for them «ownership» implied marketability, allowing trade in very personal information, almost close

to a new form of serfdom and feudalism where the new IT industry acted as being in final control. It seemed as if legal history had come full circle. Feudalism, with its historic focus on land, gradually disappeared and on the Continent of Europe was finally abolished as a result of the French Revolution. It then came back during the Industrial Revolution, with its focus on mass production and mass consumption, in the shape of factory owners exploiting their workers, although after the Bolshevik Revolution in Russia this resurfacing of feudalism was countered through employment law and other social legislation. And today it seemed to re-emerge again in the form of a data economy governed by large, global conglomerates dealing in (personal) data. This debate about data ownership quickly showed that its sole focus on what ownership entailed was a mirage. Traditionally, ownership meant that there was a unique legal object. This is what in property law is called the principle of specificity. But because data are now in digital format, they can be copied. And not only once, but infinitely, and very fast. This can be seen when a message on social media becomes viral. How can you «own» something that is no longer unique, from the moment it has been copied? This is not ownership in the classical sense of the word, but about attributing and distributing rights as a form of management. Also data as such appeared to be an impracticable term. The position and status of a person whose data have not yet been copied is fundamentally different from a person whose data were made public, and we have all kinds of positions and situations in between. This means that the classical 19th century static approach to property rights, so characteristic for the «real» world, simply does not function here. In a dynamic world, as the virtual world is, we need a dynamic approach. This is why in earlier writings I defended the view that the rights of stakeholders regarding data depend on the specific moment in time which we take as the starting point for our decisions regarding those rights. It also means that a decision today may be meaningless and ineffective tomorrow. This brings with it that we will also have to reconsider our approach to remedies and the role of private law here. This is already happening. When it comes to grave violations of rights which persons have regarding data, such as a right to privacy, already in practice remedies are, first and foremost, more of a public law than a private law nature. Remedies

sometimes only prove to be effective, also for individual citizens, if they are very hefty fines to, for example, the IT industry imposed by a government or in Europe the European Union.

Data ownership is, in light of the above, therefore not «ownership», but management of rights. But what is at the heart of those rights? Ownership gives its holder access to its (mostly economic) benefits. If we keep this in mind, it is becoming apparent that access is the essence of any rights in data. We now see a development towards gradual acceptance of this approach, although sometimes not the term «access», but «control» is used. By looking at ownership from the perspective of a notion, with certain open-ended characteristics, instead of a concept with strictly determined boundaries we can move forward towards more flexible, adaptive and workable solutions. Recently, the English Law Commission proposed that in English law, next to the traditional distinction in choses in action and choses in possession a new category «data objects» should be introduced[22]. I find this a positive approach, as it shows how data are now recognised as a new type of legal object, but at the same time need to be classified against the background of an existing, and well-functioning, legal system. It will be interesting to see how far this approach will be taken over by English courts and the legislature when developing their system of Equity law, in my view an expression of what I previously called «differential law».

4. Three principles of differential law

Earlier I argued that differential law concerns regulating new phenomena, which the law as we inherited it from earlier generations could not have foreseen, by adding a flexible layer to the existing law. Private law, as we know it today, still is heavily based on 19th century ideas and precepts. Who in the 19th century could have predicted that our climate could change globally in such a drastic way that it might become una-

[22] LAW COMMISSION FOR ENGLAND & WALES, Digital Assets: Consultation paper, Law Com No 256 (published July 2022): *https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2022/07/Digital-Assets-Consultation-Paper-Law-Commission-1.pdf* (last accessed on 6 September 2023).

voidable to relocate communities? And who could have foreseen that we would be living in a hybrid world where the «real» world would merge with a virtual world and where mining data has become as valuable as mining precious metals? We can react by denying what is happening, by ignoring that our climate is changing and by disregarding that we now live in a web of data (where we are not the spider in the web, but far more the prey). However, we can also react by trying to understand what is going on and looking at how the existing law could be applied as it is, or if needed and possible by re-interpreting it. If that does not seem to result in workable solutions we can then consider to create a whole new set of legal rules. They could range from voluntary codes of practice or conduct, case-law, more robust legislative interpretation or statutory law making. If we choose to do the latter, we must be prepared – as we can now see with the proposed EU legislation regarding Artificial Intelligence – that parties with an interest in legal abstention will attempt to put pressure on the legislative process. This new set of legal rules I call «differential law» and the question arises whether, not unlike *ius honorarium* in Roman law and Equity in English law, certain maxims of differential law can be formulated, which might assist law makers[23]. I would suggest three principles.

a. Differential law prevents a legal vacuum

The first is that differential law, because it is correcting and supplementing existing law, must be formulated as such. So, as in Roman *ius honorarium* and English law of Equity, differential law is created to avoid a legal vacuum. As such it resembles the English maxim of Equity that «Equity will not suffer a wrong to be without a remedy». The classical argument that ownership (1) implies both the positive freedom to act with an object as you please and the negative freedom to prevent others from interfering with your use of an object, (2) is the most extensive right a person can have regarding an object and (3) that expropriation only is allowed in the general interest and not in the owner's per-

[23] See M. ILLMER, *Equity*, in *Max-EuP*, 2012: *https://max-eup2012.mpipriv.de/index.php/Equity* (last accessed on 27 May 2023), who also makes a reference to the *dispensatio* in canon law.

sonal interest provokes considerable problems in situations for which 19th century law was not written. Such an approach implies that a legal framework to facilitate managed retreat or attribute and distribute rights in data is excessively difficult to create. An owner whose land and dwellings are at risk of flooding may refuse to move, thus creating a situation where for example after heavy rainfall and resultant flooding life threatening rescue measures are necessary, which otherwise could have been avoided. This would not only be in the personal interest of those rescued and their rescuers, but also in the general interest given the (financial and human) cost of these measures. A classical approach to ownership also implies that land owners confronted with migration caused by climate change may then refuse to allow using derelict land or vacant rooms in a house, thus using land and space urgently needed by others. Looking at ownership from the perspective of a differential notion of ownership as explaining who may have access to a resource implies that an owner still might be the first right holder and, as such, does have a strong right that should be protected, but not under all circumstances. A right to access depends for a considerable part on balancing a constitutionally protected right of ownership and the fundamental rights of others, such as a right to housing. With regard to data we see the same pattern of thought emerging. Also concerning data an attempt to attribute «ownership» as a classical absolute right is meaningless, given the limited classical concepts which are used. What matters here is, again, access, allowing different types of control as for example «read only» or «reading and writing» rights. It should be acknowledged that ownership is neither absolute, nor forever, two basic tenets of ownership in the Civil Law tradition. Ownership from a differential legal viewpoint can also be relative, depending on who are the stakeholders involved (how many data copies exist and who has control over these copies?) and may depend on the moment in time when the position of stakeholders is analysed. A WhatsApp message, sent with encryption, can more easily be seen as «belonging» to the sender, and perhaps also to the receiver, but once such a message somehow has gone «viral» any control is lost and access has become meaningless.

b. Differential law follows existing law

From the above it will be clear that differential law will build upon the existing law, using the fundamental structure of that law. In the case of property law that structure is built upon three principles: *numerus clausus*, transparency and hierarchy. Differential law will also have no impact on situations where existing law works perfectly well. In spite of the debate on whether you can «own» data, ownership of physical things is, as such, not in doubt. What we doubt is which content a right of ownership should have in light of a changing climate with the resulting impact on our living environment. The principle that differential law follows existing law corresponds with the maxim of Equity in English law that «Equity follows the (common) law». A fact situation should first be analysed based on the common law in a strict sense, then be examined from the perspective of Equity. Procedurally this is not different from how I look at differential law. Analysis should begin by looking at existing law, if that does not fit well it should be considered whether re-interpretation might be helpful and if that fails new law should be developed but without ignoring the fundamentals of our inherited legal system as can be found in leading principles and ground rules.

c. Differential law prefers notions over concepts

A third principle can be added, based upon what we saw regarding the meaning, role and limitations of ownership. Differential law should be founded on notions and not on concepts. In other words we should formulate legal relations between a subject and a relevant and considerable group of other subject regarding an object not following the form of strictly defined (and thus a priori limited) concepts, but the form of loosely defined (and thus to be further explicated a posteriori) notions. With respect to «ownership» I would propose that from a differential legal viewpoint we add a layer using the term «access». Not unlike under the Common Law tradition trust law creates equitable rights in what otherwise would have been unburdened freehold land. In the Civil Law tradition access has been made absolute as the most extensive right

against the world a person can have regarding an object, forgetting that access may imply considerable limitations under unforeseen circumstances. The Common Law tradition, however, due to its continued use of a more relative approach emanating from, although now abolished, feudal ideas did not make ownership a unitary and absolute concept. It kept distinguishing «estate» (land law) from «title» (personal property), maintaining an element of time (types of estates) and relative strength (title) as an inherent part of any property entitlement and, finally, developed Equity next to its common law rules.

5. Concluding remarks

Managed retreat is a last resort measure in case other measures to combat climate change and its consequences are failing. It is often seen as a type of adjustment to climate change, and thus is at the most extreme end of an adaptation spectrum beginning with protective measures, followed by accommodation to changing circumstances and ending with forced relocation. It results in people losing their land and homes, because of a (near) disaster resulting from climate change, or otherwise being forced to stay living on land and in homes under stressful and risky conditions. Managed retreat is more than just evacuation. It is also about permanently relocating people to places where already other people live, who own land and buildings. Retreat also requires settlement management, resulting in a conflict of interest between those who have to leave their property and those who are confronted with others looking for a place to live. Traditional concepts of ownership, as they were formulated against a 19th century background where climate change was an unimaginable idea, do not really function here. A comparable type of problem surfaces when looking at questions regarding «ownership» of data. Given that all data can be copied, we are confronted with a new type of object as until now legal objects had to be unique. Otherwise they could not be seen as sufficiently specific to be made the object of a right granted to a particular person against a relevant and considerable group of other persons. The statement: «I own» is from a legal perspective completely meaningless. What do you own?

You may own a particular thing, but it must be clear which thing. It might sound reassuring that you «own» data, but in fact there is never absolute certainty that they are not somehow, somewhere by someone copied. A person's right to data is access to those data and the follow-up question then is what «access» means. Is it perhaps «control»? But what does control then mean? At least it should be clearly distinguished from «possession», because the latter is like ownership a classical concept that is too much focussed on traditionally unique objects, not on objects which can be copied infinitely.

To deal with these new questions, unforeseen by 19th century legal thinking which still governs to a larger or lesser degree the way we attempt to solve such problems, we need an intellectually free space, however not without bounds. This is what I propose by introducing the idea of differential law. In this contribution I described what I mean by differential law and which three principles of differential law I see developing: (1) Differential law prevents a legal vacuum, (2) Differential law follows existing law and (3) Differential law prefers notions over concepts. As an example of the latter I argued that «access» is such a notion. Thinking in terms of access functions as a correction mechanism supplementing the application of ownership, a concept belonging to more classical private law.

HUMAN RIGHTS IN EUROPEAN PRIVATE LAW

Chantal Mak[*]

TABLE OF CONTENTS: *1. Private actors and the public interest. 2. Constitutionalising private law. 2.1. Dignity as basis. 2.2. Constitutionalisation of private law. 2.3. Europeanisation and transnationalisation of private law. 3. Three perspectives on human rights and private law. 3.1. Legal-political stakes in private law. 3.2. First perspective: Nothing new? 3.3. Second perspective: Social justice in European private law. 3.4. Third perspective: Reimagining Europe through private law. 4. An illustration: housing under the EU Unfair Contract Terms Directive. 5. Drivers for Constitutionalisation of Private Law in Europe*[**].

ABSTRACT: *This Chapter introduces the academic debate on the role of human rights in private law for an audience of students in transnational and European private law. It first explores the ways in which dignity may provide a foundation for extending human rights protection to private legal relations and sets out the legal context in which the «constitutionalisation of private law» has developed, both nationally and under European law. Subsequently, the societal relevance of these legal developments is analysed and mapped according to three strands in the academic discourse in the field: one that holds that constitutionalisation does not provide a new view on private law, a second that sees a role for human rights in pursuing social justice in private law, and a third that considers private law to contribute to the constitutional imagination of Europe. Finally, the practical application of human rights in private law is discussed on the basis of the development of effective remedies in housing cases under the EU Unfair Contract Terms Directive. The Chapter con-*

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[**] Sections 1 to 3 of this paper replicate large parts of a Chapter written for the European Private Law Handbook that is being developed for the LL.M. programme on transnational and European private law at the University of Amsterdam. This book may be referred to as: M. BARTL, L. BURGERS, C. MAK (eds.), *Uncovering European Private Law* (forthcoming). A new section 4, written for this collection of essays, discusses the practical application of human rights in the case law on unfair terms and housing contracts. A new section 5, finally, reflects on a number of factors that can explain and justify the current state of constitutionalisation of private law in Europe.

cludes with a reflection on the main drivers for constitutionalisation of private law in Europe.

1. Private actors and the public interest

Although the combination of the notions of «human rights» and «private law» at a first glance may seem to be at odds with existing systemic divisions, the impact of human rights on private legal relationships has become a part of both national[1] and European[2] developments. While human rights are often located in the sphere of public law, where they protect citizens against public authorities, they have been recognised to also affect private legal matters[3]. National courts have, for instance, extended human rights reasoning to topics as diverse as access to goods and services, mortgage contracts[4] and climate change liability[5]. The Court of Justice of the EU (CJEU) and European Court of

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[1] G. BRÜGGEMEIER, A. COLOMBI CIACCHI, G. COMANDÉ (eds.), *Fundamental Rights and Private Law in the European Union*, Volumes 1 and 2, Cambridge, 2010; O.O. CHEREDNYCHENKO, *Fundamental Rights, Contract Law and the Protection of the Weaker Party: A Comparative Analysis of the Constitutionalisation of Contract Law, with Emphasis on Risky Financial Transactions*, Munich, 2007; C. MAK, *Fundamental Rights in European Contract Law: A Comparison of the Impact of Fundamental Rights on Contractual Relationships in Germany, the Netherlands, Italy and England*, Alphen a/d Rijn, 2008; C. BUSCH, H. SCHULTE-NÖLKE, *EU Compendium – Fundamental Rights and Private Law*, Munich, 2011; S. WALKILA, *Horizontal Effect of Fundamental Rights in the EU*, Groningen, 2016.

[2] H. COLLINS (ed.), *European Contract Law and the Charter of Fundamental Rights*, Cambridge-Antwerp, 2017; H.-W. MICKLITZ (ed.), *Constitutionalization of European Private Law*, Oxford, 2014; S. GRUNDMANN (ed.), *Constitutional Values and European Contract Law*, Deventer, 2008.

[3] H. COLLINS, *On the (In)compatibility of Human Rights Discourse and Private Law*, in H.-W. MICKLITZ, *Constitutionalization of European Private Law*, cit., p. 26-60, who discusses both doctrinal and theoretical questions that these developments raise.

[4] J.M.L. VAN DUIN, *Effective Judicial Protection in Consumer Litigation: Article 47 of the EU Charter in Practice*, Cambridge, 2022.

[5] L.E. BURGERS, *Justitia, the People's Power and Mother Earth: Democratic Legitimacy of Judicial Law-making in European Private Law Cases on Climate Change*, PhD thesis, University of Amsterdam, 2020, *https://hdl.handle.net/11245.1/0e6437b7-399d-483a-9fc1-b18ca926fdb5* (last accessed on 12 July 2021).

Human Rights (ECtHR) have contributed to the extension of human rights to such private legal questions by establishing the potential for the EU Charter of Fundamental Rights (CFR)[6] and European Convention on Human Rights (ECHR)[7] to pose obligations on private parties.

These developments raise the question to what extent private actors should heed the public interest that is reflected in human rights reasoning. Although the principles of private autonomy and freedom of contract provide individuals and companies with space to make their own decisions on their legal relationships, their freedom is not absolute[8]. This is inherent in the idea of autonomy, since one person's freedom finds its limits in the freedom of others[9], who deserve equal concern and respect[10]. Taking into account societal concerns may even go further and require parties to consider the consequences of their conduct

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[6] Judgment of 15 January 2014, *Association de Médiation Sociale v Union locale des syndicats CGT and Others*, C-176/12, EU:C:2014:2; Judgment of 6 November 2018, *Stadt Wuppertal v Maria Elisabeth Bauer and Volker Wilmeroth v Martina Broßonn*, Joined Cases C-569/16 and C-570/16, EU:C:2018:871. See also E. FRANTZIOU, *(Most of) the Charter of Fundamental Rights is Horizontally Applicable*, in *European Constitutional Law Review*, 2019, p. 306-323.

[7] E.g. ECtHR 13 July 2004, application No. 69498/01, ECLI:CE:ECHR:2004:0713JUD006949801, *Pla and Puncernau v Andorra*. It may be noted that the ECtHR does not rule in private legal disputes itself. Its case law has, nevertheless, impacted private legal relations indirectly, through the assessment of the compliance of national private laws with the Convention; A.S. HARTKAMP, *European Law and National Private Law*, Cambridge-Antwerp, 2016, p. 188-192.

[8] M.R. MARELLA, *The Old and the New Limits to Freedom of Contract in Europe*, in *European Review of Contract Law*, 2006, p. 258. It is important to add that different legal traditions in Europe draw limits to freedom of contract in different manners; on the French, German and English traditions, and what a comparative perspective may offer, see H.-W. MICKLITZ, *On the Intellectual History of Freedom of Contract and Regulation*, in *Penn State Journal of Law & International Affairs*, 2015, *http://elibrary.law.psu.edu/jlia/vol4/iss1/3* (last accessed on 12 July 2021).

[9] I. BERLIN, *Two Concepts of Liberty*, in ID., *Four Essays on Liberty*, Oxford, 1969, p. 171-173.

[10] R. DWORKIN, *Sovereign Virtue: The Theory and Practice of Equality*, Cambridge (MA), 2000, p. 121-122, 182-183, and *Justice for Hedgehogs*, Cambridge (MA), 2011, p. 364-371.

on, for instance, equal access to employment[11] and housing[12], the protection of the environment[13], or the safety of the digital sphere[14]. In the past decades, these concerns have more and more often been recognised as interests that are so fundamental that they should also be protected in private legal relationships[15]. Human rights provide an inroad for such concerns in private legal cases. As individual rights, they may offer protection against one-sided balances of interests in private law[16]. At the same time, the societal interests that human rights represent may induce a more fundamental rethinking of legal responsibilities of private actors[17]. Still, it remains the topic of debate how far private actors' responsibility for human rights goes.

This Chapter explores the legal framework and traces the legal-political debates on the impact of human rights in European private law. «Human rights» are understood in a broad sense, including both national constitutional norms and international rights protecting the basic needs of people. The main question is which factors determine whether and to what extent private legal relations should be rethought

[11] H. COLLINS, *Discrimination, Equality and Social Inclusion*, in *The Modern Law Review*, 2003, p. 16-43.

[12] I. DOMURATH, *Consumer Vulnerability and Welfare in Mortgage Contracts*, Oxford, 2017.

[13] L.E. BURGERS, *Justitia, the People's Power and Mother Earth: Democratic Legitimacy of Judicial Law-making in European Private Law Cases on Climate* Change, cit.

[14] A. DAVOLA, *Fostering Consumer Protection In The Granular Market: The Role Of Rules On Consent, Misrepresentation And Fraud In Regulating Personalized Practice*, in *Technology And Regulation (Techreg)*, 2021, p. 76-86.

[15] For an overview of fact patterns of cases in which such effects of human rights have been recognised, see A. COLOMBI CIACCHI, *European Fundamental Rights, Private Law, and Judicial Governance*, in H.-W. MICKLITZ, *Constitutionalization of European Private Law*, cit., p. 102-136.

[16] A. COLOMBI CIACCHI, *The Constitutionalization of European Contract Law: Judicial Convergence and Social Justice*, in *European Review of Contract Law*, 2006, p. 178-179.

[17] C. MAK, *Fundamental Rights in European Contract Law: A Comparison of the Impact of Fundamental Rights on Contractual Relationships in Germany, the Netherlands, Italy and England*, cit., p. 294-295, building on the idea that (fundamental) rights mediate between law and politics, as elaborated by D. KENNEDY, *A Critique of Adjudication {fin de siècle}*, Cambridge (MA), 1997, p. 125, 305, 319-320.

in constitutional terms. In order to answer this question, first, a brief description will be given of the history of the gradual extension of human rights to the realm of private law, in national laws and under the ECHR and CFR. Subsequently, the legal-political implications of human rights reasoning in private law will be further explored, presenting an overview of different academic positions on the extent to which human rights reasoning can and should influence private legal matters. Finally, on the basis of case law concerning the effective protection of mortgage holders under European consumer law, it will be shown how these different perspectives are reflected in the practical application of human rights in private law. From this analysis, a number of factors will be distilled that can explain and justify the constitutionalisation of private law through human rights reasoning.

2. Constitutionalising private law

2.1. Dignity as basis

From a legal and philosophical perspective, a basis for human rights protection is often found in human dignity[18]. Article 1 of the UN's Universal Declaration of Human Rights (1948) determines that «All human beings are born free and equal in dignity and rights». The reference to dignity is repeated in the preambles of such binding instruments as the International Covenant on Civil and Political Rights (1966) and International Covenant on Economic, Social and Cultural Rights (1966). The CFR, as well as many European Constitutions, recognise dignity as an underlying principle or sometimes even a self-standing human right[19]. In private legal cases with a strong moral dimension, such as those on prostitution, surrogate motherhood or unfair exploitation, it does there-

[18] J. HABERMAS, *The Concept of Human Dignity and the Realistic Utopia of Human Rights*, in ID., *The Crisis of the European Union: A Response*, Cambridge, 2012, p. 71-100.

[19] For an overview, see *https://fra.europa.eu/en/eu-charter/article/1-human-dignity #TabNational* (last accessed on 28 May 2021).

fore not seem surprising that this concept is often referred to[20]. The increasing impact of human rights on the legal relations between private actors might, accordingly, be seen as inspired by the wish to protect human dignity.

The matter is, however, more complex. In the first place, as put forward by Marella, there may be a tension between ideals of human dignity and social dignity[21]. Cases on controversial forms of employment illustrate this well. In the famous case of *Wackenheim v France*[22], for instance, the idea of human dignity was in tension with a more social reading of dignity. The case concerned the prohibition of so-called «dwarf-tossing events», in which strong men would compete at throwing a person who had dwarfism through a bar onto an airbed. Several municipalities in France had prohibited such games, since they would infringe upon human dignity. Mr Wackenheim, who had dwarfism and wished to participate in the events, challenged these decisions. One of his arguments was that these activities would allow him to make a living and would, thus, actually be beneficial to him[23]. While Mr Wackenheim's claim remained unsuccessful, his reliance on social dignity deserves further thought on the possibility to find diversified solutions for morally controversial contracts.

In the second place, new developments in, for instance, cases on climate change liability may not easily be explained on the basis of human dignity. In a ground-breaking judgment of 26 May 2021, the District Court of The Hague ordered the multinational oil company Royal Dutch Shell to reduce its greenhouse gas emissions by 45% by the year 2030 in respect to 2019[24]. The decision was based on Shell's

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[20] A. COLOMBI CIACCHI, C. MAK, Z. MANSOOR (eds.), *Immoral Contracts in Europe*, The Common Core of European Private Law Series, Cambridge, 2020.

[21] M.R. MARELLA, *The Old and the New Limits to Freedom of Contract in Europe*, in *European Review of Contract Law*, cit., p. 272-274.

[22] UN Human Rights Committee 15 July 2002, Communication No. 854/1999, *Manuel Wackenheim v France*, *http://hrlibrary.umn.edu/undocs/854-1999.html* (last accessed on 15 July 2021).

[23] Ibid., under *4) Legal arguments*.

[24] Rb. (district court) The Hague 26 May 2021, ECLI:NL:RBDHA:2021:5339 (*Milieudefensie/Shell*). For an early comment on the cases see this blogpost by LAURA BURGERS: *https://transformativeprivatelaw.com/friends-of-the-earth-netherlands-versu*

duty of care under Dutch tort law, which had been invoked by the NGO Milieudefensie in a public interest action[25]. Similar to the well-known *Urgenda* case[26], the court embedded the duty of care in the right to life and the right to respect for private and family life, which are protected under Articles 2 and 8 of the European Convention on Human Rights (ECHR) respectively. Where *Urgenda* established unprecedented environmental obligations of the Dutch government, the judgment in the *Shell* case extends such obligations to businesses[27]. It might seem difficult to explain cases like *Urgenda* and *Milieudefensie v Shell* solely on the basis of human dignity. Although the basis of these judgments was found in human rights, the protection of these rights very much depends on the preservation of the (clean) environment in which people live. Accordingly, Burgers rightly raises the question if and how to include the interests and possibly rights of non-human entities, like animals, plants, rivers and mountains – either through human rights protection or private legal mechanisms such as legal personhood[28]. One way to solve the conundrum, proposed by Townsend, would be to include the protection of these entities within the notion of human dignity, holding that people would harm their own dignity if they showed a lack of respect for non-human entities[29]. A further-reaching solution might be to ex-

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s-royal-dutch-shell-all-companies-must-act-against-climate-change/ (last accessed on 31 May 2021).

[25] Article 3:305a of the Dutch Civil Code allows foundations or associations that represent public interests to bring such actions.

[26] Hoge Raad (Dutch Supreme Court) 20 December 2019, ECLI:NL:HR:2019:2007 (*The State of The Netherlands/Urgenda*).

[27] It should be noted that an appeal against the judgment of the district court is currently pending. Nevertheless, Shell is already obliged to comply with this judgment in first instance, as the court declared the order to be provisionally enforceable (*uitvoerbaar bij voorraad*); see para. 4.5.7 of the judgment.

[28] L.E. BURGERS, *Justitia, the People's Power and Mother Earth: Democratic Legitimacy of Judicial Law-making in European Private Law Cases on Climate Change*, cit., p. 283-297; C.D. STONE, *Should Trees Have Standing? Law, Morality and the Environment*, Oxford, 2010.

[29] D. TOWNSEND, *Taking dignity seriously? A dignity approach to environmental disputes before human rights courts*, in *Journal of Human Rights and the Environment*, 2015, p. 220-221.

tend rights to nature itself[30]. These developments do not only require a fundamental rethinking of the scope of human rights protection, but will also impact the enforcement of such rights through private legal mechanisms such as tort law[31].

While human dignity, thus, seem to provide a convincing basis for human rights protection, the previous observations do not fully answer the question why these rights should extend to private legal relations at all. Why should private actors be concerned with societal ideals of human dignity in contractual relations, cases of possible tort liability, or claims concerning property rights? We need to turn to the development of «constitutionalisation of private law» in order to get a better understanding of the reasons for relating human rights to private law.

2.2. Constitutionalisation of private law

From a doctrinal legal perspective, the impact of human rights on private legal relationships can be discerned in direct and more indirect ways. In national legal systems in Europe, courts have interpreted some constitutional rights in the sense that they do not only address the relationship between the State and its citizens, but to a certain extent also the relations of citizens among each other[32]. A direct horizontal effect of human rights is said to occur when courts in private legal relation-

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[30] N. NAFFINE, *Legal personality and the natural world: on the persistence of the human measure of value*, in *Journal of Human Rights and the Environment*, 2012, p. 68-83. See also L.E. BURGERS, *Justitia, the People's Power and Mother Earth: Democratic Legitimacy of Judicial Law-making in European Private Law Cases on Climate Change*, cit., p. 291-294, referring, inter alia, to the Belgian *Klimaatzaak* (climate case), in which the lawyers included a complaint on behalf of 82 trees. On 17 June 2021, the claim against the Belgian State was awarded by the court of first instance, but it did not grant standing to the trees; Tribunal de première instance francophone de Bruxelles, Section Civile-2015/4585/A.

[31] M. HINTEREGGER, *Civil Liability and the Challenges of Climate Change: A Functional Analysis*, in *Journal of European Tort Law*, 2017, p. 238-260.

[32] For country reports on England, France, Germany, Italy, the Netherlands, Poland, Portugal, Spain and Sweden, see G. BRÜGGEMEIER, A. COLOMBI CIACCHI, G. COMANDÉ, *Fundamental Rights and Private Law in the European Union*, cit., Vol. 1.

ships attach legal consequences to the breach of human rights as such[33]. An indirect horizontal effect of human rights takes place when provisions of private law are read in the light of the principles and values expressed in such rights[34].

A German case on personal suretyships very well illustrates how the constitutionalisation of private law has taken shape. This *Bürgschaft* case[35] concerned a young woman who had agreed to provide security for her father's business loan at a bank. At the time of signing the suretyship contract, she was 21 years old, she did not have any higher education and was often unemployed[36]. When the father's company got into financial difficulties, the bank requested the daughter to pay the amount of the surety. She was not able to do so and given her financial circumstances it was unlikely that she would ever be able to resolve the debt[37]. In ensuing civil proceedings that went up to the highest German court in civil cases, the *Bundesgerichtshof*, the suretyship contract was, nevertheless, upheld. Since the daughter had reached the age of majority when entering into the contract, the Court considered that she should have been aware of the risks attached to the contract[38]. According to the rules of private law that governed the contract, thus, there seemed to be no remedy for her. At this point, the case took a constitutional turn, as the daughter brought an individual complaint to the German Constitutional Court, the *Bundesverfassungsgericht*, claiming that the judg-

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[33] H. COLLINS, *On the (In)compatibility of Human Rights Discourse and Private Law*, cit., p. 38. For an overview of the development of the conceptual distinction between direct and indirect horizontal effects in German case law and literature, see C. MAK, *Fundamental Rights in European Contract Law: A Comparison of the Impact of Fundamental Rights on Contractual Relationships in Germany, the Netherlands, Italy and England*, cit., p. 47-50; and O.O. CHEREDNYCHENKO, *Fundamental Rights, Contract Law and the Protection of the Weaker Party: A Comparative Analysis of the Constitutionalisation of Contract Law, with Emphasis on Risky Financial Transactions*, cit., p. 58-63.

[34] H. COLLINS, *On the (In)compatibility of Human Rights Discourse and Private Law*, cit., p. 38.

[35] BVerfG 19 October 1993, BVerfGE 89, 214 (*Bürgschaft*).

[36] BVerfGE 89, 214, 218.

[37] BVerfGE 89, 214, 220-221.

[38] BVerfGE 89, 214, 219.

ments of the civil courts infringed her constitutional rights. In a by now famous judgment, the *Bundesverfassungsgericht* found that the judgment of the *Bundesgerichtshof* had indeed violated the daughter's private autonomy, which was protected under Article 2(1) of the German Constitution, the *Grundgesetz* (*GG*), in combination with the principle of the social state safeguarded by Articles 20(1) and 28(1) *GG*[39]. In particular, the civil courts had failed to address the structural imbalance of power between the parties, which should have been redressed through the interpretation of the open norm of «good morals and public policy» of § 138 of the German Civil Code, the *Bürgerliches Gesetzbuch* (*BGB*)[40]. The complexity of the contract was difficult to assess even for more experienced clients than the 21-year-old daughter and the bank employee who had concluded the contract had downplayed the risk rather than informing her well[41]. Therefore, the *Bundesverfassungsgericht* found that the civil courts had not correctly interpreted and applied § 138 *BGB* in light of the Constitution. Following this judgment, the *Bundesgerichtshof* established the nullity of the contract. The constitutional reading of the Civil Code, thus, changed the legal framework for personal suretyships.

Although the protection of weaker parties like the unfortunate daughter in the *Bürgschaft* case is often not challenged, judgments like these do require further thought on the extent to which private legal relations are and should be governed by basic constitutional rights that have been written for the State/citizen relation. In the German national academic debate concerning the *Bürgschaft* judgment, it was asserted that clearer boundaries needed to be defined for the scope of the substantive review of contracts in light of the Constitution[42]. Almost thirty

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[39] BVerfGE 89, 214, 234-235.

[40] BVerfGE 89, 214, 234.

[41] BVerfGE 89, 214, 234, 235.

[42] H. WIEDEMANN, *BVerfG, 19.10.1993 – 1 BvR 567 u. 1044/89. Zur verfassungsrechtlichen Inhaltskontrolle von Verträgen*, in *JuristenZeitung* 1994, p. 412-413; J. SCHAPP, *Privatautonomie und Verfassungsrecht*, in *Zeitschrift für Bankrecht und Bankwirtschaft*, 1998, p. 33. For an overview of the debate, see also C. MAK, *Fundamental Rights in European Contract Law: A Comparison of the Impact of Fundamental Rights on Contractual Relationships in Germany, the Netherlands, Italy and England*, cit., p. 75-82, with further references.

years after the decision, it is still questioned whether the law is sufficiently clear on when and how to apply the principles defined in the *Bürgschaft* case[43]. Similar doubts on the possibility for constitutional and human rights to guide the interpretation of private law have been expressed in the international academic debate[44]. Yet, the potential for human rights reasoning to enrich the range of private legal remedies has also been recognised[45]. The *Bürgschaft* case, thus, remains an important point of reference, as it provides an opening for human rights in private law, but does not fully establish the conditions for the application of these rights in actual cases.

2.3. Europeanisation and transnationalisation of private law

The influence of European law on national systems of private law has introduced another human rights strand, which is becoming more and more important[46]. The main sources for this development are the ECHR and CFR, which both have found application in private legal relationships[47]. Although the institutional structures surrounding the two instruments are very different, the extension of the European Convention and the EU Charter to private law raises similar questions on the interaction between public and private law and the intensity of effects of human rights between private actors.

An example is found in the case law on housing, where privatisation has raised the question to what extent tenants and homeowners may

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[43] L. KÄHLER, *Case 12: Immoral Suretyships – Germany*, in A. COLOMBI CIACCHI, C. MAK, Z. MANSOOR, *Immoral Contracts in Europe*, cit., p. 677.

[44] O.O. CHEREDNYCHENKO, *Subordinating Contract Law to Fundamental Rights: Towards a Major Breakthrough or towards Walking in Circles?*, in S. GRUNDMANN (ed.), *Constitutional Values and European Contract Law*, Deventer, 2008, p. 35-60; H. COLLINS, *Cosmopolitanism and Transnational Private Law*, in *European Review of Contract Law*, 2012, p. 316.

[45] C. MAK, *Fundamental Rights in European Contract Law: A Comparison of the Impact of Fundamental Rights on Contractual Relationships in Germany, the Netherlands, Italy and England*, cit., p. 294-295, 311.

[46] H. COLLINS, *Cosmopolitanism and Transnational Private Law*, cit., p. 315-316, 318-319.

[47] For an overview, see A.S. HARTKAMP, *op. cit.*, Chapter 6.

rely on equal protection in the «horizontal» relation to private landlords and banks as they would in the «vertical» relation to (semi-)public housing providers and the State[48]. Consider, for instance, a homeowner who has obtained a mortgage loan at a bank, for which the house provides security. If the bank has imposed standard terms that allow it to invoke the security under conditions that rather one-sidedly favour its interest, to what extent can such terms be challenged on the basis of a human right to housing? On the basis of a case law analysis, Irina Domurath and I found that under the ECHR, in contrast to the CFR, the answer very much depends on the balance struck in national laws[49]. Although an eviction based on the mortgage contract falls within the broad scope of the notion of the «home» protected under Article 8 ECHR[50], the ECtHR's scrutiny of legislation that legitimately limits the right to housing does not involve a proportionality test if the regulation of the *privatised* housing market is concerned[51]. The reason for this is that the national legislature has already struck a balance between contracting parties' interests, with which the ECtHR does not wish to interfere[52]. As a consequence, ECHR protection does not fully extend to private housing provision. Under EU law, such restrictions do not exist, since the policing of unfair terms has been harmonised throughout Member States by the Unfair Terms Directive. The right to housing (Article 7 CFR) and the right to effective judicial protection (Article 47 CFR) have implicitly (CJEU *Aziz*)[53] and explicitly (CJEU *Sánchez*

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[48] I. DOMURATH, C. MAK, *Private Law and Housing Justice in Europe*, in *The Modern Law Review*, 2020, p. 1188-1220. See also IRINA DOMURATH's contribution to M. BARTL, L.E. BURGERS, C. MAK (eds.), *Uncovering European Private Law* (forthcoming).

[49] Ibid., p. 1204-1206.

[50] ECtHR 24 April 2012, application No. 25446/06, ECLI:CE:ECHR:2012:0424JUD002544606, *Yordanova and others v Bulgaria.*

[51] ECtHR 12 July 2016, application No. 43777/13, ECLI:CE:ECHR:2016:0712JUD004377713, *Vrzić v Croatia.*

[52] ECtHR *Vrzić*, para. 107; ECtHR 6 November 2018, application No. 76202/16, ECLI:CE:ECHR:2018:1106DEC007620216, *F.J.M. v the United Kingdom*, paras. 42-46.

[53] Judgment of 14 March 2013, *Mohamed Aziz v Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)*, C-415/11, EU:C:2013:164, paras. 60-61, where the Court underlines the importance of protecting the family home.

Morcillo, *Kušionová*)[54] affected the application of the Directive to standard terms of banks in mortgage enforcement proceedings. Accordingly, human rights reasoning may reshape the substantive review of mortgage contracts through EU law[55]. At the same time, the question remains whether the framework of EU consumer law will provide sufficient protection, as it relies on a relatively high standard of the «average consumer»[56].

The contrast between the approaches to privatised housing provision under the ECHR and under EU law, thus, in a nutshell contains two big questions on human rights reasoning in private law. Similar to national debates, the division between public and private legal spheres is challenged: to what extent may one rely on equal human rights protection (be it on employment, financial products, housing or climate change) in respect to a private actor as one may in relation to public authorities? Furthermore, the European dimension creates different spheres of substance and competence: to what extent may European human rights guide the development of national private laws? Developments in case law further specify these questions for different substantive matters, thus contributing to the constitutionalisation of private law as well as exploring its limits.

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[54] Judgment of 17 July 2014, *Sánchez Morcillo and Abril García v Banco Bilbao*, C-169/14, EU:C:2014:2099, paras. 48-50; Judgment of 10 September 2014, *Monika Kušionová v SMART Capital*, C-34/13, EU:C:2014:2189, paras. 65-66.

[55] The potential influence of the CFR has been further increased by the CJEU's judgment that Charter rights may entail obligations for private actors, insofar as these rights are «mandatory and unconditional in nature»; CJEU, *Bauer and Broßonn*, paras. 85, 87. See further section 4 below.

[56] J.W. RUTGERS, *The Right to Housing (Article 7 of the Charter) and Unfair Terms in General Conditions*, in H. COLLINS, *European Contract Law and the Charter of Fundamental Rights*, cit., p. 136-137.

3. Three perspectives on human rights and private law

3.1. Legal-political stakes in private law

It is likely not a coincidence that human rights reasoning in private law mostly occurs in cases with a sensitive legal-political dimension, given the fundamental values that these rights refer to. Therefore, despite the doctrinal difficulties of integrating this type of reasoning in private law, human rights have the potential to contribute to solutions for societal issues, ranging from access to (mortgage) credit under fair conditions to measures needed to prevent climate change.

The political stakes are not always immediately visible, especially in cases that concern technical questions on, for instance, the validity of contract terms[57]. In the *Bürgschaft* case, for example, in the initial dispute, any concerns regarding the validity of the suretyship were dismissed as the formal requirements for concluding a contract had been fulfilled. Only when the case was referred to constitutional review, did the tension become clearer between the interests of banks and prospective sureties with a personal relationship to the principal debtor. The judgment of the *Bundesverfassungsgericht*, thus, allowed for a rebalancing of underlying interests under § 138 of the German Civil Code. These and other examples from case law show how human rights have the capacity to make explicit the more fundamental legal-political considerations underlying the balance that in private legal rules has been struck between the parties' interests[58].

The question is still open, however, how and to what extent this repoliticisation of private legal doctrines in light of human rights may serve the solution of societal issues. In the academic debate, a diverse

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[57] D. KENNEDY, *The Political Stakes in "Merely Technical" Issues of Contract Law*, in *European Review of Private Law*, 2001, p. 7-28.

[58] C. MAK, *Fundamental Rights in European Contract Law: A Comparison of the Impact of Fundamental Rights on Contractual Relationships in Germany, the Netherlands, Italy and England*, cit., p. 220, 229, building on D. KENNEDY, *A Critique of Adjudication {fin de siècle}*, cit., p. 305. See also D. KENNEDY, *Form and Substance in Private Law Adjudication*, in *Harvard Law Review*, 1976, p. 1724, 1766-1767.

range of views can be found. Without attempting to give an exhaustive overview, at least three distinct perspectives may be discerned.

3.2. First perspective: Nothing new?

In the first place, a relatively sceptical strand of literature maintains that human rights reasoning does not add much to existing frameworks and principles of private law. Cherednychenko has, for instance, submitted that human rights are too vague to give guidance to balancing processes in private law[59]. The well-established general clauses of private law would be substituted or even subordinated to vague standards of a public legal nature, if fundamental rights were applied[60]. The handling of societally sensitive questions would, thus, not be made easier, but would rather become more complicated.

What is more, insofar as both parties to a dispute may rely on human rights, courts face a very difficult task in establishing which one should prevail[61]. In this context, Collins has submitted that civil courts are requested to conduct a «double proportionality test» to strike the balance between conflicting rights[62]. In line with the proportionality test developed in public law, courts then have to assess to what extent a restriction of a human right may be justified. The balance becomes a double one in private legal cases in which both parties may rely on hu-

[59] O.O. CHEREDNYCHENKO, *Subordinating Contract Law to Fundamental Rights: Towards a Major Breakthrough or towards Walking in Circles?*, cit. In a similar sense, B. DE VOS, *Horizontale werking van grondrechten: een kritiek*, Apeldoorn, 2010. In more recent work, Cherednychenko indicates some potential for human rights to define individual, private law remedies under EU Directives; *Rediscovering the public/private divide in EU private law*, in *European Law Journal*, 2019, p. 29.

[60] O.O. CHEREDNYCHENKO, *The Constitutionalization of Contract Law: Something New under the Sun?*, in *Electronic Journal of Comparative Law*, 2004, p. 16 and O.O. CHEREDNYCHENKO, *Subordinating Contract Law to Fundamental Rights: Towards a Major Breakthrough or towards Walking in Circles*?, cit., p. 44.

[61] O.O. CHEREDNYCHENKO, *Subordinating Contract Law to Fundamental Rights: Towards a Major Breakthrough or towards Walking in Circles*?, cit., p. 43-44.

[62] H. COLLINS, *On the (In)compatibility of Human Rights Discourse and Private Law*, cit., p. 50-51.

man rights[63]. The difficulty of conducting such an «ultimate balancing test» provides another argument against the (direct) effect of human rights in private legal relationships and for remaining within established doctrines and principles of private law[64].

3.3. Second perspective: Social justice in European private law

In the second place, and partly in response to sceptical views on constitutionalisation of private legal questions, a justice perspective has been put forward[65]. This view is based on the idea that, despite its technical intricacies, human rights reasoning in private law may contribute to the elaboration of a social justice agenda for Europe. In a 2004 Manifesto, the Study Group on Social Justice in European Private Law highlighted this justice dimension as one of the «real issues» that the European legislature should focus on in regard to the further harmonisation of contract law[66]. The work of one of the authors of the Manifesto, Colombi Ciacchi, finds inspiration for the elaboration of this social justice dimension in a comparative analysis of case law of national civil courts in Europe. She observes that the application of human rights in contract law is not politically neutral:[67] courts rely on these rights to protect weaker contracting parties against stronger ones (e.g. consumer v busi-

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[63] H. COLLINS, *On the (In)compatibility of Human Rights Discourse and Private Law*, cit., p. 50.

