HABILITÁCIÓS TÉZISEK

írta

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Private law governance and consumer contract fairness law under the impact of the global economic crisis: a new research agenda for policy and doctrine in Europe

I. Introduction

The paper provides an analytical and theoretical framework on the actors and factors framing unfair terms law under the impact of the global economic crisis. I try to capture, describe and normatively discuss the multiple levels of private law governance in unfair terms law, presenting the developments of the past decade in contract justice from a broad, systemic perspective, that of European Private Law. The ultimate aim of this academic exercise is to identify the most important difficulties in enforcing unfair contract terms law and, on this basis, to draw up a post-crisis research agenda.

I start from the premise and I subscribe to the approach that research on European private law should avoid a dogmatic 'either/or' approach and overcome the difficult decision of where to anchor the market component and material justice in private law. [1] The aim of the paper is to summarise and critically assess both mainstream and non-mainstream approaches on private law governance in Europe.

Most parts of the paper present the findings of my earlier research while further elaborating on certain aspects in the light of recent developments in case law and doctrine. I start and build the analysis on interdisciplinary research conducted under the leadership of the European University Institute in Florence on the evolution of unfair terms law under the impact of the global economic crisis, that provided an evolutionary map of the causes of consumer over-indebtedness in Europe and analysed the role of and contribution to unfair terms law in this process. The findings of this project were later further developed by focusing on the role of judicial dialogue taking place between the CJEU and national courts. These will also be presented. The paper also summarises preliminary findings in another (ongoing) comparative law research, in which I am also involved, that studies the role and impact of the general principles of European Private Law in bridging and overcoming systemic differences between the European and national layers of private law. Last but not least the paper builds on the research experience I gathered in comparative private law within the framework of research conducted at MPI Hamburg (2009-2011) and comparative research in case law under the Trento Common Core Method.

The reason for selecting the field of consumer loan as focus of the paper is because this field has manifested most acutely the crisis of contract justice following the global economic crisis hitting Europe in 2008 and became the actual test of the difficult marriage between European and national private law. Solutions drawn up to handle unfairness in consumer mortgage contract cases today extend to contract fairness law in general, a process that certainly has costs and externalities in other sectors.

[1] H. -W. Micklitz, *The Visible Hand of Regulatory Private Law in Europe*, EUI Working Paper Law, No. 2008/27, p. 33.

From a methodological point of view when assessing the ongoing multiple level private law governance the paper goes beyond streamline *European integration research* (first generation research), which is primarily interested in the impact of the European unfair terms law on Member States, especially at level of enforcement. It also exceeds the methodology of *Europeanisation research* (second generation research), with a focus on the actors and factors framing national law under the impact of European law and the integrative capacity of the European rules in the context of the national private law culture, identifying systemic and national legal cultural limits and the potential of further approximation of national private law. The paper approaches unfair terms law from the perspective of governance research and alongside the study of the interplay between the top-down (European) and bottom-up (national) developments which frame contract justice in Europe it also introduces a third layer into the research, one with increasing importance, that of horizontal judicial dialogue in the process of enforcement of European unfair terms law.

These processes will be reflected upon under the following structure:

Section II sets the scene of national developments in regulatory and judicial law on unfair terms law in response to the impact of the global economic crisis after 2008, starting with the assessment of the causes driving the revival of unfair terms law in the search for solutions to cure the legal, economic and social effects of consumer over-indebtedness in a significant number of Member States (especially Spain, Greece, Portugal, Hungary and Romania) and continuing with the responses provided by unfair terms law. This section also reviews the impact of unfair terms law on the function and role of private law and assesses the developments' internal conflicts.

Section III presents and comments on policy responses and the methodology of the CJEU on unfair terms law. It also provides an assessment of the judicial law from a consumer perspective.

Section IV is the main pillar of the paper. It views the national and European judicial solutions in their interplay, while mapping the internal dynamics of the process and summarising different stages in evolution, theorisation and conceptualisation of solutions. It does so from the perspective of the systemic conditionality of unfair terms law as driven by the interplay between national and European rules, policies and doctrine. It also debates the governance question in European private law, in general and in unfair terms law, in particular.

The paper concludes in *Section V* by identifying some major research questions left unsolved by judicial law and framing a new agenda for doctrine and policy.

II. Factors driving the 'bottom up' legal crisis management in Europe and the foundation of a new contract fairness paradigm under the impact of the global economic crisis

When mapping and assessing the factors framing unfair contract terms law in Europe, one must first acknowledge that the regulatory needs of consumer over-indebtedness under the impact of the global financial crisis have framed unfair contract terms law in general, both at the domestic and European level, and that solutions developed in response to those needs govern today's contractual justice paradigm in Europe in business to consumer (B2C) contracts.[2] As such, it is imperative to review the main causes of consumer over-indebtedness before making any value judgement on the role of unfair contract terms law, and that of judicial private law in general, in framing a new contract justice concept in Europe.

Consumer over-indebtedness has complex macro and micro-economic causes alongside its legal causes that exceed the borders of unfair contract terms law and those of contract law

[2] More than 80% of the preliminary rulings issued by the CJEU in the field of unfair contract terms law, as well as the large majority of national cases in Hungary, Greece, Romania, Spain and Portugal concern consumer loan agreements.

in general, and the legal ones should not be treated separately from the economic and social ones. These can be summarized as missing market surveillance of the consumer credit markets at the time of a housing boom, which allowed easy lending without robust creditworthiness assessments and poorly managed credit agencies using aggressive and misleading marketing to promote highly risky financial products to consumers, sold under unfair contract terms, that transferred unforeseeable global risks of the financial markets even those for which credit institutions usually have insurance, onto consumers.[3] Unfair terms were only the vehicle for selling the highly risky financial products which were facilitated and made possible by the absence of market regulations and ineffective market surveillance. As such, consumer over-indebtedness was to a large extent the consequences of inadequate regulatory law at the time when the loans were contracted.[4] It also has to do with this reality that domestic judgements and the later rulings of the CJEU continued to focus on the moment of contract conclusion and not on the changed circumstances influencing contract implementation under the impact of the global financial crisis, attributing an ex post market policing function to unfair contract terms law.

After 2008, the drop in economic performance of these economies, followed by higher levels of unemployment, and drastic falls in real incomes further weakened the ability of consumers to repay their debts according to highly costly contract terms and the consequences of market failures fuelled the crisis, and vice versa.[5] Over-indebtedness was also affected by the responses of governments and regulators to the financial crisis, often transferring the consequences of economic 'downturn' onto individuals.[6] One can establish that, in countries most affected by large scale use of unfair consumer contracts (Spain, Greece, Hungary, Romania), consumers were highly exposed to systemic factors that strongly affected their bargaining power, aggravated the information asymmetry, distorted their informed choice, and strongly defined their subsequent ability to perform under those contracts. The large scale practice of what came to be regarded as unfair contract terms is thus only one of the tools employed by the credit institutions in generating the accumulation of non-performing loans. This is why individual justice under unfair contract terms law could not handle the crisis effectively and in the attempt to fill the gaps in regulatory law, it tried to assume tasks that exceeded the functions of private law.

However, the most severely affected countries perceived the problem of consumer indebtedness as an issue of individual justice (a problem between the individual consumer and the bank concerned) for too long, although relatively early on, the national courts acknowledged

[3] G. Mentis, K. Panzatou, Country Report Greece, in H.-W. Micklitz, I. Domurath (eds) *Consumer Debt and Social Exclusion in Europe,* Ashgate, 2015, pp. 29-34; C. Frade and M. Pinheiro Almeida, Country Report Portugal, in H.-W. Micklitz, I. Domurath (eds), *Consumer Debt and Social Exclusion in Europe*, 2015, pp. 53-56; P. Gutiérrez de Cabiedes Hidalgo and M. Cantero Gamito, Country Report Spain, in H.-W. Micklitz, I. Domurath (eds), *Consumer Debt and Social Exclusion in Europe,* 2015, pp. 71-73; B. Andresan Grigoriu and M. Moraru, Country Report Romania, in H.-W. Micklitz, I. Domurath (eds), *Consumer Debt and Social Exclusion in Europe*, 2015, pp. 121-123; M. Józon, Country Report Hungary, in H.-W. Micklitz, I. Domurath (eds), *Consumer Debt and Social Exclusion in Europe*,2015, pp. 86-89.

[4] M. Józon, Country Report Hungary, in H.-W. Micklitz, I. Domurath (eds), *Consumer Debt and Social Exclusion in Europe*, 2015, p. 87

[5] M. Józon, Country Report Hungary, in H. -W. Micklitz, I. Domurath (eds), *Consumer Debt and Social Exclusion in Europe*, Asgahte, 2015, p. 89; C. Frade and M. Pinheiro Almeida, Country Report Portugal, in H. -W. Micklitz, I. Domurath (eds), *Consumer Debt and Social Exclusion in Europe*, 2015, p. 63; B. Andresan Grigoriu, M. Moraru, Country Report Romania, in H. W. Micklitz, I. Domurath (eds), *Consumer Debt and Social Exclusion in Europe*, 2015, p. 123, G. Mentis, K. Pnatazatou, Country Geport Greece, in H.-W. Micklitz, I. Domurath (eds), *Consumer Debt and Social Exclusion in Europe*, 2015, p. 32.

[6] A. Kempson, Over-indebtedness and its Causes Across European Countries, in H. -W. Micklitz, I. Domurath (eds), *Consumer Debt and Social Exclusion in Europe*, 2015, pp. 146-147.

that unfair contract terms were only one of the causes of non-performing loans, along with several regulatory gaps, and that private law cannot substitute for regulatory law.

During the first years after the crisis, unfair contract terms law was the only tool available to consumers and the courts in their efforts to redress the contractual imbalance caused by the change in circumstances in the financial markets and in the payment ability of debtors as consequence of the global financial crisis. Moreover, when the global financial crisis hit Europe in 2008, unfair contract terms law was not functionally integrated into private law thinking and the judicial reasoning of the countries affected by over-indebtedness; it was more 'law on paper'. As a consequence, the courts encountered tremendous difficulties in establishing a contractual balance in consumer loan agreements, because they did not have suitable substantive and procedural tools within their domestic law to handle non-performing loans on such a large scale. In addition, regulatory gaps were sometimes treated by the courts as private law problems in need of judicial solutions. In some countries the courts were reluctant to come up with innovative solutions; they preferred to search for solutions in general contract law.[7]

In the absence of regulatory intervention, civil justice found itself in the role of *ex post market police* due to the lack of ex ante market surveillance by the authorities. The courts therefore had to come up with innovative solutions while shifting the problem-solving up to EU level, thus also impelling the CJEU towards innovative solutions that would never have occurred in the form of secondary legislation. Under such circumstances, it was inevitable that the procedure of preliminary reference would be used by Member State courts as a tool of domestic judicial policy in the search for solutions to the far-reaching economic, social and political consequences of the global financial crisis, exceeding the boundaries of European unfair contract terms law. This new multiple-level judicial governance has been driven by spontaneous private law governance rather than a coordinated one at Member State level. Europe rediscovered unfair contract terms law, *the sleeping beauty – European unfair terms law, being discovered by the judiciary*, as the title of the article published by *Micklitz* and *Reich* on the role attributed to Directive 93/13/EC (hereinafter "the Directive") after 2008 put it.[8]

However, when national courts rediscovered the Directive, they saw European unfair contract terms law as an unfinished piece of work. It was not recognized in sufficient time by the affected Member States that Directive 93/13/EC is based on *minimum harmonization* which allows in certain aspects for stricter rules according to the domestic needs and preferences of the Member States, rules that could have been actually suited and adjusted to domestic market conditions, on one hand, and that *harmonization is not full* but *partial* only, important aspects of contract justice being left into Member State competence. The Directive turned out to be a central testing ground of how much harmonisation is needed and how much would be enough for rules to work within the context of private law pluralism in Europe. Minimum and partial harmonisation implies that the Member States make effective use of the substantive and procedural autonomy left to them and this seem not to have happened in Europe in the 20 years since Directive 93/13/EC was enacted.

From the preliminary questions referred by Member States courts to the CJEU, it is clear that the affected Member States mostly have not explored and have not exploited the potential of the Directive to counter the impact of consumer over-indebtedness in terms of the further

[7] C. Frade and M. Pinheiro Almeida, Country Report Portugal, in H. -W. Micklitz, I. Domurath (eds), *Consumer Debt and Social Exclusion in Europe*, 2015, p. 57, 60; P. Gutiérrez de Cabiedes Hidalgo and M. Cantero Gamito, Country Report Spain, in H. -W. Micklitz, I. Domurath (eds), *Consumer Debt and Social Exclusion in Europe*, 2015, p. 77; M. Józon, Country Report Hungary, in H. -W. Micklitz, I. Domurath (eds), *Consumer Debt and Social Exclusion in Europe*, 2015, p. 89.

[8] H.-W. Micklitz, N. Reich, The Court and the Sleeping Beauty: The Revival of the Unfair Contract Terms Directive (UCTD), (2014) 51 *Common Market Law Review*, Issue 3, pp. 771-808.

development of unfair terms law via bottom-up elaboration of the domestic background legislation, including special provisions in procedural law for consumers. They did not develop solutions from within the national civil law system to bridge consumer contract fairness and general contract law and civil procedural law. Consumers, the victims of the weak regulatory framework on consumer credit, have found that the traditional principles of contract law (freedom of contract, equality of parties) cannot provide contractual justice under the changed circumstances, and that individual justice based on European unfair contract terms law faces multiple obstacles in their domestic private law and civil procedural law - since the three domains were not bridged by consumer policy rules. This approach of the courts had to do above all with the very fragile internalisation of consumer policy in their judicial reasoning in general and in the unfair terms law in particular. The global financial crisis has brought to surface the fragile embeddedness of consumer policy in the contract law of the Member States (Hungary, Greece, Spain, Romania, Portugal)[9] most affected by consumer over-indebtedness and the regulatory gaps in the national consumer finance markets.

In addition, contract law proved to be several steps behind the high technicality of contracting practices and the regulatory needs of so-called 'relational contracts' or 'life-time social contracts' that establish long-term relationships between parties, with a long-lasting or recurring obligation.[10] Consumer loan cases present many features in common with conflict - resolution in other 'post-deregulatory' markets: a) new facts of the case, which did not previously belong to judicial law; b) new legal questions not yet clarified in legislation or case law; c) civil law developments waiting for solutions in public law and regulatory law; d) inequality between the parties to the litigation – between consumers and business entities; e) the cases raise complex economic issues where public interest and economic consideration can run counter to each other; f) individual decisions, especially those of the highest courts, have regulatory effects, impacting the economic field concerned. [11] To these realities of the legal environment one should also add the interpretation and enforcement difficulties arising from differencies in the regulatory approach and legislative technique of the European regulatory private law and national systems of civil law. Soon after the global financial crisis, when these litigation reached the courts, the judges had to realise that domestic private law did not have the measures in place for effective enforcement of European unfair contract terms law.

In the absence of regulatory law at a time when unfair terms were employed on a vast scale and private law lacked the necessary tools, national courts were concerned with two main issues: the borders and content of the '*market policing'* role of the judiciary and the borders of minimal and partial harmonization. They were confused for quite a long time about their law-framing role. In addition, the courts were faced with another pressure: mass-litigation with a major social impact and severe economic consequences affecting large groups of society. This is indeed a new type of public interest (a domestic one), in contrast with the public interest policy of the European unfair terms law and this was also hardly reconcilable with the traditional principles of continental contract law, based on contractual autonomy. Under this later conditionality, the courts have involuntarily assumed the role of policy framers in the field of consumer contract justice by testing, through their questions referred to the CJEU, the room available under the Directive to shift the responsibility back onto the national legislative. As a consequence, the actors framing unfair terms law at national level also changed under the

[9] For an overview of the economic and social impacts of consumer over-indebtedness in the most affected Member States: H. -W. Micklitz, I. Domurath, G. Comparato, *Over-Indebtedness of the Consumers in Europe. A View from Six Countries*, EUI Working Paper, Law 2014/10; H. W.- Micklitz, I. Domurath (eds) *Consumer Debt and Social Exclusion in Europe*, Ashgate, 2015.

[10] K. Riesenhuber, A 'Competitive Contract Law', in K. Purnhagen, P. Rott (eds) *Varieties of European Economic Law and Regulation: Liber Amicorum for Hans Micklitz*, Springer, 2014, p. 8; L. Nuger, U. Reifner (eds) *Life Time Contracts, Social Long Term Contracts in Labor, Tenancy and Consumer Credit Law*, Eleven Publishing, 2014.

[11] R. Podszun, *Wirtshaftsordnung durch Zivilrecht*, Mohr Siebeck, 2012, p. 297.

impact of the global financial crisis. Decentralized enforcement of European unfair contract terms law has intensified upon the impact of the crisis, which generated a process of 'voluntary bottom up approximation of private law', framed by the domestic courts of the Member States via the procedure of preliminary reference. Although, in respect of the preliminary rulings issued by the CJEU in cases dealing with unfair contract terms, the European doctrinal focus is on the impact of the European judicial policy on national case law and legislative developments, it is indeed equally important, if not more so, to examine the impact of the national judicial question-framing and national judicial policy on the development of the European judicial policy on contract justice.

A lot has been written about the economic crisis, social crisis and political crisis generated by the global financial crisis, but what is still missing is an open discourse on the crisis of private law in Europe that came to surface like an iceberg after 2008. Assessment of the questions referred to the CJEU concerning the interpretation of the Directive revealed that they mostly concern also: i) the state of domestic private law in the Member States, ii) the national perception of contractual justice and iii) the national perception of consumer protection via private law mechanisms. These issues (discussed in detail in Section III) are in fact interpretation problems stemming from the very heart of the Member State's private law and have to do with paradigms that have not changed since the enactment of the Directive 93/13/EC more than twenty years ago.