[64] H. COLLINS, *On the (In)compatibility of Human Rights Discourse and Private Law*, cit., p. 51.

[65] STUDY GROUP ON SOCIAL JUSTICE IN EUROPEAN PRIVATE LAW, *Social Justice in European Contract Law: a Manifesto*, in *European Law Journal*, 2004, p. 653-674; A. COLOMBI CIACCHI, *The Constitutionalization of European Contract Law: Judicial Convergence and Social Justice*, cit., p. 178; B. LURGER, *The "Social" Side of Contract Lawand the New Principle of Regard and Fairness*, in A.S. HARTKAMP, M.W. HESSELINK, E.H. HONDIUS, C. MAK, C.E. DU PERRON (eds.), *Towards a European Civil Code* (4th revised and expanded edition, Nijmegen-Alphen aan den Rijn, 2011, p. 353-386).

[66] STUDY GROUP ON SOCIAL JUSTICE IN EUROPEAN PRIVATE LAW, *op. cit.*, p. 656.

[67] In this sense also M.W. HESSELINK, *The Justice Dimension of the Relationship between Fundamental Rights and Private Law*, in H. COLLINS, *European Contract Law and the Charter of Fundamental Rights*, cit., p. 167-196.

ness, employee v employer) and to safeguard basic democratic values (e.g. equality, freedom of speech, freedom of religion)[68]. More recently, in the context of the reform of the French Civil Code, Fabre-Magnan has added that a modern law of contracts should extend human rights reasoning to cases of discrimination on the basis of social and financial resources[69] and sustainable contracting[70].

This justice view does, however, not fully escape the difficulties highlighted by those who are sceptical of the application of human rights in private law. In particular, the question remains which goals are pursued. Evaluating the effects of the Social Justice Manifesto, Caruso observes that it has certainly affected the discourse on the social dimension of European contract law[71]. Still, since no clear definition of distributive goals was established, much of the Manifesto's ambitions have failed to materialise into conclusive effects[72]. Although Caruso's critique mostly concerns the development of legislative instruments, her analysis may easily be extended to the case law in which human rights have been invoked to protect social, distributive interests. While Colombi Ciacchi's examination of national case law provides some common starting points for the conceptualisation of social justice, these have not yet found an undisputed translation on the European level. In

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[68] A. COLOMBI CIACCHI, *The Constitutionalization of European Contract Law: Judicial Convergence and Social Justice*, cit., p. 177. See also G. BRÜGGEMEIER, A. COLOMBI CIACCHI, G. COMANDÉ, *Fundamental Rights and Private Law in the European Union*, cit., Vol. 2, p. 12.

[69] M. FABRE-MAGNAN, *What is a Modern Law of Contracts? Elements for a New Manifesto for Social Justice in European Contract Law*, in *European Review of Contract Law*, 2017, p. 381. On the potential for human rights to foster social inclusion in horizontal legal relationships, see also H. COLLINS, *Discrimination, Equality and Social Inclusion*, in *The Modern Law Review*, cit.; E. FRANTZIOU, *The Horizontal Effect of Fundamental Rights in the European Union*, Oxford, 2019, p. 167; B. KAS, *Transforming the European "Legal Field" by Strategic Litigation*, in L. DE ALMEIDA, M. CANTERO GAMITO, M. DJUROVIC, K. PURNHAGEN (eds.), *The Transformation of Economic Law*, Oxford, 2019, p. 366.

[70] M. FABRE-MAGNAN, *op. cit.*, p. 385. See also D. CARUSO, *Qu'ils mangent des contrats: Rethinking Justice in EU Contract Law*, in D. KOCHENOV, G. DE BÚRCA, A. WILLIAMS (eds.), *Europe's Justice Deficit?*, Oxford, 2015, p. 375.

[71] D. CARUSO, *op. cit.*, p. 370.

[72] D. CARUSO, *op. cit.*, p. 371.

fact, the CJEU's predominantly market-oriented interpretation of EU (private) law is perceived as a risk in regard to the constitutionalisation of private law: where the *Aziz* judgment raised some hope for the development of a social dimension to European private law, the Court's business-friendly approach in cases like *Alemo-Herron* showed that human rights reasoning might also go the other way[73].

3.4. Third perspective: Reimagining Europe through private law

In the third place, then, the repoliticisation of private law may be related to the debate on the constitutional foundations of Europe[74]. From this point of view, the focus no longer primarily rests on what human rights contribute to private legal reasoning – «the constitutionalisation of private law» – but rather shifts to what private law may contribute to the shaping of a European society or even a political community – what I would call «the Europe-making capacity of private law»[75]. This development is still at a relatively early stage, compared to national ideas

[73] M. BARTL, C. LEONE, *Minimum Harmonisation and Article 16 of the CFREU. Difficult Times Ahead for Social Legislation?*, in H. COLLINS, *European Contract Law and the Charter of Fundamental Rights*, cit., p. 113-124; H. COLLINS, *Introduction*, in ID., *European Contract Law and the Charter of Fundamental Rights*, cit., p. 20; M.W. HESSELINK, *The Justice Dimensions of the Relationship between Fundamental Rights and Private Law*, in H. COLLINS, *European Contract Law and the Charter of Fundamental Rights*, cit., p. 188-189, considering this interpretation of Art. 16 to be «partisan and therefore illegitimate form the perspective of the principles of justice that should prevail in a pluralist society».

[74] E.g. J.H.H. WEILER, *The Constitution of Europe: 'Do the New Clothes Have an Emperor?' and Other Essays on European Integration*, Cambridge, 1999; the contributions to G. DE BÚRCA, J.H.H. WEILER (eds.), *The Worlds of European Constitutionalism*, Cambridge, 2012; K. TUORI, *European Constitutionalism*, Cambridge, 2015.

[75] Reminiscent of M. LOUGHLIN, *The Constitutional Imagination*, in *The Modern Law Review*, 2015, p. 1-25. This idea is further elaborated in C. MAK, *Reimagining Europe through Private Law Adjudication*, in C. MAK, B. KAS (eds.), *Civil Courts and the European Polity: The Constitutional Role of Private Law Adjudication in Europe*, Oxford, 2023, p. 63-77.

on the relation between human rights and private law[76]. Yet, a number of observations in the academic literature on the theme show glimpses of this imaginative power of private law in Europe.

The origins of this perspective on the societal relevance of private law may be found in the connection that was forged between citizenship and private legal relations in the development of EU law[77]. Consumer law provides an illustration. In this field, the EU's instrumental use of private law to enhance the functioning of the European market resulted in the hybrid idea of the «consumer citizen»[78]. This conceptualisation of market participants received considerable criticism for its marginalisation of social concerns, insofar as EU law mainly understands consumption in economic terms[79]. As a response, in part inspired by ideals of social justice, consumers started to rely on human rights to counterbalance the detrimental effects of a too far-reaching marketisation of their legal position[80]. The Spanish mortgage cases, with *Aziz* as their flagship, attest of this trend[81]. While consumers, thus, have to «fight for their rights»[82], the constitutionalisation of European private law in consumer cases has started to provide constitutive elements of a developing European society[83].

A variety of views on the contribution of private law to the (re)imagination of a European community may be categorised under

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[76] H.-W. MICKLITZ, *The Consumer: Marketised, Fragmentised, Constitutionalised*, in D. LECZYKIEWICZ, S. WEATHERILL (eds.), *The Images of the Consumer in EU Law: Legislation, Free Movement and Competition Law*, Oxford, 2016, p. 25-26.

[77] H.-W. MICKLITZ, *The Politics of Justice in European Private Law: Social Justice, Access Justice, Societal Justice*, Cambridge, 2018, p. 392-393.

[78] On this development, see I. BENÖHR, *EU Consumer Law and Human Rights*, Oxford, 2013, p. 37-39.

[79] See e.g. G. DAVIES, *The Consumer, the Citizen and the Human Being*, in D. LECZYKIEWICZ, S. WEATHERILL, *op. cit.*, p. 325-338; I. BENÖHR, *op. cit.*, p. 38.

[80] H.-W. MICKLITZ, *The Consumer: Marketised, Fragmentised, Constitutionalised,* cit., p. 35-37.

[81] See further section 4 below.

[82] H.-W. MICKLITZ, *The Politics of Justice in European Private Law: Social Justice, Access Justice, Societal Justice*, cit., p. 393.

[83] H.-W. MICKLITZ, *The Politics of Justice in European Private Law: Social Justice, Access Justice, Societal Justice*, cit., p. 392.

this heading. They all place considerable emphasis on the role of courts in this process. Colombi Ciacchi, for instance, considers private law adjudication to contribute to «societal policy-making», insofar as it balances interests and policy objectives through the application of human rights[84]. Comandé discerns the emergence of a «shadow citizenship» in the CJEU's case law on private legal matters, submitting that a European private law may serve to develop a European social model[85]. And Gerstenberg reads the case law in light of a theory of democratic experimentalism, proposing that adjudication can provide a forum for deliberation of legal-political questions[86].

None of these views is uncontested, as they require new ways of understanding the role of courts and political deliberation[87]. In my view, however, they provide an important theoretical contribution to the understanding of the process of reimagining Europe through deliberation on the legal-political stakes reflected in high-profile cases. Human rights protection in private legal relations as diverse as those concerning housing, non-discrimination or climate change may serve to include those whose voices are less prominent in private legal frameworks[88].

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[84] A. COLOMBI CIACCHI, *Judicial Governance in European Private Law: Three Judicial Cultures of Fundamental Rights Horizontality*, in *European Review of Private Law*, 2020, p. 935.

[85] G. COMANDÉ, *The Fifth European Union Freedom: Aggregating Citizenship… around Private Law*, in H.-W. MICKLITZ, *Constitutionalization of European Private Law*, cit., p. 61-101.

[86] O. GERSTENBERG, *Euroconstitutionalism and its Discontents*, Oxford, 2018.

[87] E.g. O.O. CHEREDNYCHENKO, N. REICH, *The Constitutionalization of European Private Law: Gateways, Constraints, and Challenges*, in *European Review of Private Law*, 2015, p. 827, who observe that the adjudication of sensitive legal-political issues may undermine the legitimacy of the CJEU.

[88] E. FRANTZIOU, *The Horizontal Effect of Fundamental Rights in the European Union*, cit., p. 167; C. MAK, *Reimagining Europe through Private Law Adjudication* (forthcoming).

4. An illustration: housing under the EU Unfair Contract Terms Directive

The case law on mortgages under the EU Unfair Contract Terms Directive (UCTD), which has already been referred to a couple of times, may serve as an illustration of the practical relevance of human rights application in European private law. What does human rights reasoning add to a private legal framework? And to what extent may it help the parties who are directly involved in a case and further the development of effective legal protection of housing more generally?

Starting with the Spanish *Aziz* case of 2013[89], national judges began referring preliminary questions on the interpretation of the UCTD in mortgage enforcement cases to the CJEU[90]. These cases arose out of the economic crisis in Europe, which severely affected employment and housing markets in many EU Member States, including Spain. The case of Mr Aziz was representative of thousands of similar ones in which homeowners were no longer able to pay the instalments of their mortgage contracts and banks started enforcement proceedings. In its judgment, the CJEU held that Spanish procedural law was not in compliance with the objectives of the UCTD, since it did not provide homeowners effective protection against the one-sided, unfair contract terms that allowed for accelerated enforcement proceedings which resulted in evictions[91]. In particular, since mortgage enforcement and unfair terms assessment took place in separate proceedings, Spanish law did not allow for any consequences to be attached to the finding that a bank's terms were unfair towards mortgage holders, who faced the irredeemable loss of their homes. The CJEU's ruling led to an almost immediate change in this legal framework, with the Spanish legislature introducing a reform of procedural law to include unfair terms assessments within months of the *Aziz* judgment.

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[89] CJEU, *Aziz*.

[90] J.A. MAYORAL, A. TORRES PÉREZ, *On judicial mobilization: entrepreneuring for policy change at times of crisis*, in *Journal of European Integration*, 2018, p. 719-736, discuss which factors have inspired Spanish judges to raise preliminary questions.

[91] CJEU, *Aziz*, paras. 63-64.

Although the CJEU in its *Aziz* decision did not explicitly mention human rights, the judgment inspired a debate on the constitutionalisation of European consumer contract law, especially because of its importance for the protection of housing and procedural rights. As Micklitz and Reich have submitted, both Advocate-General Kokott's opinion and the Court's reasoning in the *Aziz* case could be understood as a form of «hidden constitutionalisation» of private law, insofar as constitutional elements were built into their arguments[92]. The emphasis on the protection of the home expressed this thought, as the CJEU's reasoning built on the recognition that an eviction that was based on unfair contractual terms could only be compensated in damages, while the loss of the home remained irreversible[93]. This argument was repeated in subsequent judgments, such as in the Slovak case of *Kušionová*, in which protection against loss of one's home was explicitly linked to the case law of the ECtHR and to Article 7 of the CFR[94] – hence, taking a step towards «open constitutionalisation» of EU consumer contract law[95].

Insofar as the CJEU's case law induced the development of new, effective remedies in national laws on mortgage enforcement, a constitutional perspective on contract law may, thus, be considered to have brought something new to private law. It allowed for the reading of the UCTD as encompassing the effective procedural protection of housing rights, in particular concerning the prevention of evictions on the basis of unfair terms. In that sense, the view of authors who are of the opinion that human rights do not add anything new to private legal frameworks is contradicted. It is unlikely that courts would have endorsed such a far-reaching interpretation of the UCTD if the protection of something as fundamental as the home had not been implicitly or explicitly taken into account. In this context, it has to be kept in mind that the CJEU is usually very careful not to interfere with the procedural

[92] H.-W. MICKLITZ, N. REICH, *The Court and Sleeping Beauty: The Revival of the Unfair Contract Terms Directive (UCTD)*, in *Common Market Law Review*, 2014, p. 801.

[93] CJEU, *Aziz*, para. 61.

[94] CJEU, *Kušionová*, paras. 63-65.

[95] J.M.L. VAN DUIN, *op. cit.*, p. 98-101; I. DOMURATH, C. MAK, *Private Law and Housing Justice in Europe*, cit., p. 1189 and 1201.

autonomy of Member States. The intervention in national procedural laws that occurs in housing cases is, therefore, exceptional[96].

How to read this developing constitutionalisation of European consumer contract law remains a matter of debate. Although the CJEU's case law can undoubtedly be deemed to have brought something new to the field of European private law by strengthening safeguards for effective protection of consumers against unfair terms, the manner in which the Court has developed its reasoning has also sparked critique. Worries regarding the balancing of human rights in private law have not been taken away by the housing cases, in which clear guidance on the manner in which to conduct a (double) proportionality assessment is missing[97]. Whether this is to be considered a good or bad development depends on the perspective that is taken. From a legal-technical point of view, unclarity is undesirable, as it may lead to legal uncertainty as to how judges should balance competing rights. From a substantive point of view, however, the more open nature of the proportionality test may create some space for developing a more comprehensive right to housing and for clarification of its relation to other rights, such as those concerning property[98]. The extension of unfair terms control to housing, in combination with the CJEU's development of horizontal effects of the CFR, may then serve as a legal point of reference for the deliberation of ideals of justice in the EU. If seen in this way, despite the uncertainty human rights reasoning brings to existing frames of private law, constitutionalisation can provide a basis for developing weaker party protection, thus serving social justice, as well as contribute to the reimagination of the European polity.

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[96] J.M.L. VAN DUIN, *op. cit.*, p. 45, 49-50, speaking of «proceduralised constitutionalisation».

[97] J.M.L. VAN DUIN, *op. cit.*, p. 101, cf. H. COLLINS, *On the (In)compatibility of Human Rights Discourse and Private Law*, cit., p. 50-51.

[98] I. DOMURATH, C. MAK, *Private Law and Housing Justice in Europe*, in *The Modern Law Review*, cit., p. 1216.

5. Drivers for Constitutionalisation of Private Law in Europe

This Chapter traced the debate on the impact of human rights in private law along three lines: the basis in human dignity of an extension of human rights protection to private legal relationships; the constitutionalisation of private law on the national and European levels; and the legal-political dimensions of these developments, including the role of courts in elaborating human rights reasoning in private law. Surveying the general tendencies, the question no longer is if human rights should have a place in private law. Both national and European courts have embedded the possibility to rely on such overarching or background rights in doctrines of private law, slowly but steadily expanding the reach of human rights. Current questions, thus, regard the understanding of the substantive, transformative effects that result from these dynamics: the reimagination of private law in light of human rights and, in relation to this, societal transformations to which private law may contribute.

Surveying the developments of the past decades, in conclusion, a number of factors can be discerned that have driven the process of constitutionalisation of European private law. In the first place, the extension of human rights to questions of private law under the ECHR and CFR has provided a legal framework for the elaboration of the constitutional dimension of private law. The CJEU's recent case law provides a basis for continuation of this trend, insofar as it in principle leaves open the possibility for all Charter rights to take effect in private legal relationships. In the second place, the social context of private legal issues has been an important inspiration for processes of constitutionalisation. Tort claims concerning climate change and contractual dilemmas regarding housing and non-discrimination cannot be fully understood without considering the context in which they arose. Against the background of current debates on sustainability and equality, private law is providing legal starting points for addressing such big societal questions. In the third place, courts have a key role in these developments, since it is mostly through adjudication that human rights issues are brought within the realm of European private law. A partial explanation for this may be found in the slowness of legislative processes. The lack of legislative initiative can be a reason for parties, and occasionally judges (as in the *Aziz* case), to ex-

plore new legal solutions through the interplay of human rights and existing doctrines of private law. Finally, all of these drivers for constitutionalisation find support in an increasing blurring of the public/private divide. Concerns with sustainability and equality urge a rethinking of privatisation of the supply of basic needs, such as housing, employment and energy. Human rights provide a legal vocabulary for the reconsideration of the role of private actors in the provision of such needs. In this reading, constitutionalisation can be seen as a way to bring back a public dimension to private law in Europe.

ADDRESSING THE BLURRING PUBLIC/PRIVATE DIVIDE IN THE EU'S DIGITAL SINGLE MARKET

Sybe Alexander de Vries[*]

TABLE OF CONTENTS: *1. Introduction. 2. The horizontal application and direct effect of EU free movement law. 2.1. Extending the personal scope of application of the prohibitive rules on free movement. 2.2. Private actors invoking public or private interest exception grounds. 3. The horizontal direct effect of EU fundamental rights. 3.1. The development of horizontal direct effect of EU Charter provisions. 3.2. Which provisions of the EU Charter? 3.3. Conflicting fundamental rights: a difficult balancing exercise. 3.4. The role of Article 16 EU Charter to protect private interests. 4. Addressing fundamental rights' concerns through legislative harmonisation. 4.1. The strong preference for regulations. 4.2. Protecting fundamental rights through internal market legislation. 5. Conclusion.*

ABSTRACT: *The EU's Digital Single Market can be distinguished from the «offline», physical internal market in at least two ways, i.e. firstly through the importance of data and information, and the strong interrelationship between the digital market and citizens' fundamental rights and, secondly, through the strength and power of private actors. Private actors appear to constitute not only a source of significant restrictions of trade and competition, but also of non-trade or non-market concerns, including fundamental rights. In this contribution the question will be addressed as to how these non-market and fundamental rights concerns of actions by private actors have been and could be addressed by EU internal market law and more in particular by EU free movement law.*

1. Introduction

Rapid and disruptive technological developments and the growing digitalisation of our societies have a profound impact on how individuals and companies interact, on market dynamics and on how our socie-

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ties are shaped. Digital technologies thus also impact and create challenges for the law, and raise new legal questions as to how technology and the law should interact.

At the level of the European Union, the law of the internal market has long been at the heart of law-based order and has played a vital role in building Europe's economic constitution[1]. EU internal market law is also at the heart of Europe's digital economy. According to the European Commission, the Digital Single Market (hereafter: DSM)

> is one in which the free movement of persons, services and capital is ensured and where the individuals and businesses can seamlessly access and engage in online activities under conditions of fair competition, and a high level of consumer and personal data protection, irrespective of their nationality or place of residence[2].

Or differently put, the DSM is about allowing the freedoms of Europe's Single Market to enter the digital age.

The DSM can be distinguished, though, from the «offline», physical internal market in at least two ways, i.e. firstly through the importance of data and information, and the strong interrelationship between the digital market and citizens' fundamental rights and, secondly, through the strength and power of private actors, such as platforms like Amazon, Uber, Airbnb, or Booking.Com, or big tech companies, like Meta, Alphabet or Microsoft. There were at first no or hardly national public economic laws that specifically targeted the digital economy, whereas private, non-state actors had almost been given free rein[3].

These specific features of the DSM mean that private actors appear to constitute not only a source of more significant restrictions of trade than those deriving from purely state barriers to trade, but also of non-

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[1] Judgment of 5 February 1963, *van Gend & Loos v. Nederlandse Administratie der Belastingen*, C-26/62, EU:C:1963:1. R. BARENTS, *De constitutionele paradox van het Unierecht*, in *SEW*, 2013, afl. 7, p. 302.

[2] See European Commission, available at *https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age_en* (last accessed on 14 July 2023).

[3] K. HELLINGMAN, K.J.M. MORTELMANS, *Economisch Publiekrecht – rechtswaarborgen en rechtsinstrumenten*, Deventer, 1989.

trade or non-market concerns, including fundamental rights[4]. In this contribution the question will be addressed as to how these non-market and fundamental rights concerns have been and could be addressed[5]. Although competition law is specifically drafted to tackle market concerns of *private actors*[6], here the focus will be on EU free movement law, which is traditionally addressed to state actors. Hereby the following three routes are followed: the application of EU free movement rules in horizontal disputes between private actors and the (limited) horizontal direct effect of EU free movement provisions will be dealt with first, whereafter the question of whether EU fundamental rights and the EU Charter of Fundamental Rights (hereafter: CFR) can be invoked by and vis-à-vis private parties will be looked into; third and last, the role of the EU legislature in regulating the DSM will be discussed.

2. The horizontal application and direct effect of EU free movement law

The fact that non-state, private actors, such as the five big tech companies, play an important (regulatory) role in our societies, is in itself not a new phenomenon. But since the last decades their role in the regulatory domain has grown, partly due to the dilution of the traditional public-private divide. Fourteen years ago Prechal and de Vries wrote that

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[4] See also my earlier contribution on Digitalisation and EU internal market law: S.A. DE VRIES, *Chapter 1 – The Resilience of the EU Single Market's Building Blocks in the Face of Digitalization*, in U. BERNITZ, X. GROUSSOT, J. PAJU, S.A. DE VRIES (eds.), *General Principles and the EU Digital Order*, Alphen a/d Rijn, 2020, p. 24.

[5] S.A. DE VRIES, *Securing Private Actors' Respect for Civil Rights Within the EU: Actual and Potential Horizontal Effects of Instruments*, in S.A. DE VRIES, H. DE WAELE, M.-P. GRANGER (eds.), *Civil Rights and EU Citizenship – Challenges at the Crossroads of the European, National and Private Spheres*, Cheltenham, 2018, pp. 43-44.

[6] A. GERBRANDY, *Chapter 12 – General Principles of European Competition Law and the 'Modern Bigness' of Digital Power: The Missing Link Between General Principles of Public Economic Law and Competition Law*, in U. BERNITZ, X. GROUSSOT, J. PAJU, S.A. DE VRIES (eds.), *General Principles and the EU Digital Order*, Alphen a/d Rijn, 2020, p. 309-312.

> [t]his holds especially true in areas where semi-private/semi-public entities lay down the rules. Private or semi-private bodies make use of derived or autonomous rule-making powers alongside the government, while public authorities act more and more often as market participants and swap traditional public law regulation for private law instruments. Although the extent to which this occurs, varies from one Member State to another, these processes are symptomatic for a more general evolution in which the internal market rules have to operate[7].

The case law in the field of free movement is evidence of the Court's acceptance that clear-cut dividing lines between the public and private domain are fading.

2.1. Extending the personal scope of application of the prohibitive rules on free movement

As is well-known by now, the Court has extended the *personal* scope of application of the EU free movement rules and thereby accepted a (limited) form of horizontal application and direct effect, at least where the Treaty rules on the free movement of persons and services are concerned. The provisions on services (Article 56 TFEU) are, due to the digitalisation and datification of our economy, as well as the emergence of the Internet and the role of information therein, particularly relevant in the Digital Single Market[8]. Where the free movement of persons is concerned, not only the provisions on workers (Article 45 TFEU) but also on establishment (Article 49 TFEU) have (limited) horizontal direct effect. The gig economy, where the «micro-entrepreneurs, on-demand workers, freelancers or contractors are typically self-employed», shows the importance of the freedom of establishment[9].

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[7] S. PRECHAL, S.A. DE VRIES, *Seamless web of judicial protection in the internal market?*, in *ELRev.*, 34, 2009, p. 6.

[8] C.S. RUSU, A. LOOIJESTIJN-CLEARIE, J.M. VEENBRINK, *Digitalisation of Economic Law in the EU: Which Way Forward?*, in *Radboud Eco. L. Blog*, 2018, available at: *https://www.ru.nl/law/research/radboud-economic-law-conference/radboud-economic-law-blog/2018/digitalisation-economic-law-eu-which-way-forward/* (last accessed on 23 August 2019).

[9] V. HATZOPOULOS, *The Collaborative Economy and EU Law*, Oxford, 2018, p. 150.

As explained elsewhere, basically three strands of argumentation are followed by the Court to accept horizontal direct effect of the Treaty provisions on free movement[10]. The first argument is based on the *effet utile* principle or useful effect doctrine, meaning that the useful effect of EU law must be guaranteed and may not be jeopardised, either by the state or private actors[11]. In the *Walrave Koch* and *Bosman* cases on rules laid down by sporting organisations affecting sporters as employees the Court held that

> [T]he abolition as between Member States of obstacles to freedom of movement for persons and to freedom to provide services would be compromised if the abolition of State barriers could be neutralized by obstacles resulting from the exercise of their legal autonomy by associations or organizations not governed by public law[12].

Article 45 TFEU on the free movement of workers thus also applies to rules of private associations aimed at regulating gainful employment in a collective manner[13].

The second argument is based on the fact that certain private actors are dominant. According to the Court in its judgment in *Ferlini* the principle of non-discrimination on grounds of nationality as now laid down in Article 18 TFEU

> also applies in cases where a group or organisation such as the EHL (Entente des Hôpitaux Luxembourgeois - Luxembourg Hospitals

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[10] S.A. DE VRIES, R. VAN MASTRIGT, *The Horizontal Direct Effect of the Four Freedoms: From a Hodgepodge of Cases to a Seamless Web of Judicial Protection in the EU Single Market?*, in U. BERNITZ, X. GROUSSOT, F. SCHULYOK, *General Principles of EU Law and European Private Law*, Alphen a/d Rijn, 2013, pp. 264-265.

[11] The *effet utile* principle implies that the free movement provisions would be prevented from functioning effectively if private organisations were allowed to create or maintain obstacles that governments are not allowed to create or maintain. Judgment of 12 December 1974, *Walrave and Koch*, C-36/74, EU:C:1974:140; Judgment of 15 December 1995, *Bosman*, C-415/93, EU:C:1995:463; Judgment of 11 December 2007, *Viking Line*, C-438/05, EU:C:2007:772; Judgment of 18 December 2007, *Laval*, C-341/05, EU:C:2007:809.

[12] CJEU, *Walrave and Koch*; CJEU, *Bosman*, para. 83.

[13] CJEU, *Bosman*, para. 82.

> Group) exercises a certain power over individuals and is in a position to impose on them conditions which adversely affect the exercise of the fundamental freedoms guaranteed under the Treaty[14].

The third and last argument relates to the fundamental rights character of the principle of non-discrimination of grounds of nationality (*Angonese*)[15], and the principle of equal pay for men and women (*Defrenne*), which principles apply to private actors acting individually[16]. It means that the prohibition of discrimination applies more generally to contracts between individuals, private parties, and not only contracts that intend to regulate labour collectively.

Hence, private actors have, next to rights under EU free movement law, also duties to respect the principles of non-discrimination and market access under certain conditions. Considering the crucial role of private actors and in particular the dominance of big tech corporations in the digital market place, it could be argued on the basis of the foregoing that they can be held accountable for infringements of EU free movement provisions under the conditions set out in the Court's case law.

2.2. Private actors invoking public or private interest exception grounds

Assuming that the prohibitive Treaty rules on free movement apply to private actors, what possibilities are there for private actors to justify their discriminatory or otherwise restrictive behaviour? As is well known, EU free movement law, as developed and interpreted in a primarily offline, analogue context, has proven to be sufficiently receptive to *public interests*. The Treaty freedoms may be fundamental but have no absolute character[17]. Safety valves are built in the system, through

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[14] For example Judgment of 3 October 2000, *Ferlini*, C-411/98, EU:C:2000:530, para. 50. S. PRECHAL, *Horizontal direct effect of the Charter of Fundamental Rights of the EU*, in *Revista de Derecho Comunitario Europeo*, 66, 2020, p. 412.

[15] Judgment of 6 June 2000, *Angonese*, C-281/98, EU:C:2000:296.

[16] Judgment of 8 April 1976, *Defrenne II*, *C*-43/75, EU:C:1976:56.

[17] The Court has emphasised this in a number of cases where fundamental freedoms clashed with fundamental rights, like Judgment of 12 June 2003, *Schmidberger*, C-

Treaty exceptions and the Court's case-law, which guarantee that public values continue to be protected within the context of the freedoms, subject to a proportionality review[18]. And in addition, the EU legislator in regulating the EU internal market is required to take account of public interests. This has worked pretty well, with the exception of some cases which have been criticised for subordinating social values and rights to the requirements of free movement[19]. There is no reason to believe that the scheme developed in the offline world with a view to adjudicate conflicting national, public interests with the EU legal requirements of free movement, should not offer similar possibilities to take account of public interests and fundamental rights in an *online* world.

When it comes to more specifically *private actors* relying on *public* interests, the Court in *Bosman* and *Angonese* provided for an opening in case of violation of one of the fundamental freedoms[20]. In the latter case, the Court accepted that restrictions on the free movement of workers caused by private individuals might be justified if that restriction is based on objective considerations irrespective of the nationality of the persons concerned and proportional to the objective legitimately pursued[21]. And in *Bosman* the Court in a rather sweeping statement held that

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112/00, EU:C:2003:333, para. 78; or CJEU, *Viking Line*; cf. also Opinion of Advocate General Trstenjak of 14 April 2010, *Commission v. Germany*, C-271/08, ECLI:EU:C:2010:183.

[18] S. WEATHERILL, *Protecting the Internal Market from the Charter*, in S.A. DE VRIES, U. BERNITZ, S. WEATHERILL (eds.), *The EU Charter of Fundamental Rights as a Binding Instrument – Five Years Old and Growing*, Oxford-Portland, 2015, p. 213.

[19] Most infamous are, of course, the CJEU *Viking Line* and *Laval* cases. C. BARNARD, *The Protection of Fundamental Social Rights in Europe after Lisbon – A Question of Conflicts of Interest*, in S.A. DE VRIES, U. BERNITZ, S. WEATHERILL (eds.), *The Protection of Fundamental Rights in the EU after Lisbon*, Oxford-Portland, 2013, p. 37; A. VELDMAN, S.A. DE VRIES, *Chapter 4 – Regulation and Enforcement of Economic Freedoms and Social Rights; A Thorny Distribution of Sovereignty*, in T. VAN DEN BRINK, M. LUCHTMAN, M. SCHOLTEN (eds.), *Sovereignty in the Shared Legal Order of the EU – Core Values of Regulation and Enforcement*, Cambridge, 2015, p. 83.

[20] CJEU, *Bosman*; CJEU, *Angonese*.

[21] CJEU, *Angonese*, para. 42.

> [t]here is nothing to preclude individuals from relying on justifications on grounds of public policy, public security or public health. Neither the scope nor the content of those grounds of justification is in any way affected by the public or private nature of the rules in question[22].

However, with respect to more specifically private, commercial interests, the situation is more complex. The exceptions to free movement can only be invoked for non-economic interests. Economic considerations may play a role, only in as far as the restrictive measure definitively serves a (further) non-economic interest[23]. But this traditional approach to justifications may need to be revised. After all, the commercial interests of private actors in the digital market place may be seriously jeopardised by requirements of EU free movement law and EU fundamental rights. Advocate General Trstenjak in the *Fra.bo* case suggested that a private actor could perhaps rely on «a special ground of private interest, emphasising its own private law nature». This case involved a restriction on the free movement of goods, more specifically copper fittings for water pipelines, imposed by a German private law body[24]. The Court, in its judgment, did not reason along the similar lines of horizontal direct effect as set out by the Advocate General and did not look into the question of justification. The reasoning of the Advocate General is related to the principle of private autonomy, in which the horizontal application of the free movement provisions finds its limits. It is here that the freedom to conduct a business as enshrined in Article 16 CFR may come to the rescue as will be explained hereafter[25].

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[22] CJEU, *Bosman*, para. 86.

[23] Judgment of 10 July 1984, *Campus Oil*, C-72/83, EU:C:1984:256, para. 7; Judgment of 28 March 1995, *Evans Medical*, C-324/93, EU:C:1995:84; Judgment of 19 October 2016, *Deutsche Parkinson Vereinigung eV*, C-148/15, EU:C:2016:776, para. 31.

[24] Opinion of Advocate General Trstenjak of 28 March 2012, *Fra.bo*, C-171/11, ECLI:EU:C:2012:176, para. 56.

[25] S.A. DE VRIES, R. VAN MASTRIGT, *The Horizontal Direct Effect of the Four Freedoms: From a Hodgepodge of Cases to a Seamless Web of Judicial Protection in the EU Single Market?*, in U. BERNITZ, X. GROUSSOT, F. SCHULYOK, *General Principles of EU law and European Private Law*, Alphen a/d Rijn, 2013, pp. 264-265.

3. The horizontal direct effect of EU fundamental rights

The horizontal direct effect of fundamental rights is, generally, more contentious as the classic approach to fundamental rights relates to the vertical relationship between the state and the citizen. But this rigorous dividing line between the horizontal and vertical dimensions of fundamental rights in most Member States[26] and in respect of the application of European Convention on Human Rights (ECHR) does not mean that fundamental rights may not produce effects in relations governed by private law at all[27]. For example, under the ECHR individuals can indeed only bring an application before the European Court of Human Rights (ECtHR) «regarding an alleged violation of a Convention Right by one of the Convention States» and applications against private actors are declared inadmissible. But the ECtHR does not ignore private actors' infringements of fundamental rights, for instance by imposing positive obligations on states to secure individual rights guaranteed by the Convention in relations between private actors[28].

3.1. The development of horizontal direct effect of EU Charter provisions

With respect to EU fundamental rights the CJEU has gone a step further by granting horizontal direct effect to some provisions of the EU Charter of Fundamental Rights, which may thus be directly relied upon by an individual vis-à-vis another private actor before a national court. The recognition of horizontal direct effect of EU fundamental rights has its origin in the case law on the Treaty rules on free movement, as dis-

[26] S. WALKILA, *Horizontal Effect of Fundamental Rights in EU Law*, Groningen, 2016. S.A. DE VRIES, *Securing Private Actors' Respect for Civil Rights Within the EU: Actual and Potential Horizontal Effects of Instruments*, in S.A. DE VRIES, H. DE WAELE, M.P. GRANGER (eds.), *Civil Rights and EU Citizenship – Challenges at the Crossroads of the European, National and Private Spheres*, Cheltenham, 2018, p. 47.

[27] S. PRECHAL, *Horizontal direct effect of the Charter of Fundamental Rights of the EU*, cit., p. 409.

[28] C. LOVEN, *Fundamental Rights Violations by Private Actors and the Procedure before the European Court of Human Rights – A Study of Verticalized Cases*, Cambridge, 2022, p. 4.

cussed above, which are after all according to the CJEU in themselves «fundamental». Furthermore, the Court already decided in several judgments that the principle of non-discrimination on grounds of nationality, the principle of equal pay for male and female workers as laid down in Article 157 TFEU[29] and the principle of non-discrimination on other grounds than nationality, which are fundamental rights, have horizontal direct effect[30].

Whereas the rationale for accepting horizontal direct effect of the Treaty provisions on free movement was originally «integration-driven», this is different for EU fundamental rights. Here relevant factors are the growing importance of the private sector also in the «fundamental rights domain», the blurring public and commercial spheres and the perception of fundamental rights as core EU values which by their very nature both impact public and private law[31].

The recognition of horizontal direct effect of EU Charter provisions was, however, not entirely self-evident. After all, Article 51 of the EU Charter determines the general scope of application of the EU Charter and only refers to EU institutions and the Member States as addressees. But in the *Bauer et al.* and *Max Planck* cases the Court decided that Article 51(1) of the EU Charter could not be interpreted as precluding the possibility that private individuals may be required to comply with the Charter[32]. First, the Court observes that provisions of primary law addressed to Member States, can be relied upon vis-à-vis other individ-

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[29] CJEU, *Defrenne II*.

[30] Judgment of the Court of 22 November 2005, *Mangold*, C-144/04, EU:C:2005:709.

[31] S. PRECHAL, *Horizontal direct effect of the Charter of Fundamental Rights of the EU*, cit., pp. 417-418.

[32] Judgment of 6 November 2018, *Bauer and Broßonn*, Joined Cases C-569/16 and C-570/16, EU:C:2018:871; Judgment of 6 November 2018, *Kreuziger and Max Planck*, Joined Cases C-619/16 and C-684/16, EU:C:2018:872. See also Judgment of 17 April 2018, *Egenberger*, C-414/16, EU:C:2018:257. E. FRANTZIOU, *Joined Cases C-569/16 and C-570/16, Bauer et al: (Most of) the Charter of Fundamental Rights is Horizontally Applicable*, in *European Law Blog*, 19 November 2018, available at: *http://europeanlawblog.eu/2018/11/19/joined-cases-c-569-16-and-c-570-16-bauer-et-al-most-of-the-charter-of-fundamental-rights-is-horizontally-applicable/* (last accessed on 6 September 2023).

uals. It hereby mentions its judgment in *Egenberger,* wherein the Court referred to case law on the Treaty rules on free movement and non-discrimination on grounds of nationality, including *Defrenne, Angonese, Ferlini and Viking Line*[33]. In the *Egenberger* case it concerned Ms Egenberger's application for a job with Evangelisches Werk which was rejected because she did not belong to a denomination. Ms Egenberger then relies upon the prohibition of discrimination on grounds of religion, which is included in Article 4(2) of Directive 2000/78 establishing a general framework for equal treatment in employment and occupation and in Article 21(1) of the EU Charter, to claim compensation. The Court held that Article 21(1) of the EU Charter, which lays down the prohibition of discrimination, can be invoked in a dispute between private actors. It also declared Article 47 of the EU Charter, which lays down the right to effective judicial protection, to be horizontally directly effective. After all, the national court, i.e. the German court, must strike

> a balance between the right of autonomy of churches and other organisations whose ethos is based on religion or belief, on the one hand, and, on the other hand, the right of individuals not to be discriminated against on grounds of religion or belief[34].

The *Bauer et al.* and *Max Planck* cases concerned the right of every worker to a limitation of working time and to an annual period of paid leave as laid down in Article 31(2) of the EU Charter and as further elaborated in a directive[35]. As, according to the Court, Article 31(2) is mandatory and unconditional in nature and does not require concrete

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[33] CJEU, *Defrenne II*, para. 39; CJEU, *Angonese*, paras. 33 to 36; Case C-411/98, CJEU, *Ferlini*, para. 50; CJEU, *Viking Line*, paras. 57 to 61; CJEU, *Egenberger*, para. 77.

[34] S. PRECHAL, *Horizontal direct effect of the Charter of Fundamental Rights of the EU*, cit., pp. 415-416. Sacha Prechal explains why Article 47 EU Charter was relevant in this case considering the more restrained judicial review under German law in these types of cases.

[35] For an extensive analysis of the Court's case-law, see S.A. DE VRIES, *The Bauer et al. and Max Planck Judgments and EU Citizens' Fundamental Rights: An Outlook for Harmony*, in *European Equality L. Rev.*, 1, 2019, pp. 16-30.

expression by the provisions of EU and national law, it can be relied upon in a procedure before a national court, also in a dispute between private individuals. The Court concludes by stating that the judicial protection for individuals flowing from Article 31(2) of the EU Charter and the guarantee of full effectiveness of this provision require the national court to disapply conflicting national legislation, if needed.

Now the EU Charter does not apply in a vacuum but only when, according to Article 51(1) EU Charter, Member States are implementing EU law, or, as clarified in the case law, when a situation falls within the scope of application of EU law[36]. In the cases *Egenberger* and *Bauer et al.*, Directive 2000/78 on equal treatment in employment and occupation and Directive 2003/88/EC on the organisation of working time «pulled the Member State action into the scope of EU law and rendered the Charter applicable»[37]. As the subject matter was covered by EU legislation, the Charter provisions could be invoked, although independently from the directives in horizontal disputes.

3.2. Which provisions of the EU Charter?

Following the reasoning of the Court in *inter alia Bauer et al.* and *Egenberger* the question is: which other Charter provisions than Articles 21, 47 and 31(2) EU Charter may have horizontal direct effect? Prechal suggests that, for instance, the «rights such as respect for private and family life, freedom of expression and information and freedom to conduct a business, which includes freedom of contract» may impose obligations on private parties, as well *inter alia* the right to the integrity of the person[38].

These rights are particularly relevant in the DSM and have already been subject to the Court's case law where the interpretation of EU legislation was concerned. In the well-known *Google Spain* case, for instance, the rights of the data subject under the EU Charter and the for-

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[36] Judgment of 26 February 2013, *Åkerberg Fransson*, C-617/10, EU:C:2013:105.

[37] S. PRECHAL, *Horizontal direct effect of the Charter of Fundamental Rights of the EU*, cit., p. 422.

[38] S. PRECHAL, *Horizontal direct effect of the Charter of Fundamental Rights of the EU*, cit., p. 419.

mer Data Protection Directive conflicted with the economic rights of Google and the right of the general public to information. The central question related to Mr Consteja González's request to order Google Spain SL and Google Inc to withdraw personal data relating to Mr Costeja González from its index and to prevent access to the data in the future. In particular, he wanted links to pages of a newspaper, which included an announcement mentioning his name in connection with a real-estate auction and social security debts, to be removed. The Court held that

> the data subject may […] request that the information in question no longer be made available to the general public by its inclusion in such a list of results, it should be held … that those rights override, as a rule, not only the economic interests of the operator of the search engine but also the interest of the general public in finding that information upon a search relating to the data subject's name[39].

Although this case was decided against the backdrop of the Data Protection Directive, which is the predecessor of the General Data Protection Regulation and which the Court was asked to interpret, the Court was rather explicit on the potentially horizontal direct effect of Articles 7 (privacy) and 8 (data protection) of the EU Charter.

In a similar vein the horizontal dispute between Eva Glawischnig-Piesczek and Facebook Ireland concerning the publication on Facebook by a user of messages containing statements that are harmful to the reputation of Ms Glawischnig-Piesczek, in fact involved the right to the integrity of the person (reputation and dignity right)[40], the right to privacy and personality, the freedom of expression and information, and the freedom to conduct a business. Without mentioning these fundamental rights or the Charter provisions explicitly, contrary to the Advocate General in his opinion, the CJEU limited itself to an interpretation of the E-Commerce Directive[41].