It was inevitable that the procedure of preliminary reference would be used by Member State courts as a tool of domestic judicial policy in the search for solutions to the far-reaching economic, social, and political consequences of the global financial crisis, going beyond the boundaries of European unfair contract terms law in the strict meaning of the term. Courts increasingly exported the problem-solving to EU level attributing by this approach to the procedure of preliminary reference also different domestic function(s), while trying to fill gaps in national regulatory law, national civil law, national procedural law and testing boundaries of judicial law-framing, needed in support of effective enforcement of the Directive. Courts become in fact the most important actors in multiple-level governance in unfair terms law, in this way assuming indirectly a policy framing role in contract justice. Unfair contract terms law has experienced a fast-evolving, *bottom-up unification* via preliminary references, pursued mainly by Hungarian and Spanish courts. [12]

This situation also arose because, following the manifestation of the crisis, the domestic courts were left on their own by the legislators of the Member States, waiting for individual justice for too many years to handle the large scale use and mass impact of unfair contracts, whereas the European policy makers also postponed coming up with common European solutions to mitigate the impact of new products and new practices in the consumer markets for financial products under the impacts of the global economic crisis. European unfair contract terms law in both the context of the legal environment of Member States'and that of European judicial policy performed a function that far exceeds the aims of Directive 93/13/EC.

In reaction to the efforts by the judiciary to clarify issues of policy, even if late, but at different stages of the crisis and to a different extent, individual justice was supported by *regulatory justice*, such as happened in Hungary in 2014, where mandatory rules re-established the contractual balance between consumers and credit institutions.[13] Such solutions are competing now with the judicial justice provided from Luxembourg under European unfair contract terms law.

[12] M. Józon, The Methodology of Judicial Cooperation in Unfair Contract Terms Law, in F. Cafaggi, S. Law (eds), *Judicial Cooperation in European Private Law*, Edward Elgar, 2017, p. 165.

[13] For details on regulatory interventions aimed at strengthening the enforcement of Directive 93/13/EC in Hungary: M. Józon, op. cit., in F. Cafaggi, S. Law (eds), *Judicial Cooperation in European Private Law*, Edward Elgar, 2017, pp.140-145.

Under the impact of the global financial crisis, these two mutually reinforcing processes (policy framing by judicial law and regulatory intervention in contracts) often forced contract law to step out from its traditional function of commutative justice and turn into an instrument of 'distributive justice'[14], aimed at curing market failures or inequalities along with other market regulatory measures. Under commutative justice, the private law relationship should be governed only by the criteria set up by the parties themselves and not by reference to external, political, social or economic goals[15], whereas distributive justice perceives private law to be intrinsically linked with public law.[16]

This change of role caused further system and function changes in the private law system of the Member States. Deterrence and compensation were perceived differently than in general contract law; a certain degree of role-changing took place in contract law and torts (the focus was on unfair terms law, while unfair commercial practices law has been marginalized as tool protecting the consumers). Consumer contract law is attributed a new domestic role – a market regulatory function *ex post*, as compensation for the lack of or deficient regulatory law and market surveillance in the past. The social and economic impact of long term and mass practice of unfair terms drives to wealth redistribution by various debtor rescue measures.

The consumer concept is rapidly changing in the search for substantive justice at the domestic level, capable of curing the social, economic and political consequences of the large scale practice of unfair contracts aggravated under the impact of the global economic crisis. The consumer is first perceived as any contracting person for a relatively long period of time. Then, when the courts finally discovered the potential of the European unfair terms law, the lack of consumer policy reasoning in court methodology or the missing civil procedural law tools pose obstacles to the consumers in enforcing their substantive rights. However, more paradoxically, when consumers and courts call upon fundamental rights in defence of consumer rights granted under unfair terms law vis a vis procedural law obstacles, the consumer is viewed again as a simple citizen in procedural terms. This changing status of consumers occurs while contract freedom, as reinforced by ineffective market regulations, produced new categories of vulnerable consumers or persons with increased need for protection.

As such, in such a private law environment, in a further search for a cure for the economic and social impact of the crisis, contract justice increasingly has a public law dimension. Private law becomes instrumental to public policy aims. [17] Under this process, labelled in the German civil law doctrine as *'Publifizierung des Zivilrechts,'*[18] the legislative brings together public interest with the private interest, in this way facilitating the enforcement of private interest in a way that serves the public interest'.[19] In Member States where the crisis

[14] On the difference between commutative and distributive justice in general: C. –W. Canaris, *Die Bedeutung der iustitia distributiva im deutschen Vertragsrecht,* C.-H. Beck, 1997; On distributive justice and European Contract Law: K. Riesenhuber, *System und Prinzipien des Europäischen Vertragsrecht*, de Gruyter, 2003, p. 580; R. Michael, The Two Rationales of European Private Law, in R. Brownsword, H.-W. Micklitz, L. Niglia and S. Weatherill (eds) *The Foundations of European Private Law*, Hart, 2011, pp. 144, 156.

[15] Ch. U. Schmid, *Instrumentalist Conception of the Acquis Communautaire in Consumer Law*, in S. Grundmann, M. Schauer (eds) The Architecture of European Codes and Contract Law, Kluwer Law International, 2006, p. 257.

[16] R. Michael, The Two Rationalities of European Private Law, R. Brownsword, H.-W. Micklitz, L. Niglia and S. Weatherill (eds) *The Foundations of European Private Law*, Hart, 2011, p. 156.

[17] H.-W. Micklitz, The Visible Hand of European Regulatory Private Law - The Transformation of European Private Law from Autonomy to Functionalism in Competition and Regulation', in T. Tridimas and P. Eckhout (eds) *Yearbook of European Law 2009*, Vol. 28; F. Cafaggi, H. Muir Watt (eds) *The Regulatory Function of European Private Law*, Edward Elgar, 2009.

[18] On more theoretical elaboration on the concept: W. Leisner, *Privatisierung des Öffentlishes Recht*, 2007, p. 34, R. Podszun, *Wirtshaftsordnung durch Zivilrecht*, Mohr Siebeck, 2012, p. 98.

[19] R. Podszun, op. cit., p. 98.

was the most severe (Greece, Hungary, Romania, Spain and Portugal)[20] the impact of crisis management seem to be much more disruptive to domestic private law than any of the measures proposed under 'European Private Law' during the past two decades. In fact, measures that were considered as a threat to the integrity of the Member States' private law systems are now welcome additions to private law in the Member States.

III. The methodology beyond the shared judicial activism between Member State courts and the CJEU

In such domestic legal environments as presented above, from where the preliminary references stem, the primary task of the CJEU was thus to mitigate the conflict between Directive 93/13/EC and the insufficiencies of domestic private law in response to the needs of consumers affected by the economic crisis. This has been done in highly innovative ways. On one hand, the CJEU established the possibility of the national courts to assess unfairness of their own motion, by which the courts have a European empowerment to proceed with judicial control on contract fairness. On the other hand, the CJEU declared the provisions of Directive 93/13/EU to be of the same public law nature as the domestic provisions on public policy, with the same ranking within the national legal systems. In parallel to this, the CJEU has provided several tools for the national judiciaries on how to assess unfairness and guidance on developing effective rules on the consequences of unfairness. This strategy of the CJEU has evolved gradually over time in response to the more or less effective role assumed by the judiciary and the legislators of the Member States in anchoring European unfair terms law in their national private law.

III. a) The policy of acting on own motion and the public law dimension of consumer contract fairness

In *Pénzügyi Lízing*[21] the CJEU established the institutional aspects of the 'complex cooperative relationship' between the national courts and the CJEU.[22] In a strongly affirmative response to the question framed by the Hungarian court in that case, the CJEU stressed its competence to interpret the general provisions of the Directive, but it has firmly refrained from applying these general provisions to specific contract clauses challenged by the referring courts. However, this seems not to be fully acknowledged by the referring courts, looking for material justice to provide substantive criteria, so from time to time they ask the CJEU to assess the clauses under question. In *Pannon GSM*[23] the CJEU turned the option of the courts to assess unfairness of their own motion, established in *Océano*[24], into an obligation. In the same time the CJEU has also drawn limits to the own motion obligation in line with its neoliberal approach, based on the consumers' active role in pursuing their economic interest. In line with this aim, in *Pannon GSM*[25], the CJEU established that consumers cannot be protected against their will, meaning that a consumer who prefers to keep an unfair term in place is free to do so. As such, the courts must give the consumer the chance to take a position on the findings of the court. Through *Jörös,* the CJEU has further narrowed the competence and obligation of national courts to act

[20] On the causes of consumer over-indebtedness and Member State responses to the crisis in Spain, Portugal, Greece, Hungary, Romania and Iceland see: H.-W. Micklitz, G. Comparato, I. Domurath (eds), *The Over-indebtedness of European Consumers-a View from Six Countries,* EUI Working Paper, Law 2014/10; H.-W. Micklitz, I. Domurath (eds), *Consumer Debt and Social Exclusion in Europe,* Ashgate, 2015.
[21] CJEU 9 November 2010, Case C-137/08, ECLI:EU:C:2010:659 (Pénzügyi Lízing).
[22] H.-W. Micklitz, N. Reich, op. cit., p. 780.
[23] CJEU 4 June 2009, case C-243/08, ECLI:EU:C:2009:350 (Pannon GSM), para 35.
[24] CJEU 27 June 2000, joined cases C-240/98 u/i C-244/98, ECLI:EU:C:2000:346 (Océano), para 29.
[25] CJEU 4 June 2009, case C-243/08, ECLI:EU:C:2009:350 (Pannon GSM), para 35.

on own motion to those cases where they have the factual and legal elements at hand to proceed with the assessment of unfairness, meaning that the courts are not obliged to gather evidence on their own motion.[26]

In *Mostaza Claro,* however, the CJEU had made a seminal step in clarifying that, according to the Directive's approach, consumer protection is public interest, pursuing the collective rights of consumers, and therefore its provisions are of equal ranking with other domestic provisions protecting public policy[27]. Later the CJEU reinforced this rule in *Asturcom*[28] and *Pohotovost*.[29] It is quite radical, according to continental private law thinking, for the CJEU to confer a public law dimension and function on a private law provision when, in *Asturcom,* it established that what a court is allowed to do for reasons of public policy should also be done in the interest of assessing unfairness.[30] However, in a more recent case, *Aziz,* the CJEU remained silent on the issue of own motion and did not go further in later cases. It turned to a different discourse, focused onto the unity and integrity of domestic procedural law[31], whereas in *Macinszky*, Advocate General Wahl emphasised that the first step should be taken by the consumer in unfairness control.[32]

The CJEU consistently pursues the approach that, in civil law suits, the parties are to initiate the provision of justice. *AG Trstenjak,* who had a seminal role in developing the judicial theory of procedural autonomy in consumer contract law, made it clear that the CJEU does not affect Member State procedural autonomy, but interprets this autonomy in a consumer-oriented way by emphasising the weaker position of the consumer and by establishing stricter requirements on effectiveness.[33] According to this concept, national procedural law must comply with the principle of effectiveness and equivalence: cannot make it impossible or unreasonably difficult to enforce the rights granted to consumers under the Directive and should not provide less protection to foreign consumers than for their nationals. This standard remained unchanged, although most if not all cases referred to the CJEU concern citizens of the referring Member State and so did not have cross border relevance, meaning that only one pillar of the cumulative standard has relevance in practice.[34] It also worth mentioning that, with regard to the cumulative assessment of the conditions of unfairness, the general principles that stay at the basis of the national judicial system must be also analysed.[35] This standard strongly ties effectiveness to national procedural justice's own limits, although it is more than evident from the preliminary references that national procedural laws do not work according to double standards but consider the business entity and the consumer (who is no longer the weaker party) as equal from the procedural point of view. This is why today most of the references still concern the national procedural barriers that prevent the courts from proceeding with the unfairness check. Whereas during the first years after the crisis, the national courts were asking for substantive criteria for an easier assessment of unfairness under the general provisions of

[26] CJEU 30 May 2013, case C-397/11, ECLI:EU:C:2013:340 (Jőrös).
[27] CJEU 26 October 2006, case C-168/05, ECLI:EU:C:2006:675 (Mostaza Claro).
[28] CJEU 6 October 2009, case C-40/08, ECLI:EU:C:2009:615 (Asturcom), para 52.
[29] CJEU 16 November 2010, case C-76/10, ECLI:EU:C:2010:685 (Pohotovosť), para 49.
[30] Ibidem.
[31] CJEU 14 March 2013, case C-415/11, ECLI:EU:C:2013:164 (Aziz), para 53.
[32] Opinion of Advocate General Wahl of 21 November 2013, case C-482/12, ECLI:EU:C:2013:765 (Macinský), paras 62 and 65.
[33] V. Trstenjak, E. Beysen, European consumer protection law: Curia semper debit remedium', *Common Market Law Review*, Volume 48 (2011), Issue 1, 122-123, p. 119.
[34] CJEU 14 March 2013, case C-415/11, ECLI:EU:C:2013:164 (Aziz), para 50; CJEU 30 April 2014, case C-280/13, ECLI:EU:C:2014:279 (Barclays Bank), para 37; CJEU 17 July 2014, case C-169/14, ECLI:EU:C:2014:2099 (Sánchez Morcillo), para 31.
[35] CJEU 5 December 2013, case C-413/12, ECLI:EU:C:2013:800 (Asociación de Consumidores Independientes de Castilla y León), para 34; CJEU 16 November 2010, case C-76/10, ECLI:EU:C:2010:685 (Pohotovosť), para 51; CJEU 17 July 2014, case C-169/14, ECLI:EU:C:2014:2099 (Sánchez Morcillo), para 34.

the Directive, nowadays the challenge for consumers is not to win a case under the own motion fairness assessment, but how to overcome the procedural barriers to have the contract assessed by a court on own motion.

III. b) The test of fairness

The CJEU was consistent in its approach that unfairness must be assessed by considering the object and nature of the contract and all circumstances of contract conclusion.[36] Even in its early ruling, in *Freiburger Kommunalbauten,* the CJEU established the landmark rule that unfairness must be analysed in the wider context of national law, taking the consequences of the clause according to domestic law into account.[37] This approach provided the domestic courts with wide discretion for balancing. However, subsequent references testify that courts had difficulties with this adjudicator role and preferred more concrete criteria of assessment. This reality may have also contributed to the turn in the CJEU's approach in *Aziz,* when it has established the default rules of domestic law as the yardstick for unfairness.[38] The CJEU also departed from its consumer focus in the direction of contract autonomy and established that, from recital (16) of the preamble to the Directive, it follows that the national judge must also assess whether the seller or service provider acting in good faith and reasonably would have expected the consumer to accept the clause if this would have been negotiated individually.[39] While narrowing the competence of the national judge to adjudicate on the issue of fairness, the CJEU brings into the test a new element in *Aziz*, the "reasonable expectations of the business entity". In *Aziz*, the CJEU applied the proportionality test to private law and this is an innovation in European law. Although in *Sebestyén*[40], the CJEU clarifies to a certain extent the relationship between the new rule established in *Aziz* and its previous case law, recalling *Pannon GSM* and *Pénzügyi Lízing*, according to which the circumstances of contract conclusion have a fundamental role in establishing unfairness, it adds that the court must also consider the effects of the clause within the context of national law. Important to acknowledge that making the default rules a central element of the test, the CJEU it turned unfairness from a *question of fact* into a *question of law* and this has far-reaching consequences in practice for the consumers.

This new approach has been later consolidated by the *Kásler* ruling, which allows the national judge to replace the unfair term with the provisions of the national law, where the unfair clause would hamper contract validity.[41] The CJEU established that replacement of the unfair terms with the provisions of domestic default rules is compatible with Article 6, paragraph 1 of Directive 93/13/EC, since this replaces the formal balance established by contract with the real balance.[42] Moreover, in *Kásler* the CJEU has also recalled its ruling from *OSA*[43] in stressing that the interpretation of the clause according to the national law has its own boundaries set by the general principles of law, namely that an interpretation in line to EU law cannot lead to a *contra legem* interpretation of the national law.[44]

The rulings of the CJEU in *Aziz* and *Kásler* introduce new rules of the game. These are far from clear but which bear in them the message that *substantive justice is an issue of Member*

[36] CJEU 4 June 2009, case C-243/08, ECLI:EU:C:2009:350 (Pannon GSM), para 39; CJEU 9 November 2010, case C-137/08, ECLI:EU:C:2010:659 (Pénzügyi Lízing), para 42; CJEU 3 April 2014, case C-342/13, ECLI:EU:C:2014:1857 (Sebestyén), para 26.
[37] CJEU 1 April 2004, case C-237/02, ECLI:EU:C:2004:209 (Freiburger Kommunalbauten), para 151.
[38] CJEU 14 March 2013, case C-415/11, ECLI:EU:C:2013:164 (Aziz), para 49.
[39] CJEU 14 March 2013, case C-415/11, ECLI:EU:C:2013:164 (Aziz), para 69.
[40] CJEU 3 April 2014, case C-342/13, ECLI:EU:C:2014:1857 (Sebestyén), para 29.
[41] CJEU 30 April 2014, case C-26/13, ECLI:EU:C:2014:282 (Kásler), para 80.
[42] CJEU 30 April 2014, case C-26/13, ECLI:EU:C:2014:282 (Kásler), para 82.
[43] CJEU 27 February 2014, case C-351/12, ECLI:EU:C:2014:110 (OSA), para 45.
[44] CJEU 30 April 2014, case C-26/13, ECLI:EU:C:2014:282 (Kásler), para 65.

State law, with all its consequence for consumers, including that the level of protection can be very different depending on the national approach to contract fairness and the shift in focus to general contract law. The warning by *Micklitz* and *Reich*, that this new approach may support Member States to keep non-consumer friendly solutions in place and invoke legal culture to justify it,[45] may therefore be warranted.

Referring back to national law, the issue of substantive justice may in the future also promote more regulatory competition between the Member States and may generate a race to bottom especially in those countries where regulatory law and market surveillance remain weak, even under the impact of the crisis. This is a significant step back by the CJEU from its earlier rulings, which were based on a policy rationale in favour of special protection of consumers as a public interest. However, here again the new approach does not prevent the Member States to make future use of the possibility granted by Article 8 of Directive 93/13/EC to enact special rules suited to the interest of consumers.

III. c) The consequences of unfairness

Directive 93/13/EC does not contain rules on the restoration of the situation before contract conclusion and damages upon unfairness has been established, this being a Member State competence. The doctrine of acting on own motion did not bring effective justice provision for the consumers, if one considers that the central function of contractual justice is compensation, because in most of the referring Member States the domestic courts run out of solutions after having declared the terms unfair. The CJEU only emphasised in its rulings that Article 7 and recital (24) of the preamble to the Directive oblige the Member States to have effective instruments in place to stop the continued use of unfair terms. [46] This very general wording in the Directive and the rulings gave rise to very different interpretations of this obligation by the Member States. This has to do with the consumer policy perception of the judiciary, namely whether it treats consumer contract justice as a pure private law matter or has found a way to internalise the public policy argument of the Directive into private law reasoning.