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[39] Judgment of 13 May 2014, *Google Spain*, C-131/12, EU:C:2014:317, para. 97.

[40] D. KELLER, *Facebook Filters, Fundamental Rights, and the CJEU's Glawischnig -Piesczek Ruling*, in *GRUR International*, 69(6), 2020, p. 622.

[41] Judgment of 3 October 2019, *Glawischnig-Piesczek v. Facebook Ireland Ltd*, C-18/18, EU:C:2019:821; see also the Opinion of Advocate General Szpunar of 4 June

The E-Commerce Directive also played a role in the *Scarlet Extended* case, wherein the CJEU had to decide on the compatibility of the requirement for an Internet Service Provider, Scarlet Extended, to install a filtering system in response to infringements of intellectual property rights of authors, composers and editors of musical works, and to combat privacy with other fundamental rights. Although the Court in interpreting the E-Commerce Directive put the freedom to conduct a business at the heart of its judgment, other fundamental rights, i.e. the protection of personal data and the freedom to receive information, were mentioned as well[42].

3.3. Conflicting fundamental rights: a difficult balancing exercise

Where different fundamental rights are at issue and where they clash with each other, the courts will have to engage in a balancing exercise. In legal doctrine, the question has been raised how in general conflicting fundamental rights should be balanced with a view to prevent courts to issue value judgments but rather reach reasonable and well-motivated judgements[43]. When the CJEU is called upon to balance conflicting fundamental rights, Article 52(1) of the EU Charter of Fundamental Rights is relevant:

> Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet

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2019, *Glawischnig-Piesczek v. Facebook Ireland Ltd*, C-18/18, ECLI:EU:C:2019:458, paras. 63-65.

[42] Judgment of 24 November 2011, *Scarlet Extended SA v. Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM/Scarlet Extended)*, C-70/10, EU:C:2011:771. See also S.A. DE VRIES, *11-The EU Single Market as 'Normative Corridor' for the Protection of Fundamental Rights: The Example of Data Protection*, in S.A. DE VRIES, U. BERNITZ, S. WEATHERILL (eds.), *The EU Charter of Fundamental Rights as a Binding Instrument – Five Years Old and Growing*, Oxford, 2015, p. 242.

[43] S.A. DE VRIES, *3 - The Protection of Fundamental Rights within Europe's Internal Market – An Endeavour for More Harmony*, in S.A. DE VRIES, U. BERNITZ, S. WEATHERILL (eds.), *The Protection of Fundamental Rights in the EU After Lisbon*, Oxford, 2013, p. 76.

> objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

The proportionality principle plays a crucial role here, emphasising the need for the Court to strike a fair balance between conflicting fundamental rights. In the above-mentioned *Scarlet Extended* case the Court held that the intellectual property right as enshrined in Article 17(2) of the EU Charter is not inviolable or must be absolutely protected. Rather, «national authorities and courts must strike a fair balance between the protection of copyright and the protection of the fundamental rights of individuals who are affected by such measures». In this particular case a fair balance should be struck between «the protection of the intellectual property right enjoyed by copyright holders and that of the freedom to conduct a business enjoyed by operators such as ISPs pursuant to Article 16 of the Charter»[44].

There are several notable aspects to the Court's case law. Firstly, the applicable EU legislative framework informs the balancing exercise of the Court. In fact the Court should seek legislative guidance from the applicable directive where conflicting fundamental rights have to be balanced, also in horizontal disputes[45]. Hence, even though the Directive itself, contrary to the directly effective EU Charter provision, cannot be *invoked* before the national court to impose obligations on private parties, the Directive may include criteria as to how fundamental rights have to be balanced. *Egenberger* provides a good example, as Directive 2000/78 determines how ought to be balanced[46]

> the right of autonomy of churches and other organisations whose ethos is based on religion or belief, on the one hand, and, on the other hand, the right of workers not to be discriminated against on grounds of religion or belief.

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[44] CJEU, *Scarlet Extended*, paras. 45-46.

[45] S. PRECHAL, *Horizontal direct effect of the Charter of Fundamental Rights of the EU*, cit., p. 423-424.

[46] S. PRECHAL, *Horizontal direct effect of the Charter of Fundamental Rights of the EU*, cit., p. 423.

Furthermore, next to the fact that the EU legal framework is, as stated above, relevant for deciding upon the applicability of the EU Charter, it may also determine the extent to which certain fundamental rights are given weight or may even take priority over other fundamental rights. In the *Google Spain* case the problem of removing search results from the Internet was (almost) exclusively viewed through the lens of the Data Protection Directive. In other words, whereas the Directive allowed to Court to offer a far-reaching right to protect personal data, this may possibly be at the cost of other fundamental rights, like the freedom of expression or the freedom to receive information, which are not covered by the Directive[47]. In a similar vein, in the case of *Scarlet Extended* the e-commerce Directive (Directive 2000/31) allowed the Court to focus on the freedom to conduct a business, thereby outflanking other fundamental rights, such as the rights of Internet users to privacy and to the protection of personal data. The freedom to conduct a business as contained in Article 16 of the Charter in fact strengthened Article 15(1) of the e-commerce Directive, prohibiting too severe a measure such as the requirement to install a filtering system[48].

Lastly, Article 52(1) EU Charter does not mention whether certain Charter rights may prevail in a specific case. The extent to which the Court will pursue a differentiated approach in the context of the proportionality test as contained in Article 52(1) thus remains unclear. It will ultimately depend on the area concerned, the nature of the Charter right at issue, the nature and seriousness of the interference and the objective pursued in determining how restrictions on fundamental rights are assessed[49].

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[47] S. KULK, F.J. ZUIDERVEEN BORGESIUS, *Google Spain v. González: Did the Court Forget About Freedom of Expression?*, in *European Journal of Risk Regulation*, 2, 2014, pp. 389-398; S.A. DE VRIES, *11-The EU Single Market as 'Normative Corridor' for the Protection of Fundamental Rights: The Example of Data Protection*, cit., p. 258.

[48] S.A. DE VRIES, *11-The EU Single Market as 'Normative Corridor' for the Protection of Fundamental Rights: The Example of Data Protection*, cit., p. 258.

[49] Judgment of 8 April 2014, *Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources and Others and Kärntner Landesregierung and Others (Digital Rights Ireland)*, Joined cases C-293/12 and C-594/12, EU:C:2014:238, para. 47.

3.4. The role of Article 16 EU Charter to protect private interests

What role could Article 16 EU Charter which contains the freedom to conduct a business play in defending the interests of private actors[50]? Advocate-General Trstenjak suggested in her Opinion in the above-mentioned *Fra.Bo* case, a private party could refer to its private-law nature and rely on the freedom to conduct a business[51]. The *Scarlet Extended* case shows the potential of Article 16 EU Charter for tech firms in defending themselves vis-à-vis other private actors claiming an infringement of their fundamental right(s) and wishing to impose a corresponding obligation on the other party.

But in *Sky Österreich* the Court made clear that

> [o]n the basis of that case-law and in the light of the wording of Article 16 of the Charter […] the freedom to conduct a business may be subject to a broad range of interventions on the part of public authorities which may limit the exercise of economic activity in the public interest. That circumstance is reflected, inter alia, in the way in which Article 52(1) of the Charter requires the principle of proportionality to be implemented[52].

Yet, this case concerned a *public authority*, the EU legislature, restricting the freedom to conduct a business of broadcasting corporations in *the public interest.* The CJEU was asked to rule on the compatibility of the Audiovisual Media Services Directive (AMSD) with the EU Charter[53], in particular the freedom to conduct a business and the right

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[50] See in general P. OLIVER, *Chapter 12 – What Purpose Does Article 16 of the Charter Serve?*, in U. BERNITZ, X. GROUSSOT, F. SCHULYOK, *General Principles of EU law and European Private Law*, Alphen a/d Rijn, 2013, pp. 281-300.

[51] Opinion AG Trstenjak, *Fra.bo*, para. 56.

[52] Judgment of 22 January 2013, *Sky Österreich GmbH v Österreichischer Rundfunk (Sky Österreich)*, C-283/11, EU:C:2013:28, paras. 46-47. See in particular S. PEERS, S. PRECHAL, *Article 52*, in S. PEERS, T. HERVEY, J. KENNER, A. WARD (eds.), *The EU Charter of Fundamental Rights – A Commentary*, Oxford, 2014, pp. 1484-1485.

[53] Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or

to property as contained in Articles 16 and 17 of the EU Charter[54]. The question was whether Article 15(6) of the AMSD, which requires the holder of exclusive broadcasting rights to authorise any other broadcaster to make short news reports without being able to seek compensation exceeding the additional costs directly incurred in providing access to the signal, infringes the fundamental rights of the holder of exclusive broadcasting rights. According to the CJEU the Directive had been adopted in accordance with the EU Charter and thereby the EU legislature was entitled to adopt rules which limit the freedom to conduct a business, and to give priority, in the necessary balancing of the rights and interests at issue, to public access to information over contractual freedom[55].

Now would it be different where a *private actor* rather than a public authority restricts the freedom to conduct a business of another private party whilst relying on the protection of (other) fundamental rights? It may well be. In *Scarlet Extended* the Court seems to give more weight to the freedom to conduct a business where horizontal disputes between private parties are concerned, however here, of course, backed by the E-Commerce Directive. In any event, a fair balance would have to be struck in application of the proportionality principle under Article 52(1) EU Charter.

4. Addressing fundamental rights' concerns through legislative harmonisation

The Treaty does not confer upon the EU legislature a general legislative competence to regulate fundamental rights at EU level. Only for certain fundamental rights, often more closely connected to the internal market, including the principle of non-discrimination and the right to data protection, the Treaty contains specific legal bases for the adoption

administrative action in Member States concerning the provision of audiovisual media services (2010) OJ L95/1 (Audiovisual Media Services Directive).

[54] CJEU, *Sky Österreich GmbH v Österreichischer Rundfunk (Sky Österreich)*.

[55] CJEU, *Sky Österreich GmbH v Österreichischer Rundfunk (Sky Österreich)*, para. 66.

of binding harmonisation measures. But more importantly, the role of the general internal market legal basis, i.e. Article 114 TFEU, has been reinforced in the Digital Single Market, not only to give effect to the digital transition of Europe's economy but also to safeguard fundamental rights. Furthermore, Article 114 TFEU can also be used to deal with future disparities between national laws and future obstacles to trade[56]. As will be briefly discussed hereafter, the EU legislature thereby favours the legal instrument of regulation to create a level playing field for businesses in the DSM and does not shred away from including provisions on fundamental rights, even though an explicit competence in this regard is lacking.

4.1. The strong preference for regulations

The importance of the private sector and the role of private actors in the digital society at least in part explain the EU legislature's strong preference for the use of regulations rather than directives as instruments for legislative harmonisation. After all, regulations have direct and general application, and its provisions can be invoked in horizontal disputes. Furthermore, the instrument of regulation has particularly been adopted in areas where Member States had not yet enacted rules[57]. As stated above, this has been the situation in the digital marketplace, where national, specific regulatory standards – a public economic law infrastructure – have been lacking for a long time and the role of private actors has been imminent[58]. Regulations can thereby provide a coherent

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[56] M. BRENNCKE, *Case C-58/08 Vodafone Ltd and Others v. Secretary of State for Business, Enterprise and Regulatory Reform, Judgment of the Court of Justice (Grand Chamber)*, in *CML Rev.*, 47, 2010, pp. 1802-1807.

[57] P. SLOT, *Harmonisation*, in *EL Rev.*, 21(5), 1996, pp. 378, 382.

[58] S.A. DE VRIES, *The Resilience of the EU Single Market's Building Blocks in the face of Digitalization*, in U. BERNITZ, X. GROUSSOT, J. PAJU, S.A. DE VRIES (eds.), *General Principles of EU Law and the EU Digital Order*, Alphen a/d Rijn, 2020, p. 5; see also Opinion of Advocate General Poiares Maduro of 1 October 2009 in *Vodafone Ltd and Others v. Secretary of State for Business, Enterprise and Regulatory Reform*, C-58/08, ECLI:EU:C:2009:596: the Roaming Regulation addressed private behaviour that impacted cross-border trade – the behaviour of telecom operators charging roaming prices – which the EU legislator, by analogy with the EU free movement rules having

legal framework for citizens, wherein market, and non-market interests and fundamental rights are balanced.

The increased use of regulations fits into a trend that had been observed by Keleman already more than a decade ago, which he described as Eurolegalism and which entailed more compelling and detailed EU legislation directed at enforceable rights and obligations[59]. Regulations, like the Geo-Blocking Regulation, the Digital Services Act (DSA), the Digital Markets Act (SMA) or the proposed Artificial Intelligence Act (AI Act) can indeed be seen as rather compelling with extensive obligations for – mostly – private actors[60]. The Geo-blocking Regulation, for example, seeks to address discriminatory practices of business in the offline and online environment. The proposed AI Act contains mandatory requirements for designing and developing specific AI systems prior to their placement on the EU internal market and applies to public and private providers of AI[61]. It thereby seeks to create a level playing field for an internal market in lawful, safe and trustworthy AI systems.

(limited) horizontal application, should be able to address on the basis of Article 114 TFEU. Whether the EU is competent on the basis of Article 114 TFEU to directly regulate actions of private parties was not wholly uncontested; Brenncke (n 56) p. 1808: «The decisive argument against the Advocate General's proposal relates to the alleged parallelism between Article 95 EC and the free movement provisions with regard to their application to certain actions of private parties. The express wording of Article 95(1) EC unambiguously requires provisions laid down by a public law body. It would be irreconcilable with and in fact abolish this requirement if genuinely private behaviour were covered by the internal market competence».

[59] R.D. KELEMEN, *Eurolegalism: The Transformation of Law and Regulation in the European Union*, Vol. 10, Cambridge (MA), 2011, p. 30.

[60] Commission, Proposal for a Regulation of the European Parliament and of the Council on European data governance (Data Governance Act) COM (2020) 767 final; Council Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act) [2022] OJ L277/1; Draft AI Act COM (2021) 206 final.

[61] Commission, Proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence (Artificial Intelligence Act) and amending certain Union legislative acts COM (2021) 206 final (Draft AI Act).

4.2. Protecting fundamental rights through internal market legislation

Although the draft AI-Act uses a typically internal market harmonisation technique to regulate the field of AI, it introduces a risk-based approach, applying different legal regimes to AI systems with varying risks for fundamental rights and other core values. Some other legislative initiatives which have been launched on the basis of the internal market legal basis of Article 114 TFEU may even go further where the protection of fundamental rights is concerned. The proposed regulation on political advertising[62] and the so-called European Media Freedom Act[63] are good examples of this and seem quite far from the «original» idea of the internal market, which focused on the abolition of trade barriers. The use of Article 114 TFEU for the domain of political advertising, for example, illustrates

> how difficult the concept of Internal Market as a strictly economic project is to maintain in the digital environment. In the digital environment and data-driven services in particular, the economic aspects of the internal market are often two sides of the same coin. The actors, means and mechanism for political and commercial advertising are increasingly difficult to separate, and often identical[64].

Regarding the European Media Freedom Act, media plurality and the internal market, the EU Commissioner for the Internal Market, Thierry Breton, stated that

> [t]he EU is the world's largest democratic single market. Media companies play a vital role but are confronted with falling revenues, threats

[62] Commission, Proposal for a Regulation of the European Parliament and of the Council on the transparency and targeting of political advertising COM (2021) 731 final.

[63] Commission, Proposal for a Regulation of the European Parliament and of the Council establishing a common framework for media services in the internal market (European Media Freedom Act) COM (2022) 457 final.

[64] M.Z. van Drunen, N. Helberger, R.Ó Fathaigh, *The beginning of EU political advertising law: unifying democratic visions through the internal market*, in *International Journal of Law and Information Technology*, 30, 2022, p. 194.

to media freedom and pluralism, the emergence of very large online platforms and a patchwork of different rules[65].

Hence, Article 114 TFEU appears to be a powerful legal basis for regulations which address not only market but also non-market and fundamental rights concerns in the DSM, particularly including the concerns that arise out of the strong role of private actors. The DSA which recently entered into force and contains rules primarily for intermediaries and online platforms, also seeks to balance and integrate (opposing) fundamental rights, including the freedom of information, the freedom of expression, the right to non-discrimination, human dignity and the freedom to conduct a business. The DSA also includes a provision, albeit limited in scope and quite vaguely formulated, directed at very large platforms on misinformation or disinformation. Hence, next to the market integration rationale of the DSA which is reinforced by the freedom to conduct a business and is implemented through the adoption of less onerous rules that apply to smaller platforms, the protection of other fundamental rights more specifically connects to its regulatory function[66].

5. Conclusion

The notion of horizontal direct effect has really gained traction in the Court's case law, first in the field of EU free movement law, and later in the field of EU fundamental rights, including provisions of the EU Charter of Fundamental Rights. The EU legislator in a way picked up on this by issuing regulations as preferred legislative harmonisation instrument, particularly on the basis of Article 114 TFEU with a view

[65] European Commission, European Media Freedom Act: Commission proposes rules to protect media pluralism and independence in the EU (16 September 2022), *www.ec.europa.eu/commission/presscorner/detail/en/ip_22_5504*, last accessed on 18 March 2023.

[66] Blogpost by S.A. DE VRIES, available at *https://www.uu.nl/en/opinion/the-potential-of-shaping-a-comprehensive-digital-single-market-with-the-long-awaited-digital-single* (last accessed on 15 July 2023).

to regulate the (Digital) Single Market and to safeguard fundamental rights; a logical consequence of the strong role of private parties impacting not only cross-border economic activities but also non-market interests and fundamental rights.

Of course, accepting horizontal direct effect should not lead to a permanent risk for the exercise of contractual freedom of private parties[67]. A balanced approach is needed. And contractual autonomy has be exercised within the limits of the law, hence private actors cannot be prevented from duties that derive from EU primary or secondary law. This was - in a way - already recognised in ancient Rome in private law with respect to the protection of privacy in horizontal disputes: «the protection provided was the result of the existence of certain actions, mainly the *actio iniuriarum*, as the means to protect individual personality»[68].

The rationale for granting horizontal direct effect to protect Roman citizens' personality emerged from «the development of the classical legal system […] and the social requirement of protection of individuality as a legal value»[69]. This is not so different from the rationale underlying the horizontal direct effect to EU fundamental rights, which are after all regarded as «essential values permeating the entire EU legal order»[70].

To conclude I would like to quote my publication on the *Bauer* and *Max Planck* cases, in which I referred by analogy to Piet Mondriaan's painting «Composition with Yellow, Blue and Red» to describe the development of the Court's case law on horizontal direct effect of EU fundamental rights:

> During the first stage the Court, similarly to the painter who draws horizontal and vertical lines defines and demarcates the conditions under which EU law has vertical and horizontal direct effect; during the sec-

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[67] S. PRECHAL, S.A. DE VRIES, *Seamless web of judicial protection in the internal market?*, in *ELRev.*, 34, 2009, p. 18.

[68] See B. PERNINAN, *The Origin of Privacy as a Legal Value: A Reflection on Roman and English Law*, in *American Journal of Legal History*, 52, 2012, p. 183.

[69] B. PERNINAN, *op. cit.*, p. 199.

[70] S. PRECHAL, *Horizontal direct effect of the Charter of Fundamental Rights of the EU*, cit., pp. 417-418.

ond stage, the painter uses colours to fill in blank spaces. The different colours may well reflect the different status of fundamental rights, the extent to which they have been subject to secondary legislation, have been given shape and meaning in the case law and have (horizontal) direct effect. During the third and final stage, whereas the painter illustrates a lookout for harmony, the Court is working towards a harmonious and seamless web of judicial protection[71] of citizens within the EU […][72].

[71] S. PRECHAL, S.A. DE VRIES, *Seamless Web of Judicial Protection in the Internal Market?*, in *ELRev.*, 34, 2009, p. 5.

[72] S.A. DE VRIES, *The Bauer et al. and Max Planck judgments and EU citizens' fundamental rights: An outlook for harmony*, in *European Equality Law Review*, Issue 1, 2019, p. 17.

EUROPEAN CONTRACT LAW – THE RECENT CHANGES TO CONCEPTS AND STRUCTURES

Reiner Schulze[*]

TABLE OF CONTENTS: *1. Introduction. 2. Recent Innovations. 2.1. System of contractual rights and obligations. 2.2. Concept of contract. 2.3. Trade in digital products and goods with digital elements. 3. Effects in National Laws. 4. Structural Shifts. 4.1. Increasing Importance of EU Private Law. 4.2. Impact on National Codifications. 5. Conclusions*[1].

ABSTRACT: *Following the failure of the Common European Sales Law, the Digital Single Market Strategy has ushered in a new phase in the development of European contract law since 2015, in which adaptation to the challenges of the digital age is at the centre of EU legislation. Within just a few years, a series of directives and regulations have further developed EU law in this area, both quantitatively and qualitatively, as never before in such a short period of time. Far-reaching changes affect in particular the concepts of the sales contract, conformity with the contract and counter-performance and also have an impact on EU law in relation to national contract law. This article outlines some of these new features of European contract law.*

1. Introduction

In recent years, European contract law has taken a remarkable upswing. Since the European Commission's documents on the «New

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[1] This article is based on a lecture given by the author in Trento on April 5, 2022. Some parts concerning contract law in the author's article *European Private Law in the Digital Age*, in A. JANSSEN, M. LEHMANN, R. SCHULZE (eds.), *The Future of European Private Law*, Baden-Baden, 2023, emerged from this lecture. These parts are reproduced here without any significant change from the version in the volume just mentioned.

Start»[2] and the «Digital Single Market Strategy»[3], a rapid succession of legal acts has responded to the challenges of digitalisation for contract law and ushered in a new phase in the development of this area of law. These recent changes draw renewed attention to this core area of European private law and call for a rethinking of its conceptualisation and structures in the digital age.

Already at the beginning of the first phase of its development, contract law has been at the centre of public interest in European private law and of academic debate on it. Since the 1980s – beginning with the Doorstep Directive[4] and with the Commercial agents Directive[5] – a relatively extensive, albeit «fragmented» and non-systematised *acquis communautaire* had developed in this field. In addition, academic working groups had prepared drafts for a systematically structured European contract law[6]. In particular, the «Lando Commission» with the «Principles of European Contract Law» (PECL)[7] presented a much-discussed proposal with modern traits (compared to most national contract laws at the time) by taking up suggestions from the UN Convention on Contracts for the International Sale of Goods (CISG) and developing them further with its own approaches.

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[2] Communication from the Commission of 16.12.2014, Commission Work Program for 2015, A new start, COM (2014) 910 final.

[3] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *A Digital Single Market Strategy for Europe*, COM (2015) 192 final.

[4] Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises [1985] OJ L 372; later replaced by the Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council [2011] OJ 304/64.

[5] Directive 86/653/EEC of 18 Dec. 1986; see fn. 9.

[6] For more details R. SCHULZE, F. ZOLL, *European Contract Law*, Baden-Baden, 2021, Ch. 1, mn. 44 et seq.

[7] O. LANDO, H. BEALE (eds.), *Principles of European Contract Law: Parts I and II*, The Hague, 2000.

However, neither the PECL nor later the academic draft for a Common Frame of Reference (DCFR)[8] had already taken into account the new challenges arising from digitalisation for contract law. Only in the European Commission's proposal for a Common European Sales Law (CESL) of 2011[9] were there some remarkable approaches to this (in particular the explicit inclusion of contracts for the supply of digital content and the introduction of corresponding definitions and corresponding provisions for non-performance; Art. 5 lit. d and Art. 2 lit. j, 87 (1) lit. d CESL).

In the phase following the failure of the CESL, EU legislation has now addressed these challenges to a considerably greater extent in the context of the «Digital Single Market Strategy»[10], but without so far leading significantly beyond the «fragmentary» character of the earlier legislation. The new legal acts include several Directives as well as a growing number of regulations, which increasingly place uniform Union contract law alongside the harmonised law of the Member States. Among the Directives, the «Modernisation Directive»[11] and, in particular, the «Twin Directives» of 2019 – the Digital Content Directive

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[8] See Common Frame of Reference, available at *http://ec.europa.eu/justice/policies/civil/docs/dcfr_outline_edition_en.pdf* (last accessed on 6 September 2023).

[9] R. SCHULZE, *Contract Law and the Digital Single Market* in A. DE FRANCESCHI (ed.), *European Contract Law and the Digital Single* Market, Cambridge, 2016, pp. 127, 133; on the role of this set of rules as a model for contract law reforms S. VOGENAUER, *The DCFR and the CESL as Models for Law Reform*, in G. DANNEMANN, S. VOGENAUER (eds.), *The Common European Sales Law in Context*, Oxford, 2013, p. 732 et seq.

[10] Partly following on from the earlier approaches in the CESL; R. SCHULZE, D. STAUDENMAYER, *EU Digital Law Commentary*, Baden-Baden, 2020, Introduction, § 14; R. SCHULZE, *Die Digitale-Inhalte-Richtlinie – Innovation und Kontinuität im europäischen Vertragsrecht*, in *ZEuP*, 4, 2019, pp. 695 et seq., 699, 704.

[11] Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules [2019] OJ L 328/7.

(DCD)[12] and the Sale of Goods Directive (SGD)[13] – stand out for their relatively wide scope and for a number of notable innovations. As far as uniform law is concerned, in addition to the Portability Regulation, the Geoblocking Regulation and the Platform Regulation, the private law provisions in the Digital Market Act[14] and the Digital Services Act[15] contribute to the further development of European contract law.

Looking at this recent legislation as a whole, it is apparent that European contract law in the transition to the digital age, while building to a considerable extent on foundations that emerged in its previous phase of development in the *acquis communautaire*, now has contours that go far beyond what was previously modern law[16]. Today's European contract law, and even more so in the foreseeable future, also differs considerably from the models once drafted by the «Lando Commission» and the authors of the DCFR[17]. Its scientific presentation and systematisation by legal doctrine will therefore require new categories and frameworks to be developed.

In the following, some innovations in the context of the recent legislation of the EU in the field of contract law are to be examined in more detail, in order to then discuss some overarching structural changes that

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[12] European Parliament and Council Directive (EU) 2019/770 of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services [2019] OJ L 136/1.

[13] European Parliament and Council Directive (EU) 2019/771 of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC [2019] OJ L 136/28.

[14] Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) [2022] OJ L 265/1.

[15] Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services (Digital Services Act) and amending Directive 2000/31/EC [2022] OJ L 277/1.

[16] For some examples of «"disruption», see C. TWIGG-FLESNER, *Disruptive Technology – Disrupted Law?*, in A. DE FRANCESCHI (ed.), *European Contract Law and the Digital Single Market*, Cambridge, 2016, p. 21 et seq.

[17] R. SCHULZE, *Redrafting Principles of European Contract Law*, in *EuCML*, 2020, p. 179 et seq.

are emerging from the adaptation of the *acquis communautaire* to the digital age in this field and have an impact on the relationship of EU law with the law of the Member States.

2. Recent Innovations

2.1. System of contractual rights and obligations

If one takes a closer look at the «Twin Directives» as outstanding examples of the new legislation, it becomes apparent that the innovations are partly related to the special features of trade in digital products and in goods with digital elements, but partly also concern general features of contract law beyond this. In the latter respect, it should be of particular importance for the future systematic development of European contract law that the DCD now contains a comprehensive regime of contractual obligations of the supplier. Within one set of rules, it includes on the one hand the obligation to perform and the remedies for failure to perform and on the other hand the requirements for conformity with the contract and the remedies for non-conformity. This classification of contractual obligations ties in with the dual concept of the CISG (obligation to deliver the goods according to Art. 31 CISG, and conformity of the goods according to Art. 35 et seq. CISG), and transfers it to liability for non-compliance with contractual obligations. In contrast, the SGD continues to be limited to conformity with the contract and the consequences of non-conformity according to the model of the Consumer Sales Directive, but leaves the obligation and failure to perform to separate regulation in the context of another set of rules (Art. 18 Consumer Rights Directive)[18]. Art. 3 DCD provides for the application of the comprehensive regime of the Directive only to the supply of digital content and services to consumers. However, the con-

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[18] Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council [2011] OJ L 304/64.

cept on which it is based is in principle not bound to this specific scope of application. Rather, the dualistic approach of the DCD can also provide a pattern of orientation in order to coherently develop future more general provisions of European contract law[19].

2.2. Concept of contract

No less significant for the future development of European contract law is likely to be the change in the relationship between subjective and objective requirements for conformity with the contract, as laid down in Art. 8 (1) DCD and Art. 7 (1) SGD. It has profound implications for the concept of contract that have been little discussed so far[20]. While the CSD[21] assumed the priority of the subjective requirements, the «Twin Directives» now introduce the equal rank of both types of requirements. Digital products and goods are therefore in principle only in conformity with the contract if they meet the objective requirements as well as the subjective ones. Two core elements of this objective determination of conformity are the «fit for purpose-test» and the standards of the qualities and performance features, which are normal for digital products or goods of the same type and which the consumer may reasonably expect (Art. 8 (1) lit. a and b DCD; Art. 7(1) lit. a and d SGD). Equating these objective criteria with the subjective ones considerably affects the traditionally prevailing view that the content of the contract is essentially determined by the corresponding declarations of intent of the parties. In addition to the declared individual intent of the respective contracting parties, standardised criteria, in particular reasonable consumer expectations, now have equal status.

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[19] R. SCHULZE, *Die Digitale-Inhalte-Richtlinie – Innovation und Kontinuität im europäischen Vertragsrecht*, cit. 709; R. SCHULZE, F. ZOLL, *European Contract Law*, cit., pp. 208, 249.

[20] R. SCHULZE, F. ZOLL, *European Contract Law*, cit., 43, 58; F. ZOLL, *Rekojmia: odpowiedzialnosc sperzedawcy*, Warsaw, 2018, Ch. II, para. 1.II.

[21] 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 (CSD) [1999] OJ L 171.

This objectification of contractual conformity by no means completely displaces freedom of contract from its central role in the conclusion of the contract. But it relativises the determination of the content of the contract by the corresponding declarations of intent of the parties as a traditional core element of contractual freedom in favour of factors outside of these declarations of intent when concluding the contract. This relativisation had already begun before through the inclusion of the objective criteria in Art. 2 CSD and furthermore through the consideration of public declarations of preceding links in the contractual chain (Art. 2 CSD; now Art. 8 (1) lit. b DCD; Art. 7 (1) lit. d SGD) [22]. However, with the equating of the objective criteria in the DCD and the SGD it now reaches a new level.

This approach combines the concern to compensate for presumed structural asymmetries in the relationship between the contracting parties with an adaptation of contract law to the considerably increased importance of mass contracting in contract practice. The conventional model of the contract individually negotiated by the parties in each specific case often no longer corresponded to the reality of mass production, mass distribution and the corresponding mass contracting in the 20th century, which includes a «standardisation» of both contract terms and customer expectations. In the course of digitisation, this standardisation has become the regular practice for concluding contracts on the internet, while the individual design of contract content and the process of concluding the contract is the exception[23].

In this respect, the objectification of the design of contractual obligations is in the context of a development that had already found expression at the European level, for example, before digitisation in the Unfair Terms Directive[24] and is now proving not to be limited to consumer law with the provisions on the control of contract terms in the

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[22] R. SCHULZE, F. ZOLL, *European Contract Law*, cit., 141 et seq.

[23] R. SCHULZE, T. ARROYO VENDRELL, *Standardisierte Verträge zwischen Privatautonomie und rechtlicher Kontrolle – eine Einführung*, in J. KINDL et al. (eds.), *Standardisierte Verträge - zwischen Privatautonomie und rechtlicher Kontrolle*, Baden-Baden, 2017, pp. 11, 12.

[24] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L 186/57.

Online Platform Regulation[25]. The rules on the control on contractual terms, like the objectification of contractual obligations, react to effects of standardisation in contractual practice, but with different objectives (the former by protecting a contracting party against the use of standardisation of contracts by the other party for its own unilateral benefit; the latter by using standardisation to protect a contracting party against contracts that are unilaterally designed for the benefit of the other party).

Against this background, the question also arises for the objectification of contractual obligations whether and, if so, in what way and to what extent the models of the «Twin Directives» should become as relevant beyond consumer law as the rules on the control of terms have become. While this question is still unanswered at the European level, at the national level German legislation has already given a positive answer: it has implemented the SGD in an extended manner and has incorporated a large part of the objective criteria of conformity with the contract with the same rank as the subjective criteria into the general law on sales, so that they are applicable to all sales contracts (§ 434 (2) and (3) BGB).

2.3. Trade in digital products and goods with digital elements

a) As far as specifically contracts for digital products and goods with digital elements are concerned, it should be emphasised foremost that a conceptual framework has emerged with the most recent Directives that can contribute to structuring future European legislation and case law beyond consumer law. This concerns the definitions of fundamental terms such as «digital content», «digital services», «goods with digital elements», «integration of digital content or digital environment» (Art. 2 DCD; Art. 2 SGD). They can be used far beyond the scope of the «Twin Directives» – also outside consumer law and even outside of contract law – in many areas of law that in some way deal with data in digital form or with digital services. Also, the potential

[25] Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services [2019] OJ L 95/25.

scope of application of, for example, the definitions of performance features such as compatibility, functionality and interoperability is not limited to contracts currently covered by the DCD and SGD. The same applies to terms that are not explicitly defined in the Directives, but whose content is clearly determined by provisions of the Directives, such as «supply of digital content or digital services» and «compliance with the obligation to supply» (Art. 5 DCD) or «continuous supply over a period of time», «single act of supply» and «series of individual acts of supply» (Art. 8 (2) DCD; Art. 7 (3) SGD). In this way, the future of European Private Law is provided with a basic set of guiding concepts.

b) Of far-reaching importance for the future development of European Private Law is also a provision which, at first glance, merely defines the scope of application of the DCD: According to Art. 3 (1) subpara. 2 DCD, this Directive shall also apply where the trader supplies or undertakes to supply digital content or a digital service and the consumer provides or undertakes to provide personal data to the trader. The rather technical definition contains the assessment that the provision of personal data has a similar value as the payment of a price[26]. This valuation reflects the immense importance of data in the digital age not only as a performance owed by the trader according to the respective contract, but also as a counter-performance on the part of the recipient of such a performance. It also substantially extends to many contracts that do not fall within the scope of the DCD. With regard to personal data, however, the classification as counter-performance is controversial[27]. Despite the reservations from the point of view of data protection, however, the importance that such data have obviously acquired as an object of trade in current contractual practice already speaks in favour of this understanding of personal data as counter-performance in the con-

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[26] For more details A. METZGER, *A Market Model for Personal Data: State of Play under the New Directive on Digital Content and Digital Services*, in S. LOHSSE et al. (eds.), *Data as Counter-Performance - Contract Law 2*.0?, Baden-Baden, 2020, p. 25 et seq.

[27] On the spectrum of opinions S. LOHSSE et al., *Data as Counter-Performance - Contract Law 2.0?*, cit.

text of private law[28]. It would be inconsistent to characterise the supply of personal data in the contractual relationship of two data traders as performance, but not in the relationship of the consumer to the trader as counter-performance.

This discussion on the classification of personal data as counter-performance confronts legal doctrine with the task of specifying the concept of contractual synallagma for European contract law with a view to the consequences of digitalisation. For the future development of European Private Law, therefore, personal data constitute a primary challenge in two respects: not only with regard to the system of property rights (as it has been the subject of a lively controversial discussion for some time)[29], but also with regard to contract law. The open questions about the position of rights to data between relative and absolute legal positions and correspondingly between the law of obligations and property law will require both areas of discussion to be considered in context.

c) If one takes a closer look at the structuring of contractual obligations in the «Twin Directives», the introduction of updating obligations stands out as an approach of particular importance for the future development of European contract law. In contrast to traditional sales law, the trader's liability for conformity with the contract does not end with the «passage of risk» (i.e. regularly with the delivery of the item). Rather, with regard to the contracts on digital products and on goods with digital elements, there are continuing obligations beyond this point to enable the customer to make reasonable use of the product for the period that can be expected. Although the legal nature of these updating

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[28] R. SCHULZE, F. ZOLL, *European Contract Law*, cit., para. 1 mn. 61; A. METZGER, *Dienst gegen Daten: Ein synallagmatischer Vertrag*, in *AcP*, 216, 2016, p. 817 et seq.

[29] C. VON BAR, *Shaping European Property Law: Observations about 'Things' as Objects of Property Rights*, in A. JANSSEN, M. LEHMANN, R. SCHULZE, *The Future of European Private Law*, Baden-Baden, 2023, p. 285 et seq.; J. DREXEL, *Legal Challenges of the Changing Role of Personal and Non-Personal Data in the Data Economy*, in R. SCHULZE, A. DE FRANCESCHI, *Digital Revolution – New Challenges for Law*, Munich, 2019, p. 19 et seq.; S. VAN ERP, *Management as Ownership of Data*, in S. LOHSSE et al., *Data as Counter-Performance - Contract Law 2.0?*, Baden-Baden, 2020, p. 77.

obligations is disputed in detail[30], the new approach can be understood as a «dynamisation» of obligations compared to the traditional sales law, which in a certain way brings the sales contract closer to the service contract.

Linked to this dynamisation of performance obligations is a corresponding design of the information obligations of the trader, so that his obligations with regard to updates form a «two-track» regime[31]. In addition, the differentiation between the «continuous supply over a period of time» and the «single act of supply or a series of individual acts of supply» has been introduced, which in the synopsis of SGD and DCD is also of importance for the burden of proof, the obligations in the event of termination and the modification (Art. 7 (3); 11 (3) SGD; Art. 8 (2), (3) and (4); 12 (2) and (3); 16 (1); 19 (1) DCD). It can therefore be considered as a structural element within the new European Contract Law[32]. Just like the «two-track» regime of the update obligations, this differentiation with regard to the continuous supply of digital products over a period of time is likely to form a pattern to which future legislation can refer beyond the scope of the recent Directives.

d) With regard to remedies, the «Twin Directives» combine a far-reaching orientation towards principles previously formed in the *acquis communautaire* (such as the regular primacy of subsequent performance over other remedies) with a number of new and partly different accents. For example, Art. 14 (2) and (3) DCD now grants the trader the right to choose the means to bring digital products into conformity (while Art. 13 (2) SGD continues to retain the consumer's right of choice for the sale of goods, as did formerly Art.3 (3) CSD). It is now

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[30] H. SCHULTE-NÖLKE, *Digital obligations of sellers of smart devices under the Sale of Goods Directive 771/2019*, in S. LOHSSE et al. (eds.), *Smart Products*, Baden-Baden, 2022, p. 47 et seq.; C. WENDEHORST, *The update obligation – how to make it work in the relationship between seller, producer, digital content or service provider and consumer*, in S. LOHSSE et al. (eds.), *Smart Products*, cit., p. 63 et seq.; A. JANSSEN, *The Update Obligation for Smart Products – Time Period for the Update Obligation and Failure to Install the Update*, in S. LOHSSE et al. (eds.), *Smart Products*, cit., p. 91 et seq.

[31] R. SCHULZE, F. ZOLL, *European Contract Law*, cit., Ch. 5, mn. 48.

[32] R. SCHULZE, *Die Digitale-Inhalte-Richtlinie – Innovation und Kontinuität im europäischen Vertragsrecht*, cit., pp. 695, 714.

also explicitly stated that the right to terminate the contract is to be exercised by means of a statement to the trader (Art. 15 DCD; Art. 16 (1) SGD). The termination of the contract is thus conceived as a formative right (*Gestaltungsrecht*) of a party[33] (in contrast to the former tradition in some Member States to bind the recission from the contract to a judicial decision). One of the most important innovations, however, is that the DCD contains a comprehensive regime of the legal consequences of the termination of a contract. Unlike most other provisions of the Directive, it sets out the mutual rights and obligations of trader and consumer.

In particular, this regime includes a number of new legal instruments that take into account the importance of data as the subject of performance obligations in the digital age. For example, it establishes the prohibitions on the use of data, the right to retrieve data, the blocking of access to data and the obligation to delete data (Art. 16 and 17 DCD). A number of problems are likely to arise in the interpretation and application of these new concepts in practice[34], so that the sufficiently established dogmatics for this matter can only emerge through future case law and the doctrine. However, the basic patterns of these dogmatics will not only suitable for apply within in the scope of the DCD, but may gain more general significance for the consequences of the termination of contracts on data.

3. Effects in National Laws

All of these changes in the Union's Contract Law result in a corresponding design of the law that is applicable in the Member States of the EU – directly, insofar as they are contained in regulations of the EU; or through transposition into national law, insofar as they are provisions in Directives. As far as the latter are concerned, however, the extent and the forms of the effects in the Member States differ as far as

[33] On rescission as a «formative right» see e.g. R. SCHAUB, in G. DANNEMANN, R. SCHULZE (eds.), *German Civil Code I*, Munich - Baden-Baden, 2020, § 437, mn. 9.

[34] R. SCHULZE, F. ZOLL, *European Contract Law*, cit., Ch. 6, mn. 132 et seq.

they depend on the approach of the respective national legislator in the implementation.

For the implementation of the «Twin Directives» this results in a complex picture[35]. The spectrum of approaches in the Member States ranges from the separate implementation of each of the two Directives in individual legislative acts, to the combined regulation of both in a special law, and to the integration of the implementing provisions for one or both Directives into national the Law of Obligation Act or Civil Code. In addition, in contrast to close adherence to the wording of the Directives in some Member States, other Member States have chosen an intertwining with independently developed concepts and/or an extended implementation of the requirements of the Directives beyond the scope of the Directives. For example, Germany has adopted a large part of the objective criteria provided by the SGD for conformity with the contract and the equation of these criteria with the subjective ones into the General Sales Law to extend them to all sales contracts (§ 434 (3) BGB). In addition, the German legislator has adapted the systematics of the BGB to the changes of the digital age by inserting a new title on «Contracts on Digital Products» into the General Law of Obligations to implement the provisions of the DCD (§§ 327 et seq. BGB) [36].

Aside from this direct impact of the adoption of the provisions transposing the Directives, however, the foreseeable further influences on national laws must not be ignored. On the one hand, in view of the growing importance of digital products and trade with data, legislation in many Member States will have to deal more and more with the question of whether related matters should be regulated around the provisions transposing the Directives and whether the Directives can also provide models for this (for example, with regard to B - B contracts on the supply of digital products or the updating obligations for B - B sales contracts on goods with digital elements). On the other hand, the potential influence on the development of the law in the Member States in

[35] For more details on the following A. De Franceschi, R. Schulze (eds.), *Harmonizing Digital Contract Law*, Baden-Baden, 2023; H.-W. Micklitz, *The Full Harmonization Dream*, in *EuCML*, 2022, p. 117 et seq.

[36] For these and other influences on the German Civil Code R. Schulze, *The German Civil Code on its Way into the Digital Age*, in *EuCML*, 2022, p. 192.

ways other than legislation should not be underestimated – the influence on the basis of private autonomy and through case law. In many Member States, the practice of contracting and the case law – and doctrine dealing with it – may find inspiration and role models for the terminology and for solving legal problems in some new areas by taking into account the provisions transposing the Consumer Rights Directives rather than in the previously existing national law which has so far only insufficiently addressed such new subjects. Not only the definitions of basic terms for contracts in trade with data, but also, for example, criteria for the compliance with the obligation to supply[37] or legal instruments regarding the consequences of the termination of the contract can in this way also find their way into the law of the Member States outside the scope of the Directives. Such «creeping harmonisation» will not always be unambiguously and precisely recognizable. However, in its broad effect it could reach far beyond legislative harmonisation and prove to be an important factor in the «Europeanisation» of law in the Member States.