In *Invitel*, the Hungarian referring court asked the CJEU to provide a solution on the consequences of unfairness in general for the parties to contracts containing unfair terms, but the CJEU left this unanswered[47] and this issue was never touched upon by the CJEU in subsequent cases. The national courts thus must again acknowledge, also in respect of this issue, that Directive 93/13/EC is not sufficient in itself to provide justice to consumers if is not functionally backed up by national rules on damages provided in legislation or judge-made law and rules suited to the interest of consumers and the particularities of consumer contracts, because the rules of general contract law may not suffice for this purpose.

However, although the consequences of unfairness for the parties do not fall under the judge-made law of the CJEU, the Luxembourg court succeeded in framing the doctrine of nullity of unfair terms along market considerations in such a way that implicitly limits the freedom of the Member States to determine, according to their own policy, the consequences of finding unfairness onto the contractual relation between the parties. Firstly, in *Pereničová*, the CJEU made it clear that the consumer cannot choose between keeping the contract in force after the unfair term is eliminated or asking the invalidity of the whole contract, since the aim is for the contract to remain in force after the elimination of the unfair term.[48] Then, as a next

[45] H.-W. Micklitz, N. Reich, op. cit., (2014) CMLRev. p. 799.
[46] CJEU 14 June 2012, case C-618/10, ECLI:EU:C:2012:349 (Banco Español de Crédito), para 8; CJEU 30 April 2014, case C-26/13, ECLI:EU:C:2014:282 (Kásler), para 78; CJEU 21 January 2015, joined cases C-482/13, C-484/13, C-485/13 and C-487/13, ECLI:EU:C:2015:21 (Unicaja Banco), para 30.
[47] CJEU 26 April 2012, case C-472/10, ECLI:EU:C:2012:242 (Invitel), para 20.
[48] CJEU 15 March 2012, case C-453/10, ECLI:EU:C:2012:144 (Pereničová), para 36.

step, in *Banco Español*, the CJEU rejected the possibility of the domestic court to replace the unfair term with a fair term.[49] The CJEU built its reasoning on the public policy nature of the consumer protection pursued under the Directive, emphasising that it would weaken the preventive function of the unfairness control if the unfair terms could be later rectified by the judiciary.[50]It is worth mentioning that the CJEU, in this matter as well, leaves room for the Member States to opt for a stricter standard of consumer protection by legislation. Thus, in *Pereničová* the CJEU established that Member States may provide, in line with the European unfair contract terms law, that consumer contracts containing one or more unfair terms will be invalid, subject that it serves better the interest of consumers[51], although the judge cannot rely exclusively on the fact that one or other party is interested in achieving the nullity of the whole contract.[52] The Member States may enact under the *Pereničová* ruling special provisions on the nullity of the whole contract, if they wish so; the CJEU only limits the competence of judges to adjudicate on the consequences of unfairness.

Considering the reluctance of national judges to adjudicate on fairness (expressed in form of demand for more detailed substantive criteria from the CJEU), many courts may feel comfortable with this solution and certainly consider this a welcome development, although this has the consequence of a loss of land by judicial law in favour of mandatory consumer law, with implications for the dynamism of law and, above all, it may result in a return to general contract law in certain Member States and the level of protection may become lower.

Nevertheless, before making any value judgements on the solutions of the CJEU, the extremely high number of cases on which the courts must rule, the high technicality of the clauses that must be assessed by the judges, as well as the social implications of the individual judgements should be taken into account. Some courts cope better with the adjudicator role (such as the Spanish referring courts), and asked for allowance to replace the terms or to involve the parties in the process of correction of the unfair terms, whereas others (such as the Hungarian courts) consider that material justice is an issue that should be settled by law. Thus some jurisdictions are losers and others are winners of the judicial solutions of the CJEU.

This is valid also in respect of the solution of the CJEU in *Kásler* that the judge should replace the unfair term with national default rules in order to keep the contract in force when this would be impossible after the elimination of the unfair term. It has certainly also contributed to this solution, that national courts continued even after the *Pereničová* ruling to ask the CJEU for reinforcement of their competence to cure unfairness, while the Member States concerned had not enacted any special provision on this issue in the meantime. Here again, it is important to note that, in *Kásler,* the CJEU does not impose on the Member States to substitute the unfair term with existing default rules, but only allows the Member States to do so, the Member States also being free to enact new specific provisions for this purpose. This means that the Member States have the freedom to establish fairness according to their preferences.

Faure and *Luth* warn that default rules are usually too general and so do not properly serve the specific needs of the fields of law concerned; as such, they emphasise that more substantive control is needed with regard to standard contracts and this must be carried out by the authorities, which cannot happen via procedural justice.[53] The *Kásler* ruling however does not provide guidance to the judiciary on how to establish whether the contract will be void without the unfair term(s), this issue also being left to the national law. In the absence of specific

[49] CJEU 14 June 2012, case C-618/10, ECLI:EU:C:2012:349 (Banco Español de Crédito), para 73.
[50] CJEU 14 June 2012, case C-618/10, ECLI:EU:C:2012:349 (Banco Español de Crédito), para 69; CJEU 30 April 2014, case C-26/13, ECLI:EU:C:2014:282 (Kásler), para 9; CJEU 21 January 2015, joined cases C-482/13, C-484/13, C-485/13 and C-487/13, ECLI:EU:C:2015:21 (Unicaja Banco), para 31.
[51] CJEU 15 March 2012, case C-453/10, ECLI:EU:C:2012:144 (Pereničová), para 36.
[52] CJEU 15 March 2012, case C-453/10, ECLI:EU:C:2012:144 (Pereničová), para 36.
[53] M.G. Faure, H.A. Luth, Behavioural Economics in Unfair Contract Terms. Cautions and Consideration, *Journal of Consumer Policy* (2011) 34, p. 349.

rules, there is the risk that the court will only have the provisions of general contract law and will not examine whether the consumer would have concluded the contract if would have known the economic consequences of the unfair terms.

From the consumer perspective, the *Kásler* ruling means that they are better off when unfairness affects the contract less, since the sanction is nullity of the unfair term that will not be replaced by other term, compared to the case when the effect is severe –the existence of the contract is affected by unfairness - since in this case the sanction is replacement of the unfair term with a legal provision, which may be the provisions of general contract law (default rules). For the business entity, this solution implies less deterrence than if the unfairness affects only the clause but not the whole contract. In *Kásler* the CJEU overruled its earlier principle that replacement of the unfair term would significantly affect the coercive effect of Article 6 of Directive 93/13/EC. Beyond this solution is obviously market consideration. The CJEU takes it as axiomatic that keeping the contract alive, instead of granting the consumer the possibility to freely decide what is his or her own best interest, always serves the interest of the consumer.

The *erga omnes* effect of finding a term to be unfair is another sensitive issue on which we still do not have a clear position of the CJEU. This was raised in *Invitel* by the Hungarian referring court, which asked the CJEU whether finding unfair general terms and conditions within an action for an injunction brought in the public interest and on behalf of consumers by a body appointed by national legislation has the consequence that such terms will be void with any other party with whom the business entity used it. The referring court also asked whether *erga omnes* concerns other business entities using the same terms and conditions. The CJEU only established that unfairness established within such a procedure has *erga omnes* on all consumers with whom the same term was used by the defendant business entity. [54] Nevertheless, the CJEU emphasised that its ruling does not prevent the Member States from also employing other effective sanctions according to their national law in such cases. This type of wording is again an invitation for the Member States to legislate if necessary, in the interest of effective enforcement of Directive 93/13/EC and does not prevent the Member States from extending the *erga omnes* effect onto other business entities using the same terms and conditions. However, although an important step in the direction of consolidating the preventive function of the unfairness control, the *Invitel* ruling does not discuss whether unfairness has *erga omnes* effect also in litigation initiated by individuals and onto other business entities using the same term in the future (*erga omnes future*). This question remains unanswered and the CJEU does not tend to propose solutions that would allow consumers to defend their rights granted by Directive 93/13/EC under collective procedures, as the *Castilla y León*[55] ruling testifies. The CJEU considered Spanish law, which did not allow, within an action for an injunction brought by a consumer protection association with a small budget and few members not associated to the federal one, to represent the collective interest of consumers at the territorial court where it has its seat, to be compatible with the Directive, in the name of procedural autonomy.[56]

III.d) The inner limits of Directive 93/13/EC stemming from its policy foundation

One may wonder why such developments in the approach of the CJEU took place during recent years; why the CJEU looks at solutions in general contract law; why the focus in its reasoning shifts from judicial standards to legal standards, narrowing the room of the courts to adjudicate on fairness; why there has been no progress in developing judicial rules on collective action by

[54] CJEU 26 April 2012, case C-472/10, ECLI:EU:C:2012:242 (Invitel), para 38.
[55] CJEU 5 December 2013, case C-413/12, ECLI:EU:C:2013:800 (Asociación de Consumidores Independientes de Castilla y León).
[56] Idem., para 22.

consumers although large groups are affected by the same terms; and why have market principles been introduced in assessing fairness – the test of proportionality. The policy of Directive 93/13/EC has a major role beyond such developments, and to large extent it determined the Member States' perception of the room left to national solutions to be developed from within domestic private law, the delayed legislative solutions and the hesitation of the courts to come up with workable solutions aimed at strengthening the effectiveness of enforcement.

Wilhelmsson warned well in advance, in his study published in 2008 before the global financial crisis manifested, that basic questions still wait for clarification in relation to European unfair contract terms law, especially: the criteria that can be used to establish unfairness, whether the examination of unfairness should be limited to the moment of contract conclusion only (procedural fairness) or should also involve the content of the contract (substantive fairness) and what should be the balance between the two types of fairness.[57] He also signals in his study that these are not pure legal technical issues, but they relate to the perception of justice in society.[58] In this way, he suggested in 2008, that consumer justice in contract law is more than individual justice in the narrow meaning of the word. [59]

Wilhelmsson identifies four types of contract fairness under which Directive 93/13/EC may be defined: a) *procedural justice,* with its focus at the moment of contract conclusion, b) c*ommutative justice,* which aims to achieve substantive fairness based on the balance of the promises of the contracting parties, c) *distributive justice,* which protects the weaker party against other social groups, and d) *justice that support other societal policies,* when the value judgement on contract fairness promotes other social values as well.[60] The Directive is considered by the author as a mix of a consumer protection approach with the standard contract approach[61], where the standard contract approach is built on the paradigm that there is '*no special problem'* thus the free will of the contracting parties may grant justice and so other forms of justice play a secondary role under this approach.[62]

Directive 93/13/EC is based on the idea that is not the job of the Member States or of the EU to regulate specific elements of the contract, the role of the state and the EU being exhausted in creating for the contracting parties the tools by which they may adopt rational market decisions and defend their own interests. *Domurath* criticises the approach of the Directive for putting too much value on private law by *ex post* unfairness control, on its normative superiority compared to public law intervention and expecting the judiciary to correct market failures instead of directly preventing them.[63]

Assessment of the CJEU rulings shows that these are very much in line with the well informed circumspect average consumer paradigm and follow the thinking of information economics. They do not raise the issue of whether the consumer is vulnerable in long term social contracts (such as housing loans) and would need even stricter protection than the average

[57] Th. Wilhelmsson, Various Approaches to Unfair Terms and their Background Philosophies, *Juridica International* XIV (2008) No.1, p. 52.
[58] ibidem.
[59] Th. Wilhelmsson, op. cit., p. 57.
[60] Th. Wilhelmsson, op. cit., p. 52.
[61] Th. Wilhelmsson, op. cit., p. 54.
[62] Th. Wilhelmsson, op. cit., pp. 53-54.
[63] I. Domurath, The Case of Vulnerability as Normative Standard in European Consumer Credit and Mortgage Law-An Inquiry into the Paradigms of Consumer Law, *Journal of European Consumer and Market Law* (2013) 3, 124-137, p. 128.

consumer[64] or the social consequences of unfairness that affect people other than the parties to the contract that may justify reconsidering the principle of relative effect of contracts.[65]

Member States should acknowledge that it is the policy of the Directive that bars the CJEU from advancing solutions that would also handle the social consequences of unfair contract practices applied on a mass scale in Europe. A few preliminary references have tried to pursue the CJEU to assess the interpretation problems of the Directive in a larger social perspective – that of fundamental rights –, but the CJEU does not seem to be ready to accept the collective vulnerability of consumers.[66]

In *Castilla y León,* the referring Spanish court was unsuccessful in invoking Article 38 of the EU Charter of Fundamental Rights in support of more effective enforcement of Directive 93/13/EC.[67] The CJEU did not comment on Article 38 of the Charter and has avoided taking any position on this issue. The ruling only mentions that the case concerned a loan that was contracted for housing purpose.[68] The CJEU does not want to transform the private law question referred to it into a constitutional conflict.[69] Thus, the *Aziz* ruling is only a partial success in this respect, because the CJEU only states that where, as a consequence of unfairness, the home and family of the consumer is at risk, the award of subsequent damages is an insufficient remedy if, according to the national law, the judge would not be in the position to suspend the eviction during the procedure of unfairness control in order to stop the irreversible and final loss of home by the consumer and his family.[70]Even in *Sánchez Morcillo*[71] the CJEU did not invoke Article 7 of the Charter, although it recalled its findings from *Aziz* and acknowledged that once eviction has been launched, the consumer will not receive back his home even if unfairness will be established subsequently.

There are two breakthrough cases, *Banif Plus*[72] and *Sánchez Morcillo*,[73] where the CJEU established that effective consumer protection implies respect for fundamental rights – the consideration of the right of citizens to effective judicial remedy according to Article 47 of the EU Charter of Fundamental Rights. However, the reference to fundamental rights does not automatically bring with it more protection for consumers. For this, Member States action is needed, whether legislative or judicial. On the other hand, these other innovative attempts to search for new tools to solve the conflict between unfair contract terms law and the national civil procedural law have their own costs: the debate is shifted again to a perspective where the consumer is considered a citizen/contracting party and his or her special protection needs as weaker party are forgotten again.

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[64] On the debate on contract fairness in case of long term social contracts see: G. Howells, *Change in Circumstances in Consumer Credit Contracts- The United Kingdom Experience and the Call for the Maintenance for Sector Specific Rules,* in L. Nogler, U. Reifner, *Life Time Contracts: Social Long-term Contracts in Labour, Tenancy and Consumer Credit Law,* Eleven International, 2015, pp. 301- 311; I. Domurath, The Case of Vulnerable Consumer as the Normative Standard in European Consumer Credit and Mortgage Law – An Inquiry into the Paradigms of Consumer Law, *Journal of European Consumer and Market Law* (2013) 3, pp. 124-137.

[65] B. *Lurger,* Old and New Insights for the Protection of Consumers in European Private Law in the Wake of the Global Economic Crisis, in R. Brownsword, H.-W. Micklitz, L. Niglia, S. Weatherill (eds.), *The Foundations of European Private Law*, Hart, 2011, pp. 105-106.

[66] CJEU 5 December 2013, case C-413/12, ECLI:EU:C:2013:800 (Castilla y León); CJEU 14 March 2013, case C-415/11, ECLI:EU:C:2013:164 (Aziz), ; CJEU 17 July 2014, case C-169/14, ECLI:EU:C:2014:2099 (Sánchez Morcillo); CJEU 3 December 2015, case C-312/14, ECLI:EU:C:2015:794 (Banif Plus); CJEU 17 July 2014, case C-169/14, ECLI:EU:C:2014:2099 (Sánchez Morcillo).

[67] Case C-413/12 (Castilla y León), para 22.

[68] Case C-413/12 (Castilla y León), para 61.

[69] H.-W. Micklitz, N. Reich, op. cit., (2014) *CMLRev.*, p. 800.

[70] Case C-415/11 (Aziz), para 61.

[71] Case C-169/14 (Sánchez Morcillo), para 43.

[72] CJEU 3 December 2015, case C-312/14, ECLI:EU:C:2015:794 (Banif Plus), para 29.

[73] Case C-169/14 (Sánchez Morcillo), para 35.

The doctrine of judicial autonomy may not drive more effectiveness in enforcement, even when it is backed up by requirements resulting out of fundamental rights, because the consumer perspective is missing from this approach. It is also strange that it is not Article 38 of the Charter on consumer protection that is called upon, but Article 47 of the Charter. However, even Article 38 of the Charter would not strengthen enforcement since is too general to be invoked by consumers.[74] The new construction therefore is as fragile as the doctrine of judicial autonomy on its own in eliminating the procedural obstacles of unfairness control, as long as neither the national nor the European rules acknowledge that the consumer is weaker than the business entity in procedural terms as well, and therefore procedural rules based on the concept of equality of arms may not properly serve the interest of consumers. It still waits for answer as to why the Member States are not willing to make effective use of procedural autonomy in the interest of their consumers and develop rules that would promote a more effective contractual justice policy according to their actual regulatory needs and preferences. The legal literature debate on the potential of fundamental rights in pursuing consumer protection in Europe has put much more value on the EU Charter on Fundamental Rights than the fathers of the Charter did.

III. e) Lessons to Member States from the judicial policy of the CJEU

The new contractual justice developed by judicial governance contains important messages for the Member States. Assessment of the preliminary references reveals that, beyond the severe enforcement deficit of Directive 93/13/EU, a high share have the omissions of the legislative in the Member States even under the pressure coming with the global financial crisis to implement reforms in general contract law and civil procedural law to make the Directive based on minimum and partial harmonization workable within the context of their national private law(s).

The Member States should acknowledge that the rulings of the CJEU did not reflect on the social consequences of unfair contract terms because this is alien to the policy of Directive 93/13/EC. The Directive is market regulation, aimed at strengthening the Internal Market and is interpreted by the CJEU according to market considerations. Social contract law remains the domain of national private law and regulatory law. Indeed, the CJEU reinforces in its rulings that consumers should be active in pursuing their own interest, and they should make the first step in the process of enforcement of their rights. In line with this paradigm aligned with general contract law, the CJEU is slowly departing from its earlier reasoning policy based on a public policy perception of consumer protection.