4. Structural Shifts

4.1. Increasing Importance of EU Private Law

The prominent role of digital matters in private law also leads to a shift in the balance between European and national law. As has been shown for contract law and is becoming apparent for non-contractual liability[38], the new technologies and the market conditions and risks associated with them often suggest that legal responses should be sought at the European level. This is also likely to apply to other areas of law, from intellectual property law to banking law and capital markets law. In this respect, there seems to be a foreseeable tendency that

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[37] For more details R. SCHULZE, F. ZOLL, *European Contract Law*, cit., Ch. 5 mn.16 et seq.

[38] See S. LOHSSE et al. (eds.), *Liability for Artificial Intelligence – Münster Colloquia on EU Law and the Digital Economy* (forthcoming 2023).

the challenges of the digital age will lead to a considerable growth of European Contract Law and other areas of European Private Law.

This strengthening of European Private Law comprises a quantitative and a qualitative component. In quantitative terms, new matters will be included (such as contracts on digital products). In qualitative terms, new concepts, legal institutions and principles are being developed (such as update obligations, integration into the digital environment or the right to retrieve data).

Moreover, recent legal acts in these areas indicate that the regulatory intensity of European legislation is increasing. This has been evident for some time with the trend to move from minimum harmonisation to full harmonisation. A significant example of this is the Consumer Rights Directive (CRD) of 2011, which replaced the minimum harmonisation of the predecessor directives with full harmonisation of these (and other) matters (see Art. 4 CRD). The full harmonisation in the areas of consumer contracts on digital products and consumer sales through the «Twin Directives» has recently confirmed this trend.

However, it is questionable whether the focus on full harmonisation will continue to the same extent in the future or whether the enactment of Regulations to establish European uniform law will increase in situations where minimum harmonisation is insufficient with regard to the regulatory objectives[39]. Looking at the legislation of the past few years, it can already be observed that the EU seems to be less reluctant than before to use the instrument of Regulation even in areas of private law that have considerable relevance for national law systems (such as contract law). This is shown in particular by the Geoblocking Regulation, the Portability Regulation and the Online Platform Regulation, which, as mentioned, have created a considerable body of directly applicable Union law with relevance for contract law. In the dualism of national law and Union law, the uniform law of the EU has thus also gained in importance compared harmonised national law. For the future structure of private law in Europe, this suggests the assumption that, in addition to national private law (including its harmonised parts), the directly

[39] Critical to full harmonisation H.-W. MICKLITZ, *op. cit.*, p. 117 et seq.

applicable uniform law of the Union will be a determining factor more than in the past.

4.2. Impact on National Codifications

This increase in the importance of European Private Law does not mean, however, that EU legislation would displace national legislation and especially national codifications from their role as the main sources of private law in most Member States. Such a complete change is out of the question for the foreseeable future not only with regard to the scope of European legislation, but also with regard to its character. This legislation has remained «fragmented» individual legislation even in the transition to the digital age; and a fundamental change in this respect is not discernible for the near future. European Private Law is therefore also in the new phase of its development far removed from the ideal of a «European Civil Code», which was a leitmotif for some of the research approaches in the previous phase[40].

Nevertheless, the emerging growth of European Private Law in the digital age is significantly changing the character of national codifications. Originally, according to the «classical» codification model, national Civil codes were supposed to completely and exhaustively regulate civil law in the country concerned[41]. Today, however, they are only one (albeit extensive) source of law alongside another source – the law made by the EU that not only harmonises national private law, but stands alongside it as directly applicable Union law. In case of conflict, the application of this other source even takes precedence[42]. In this respect, the national civil codes no longer assume the «monopolistic» role that was originally intended for them in the time of the nation state.

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[40] In particular the Study Group on a European Civil Code; overview of its work in C. VON BAR et al., *Introduction*, in C. VON BAR et al. (eds.), *Principles, Definitions and Model Rules of European Private Law*, Oxford, 6th ed., 2009, pp. 1, 33.

[41] Detailed on the concepts of codification B. MERTENS, *Gesetzgebungskunst im Zeitalter der Kodifikationen. Theorie und Praxis der Gesetzgebungstechnik aus historisch -vergleichender Sicht*, Tübingen, 2004.

[42] Judgment of 5 February 1963, *van Gend & Loos*, C-26/62, EU:C:1963:1.

In yet another respect, the growth of European Private Law can change the character of national codifications: The implementation of European Directives – and even more their extended implementation, the «gold plating» – can significantly influence the contents of these codifications. This is evident in Germany, for example, because numerous provisions of European Directives have been implemented there for 20 years within the Civil Code and because basic provisions of the Law of Obligations have been adapted to European models (a very far-reaching «gold-plating»)[43].

In other EU Member States, the influence of European law on national civil codes is currently much weaker. In particular, in most of them the extensive EU provisions on consumer law have predominantly not been implemented in the Civil Codes, but in separate consumer codes (such as the *Code de consommation* in France or the *Codice del consumo* in Italy). But it remains to be asked how this will develop in the future, when even more European patterns beyond consumer law will shape the legal responses to the challenges of the digital age. Should important items such as the specific contractual obligations regarding digital products (or more generally: the obligations in trade with data)[44] and such as the rules for the use of online platforms not be included in the Civil Codes? The consequence would probably be a progressive loss of importance of these codes and, in a way, a «decodification». The alternative would be to eventually incorporate some new legal matters including the related provisions based on European Directives in the Civil Codes, at least in part. This would result in a certain «Europeanisation» of the Codes and, in a way, a «recodification». One way or the other, a significant change in the character of the national codes is to be expected as a consequence of the increased importance of cross-border Regulations through European law in the digital age.

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[43] R. SCHULZE, *Recent Influences of the European Acquis – Communautaire on German Contract Law*, in *NTBR*, 17, 2022, p. 132 et seq.

[44] On the economic and legal importance of this subject H. ZECH, *Data as Tradeable Commodity*, in A. DE FRANCESCHI (ed.), *European Contract Law and the Digital Single Market*, Cambridge, 2016, p. 51 et seq.; S. LOHSSE et al. (eds.), *Trading Data in the Digital Economy*, Baden-Baden, 2017.

5. Conclusions

The example of the «Twin Directives» on the supply of digital content and services and on the sale of goods has shown that this new legislation contains numerous approaches and patterns that can serve as models for the terminology and principles of private law in the digital age far beyond the scope of the respective individual legal act. In this respect, some basic features of a European Contract Law of the digital age are already recognisable such as the inclusion of data as the subject of performance and of counter-performance; the focus on objective requirements of the conformity with the contract (including the «fit for purpose-test» and the «legitimate expectations») and a corresponding standardisation of the profile of contractual obligations; the definition of specific performance features for the distribution of digital products and the sale of goods with digital content (e.g. compatibility and accessibility) and the introduction of continuing obligations to maintain the functionality of such products and goods (in particular update obligations); the conceptual dualism of failure to perform (e.g. to supply the digital content) and non-conformity with the contract and of the respective legal consequences; the design of the termination of the contract as a «formative right» and the provision of specific instruments to handle terminated contracts on data; and much more.

In addition to the «Twin Directives», other recent legal acts have also marked out starting points for the future development of European Private Law, as can be seen inter alia from the example of the Online Platform Regulation, which has established the control of contract terms beyond consumer law and has underlined the role of the principles of transparency and good faith for European Private Law as a whole. Connected with that, a broad conceptual framework has already emerged with numerous definitions of fundamental terms set out in the recent legislation of the EU (from basic terms such as «digital content», «online intermediary services» and «general terms and conditions» to individual performance features in the distribution of digital products and of goods). Legal doctrine and case law will have to deal with this rich supply of terminology for the digital age in the near future; and the

European and national legislators will probably find numerous clues in it for the terminology of future legal acts.

This legislation with the aim to overcome the legal challenges of the digital revolution is currently leading – and will probably lead even more in the future – to a stronger role of European Private Law in relation to national law with regard to the extent, the innovative approaches and the intensity of the Regulations. In the latter respect, a trend is emerging towards both to move from minimum harmonisation to full harmonisation as well as a considerable increase of European uniform law. If this development continues, the dual approach to «Europeanise» areas of Private Law in the view of digital challenges will have an even greater impact than now: Directly applicable uniform law of the Union will increasingly establish itself as the second important component of private law in the EU alongside national private law; and national private law in turn will include more and more fully harmonised parts. In addition, it can be assumed that the conceptual patterns of recent European legislation on digital matters can also provide inspiration for legislation, case law and contractual practice in the Member States beyond the scope of the relevant legal acts. This could probably result in a «creeping Europeanisation», especially in areas where corresponding national models do not yet exist.

Despite this increasing importance, there are no signs that the *acquis communautaire* in the field of private law will overcome its «fragmentary» character in the new phase of its development. Rather, the most recent legal acts suggest that EU legislation will continue to be bound up with the individual policies and sectors and will limit itself to focusing the specific objectives of each legal act (or at most will try to coordinate a few closely related individual legal acts with each other like the recent «Twin Directives» in contract law and in tort law). However, as the scope and intensity of European legislation grows, so does the task of ensuring coherency of the *acquis communautaire*, in particular of ensuring the consistency of the concepts and values it contains. This is likely to be essential to create an effective regulatory context, to offer orientation for legal development in the Member States and to convince citizens of the legal solutions at the European level. Given the apparent weaknesses of European legislation in this regard, it therefore seems to

remain a challenge for legal doctrine and legal practice to contribute as far as possibly to this coherency of the European Private Law, as before, so also in the digital age.

THE 2019 EU DIRECTIVES AND ONLINE CONTRACTING: A BALANCE

Fernando Gómez Pomar[*]

TABLE OF CONTENTS: *1. The Digital agenda and the 2019 EU Directives on Contract Law. 2. Contractual issues in the digital environment. 2.1. Digitalisation of the contract's subject matter. 2.2. Digital environment and contractual process: new factors modifying well-known problems. 3. The 2019 EU legal instruments and the challenges of the digital contracting environment. 4. Conclusion.*

ABSTRACT: *The chapter provides an assessment as to the way in which the 2019 EU consumer Directives have comprehensively responded to the challenges of contracting in the digital environment. Concerning mainly Directive 2019/771 the balance is far from being fully satisfactory. Although some dimensions of contracting over goods with digital elements have been considered, many issues raised by online contracting have been overlooked. The other 2019 Directives, although perhaps more attentive to some of these problems, have not covered them in full, and have been unable to display new ways of tackling informational distortions in digital contracting. The DSA and DMA have not filled the gap, although a full analysis of the latter is for another day.*

1. The Digital agenda and the 2019 EU Directives on Contract Law

Arguably, one of the defining features of our times, among others with perhaps a more ominous character, is the availability of worldwide communication and connectivity mediated by digital technology. The digital transformation affecting social and economic activity dominates the European Union's legislative action on Private Law matters in recent years. Very recent pieces of legislation and initiatives bear witness to the key position of the digital agenda in EU law-making and also of the concerns raised among European policymakers by artificial intelli-

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gence (AI): 2022 Digital Markets Act[1], 2022 Digital Services Act[2], and on the expected disruptions arising from the expansion of AI, the 2021 Proposal on an AI Act[3], 2022 Proposal Directive on civil liability for AI[4], among others.

In this paper, however, I do not intend to delve on the 2021-2022 wave of digital rules and AI proposals, but on the shortcomings, when confronting the digital environment, to be found in the 2019 core Directives on Contract Law adopted on May 20, 2019: Directive 2019/771 on certain aspects concerning contracts for the sale of goods[5] (hereinafter «Directive 2019/771») and Directive 2019/770 on certain aspects concerning contracts for the supply of digital content and digital services[6] (hereinafter «Directive 2019/770»). These two pieces of legislation were presented as fundamental milestones to bring contractual reg-

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[1] Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (O J L 265/1, 12.10.2022), henceforward «DMA».

[2] Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on September 2022 on a Single Market for digital services and amending Directive 2000/31/EC (O J L 277/1, 27.10.2022), henceforward «DSA».

[3] Proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence, COM/2021/206 fin., 21.04.2021.

[4] Proposal for a Directive of the European Parliament and of the Council on adapting non-contractual civil liability rules to artificial intelligence, COM/2022/496 fin., 28.09.2022.

[5] Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC (O J L 136/28, 22.05.2019). In March 2023, the Commission has approved a Proposal for a Directive of the European Parliament and of the Council on common rules promoting the repair of goods that would amend Directive 2019/771 (COM/2023/155 fin.), The proposed amendment, however, does not hinge around the digital dimensions of Directive 2019/771, but its sustainability consequences. Sustainability is clearly another prominent axis of EU legislative action in recent years.

[6] Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services (O J L 136/1, 22.05.2019).

ulation in line with the world of e-commerce and to take bold steps towards the digital single market[7].

Both Directives have already received important attention in the European legal literature[8]. Commentators have analysed their main legal policy options in several dimensions (level of harmonisation, extent of application, scope of their provisions, relationship between the two Directives), as well as the legal solutions (conformity criteria, remedies in favour of the consumer) adopted in each of them.

Directive 2019/771 aimed to find its justification in the – essential and unavoidable, according to its recitals – adaptation of the regulation of markets in consumer goods to developments in the digital environment and e-commerce. It is presented (Recital 3) as a fundamental tool

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[7] Internet sales, however, continue to represent only a comparatively minor proportion of total economic exchanges between retailers and customers in the economy. In the United States, they accounted for 14,8% of total retail sales in the third quarter of 2022 (*US Census Bureau* data, ec_current.pdf (*census.gov*)). One would conjecture that in the EU they are likely to represent a somewhat smaller percentage than in the US (not necessarily in every Member State, but in the aggregate of the EU).

[8] J. MORAIS CARVALHO, *Sale of Goods and Supply of Digital Content and Digital Services – Overview of Directives 2019/770 and 2019/771*, in *Journal of European Consumer and Market Law*, Vol. 8:5, 2019, p. 194; K. SEIN, *"Goods with digital elements" and the Interplay with Directive 2019/771 on the Sale of Goods*, in *SSRN Electronic Journal*, 2020, p. 1 (*https://ssrn.com/abstract=3600137*); K. SEIN, G. SPINDLER, *The new Directive on Contracts for the Supply of Digital Content and Digital Services - Scope of Application and Trader's Obligation to Supply - Part I*, in *European Review of Contract Law*, Vol. 15:3, 2019, p. 257; K. SEIN, G. SPINDLER, *The new Directive on Contracts for the Supply of Digital Content and Digital Services - Scope of Application and Trader's Obligation to Supply - Part 2*, in *European Review of Contract Law*, Vol. 15:4, 2019, p. 365; L. ARNAU RAVENTÓS, *Remedios por falta de conformidad en contratos de compraventa y de suministro de elementos digitales con varias prestaciones*, in E. ARROYO AMAYUELAS, S. CÁMARA LAPUENTE (Dirs.), *El Derecho privado en el nuevo paradigma digital*, Madrid-Barcelona-Buenos Aires-Sao Paulo, 2020, p. 79; B. GSELL, *Time limits of remedies under Directives (EU) 2019/770 and (EU) 2019/771 with particular regard to hidden defects*, in E. ARROYO AMAYUELAS, S. CÁMARA LAPUENTE (Dirs.), *op. cit.*, p. 101; J. MORAIS CARVALHO, *Introducción a las nuevas Directivas sobre contratos de compraventa de bienes y contenidos o servicios digitales*, in E. ARROYO AMAYUELAS, S. CÁMARA LAPUENTE (Dirs.), *op. cit.*, 2020, p. 31; C. TWIGG, C. FLESNER, *Conformity of Goods and Digital Content/Digital Services*, in E. ARROYO AMAYUELAS, S. CÁMARA LAPUENTE (Dirs.), *op. cit.*, p. 49.

for achieving the digital single market and considers technological evolution, specifically the proliferation of goods with digital elements in consumer markets, an essential factor in the need for change in the European regulatory framework. These elements, undoubtedly, also provided the *raison d'être* of the «sister» Directive 2019/770, since the digital scenario squarely dominates its material scope. Directive 2019/771, on the other hand, applies to all movable properties, including those with and without digital aspects, and to all channels of marketing goods, not just those based on digital communication and contracting[9].

I will argue in this chapter that Directive 2019/771 does not appear to have properly addressed many of the issues that its promoters imagined would be improved by the new rules. Specifically, the challenges of the digital environment in contracts for consumer goods. This pessimistic view applies also to Directive 2019/770, since Directives share a large portion of their content and many of the omissions concerning significant digital market problems can be found in both instruments.

2. Contractual issues in the digital environment

Digital technology has profoundly impacted many and different aspects of our life, from leisure to communications. It has deeply transformed work in practically every sector of activity and, more recently, as evidenced during the times of the pandemic, education at all levels. Contracts and contractual procedures, inevitably, have not been im-

[9] Recital 9 of Directive 2019/771 argues in favour of the broad scope of its provisions – covering all channels for the sale of products to consumers, whether digital or not – on ground of preserving a level playing field and a degree of uniformity in the laws regulating contracts concluded on the various contractual channels. This differs from the European Commission's earlier plan, which advocated a separate legal instrument to govern online sales and transactions. The initial position was abandoned in 2017 in favour of a unified approach that included both face-to-face and online sales. Most Member States asked for such a change in order to avoid the fragmentation that would result from the adoption of two parallel regimes for the sale and purchase of the identical consumer products depending on the contracting channel.

mune to this influence, and the impact of digital technology on contracting has been and continues to be sizable.

2.1. Digitalisation of the contract's subject matter

On the one hand, digital technologies have vastly expanded what is the objective domain of consumer contracts (and also B2B contracts, to be sure). Digital services and content, or content connected to digital networks, have become the object of innumerable contracts that many consumers enter into every day or on a regular basis. Many more consumers are able to reap the advantages from services and entertainment wholly or partially shaped by digital technology. New product categories including digital elements or dimensions that are required for their functioning or to provide value to customers have also emerged.

It is undeniable that the 2019 European legislator intended to pay close attention to the dimensions linked to the digital transformation of consumer contracting. This is especially clear in view of Directive 2019/770, focused on the contracts that channel the supply of digital content and services from businesses to consumers. However, it also accounts for a significant portion of the changes introduced in the regime of Directive 1999/44 by Directive 2019/771: goods with digital elements are prominent among the new feasible subject matters of the sale of consumer goods and several dimensions of «smart goods» are specifically added to the rules on conformity to the contract (updates, compatibility with the consumer's digital environment). One of the issues that has attracted significant attention from the legal literature dealing with both Directives is whether the digital elements of such goods are subject to one or the other Directive[10].

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[10] K. SEIN, *What Rules Should Apply to Smart Consumer Goods? Goods with Embedded Digital Content in the Borderland Between the Digital Content Directive and "Normal" Contract Law*, in *Journal of Intellectual Property, Information Technology and Electronic Commerce Law*, Vol. 8:2, 2017, p. 97; J. MORAIS CARVALHO, *Sale of Goods and Supply of Digital Content and Digital Services – Overview of Directives 2019/770 and 2019/771*, in *Journal of European Consumer and Market Law*, Vol. 8:5, 2019, p. 194; K. SEIN, *"Goods with digital elements" and the Interplay with Directive 2019/771 on the Sale of Goods*, in *SSRN Electronic Journal*, 2020, p. 1 (*https://ssrn.*

2.2. Digital environment and contractual process: new factors modifying well-known problems

The digital economic and social transformations are not exhausted, in the contractual sphere, with the digitalisation of the contract's subject matter (goods or services)[11]. They encompass additional dimensions of contracting, many of which are extremely significant to Contract Law as well as Consumer Sales Law.

Contracting through digital means has enabled consumers' options to grow in amazing ways – inconceivable only two decades ago. Not just in terms of what goods and services we purchase, but also in terms of who offers them to us and how we go about purchasing them. It is almost miraculous that millions of individuals all around the world buy millions of items they cannot test or check first-hand through online contracting every day, and that they do so by dealing with sellers who are frequently anonymous – or unknown, at least – and situated in remote – very often, also foreign – locations.

Contracting in the digital environment has led to a significant extension of consumer markets, allowing for the entry of new sellers and enabling exchanges of products and services that were previously not possible due to high transaction costs and geographical distance separating the contracting parties. These effects on consumer markets are not just a result of the decrease in communication and contracting costs brought about by e-commerce, however essential the aspects related with the reduction in contractual costs may be (and they indeed are). The digital environment introduces a new set of fundamental innova-

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com/abstract=3600137); K. SEIN, G. SPINDLER, *The new Directive on Contracts for the Supply of Digital Content and Digital Services - Scope of Application and Trader's Obligation to Supply - Part I*, in *European Review of Contract Law*, Vol. 15:3, 2019, pp. 269-270.

[11] Despite the fact that the European legal literature has mostly concentrated on these issues, with much less attention paid to others: C. WENDEHORST, *Sale of Goods and supply of digital content -two worlds apart? Why the law on sale of goods needs to respond better to the challenges of the digital age*, *Study for the JURI Committee of the European Parliament*, Brussels, 2016 (available at *https://www.europarl.europa.eu/cmsdata/98774/pe%20556%20928%20EN_final.pdf*, last accessed on 6 September 2023).

tions for consumer contracting, all of which are connected to other aspects of the contractual experience.

Online contracting alters the nature and severity of contractual challenges associated with information asymmetries between sellers and purchasers as well as the remedies for them. This is related, naturally, to adverse selection – i.e., buyers' lack of information enhances the advantage of low-quality vendors. But also to moral hazard – buyers' insufficient level of information discourages sellers from engaging in costly actions to improve the quality and value – to the buyer – of the item being offered to the consumer.

The inability of the consumer to directly observe the good she is purchasing in the digital environment, combined with the proliferation of heterogeneous sellers located in remote, even practically inaccessible – from the perspective of the consumer – locations, aggravates in principle information asymmetries when compared to consumer sales in the physical or brick-and-mortar environment. On the other hand, the heterogeneity, distance, and, often, foreign character of many sellers presumably impairs the practical effectiveness of traditional mechanisms to bridge information asymmetries in consumer sales and purchases, as it seems intuitively more difficult and costly for most consumers in the digital scenario to identify the seller and to obtain redress (both trough legal and non-legal channels) for their infringed rights.

Thus, in the realm of online contracting, legal assurances of conformity encounter greater practical barriers than in face-to-face business, where the supplier and the customer are often in close proximity. Anyone who has purchased goods from an online marketplace[12] realises

[12] This is the «official» name of Directive 2019/2161 on better enforcement and modernisation of consumer protection rules («Directive 2019/2161»), Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules (O J L 328/7, 18.12.2019), amending the Article 2 of Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the

the difficulties in exercising the remedies corresponding to the legal warranty mandated by EU Law against a seller who lives thousands of miles away and is likely ignorant not only of the content of the legal warranty but also of the law applicable to the contractual relationship.

Given the anonymity and small scale of many online retailers, a guarantee arising from the terms of the contract appears to face significantly more hurdles than those in the non-virtual world. The same holds true for business reputation as mechanism to induce contract quality: reputation is the other standard mechanism that, by reducing adverse selection and moral hazard, allows buyers with less information than the seller to be reasonably confident that they will receive goods possessing the desired quality and performance. Again, geographical remoteness, lack of familiarity with sellers, and the lower scale and size of vendors enabled by the digital environment make «traditional» business reputation a less effective tool for overcoming information asymmetries between sellers and buyers.

However, in the digital domain, certain elements work in the opposite direction and can – and, to a varied but observable extent, in fact do – ameliorate the asymmetric information issue that afflicts consumer markets. Two in particular stand out.

The first concerns the role of online platforms[13] in the sale of consumer goods and services. Often they do not act and do not appear as the direct contractual counterparties to the consumer, that is, they do not undertake in the online agreement the obligation to deliver the item or supply the digital content or service[14], these platforms are, at least not obviously and uniformly, not typically regarded «sellers» (within the meaning of Directive 2019/771) or «traders» (for the purposes of

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European Parliament and of the Council (O J L 304/64, 22.11.2011), henceforward «Directive 2011/83».

[13] The legal denomination in Article 3.1.18 of Directive 2011/83, paragraph introduced by Directive 2019/2161, is «provider of an online marketplace».

[14] J. SÉNÉCHAL, *Art. 2*, in R. SCHULZE, D. STAUDENMAYER, *EU Digital Law*, Baden-Baden, 2020, p. 50, in the sense that the provisions of the Directive do not apply to the platform if it operates as an intermediary between the direct supplier of the product or service (it refers to Directive 2019/770, but the conclusion would be the same, a fortiori, for the sister Directive 2019/771).

Directive 2019/770). However, it is clear that platforms have an important vested interest in consumers relying upon the quality of the goods and services offered in the contracting environment they provide: the more buyers look to the platform for goods and services, the more sellers will come to sell there (and vice versa), and the more transactions will occur. In short, the more appealing the platform, the higher the predicted income for the platform's owner[15].

As a result, the platform may be encouraged to use the tools at their disposal to ease some of the contractual problems arising from information asymmetries between sellers and purchasers. For example, the platform is able to supervise the behaviour of sellers or service providers (or at least part of it) by designing and deploying digital tools or by conducting random checks on the performance of the sellers. The platform can set up cheap and effective mechanisms to channel buyer complaints by instituting internal «sanctions» (suspension or expulsion from the platform[16], withholding of amounts due by the platform to the sellers, disciplining sellers through contractual monetary penalties) in cases of inattention or lack of adequate resolution to consumer complaints.

There is evidence that both approaches are able to reduce moral hazard (inappropriate behaviour by sellers or service providers) and adverse selection (the substitution of sales from high-quality sellers by those of lesser quality ones)[17]. However, the internal platform buyer

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[15] The (positive) network effect in economics refers to a good or service which becomes more appealing the more it is used. For its application to digital platforms, P. BELLEFLAMME, M. PEITZ, *Platforms and network effects*, in L. CORCHÓN, M. MARINI (eds.), *Handbook of Game Theory and Industrial Organization II: Applications*, Cheltenham-Northampton, 2018, p. 286; P. BELLEFLAMME, M. PEITZ, *The Economics of Platforms. Concepts and Strategy*, Cambridge, 2021, p. 17.

[16] Although platforms are bound to certain obligations regarding the suspension or termination of their services to sellers: Article 4 of Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services (D O L 186/57, 11.07.2019), henceforward «Regulation 2019/1150».

[17] M. LIU, E. BRYNJOLFSSON, J. DOWLATABADI, *Do digital Platforms Reduce Moral Hazard? The Case of Uber and Taxis*, in *Management Science*, Vol. 67:8, 2021, p. 4665; M. ROSSI, *How Does Competition Affect Reputation Concerns? Theory and*

protection systems that do not entail costs to opportunistic sellers beyond future reduced sales or lower prices may have the opposite effect and reduce consumer welfare: if consumers feel «more protected» in their purchase, their willingness to pay increases, which may raise the number of strategic sellers who offer lower quality than buyers expect[18].

The second mechanism is based on reviews, comments, and opinions on items or sellers provided by users themselves. If the seller rankings and users' evaluations available to new customers online give sufficiently accurate indications of the quality of a given seller (quality that otherwise would be very hard to discern for a new customer), the system mitigates the information problem that affects online buyers. Furthermore, the larger the amount, variety, speed, and availability of data on sellers that consumers can access, the greater the corrective effect on information asymmetries, as network effects play a role here as well. There is a wealth of evidence[19] on how various techniques for evaluating users and categorising vendors based on those ratings mitigate both decrease adverse selection and moral hazard problems. Many of these tools are in fact implemented by digital platforms[20].

Evidence from Airbnb, in *CESifo Working Paper*, No. 7972, 2019; X. HUI, M. SEEDI, Z. SHEN, N. SUNDARESAN, *Reputation and Regulations: Evidence from eBay*, in *Management Science*, Vol. 62:12, 2016, p. 3604.

[18] H. CAI, G. JIN, C. LIU, L. ZHOU, *More Trusting, Less Trust? An Investigation of Early E-commerce in China*, in *National Bureau of Economic Research Working Paper*, No. 18961, 2013 (*http://www.nber.org/papers/w18961*).

[19] There are several papers that synthesise this body of evidence: S. TADELIS, *Reputation and Feedback Systems in Online Platform Markets*, in *Annual Review of Economics*, Vol. 8:1, 2016, p. 321; M. ROSSI, *Asymmetric Information and Review Systems: The Challenge of Digital Platforms*, in J.J. GANUZA, G. LLOBET, *Economic Analysis of the Digital Revolution*, Madrid, 2018, p. 47; P. BELLEFLAMME, M. PEITZ, *Inside the Engine Room of Digital Platforms: Reviews, Ratings and Recommendations*, in *École d'Économie d'Aix-Marseille Working Paper*, No. 06, 2018, p. 340. See also P. BELLEFLAMME, M. PEITZ, *The Economics of Platforms. Concepts and Strategy*, Cambridge, 2021, p. 41.

[20] Some of the most relevant studies are: C. NOSKO, S. TADELIS, *The limits of reputation in platform markets: An empirical analysis and field experiment*, in *NBER Working Paper*, No. 20830, 2015; X. HUI, M. SEEDI, Z. SHEN, N. SUNDARESAN, *Reputation and Regulations: Evidence from eBay*, in *Management Science*, Vol. 62, 2016, p. 3604;

Nevertheless, empirical evidence shows that user rating and scoring mechanisms – with greater or lesser intervention by platforms and/or sellers – face significant problems related to the incentives for users to rate and score, the reliability of the ratings and rankings, and consumer understanding of the meaning and significance of the ratings. Indeed, it is clear that incentives to make informative ratings are frequently lacking. Moreover, there is a user bias in favour of positive ratings – due to a variety of factors ranging from fear of retaliation in the form of a negative rating to the psychological cost of an adverse reaction: very often the rating systems have very high averages and medians, ratings are distorted by providers and sellers, and that users are driven by the inertia of following the others' recent line of rating.

What the empirical evidence concludes is that the reputational dynamics created by user rating and scoring mechanisms are critical to the functioning of online markets for consumer goods and services[21]. However, the evidence concerning the undesirability use of positive economic incentives offered by sellers to consumers who leave an informative rating or opinion seems to be lacking, as long as the incentive is guaranteed to be independent of whether the rating is positive or negative[22], which would seem feasible only when there is a third party that effectively verifies the neutrality of the incentive to the favourable or unfavourable nature of the rating.

On the other hand, there is some evidence that «warranty» mechanisms (the existence of protection or compensation for dissatisfied buyers) and reputational mechanisms based on seller ratings and rankings are substitutes rather than complements. In other words, each mecha-

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T. KLEINT, C. LAMBERTZ, K. STHAL, *Market Transparency, Adverse Selection and Moral Hazard*, in *Journal of Political Economy*, Vol. 124:6, 2016, p. 1677.

[21] See above note 15.

[22] L. LI, S. TADELIS, X. ZHOU, *Buying Reputation as a Signal of Quality*, in *Rand Journal of Economics*, Vol. 51:4, 2020, p. 965. Regulation 2019/1150 does not restrict economic incentives for rankings and classifications; rather, it requires suppliers to understand how they function and what criteria are used: «Where the main parameters include the possibility to influence ranking against any direct or indirect remuneration paid by business users or corporate website users to the respective provider, that provider shall also set out a description of those possibilities and of the effects of such remuneration on ranking, […]» (Article 5.3).

nism appears to reduce (rather than improve) the efficacy of the other in ameliorating contractual problems associated with buyers' informational inferiority when compared to sellers[23].

In short, when we move from the physical to the online world, the contractual problems that warranties in the sale of consumer goods and services – the core instrument in Directive 2019/771 and Directive 2019/770 – seek to address, at least those related to information asymmetries, undergo significant changes. And this is the case regardless of whether or not the good that is the subject matter of the contract itself has digital elements or lacks any such dimension.

Yet, there is more. The digital contracting environment intensifies several additional features – or pathologies, if one so prefers – of business-to-consumer interactions. The first of them is the «personalisation» of contractual connections, namely those that a customer may have in the future with a vendor from whom she has previously purchased, or perhaps with many other vendors. Economic interactions in a digital environment leave a trail that can be easily used to tailor contract offers and contractual terms and conditions of future exchanges to the consumer's characteristics and preferences – including biases, vulnerabilities, and willingness to pay for various goods and services.

A digital contractual interaction, indeed, makes it simpler than in the physical world to connect the past with the future and to guarantee that various contractual transactions are no longer separate and unconnected episodes. With the support of big data, the digital trace of our contracts and prior digital activity makes it possible to create consumer profiles that allow the future economic ties in the digital environment to become customised.

Personalisation, to be sure, is not necessarily detrimental to consumer welfare. Consider the savings in search costs that can follow from better matching of sellers and consumers based on their traits, or the display of online material that is more relevant and intelligible to a customer with a certain profile. These potential enhancements would not be attainable without the ability to rely on digital history and algo-

[23] X. Hui, M. Seedi, Z. Shen, N. Sundaresan, *Reputation and Regulations: Evidence from eBay*, in *Management Science*, Vol. 62, 2016, p. 3604.

rithms. Personalisation, on the other hand, can permit or lower the cost of contractual practises that harm customer welfare.

Undoubtedly, the adaptation of the contract to the contractual parties' past experiences and characteristics, as well as the presence of contracts with diverging terms for distinct groups of contracting parties, is not an exceptional phenomenon in the evolution of contracting. Repeated interactions between a seller and a buyer have always made it simpler for sellers to better tailor their offers to buyers' preferences, as well as influence price determination. And here, the spectrum of results is really diverse, since, in addition to discounts to good customers, we observe astute sellers who trained in assessing the willingness to pay for goods of services of a given buyer and thus are able to extract a larger surplus from that repeated client. In fact, as the economic literature points out, pre-announced pricing for the general public is a relatively new phenomenon in the history of trade, linked to the emergence and triumph of mass production and distribution[24].

Contract digitalisation and big data enable the identification of patterns in consumer preferences that shift the chances for personalisation of online contractual conditions to qualitatively and quantitatively different levels[25]. Alongside the benefits that personalisation brings to the

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[24] J.J. GANUZA, G. LLOBET, *Personalized Prices in the Digital Economy*, in ID., *Economic Analysis of the Digital Revolution*, Madrid, 2018, p. 118.

[25] On the benefits of personalisation, from a broad perspective, O. BEN-SAHAR, A. PORAT, *Personalized Law. Different Rules for Different People*, Oxford-New York, 2021, p. 39. Also positively oriented, but more restrained, C. BUSCH, *Implementing Personalized Law: Personalized Disclosures in Consumer Law and Data Privacy Law*, in *University of Chicago Law Review*, Vol. 86:2, 2019, p. 309. In a very critical way in relation to personalisation in consumer transactions, G. WAGNER, H. EIDENMÜLLER, *Down by Algorithms? Siphoning Rents, Exploiting Biases and Shaping Preferences - The Dark Side of Personalized Transactions*, in *University of Chicago Law Review*, Vol. 86, 2019, p. 581.

Concerning price personalisation in digital contracts, J.J. GANUZA, G. LLOBET, *Personalized Prices in the Digital Economy*, in ID., *Economic Analysis of the Digital Revolution*, cit., p. 118; O. BAR-GILL, *Algorithmic Price Discrimination when Demand is a Function of Both Preferences and (Mis)perceptions*, in *University of Chicago Law Review*, Vol. 86, 2019, p. 217; H. PORAT, *Consumer Protection and Disclosure Rules in the Age of Algorithmic Behavior-Based Pricing*, in *Harvard Law School Working Paper*, 2021, p. 34.

offers we receive from sellers – more tailored to our preferences as shown by the pattern of our previous online activities – we can also experience (or suffer) how prices can be adjusted to our expected willingness to pay. Then, our surplus as buyers may be reduced or evaporated, even «appropriated» entirely by the seller. Also, other contract terms may be adjusted to take better advantage of the cognitive and behavioural biases of the «categorised» buyers using their online transaction history.

In fact, a sector of the legal literature, particularly in the US, emphasises the ability of powerful companies in the digital environment to severely manipulate to their own advantage virtually all aspects of the company-consumer interaction and thus exploit consumers' decision-making difficulties[26]. It is also mentioned how the contractual changes brought about by online contracting alter customers' perceptions of the contract[27].

Without taking an aprioristic or catastrophic stance in the matter, it seems clear that the digital environment may enable the aggravation of several consumer behavioural biases, which have been well-documented in the economic literature[28]. A few examples are provided below.

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[26] The «market manipulation theory» predates the expansion of contracting in the digital environment, and it refers to the idea that firms set up contracting environments with consumers in order to exploit various behavioural biases that cause consumer behaviour to be predictably misaligned with rational decision postulates in their own interests: J. HANSON, D. KYSAR, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, in *New York University Law Review*, Vol. 74, 1999, p. 630 (a critique of its indiscriminate extension to consumer contracting as a whole, in F. GÓMEZ POMAR, *The Unfair Commercial Practices Directive. A Law and Economics Perspective*, in *European Review of Contract Law*, Vol. 2, 2006, p. 4). It was recently revitalised in connection with online procurement: R. CALO, *Digital Market Manipulation*, in *George Washington Law Review*, Vol. 82, 2014, p. 995; J. LUGURI, L.J. STRAHILEVITZ, *Shining a Light on Dark Patterns*, in *Journal of Legal Analysis*, Vol. 13, 2021, p. 43.

[27] D. HOFFMAN, *From Promises to Form: How Contracting Online Changes Consumers*, in *New York University Law Review*, Vol. 91, 2016, p. 1595; S. BECHER, T. ZARSKY, *Minding the Gap*, in *Connecticut Law Review*, Vol. 51, 2019, p. 69.

[28] A summary of a significant number of the same in relation to consumer contracting, in F. GÓMEZ POMAR, M. ARTIGOT GOLOBARDES, *Rational Choice and Behavioral Approaches in Consumer Law*, in H. MICKLITZ, A.L. SIBONY, F. ESPOSITO (eds.), *Handbook of Consumer Research*, Cheltenham-Northampton, 2018, p. 119. A complete

Consumers (and not only consumers; there is evidence that decision-makers in corporations also make this sort of deviation from the rigorous pattern of entirely rational conduct) make mistakes in strategic interactions with other subjects. One of them is connected to inference errors regarding the content of private – unobservable – information available to the individual with whom we interact, based on our observations of prior behaviour and actions in our encounter. For instance, if we expect the value of a good whose quality we do not know (but its owner does) to be between 0 and 10, and we offer 4, many buyers are unaware that any seller who knows the good is worth more than 4 will refuse to sell at that price. So if the offer is accepted, the expected value of what we have acquired is between 0 and 4, not between 0 and 10[29].

Something similar happens with product information and the seller's disclosure of its features. The higher the quality of the good, the more transparency we expect from the vendor; the lower the quality, the less thorough and clear the explanation of its characteristics and properties. However, most buyers are not sufficiently «suspicious» of sellers who do not disclose much – or nothing at all – about the good's performance and condition[30]. Buyers' strategic inference errors lead them to be disappointed with the quality of what they are buying in comparison to what they expected and paid for.

On the other hand, consumers pay limited attention to the information presented to them because they frequently structure their behaviour according to an overly simplistic model of how things are, so that these attention deficits in relation to what escapes the simplified model cause everything outside that model to lose relevance in decision-making. This makes it simpler for techniques that conceal the expenses of

– and complex – treatment of the subject in B.D. BERNHEIM, S. DELLAVIGNA, D. LAIBSON (eds.), *Handbook of Behavioral Economics. Foundations and Applications*, Vol. 2, Amsterdam, 2019.

[29] E. EYSTER, *Errors in strategic reasoning*, in B.D. BERNHEIM, S. DELLAVIGNA, D. LAIBSON (eds.), *Handbook of Behavioral Economics. Foundations and Applications*, cit., p. 216.

[30] G.Z. JIN, M. LUCA, D. MARTIN, *Is No News (Perceived As) Bad News? An Experimental Investigation of Information Disclosure*, in *Harvard Business School Working Paper*, No. 15-078, 2017.

an economic transaction or subordinate features that are not very important to the majority of customers to negatively influence consumers' contractual decisions[31].

It seems that the digital environment, while not creating these biases as such – they also exist in the context of economic interactions in the physical world – might increase their frequency or intensity. The familiarity (sometimes more apparent than real) with the interfaces or online contracting environments, the ease of contracting according to the scheme preordained by the company designing the online interaction, and the difficulty and cost of asking questions or raising issues about elements or dimensions of the transaction – which are potentially effective ways to correct the negative effects of the buyer's mistakes due to inadequate strategic inference or inattention to not highlighted aspects of the interaction –, the recurrence of purchase transactions with auction-like schemes, as well as the frequency with which interaction occurs as a result of a personalised notice to the consumer, so that the consumer does not take the initiative in commencing the contractual process, all contribute to the aggravation of these biases[32].

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[31] X. GABAIX, D. LAIBSON, *Shrouded attributes, consumer myopia, and information suppression in competitive markets*, in *Quarterly Journal of Economics*, Vol. 121:2, 2006, p. 505. A thorough summary of this literature in X. GABAIX, *Behavioral Inattention*, in B.D. BERNHEIM, S. DELLAVIGNA, D. LAIBSON (eds.), *Handbook of Behavioral Economics. Foundations and Applications*, Vol. 2, Amsterdam, 2019, p. 261.

[32] For instance, in relation to the negative repercussions of exploiting inattention in digital contracting, T. HOSSAIN, J. MORGAN, *Plus Shipping and handling: revenue (non) equivalence in field experiments on eBay*, in *Advances Economic Analysis and Policy*, Vol. 6(2) article 3, 5, 2006; J. BROWN, T. HOSSAIN, J. MORGAN, *Shrouded Attributes and information suppression: evidence from the field*, in *Quarterly Journal of Economics*, Vol. 125:2, 2010, p. 859; N. LACETERA, D. POPE, J. SYNDOR, *Heuristic thinking and limited attention in the car market*, in *American Economic Review*, Vol. 102, 2012, p. 2206; T. BLAKE, S. MOSHARY, K. SWEENEY, S. TADELIS, *Price Salience and Product Choice*, in *Marketing Science*, Vol. 40:4, 2021.

3. The 2019 EU legal instruments and the challenges of the digital contracting environment

Were the 2019 EU Directives responsive to the contractual transformations and processes that define the digital environment? Anticipating the outcome of my analysis, the answer would be: only partially and mostly in an indirect way.

It has already been stated how the digitalisation of goods sold and bought (online or offline) constitutes a relevant addition to the regime of Directive 2019/771, when compared to Directive 1999/44 (Articles 2.5, 8, 9 and 10 and Article 7.3 of Directive 2019/771). Naturally, this represents the core of Directive 2019/770.

However, the rest of the changes in consumer contracting associated with the digital environment, on the other hand, are less prominent in the 2019 legislative wave. It could be argued – and there is some truth to this – that the omissions in Directive 2019/770 and Directive 2019/771 are merely the outcome of a division of labour between the latter two and other EU Directives (2005/29 and 2011/83) amended in 2019 (by Directive 2019/2161)[33] in order to deal with these contractual problems of online contracting. The absence of tailored responses to many of these problems may also reflect lack of consensus among Member States on how to address some of the regulatory challenges associated with contracts and contracting processes in the digital environment. Anyhow, these arguments only provide a partial explanation for the lack of attention paid to new contractual issues of online consumer contracts.

The 2019 European legislator took notice of the role and importance of online contracting platforms for contracts in the digital environment. Directive 2019/771 echoes the debate on the possible liability of platforms even if they are not the direct counterparty of the consumer in contractual interactions subject to its regime, by stating in Recital 23:

> This Directive should apply to any contract whereby the seller transfers or undertakes to transfer the ownership of goods to the consumer. Platform providers could be considered to be sellers under this Directive if

[33] And even with Regulation 2019/1150.

> they act for purposes relating to their own business and as the direct contractual partner of the consumer for the sale of goods. *Member States should remain free to extend the application of this Directive to platform providers that do not fulfil the requirements for being considered a seller under this Directive* (emphasis added).

The liability of platforms for the negative consequences – damages, non-conformity of goods and services – of their actions as «market makers» in digital contracting, even when they are not manufacturers, sellers, or providers of services, has become a contentious issue on both sides of the Atlantic. The debate erupted a few years before 2019.

In the US, where there have already been a significant number of court rulings on Amazon's liability for personal injury arising from defective products purchased through its platform but not so much as its status as seller, the focus has been on product liability, though the characterisation under the Uniform Commercial Code is also becoming relevant[34].

The contractual field, by contrast, has been the focus of attention in Europe[35]. We have seen plenty of proposals in European academic circles intending to identify the conditions under which consumers will be entitled to exercise contract claims against online platform operators who are not direct sellers of goods and services[36].

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[34] T. MONESTIER, *Amazon as a Seller of Marketplace Goods Under Article 2*, in *Cornell Law Review*, Vol. 107:3, 2022, p. 705.

[35] F. MAULTZSCH, *Contractual Liability of Online Platforms Operators: European Proposals and established Principles*, in *European Review of Contract Law*, Vol. 14, 2018, p. 209, taking a critical position on proposals to broaden platform contractual liability by leaping over the principle of relativity of the contract's effects.

[36] RESEARCH GROUP ON THE LAW OF DIGITAL SERVICES, *Discussion Draft of a Directive on Online Intermediary Platforms*, in *Journal of European Consumer and Market Law*, 2016, p. 164; EUROPEAN LAW INSTITUTE, *Model Rules on Online Platforms*, Vienna, 2019. According to the ELI model rules, a lack of transparency about the platform's role in the contract or its dominant influence on the contract between the seller or supplier and the consumer would allow for the subjective extension of Consumer Law remedies against the platform, even if the seller or supplier was not a trader or professional.

Although it does not refer to the digital environment nor does it use the term «predominant influence», the Spanish Supreme Court has made use of a comparable ap-

Perhaps one could say that Directive 2019/771 chose to follow the advice of those commentators expressing the view that given the lack of shared solutions across jurisdictions in relation to contractual phenomena linked to online platforms, it was prudent to let Member States experiment with different regulatory models and to allow «regulatory competition» between countries in this area[37]. Although there is probably some degree of praiseworthy caution in Directive 2019/771's deferential attitude toward Member States regarding contractual liability of online platforms, my impression is that there seems to be some naïveté as to the complexity of regulatory decisions in this field, beyond a general «extensive» or «restrictive» policy orientation for consumer protection in the digital environment. In my view, the variety and complexity of the many economic and contractual concerns underpinning the role

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proach. In STS, 1ª, 735/2020, of 11.03.2020, in relation to a claim for damages resulting from breach of contract in the «Dieselgate» case, the Spanish Court holds that the principle of privity of contract must give way to the realities of the economic connection between the seller and a «third party» (the manufacturer, in that case), with this main argument: «Contracting in the automobile sector also presents particularities that justify limiting or exempting in some cases the principle of relativity of contracts, given the special links between the manufacturer, dealers and buyers, the importance of the manufacturer's brand, the consumer's loyalty to this brand, its influence on the decision of the purchaser of a car, and the massive impact on a large number of purchasers that manufacturing defects tend to cause». The reasoning could be easily transposed to the digital environment by replacing «manufacturer» with «platform» and «brand» with «online market environment».

This issue has received attention by Spanish commentators: M.T. ÁLVAREZ MORENO, *La protección del consumidor en la contratación electrónica de bienes y servicios a través de plataformas*, in ID. (ed.), *Innovación tecnológica, mercado y protección de los consumidores*, Madrid, 2018, p. 39; G. RUBIO GIMENO, *Responsabilidad de las plataformas de economía colaborativa y responsabilidad del proveedor del servicio*, in A. ORTI VALLEJO, G. RUBIO GIMENO (Dirs.), *Propuestas de regulación de las plataformas de economía colaborativa. Perspectivas general y sectoriales*, Cizur Menor-Pamplona, 2019, p. 115; E. ARROYO AMAYUELAS, *El Derecho de las plataformas en la Unión Europea*, in E. ARROYO AMAYUELAS, Y. MARTÍNEZ MATA, M. RODRÍGUEZ FONT, M. TARRÉS VIVES, *Servicios en plataforma. Estrategias regulatorias*, Madrid, 2021, p. 49.

[37] F. MAULTZSCH, *Contractual Liability of Online Platforms Operators: European Proposals and established Principles*, in *European Review of Contract Law*, Vol. 14, 2018, p. 215.

of platforms in digital contracting do not seem to have been recognised by the 2019 European legislator, or at least not fully.

True, only a few years later than the 2019 legislative wave, online platforms have become the target of intense EU regulation through the DMA and the DSA.

Focusing on the latter, it is clear that online platforms figure prominently in the regulatory scope and reach of the DSA: Articles 16-32 set a number of obligations for online platforms, and Articles 33-43 contain additional and more exacting duties for very large online platforms. And from a contractual point of view, Article 6.3 DSA provides for an exemption to the liability limitation granted to providers of hosting services, pursuant to which, liability under consumer protection law of intermediary online platforms will not be exempted when the latter presents the specific item of information or otherwise enables the specific transaction at issue in a way that would lead an average consumer to believe that the information, or the product or service that is the object of the transaction, is provided either by the online platform itself or by a recipient of the service who is acting under its authority or control. The impact of such a provision, except when interpreted well beyond its feasible ordinary meaning, is likely to be modest.

The DSA also includes (Article 25) a broad mandate not to engage in actions or practices that may deceive or manipulate customers or materially distort or impair the ability of customers to make free and informed decisions. More specifically, intermediary platforms are subject to further duties (Articles 30 and 31) concerning the implementation of measures to ensure traceability of sellers operating under the platform and enabling sellers to comply with their obligations regarding pre-contractual, compliance, and product safety information mandated by EU Law. These provisions seem focused on preventing online platforms from negatively affecting the functioning of liability between suppliers or sellers and consumers as one would expect it to work in the off-line environment, but if falls short of fully addressing the new role of online platforms in digital contracting.

Going back to the other EU instruments, what is notably (but not exclusively)[38] missing in the 2019 EU is the awareness of the importance for the informational asymmetry between sellers and buyers in online contracting of users' assessments, opinions and recommendations. Their role in reducing the asymmetry, their conditions of reliability and relevance for this purpose, as well as their possible legal significance in defining the expectations and rights of consumers has been largely overlooked. Despite the fact that these issues have an impact on sales contracts and on contracts on digital services and content, Directives 2019/771 and 2019/770 made no mention of them.

Directive 2019/2161 did face the issue in its own way. First, it adds a new paragraph 6 to Article 7 of Directive 2005/29 concerning misleading omissions, which states:

> Where a trader provides access to consumer reviews of products, information about whether and how the trader ensures that the published reviews originate from consumers who have actually used or purchased the product shall be regarded as material.

And, in Annex I of Directive 2005/29, which contains a list of conduct deemed in any case to be an unfair practice with consumers, three additional actions (paragraphs 11 *bis*, 23 *ter*, and 23 *quater*) relating to consumer ratings and recommendations are included: providing online search results without disclosing whether there is paid advertising or any payment linked to the ordering of the search, claiming that product reviews come from consumers who have purchased it without taking reasonable and proportionate measures to ensure that this is true (connected to the new Article 7.6 of Directive 2005/29), and misrepresenting or distorting, directly or indirectly, user reviews.

Furthermore, Article 6 *bis* 1.a of Directive 2011/83, added by Directive 2019/2161, required the online marketplace provider to offer general information on the main parameters that determine the classifi-

[38] Although Article 27 DSA looks into recommender systems, its provisions are circumscribed to transparency obligations and do not delve into the contractual side-effects of these and other sources of information to consumers in the platform environment.

cation and ranking of suppliers as well as on the relative importance of these parameters compared to others, within a specific section of the online interface that is easily and directly accessible from the page on which the offers are presented, before the consumer is bound by the contract concluded on the online marketplace. In Article 7.4 *bis* of Directive 2005/29, similar necessary content was introduced whose absence may give rise to an unfair practise of misleading omission. Regulation 2019/1150, on the other hand, dealt with sellers' knowledge of the parameters underlying the rankings and classifications of providers of products and services in the online marketplace[39].

These modifications have been unquestionably welcome. However, even those of Directive 2005/29 appear to exert a limited influence, and their breadth and clout are highly uncertain. One of the desirable operating conditions of the reputation connected with customer ratings is the verification of the origin of the review and the exclusion of those not originating from genuine users of the product. Although the inclusion of falsehood and distortion of valuations and reviews in the list of specific unfair practises is more certain, there was little doubt that they are unfair under the formula of misleading practises in Article 6.1 of Directive 2005/29, because they involve false information that may mislead the average consumer and negatively influence their economic behaviour. The transparency obligations on recommender system in the DSA will also help, but do not seem to add much to the contractual dimensions of the issue.

Beyond the changes made in Directives 2005/29 and 2011/83 just described there was little trace of a coherent approach to the challenges posed or intensified by online consumer contracting. As a whole, per-

[39] Article 5.5 of Regulation 2019/1150 reads as follows: «The descriptions referred to in paragraphs 1, 2 and 3 shall be sufficient to enable the business users or corporate website users to obtain an adequate understanding of whether, and if so how and to what extent, the ranking mechanism takes account of the following:

(a) the characteristics of the goods and services offered to consumers through the online intermediation services or the online search engine;

(b) the relevance of those characteristics for those consumers;

(c) as regards online search engines, the design characteristics of the website used by corporate website users».

haps the most relevant and ambitious provision is the new Article 11 *bis* of Directive 2005/29, pursuant to which states that consumers who are harmed by unfair commercial practises – counting, of course, those related to user ratings and reviews that do not comply with the requirements of Directive 2005/29 – will have access to proportionate and effective remedies, including compensation for the damages suffered and, where appropriate, a price reduction or termination of the contract. Individual claims by the injured consumer, while not necessarily of a contractual nature – for example, the contract intended to be induced by the unfair practise may not have been agreed in the end – clearly cover those based on Contract Law. The new provision, however, is rather uncertain. On the one hand, because its conditions and consequences are remanded to the Member States in Article 11 *bis* of Directive 2005/29. On the other, because the contractual consequences most closely associated with European Contract Law – price reduction and contract termination as European remedies for lack of conformity in consumer sales – are provided for only «where appropriate», i.e., subject to – at least – the provisions of the provisions governing such remedies.

In Directives 2019/771 and 2019/770 there was no indication, with respect to the test and criteria of conformity to the contract, whether users' valuations and ratings could be used to shape consumers' reasonable expectations about the goods, services or content traded in the contract.

In fact, the phrasing of Article 7.1 (d) of Directive 2019/771 and Article 8.1 (b) of Directive 2019/771 would initially seem to exclude them from the building blocks of reasonable expectations, as other consumers acting at the same level hardly can be understood as «previous links of the chain of transactions». Not even when digital contracting is arranged by the seller (own website) and not carried out through a platform organised by a third party, and therefore where the opinions and ratings of users are controlled by the operator of the platform and not by the sellers who use it to contract online with consumers, it can easily be concluded, being faithful to the wording of Directives 2019/771 and 2019/770, that users' ratings and reviews are elements that should be

assessed to determine what are the reasonable expectations of the consumer.

The problem is far from simple. The – not conclusive, surely – evidence available points at the legal or contractual guarantees of conformity and the reduction in informational asymmetry due to the reputational effect of user ratings and recommendations interact being substitutes rather than complements. However, a reference to users' reviews and recommendations within the framework of objective requirements for conformity, would allow Member States and courts to include ratings leveraged to generate favourable reputation by sellers and online platform operators as relevant factors to assess conformity. This would have been preferable, in my view.

To be fair, given the generality of its underlying concepts and some of the new features introduced by Directive 2019/2161, Directive 2005/29 can serve to address some of the most acute issues of conditioning, manipulation, or distortion of the informative nature of users' opinions and ratings. Nonetheless, direct contractual instruments that are sufficiently clear and coordinated with those more characteristic of unfair competition would provide a valuable tool to address some challenges of online consumer contracting.

Similar ideas can be expressed about the concerns of transparency in online market functioning that Directive 2019/2161 integrated into Directive 2011/83. The clarifications required by Article 6 *a* of Directive 2011/83 have been unquestionably useful: whether the party offering goods and services is a trader or not – based solely on that party's declaration –, that if the party making the offer is not a professional European consumer rights protection does not apply, and the possible division of contractual obligations between the provider of an online marketplace and the seller as far as the consumer is concerned, are all certainly relevant elements of information for the online buyer via platforms. Yet, even if Member States are not barred from applying further informational requirements, it is evident that the risks to consumer contracting outlined above are not mitigated by the extra disclosure duties placed on providers of an online marketplace providers.

Article 6.1 of Directive 2011/83 includes after the 2019 reform a new paragraph (*ea*). It states that the trader must notify the customer

«where applicable, that the price was personalised on the basis of automated decision making» before the consumer is bound by the contract. In this case, it is not even certain that the new transparency requirement will improve the situation for consumers, because economic models have shown that in an environment of price personalisation such as that enabled by digital contracting and the use of algorithms to connect current and future prices to past consumption behaviour, the cross-over effects between different consumer groups are critical to determining the overall effects on the entire consumer population. Under certain conditions, the fact that more sophisticated consumers or those who place a higher value on the good can know before their first purchase that the price will be personalised in the future, or that they can «defend themselves» against the use of their previous of consumption history through technological tools to avoid higher prices in the future, can have an overall negative impact[40].

There is no mention of the aggravation of contractual difficulties in consumer markets as a result of the accentuation and increased possibilities of exploiting strategic blunders, inattention, and behavioural biases of digital purchasers in Directive 2019/771 or its sister Directive 2019/770. It is also not found in Directive 2019/2161 and the changes introduced in other Directives that, if the European legislator wanted to maintain a clear delimitation of functions between legislative instruments, could contain such provisions, like Directive 2005/29, Directive 2011/83, or even Directive 93/13.

Undoubtedly, the contractual transformations arising from consumer online acquisition of goods and services are difficult to understand in all their complexities and nuances, and so defy being reduced to a simple recipe book of Contract Law remedies. However, while a certain degree of caution in dealing with new developments is commendable, it does not appear that the 2019 European legislator managed to clear the

[40] P. BELLEFLAMME, W. VERGOTE, *Monopoly price discrimination and privacy: The hidden cost of hiding*, in *Economics Letters*, Vol. 149, 2016, p. 141; J.J. GANUZA, G. LLOBET, *Personalized Prices in the Digital Economy*, in J.J. GANUZA, G. LLOBET, *Economic Analysis of the Digital Revolution*, Madrid, 2018, pp. 126-128; H. PORAT, *Consumer Protection and Disclosure Rules in the Age of Algorithmic Behavior-Based Pricing*, in *Harvard Law School Working Paper*, 2021, p. 34.

ground to address these concerns. This is troubling, since many of them are not entirely new, since they have been accompanying internet consumer marketplaces for years. The DSA, although cogently focusing on online platforms, does not appear to have produced clear change in the contractual sphere.

4. Conclusion

Concerning the contracting transformations brought about by the online environment, Directive 2019/771 focused almost entirely on the digitisation of the object of the sales contract and subjecting goods with digital elements to general rules and remedies dealing with conformity with the contract. Directive 2019/770 was also mainly a tool to apply those rules and remedies on digital services and content. Both Directives have missed the chance to provide the basis for a fine-tuning of contractual instruments to reflect developments in online contracting. The other portions of the 2019 wave of consumer directives have also failed in making significant headway in this task. After the 2019 EU legislative efforts, still most contractual concerns related to online contracting await to find an appropriate legal framework. This appears to me to be the case even after the DMA and the DSA.

NON-CONTRACTUAL LIABILITY APPLICABLE TO ARTIFICIAL INTELLIGENCE: TOWARDS A CORRECTIVE READING OF THE EUROPEAN INTERVENTION

Henrique Sousa Antunes[*]

TABLE OF CONTENTS: *1. Background and sequence of arguments. 2. Enhancement of the strict liability of the producer in the PLD. 3. The gap between liability of the artificial intelligence system operator and liability of the producer. 4. The ground gained by strict liability of the operator of artificial intelligence systems in the European debate. 5. Breach of subsidiarity. 6. Subsidiarity in the light of the principles of precaution and innovation. 6.1. The innovation principle and the precautionary principle: basis and reach. 6.2. Application of the innovation principle and the precautionary principle in the regulation of artificial intelligence. 6.3. Precaution in civil liability. 6.4. The safety that can legitimately be expected. 7. A corrective reading of compensation for damage. 8. Summary.*

ABSTRACT: *The aim of this article is to demonstrate that the application of the principle of subsidiarity to European regulation of compensation for damage attributable to artificial intelligence requires more than adjustments to fault-based liability, with the necessary creation of compensation funds for injuries caused by high-risk artificial intelligence systems. The conclusion is supported by an analysis of the relationship between the innovation principle and the precautionary principle in the regulation of artificial intelligence and by the specific features of this emerging digital technology.*

1. Background and sequence of arguments

On 28 September 2022, the European Commission published proposals for the revision of the legal rules on product liability and the regulation of non-contractual liability for damage caused by the use of

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artificial intelligence. The two texts have convergent purposes, but are structured around different types of liability.

In terms of the Proposal for a Directive of the European Parliament and of the Council on liability for defective products [COM(2022) 495 final – hereinafter, PLD], the reform seeks to respond to the challenges raised by emerging digital technologies, new circular economy business models, current networks of global product distribution and the shortcomings of the previous rules regarding product liability. On this last point, one can highlight the difficulty the injured person has in satisfying the burden of proof regarding the defectiveness of the product and establishing the causal link between the defect and the damage suffered, particularly due to an increase in the technical and scientific complexity of products.

With the Proposal for a Directive of the European Parliament and of the Council on adapting non-contractual civil liability rules to artificial intelligence [COM(2022) 496 final – hereinafter, AILD], the European legislator hopes to overcome the difficulties that the features of artificial intelligence systems bring in terms of the proof required from the injured party in order to obtain compensation for damage suffered. The rules seek to ensure that compensation for damage caused by artificial intelligence systems is equivalent to the protection for harm not related to the intervention of artificial intelligence, where, for this purpose, fault is considered as a general criterion for attributing liability in several national legal systems.

In both cases, the legislator expresses the desire to accommodate the particularities of damage attributable to artificial intelligence systems in order to facilitate compensation for harm caused to victims. The routes adopted, however, are different.

In the PLD, the legacy of strict liability is honoured, and built on, with the producer continuing to be liable for damage caused without fault to the injured person, and with the success of compensation claims based on those grounds being favoured. In the AILD, there is a move away from the approach agreed upon in the recommendations, proposals or reports submitted by the European Parliament and by the European Commission, as it rejects the immediate provision of strict liability as the basis of the obligation to compensate damage caused by

high-risk artificial intelligence systems. The European Commission opted for a staged approach, subjecting the adequacy of no-fault liability and the guarantee provided by mandatory insurance to an assessment of the application of the Directive five years after the end of its transposition period[1]. The significance of this choice is clear: in the current circumstances, the strict liability option is left up to the national legal systems.

In the following analysis, we will begin by detailing the choices made in the PLD, and will attempt to demonstrate that the legislator replaces the previous regime without rejecting its legacy. In fact, it accommodates and enhances strict product liability.

The PLD proposes that the new rules repeal Council 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[2]. And yet the application to the producer of no-fault liability is uncontested. Moreover, the considerations that have arisen on the impact of technological development on the applicable normative solutions, and the observations on the obstacles raised by innovation in terms of proving defectiveness and the causal link, justified extending the reach of strict liability.

The second part of our research studies the direction taken in the AILD. It does so from the essential perspective of whether it is legitimate to restrict the liability of the user, provider or person subject to the obligations of a provider, to acts carried out with fault, knowing that laying down a duty to disclose evidence, establishing a rebuttable presumption of breach or fixing a rebuttable presumption of causality does not remove the scope for no-fault imputation of damage. This is clearly shown by the fact that equivalent solutions are accommodated in the product liability rules. Therefore, the current option of rejecting the adoption of a strict liability standard for operators of certain artificial intelligence systems, in contrast to the position that has been defended in the European debate, is investigated. This examination calls for sev-

[1] P. 9 of the explanatory memorandum and Article 5(1) and (2) of the Proposal.

[2] The Directive was published in the "Official Journal of the European Communities" L 210, of 7 August 1985, p. 8 et seq.

eral considerations, essentially framed by the principle of subsidiarity applicable to European law.

It will be argued that the European Commission's proposal does not fulfil one of the criteria on which it is based:

> subsidiarity is about identifying the best level of governance to make and implement policies. The Union should do so only where it is necessary and where it delivers clear benefits over and above measures taken at national, regional or local levels[3].

Actually, the matter in question justifies the intervention of the Union, but, despite the proposal's call for legal certainty, it is, in fact, incapable of preventing the fragmentation of the rules applicable to damage caused by high-risk artificial intelligence systems, considering, first of all, the nature of the differences among the national legal systems in terms of the rules on civil liability for dangerous activities. Or the meaning of the legal provision of the strict liability rules. That is, between compensation based on fault or that can be separated from it.

The benefits of the AILD appear to be limited to medium- or low-risk artificial intelligence systems. In high-risk situations, the different legal orders have instruments capable of safeguarding the interests of injured persons. One can, even, legitimately note in the European Union's intervention an indifference towards to the protection of victims of artificial intelligence systems in comparison with the protection granted to other injured persons. In fact, where the activity is, by its

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[3] Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions of 28 October 2018 [COM(2018) 703 final – The principles of subsidiarity and proportionality: Strengthening their role in the EU's policymaking], p. 3. Similarly, we read in the 1997 Protocol on the application of the principles of subsidiarity and proportionality, annexed by the Treaty of Amsterdam to the Treaty establishing the European Community: "action at Community level would produce clear benefits by reason of its scale or effects compared with action at the level of the Member States". It is true that the 1997 Protocol was replaced by Protocol no. 2, introduced by the Treaty of Lisbon (2007) annexed to the Treaty of the European Union (TEU), and Protocol no. 2 does not contain the above citation. Nevertheless, Article 5(3) of the TEU refers to a requirement of added value. It appears, then, that the Union's action can be controlled by reference to the need to identify clear advantages associated with that intervention.

nature, dangerous, and therefore subject to strict liability, the additional potential danger created by the features of artificial intelligence systems has not led to any particularities in the rules, since the proposal is limited to subjective liability.

At a later moment in our reflection, the inadequacy of fault-based rules is also found in a reading of the principle of subsidiarity, in light of how the innovation principle interacts with the precautionary principle in artificial intelligence regulation (where, in particular, acceptable residual risks are accommodated). In this aspect, it is worth comparing the options taken by the European legislator regarding product safety and approximation of the national legal rules on product liability.

This brings us to the last part of this article. Ultimately, might the five years of reflection mentioned by the European Commission be justified rather to consider the space that can be afforded to civil liability, as a result of a paradigm change in the facts giving rise to liability?

2. Enhancement of the strict liability of the producer in the PLD

In Recital 2 of the PLD we read that

> Liability without fault on the part of the relevant economic operator remains the sole means of adequately solving the problem of a fair apportionment of the risks inherent in modern technological production.

Indeed, the protection granted to the injured person by strict liability for damage caused by defective products is enhanced in the above-mentioned document. This happens in two ways: by extending the rules to the implications of a society transformed by emerging digital technologies and by favouring the injured person with revision of some rules that are applicable to products in general.

In the first area, the following changes can be highlighted: expansion of the notion of product to digital manufacturing files and to software; extension of liability to related digital services; amplification of compensable damage to include lost or corrupted data; and extension of the manufacturer's liability after the product has been placed on the

market or in service, where software or related services are under the manufacturer's control.

In the second sphere, we may note the following modifications: clarification of the relevance of damage to psychological health; inclusion of compensation for damage caused to property that is simultaneously used for private and professional purposes; expansion of the list of economic operators that can be held liable; provision of a duty of the defendant to disclose evidence; reversal of the burden of proof regarding defectiveness and the causal link in favour of the injured party for reasons of technical or scientific complexity; extension of the limitation period from 10 to 15 years, if justified by the period of latency of a personal injury; and elimination of the maximum limits for compensation applicable in the event of death or injury of several persons caused by identical products with the same defect.

This enhancement of the solutions granted to the injured person through strict product liability makes the contrast with the AILD even starker. In fact, the operator's duty to compensate arises from subjective liability, thereby distancing it further from the protection given by the original rules on no-fault product liability.

3. The gap between liability of the artificial intelligence system operator and liability of the producer

The AILD accommodates solutions that aim to facilitate the success of a compensation claim based on the fault of the defendant. The European Commission proposes, in short, three key measures for this purpose: an obligation to disclose evidence, a rebuttable presumption of fault in case of non-compliance with a court order to disclose evidence and a rebuttable presumption of causality in case of fault liability.

What meaning should we give to these proposals in comparison with the strict liability of the producer? In our opinion, we are far from a compromise which, while rejecting no-fault liability, would bring subjective liability closer to the regime for attributing damage to the producer. In fact, it seems to us that the options in the AILD are, above all, an irrepressible effect of some of the changes introduced in the PLD,

i.e. the provision of a duty to disclose evidence and the reversal of the burden of proving defectiveness and causality. They only serve, in this way, to prevent any widening of the gap between the levels of protection provided by subjective liability and by no-fault liability. Indeed, the introduction of a presumption of fault is expressly rejected[4].

In the PLD, the level of protection of the injured person is enhanced, altering the apportionment of risk in the law currently in force. Regarding the disclosure of evidence, the text reads (Recital 30):

> In light of the imposition on economic operators of liability irrespective of fault, and with a view to achieving a fair apportionment of risk, the injured person claiming compensation for damage caused by a defective product should bear the burden of proving the damage, the defectiveness of a product and the causal link between the two. Injured persons, are, however, often at a significant disadvantage compared to manufacturers in terms of access to, and understanding of, information on how a product was produced and how it operates. This asymmetry of information can undermine the fair apportionment of risk, in particular in cases involving technical or scientific complexity.

Failure to comply with the obligation to disclose information gives rise to a presumption of defectiveness [Recital 33 and Article 9(2) a)]. It may also be seen that, aside from the omission of the duty to disclose evidence, there is the possibility of a presumption of defectiveness and of causal link in certain circumstances. Regarding defectiveness, this is the case when there is non-compliance with product safety rules, or when there is an obvious malfunction of the product [a glass bottle explodes in the course of normal use – Recital 33 and Article 9(2) b) and c)]. There will also be a presumption of defectiveness and, also, of the causal link based on the technical or scientific complexity of proving this, when the claimant demonstrates that the product contributed to the damage and that the defectiveness or causality was likely [Recital 34 et seq., and Article 9(4)]. Artificial intelligence systems serve to illustrate these rules (Recital 34):

[4] AILD, p. 6.

> Technical or scientific complexity should be determined by national courts on a case-by-case basis, taking into account various factors. Those factors should include (…) the complex nature of the technology used, such as machine learning (…) and the complex nature of the causal link, such as (…) a link that, in order to be proven, would require the claimant to explain the inner workings of an AI system.

Lastly, a causal link is presumed to exist if the damage suffered is of a kind typically consistent with the defect in question (Article 9(3)).

These solutions are replicated in the AILD, in relation to subjective liability: non-compliance with the duty of disclosure gives rise to a presumption of fault [Recital 21 and Articles 3(5) and 4(1) a)]; if the claim for damages relates to an AI system other than high-risk, the presumption of causality only applies if the court considers that proving that connection is excessively difficult for the claimant [Recital 28 ("(…) such difficulties could be assessed in light of the characteristics of certain AI systems, such as autonomy and opacity, which render the explanation of the inner functioning of the AI system very difficult in practice, negatively affecting the ability of the claimant to prove the causal link between the fault of the defendant and the AI output"), and Article 4(5)]; even in claims for damages relating to a high-risk artificial intelligence system, the presumption of causality shall not be applied if the defendant proves that the claimant can reasonably gain access to evidence and specialist knowledge sufficient to prove causality (Recital 27 and Article 4(4)); for the presumption of causality to operate, it must be demonstrated that it is reasonably likely that the fault gave rise to the damage [Recitals 22 and 25, and Article 4(1) b) and c). Recital 25 states: "(…) a breach of a requirement to file certain documents or to register with a given authority, even though this might be foreseen for that particular activity or even be applicable expressly to the operation of an AI system, could not be considered as reasonably likely to have influenced the output produced by the AI system or the failure of the AI system to produce an output"].

4. The ground gained by strict liability of the operator of artificial intelligence systems in the European debate

The AILD contains an overview of the most important moments in identifying the option for and content of a regulation on non-contractual liability applicable to damage attributable to artificial intelligence systems. Tracing these steps, the conclusion reached is that harmonisation or unification of the rules on liability is essential for the development of artificial intelligence in Europe. Moreover, it is accepted that there is scope for no-fault liability in relation to injuries caused by the operation of high-risk systems, in order to guarantee citizens' confidence in the use of artificial intelligence.

Following the route taken by the European Commission in the AILD, our findings are confirmed. And they are supported by other documents as well. The issue of the relevance of strict liability prevails.

One may read in the *European enterprise survey on the use of technologies based on artificial intelligence (A study prepared for the European Commission by Ipsos Belgium and iCite*, 2020) that liability for damage constitutes a particularly significant external obstacle to investment in artificial intelligence[5]. Uncertainty regarding the applicable legal framework clearly contributes to increasing this fear. The other key pillar of legislative intervention in the area of civil liability is citizens' trust. And therein lies the motivation for no-fault liability.

In a Communication of 25 April 2018, the European Commission noted:

> The emergence of AI, in particular the complex enabling ecosystem and the feature of autonomous decision-making, requires a reflection about the suitability of some established rules on safety and civil law questions on liability. (…) A high level of safety and an efficient redress mechanism for victims in case of damages helps to build user trust and social acceptance of these technologies[6].

[5] See p. 55 et seq.

[6] Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Commit-

Indeed, in a working document that accompanied the Communication, on liability for damage caused by emerging digital technologies, the Commission accepted that the autonomy of the technologies in question would undermine the importance of the duty of care with regard to the principle of liability based on the creation of a risk[7]. Accordingly, it stated that no-fault liability was suited to the inevitability of risks and, consequently, to protecting injured persons:

> Conceptually speaking, a strict liability approach to AI powered devices would acknowledge that damages resulting from the use of these devices cannot entirely be avoided. At the same time, it would ensure that potential victims are compensated by the liable person[8].

In the White Paper on artificial intelligence, the European Commission pointed to the regulatory requirements that are particularly necessary for high-risk systems[9]. The challenge for liability is clear. If there is a significant threat to important assets protected by law, such as life, health or property, and to the public in general,

> the challenges of autonomy and opacity to national tort laws could be addressed following a risk-based approach. Strict liability schemes could ensure that whenever that risk materialises, the victim is compensated regardless of fault[10].

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tee of the Regions, *Artificial Intelligence for Europe* {SWD(2018) 137 final}, COM(2018) 237 final of 25 April 2018, p. 15 et seq.

[7] Commission Staff Working Document, *Liability for emerging digital technologies (Accompanying the document Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions Artificial intelligence for Europe {COM(2018) 237 final})*, SWD(2018) 137 final of 25 April 2018, p. 19.

[8] Ibid., p. 21.

[9] White Paper on Artificial Intelligence – A European approach to excellence and trust, COM(2020) 65 final of 19 February 2020, p. 18 et seq.

[10] Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee – *Report on the safety and liability implications of Artificial Intelligence, the Internet of Things and robotics*, COM(2020) 64 final of 19 February 2020, p. 16.

The European Commission raised the question of the relevance of a specific strict liability, and a corresponding mandatory insurance, in the public consultation that took place between 18 October 2021 and 10 January 2022. 233 entities answered the question, among them business associations (63), individual companies (29), including small and medium enterprises (9), consumer associations (7), citizens (95), non-governmental organisations (10), research centres (14) and national public authorities (5). The option of a European framework law for no-fault liability for damage caused by artificial intelligence systems was favoured by most of the respondents, with the exception of the majority of the business associations and large corporations. We may note, even, that almost all of the small and medium enterprises supported harmonisation of this strict liability[11].

And yet, in the AILD, the European Commission explains that the sacrificing of no-fault liability seeks «to strike a balance between the needs expressed and concerns raised by all relevant stakeholder groups»[12]. In short, it appears that the larger corporate entities had a decisive impact in delaying no-fault liability, granting the power to the legislators or judges of each Member State to shape it. The same entities that, in the consultation, expressed concerns about the negative impacts of legal fragmentation contributed, ultimately, to subjecting compensation claims for damage caused by high-risk artificial intelligence systems to variable solutions, in line with the applicable national laws[13].

The European Commission favoured a fuzzy approach, contradictory in its reasons, in abandoning the proposals it had welcomed in earlier documents. Furthermore, it also rejected the position that the European Parliament had clearly taken on different occasions.

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[11] *Adapting Civil Liability Rules to the Digital Age and Artificial Intelligence. Factual summary report on public consultation* (available online – portal “Have Your Say”).

[12] P. 8.

[13] The concern regarding legal fragmentation underlined by the majority of the companies was expressed in defence of European legislative intervention on the matter of civil liability and artificial intelligence (*Adapting Civil Liability Rules to the Digital Age and Artificial Intelligence. Factual summary report on public consultation*, cit., p. 9). Rejection of harmonised strict liability clearly contradicts that position.

In its Resolution of 2017, the European Parliament set compensation for damage caused by robots between strict liability, possibly accompanied by mandatory insurance, and the intervention of compensation funds[14]. It also considered,

> creating a specific legal status for robots in the long run, so that at least the most sophisticated autonomous robots could be established as having the status of electronic persons responsible for making good any damage they may cause, and possibly applying electronic personality to cases where robots make autonomous decisions or otherwise interact with third parties independently[15].

Three years later, the European Parliament abandoned the electronic person status, although defending strict liability for high-risk artificial intelligence systems[16]. That option was kept in 2022[17]. While respecting a general framework of subjective liability, the European Parliament stresses the importance of liability without fault, accompanied by mandatory insurance, for high-risk artificial intelligence systems and, in general, a presumption of fault. It does so highlighting that,

> due to the characteristics of AI systems, such as their complexity, connectivity, opacity, vulnerability, capacity of being modified through updates, capacity for self-learning and potential autonomy, as well as the multitude of actors involved in their development, deployment and use, there are significant challenges to the effectiveness of Union and national liability framework provisions[18].

The issue appears inextricably linked to the importance that the precautionary principle plays in the regulation of artificial intelligence. The 2022 European Parliament Resolution notes:

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[14] European Parliament Resolution of 16 February 2017 with recommendations to the Commission on Civil Law Rules on Robotics [2015/2103(INL)], point 49 et seq.

[15] Point 59 f).

[16] European Parliament Resolution of 20 October 2020 with recommendations to the Commission on a civil liability regime for artificial intelligence [2020/2014(INL)].

[17] European Parliament Resolution of 3 May 2022 on artificial intelligence in a digital age [2020/2266(INI)].

[18] Point 146.

> (…) the level of risk of a particular AI application varies significantly depending on the likelihood and severity of harm; (…) therefore, (…) legal requirements should be adjusted to this, in line with a risk-based approach and taking into due account, when justified, the precautionary principle (…)[19].

Lastly, it should be noted that no-fault liability of the operator is considered to be an appropriate response to certain risks caused by emerging digital technologies, in the important experts report published at the end of 2019 on the transformation of civil liability in the digital age (*Liability for Artificial Intelligence and other emerging digital technologies*, of the Expert Group on Liability and New Technologies – New Technologies Formation, appointed by the European Commission][20]. This is the case, for example, when those technologies are used in public access environments and may frequently cause significant damage («Strict liability is an appropriate response to the risks posed by emerging digital technologies, if, for example, they are operated in non-private environments and may typically cause significant harm»[21])[22].

What can we say in light of all of the above considerations? This is the reflection that we propose in the following pages.

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[19] Point 19.

[20] An extended discussion of this text is provided by M. MIRANDA BARBOSA, *O futuro da responsabilidade civil desafiada pela inteligência artificial: as dificuldades dos modelos tradicionais e caminhos de solução*, in *Revista de Direito da Responsabilidade*, year 2, 2020, p. 280 et seq.

[21] P. 39 et seq.

[22] Strict liability in situations of high-risk systems has also been accepted by legal doctrine. See, for example, E. KARNER, *Liability for Robotics: Current Rules, Challenges, and the Need for Innovative Concepts*, in S. LOHSSE, R. SCHULZE, D. STAUDENMAYER (eds.), *Liability for Artificial Intelligence and the Internet of Things – Münster Colloquia on EU Law and the Digital Economy IV*, Baden-Baden, 2019, p. 122 et seq., and G. SPINDLER, *User Liability and Strict Liability in the Internet of Things and for Robots*, in S. LOHSSE, R. SCHULZE, D. STAUDENMAYER (eds.), *op. cit.*, p. 136 et seq.

5. Breach of subsidiarity

The European Union's intervention in areas that are not within its exclusive competence requires establishing an added value in its actions. In other words, the Member States are unable to meet the desired aims and the European Union offers evident benefits. Pursuant to the first paragraph of Article 5(3) of the TEU,

> Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

It would appear, then, that the added value requires, in short, that the European Union's action be tailored to the aims of the action considered. In this context, it is necessary to identify the objectives pursued by the AILD. These are framed within the legal basis of the proposal, the adoption of measures intended to ensure the establishment and functioning of the internal market (Article 114 of the Treaty on the Functioning of the European Union – TFEU)[23].

To this end, the objectives of the proposal are to increase legal certainty and prevent the fragmentation of rules on non-contractual liability applicable to artificial intelligence. Harmonisation seeks, therefore, to reduce the existing differences in the rules and prevent further heterogeneity:

> Given the large divergence between Member States' existing civil liability rules, it is likely that any national AI-specific measure on liability would follow existing different national approaches and therefore increase fragmentation[24].

Harmonisation aims to provide legal certainty for companies operating across borders, reducing the financial costs associated with a lack of

[23] P. 5.
[24] P. 6.

knowledge of civil liability rules and guarding against distortion of competition between companies in the internal market. It protects, in particular, the position of start-ups and small and medium enterprises, «which account for most companies and the major share of investments in the relevant markets»[25].

According to the European Commission, the requirement that the Union's intervention produces obvious benefits is met:

> Harmonised measures at EU level would significantly improve conditions for the rollout and development of AI-technologies in the internal market by preventing fragmentation and increasing legal certainty. This added value would be generated notably through reduced fragmentation and increased legal certainty regarding stakeholders' liability exposure[26].

Given that increased legal certainty is dependent on reducing current legal fragmentation and preventing future fragmentation, the core of subsidiarity lies in the effectiveness of the proposal with regard to fragmentation. In our opinion, the terms of the AILD do not contribute significantly to approximation of the different national legislations and, thus, to increasing legal certainty.

The analysis must be limited to the first stage of the AILD, on the fault-based imputation of damage. The second stage is based only on a re-examination mechanism, and in no way binds the legislator to establish strict liability. There is not even a conditional relationship between the two moments. In fact, the evaluation report provided for in Article 5 could take as a reference the application of the different national laws, without any prior harmonisation.

With this caveat, it is our conviction that the proposal is largely ineffective. The usefulness of disclosing evidence or of a presumption of causality is inextricably linked to situations of subjective liability, where the injured party has the burden of proving fault. Where there is a reversal of the burden of proof of fault, the protection granted by the AILD is irrelevant: the information on compliance with due diligence

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[25] P. 6.

[26] P. 6 et seq.

must be provided by the defendant and the presumption of fault typically covers a presumption of abstract causality [it will be recalled that, in line with Article 4(1) c) of the AILD, the injured party must prove the relationship of conditionality].

Now, fragmentation of the liability rules that may be applicable to high-risk artificial intelligence systems does not lie in the reversal of the burden of proof of fault or not, but, in general, between civil liability with presumed fault and strict civil liability. We are thinking, in particular, of the rules on dangerous activities[27]. Other rules that we might bring to the discussion give rise to the same reflection, e.g., damage caused by things or animals, liability for the acts of another person. or accidents involving land vehicles[28].

In short, the existing fragmentation remains untouched. The contribution of the proposal regarding damage caused by medium- or low-risk artificial intelligence systems is certainly not unknown. Subject, in principle, to fault, the presumption of causality reduces the evidence required by the general regime of fault liability. We are, nevertheless, in an area where the relevance of protecting the injured party is reduced, due to the lesser degree of potential danger of the systems covered. It should be added that the presumption «shall only apply where the national court considers it excessively difficult for the claimant to prove the causal link (…)» (Article 4(5)).

Furthermore, the AILD is a Directive of minimal harmonisation (Recital 14):

> (...) Such an approach allows claimants in cases of damage caused by AI systems to invoke more favourable rules of national law. Thus, national laws could, for example, maintain reversals of the burden of proof under national fault-based regimes, or national no-fault liability (referred to as 'strict liability') regimes of which there are already a

[27] See R.P. COUTINHO DE MASCARENHAS ATAÍDE, *Responsabilidade Civil por Violação de Deveres no Tráfego*, Coimbra, 2015, p. 443 et seq.

[28] See E. KARNER, B. A. KOCH, *Civil Liability for Artificial Intelligence. A Comparative Overview of Current Tort Laws in Europe*, in EUROPEAN COMMISSION (JUSTICE AND CONSUMERS), *Comparative Law Study on Civil Liability for Artificial Intelligence*, Brussels, 2020, p. 41 et seq.

> large variety in national laws, possibly applying to damage caused by AI systems.

Member States are even free to adopt rules that are more favourable for claimants (Article 1(4)).

Lastly, it should be acknowledged that the ineffectiveness of the proposal may also mean disregard for the specific nature of the injuries attributable to artificial intelligence systems. Under the principle of proportionality (Article 5(4) 1st paragraph of the TEU), EU action must guarantee «that victims have the same level of protection as in cases not involving AI systems»[29]. The intervention may thus prove to be unfair. In fact, equating the protection to that granted to other victims ignores the fact that, when faced with equally dangerous activities, the additional potential danger brought about by the use of artificial intelligence may justify positive discrimination.

We may consider the case of certain medical activities that are considered dangerous. In the legal systems where the potential danger of an activity has justified strict liability, the characteristics of artificial intelligence will not lead to a presumption of causality. The proposal restricts this to fault liability. And yet, the European Commission accepts the normative relevance of the specific potential danger of artificial intelligence in relation to medium- or low-risk artificial intelligence systems (Recital 28):

> The presumption of causality could also apply to AI systems that are not high-risk AI systems because there could be excessive difficulties of proof for the claimant. For example, such difficulties could be assessed in light of the characteristics of certain AI systems, such as autonomy and opacity, which render the explanation of the inner functioning of the AI system very difficult in practice, negatively affecting the ability of the claimant to prove the causal link between the fault of the defendant and the AI output.

Having said this, it seems clear to us that the breach of subsidiarity, in the terms indicated, arises as a result of an unfortunate response to the tension between precaution and innovation in the regulation of arti-

[29] P. 6.

ficial intelligence. We must, therefore, revisit the issue of subsidiarity from this perspective.