Today *substantive justice* is referred back to Member State contract law. By this, the CJEU encourages Member States to assume a more active role in defining substantive justice by enacting rules or developing judicial solutions according to the needs of their consumers. Indeed, the question-framing of the national courts, committed to defending national general contract law at any price, pursued the CJEU when proposing to the Member States to search for solutions in the default rules of general contract law instead of looking for specific judicial solutions suited to the needs of the consumers, who are weaker party compared to the business entities. This is why, from a consumer perspective, the *Aziz* and the *Kásler* rulings should not be seen as victory in defence of the unity and integrity of domestic private law.

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[74] Jules Stuyck, The Transformation of Consumer Law in the EU in the Last 20 Years, 20 *Maastricht Journal of European and Comparative Law* (2013), p. 385 ff; S. Peers, T. Hervey, J. Kenner and A. Ward (eds), *The EU Charter of Fundamental Rights*, Hart, 2014, pp. 1005-1025; I. Benöhr, *EU Consumer Law and Human Rights*, Oxford University Press, 2013; M. Jagielska and M. Jagielski, Are consumer rights human rights, in J. Devenney and M. Kenny (eds), *European Consumer Protection. Theory and Practice*, Oxford University Press, 2012, pp. 336-353.

Procedural law was turned into compensatory law by the CJEU in *VB Pénzügyi Lízing,*[75] among others, but today procedural justice is fragile as before. As long as national procedural law views consumer cases through the spectacles of equality of arms, considering that, from a procedural point of view, consumers are not weaker parties vis a vis the business entities; procedural autonomy is not a success story for consumers. Consumers may not be better off under more procedural autonomy as long as domestic procedural law does not acknowledge their specific regulatory needs from a procedural law perspective as well. As by 2010 the demand for substantive justice had escalated in the severely affected Member States, consumers had to realize that the real challenge was no longer to win the case under the Directive but to bring the case to court, this being prevented by several procedural obstacles in the domestic law and the hesitation of the judiciary to fully assume its law-framing role. This is a step backward if one considers that, in the first years after the crisis, the preliminary references were asking the CJEU for more substantive criteria to proceed with the unfairness control, whereas in recent years the references almost exclusively concern the problems of domestic procedural law.

All the above developments justify solution-finding being reinforced at Member States level. However, most Member States are still not willing to touch general contract law or civil procedural law with enough vigour to adjust them to the needs of effective consumer protection, although the CJEU has consistently indicated in its rulings where the borders of Member States law-making are still open. *Paradoxically, by doing so, the Member States actually campaign strongly against minimum and partial harmonisation in the field of private law, which has not turned out to be a success for contract fairness law.* Consumers will continue to be victims of this mismatch as long as the discourse is lost in innovative solutions and the very heart of contract fairness, substantive justice, is avoided. Continental civil law has not learned enough from the global economic crisis. It has not even acknowledged yet that it is in crisis itself.

However, weak internalisation of the consumer policy in the private law reasoning of the Member States courts is only one major reason for the weak enforcement of unfair terms law under the impact of the global financial crisis. Understanding the process of development of the living law with its shortcomings and its potential towards a more effective enforcement demands not only the acknowledgement of the internal conditionality of enforcement presented above, but also a deeper and broader analysis of the external (European) conditionality of the enforcement process.

Such analysis implies the study:of the policy of European unfair terms law as framed by Directive 93/13/EC and the CJEU; of its regulatory approach, function and legislative style; of the system of European Private Law to which Directive 93/13/EC belongs; of the judicial methodology of the CJEU and its role in law-framing and, last but not least of the role and share of the doctrine on European private law in assisting the courts with theories and methodology on how to integrate the 'new-comer' contract law institution into national private law. The way that national legislators, enforcement authorities and courts approach consumer unfair terms law is, to a large extent, influenced by the interplay of complex external conditionality and the one at national level; as such, they need to use appropriate tools and mechanisms to bring together the two layers of governance (national and European) and turn them into a fully functional system.

IV. The dynamics of the private law governance of the EU in unfair terms law from the broader perspective of the system and policy of the European Private Law

European private law is different from national civil law in function and in structure, which leads to conflicts between the two. The third source of conflict between the national and

[75] H.-W. Micklitz, N. Reich, op. cit., (2014) *CMLRev*., p. 803.

European layers of private law stems from the judicial methodology of the CJEU, which also differs fundamentally from the national enforcement traditions. The forth conditionality is the role and function of the doctrine and legal theoretical conceptualisation of the developments in living private law. There is no European doctrine and methodology yet in place and the national legal theory is not capable of conceptualising the hybrid law resulting from the interaction between the private law acquis of the EU and national private law. However, before entering into a systemic analysis of how all these conditionality interplay and frame contract fairness today, a broader analytical perspective on the sui generis nature of European Private Law is needed, starting with conceptual clarifications.

IV. a) The concept and sources of 'European Private Law'

European Private Law first emerged as a separate field of legal study in the 1990s as a result of several related developments. In the 1980s, when the Community started issuing directives in the field of private law the authority of national legislative and judiciary has been gradually changed. From that moment, it was no longer possible to view contract law as a purely national phenomenon. Also at that time academic concerns that a purely national approach to law may be misguided was growing. The pioneer of this approach was *Zimmermann,* who with his 'Law of Obligations' [76] raised academic awareness of the common aspects of national private laws. "An essential prerequisite for a truly European private law would be the emergence of an organically progressive legal science, which would have to transcend the national boundaries and to revitalise a common tradition"[77], he said.

The term 'European Private Law' was used first in the context of academic projects aimed at searching for the common roots of European civil law systems (national systems), as background research within the academic debates on harmonisation and unification of private law as part of the process of European integration. These comparative law initiatives were mapping the commonalities of national private law systems to reconnect them to the old *ius commune.* As such, "comparative law is a moment from many others of the birth of European private law"[78].

This process culminated in the academic projects of the past 20 years on the unification of private law, the product of which is the development of a set of principles of private law and soft rules such as the PETL[79], PECL[80] and the DCFR[81]. In line with these common-core research projects, the issue of developing a European Civil Code[82] was increasingly debated, but finally failed. However, thanks to these initiatives, comparative private law also started to rise in importance. In fact, the academic European Private Law as a science (also called *Professorenrecht* by German scholars) has evolved from comparative law in the same way as

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[76] R. Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition*, Clarendon Press, 1990.

[77] R. Zimmermann, 'The Civil Law in European Codes', in D L. C. Miller, R. Zimmermann (eds), *The Civilian Tradition and Scots Law* (Berlin: Duncker & Humblot, 1997), p. 293.

[78] R. Michaels, in J. Basedow, K. J. Haupt, R. Zimmermann (eds) *Handwörterbuch des Europäischen Privatrecht,* Mohr Siebeck, 2009, p. 1269.

[79] Principles of European Tort Law; F. D. Bussani, G. Commande, H. Cousy, D. B. Dobbs, M. G. Faure, B. W. Duffa, I. Gilead, M. D. Green, K. D. Kerameus, B. A. Kock (eds), *Principles of European Contract Law*, De Gruyter, 2005.

[80] Principles of European Contract Law; O. Lando, H. Beale (eds) *Principles of European Contract Law,* Vol. I and II, Kluwer Law International, 2000, Vol. IIII, 2003.

[81] C.von Bar, E. Live, H. Schulte-Nölke (eds) *Principles, Definitions and Model Rules on European Private Law, -DCFR*, Sellier, 2009.

[82] M. W. Hesselink (ed.) *Toward the Politics of a European Civil Code*, Kluwer Law International, 2006; A. S. Hartkamp, C. von Bar (eds) *Towards a European Civil Code,* Kluwer Law International, 2011 (first edition 1994).

European law evolved from public international law and national constitutional law. [83] However, this connection does not make the task of modern legal theory and comparative law easier in coping with the complexity of European private law, since comparative law is mainly focused on the common roots of national private law systems, thus having a perspective from the inside and not on integrating through conceptualising supranational rules. "European private law suffers from an even greater lack of reflection on its aims and method than mainstream comparative law".[84]

To a certain extent this state of affairs is also due to the two processes not being mutually reinforcing; they tended to have parallel lives in the sense that the private law regulatory policy of the EU does not integrate the findings and proposals of the academic projects on a better systematisation of the private law acquis of the EU in order to cure fragmentation, on one hand, while these academic projects could not come up with solutions that would have effectively assisted legal practice and national doctrine in handling the main characteristics of the European private law directives (marketization, instrumentalisation) and the system itself (hybridisation, fragmentation), on the other hand. This mismatch significantly impacts the quality of legal enforcement at national level. I fully subscribe to the idea that "*European Private Law is less about a fully elaborated and fully developed system and is more a political and scientific project"*[85].