6. Subsidiarity in the light of the principles of precaution and innovation

In the AILD, protecting innovation appears as a limit to adjusting liability, excluding, for that reason, strict liability or even liability based on a presumption of fault:

> The proposal does not lead to a reversal of the burden of proof, to avoid exposing providers, operators and users of AI systems to higher liability risks, which may hamper innovation and reduce the uptake of AI-enabled products and services[30].

The contrast with what happened when the product liability rules were approved is significant. In Directive 85/374/CEE, cited above, it is understood that the acceptance of innovation forms the basis for the provision of compensation rules that are particularly favourable to consumers:

> (…) liability without fault on the part of the producer is the sole means of adequately solving the problem, peculiar to our age of increasing technicality, of a fair apportionment of the risks inherent in modern technological production.

Some years later, when the application of the product liability rules was well established, the legislator once again stated that strict liability is consistent with the challenges raised by innovation. In Directive 1999/34/EC of the European Parliament and of the Council, of 10 May 1999, amending Council Directive 85/374/EEC on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, we read (Recital 2):

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[30] P. 6.

> (…) Directive 85/374/EEC established a fair apportionment of the risks inherent in a modern society in which there is a high degree of technicality; (…) struck a reasonable balance between the interests involved, in particular the protection of consumer health, encouraging innovation and scientific and technological development, guaranteeing undistorted competition and facilitating trade under a harmonised system of civil liability; (…) thus helped to raise awareness among traders of the issue of product safety and the importance accorded to it[31].

In our opinion, the European Commission's analysis in the AILD fails for three fundamental reasons: firstly, it forgets that innovation, although established as a principle, cannot generally be separated from the precautionary principle; next, it forgets that the combination of these two principles in the regulation of artificial intelligence is required upstream, when identifying the compliance requirements of the systems concerned; lastly, it disregards the fact that articulation between the regulation upstream of safety and the regulation downstream of damage makes it possible to provide a degree of flexibility when applying the innovation and precautionary principles, by balancing the protection of innovation with the call for precaution in the definition of an effective compensation regime.

These reflections require some brief notes on the innovation principle and the precautionary principle and, in particular, on the role of precaution in civil liability.

Once this background has been provided, we will consider the legitimacy of giving prevalence to each of the two principles in different moments in the regulation. We are thinking, in particular, of the articulation between product safety legislation and the product liability rules. This is what we will now set out to do.

[31] Official Journal of the European Communities, L 141, of 4 June 1999, p. 20 et seq.

6.1. The innovation principle and the precautionary principle: basis and reach

In European law, innovation and precaution emerge as principles based on foundations of a different nature. Let us begin with innovation.

The root of a principle of innovation in European public policies can be found in a letter sent in October 2013 by 12 executive directors of multinational corporations to the presidents of the three European institutions, which was strengthened by a second letter (in November 2014), signed by 22 executive directors and sent to the then President of the European Commission, Jean-Claude Juncker[32]. The documents were based on a report of the European Risk Forum[33].

Since then, the innovation principle has been mentioned in various communications of the European Commission. Among other texts, of particular note is the «renewed European Agenda for Research and Innovation - Europe's chance to shape its future» [COM(2018) 306 final], and the Communications «Artificial Intelligence for Europe» [COM (2018) 237] and «The Single Market in a changing world - A unique asset in need of renewed political commitment» [COM(2018) 772]. The principle also appears in the recitals of the Horizon Europe Regulation[34].

What do we mean by the innovation principle? Its origins can be traced back to the desire to counterbalance the effects of precaution. In the letter of October 2013, the signatories referred to the need to balance the risk posed by new technologies against the social and econom-

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[32] See EUROPEAN COMMISSION, *Study supporting the interim evaluation of the innovation principle (Final report)*, Brussels, November 2019, p 8.

[33] EUROPEAN RISK FORUM – Communication 12, *The Innovation Principle – Letter to the Presidents of the European Commission, the European Council, and the European Parliament*, Brussels, October 2013.

[34] Regulation (EU) 2021/695 of the European Parliament and of the Council of 28 April 2021 establishing Horizon Europe – the Framework Programme for Research and Innovation, laying down its rules for participation and dissemination, and repealing Regulations (EU) No 1290/2013 and (EU) No 1291/2013.

ic benefits associated with technological innovation, thus limiting the effects of the precautionary principle:

> Our concern is that the necessary balance of precaution and proportion is increasingly being replaced by a simple reliance on the precautionary principle and the avoidance of technological risk. We see numerous practical examples across a range of technologies, from engineering to chemicals and agricultural to medical sciences. The potential for all these technologies to advance social and economic welfare is undisputed but is being put at risk by an increasing preference for risk avoidance and the loss of scientific methodology from the regulatory process[35].

Accordingly, the innovation principle determines that, where legislation motivated by the precautionary principle is being assessed, the impact of innovation should be duly considered in the political process and in the legislative activity[36]. Precaution should prevail only in situations where there is a real threat of an unacceptable risk: «Where there is real danger and unacceptable risk, precautionary considerations should be uppermost»[37]. Otherwise, society must accept, understand and manage the risk posed by technological innovation, benefiting from the advantages of that process and enabling Europe to become more competitive in scientific development[38].

While recognising that the use of the precautionary principle in European legislation does not impose a prohibition on products or processes carrying potential risks, supporters of the innovation principle consider that a failure to determine the criteria for applying precaution leads to a lack of political and regulatory predictability of the action of the competent bodies. This is the case, particularly, with risk management measures. Hence, even the «weak» version of the precautionary principle impacts the confidence of companies and investors[39].

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[35] EUROPEAN RISK FORUM – Communication 12, cit., p. 3.

[36] EUROPEAN RISK FORUM – Communication 12, cit., p. 4: "The principle is simple – that whenever precautionary legislation is under consideration, the impact on innovation should also be taken into full account in the policy and legislative process".

[37] EUROPEAN RISK FORUM – Communication 12, cit., p. 10.

[38] See EUROPEAN RISK FORUM – Communication 12, cit., p. 9.

[39] EUROPEAN RISK FORUM, *Monograph – Fostering Innovation. Better Management of Risk*, Brussels, March 2015, p. 23 et seq.

The precautionary principle is mentioned in Article 191(2) of the TFEU. It was introduced by the Maastricht Treaty of 1992 as a fundamental principle of European environmental policy, learning from the teachings of earlier international conventions. The movement has been particularly significant since the 1980s. An important illustration of the precautionary principle is found in the Rio Declaration on Environment and Development of 1992 (United Nations Conference). Principle 15 reads:

> In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

Over time, precaution gained the dimension of a general principle of European law[40]. In this context, the impact of new technologies or human health products can be highlighted. The debate continues, however, as to the meaning of the principle and its implications.

Article 191(2) of the TFEU does not define precaution. According to the Treaty,

> Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay.

The Commission issued some guidelines in its Communication on the precautionary principle[41]. This provides an initial framework for the use of the principle. It remains to be seen how it is applied in practice.

According to the Communication, essential features of the content of precaution are the existence of a preliminary objective evaluation

[40] See, for example, K. De Smedt, E. Vos, *The Application of the Precautionary Principle in the EU*, in H. A. Mieg (ed.), *The Responsibility of Science*, Studies in History and Philosophy of Science 57, Cham, 2022, p. 166.

[41] COM(2000) 1 final.

and identification of reasonable grounds for concern that there will be potentially dangerous effects on the environment, human, animal and plant health[42]. The interests protected are, however, broader: «The search for a high level of health and safety and environmental and consumer protection belongs in the framework of the single market, which is a cornerstone of the Community»[43]. Articles 11, 114, 168, 169 and 191 of the TFEU serve as a basis for this argument.

We are in the area of scientific uncertainty. Scientific evaluation is unable to determine with sufficient certainty the risk of a potential danger of a phenomenon, product or process[44]. In fact, «Whether or not to invoke the Precautionary Principle is a decision exercised where scientific information is insufficient, inconclusive, or uncertain (…)»[45]. On the other hand, we would be within the scope of prevention if there were scientific evidence about the existence of a danger.

It is important to stress that the risk goes beyond a short- or medium-term timeframe. Considering the well-being of future generations, potential long-term dangers are relevant[46].

The precautionary principle operates at three different levels: risk assessment, risk management and risk communication. It gains particular relevance within the scope of risk management[47].

In this context, the Commission states the need to «clarify a misunderstanding as regards the distinction between reliance on the precautionary principle and the search for zero risk, which in reality is rarely to be found»[48]. It is up to political decision-makers to define the level of «acceptable» risk for society. The nature of the risk, scientific uncertainty and public concerns are crucial factors when taking decisions:

> In some cases, the right answer may be not to act or at least not to introduce a binding legal measure. A wide range of initiatives is available

[42] P. 3.

[43] P. 8. See also p. 9 et seq.

[44] P. 3.

[45] P. 7.

[46] P. 17 et seq.

[47] P. 2.

[48] P. 8.

in the case of action, going from a legally binding measure to a research project or a recommendation[49].

Once the decision to act is taken, it is proposed, non-exhaustively, that the measures should be proportional to the aim of protection, non-discriminatory, consistent with previous measures, based on a cost/benefit analysis, capable of being reviewed and acting as catalysts for the production of more consistent scientific data[50].

6.2. Application of the innovation principle and the precautionary principle in the regulation of artificial intelligence

In describing the precautionary principle, we highlighted the link that the European Commission established between this principle and the achievement of a high level of protection of interests that must be safeguarded:

> The Community has consistently endeavoured to achieve a high level of protection, among others in environment and human, animal or plant health. In most cases, measures making it possible to achieve this high level of protection can be determined on a satisfactory scientific basis. However, when there are reasonable grounds for concern that potential hazards may affect the environment or human, animal or plant health, and when at the same time the available data preclude a detailed risk evaluation, the precautionary principle has been politically accepted as a risk management strategy in several fields[51].

Achieving «a high level of protection of health, safety and fundamental rights» is one of the aims expressly set out in the Proposal for a Regulation of the European Parliament and of the Council, of 21 April 2021, laying down harmonised rules on artificial intelligence (Artificial Intelligence Act) and amending certain Union legislative acts [COM (2021) 206 final – hereinafter, AI Act][52]. It is a matter of protecting the

[49] P. 3.

[50] P. 3 et seq. and 17 et seq.

[51] Communication from the Commission on the precautionary principle, cit., p. 8.

[52] Recital 1.

internal market, ensuring a high level of protection of regulated interests:

> A consistent and high level of protection throughout the Union should (…) be ensured, while divergences hampering the free circulation of AI systems and related products and services within the internal market should be prevented, by laying down uniform obligations for operators and guaranteeing the uniform protection of overriding reasons of public interest and of rights of persons throughout the internal market based on Article 114 of the Treaty on the Functioning of the European Union (TFEU)[53].

In the European Union's Charter of Fundamental Rights, a high level of protection is referred to in Articles 35, 37 and 38, concerning, respectively, health protection, environmental protection and consumer protection. Article 114(3) of the TFEU, in particular, is aligned with these rules. Here we read, on the issue of the approximation of laws affecting the establishment and functioning of the internal market,

> The Commission, in its proposals envisaged in paragraph 1 concerning health, safety, environmental protection and consumer protection, will take as a base a high level of protection, taking account in particular of any new development based on scientific facts. Within their respective powers, the European Parliament and the Council will also seek to achieve this objective.

Consequently, the Artificial Intelligence Act accommodates and possibly extends the high level of protection provided for in Article 114(3) of the TFEU. To this end, it accepts the precautionary principle.

The requirement that measures applying the precautionary principle be proportionate opens the door, however, to the innovation principle. Indeed, in its Communication «Artificial Intelligence for Europe», cited above, the European Commission only refers to the innovation principle:

> For any new regulatory proposals that shall be needed to address emerging issues resulting from AI and related technologies, the Com-

[53] Recital 2.

> mission applies the Innovation Principle, a set of tools and guidelines that was developed to ensure that all Commission initiatives are innovation friendly[54].

This ambivalence perhaps explains why, in the same document in which it commits to achieving a high level of protection of the above-mentioned interests, the European Commission accepts the concept of responsible innovation in the explanatory memorandum, and limits proportionality to the minimum necessary action:

> This proposal imposes some restrictions on the freedom to conduct business (Article 16) and the freedom of art and science (Article 13) to ensure compliance with overriding reasons of public interest such as health, safety, consumer protection and the protection of other fundamental rights ('responsible innovation') when high-risk AI technology is developed and used. Those restrictions are proportionate and limited to the minimum necessary to prevent and mitigate serious safety risks and likely infringements of fundamental rights[55].

There appears to be a sacrificing of the precautionary principle. Although the European Commission does not define a level of acceptable risk, a high level of protection would suggest favouring more restrictive measures than the minimum necessary for the protection of fundamental rights.

A clear example of the sacrificing of the precautionary principle in the regulation of high-risk artificial intelligence systems can be found in Article 9 of the AI Act proposal, on risk management. This contrasts with the rules on prohibited artificial intelligence systems.

High-risk artificial intelligence systems providers are required to establish, implement, document and maintain a risk management system [Articles 9(1) and 16(a)]. The proposed act requires identification, analysis and management of the risks associated with the artificial intelligence system in question, taking known and foreseeable risks as its reference, however [Article 9(2) a)]. Knowledge of the dangers is key,

[54] COM(2018) 237 final, p. 15, note 56.

[55] AI Act Proposal, cit., p. 11.

since foreseeable risks are also known risks. In fact, foreseeability requires more than scientific uncertainty.

Actually, knowledge seems to be equated with foreseeability, since, in the case of risks, certainty of their occurrence is excluded by definition. This framing influences the interpretation of points b) and c) of Article 9(2), which, in fact, only specify the circumstances for the identification of risks, rather than characterising them. In this sense, there is a requirement of «estimation and evaluation of the risks that may emerge when the high-risk AI system is used in accordance with its intended purpose and under conditions of reasonably foreseeable misuse» [point b)]. A further obligation is the «evaluation of other possibly arising risks based on the analysis of data gathered from the post-market monitoring system referred to in Article 61» [point c)].

The risk management system is dependent, therefore, on scientific certainty regarding the identified dangers. The risk management measures will therefore be preventive in nature rather than precautionary. And even based on the foreseeability established by scientific knowledge, the proposal for the AI Act allows acceptable risks to remain (Article 9(4)):

> The risk management measures referred to in paragraph 2, point (d) shall be such that any residual risk associated with each hazard as well as the overall residual risk of the high-risk AI systems is judged acceptable, provided that the high-risk AI system is used in accordance with its intended purpose or under conditions of reasonably foreseeable misuse. Those residual risks shall be communicated to the user[56].

On the other hand, prohibited artificial intelligence systems cannot escape prohibition in view of the identified risks. And, in this case, even when there is scientific uncertainty. The mere possibility of damage is, in the light of precaution, sufficient to provide the grounds for

[56] On the ambiguity of the concept of residual risks, see the relevant study by H. FRASER, J.-M. BELLO Y VILLARINO, *Where Residual Risks Reside. A Comparative Approach to Art 9 (4) of the European Union's Proposed AI Regulation*, Global AI+Regulation Emerging Scholars Workshop, Ottawa, Canada, 2021, in Queensland University of Technology, Brisbane, Australia, *https://eprints.qut.edu.au/233179/*, last accessed on 6 September 2023).

prohibition. One example is the category of subliminal techniques that aim to influence human behaviour. To establish a prohibition, it is sufficient the likelihood of physical or psychological harm attributable to the material distortion of the behaviour of the injured person or of a third party [Article 5(1) a)]. The same happens with artificial intelligence systems that exploit any vulnerabilities of a specific group of persons due to their age or physical or mental disability. The prohibition is based on actions that materially distort the behaviour of the vulnerable person «in a manner that causes or is likely to cause that person or another person physical or psychological harm» [Article 5(1) b)].

Should there be any doubt as to the prevalence of innovation in the regulation of high-risk artificial intelligence systems, this is dispelled by the amendments suggested to these regimes in the Council of the European Union's position on the AI Act proposal. Article 9(2) a) is modified so as to refer to known and foreseeable risks most likely to affect health, safety and fundamental rights, in view of the intended purpose of the high-risk artificial intelligence system. The possibility of misuse of the system is also discarded [Article 9(2) b) and (4)].

It will also be noted that the preference for precaution in the prohibited use of artificial intelligence is diluted by the Council with the introduction of an assessment of reasonableness. In fact, the relevance of the likelihood of damage as a ground for prohibiting artificial intelligence systems depends, in that perspective, on a judgement of reasonable prediction, which is certainly closer to scientific certainty [Article 5(1) a) and b)].

The choice of innovation as the guiding principle in the regulation of artificial intelligence would be acceptable if liability functioned as a counterbalance, allowing precaution the possibility of correcting the excesses of technological development. While making room for new technologies due to the over-riding benefits of innovation in the face of scientific uncertainty surrounding the risks, the legislator cannot disregard reasonable indications of potentially dangerous effects on citizens' fundamental rights, observed in an objective preliminary scientific assessment. This is what is required by a high level of protection.

This means recognising the additional role to be played by the liability regime in relation to safety rules[57]. And this is accepted by the European Commission:

> In the AI Act proposal, the Commission has proposed rules that seek to reduce risks for safety and protect fundamental rights. Safety and liability are two sides of the same coin: they apply at different moments and reinforce each other. While rules to ensure safety and protect fundamental rights will reduce risks, they do not eliminate those risks entirely. Where such a risk materialises, damage may still occur. In such instances, the liability rules of this proposal will apply[58].

In this sense, relaxation of regulatory measures for high-risk artificial intelligence systems would be understandable if, as a precaution, the rules on victim compensation were effective. The innovation principle would prevail *ex ante* and the precautionary principle would prevail *ex post*. However, this is not what happens.

6.3. Precaution in civil liability

The compensatory aim of civil liability presupposes the existence of damage and, to that extent, appears to be in conflict with the nature of the precautionary principle. After all, the application of that principle seeks to avoid the occurrence of the feared dangerous effects. However, there are several noteworthy proposals for merging the two perspectives[59]. We would highlight two different approaches.

In legal theory, a direction is emerging that favours increasing the compatibility between civil liability and the precautionary principle by identifying damage prevention as an autonomous area within the liability assessment. The preventive effect associated with imputation of damage would work alongside prevention of harm by using liability as a tool to inhibit potentially harmful practices.

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[57] See, for example, H. ZECH, *Liability for AI: public policy considerations*, in *Era Fórum*, 22, 2021, p. 153.

[58] AILD, p. 2.

[59] See, in particular, M. BOUTONNET, *Le Principe de Précaution en Droit de la Responsabilité Civile*, Paris, 2005, p. 297 et seq.

We believe that this understanding distorts the meaning of liability, without a practical need supporting it. The room for prevention is not disputed; what is questioned is the dogmatic framework.

Reaction to the risk of an offence certainly has a place in private law. Moreover, the existence of reasonable scientific grounds foreseeing the severity or irreversibility of certain risks may legitimise a prohibitive judicial reaction.

Similarly to what happens with abstract options taken in legislative policy, the interests in conflict in a specific dispute may imply a requirement of precaution. The grounds for the courts' application of this principle lie in the general instruments of civil procedure, these instruments being understood as a commitment to the constitutional right to effective legal protection. The vocation of civil liability is different. The decision on imputation is separated from the exercise of injunctive protection.

It is accepted, however, that the precautionary principle may have a role to play. In fact, it allows a basis for reconfiguring the methods for assessing the general conditions of liability, namely fault and causal link[60]. The usefulness of the principle in this sense is accepted.

This route allows us to demonstrate how the elements of liability may be made more flexible. In this context, is the choice of subjective liability for damage attributable to artificial intelligence systems compatible with a high level of protection of persons? The answer, in our view, is no, if the safety standard of those systems reflects the requirements of the innovation principle, namely, with the use of an acceptable risk, the content of which is ambiguous. This assessment is guided by the rules on product liability.

6.4. The safety that can legitimately be expected

Some would like to see a concession to *culpa levissima* in the exclusion of a producer's civil liability on the basis of development risks. This understanding would enable liability to be excluded on the

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[60] Again, see M. BOUTONNET, *op. cit.*, p. 431 et seq.

grounds of lack of imputability of the agent or the existence of causes that excuse his behaviour.

In a very clear-cut manner, Article 1 of Decree-Law no. 383/89, of 6 November, which transposes the above-cited Directive no. 85/374/EEC into Portuguese law, attributes liability to the producer «regardless of fault». And although Article 1 of the Directive is silent on this matter, it appears possible to identify it in the restriction of the injured person's burden of proof to proof of damage, defect and the causal relationship between defect and damage, and in the fact that lack of fault is not listed among the reasons for excluding liability (Articles 4 and 7 of the Directive). We might add that, according to the Directive's preamble,

> liability without fault on the part of the producer is the sole means of adequately solving the problem, peculiar to our age of increasing technicality, of a fair apportionment of the risks inherent in modern technological production[61].

It is not possible, therefore, to base the subjective liability of the producer on the standard of exceptional diligence, based in particular on an assessment of the development risks. «Cryptoblame» is avoided[62]. «Excessive objectification of fault, abandoning fault without culpability so to speak» is prevented[63]. The «psychological link between the product's defect and the will of the manufacturer» becomes «irrelevant»[64]. This naturally influences the interpretation of the reasons for excluding liability based on development risks.

The Portuguese legislator accepted that «the producer is not liable if he proves that the state of scientific and technical knowledge, at the time when he put the product into circulation, would not enable the existence of the defect to be detected» [Article 5 e) of Decree-Law no. 383/89, cited above][65]. The foregoing highlights the rejection of the

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[61] In this direction, see the reflections of J. CALVÃO DA SILVA, *Responsabilidade Civil do Produtor*, Coimbra, 1990, p. 489 et seq.

[62] J. CALVÃO DA SILVA, *op. cit.*, p. 515, note 1.

[63] J. CALVÃO DA SILVA, *op. cit.*, p. 516.

[64] J. CALVÃO DA SILVA, *op. cit.*, p. 516.

[65] Directive no. 85/374, cit., allowed a derogation from that ground for exemption from liability [Article 15(1) b)].

notion that average diligence by the producer is sufficient to exclude liability. This view is commonly shared.

Within the dominant position, however, there are differences of opinion on the content of the above-mentioned reason for exclusion. The options reflect differences regarding the scope of precaution in the imputation of damage.

For some, liability is dependent on the knowledge (actual or potential) or foreseeability of the defect[66]. The relevance of scientific uncertainty thus appears to be set aside, and it remains as an expression of a dissenting line of thought:

> given that the state of the art is not a decided and closed concept, but rather a fluid concept that needs to be judged in the circumstances of the case, its framework must be the scientific and technical possibility that has been imposed in the respective field (…), even if it is not yet that which is practised in the respective industrial segment[67].

For others, precaution justifies restricting exclusion of liability due to development risks to absolute ignorance of legitimate scientific data[68]. The existence of minority opinions, provided they are duly substantiated in scientific terms, prevents exoneration due to development risks. Some even consider that the state of the art includes the sum of all scientific and technical knowledge at the global level, including isolated opinions, if these are duly substantiated[69].

This broad approach is also our understanding. The application of precaution is therefore legitimised, without this affecting the requirement of substantiation. In relation to this, we may consider the European Commission's requirement:

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[66] See J. CALVÃO DA SILVA, *op. cit.*, p. 516.

[67] J. CALVÃO DA SILVA, *op. cit.*, p. 512.

[68] This theory is considered to be prevalent under Italian law by R. MONTINARO, *Dubbio Scientifico e Responsabilità Civile*, Milano, 2012, p. 110 et seq.

[69] See O. BERG, *La notion de risque de développement en matière de responsabilité du fait des produits défectueux*, in *La Semaine Juridique - Édition Générale,* 1996, I-3945, p. 271 et seq.

> An assessment of risk should be considered where feasible when deciding whether or not to invoke the precautionary principle. This requires reliable scientific data and logical reasoning, leading to a conclusion which expresses the possibility of occurrence and the severity of a hazard's impact (…)[70].

Even in the face of scientific uncertainty, this is sufficient to distance absolute ignorance[71].

It should be added that strict liability allows precaution to be immune to the existence of reasons for excuse. This further broadens the meaning of precaution.

It can be seen, therefore, that, despite the regulations on product safety, the legislator did not refrain from making liability operate subject to precaution. And it was this choice that determined the scope of the protection granted, by means of a convergent reading of the notion of defect, linked to the lack of safety that can legitimately be expected (Article 6(1) of Directive no. 85/374/CEE, cited above), with the demands placed by development risks as a reason for excluding liability. To put it more simply, the omission of the conduct which would have been required from the producer to exclude his liability on the basis of the state of scientific and technical knowledge at the time when the product was put into circulation, fulfils the requirement of defect and, accordingly, leads to the finding of liability.

In this context, it does not appear legitimate to establish the high level of protection of fundamental rights required by the AI Act proposal at a level that is different from the safety that can legitimately be expected when applying the notion of a defective product. Even more so because product liability, as we have seen, is an instrument used to protect citizens in light of the harm caused by artificial intelligence systems.

Moreover, one cannot accept the possibility of having different rules for producer's liability and for operator's liability in the event of a third party being exposed to the same danger. In other words, the risk is not determined by the agent, but by the purpose of the artificial intelligence

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[70] Communication from the Commission on the precautionary principle, cit., p. 14.

[71] See, for example, R. MONTINARO, *op. cit.*, p. 113.

system. Indeed, certain statements from the European institutions have unequivocally expressed that there must be equivalence of liabilities. See, for example, the European Parliament:

> The introduction of a new liability regime for the operator of AI-systems requires that the provisions of this Regulation and the review of the Product Liability Directive be closely coordinated in terms of substance as well as approach so that they together constitute a consistent liability framework for AI-systems, balancing the interests of producer, operator, consumer and the affected person, as regards the liability risk and the relevant compensation arrangements[72].

Lastly, it should be stressed that delaying the European regulation of strict liability for damage caused by high-risk artificial intelligence systems does not exclude the equivalence between the liability of the operator and the obligation of the producer. This is, in fact, the case.

We may consider corporate liability for risk, a theory that is broadly developed in Italian law. In this legal order, the rules providing for specific situations of strict liability have given rise to the development of a general principle, parallel to fault, based on the risk created by the carrying out of economic activities or, in a narrower sense, by companies. A bipolar system (based on fault or risk) thus emerges[73].

In a similar way, transformation of the civil liability rules for dangerous activities into no-fault liability rules is also occurring. An example is what happens in Article 2050 of the Italian *Codice Civile* and, in particular, in the articulation with the imputation of damage caused by a defective product[74]. Civil liability for dangerous activities, although subject to proof of the likelihood of damage, has come to accept the relevance of supervening scientific knowledge about the activity's po-

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[72] European Parliament resolution of 20 October 2020 with recommendations to the Commission on a civil liability regime for artificial intelligence [2020/2014(INL)], cit., recital 23 of the Proposal.

[73] For a critique, see C. SALVI, *La Responsabilità Civile*, terza edizione, Milano, 2019, pp. 155 and 158 et seq.

[74] In this respect, some have established a parallel with the opening of other laws to objective liability, in particular with the development and the scope attributed to the *Verkehrspflichten* (duties of care) in German law. See, for all, C. CASTRONOVO, *Responsabilità Civile*, Milano, 2018, p. 465 et seq.

tential risk to cause damage. According to some legal literature, this solution enables relevance to be given to development risks[75].

In short, no-fault liability of the operator of high-risk artificial intelligence systems is believed to be substantiated. However, will it be enough to guarantee a high level of protection of the fundamental rights compromised by the injury? We do not think so.

7. A corrective reading of compensation for damage

Strict liability is no longer acceptable as a means for implementing precaution with the ongoing shift in the injury paradigm. Acts have changed from a human source to a machine origin. In addition, the progressive sophistication of the autonomy of artificial intelligence systems will inevitably lead to the opacity of certain procedures. At the same time, other features of artificial intelligence systems, such as data dependency, vulnerability to cybersecurity breaches or interconnectivity, explain the transition from a monocausal to a multicausal reality[76].

Pursuing the condition of identifying an agent of the harmful act and imputation of liability based on risk control would mean sacrificing the injured party to the innovation principle, which is accepted *ex ante*. This would harm an efficient and speedy response to compensation claims for damage arising from the use of high-risk artificial intelligence systems.

The injured party would be left, clearly and unjustly, unprotected. In the words of Anna Beckers and Gunther Teubner:

> Suppose the law continues to react to the use of AI systems – robots, software agents, human-machine associations, or multi-agent systems – exclusively with traditional concepts tailored for human actors and thus leaves those responsibility gaps unresolved. In that case, it inevitably

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[75] See, in this respect, the exposition by R. MONTINARO, *op. cit.*, p. 121 et seq.

[76] Overcoming a human based and monocausal model is discovered as a unitary event in EXPERT GROUP ON LIABILITY AND NEW TECHNOLOGIES – NEW TECHNOLOGIES FORMATION, *Liability for Artificial Intelligence and other emerging digital technologies*, cit., p. 19.

> contributes to damage not being distributed collectively across society, but rather in a merciless *casum sentit dominus* fashion[77].

Confidence of citizens implies protecting injured parties from lengthy, expensive and, oftentimes, unsuccessful litigation. One requirement of precaution, therefore, is the creation or extension of immediate collective redress mechanisms, such as social insurance or social security. This is about creating compensation funds aimed at compensating, in general, damage associated with the performance of artificial intelligence systems that present the greatest danger to fundamental rights[78].

The innovation principle has determined social acceptance of the risks posed to the community by artificial intelligence systems placed on the market, but it appears incapable of dictating individual acceptance of damage[79]. Compensation for damage is a steadfast dimension of the requirement for a high level of protection of fundamental rights. Community interests cannot take away those rights, and adequate compensation will always be due when powers recognised for or allocated to the individual by the legal order are affected.

This is the very idea that governs compensation for sacrifice. We may take Portuguese law as an example. In Article 16 of Law no. 67/2007, of 31 December, approving the Rules on Non-Contractual Liability of the State and Other Public Entities, we read:

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[77] A. BECKERS, G. TEUBNER, *Three Liability Regimes for Artificial Intelligence. Algorithmic Actants, Hybrids, Crowds*, Oxford-London-New York-New Delhi-Sydney, 2021, p. 7.

[78] The provision is not linked to the assumption of liability. See, namely, J.F. SINDE MONTEIRO, *Estudos sobre a Responsabilidade Civil*, Coimbra, 1983, p. 74 et seq., G. BORGES, *New Liability Concepts: the Potential of Insurance and Compensation Funds*, in S. LOHSSE, R. SCHULZE, D. STAUDENMAYER (eds.), *op. cit.*, p. 159 et seq., T. VANSWEEVELT, B. WEYTS, L. VANHOOF, K. WATTS, *Comparative Analysis of Compensation Funds. Differences, Common Characteristics and Suggestions for the Future*, in T. VANSWEEVELT, B. WEYTS (eds.), *Compensation Funds in Comparative Perspective*, Cambridge-Antwerp-Chicago, 2020, p. 207 et seq.

[79] In favour of individual implications of an assessment of social acceptance of risks, see, however, M. BOUTONNET, *op. cit.*, p. 499 et seq.

> The State and other public law legal persons shall compensate private persons on whom, for reasons of public interest, they impose burdens or to whom they cause special and abnormal damage, and, for the purposes of calculating the compensation, they shall take into account, namely, the degree to which the substantial content of the violated or sacrificed right is affected.

The purpose of the rules is to compensate losses deriving from the preference that is intentionally given to the public interest over defence of the integrity of individual rights or interests:

> The primacy of the common good over private interests is a requirement of life in society: it often becomes necessary to sacrifice individual assets, in view of a greater good or the avoidance of a greater evil. In such cases, it is imperative, for reasons of justice, to provide redress or compensation for the holders of the sacrificed interests[80].

One objection to the parallel drawn with applying the precautionary principle to compensation for damage resulting from the operation of artificial intelligence systems will be that the rules on compensation for sacrifice require unequal treatment of the rights or interests affected:

> (…) Special harm is that which is not suffered by most persons, but by certain and specific persons as a result of a specific relative position. For damage to be regarded as special, it is necessary to prove that certain persons are injured in such a way that places them in an unequal situation in relation to most persons[81].

Is this not the case, however, when consumers' interests are sacrificed for the benefit of the freedom to conduct business and the freedom of art and science? Or when a distinction is made between users of high-risk artificial intelligence systems and other members of the community, whether or not users of artificial intelligence systems[82]?

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[80] P. MACHETE, *Anotação ao Artigo 16.º*, in RUI MEDEIROS – organisation, *Comentário ao Regime da Responsabilidade Civil Extracontratual do Estado e demais Entidades Públicas*, Lisboa, 2013, p. 425 et seq.

[81] P. MACHETE, *op. cit.*, p. 81.

[82] See, in parallel terms, the example cited by P. MACHETE: "(…) In the Supreme Court Judgment of 28.2.2012, Case 1077/11 – slaughter of birds for public health rea-

Bearing in mind the features of artificial intelligence systems, the acceptable risk admitted by the law exposes the user of high-risk systems to a different level of danger. There appears to be a basis, then, for the theory of precaution as a counterbalance to the prevalence of innovation in the fulfilment of the requirements for placing and monitoring the system on the market. And there also appears to be a basis for the need for efficient and speedy management of any compensation claim. In fact, it is necessary to free the decision on compensation from the assumptions and from the reasons for excluding strict liability.

This is the effect that is achieved with the stabilising mechanism of compensation for the sacrifice of individual interests or rights in light of the public interest. We are on the side-lines of a liability in a strict sense, considering rather the extent to which the contribution of an individual has exceeded the cooperation of others for the common good[83]. And when compensation for sacrifice is formatted by the general and abstract nature of approved laws, the extent of the universe of beneficiaries converts the benefit into an expense of a social nature[84].

Accordingly, and lastly, there appears to be a basis for the idea that compensation funds should be financed by European public funds, at least in part[85]. This is in exchange for a regulation that guarantees Europe's position among the main competitors in artificial intelligence innovation projects.

Increased legal certainty would continue to be an objective of European regulation on compensation for damage attributable to high-risk artificial intelligence systems, thereby contributing to ensuring the establishment and functioning of the internal market. It should be noted,

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sons – the court considered that the loss borne by the owner of the birds was special (since it does not apply to all citizens equally): "in the case at hand the damage borne by the claimant does not apply to all citizens equally, and is thus special damage. In fact, all citizens who are consumers benefit from the slaughter of the birds, for public health reasons, but only the owners of the birds suffer with their destruction"" (*op. cit.*, p. 85).

[83] See P. MACHETE, *op. cit.*, p. 438 et seq.

[84] See J.J. GOMES CANOTILHO, *O problema da responsabilidade do Estado por atos lícitos*, Coimbra, 1974, p. 153.

[85] In our opinion, a financial contribution from operators of artificial intelligence systems seems to be justified.

however, that this new perspective would not undermine the aim of solving the problem of fragmentation of national laws on liability.

Indeed, the solution of creating compensation funds to compensate damage caused by high-risk artificial intelligence systems does not mean that the advantages associated with liability judgements would be forgone. We may consider, in particular, the prevention of damage associated with the allocation of risk or the basis of fault[86]. The application of decisions on liability would continue for compensation of damage attributed to artificial intelligence systems that are not high-risk and, in any case, for the exercise of the right of recourse by the compensation funds. In these situations, a proposal for harmonising liability rules with the aim of eliminating or preventing fragmentation of national laws could be based on breach of due diligence. This subject, however, requires a separate reflection.

8. Summary

1. Basing European intervention in the adaptation of non-contractual liability rules to artificial intelligence on fault breaches the principle of subsidiarity, due to the absence of clear benefits.
2. Firstly, the usefulness of disclosing evidence or of a presumption of causality is inextricably linked with situations of subjective liability, where the injured party has the burden of proving fault. Where there is a reversal of the burden of proof of fault, the protection granted by the European solutions seems irrelevant: the information on compliance with due diligence must be provided by the defendant and the presumption of fault typically covers a presumption of abstract causality.
3. Now, fragmentation of the liability rules that may be applicable to high-risk artificial intelligence systems does not lie in the reversal of

[86] See, in particular, H. ZECH, *op. cit.*, p. 152 et seq., and K. A. CHAGAL-FEFERKORN, *The Reasonable Algorithm*, in *Journal of Law, Technology and Policy*, 1, 2018, p. 111 et seq., and *How Can I Tell If My Algorithm Was Reasonable?*, in *Michigan Technology Law Review*, 27, 2021, p. 213 et seq.

the burden of proof of fault or not, but, in general, between civil liability with presumed fault and strict civil liability.

4. The breach of subsidiarity, in the terms indicated, arises as a result of an unfortunate response to the tension between precaution and innovation in the regulation of artificial intelligence (AI Act).
5. The choice of innovation as a guiding principle in the regulation of artificial intelligence would be acceptable if liability would function as a counterbalance, giving to the principle of precaution the possibility of correcting the excesses of technological development. While making room for new technologies due to the over-riding benefits of innovation in spite of scientific uncertainty surrounding the risks, the legislator cannot disregard reasonable indications of potentially dangerous effects on citizens' fundamental rights, observed in an objective preliminary scientific assessment. This is what is required by a high level of protection.
6. In this context, it does not appear legitimate to attain a high level of protection of fundamental rights required by the AI Act proposal at a level that is different from the safety that can legitimately be expected when implementing the notion of a defective product. Even more so because product liability is an instrument used to protect citizens from the harm caused by artificial intelligence systems.
7. Strict liability is no longer acceptable as a means of implementing precaution with the ongoing shift in the injury paradigm. Acts have changed from a human source to a machine origin. In addition, the progressive sophistication of the autonomy of artificial intelligence systems will inevitably lead to the opacity of certain procedures. At the same time, other features of artificial intelligence systems, such as data dependency, vulnerability to cybersecurity breaches or interconnectivity explain the transition from a monocausal to a multicausal reality.
8. Confidence of citizens implies protecting injured parties from lengthy, expensive and, oftentimes, unsuccessful litigation. One requirement of precaution, therefore, is the creation or extension of immediate collective redress mechanisms, such as social insurance or social security. This is about creating compensation funds aimed at compensating, in general, damage associated with the perfor-

mance of artificial intelligence systems that present the greatest danger to fundamental rights.

9. The innovation principle has determined social acceptance of the risks posed to the community by artificial intelligence systems placed on the market, but it appears incapable of dictating individual acceptance of damage. Compensation for damage is a steadfast dimension of the requirement for a high level of protection of fundamental rights. Community interests cannot take away those rights, and adequate compensation will always be due when powers recognised for or allocated to the individual by the legal order are affected.
10. Accordingly, there appears to be a basis for the idea that compensation funds should be financed by European public funds, at least in part. This is in exchange for a regulation that guarantees Europe's position among the main competitors in artificial intelligence innovation projects.
11. Application of decisions on liability would continue for compensation of damage attributed to artificial intelligence systems that are not high-risk and, in any case, for the exercise of the right of recourse by the compensation funds. In these situations, a proposal for harmonising liability rules with the aim of eliminating or preventing fragmentation of national laws could be based on breach of due diligence. This subject, however, requires a separate reflection.

THE RIGHT TO HOUSING AND THE RESIDENTIAL TENANCY REGULATION: SHOULD MORE BE DONE AT A EUROPEAN LEVEL?

Ana Afonso[*]

TABLE OF CONTENTS*: 1. What has been done regarding the recognition of a right to housing and tenancy contract regulation? 1.1. Prohibition of discrimination. 1.2. The role of Article 8 of the European Convention on Human Rights and its application by European Court of Human Rights: the right to respect for «home». 1.3. The role of Article 31 of the European Social Charter. 1.4. The relevance of Article 34, para. 3, of the Charter of Fundamental Rights of the European Union. 1.5. The importance of Member States recognition of a constitutional right to housing. 1.6. The «soft law» influence – the DCFR and the «Life Time Contracts» Principles. 1.7. European social policies. 1.8. The relevance of European consumer law. 1.9. The advantages of an «Open Method of Coordination». 2. What more could be done regarding tenancy contract law?*

ABSTRACT: *With a view to «combat social exclusion and poverty», a «right to social and housing assistance» has been included in the Charter of Fundamental Rights of the European Union (Article 34, para. 3). In spite of its vagueness, a right to housing can presently be considered a European Union principle. Protection of tenancies is a facet of an effective right to housing and European Union citizens could benefit from a stable and balanced tenancy contract law regulation. However, tenancy contract law has been left out of European Union «agenda». Creating a set of «model rules» could, nonetheless, be most useful. The absence of legal authority of such texts shall not diminish its importance since they slowly settle a common juridical heritage and influence decisions within the Member States. The drafting of a «default contract» or a set of «model rules» is, notwithstanding, far from being a simple task. Adjusting protection of the tenant's interests to a functioning market is a huge challenge, already at a national level. In fact, wherever average wages are considerably low and rent prices are very high, reconciling landlords and tenants interests seems far from reachable.*

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A non-irrelevant percentage of European citizens depends on rental to meet its housing needs[1]. Although home ownership is still universally considered more appealing and, economically, a more efficient option to cope with that necessity, home renting may well be the only affordable option for some, as well as the preferable solution for others. In fact, both low-income households and migrants are likely to face insurmountable difficulties in having access to credit[2], and middle-income households could advisedly be unwilling to take such a risk and huge financial commitment upon their shoulders. Other than this, house renting is the preferable solution to satisfy a mobility interest: apart from assumedly transitional situations, such as scholarly work or professional training; in fact, jobs and personal commitments are no longer meant to last for a lifetime and a tenancy contract is more adequate to accommodate this flexibility demand.

Despite its existential dimension and economic relevance, tenancy contract regulation has, nonetheless, been essentially left out of the EU institutions agenda. Even if different tenancy contract regulations may constitute an obstacle to the freedom of people, such as capital investment (investors will find it difficult to cope with impenetrable varying laws), the EU has never undertaken any harmonisation effort of this subject. The reasons for this appear to lie not only on a legitimacy issue – the impact of the differences has probably never been considered as sufficiently relevant to affect choices and transactions within the EU and therefore approximation of the Member States legislation was considered unnecessary to ensure the proper functioning of the common market (i.e., the requirements of the proportionality and subsidiarity principles are not met); regulation of property is excluded from EU's

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[1] Eurostat (*https://ec.europa.eu/eurostat/cache/digpub/housing/bloc-1a.html*, last accessed on 6 September 2023) indicates that 30% of the European Union population lives in rented housing.

[2] Article 18 of Directive 2014/17/EU on credit agreements for consumers relating to residential immovable property, establishes an obligation for the creditor to assess the consumer's creditworthiness and to make the credit available only where the result of the creditworthiness assessment indicates that the obligations resulting from the credit agreement are likely to be met in the manner required under that agreement.

competence sphere[3] –, but also on the difficulties aroused by the highly politicised nature of the matter, dependent both on national political options and on social and economic circumstances[4].

At least during the last century, national tenancy contract law rules have consistently been of a mandatory nature, aiming to protect tenants, regarded as the weaker party of the contract. Furthermore, social housing policies have been carried out through tenancy contract law and in some countries – as it has been the case in Portugal – to an extent that goes beyond the range of possibilities and efficiency of a «social private law». A strong connection (certainly with various scope and instruments) between the recognition of a right to housing and national regulations of tenancy contract law has thus been established in most Member States. Yet, a right to housing is still but a vague programmatic rule in the European Union. It is true that over the past years, the European Union has become more committed to social policies and has recognised access to decent housing as a pre-requisite to improve the citizens conditions of life and work (which is one of its goals, see Art. 151 TFEU). However, a genuine right to housing has not so far been recognised in any of the European Union texts, let alone any harmonisation of tenancy contract's regulation to promote a European housing policy. Though still barely referred to in European texts, accepting a social right to housing as a means to combat social exclusion may affect tenancy contract law and build a common ground for tenant's protection[5].

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[3] Although it has been stated that A. 345 of TFEU does not constitute an obstacle to a European property law (see B. AKKERMANS, E. RAMAEKERS, *Article 345 TFEU (ex article 295 EC) – its meaning and interpretations*, in *European Law Journal*, Vol. 16, No. 3, 2010, pp. 292 ff.). Despite the ambiguity of the phrasing – «the Treaties shall in no way prejudice the rules in Member States governing the system of property ownership» – and its inconsistent use, Art. 345 TFEU seems, nonetheless, to establish some limits to EU regulation of national property law.

[4] According to E. BARGELLI, *Locazione abitativa e diritto europeo. Armonie e disarmonie di un capitolo del diritto privato sociale*, in *Europa e diritto privato*, No. 4, 2007, pp. 954-957, the reasons why tenancy contract law is ignored by European private law are, first of all, legal.

[5] E. BARGELLI, *Locazione abitativa*, cit., pp. 972 and 992, refers to a «diagonal» effect of European law on national tenancy contracts regulations.

Each Member State has special private law rules to protect the tenant, consisting mainly of limitations to the landlord's right to terminate the contract upon its own will and of capping rent increases. Despite the legislative reforms that took place in the final decade of last century and the beginning of the new millennium, with a market-oriented approach, most countries maintain protective solutions. But there is a very wide range of options between more liberal and more restrictive regulations, that vary over time within each Member State, according to the political majority or the strength of pressure groups[6]. Merely analysing and comparing different national laws is by itself extremely useful, since it allows national institutions to gain perspective and to be less prone to succumb to pressure groups and to adopt unstable urgent responses to specific transitory problems[7]. Nonetheless, the question we want to address in this paper is of a prospective nature: what should or could be done by European institutions to help implementing an effective right to housing through tenancy contract law legislation? Shall tenancy's regulation be entirely left to Member States competence, or should some clear and possibly concrete direction be given at the European level? Firstly, of course, we need to look into what has been done up to this moment.

1. What has been done regarding the recognition of a right to housing and tenancy contract regulation?

1.1. Prohibition of discrimination

An equal access to national housing markets has been prescribed by European law early on, based on the protection of freedom of movement for workers (see Art. 9 of Regulation 1612/68, later included in Regulation No. 492/2011). At the beginning of this millennium, prohibition of discrimination gained a broader scope with Directive

[6] Some Member States have more complex systems, dividing legislative competence on tenancies between central and regional or local entities. This is the case, for example, in Belgium, Italy, and Germany.

[7] See also, E. BARGELLI, *Locazione abitativa*, cit., p. 992.

2000/43/EC, implementing the principle of equal treatment between persons irrespective of racial or ethnic origins. The Directive's scope extends to «all persons, as regards both the public and private sectors» and specifically refers to housing, as Art. 3 h) mentions «access to and supply of goods and services which are available to the public including housing».

Despite its relevance in setting a clear principle and defining sanctions for its violations, European anti-discrimination legislation is only able to scratch the surface. Except if public announcements clearly provide a discriminatory selection, it is very difficult to identify and control personal discriminatory decisions in house renting[8]. Moreover, impenetrable regulations of the host country and poor conditions of the houses when minimum legal standards are lacking, remain unsolved problems.

1.2. The role of Article 8 of the European Convention on Human Rights and its application by European Court of Human Rights: the right to respect for «home»

The European Convention on Human Rights includes the right to respect for private and family life and home and through this door the European Court of Human Rights has already taken some decisions that protect the residential tenant or even other occupants of the house. Although the European Court of Human Rights is not part of the European Union juridical system – neither is the European Union itself legally bound by the Convention –, protection of fundamental rights within the

[8] Although structural discrimination has been identified as a persistent barrier to an effective right to adequate housing and some formal institutionalised mechanisms have been implemented, these cases have hardly ever appeared before a court. Other than this, the Directive is only related with ethnic discriminatory behaviour, but other discriminatory decisions may exist. Defining what is considered discriminatory (would that be the case when refusal is based on an excessive number of children, or upon age), may be far more complex than it appears to. Furthermore: on the basis of freedom of contract, which includes choice of one's party, up to what extent shall a public criterion prevail over the private one, when it comes to renting a private house or a part of it?

European Union is considered equivalent to the protection recognised by the European Court of Human Rights[9].

The right to respect for the home enshrined in Article 8 of the European Convention has grounded some European Court of Human Rights' rulings in which forced evictions were held inadmissible even if they were lawful according to domestic law. Being «the loss of one's home the most extreme form of interference with the respect for the home», any person should be able to have the proportionality of the measure determined by an independent tribunal; thus, a lack of procedural safeguards is a violation of Article 8. The Court has noted that whether a property is to be classified as a «home» is a question of fact and does not depend on the lawfulness of the occupation under domestic law[10]. This criterion has not, however, been applied to private landlords: within private law, the right to housing requires coordination with the protection of other fundamental rights, such as private property and an effective judicial guarantee[11]. Avoiding evictions in wintertime and sus-

[9] There has been a «cross-fertilisation» between the Court of Justice of the European Union and the European Court of Human Rights. An example of this influence, regarding the right to the inviolability of the home, is patent in the modification of the CJEU case law, which did not include business premises under the scope of Article 8 of the Convention (the CJEU held in its Hoechst judgment that it did not apply to business premises: Judgment of 21 September 1989, *Hoechst AG v Commission*, joined cases 46/87 and 227/88, EU:C:1989:337, paras. 17 and 18). After the Niemitz judgment, where ECHR made clear that Article 8 applies to business premises *(Niemietz v Germany*, Application 13710/88, Judgment of 16 December 1992), the CJEU started to bring its case law in line with this interpretation (see Judgment of 22 October 2002, *Roquette Frères*, C-94/00, EU:C:2002:603, para. 29). Moreover, with the Lisbon Treaty, the EU is bound to accede to the Convention (Art. 6, para. 3 of the TEU, includes in EU law fundamental rights as guaranteed by the European Convention on European Human). On the gaps of EU human rights protection system, see F. VAN DEN BERGHE, *The EU and issues of human rights protection: same solutions to more acute problems?*, in *European Law Journal*, Vol. 16, No. 2, 2010, pp. 112 ff.

[10] In *McCann c. UK*, 13.05.2008, procedural safeguards were considered insufficient, since the tenant was merely given a notice to vacate.

[11] As expressly acknowledged in *Vrzić v. Croatia*, 12.07.2016 (43777/13) and in *F.J.M. v. Uk*, 06.11.2018 (76202/16). Some critical element has arisen in Portugal when an administrative organism – Balcão Nacional de Arrendamento (National Counter for tenancies) – was given the to recognise the right to eviction and the power to execute it.

pending eviction in case of a serious disease (instead of merely counting on a subsequent intervention of social services) have nonetheless been defined as good practices. Article 8 ECHR has also been used as a ground to admit *mortis causa* transmission of tenancy contractual position to family members even where it was denied by national legislation[12].

On the other hand, the Convention has also been invoked against a State for disrespecting landlord's rights, either for failing to evict a tenant when the contract was extinguished, but the landlord was prevented to regain detention of the premises by the tenant's refusal to leave, and for a landlord's inability to derive a decent profit from its property. Limits imposed on property right are also subject to a proportionality test: an excessive burden on landlord's property right and patrimonial interests has thus in many cases been held inadmissible according to the Convention. Restrictions on landlord's rights are acceptable, but must be adequate and necessary to the protection of the community's needs. Rent control regulations are thus admissible, except if the amount is insignificant compared to the market value. The Court has often stated that a fair distribution of the social and financial burdens involved in solving a country's housing problem cannot be placed only on one particular social group, no matter how important the interests of the other group or the community as a whole are[13].

Nonetheless, whenever the defendant offers some argument against the eviction process or invokes some circumstance that may defer execution, the process is sent to a judicial court. See Arts. 15-A ff. of Law No. 6/2006, 17.02.

[12] In *Karner v. Austria*, 24.10.2003, the Court found a violation of Article 14 in conjunction with Article 8 when an occupant was prevented from succeeding to a tenancy after the death of his same-sex partner.

[13] Rent control has, for example, been considered disproportionate and therefore a violation of a landlord's entitlement to derive profit from its property in *Hutten-Czapska v. Poland*, 19.06.2006, where rent levels were set below the cost of maintenance. Violation of the right to property, as enshrined in Article 1 of Protocol No. 1, was not linked in this case exclusively to the rent limits, but rather it was the result of a combination between rent control, impossibility to terminate contract and lack of assistance or subsidies from public authorities to maintain the premises. On the contrary, in *Mellacher and others v. Austria*, 19.12.1989, rent control regulation was not considered as disproportionate. Some cases against Italy found a violation of the Convention for

Although European Court of Human Rights' judges have decided that no positive obligation for the local authorities can be inferred from Article 8 to provide the applicant with a home[14] or to recognise any right to live in a particular location, it has also been stated that Article 8 does not refer only to a negative defence from public authorities, but also entails the adoption of measures by the State to secure the right to the respect for one's «home» (for example, the adoption of an adequate legal framework), even in the sphere of relations between individuals.

The concept of «home» has been broadly interpreted as including an office or a business shop, being the only requirement a «sufficient and continuous connection to a place»[15]. Secondary residences and holi-

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allowing a tenant to occupy a house for too long a period of time. Italy's legal solution of evictions' suspensions was held a violation of landlords rights and patrimonial interests. A judicial decision had to be taken within a reasonable period, as provided by Article 6, para. 1, of the Convention. In *Immobiliare Saffi v. Italy*, a case decided on the 28.07.1999, the tenant occupied the premises without a title for as long as thirteen years; both in *Tanganelli v. Italy*, 11.01.2001, and *Lunari v. Italy*, 11.01.2001, the duration of evictions' suspensions was again considered disproportionate. In *Schirmer v. Poland*, 21.12.2004, the Court highlighted that «an interference with the peaceful enjoyment of possessions must strike a fair balance between the demands of the general interests of the community and the requirements of the protection of the individual's fundamental rights» and this balance had not been respected, since the landlord had to bear an individual excessive burden, being denied eviction of the tenant in spite of having found an alternative accommodation in the same town for it. In *Mattheus v. France*, 31.06.2005, although the proprietary had been given some money by the French State to compensate its impossibility to use its property, untitled detention of premises lasted for sixteen years; no social reasons could ever justify such a long-lasting illegal occupation and therefore the Court ruled that there was a violation of Articles 6, para. 1, of the Convention and Article 1 of Protocol 1. The same reasoning was followed in *Edwards v. Malta*, 24.10.2006, where the owner had lost control of its own property for thirty years. On the contrary, in *Almeida Ferreira e Melo Ferreira v. Portugal*, 21.12.2010, the Court considered (with two dissenting votes) restrictions on rent limits and impossibility to regain possession of premises (even upon a housing need for a descendant in first degree) were legitimate and proportionate to protect tenants' interests.

[14] As ruled in *Marzari v. Italy*, 4.05.1999, and *Chapman v. UK*, 18.01.2001. The Court noted that «whether the State provides funds to enable everyone to have a home is a matter for political not judicial decision».

[15] See, namely, case *Winterstein and others v. France*, application No. 27013/07, decision of 17.10.2013.

day's houses are also included in this concept[16]. Moreover, the right to respect for the «home» does not require a specific title and detention of the premises may even be unlawful; any type of premises (including movables, such as caravans) are also recognised.

Article 8 is in fact more directly connected to the idea of inviolability of home, than a real right to housing[17]. Nonetheless, regarding tenancies, it has been proved useful not only to claim that evictions shall be decided by a judicial body and further damages caused by it shall be avoided with regard to the factual circumstances of the occupant whose legitimate interests are protected (suspending evictions during wintertime or in case of a serious disease, for example), but also, conversely, to ensure the landlord's private property rights, considering eternal postponements of evictions inadmissible, and guaranteeing the right to a reasonable and decent profit[18].

There are, however, some obstacles and limits to the relevance that the ECHR may have on a private tenancy contract. Most of ECHR decisions are addressed to the States or public entities, but not to private parties. It has been accepted, nonetheless, that the aggrieved party may invoke the ECHR jurisprudence and argue the disproportionality of an eviction decision and the risk of homelessness[19].

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[16] See case *Fägerskiöld v. Sweden*, application No. 37664/04, decision of 26.02.2008.

[17] For example, in the Portuguese Constitution these are two different rights, enshrined in two different articles: Art. 34, on inviolability of home and correspondence; Art. 65, on the right to housing.

[18] On the necessary and difficult conciliation between protection of tenants and guarantee of property owners rights in post-communist countries see *Berger-Krall and others v. Slovenia*, application No. 14717/04, decision date: 12.06.2014. The Court did not find a violation of Article 8 in a reform of the housing sector, following the transition from a socialist regime to a market economy, resulting in a general weakening of legal protection for holders of «specially protected tenancies», since the tenants continued to enjoy special protection to a degree that was higher than that normally afforded to ordinary tenants.

[19] E. BARGELLI, *La costituzionalizzazione del diritto privato attraverso il diritto europeo. Il right to respect for the home ai sensi dell'art. 8 CEDU*, in *Europa e Diritto Privato*, 1, 2019, pp. 75-77, considers that the Convention also applies to private relations.

1.3. The role of Article 31 of the European Social Charter

It was only in 1996, when the European Social Charter (the counterpart of the European Convention on Human Rights in the sphere of economic and social rights) was revised, that the right to housing was introduced in the text of the Treaty. Article 31 now expressly enshrines a «right to housing», stating that the Parties are bound to «take measures designed: 1. to promote access to housing of an adequate standard; 2. to prevent and reduce homelessness with a view to its gradual elimination; 3. to make the price of housing accessible to those without adequate resources». More than the text, it is the «interpretative dynamism» of the European Social Rights Committee, to whom an analysis of the adequacy of a State law or policy in relation to the Social Charter requirements is demanded through a «collective complaint», that gives effectiveness to the Parties' commitments. In its decisions, the Committee has already highlighted that the Charter entails a positive obligation that shall be regarded not merely as an obligation of means, but further as an obligation of gradually achieving some results[20]. Although the Charter is not a juridical instrument of the European Union and not all Member States have ratified Article 31, Article 151, para. 1, TFEU expressly refers to social rights as recognised by the Charter, thus including them within a common juridical heritage[21].

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[20] N. BERNARD, *Le droit au logement dans la Charte Sociale revisée: à propos de la condamnation de la France par le Comité européen des droits sociaux*, in *Revue trimestrielle des droits de l'homme*, 80, 2009, p. 1078. Each State is, for instance, obliged to keep statistics to allow it to make a comparison of the results. With respect to evictions, the Committee has often highlighted they must be carried out in a way that respects the dignity of the evicted.

[21] The CJEU has included references to the Charter as a ground of its decisions (see, for example, Judgment of 11 December 2007, *Viking*, C-438/05, EU:C:2007:772; and Judgment of 18 December 2007, *Laval*, C-341/05, EU:C:2007:809). On the interaction of the European Social Charter through the collective complaint procedure with the legal system and the institutions of the EU, see K. LUKAS, *The Collective Complaint Procedure of the European Social Charter: Some Lessons for the EU?*, in *Legal Issues of Economic Integration*, 41, No. 3, 2014, especially pp. 281 and ff.

1.4. The relevance of Article 34, para. 3, of the Charter of Fundamental Rights of the European Union

With the adoption of an autonomous «Bill of rights» by the European Union (the Charter of Fundamental rights of the European Union was proclaimed in Nice, on 7th December 2000), the protection of fundamental rights has now a direct legal basis in order to be implemented within the European Union. Going beyond the judiciary activism of the ECHR in defining the possibilities of a «right to respect for home», and following the path led by the European Social Charter, the European Union Charter directly recognises «the right to social and housing assistance», with a view to «combat social exclusion and poverty». The problem, however, persists: these texts are an invitation to the States but do not recognise a specific and effective right to individuals; though far from being irrelevant, mere proclamation of a right is not necessarily linked to the adoption of practical measures.

With the entry into force of the Charter, the European Convention has not lost its role in the protection of human rights within the European Union – on the contrary, harmonisation has become mandatory and not only desirable – but it appears to have ceased to be the main source of reference for the CJEU. Relevance of the Convention fundamental rights protection system is guaranteed both through Art. 6, para. 3, TEU, which states that fundamental rights enshrined in the European Convention are part of EU law, and through Article 52, para. 3 of the Charter, which specifies that insofar as the Charter contains rights which correspond to rights guaranteed by the European Convention on Human Rights, the meaning and scope of those rights are to be the same as those laid down by the Convention. According to the explanation of that provision, the meaning and scope of the guaranteed rights are determined not only by the text of those instruments, but also by the case law of the European Court of Human Rights. With respect to the content of Article 8 of the Convention, its text is reproduced, with the «same meaning and scope», in Article 7 of the Charter.

If legal harmony was optional before the Charter, it has become mandatory with its entry into force. Nonetheless, the CJEU is starting to dispense with Strasbourg case law references, creating the appearance

of an autonomy which has no basis either in the Charter or elsewhere in the Treaty of Lisbon.

1.5. The importance of Member States recognition of a constitutional right to housing

Along with the recognition of fundamental rights as declared in the European Convention of Human Rights, Art. 6, para. 3, TEU includes constitutional principles of the Member States in European Union law. Constitutional law reflects the values and goals of a Member State and these are also (after the Lisbon's Treaty revision) European Union principles. Some Member States, such as Portugal (see Art. 65 in 1976), Spain (Art. 47, in 1978), Belgium (Art. 23, para. 3, in 1994), Greece (Art. 21, in 1975), the Netherlands (Art. 22, para. 2, in 1984), Sweden (Art. 2) and Poland (Art. 75, in 1997) have enshrined in their supreme laws a right to housing[22]. The Portuguese Constitution is quite detailed, mentioning inclusively a rent system adequate to the family income and access to private property. Article 75, para. 2, of the Polish Constitution also refers specifically to the protection of tenants, reading as follows: «protection of the rights of tenants shall be established by statute». Recognition of a right to housing goes beyond a solemn proclamation of a political and symbolic nature; it bounds public authorities to pursue policies conducive to satisfying the housing needs of its citizens (namely combating homelessness and supporting activities aimed at the acquisition of a home). Surely, its implementation is conditioned by politics and dependant on the availability of financial means, but the deployment of special public resources appears to be a direct effect of a constitutional provision of a right to housing. Regarding tenancy contract law, the constitutional recognition of a right to housing implies: a legislative duty to establish a harmonious legal framework for landlords and tenants (one that ensures both the security of tenure and the landlord's right to make a profit from its property) and an interpretation of

[22] A constitutional right to housing is also recognised in some countries where it is not explicitly enshrined in the fundamental text, such as France and Italy, as a result of a connection with other fundamental rights. See R. ROLLI, *Il diritto all'abitazione nell'Unione Europea*, in *Contratto e impresa / Europa*, 2, 2013, pp. 722-727.

the existing tenancy law in a way that better fits constitutional prescriptions[23].

Although the first and main obligor of a right to housing is the State, a horizontal effect has been recognised and therefore restrictions to landlords' rights are considered admissible. The conflict between the two fundamental rights at stake – property right of the landlord and the right to housing of the tenant – is not easily solved. Despite the fact that restrictions to private autonomy are necessary and market rules need to be adjusted in the landlord-tenant relationship, the housing problem cannot be solved at the expenses of a particular group of people, the owners, it is an encumbrance on society as a whole. A right to housing entitles, nonetheless, the State to adjust market rules, or to contain its excess, in order to promote socially adequate prices[24].

[23] M. LYS, C. ROMAINVILLE, *Le droit au logement dans la Constitution belge*, in *Le droit au logement: vers la reconnaissance d'un droit fondamental de l'être humain*, in *Droit et Justice*, 83, Brussels, 2009, pp. 25 ff. highlight that, although it may not have an immediate effect, the right to housing has an «effective» effect, referring to three categories of consequences: a direction to the legislator; an irradiation effect, demanding actual measures to pursue the constitutional value and a stabilisation or «standstill» consequence. The authors refer, for example, to the constitutionality of the surtax on unoccupied premises, as has already been decided by Belgian constitutional court (p. 28). On the effects of Article 23 of Belgian Constitution, see also, N. BERNARD, *Le droit au logement comme arrière-plan indissociable du droit au bail*, in G. BENOIT et al., *Le bail de résidence principale*, Brussels, 2006, especially, pp. 13 ff.

[24] N. BERNARD, *ibidem*, p. 26. The Portuguese Constitution (Art. 65, No. 3) refers specifically to a rent system compatible with family income, and recently (Law No. 19/2022) the rent increase has been limited to a 2% above the inflation level. The Portuguese Constitutional Court has traditionally accepted the Parliament options among a wide range of legal solutions, from a very restrictive frame (until the nineties when a «social encumbrance» on property was widely recognised), up to a more recent market-oriented regulation. See A. RIBEIRO MENDES, *O arrendamento na jurisprudência do Tribunal Constitucional*, in L. MENEZES LEITÃO (coord.), *I Congresso do Arrendamento*, Coimbra, 2019, pp. 7 and ff.

1.6. The «soft law» influence – the DCFR and the «Life Time Contracts» Principles

Tenancy contracts were not included in the Draft of Common Frame of Reference (DCFR), published in 2009, resulting from the 2003 Commission's Action Plan on a more coherent European contract law. Nonetheless, the DCFR contains principles and model rules on contracts in general that could be applied to tenancies. It also includes a section on leases of movables (Book IV, Part B, 1:101, ff.) that could serve as a basis for a possible extension of those model rules to the leases of immovables. The obligations of lessor and lessee, and especially the obligation of the former to provide premises in conformity with the contract, not only at the start of the lease period but also during the duration of the lease, the *emptio non tollit locatum* rule (7:101), and the prohibition to subcontract without the lessor's consent (7:103) seem to be easily adapted[25]. The most complex and core issues of the residential tenancies are, however, left unsolved. If general contract law rules and a small set of dispositive provisions were able to deal with the tension between tenant's and landlord's diverse interests, a specific set of mandatory rules would not be necessary. Freedom of market and freedom to contract are not easily reconciled with rent-control solutions and minimum duration; furthermore, some remedies, like «withholding performance» (*exceptio non adimpleti contracti*), do not operate as in other contracts, due to the existential nature of the good provided[26].

Considering that there is a social deficit in European contract law and aiming at making a positive contribution to the development of a body of European social law, the EuSoCo (European Social Contract Group) published the «Principles of Life-Time Contracts», which in-

[25] C. SCHMID, *Residential tenancies in European Union law, comparative law and the DCFR*, in A. AFONSO (coord.), *Um Direito Europeu das Obrigações? A influência do DCFR*, Porto, 2015, p. 200, notes that most of DCFR rules on leases were inspired by national legal provisions enacted and court decisions taken in the field of immovables.

[26] For example, in Portugal, courts have always ruled that the landlord may not suspend access to the premises or interrupt water, gas, electricity, indirectly hindering its use, when the tenant does not comply with payment obligations in the due time.

clude tenancy contracts[27]. Life-time contracts are those long-term contractual relationships having an existential dimension. One of these Principles is that suspending performance would be admissible in «life-time contracts» when supervening, objective difficulties arise; another one regards termination of contract, stating it must be a measure of last resort.

1.7. European social policies

European social policies against poverty and social exclusion, aiming at the improvement of housing conditions, have been affecting national tenancy law, thus promoting some convergence in this domain.

With a wider geographical scope than the European Union borders, the *European Federation of National Organisations working with the Homeless* (FEANTSA)[28] has played a major role regarding evictions, frequently filing complaints before the European Committee of Social Rights, which led to requiring States to make the necessary adjustments of the measures undertaken.

Especially from 2000 on, the EU has launched some ambitious strategies against poverty and exclusion, to be implemented through the structural funds – in particular the European Regional Development Fund (ERDF) and the European Social Fund (ESF) – whose objectives are mainly urban development fighting social exclusion. The European Housing Charter (2006) urges the use of European Union funds to renovate social housing.

Three EU Directives concerning the prevention of poverty and social exclusion linked to housing, are also worth mentioning in this regard: Directive 2003/109/EC, concerning the status of third-country

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[27] See L. NOGLER, U. REIFNER (eds.), *Life Time Contracts – Social long-term contracts in labour, tenancy and consumer credit law*, The Hague, 2014. Another «Manifesto» for social justice in contract law is reported in A. SOMMA, *Giustizia Sociale nel diritto europeo dei contratti*, in *Rivista Critica del Diritto Privato*, XXIII, 1, March 2005, pp. 75 ff., and AA.VV., *Giustizia sociale nel diritto contrattuale europeo: un manifesto*, *ibidem*, pp. 99 ff.

[28] See European Federation of National Organisations working with the Homeless, available at *https://www.feantsa.org* (last accessed on 6 September 2023).

nationals who are long-term residents; Directive 2003/86/EC on the right to family reunification, and Directive 2009/50/EC on the conditions of entry and residence of third-country nationals for highly qualified employment.

Moreover, the European Commission has set out concrete initiatives to implement the European Pillar of Social Rights (2017) – which includes a right to housing and social assistance – in a joint effort by the EU institutions, national, regional and local authorities, social partners and civil society[29]. Measures to be implemented are related to housing assistance and protection against eviction and homelessness; tenancy contract law naturally remains out of reach.

1.8. The relevance of European consumer law

European consumer Law has some direct effects in tenancy contracts, since the tenant can qualify as a consumer and thus benefit from consumer law protection[30]. The legal connection between tenants and consumers protection is, however, quite limited. The main legal impact may derive from the Unfair Terms Directive (Directive 93/13/EEC) and the respective national implementation instruments[31]. In *Asbeek Brusse*

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[29] On Italy's social housing perspectives, see G. MARCHETTI, *Il diritto all'abitazione tra ordinamento statale ed europeo e prospettive di valorizzazione nel quadro dell'Europa sociale*, in P. BILANCIA, *La dimensione europea dei diritti sociali*, Torino, 2019, pp. 261 ff.

[30] For a reference to a «consumerisation» of tenants, see F. CAFAGGI, *Tenancy Law and European Contract Law*, in *https://www.eui.eu/Documents/DepartmentsCentres/Law/ResearchTeaching/ResearchThemes/EuropeanPrivateLaw/TenancyLawProject/TenancyLawCafaggi.pdf*, p. 10 (last accessed on 6 September 2023). See also C. SCHMID, *General Report*, in *www.eui.eu/Documents/DepartmentsCentres/Law/ResearchTeaching/ResearchThemes/EuropeanPrivateLaw/TenancyLawProject/TenancyLawGeneralReport*, 2004, p. 18 (last accessed on 6 September 2023).

[31] In some Member States, such as France and Germany, control of unfair contract terms was explicitly declared applicable to tenants, and exemplification of prohibited terms referred to tenancy contracts. See, in French law, Article 4 of the 1989 Tenancy Act, with a list of nineteen forbidden contractual terms, to which the «ALUR» Act of 2014, added another four; in Germany §§ 305-310 BGB go beyond the Directive's scope, including contracts where the landlord is not an entrepreneur.

and de Man Garabito v. Jahani BV.[32] where analysis of a penalty clause in a tenancy contract was undertaken to decide whether it was an unfair term under Directive 93/13, the CJEU stated that protection for tenants should be increased through consumer law when the landlord is a business and that protection of consumers is particularly important in the case of a residential tenancy agreement.

Another legal connection between tenants and consumers protection may result from Directive 2005/29/EC, concerning unfair business-to-consumer commercial practices in the internal market, and from Directive 2006/114, concerning misleading and comparative advertising. The Directive concerning contracts for the sale of goods (Directive 1999/44/CE has been revoked by Directive 2019/771/EC) refers neither to immovables («tangible movable items that constitute goods»; «Member States should be free to regulate contracts for the sale of immovable property»), nor to leases. However, Portuguese law, in its national implementation (Law-Decree No. 84/2021, 18th October, Articles 22 to 25, and Art. 3, No. 1) includes immovables (only building for residency) in a separate section (section III of chapter II), and in defining the general scope of the law sets leases contracts beside buy-and-sale and construction contracts. This law's contribution to securing tenant's position is obviously very limited, insofar it focuses mainly on conformity and remedies in case of non-conformity and does not address the most sensitive questions of landlords and tenants contractual relation (such as limits in rent increase; duration of the contract; right to preemption; or assignment of the rental agreement to a new owner).

Using consumer laws to ensure tenants protection fails, as it faces two types of significant limitations: 1) consumer laws can only be applied to a fraction of tenants, as many landlords are not enterprises, but rather individuals operating outside a professional activity, the relationship cannot generally be qualified as a «consumer contract»; 2) consumer law is only partially suited to guarantee all the rights related to housing and tenancy. As it has been pinpointed by Fabrizio Cafaggi, consumerisation of tenancy may not be an appropriate solution if mar-

[32] Judgment of 30 May 2013, *Asbeek Brusse and de Man Garabito v Jahani BV*, C-488/11, EU:C:2013:341.

ket failures relating to housing pose different problems than those relating to consumer protection and therefore require specific intervention[33]. Moreover, protection of the tenant via consumer law would introduce a systemic split, creating a difference between civil and consumer tenancy regulation, adding insecurity when the qualification of the parties (as professional/consumer) is not certain, and creating two legal categories of tenants having common needs and interests, thus requiring application of the same protective provisions.

1.9. The advantages of an «Open Method of Coordination»

Within politically sensitive areas with considerable divergences among Member States, open coordination, as recognised by Art. 151, para. 2 TFEU, can be the best solution[34]. A comparative assessment of national problems and solutions envisaged, the sharing and spreading of best practices, the possibility to learn from one another, was applied in a research project «Tenancy Law and Procedure in the EU», of the Fiesole European University Institute, in 2003[35], and especially in the project «Tenlaw – Tenancy law and housing policy in multi-level Europe», coordinated by Christoph Schmid, from ZERP at the Bremen University, from 2012 to 2015, which is a complete and exhaustive survey of national tenancy laws[36]. This kind of work requires, nonetheless, constant updating, since tenancy contract laws are quite unstable[37].

[33] *Ibidem*, p. 10.

[34] E. Bargelli, *La locazione immobiliare nelle ultime tappe del diritto europeo*, in *Nuova Giurisprudenza Civile Commentata*, 2, 2012, p. 276, refers to this method as an effective alternative to vertical harmonisation of tenancy contract law; R. Rolli, *op. cit.*, p. 730, mentions the advantage of respecting Member States' pluralism.

[35] See European University Institute, available at *www.eui.eu* (last accessed on 6 September 2023).

[36] See *Tenlaw – Tenancy law and housing policy in multi-level Europe*, available at *http://www.tenlaw.uni-bremen.de* (last accessed on 6 September 2023).

[37] For example, in Portugal the law has, meanwhile, been significantly changed: Law No. 13/2019, of 12.02, has, once again, moved from a more liberal perspective to a higher level of protection of the tenant. Something similar happened in Spain, with Law No. 7/2019, 05.03.2019.

2. What more could be done regarding tenancy contract law?

The revision of the EU Treaties and the expansion of social values, related to the goal of combatting social exclusion and poverty, has not been accompanied by a clear redefinition of EU competences to pursue these aims[38]. The idea of a «social Europe» is still far from becoming a clear and concrete project. Though a right to housing can presently be considered a principle of European Union law – even if it is not clearly referred to in the European Charter of Fundamental Rights, it is mentioned both in the European Social Charter and in many of the Member States Constitutions, has been densified by the ECHR jurisprudence; moreover, it can generally be stated that housing supply at affordable conditions is a basic task of a modern democratic welfare state – yet its vagueness has been proved insufficient to lead to concrete solutions for the landlord's/tenant's relationship.

Protection of the tenant within a private law contract is just one of the faces of an effective right to housing, but we can certainly recognise it is an important one, since the housing problem can only be solved either by buying a house or by renting one, and most States do not have enough public property to resolve the entire problem through social lodging. This general idea leaves specific regulation questions unsolved: how far shall a legislator go to attend tenant's contractual stability interest or to ensure that the rent is adequate to families' average income? How protective may a tenancy contract law regulation be without violating the corresponding landlord's property right? Although it is true that housing should not be considered a market asset as any other, it is not less true that this social burden cannot be placed only (or mainly) on the shoulders of a specific category of people – private owners.

Defining the amount of protection while maintaining a functioning market is quite a difficult (not to say impossible) task, already at the national level. Surely difficulties increase when approaching the problem from a wider European perspective, also due to the considerable

[38] See N. RODEAN, *Social rights in our backyard: "Social Europe" between standardization and economic crisis across the continent*, in M. D'AMICO, G. GUIGLIA (eds.), *European Social Charter and the challenges of the XXI century*, Napoli, 2014, p. 31.

differences, both with respect to social and economic circumstances and to political sensibilities. In addition to the doubtful competences of the EU and to the political reluctance to regulate tenancy contracts, we also face a serious efficiency problem. Legal systems are created as a unity and isolated solutions may only add to incoherences and insecurity of judicial decisions. Given the specific national socio-economic context, a legal solution that has proven its merits in one national system may well be inappropriate for another one. It is true, nonetheless, that European social policies, aiming at the improvement of housing conditions, accompanied by comparative work, promote convergence. Moreover, Member States have followed a similar path, from defining restrictive regulations since at least the post-first World War period, to abandoning those highly protective solutions (mainly rent freezing and limitation of landlords right to terminate the contract) from the mid-nineties on, and, more recently, to limiting the liberalisation spirit and readdressing the need for protective solutions, such as the definition of some caps to contain unaffordable rent increases[39]. Thus, even if unintended, some level of convergence in tenancy contract law has made its way.

If a unification of Member States tenancy contract law is neither politically desired nor opportune or attainable (at least for the time being), a European recommendation of best practices, including draft rules and default contracts, implementing a regulatory balance, is certainly most desirable. Although not legally binding, the «informal authority» of these texts – as we know from the undeniable importance of the UNIDROIT principles, PECL or DCFR – should not be underestimated, for it can slowly develop into a form a juridical culture and influence deci-

[39] In general terms, this has been the history of tenancy contract law in most countries such as Italy, France, Spain, Portugal and, to some extent, Germany. Post-communist countries have faced specific problems, having to relodge the high percentage of people occupying previously public premises. On the evolution of Italian legislation, see, for example, S. GIOVA, *Diritto all'abitazione e contratto di locazione tra interessi generali ed equilibri negoziali*, in *Rassegna di Diritto Civile*, 4, 2002, pp. 687 ff., referring the slight reversion to the liberalisation direction introduced in 2002.

sions within each Member State[40]. These Principles stand alongside functioning, possibly coherent, legal systems, and although they are unable to change national legal orders, they may be used as a reference when there is an interpretative doubt or, particularly, when new or reforming codification projects are drafted. Furthermore, the availability of non-binding or default standard contracts alongside a provision of model rules is of the parties most immediate and concrete interest, since on one hand it saves them all the costs of negotiating a contract and, on the other hand, it promotes certainty and reliance in assessing one of the most basic human needs[41].

Defining an adequate balance between landlords' and tenants' interests is quite a difficult and complex goal, as they sometimes appear to be irreconcilable. Tenants interest in contractual stability must not go as far as to deprive landlords of their power to modify their property allocation or use, and an affordable rent can only be made effective either by State subsidies or by limiting the landlords profits, particularly in countries (or cities) where the wages are low and rental market prices are high.

We may, nonetheless, propose some adequate and reasonable solutions to overcome this landlords/tenants tension. To start with, a set of minimum habitability requirements should be defined, prohibiting the conclusion of a rental agreement for premises which do not fulfil these basic requirements[42], possibly alongside a definition of a percentage of market rent defined in accordance with a mandatory standard level. Secondly, pairing a reasonable minimum duration of the residential

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[40] As highlighted by N. JANSEN, *Informal authorities in European private law*, in *Maastricht Journal of European and Comparative Law*, 20, 2013, pp. 496 ff., one should not marginalise such phenomena by narrowing the concept of law. On the main developments in European contract law, see L. ANTONIOLLI, *The evolution of European contract law: a brand new code, a handy toolbox or a Jack-in-the-box*, in L. NOGLER, U. REIFNER (eds.), *Life Time Contracts: Social Long-term Contracts in Labour, Tenancy and Consumer Credit Law*, The Hague, 2014, pp. 75 ff.

[41] Much more than in other domains, not only due to legislative instability, but also, in some countries, to the division between central and regional competences, tenancy contract laws considerably lack legal certainty.

[42] Basic requirements may diverge from State to State, but an administrative licence of habitability is usually mandatory.

lease on behalf of the tenant (three years, for instance seems quite reasonable)[43] with a recognition of the tenant's right to terminate contract before the agreed time duration could be a solution to reconcile the tenant's interest in contractual stability with a conflicting interest in flexibility, without considerably damaging to the landlord's interests[44]. To this end, a minimum duration of the contract should also be defined on behalf of the landlord, for example, as follows: «after a third of the contractual duration is completed, the tenant is entitled to terminate the contract before the agreed time duration upon a thirty days' notice to the landlord».

Price fixation is a very sensitive question. It is well known that high rents exclude a large part of the population from adequate housing or impoverishes it (when burdening the family's income with a percentage that surpasses the 40%); furthermore, failure in payment leads to eviction and creates homelessness problems that States must attend to. Could rent control be a just and efficient solution? It has been done in the past with pitiful consequences to the rental market and to the maintenance of building, but even within a more appropriate framework (such as adjusting to inflation levels and guaranteeing landlords profit up to a reasonable extent) it is very difficult to foresee what would be the impact on the rental market. Possibly, a system based on some rent control measures combined with highly effective guarantees of payment and eviction procedures could be the answer for a function-

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[43] C.U. SCHMID, *Epilogue: Towards a European role in tenancy law and housing policy*, in ID. (ed.), *Tenancy Law and Housing policy in Europe – Towards regulatory equilibrium*, Cheltenham (UK)-Northampton (MA, USA), 2018, p. 344, suggests a guaranteed renewable rental period of three years.

[44] Some scholars consider that there should be a European common element recognising the tenant's right to termination of the contract before the agreed duration, because of the mobility provided to tenants and its advantages for the labour market, see C. MARTINEZ-ESCRIBANO, *Tenancy and right to housing: private law and social policies*, in *European Review Private Law*, 5, 2015, pp. 789-791 and C. SCHMID, *ibidem*, p. 344, admitting termination by tenant for «qualified personal and professional reasons». Measures that excessively condition tenants mobility violate the right of free movement, according to S. NASARRE AZNAR, *Leases as an alternative to homeownership in Europe. Some key legal aspects*, in *European Review of Private Law*, 6, 2014, p. 821.

ing and balanced market, insofar the landlords would not have an incentive to terminate the contract, except for tenants failure to perform, because they would not be able to receive more money from new tenants, and, consequently, other protective measures could be avoided[45]. Anyway, the most feasible solution appears to be a fixation of an initial amount, freely agreed according to market rules[46], and link rent increases to a legal parameter (related to inflation rates or a consumer prices index), alongside prohibiting rent increase during a fixed period of the contract duration (for example, allowing rent increase only after a period of one year).

Although the tenant is the weaker party of the contract, as it needs access to premises to satisfy a basic accommodation's need, thus equitable regulation shall guarantee a sufficient level of protection to the tenant, the landlord's interests cannot be disregarded. Within a market economic system, unless landlords have profitability prospects and sufficient guarantees of the tenant's obligations performance (protection against payment default and misuse of property), they would refrain from making their property available for renting. A functioning market requires, therefore, regulation that acknowledges landlord's interest of adequate gains and guarantee of compliance; moreover, one that encompasses legal stability and does not lead to disproportionate limitations of private property. Some incentives for housing rehabilitation would also be welcome.

Other questions, such as who should be entrusted with the drafting of a European Union housing model contract and if it would be better to divide this competence between a «Committee» elected by the European institutions and national representatives, such as tenants and landlords associations, or a political body composed by the Member States Ministries of Justice (ensuring that the EU model contract does not clash with national mandatory tenancy regulation)[47] and by whom

[45] S. NASARRE AZNAR, *ibidem*, p. 832.

[46] There is a shared view that rent shall be established according to market rules. See C. MARTINEZ-ESCRIBANO, *op. cit.*, pp. 791-794.

[47] C. SCHMID, *ibidem*, p. 345, thinks that the national implementation of European tenancies agreements should be made by landlords and tenants associations under the

should disputes be brought (national courts; special Alternative Dispute Resolutions systems; special courts), would also have to be addressed.

Other than selecting the most adequate and meritorious solutions, a practical difficulty that needs to be dealt with when drafting model rules or default contracts is multilingualism. Texts must therefore be drafted in a particularly simple style, avoiding terminology too closely linked to national legal systems[48]. Yet, the use of vague non-technical terms certainly conflicts with the technical nature of legal terminology. Finding functional corresponding terms appears to be even more difficult with regards to tenancy contract than, for example, the supply of services or buy-and-sale contracts, due to the former close connection to property law, where divergence is greater than in law of obligations.

In spite of all the difficulties and obstacles, the definition of a European Union model tenancy contract would have advantages: a stronger and more certain protection for migrant tenants; a reduction of transactional costs for both parties; a market differentiation between landlords and immovable agents or mediators proposing contracts with a European Union guarantee seal.

Starting with this and then gradually making progress, an experiment or test could be firstly made with a limited category of tenants, such as students. It would be easier to build a political interest, since they form a vulnerable category of tenants with high mobility; nowadays students' accommodation seems to be a growing business, one that gained investor's attention; these contracts are typically of a limited duration, therefore avoiding one of the most complex questions of tenancy contract regulation, its duration.

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auspices of a European group, such as the International Union of Tenants or, alternatively, designed by a future European Housing Observatory.

[48] As noted by B. POZZO, *Multilingualism and the Harmonization of European Private Law: Problems and Perspectives*, in *ERPL*, 2012, pp. 1185 ff.

CONCLUDING REMARKS

THE NEW EUROPEAN PRIVATE LAW: WHICH WAY FORWARD?

Luisa Antoniolli and Paola Iamiceli[*]

TABLE OF CONTENTS: *1. General issues of European private law. 1.1. The process of integration of European private law. 1.2. Tension between legal pluralism and uniformity. 1.3. The changing nature of legal taxonomies. 1.4. External effects of EU private law: the «Brussels effect». 2. The relevance of fundamental rights. 2.1. Balancing conflicting rights. 2.2. Social justice and fundamental rights. 2.3. Legal process and collective dimension of European private law. 3. Specific issues of European private law. 3.1. Contract law. 3.2. Tort law. 3.3. Property law. 4. The new European private law: which way forward?*

1. General issues of European private law

The contributions to this book, together with the other contributions to the roundtables that were not transposed in a written version, point out to a variety of issues that are highly significant for European private law. In these last pages, we will highlight some common themes underpinning them, as well as point to some related issues and trends, which will hopefully be the object of future roundtables.

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As part of the book design, the structure of both the introductory and the concluding chapters has been jointly devised and developed by the two editors; within this shared work, Paola Iamiceli has individually written the Introduction and Luisa Antoniolli the Concluding remarks.

1.1. The process of integration of European private law

All the contributions of this book concern aspects of the current evolution of European private law, with particular emphasis on the area of digitalisation[1] and fundamental rights[2], and share some common themes. One of these is the tension between the drive for uniformity and harmonisation at the European level, and the contrasting pressure to allow differentiation and pluralism, recognising the heterogeneity and complexity of national legal systems, which are due to a variety of factors: political, but also technological, cultural, social and economic[3].

At first sight, legal integration is a powerful driving force both for digitalisation and fundamental rights protection: the last decades have witnessed a veritable flood of regulation in both areas, of various kinds, moving from general binding instruments such as the EU Charter of Fundamental Rights, to secondary EU legislation (regulations and directives), rules and principles deriving from case law (both of the European Court of Justice and the European Court of Human Rights) and soft law instruments[4]. Yet, pressure to allow for legal differentiation and pluralism is strong, particularly in the area of fundamental rights, where national constitutional traditions play an important role in defining the applicable standards. In fact, it is increasingly clear that funda-

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[1] See U. BERNITZ, X. GROUSSOT, J. PAJU, S. DE VRIES (eds.), *General Principles and the EU Digital Order*, Alphen a/d Rijn, 2020.

[2] See G. BRUEGGERMEIER, A. COLOMBI CIACCHI, G. COMANDÉ (eds.), *Fundamental Rights and Private Law in the European Union*, 2 Vols., Cambridge, 2010; H.-W. MICKLITZ (ed.), *Constitutionalization of European Private Law*, Oxford, 2014; C. BUSCH, H. SCHULTE-NOELKE, *EU Compendium – Fundamental Rights and Private Law*, Munich, 2011.

[3] See A.S. HARTKAMP, *European Law and National Private Law*, Cambridge-Antwerp, 2016; for a discussion of this trend on a global level see H. COLLINS, *Cosmopolitanism and Transnational Private Law*, in *Eur. Rev. Contract L.*, 2012, p. 315.

[4] See S. DE VRIES, U. BERNITZ, S. WEATHERILL (eds.), *The Protection of Fundamental Rights in the EU After Lisbon*, Oxford, 2013; S. DE VRIES, U. BERNITZ, S. WEATHERILL (eds.), *The EU Charter of Fundamental Rights as a Binding Instrument – Five Years Old and Growing*, Oxford, 2015; H. COLLINS (ed.), *European Contract Law and the Charter of Fundamental Rights*, Cambridge-Antwerp, 2017; S. GRUNDMANN (ed.), *Constitutional Values and European Contract Law*, Deventer, 2008.

mental rights' impact is becoming stronger and deeper in the EU, particularly through the impact of the Charter of Fundamental Rights and the judicial activism of the European Court of Justice.

Yet, even in those areas where uniformity is of paramount importance, as in the case of digitalisation[5], a significant level of differentiation remains, for example in the variety of implementation of EU rules, as well as in procedural aspects and legal process features. Mapping with accuracy the areas of uniformity and differentiation is particularly relevant, and it is no easy task, both because of the complexity of the legal framework, and because of the dynamic nature of these areas, which are rapidly evolving[6].

1.2. Tension between legal pluralism and uniformity

The tension between pluralism and uniformity in the relationship between EU law and the national laws of the Member States is a fundamental feature of European private law, with significant variations depending on the areas involved and the timing. Lawyers are increasingly resorting to a concept developed by political scientists in order to analyse and describe this interaction, that of multi-level systems, which highlights the plurality of levels, actors and rules that interact and define the law in action[7].

As a consequence, awareness of the context is particularly important, covering many aspects: the legal process of law-making, the substantial features of the rules (rules/standards, soft/hard, etc.), the role that legal rules play in relation to other kinds of rules (social, technological, economic, etc.). This is true not only in Europe, but also at a

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[5] See R. SCHULZE, A. DE FRANCESCHI, *Digital Revolution – New Challenges for Law*, Munich - Baden-Baden, 2019; E. ARROYO AMAYUELAS, S. CÀMARA LAPUENTE (eds.), *El derecho privado en el nuevo paradigma digital*, Madrid, 2020.

[6] See G. BENACCHIO, *Diritto privato dell'Unione europea*, 7th ed., Padova, 2016; F. CAFAGGI (ed.), *The Institutional Framework of European Private Law*, Oxford, 2006; F. CAFAGGI, H. MUIR-WATT (eds.), *Making European Private Law – Governance Design*, Cheltenham-Northampton, 2008.

[7] See S. PIATTONI, *The Theory of Multi-Level Governance – Conceptual, Empirical and Normative Challenges*, Oxford, 2010.

wider level: borrowing a vague but effective term, law has increasingly a «glocal» nature: there is a growing drive for convergence of legal rules, and yet local contexts and circumstances continue to influence the way in which law is defined and applied[8].

The time dimension is also particularly relevant: both the area of fundamental rights and that of digitalisation are undergoing rapid change, due to new needs, challenges, and risks. In fact, in many cases new rules are the result of veritable crises and emergencies[9], as for the rules (both of public and private law) related to the health crisis of the Covid19 pandemic, those connected to climate change and connected extreme events, as well as in the previous decade the regulation wave that was spurred by the global financial crisis.

Often these crises have a global nature, and while this pushes a certain global convergence on regulatory patterns, yet the regulatory responses in Europe have specific features which are related to its context. A significant element of analysis concerns the assessment of how much the link with various crises affects the nature, scope and duration of a certain body of law: while some have a clearly emergency nature, and as such are destined to disappear once the emergency is over, others are of a structural character, which means that they are not merely related to a transient specific emergency phase. Many important new bodies of European law have this character, for example the rules on economic governance and those on environmental protection and sustainability. While this phenomenon may be less pressing in the area of digitalisation, it is still true that the «digital revolution» is creating significant challenges (and sometimes emergencies, as in the case of cybersecurity problems), which require quick but also resilient legal responses, which usually determine path-dependent patterns of regulation.

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[8] For a critical analysis of the role of private law in a global context see U. MATTEI, A. QUARTA, *The Turning Point in Private Law: Ecology, Technology and the Commons*, Cheltenham-Northampton, 2019.

[9] See M. COTTA, P. ISERNIA (eds.), *The EU through Multiple Crises. Representation and Cohesion Dilemmas for a "sui generis" Polity*, London, 2020.

1.3. The changing nature of legal taxonomies

The complex patterns of interaction between international, European, national (and often sub-national) law also impacts on legal taxonomies, changing their content and meaning. For instance, the divide between public and private law has shifted significantly[10], in response to the evolving relationship between the public institutions, the market and private stakeholders; this has led to the emergence of new categories, such as that of European private regulatory law[11]. This evolution in the legal taxonomies is visible also inside private law, as is made clear in all the contributions of this book: in the law of obligations, both contract law and tort law concepts are undergoing a significant change, and the same is happening in the area of property (e.g. in the discussion on «ownership» of data). In relation to this rapidly evolving context, a most pressing question concerns how far the existing framework of legal categories and concepts may be adapted to the new circumstances, or if, on the contrary, there is a veritable paradigm shift that requires new concepts and categories in order to be duly analysed, systematised and applied.

There is no clear-cut and general answer to this question, but lawyers cannot evade the need to make a sensible balancing effort between the advantages of applying a solid, well-known conceptual apparatus, and developing an innovative framework. While this second option may be a risky and costly enterprise, on the other hand telluric changes like digitalisation may require creative efforts which may lead to new

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[10] O. CHEREDYCHENKO, *Rediscovering the public/private divide in EU private law*, in *Eur. L. J.*, 2020, pp. 27-47.

[11] F. CAFAGGI, H. MUIR-WATT (eds.), *Making European Private Law. Governance Design*, Cheltenham, 2010; R. BROWNSWORD ET AL. (eds.), *Contract and Regulation. A Handbook on New Methods of Law Making in Private Law*, Cheltenham, 2017. For a critical evaluation of this emerging partition of law, see A.-W. MICKLITZ, *European Regulatory and Private Law - between Neoclassical Elegance and Postmodern Pastiche*, in M. KUHLI, M. SCHMIDT (eds.), *Vielfalt im Recht*, Berlin, 2021; ID., *The Visible Hand of European Regulatory Private Law - The Transformation of European Private Law from Autonomy to Functionalism in Competition and Regulation*, in *Yearbook of Eur. L.*, 2009, pp. 3-59.

concepts, categories and partitions[12]. This is surely not the first time in the history of law, yet what seems to be new is the speed and the breadth with which new changes are taking place. This requires a momentous effort by lawyers, particularly in research and legal education, a challenge that needs to be taken up at present.

As we are going to see in the next paragraphs, some concepts appear to be key and horizontal in all contributions, as «access» and «control». Particularly in the case of digitalisation and the regulation of data (be it in relation to a contract, or non-contractual liability, or transfer of property rights), the most relevant and contentious issues concern how access to data is acquired and transferred, and what are the legal consequences for all parties involved. While the concepts of access and control need to be related to traditional concepts and categories of private law, they are essential for analysing legal phenomena and devising suitable legal solutions to emerging needs and problems[13].

1.4. External effects of EU private law: the «Brussels effect»

The analysis of the new legal instruments and solutions developed by statutory law and case law in the area of digitalisation and fundamental rights protection in Europe shows another trend that is gaining ground over time: the European Union is devising regulatory strategies which influence not only the legal framework inside Europe, the EU itself and the Member States, but aim to steer regulation at the global level. The so-called «Brussels effect»[14] refers to the drive to set standards that can influence also other legal systems, be they national, regional, international or transnational. This is partly driven by mechanisms of regulatory competition: businesses and individuals that are

[12] See R. SCHULZE, A. DE FRANCESCHI, *Digital Revolution – New Challenges for Law*, Munich - Baden-Baden, 2019, and, more recently, ID., *Harmonizing Digital Contract Law, The Impact of EU Directives 2019/770 and 2019/771 and the Regulation of Online Platforms*, Baden-Baden, 2023.

[13] See D. KENNEDY, *The Rise and Fall of Classical Legal Thought*, Washington (DC), 2006.

[14] See A. BRADFORD, *The Brussels Effect – How the European Union Rules the World*, New York, 2020.

acting according to EU legal standards can better operate and move in external contexts that have a similar regulatory framework. Yet, it is also a consequence of the EU commitment to push towards standards at the international level that it considers efficient, reasonable and fair: this is particularly clear in area of digitalisation and data protection, but also in environmental protection, climate change and sustainability, health protection and other areas related to the protection of fundamental rights and the rule of law[15]. While not all of these efforts have been successful (and even if they are, implementation is frequently insufficient, even by the EU itself), undoubtedly the EU is playing a major role in the dynamics leading to the establishment of global standards. This expansion of the scope and reach of EU law, both formal and informal, raises issues related to its extra-territorial application, which can be problematic because of potential frictions and clashes with other systems both in establishing the applicable rules and in guaranteeing their implementation. This is consequently an element that must be taken into account in analysing and assessing the evolution of EU law, which is influenced both by its internal and external dimension.

2. The relevance of fundamental rights

Fundamental rights have an extremely wide scope, covering all aspects that are related to the human and social dimension of law. Historically they have been analysed mainly under the lens of constitutional and public law, i.e. in the relations between individuals and public powers, but their horizontal dimension, i.e. their impact on private legal

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[15] In this regard, the role of the Court of Justice has been particularly relevant, e.g. in the field of data protection: based on the principles of effectiveness of EU law and of effective judicial protection, the scope of application of EU law has been extended to extra-EU controllers operating in the EU (see Judgment of 24 September 2019, *Google LLC v. CNIL*, C-507/17, EU:C:2019:772); moreover, based on EU legislation, international agreements have been scrutinised through the lens of effective judicial protection to ensure that data could be safely transferred outside the EU (see, among the first ones, Judgment of 6 October 2015, *Schrems v. Data Protection Commissioner* (*Schrems I*), C-362/14, EU:C:2015:650).

relations, is increasingly recognised, which leads to a significant change in the scope and content of private law itself, both in the national legal systems and in the EU[16]. In the contributions of this volume, this issue is analysed in a variety of areas, which span from environmental protection to consumer protection, property rights, privacy, and social right to housing[17]. We will now try and highlight some common themes.

2.1. Balancing conflicting rights

A critical and essential aspect of the protection of fundamental rights concerns the balancing of conflicting rights, which is a feature that is intrinsic to the definition of rights as fundamental[18]: exactly because they are fundamental and still may be limited by law to pursue general interest, provided that their essence is preserved, the law needs to find rational, equitable and reliable mechanisms dealing with the manifold and unpredictable ways in which they can clash, and compromise or prevalence must be determined. In this context, of critical importance is the principle of proportionality, which, based on national constitutional traditions and now enshrined in Art. 52 CFR, has been thoroughly developed in EU law, first by case law and then also in stat-

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[16] S. WALKILA, *Horizontal Effect of Fundamental Rights in EU Law*, Groningen, 2016. See, in particular, Judgment of 17 April 2018, *Egenberger*, C-414/16, EU:C: 2018:257.

[17] See for example S.A. DE VRIES, *The Protection of Fundamental Rights within Europe's Internal Market – An Endeavour for More Harmony*, in S. DE VRIES, U. BERNITZ, S. WEATHERILL (eds.), *The Protection of Fundamental Rights in the EU After Lisbon*, cit., p. 76; H. COLLINS (ed.), *European Contract Law and the Charter of Fundamental Rights*, Cambridge-Antwerp, 2017; S. GRUNDMANN (ed.), *Constitutional Values and European Contract Law*, Deventer, 2008; S. DE VRIES, *11-The EU Single Market as 'Normative Corridor' for the Protection of Fundamental Rights: The Example of Data Protection*, in S. DE VRIES, U. BERNITZ, S. WEATHERILL (eds.), *The EU Charter of Fundamental Rights as a Binding Instrument – Five Years Old and Growing*, cit., p. 242; I. DOMURATH, C. MAK, *Private Law and Housing Justice in Europe*, in *Mod. L. Rev.*, 2020, pp. 1188-1220; R. ROLLI, *Il diritto all'abitazione nell'Unione europea*, in *Contratto e impresa/Europa*, 2013, p. 722.

[18] See Symposium *Balancing of Fundamental Rights in EU law*, in *Cambridge Yearbook of Eur. Leg. Stud.*, 2017.

utory law[19]. Indeed, this principle sets the limits to which fundamental rights limitations can be established, ensuring that such limitations are necessary and genuinely meet objectives of general interest recognised by the Union, or the need to protect the rights and freedoms of others. This balancing exercise, which has generated an intense dialogue between national and EU courts, can only work if there is a solid ground of fundamental values and principles which underpin it. EU law has built over the decades an extensive body of law establishing fundamental values[20]: the EC and EU Treaties have incorporated them in the opening norms (see Art. 2 TEU), the EU Charter of Fundamental Rights is based on them, and the case law of the Court of Justice has developed an extensive body of principles, based both on the national constitutional traditions and the European Convention on Human Rights, which was then embodied in the Treaties (see Art. 6 TEU); moreover, this relates to a significant body of international law on human rights.

Yet, the political, social and economic context in which these rights are defined and applied is becoming increasingly polarised, and this has significant effects also on their legal dimension, making the balancing exercise more difficult and contentious, both in setting fundamental rights protection in statutory rules, and even more in deciding specific cases in litigation.

2.2. Social justice and fundamental rights

Many of the challenges related to fundamental rights concern social justice issues. Yet, most scholars and legal practitioners share the view that the European Union has developed only a partial and insufficient notion of social justice. Historically, this is due to the fact that the em-

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[19] See T. TRIDIMAS, *The Principle of Proportionality*, in R. SCHUETZE, T. TRIDIMAS (eds.), *Oxford Principles of European Union Law*, Vol. 1, Oxford-New York, 2018, pp. 243-264.

[20] See S. DE VRIES, U. BERNITZ, S. WEATHERILL (eds.), *The Protection of Fundamental Rights in the EU After Lisbon*, cit.; S. DE VRIES, U. BERNITZ, S. WEATHERILL (eds.), *The EU Charter of Fundamental Rights as a Binding Instrument – Five Years Old and Growing*, cit.

phasis in EC law was on market integration, only indirectly touching upon social justice issues, which remained largely regulated by national law. Yet, at least since the European Single Act in the 1980s, the development of EC and then EU law has clearly proven that market integration does have deep social justice effects; moreover, the gradual but steady expansion of EU competences has clearly moved outside the economic realm. Consequently, finding a shared, even if minimal, concept of social justice for the EU is crucial for devising regulatory strategies in rapidly changing and globalised contexts. Some embryonic form of social justice is developing in EU law, as pointed out by Micklitz, who has analysed the specificities of the structure of European private law as private regulatory law, where the main emphasis is on access, rather than on equity: justice is guaranteed by allowing individuals to have access to certain rights, rather than by defining the content of these rights. This is a «thinner» version of social justice, which is usually more focused on procedural aspects (e.g. obligations to provide full information) than on substantial ones[21].

It could be expected that over time this embryonic form is destined to develop into a specific, full-fledged notion of EU social justice, but this cannot be taken for granted and in itself highly problematic[22]. Also in this area, social and political polarisation is increasing: some Member States are voicing the need for the EU to respect national differences that are mirrored in choices that affect social justice issues (e.g. access to housing, consumer protection, etc.), which makes it harder to develop a shared view and steer action at the European level. Concepts like «margin of appreciation» (which was first established in the con-

[21] See H.-W. MICKLITZ, *The Politics of Justice in European Private Law – Social Justice, Access Justice, Societal Justice*, Cambridge, 2018.

[22] For an early discussion in the area of European contract law see STUDY GROUP ON SOCIAL JUSTICE IN EUROPEAN PRIVATE LAW, *Social Justice in European Contract Law: A Manifesto*, in *Eur. L. J.*, 2004, pp. 653-674. More recently, see L. NOGLER, U. REIFNER (eds.), *Life-Time Contracts – Social Long-Ter Contracts in Labour, Tenancy and Consumer Credit Law*, The Hague, 2014; M. FABRE-MAGNAN, *What is A Modern Law of Contracts? Elements for a New Manifesto for Social Justice in European Contract Law*, in *Eur. Rev. Contract L.*, 2017, p. 381; D. CARUSO, *Qu'ils mangent des contrats: Rethinking Justice in EU Contract Law*, in D. KOCHENOV, G. DE BURCA, A. WILLIAMS (eds.), *Europe's Justice Deficit?*, Oxford, 2015, p. 375.

text of the European Convention on Human Rights) allow to define common standards, while keeping significant flexibility for States. Yet, particularly where pressure for homogeneity is strong, like in the case of digital rights, this does not rule out problems and conflicts. The redistributive consequences of EU regulatory strategies are not merely technical decisions, but have deep political implications affecting the notion of social justice[23].

2.3. Legal process and collective dimension of European private law

The evolution of fundamental rights in the European context, both in terms of types and content, is also influenced by the EU legal process, such as the law-making procedures inside the EU, highly specific and markedly different to those of the national systems due to their specific and special nature and institutional balance (as a hybrid form between an international organisation and a State). One important element is the role of private stakeholders, which in the EU context is particularly marked. This is crucial in several areas covered by the contributions in the book: one can mention the role of big tech companies in the field of digitalisation, of large energy companies and environmental NGOs in environmental protection issues, as well as consumer and tenants associations.

All the issues covered in the contributions to the book all have a strong collective dimension that complements and influences the individual one: in areas related to the use of digital technologies, access to affordable housing and protection from environmental risks, the position of the individual is inextricably connected to a large group of people sharing the same factual and legal position. While sometimes individual and collective interests converge (e.g., when individual consumers seek remedies in sales of goods that do not comply with environmental standards), sometimes, they diverge (e.g., when the consumer

[23] For a thoughtful analysis of the political implications of technical rules see D. KENNEDY, *The Political Stakes in 'Merely Technical' Issues of Contract Law*, in *Eur. Rev. Priv. L.*, 2001, pp. 7-28; ID., *Form and Substance in Private Law Adjudication*, in *Harvard L. Rev.*, 1976, p. 1724.

preference for replacement over repair clashes with concerns for excessive waste and environmental protection).

As a consequence, legal rules are increasingly focused on regulating both individual and collective aspects, and devote specific attention not only to the substantial definition of rights, but also to the procedural aspects, particularly in relation to dispute resolution mechanisms, both judicial and alternative[24]. This is a development that started in the 1990s, of which the unfair contract terms directive is a major and early example, which has gained ground over time. By now, it is clear that successful regulation of issues like consumer protection in digital transactions, or product liability related to the use of AI technologies and in the case of IoT, requires an approach that takes into consideration the collective dimension of the individual rights affected.

3. Specific issues of European private law

The evolution and current trends in European private law foster a comprehensive revision of its principles, categories, concepts and rules. This an on-going and gradual process, which builds on the pre-existing framework, developed also in connection to national legal traditions, and then developed and adjusted to the EC/EU context. It is likely that the current wide-sweeping changes, which sometimes is termed as a veritable revolution (like the green and digital revolution), need new instruments, not mere «legal tinkering». Lawyers, particularly academics, need to be able to «think out-of-the-box»: where old concepts and rules become a straitjacket, new ones need to be devised, which are able to analyse, classify and regulate new realities and needs, as the discussion by van Erp on differential law shows[25].

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[24] See C. MAK, B. KAS (eds.), *Civil Courts and the European Polity: The Constitutional Role of Private Law Adjudication in Europe*, Oxford, 2016; O. CHEREDNYCHENKO, N. REICH, *The Constitutionalization of European Private Law: Gateways, Constraints and Challenges*, in *Eur. Rev. Priv. L.*, 2015, p. 827.

[25] See also S. VAN ERP, *Differential law: Towards a two-tier approach regarding data*, in A. STROWEL, G. MINNE (eds.), *L'influence du droit européen en droit économique – Liber Amicorum Denis Philippe*, Vol. 1, Brussels, 2022, pp. 783-798.

In many cases, these novelties emphasise the increased relevance of European private law vis-à-vis national ones. Not only is the importance of harmonised or unified legal solutions particularly clear in some areas (as in the case of digitalisation), but also there is a wider phenomenon of «creeping Europeanisation», as Schulze points out, through which legal principles, concepts and rules are applied outside their formal scope of application, influencing also bordering areas that on paper still fall under the competence of Member States. In this way, the dynamic evolution of European legal integration moves outside the formal borders of EU law, stressing the multi-level dimension of European private law.

In spite of this expansive trend, EU private law (and European Union law in general) still retains a fragmentary character, which means that its nature and effects can be assessed only in relation to the national laws with which it interacts. And since national laws in the Member States still have a significantly distinct and different structure and content, this means that overall European private law lacks a comprehensive and unitary nature. All complex, multi-level systems display a level of legal pluralism and variety, so in itself this is not a novelty. Yet, because of the specific features and nature of the EU context, this fragmentary character is particularly pervasive and problematic, and this limits the capacity of even wide-sweeping efforts towards harmonisation and even unification to achieve their goals. This fragmentation is partly due to structural elements that are typical of the European context; first of all, linguistic pluralism has a critical (and often underestimated) impact, since legal concepts and taxonomies are framed in manifold languages (23 in the EU!), which are not always easily translatable, and make the task of harmonisation much more difficult and challenging[26]. There is no easy solution to this problem, since linguistic pluralism is not only a fact, but also a value that is recognised and protected in the European integration process from its very start: all recognised national languages are official languages, as they are considered a fun-

[26] See B. POZZO, *Multilingualism and the Harmonization of European Private Law: Problems and Perspectives*, in *Eur. Rev. Priv. L.*, 2012, p. 1185; E. IORIATTI, *A Twenty-First Century Approach to Law and Language in Europe*, in O. MORÉTEAU, A. PARISE (eds.), *Comparative Perspectives on Law and Language*, Maastricht, 2022, pp. 35-62.

damental component of the common European heritage, mirrored in the EU motto «united in diversity». The second element is the peculiar nature of the EU, which, in spite of the enormous expansion over the years, still keeps essential features of international organisations, among which the fundamental principle of attributed competences, as further reinforced by the principles of subsidiarity and proportionality: the EU can intervene only if the Treaties establish a competence for it, while all residual competences and powers remain vested in the Member States. Although the strict nature of this allocation of competences has played out in a much more flexible and expanding manner in practice, it is nevertheless true that there are limits to what the EU can do, and this has important implications in all fields, including private law.

3.1. Contract law

Digitalisation is impacting all legal fields, and has important consequences in European contract law[27]; as Gomez Pomar writes, «digital transformation has dominated the European Union's legislative action in recent years concerning private law». First of all, it influences the way in which the decisions to contract are made, both by consumers and businesses. Then, it affects the way in which contracts are formed, and the content they enshrine. Finally, it determines the way in which contracts are performed. The whole life-cycle of contracts is deeply affected by new digital technologies, and law cannot avoid confronting this new reality and its consequences. While some elements can be defined by stretching pre-existing EU rules (e.g. those on distance contracts), many require specific regulation, and EU institutions have been very active on this front in recent years. As de Vries writes, in the EU internal market, the recent Digital Single Market strategy by the Commission «is about allowing the freedoms of Europe's Single Market to enter the digital age».

Digitalisation implies a crucial role for data and information, and this inevitably leads to a strong interrelation with individual rights, both

[27] See R. SCHULZE, F. ZOLL (eds.), *European Contract Law*, 3rd ed., Baden-Baden, 2021.

of private nature, as in the case of contracting parties, but also of a fundamental and constitutional nature, as in the case of issues related to the protection of privacy and dignity[28]. As both Mak and de Vries underline, this implies a «constitutionalisation» of private law, and the assumption of quasi-public obligations on private parties having a strong market power, as in the case of big tech. Conversely, the interrelation between data and individual rights implies a horizontal effect of fundamental rights, either direct (*Drittwirkung*) or indirect, as in the case of judicial interpretation of private law rules based on the need to protect fundamental rights[29]. This balancing exercise between private rights and fundamental rights is very sensitive, and forces lawyers to develop new reasonings and arguments.

There are many specific changes in the EU rules on contract law and the law of obligations[30]. Schulze analyses several of them[31], for example in sales of digital products and sale of goods with digital elements with consumers, and highlights the gradual emergence of a new comprehensive regime of contractual obligations of suppliers. This covers crucial issues such as conformity and remedies for the lack of it, which have profound implications for the very concept of contract, which is now based both on a subjective (based on the buyer's expectations) and an objective notion (fit-for-the-purpose test) of conformity. While this evolution formally concerns consumer contracts, its impact is in fact much broader, and covers contract law in general: for example, it provides a normative definition of core terms, such as «digital content», «digital services», and performance features such as «compatibility,

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[28] See J. HABERMAS, *The Concept of Human Dignity and the Realistic Utopia of Human Rights*, in ID., *The Crisis of the European Union – A Response*, Cambridge, 2012.

[29] See Judgment of 14 March 2013, *Mohamed Aziz v Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)*, C-415/11, EU:C:2013:164; Judgment of 10 September 2014, *Monika Kušionová v SMART Capital*, C-34/13, EU:C:2014:2189. An important related discussion has taken place in the German legal system: see BVerfG, 19 October 1993, BVerfGE, 89, 214 (*Buergschaft* case).

[30] See A. DE FRANCESCHI (ed.), *European Contract Law and the Digital Single Market- The Implication of the Digital Revolution*, Cambridge-Antwerp-Portland, 2016.

[31] See also A. JANSSEN, M. LEHMANN, R. SCHULZE (eds.), *The Future of European Private Law*, Baden-Baden, 2023.

functionality and interoperability». Also, another fundamental element concerns the fact that these digital contracts establish continuing obligations, i.e. updating obligations that extend after the moment of the passing of risk, a feature that Schulze describes as «dynamisation» of obligations. Finally, probably the most significant novelty is that EU law now openly recognises that the provision of personal data can have the same economic value as the payment of a price or fee, thereby defining the synallgmatic (rather than gratuitous) nature of these transactions, with a number of important consequences for the distinction between contract rules and property rules.

While the current EU rules on digital contract law have solved a number of problems, not all gaps and shortcomings have been remedied, as shown in the analysis of Gomez Pomar. Digitalisation has radically increased the variety and complexity of products and services, thereby enlarging consumers' options, too. Moreover, the speed of transactions has also increased enormously. While these changes potentially expand consumers' choices, they also reinforce problems of information asymmetries, adverse selection and moral hazard. The possibility of manipulating consumers' preferences, coupled with the complexity and heterogeneity of goods and services, as well as the distance with the seller or provider, all pose risks that are qualitatively and quantitatively different than in a traditional contractual setting. Gomez Pomar argues that there are some elements that can counter the negative impact of asymmetric information: on-line platforms (recently pervasively regulated by the new Digital Services Act)[32] can play an important role in providing reliable information on the quality of the goods and services offered by businesses, supervising their behaviour and channelling complaints; moreover, consumers' review and comments can also provide general useful information through a network effect, provided that they are truthful and unbiased. Yet, empirical evidence shows that rankings and scoring are often distorted and biased, thereby worsening the information problem. Moreover, the increasing personalisation of digital goods and services also impacts on the con-

[32] Symmetrically, issues related to the competition among large on-line platform is now regulated under the Digital Market Act.

tent and working of contractual warranties, since each contract can be specifically «tailored» to the contracting party. Again, while this can expand consumers' choice, it can also reinforce bias and vulnerabilities, using profiling and data mining techniques. Also, it can use granular information to diversify prices among consumers for the same kind of goods or services, so as to maximise profits. These complex and potentially problematic issues are only partially solved by the existing EU legal instruments, which fail to provide a comprehensive and clear legal framework for the new contractual problems related to digitalisation; as stated by Gomez Pomar, EU law so far «missed the chance to provide the basis for a fine-tuning of contractual instruments to reflect developments in online contracting».

As these analyses show, in spite of its growing intensity, scope and importance, European contract law still keeps a fragmentary character, directly regulating only a limited number of types of contracts and contractual elements. Yet, it significantly influences national contract laws, in a number of ways: first, it expands the range of available contractual rules and remedies where it fills existing regulatory gaps, and in some cases it can even lead to significant modifications of the structure of civil codes, as in the case of Germany and France. Second, it can raise conflicts, insofar its structure and rules are not aligned with national laws, and consequently require modifications not only of statutory law, but also case law and legal doctrine; third, it can indirectly influence areas that are not regulated but are closely connected (as it has been often the case for rules developed for consumer contracts, subsequently stretched to also cover business contracts). This process of mutual interaction, influence and also conflict is highly dynamic and complex, and requires action by all legal actors: law-makers, courts (which play a particularly important role in the implementation of EU law), administrative bodies, lawyers, legal doctrine. The ensuing picture is therefore dynamic and complex; it varies depending on the areas and the timing, and must be kept in mind in all legal analysis concerning European private law[33].

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[33] See S. DE VRIES, H. DE WAELE, M-P. GRANGER (eds.), *Civil Rights and EU Citizenship – Challenges at the Crossroads of the European, National and Private Spheres,* Cheltenham, 2018; S. DE VRIES, *The Protection of Fundamental Rights within Europe's*

3.2. *Tort law*

Digitalisation has significantly impacted also product liability, particularly in reference to the use of AI elements in products[34]. The rapid evolving features of these technologies make it very difficult to devise suitable legal standards. In particular, there is a strong need for rules capable of finding a fair balance between the principle of innovation, allowing the benefits of new technologies to spread to users, and the principle of precaution, which requires a careful ex ante control of technologies that may pose significant risks for users and society at large, as pointed out by Sousa Antunes. This policy choice has several consequences, for example on the discussion concerning the standard of liability: while strict liability has traditionally been applied for product liability, and seems to be the preferred option in the case of IoT regulation, there is now a debate advocating for the return to fault as a suitable standard, as it is the case in the proposal concerning liability for AI, where fault is linked to the definition of risk assessment and compliance mechanisms. This is considered to be a system better aligned with the need of not hampering technological development, and at the same time protecting the interest of potential damaged parties. Yet, this is highly problematic: a fault-liability regime places a heavy burden in terms of evidence on the damaged party, and this feature is dramatically increased for digital products, where the potential involvement of several businesses and the complexity and even obscurity of the role of AI elements, risk to make it a kind of *probatio diabolica*. Nor the imposition of a duty of disclosure on the AI operator, coupled with a presumption of fault in case of breach, as now contemplated by the AI Liability Directive Proposal, fully ensure effective protection against harm generated by high-risk AI applications. Indeed, while this approach might better protect the possibility of technological development and innovation, it definitely places victims in a worse situation compared to a strict

Internal Market – An Endeavour for More Harmony, in S. DE VRIES, U. BERNITZ, S. WEATHERILL (eds.), *The Protection of Fundamental Rights in the EU After Lisbon*, cit., p. 76.

[34] A. BECKERS, G. TEUBNER, *Three Liability Regimes for Artificial Intelligence*, Oxford-London-New Delhi-Sydney, 2021.

liability regime. In fact, this kind of argument is the very reason why strict liability regimes were established around the world starting from the mid-20th century. Also, this does not seem in line with the current expanding trend applying the principle of precaution in all situations where significant risks cannot be determined *ex ante*, as in the case of development risks[35].

The emphasis on a risk-based approach also implies an assessment of the costs and benefits of each liability regime (either fault-based or strict) vis-à-vis mandatory insurance schemes and social insurance schemes, i.e. schemes, funded either by private or public revenues and operated by private or public bodies, where the compensation of damages is no longer purely related to tortious liability, but rather to the existence of a loss[36]. The choice between these different mechanisms, or a combination thereof, depends on the political, social and economic priorities that are set, a debate that involves the EU, Member States and stakeholders, also in accordance with the principle of subsidiarity. This debate, moreover, has a global dimension that influences, and is influenced by, the European debate: how to regulate liability deriving from the use of AI, both for products and services, is a critical topic in all systems that are experiencing a rapid, and partly unforeseeable, technological evolution.

3.3. Property law

Property law is the area of private law that is generally considered more resistant to the «intrusion» of EU law, both because there are important limits to the EU competences that can encroach on national

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[35] M. BOUTONNET, *Le principe de précaution en droit de la responsabilité civile*, Paris, 2005; K. DE SMEDT, E. VOS, *The Application of the Precautionary Principle in the EU*, in H.A. MIEG (ed.), *The Responsibility of Science*, Cham, 2022, pp. 163-186; P. HARREMOES, D. GEE, M. MACGARVIN, A. STIRLING, H. KEYS, B. WYNNE, S. GUEDES VAZ (eds.), *The Precautionary Principle in the 20th Century: Late Lessons from Early Warnings*, Abingdon-New York, 2002.

[36] G. BORGES, *New Liability Concepts: The Potential of Insurance and Compensation Funds*, in S. LOHSSE, R. SCHULZE, D. STAUDENMEYER (eds.), *Liability for Artificial Intelligence and the Internet of Things*, Baden-Baden, 2019, pp. 145-163.

property laws (particularly Art. 345 TFEU), and because property is traditionally considered the area where national specificities and traditions are most significant, and consequently hinder harmonisation efforts. Yet, it is currently recognised that national property law is affected in a number of ways by European law, and that, in spite of the remaining differences, there are elements of influence and partial convergence, due both to concerted efforts and exogenous pressures.

Digitalisation is one of these elements: not only it is radically changing some essential features of contract and tort law, but, in fact, some of the most contentious issues concern property law: are data a form of property? And if yes, which principles and rules apply to it? Are ordinary principles and rules on property applicable, or do the specificities of data required ad hoc new concepts and rules, such as van Erp argues in relation to the new category of «differential law»[37]? This is not merely a theoretical problem: framing the control over data as a form of property, or rather as belonging to the realm of obligations, has very important practical consequences. More broadly, what is the role of private law in regulating data? It is clear that it is far from being exclusive and exhaustive, and that public and constitutional law are vital in guaranteeing the protection of fundamental rights involved, as it is shown, for example, in the debate on the need to steer private property in order to ensure environmental protection, as shown in the discussion on managed retreat by van Erp, or that on access to housing by Afonso. Private autonomy can have a different margin and room, depending on the kind of priorities and aims of regulation. In the area of data, a rapidly evolving field, existing rules are stretched to be applied to new circumstances. Moreover, a more general issue concerns the choice between *ex ante*, which aims to steer action in specific directions, and *ex post* regulation, which is crucial for guaranteeing a suitable level of protection of individual rights through a comprehensive system of procedures and remedies.

Gradually a new bulk of rules is being defined by law-makers and case law, and it is important to be able to carve out the guiding princi-

[37] See also S. VAN ERP, *Fluidity of ownership and the tragedy of hierarchy. A sign of revolutionary evolution?*, in *Eur. Property L. J.*, 2015, pp. 56-80.

ples and fundamental aims that must be achieved, and in this European private law has an important role to play. As we have mentioned in the introductory paragraph, access and control are crucial concepts in relation to the regulation of data, and they cut across the property/obligations divide.

On a different front, an issue that has a clear European constitutional dimension related to social justice is housing. And yet, EU law plays a very marginal role in it, both in terms of legal principles and concepts and in the rules that can be applied. This is partly due to the fact that a large part of the rules concerning housing are related to property law, an area where the EU lacks a competence, and where national laws display a staggering variety of rules and policies, also due to very different social and economic contexts[38].

While this is another sign of the lack of a comprehensive notion of social justice at the EU level, yet, as discussed by Afonso, there are some instruments that can be employed to frame a role for European private law in this area: principles and rules concerning anti-discrimination, consumers and users protection instruments, and unfair contract terms rules could be used to frame a European response, albeit limited, to issues that are highly significant in all EU states, where access to housing has become a priority and sometimes even an emergency. Moreover, this is a problem that can significantly affect a key element of European integration, namely free movement of persons and European citizenship: no effective movement can be established unless access to housing is guaranteed. While the limits to EU competence are an important obstacle, some results could be achieved through a bottom-up approach, such as involving stakeholders (like tenants and landlords associations, local authorities, etc.) in developing soft law instruments (e.g. model contracts and principles), also through mechanisms such as the open method of coordination.

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[38] See C. SCHMID (ed.), *Tenancy Law and Housing Policy in Europe – Towards Regulatory Equilibrium*, Cheltenham-Northampton, 2018; E. BARGELLI, *Locazione abitativa e diritto europeo. Armonie e disarmonie di un capitolo del diritto privato sociale*, in *Europa e dir. priv.*, 2007, p. 954.

4. The new European private law: which way forward?

The path of European private law highlighted by the contributions of this book is a long, winding and at times steep one. European private law has definitely enlarged its scope and variety, developing new concepts, new categories and new principles. In this evolution, it has been influenced by the national legal systems of the Member States (and sometimes also by external legal systems), and in its turn it has influenced private law of the Member States. This is not a linear process: at the side of harmonisation and convergence there have been, and there are, gaps and frictions, and it is hard to foresee future developments.

Yet, some trends seem to be firmly established. First, European private law (and EU in general) is expanding, covering new domains and introducing new legal instruments, principles and rules. Second, this new European private law is shifting the boundaries of legal areas: private law is less and less separated from regulatory/administrative law (as made clear in the term «European private regulatory law»), and from public/constitutional law, where fundamental rights protection is deeply influencing recent legal developments. Third, the blurring of the public/private divide leads to a stronger focus on the collective/general dimension of individual rights, which has significant effects both on the definition of subjective rights, and on the remedies and procedures for protecting them. Fourth, new concepts and categories of European private law are less focused on systematic coherence and on building a new system, and more aligned with a functional logic, which is meant to pursue certain goals irrespective of the variety of the national legal settings. This has been long visible for internal market issues, but is now expanding to new domains.

All these elements need to be taken into consideration by scholars of European private law, both in their research and teaching activities. And, while the contributions of this book mirror the research interests of (some of) the scholars who have participated in the series of Roundtables on European private law issues, we would like to end these remarks by closing the circle and moving back to the start: the Roundtables, and this book which stems from them, are an instrument for stimulating the critical thinking of our students, who are going to be

the next generations of lawyers. These initiatives are a window that allows students at the beginning of their career to have a glimpse of the complexity of European private law, but also of its dynamic nature, its vitality and relevance. And our students, who choose to study at the Trento Faculty of Law because they share a keen interest on European, transnational and international law, have allowed us to build an extraordinary teaching laboratory, giving us vital feedback for improving our teaching, but also research and work. Together with our foreign guests and friends, they have built a small but vibrant academic community. This is just a fragment of a wider transnational European community that is growing, where students and scholars move and share their experience, and build a body of experiences and working methods that cuts across national borders, and participate actively and critically to the European integration process. Our hope is that our students will bring with them in their future careers some of the richness of this experience. As for us, to our students and to our guests goes our deep gratitude for the road they have shared with us.

APPENDIX

CEILS ROUNDTABLES ON ‘THE MAKING OF EUROPEAN PRIVATE LAW’

In the framework of the Courses of Foundations of Private Law from a EU perspective (prof. Paola Iamiceli) and Comparative Private Law (prof. Luisa Antoniolli)

18 May 2018, The Making of European Private Law: Which Drivers? Which Perspectives?

Welcome address:
Giuseppe Nesi (Dean of the Faculty of Law)
Chair:
Paola Iamiceli (University of Trento)
Speakers:
Luisa Antoniolli (University of Trento)
Fabrizio Cafaggi (Consiglio di Stato)
Chantal Mak (University of Amsterdam)
Fernando Gomez Pomar (University of Pompeu Fabra, Barcelona)
Anna Veneziano (Unidroit)

13 May 2019, The Making of European Private Law in a Digital Era

Chair:
Paola Iamiceli (University of Trento)
Speakers:
Hugh Beale (University of Warwick)
Fabrizio Cafaggi (Consiglio di Stato)
Fernando Gomez Pomar (University of Pompeu Fabra)
Sjef van Erp (University of Maastricht)

Concluding Remarks:
Luisa Antoniolli (University of Trento)

14 May 2020, The Impact of European Law on Private Law

Introduction:
Luisa Antoniolli (University of Trento)
Speakers:
Hugh Beale (University of Warwick)
Sybe de Vries (Utrecht University)
Sjef van Erp (University of Maastricht)
Concluding Remarks:
Paola Iamiceli (University of Trento)

10 May 2021, European Private Law in Times of Pandemic

Introduction:
Paola Iamiceli (University of Trento)
Speakers:
Hugh Beale (University of Warwick)
Fabrizio Cafaggi (Italian Council of State)
Sjef van Erp (University of Maastricht)
Henrique Sousa Antunes (Catholic University of Portugal)
Concluding Remarks:
Luisa Antoniolli (University of Trento)

5 April 2022, The Future of Europe and the Role of Private Law: Challenges and Perspectives

Chair:
Elena Ioriatti (University of Trento)
Introduction:
Paola Iamiceli (University of Trento)

Speakers:
Ana Afonso (Catholic University of Porto) - "The right to housing and the residential tenancy regulation: should more be done at a European level?"
Hugh Beale (University of Warwick) - "New trends in contracts: from sales to servitization"
Sjef van Erp (University of Maastricht) - "European data law as a new legal branch?"
Reiner Schulze (University of Münster) - "European Private Law in the Digital Age"
Sybe de Vries (Utrecht University) - "The impact of digitalization on the law of the EU Single Market"
Concluding Remarks:
Luisa Antoniolli (University of Trento)

18 May 2023, Sustainability Goals and the New Developments of European Private Law

Introduction:
Paola Iamiceli (University of Trento)
Speakers:
Hugh Beale (University of Warwick)
Sjef van Erp (University of Maastricht)
Evelyne Terryn (Catholic University of Leuven – KU Leuven)
Fryderyk Zoll (Jagiellonian University of Cracow)
Concluding Remarks:
Luisa Antoniolli (University of Trento)

COLLANA
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UNIVERSITÀ DEGLI STUDI DI TRENTO

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