Now, the next step is to define the content and sources of European Private Law. The Dictionary of European Private Law defines European Private Law as comprising the *acquis communautaire*, the national civil law and case law and international rules.[86] A definition reducing European private law to the *consumer acquis* and *global developments* it would be too marginal. This would be a view from the outside. It would be equally marginal to look at developments in private law from within the national civil law systems, since we have no longer a pure national civil law but the product of the interaction of European rules with national civil laws, the outcome of which is a *sui generis* law, no longer EU law and no longer national but a mix of the two. However, some German scholars opt for a narrowly defined field of European Private Law that would include the private law of the EU, including primary law, secondary law, general principles of law, and the case law, in line with the classical approach that legal theory is bound to the existing norms within a specific society.[87]

According to the extensive approach, to which I subscribe, the subject of European private law is the private law of Europe, composed of categories, concepts, rules and principles of private law from the existing private law in the European states in addition to the private law acquis of the EU[88], whereas the private law acquis is the central pillar of the European Private Law.[89] *Jansen* adds to this a third pillar, the soft law developed under the various academic projects aimed at restating European Private Law.[90] He names this movement '*integrative legal science*' (integrative Rechtswissenschaft).[91]

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[83] R. Mihaels, in J. Basedow, K. J. Haupt, R. Zimmermann (Hrsg.) *Handwörterbuch des Europäischen Privatrecht,* Mohr Siebeck, 2009, p. 1269.

[84] J. Smits, Rethinking Methods in European Private Law, in M. Adams, J. Bomhoff (eds), *Practice and Theory in Comparative Law*, Cambridge, 2012, pp. 170-185; Maastricht European Private Law Institute Working Paper 2012/15.

[85] N, Jansen, in J. Basedow, K. J. Haupt, R. Zimmermann (Hrsg.) *Handwörterbuch des Europäischen Privatrecht,* Mohr Siebeck, 2009, p. 551.

[86]Idem., pp. 548-551.

[87] S. Grundmann, *Europäisches Schuldvertragsrecht,* de Gruyter, 1999, p. 7.

[88] R. Zimmermann, *Roman Law, Contemporary Law, European Law*. *The Civilian Tradition Today*, OUP, 2001, p. 107.

[89] Schulze, European Private Law and Existing EC law (2005) 13 *ERPL*, pp. 3-8.

[90] N. Jansen, Dogmatik, Erkenntnis und Theorie im europäischen Privatrecht, *ZEuP*, 2005, pp. 751-752.

[91] N. Jansen, op. cit., pp. 752-753.

The main argument for what I call '*integrative understanding'* of the European Private Law is that the provisions of European private law directives have no life of their own, they become enforceable law (i.e. living law) through private law and public law instruments, institutions and mechanisms of the Member States. *Smits* views this European private law as a moving system and as a multi-layer process, which is in need of a method by which it is possible to establish what national law does and how this is affected by European developments.[92]

Furthermore, this multilayer governance also has a more recent pillar, in the form of the horizontal impact of solutions from one state to another via the procedure of preliminary reference. In this way, national contract law and private law in general is not only influenced by EU secondary law, but implicitly also by the domestic solutions of other Member States. This phenomenon not only further complicates the multiplicity of layers of the governance, but also drives a complex mechanism of *competition* among the systems, and the horizontal impacts raise additional interpretation problems for enforcement. This horizontal competition manifests itself in the form of *judicial competition* in unfair contract terms law, which also indirectly drives to more *regulatory competition* in response to the judicial solutions of the CJEU based on the solution(s) advanced by a referring court that may suit the legal system of the referring jurisdiction but not to other states. Hence, although the declared aim of Directive 93/13/EC is uniform enforcement practice, its regulatory approach in multiple ways (minimal and partial harmonisation; principle-based rules and general clauses) continues to generate competition between the national systems of private law and drives to different concepts on substantive justice in consumer contract law. This horizontal export of national solutions further amplifies the systemic disturbance caused to national private law by the European directives. *Van Gestel* and *Mikclitz* raise awareness of the reality that the CJEU is an intermediary in how country A influences the law in country B. [93]This process is ongoing and intense in unfair terms law when Spanish and Hungarian courts, by exporting their interpretation problems to EU level and by promoting and testing the EU compatibility of certain private law solutions workable in their civil law and civil procedural law systems, in fact turn such solutions into European solutions upon these being confirmed by the CJEU. National judicial activism then also drives a third perspective of system competition, a vertical one between the European judicial law and national regulatory law. The vertical and horizontal competition between judicial solutions will certainly need at national level more and more balancing mechanisms in private law.

All these developments taking place in judicial law and positive law make unfair terms law *a multiple layer dynamic system, which is the output of the interaction between the national and European law and is no longer national and no longer supranational.* National courts have to apply this body of law for which they do not have instruments that would be able to capture the process. This is why the procedure of preliminary reference in certain countries has been so often used and continues to be used. By increasing the number of interpretation issues clarified by the CJEU is not decreasing the number of preliminary references; indeed it is increasing the number of jurisdictions and courts making use of the procedure.

IV.b) The function of the private law acquis of the EU

The transformation of the function of private law into economic law did not start recently; it has older roots. In 1971 L. Raisler published a book entitled 'Die Zukunft des Privatrecht', in which advanced the issue of "Funkzionswandel des Privatrecht". [94]The current changes in the function of private law should therefore be viewed as a new stage or era in the process of

[92] J. M. Smits, Rethinking Methods in European Private Law, MAASTRICHT EUROPEAN PRIVATE LAW INSTITUTE, WORKING PAPER No. 2012/15

[93] R. van Gestel, H. -W. Miciklitz, op. cit., EUI Working Paper Law, 2011/5, pp. 67-68.

[94] L. Raisler, *Die Zukunft des Privatrecht*, de Gruyter, 1971.

economisation via the Europeanisation and globalisation of private law. According to *Micklitz* European law is squeezed between *'economisation'* on the one hand and '*politisation'* (governance) on the other hand, where economisation affects the underlying values and concepts of the private law system and politisation, through new forms and new modes of governance, tends to deprive the European integration process of the law as its driving force. [95] He adds that law-making is no longer the subject of political controversy, therefor the new forms of governance simultaneously yields a de-politicisation process, which raises concerns about transparency, accountability, and participation. [96] His findings on private law in general are from 2008, before major developments had occurred in the field of unfair contract terms law in Europe. However, his analysis offers a tool for a deeper understanding of the transformation of unfair terms law, by highlighting the interplay between the economisation and politisation of private law at European level.

Unfair terms law, like other pieces of consumer private law, has a *regulatory function.* Directive 93/13/EC was enacted to complete the project of the Internal Market of the EU. The legal basis of Directive 93/13/EC is Article 100A EC on legislative approximation, meant to reduce the disparities between the national legal regimes and by this to reduce the costs of market access. While this pursues the protection of consumers, it remains faithful and instrumental to the market. Under the European concept of consumer protection, the consumer is the product of the market whereas consumer law is 'instrumentalized' to the market aim of completing the Internal Market. [97]

The *regulatory function* of private law means the ability of private law measures to address market failures, this being the result of the decline of the regulatory state and the emergence of new regulatory modes.[98] *Reich* labels the interest pursued by EU consumer law as: '*diffuse interests*' as they are not restricted to specific interest groups or clearly definable group of persons [99]. This equally applies to unfair terms law.

The process of economisation of the legal system reduces the scope of Member States' redistributive interventions to that of providing a fair chance to benefit from the Internal Market.[100] Substantive justice is understood in this meaning in the unfair terms case law of the CJEU, which is different from the social justice concept of traditional private law. Most continental private law systems understand social justice as distributive justice, whereas European Private Law pursues a different justice that is much closer to the idea of fairness of market access (Zugangsgerechtigkeit[101]/access justice). [102] This is why the rulings of the CJEU did not provide solutions while interpreting Directive 93/13/EC on the social aspects of unfair terms law.

Politisation (governance) in private law has been considered to be compensation for the lack of traditional regulatory approaches in various boundary fields of private law. [103] It consists of new modes of governance pursued since 2002 by the European Commission, with its policy

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[95] H.- W. Micklitz, *The Visible Hand of European Regulatory Private Law The Transformation of European Private Law from Autonomy to Functionalism in Competition and Regulation,* EUI Working Paper Law, No. 2008/14.

[96] H.-W. Micklitz, op. cit., EUI Working Paper Law, No. 2008/4, p. 14.

[97] H. -W. Micklitz, The Consumer, Marketized, Fragmented, Constitutionalized in D. Leczykiewicz, S. Weatherill (eds) *The Images of Consumer in EU Law: Legislation, Free Movement and Competition,* Oxford University Press, 2016, p. 22.

[98] F Cafaggi, H. Muir Watt (eds), *The Making of European Private Law*, Edward Elgar, 2008, pp. 2-3.

[99] N. Reich, Economic Law, Consumer Interest and EU integration, in N. Reich, H. W. Micklitz, P. Rott, K. Tonner, *Consumer Law*, 2nd edition, 2014, p. 7.

[100] H. -W. Micklitz, op cit., EUI Working Paper Law, No. 2008/14, p. 9.

[101] Micklitz quotes the term from J. Rawls, *Justice as Fairness. A Restatement*, 2001.

[102] H. -W. Micklitz, op. cit., EUI Working Paper Law, No. 2008/14, p. 9.

[103] H. -W. Micklitz, op. cit., EUI Working Paper Law, No. 2008/14, p. 8.

aimed at better regulation. This process is seen by legal scholars as a turn from *'evidence-based policy making'* to *'policy-based evidence making'.* [104] Increasing judicial governance via Luxembourg in the field of unfair terms law should be seen as a new form of manifestation of '*innovative governance'* [105] in EU consumer law**,** which evolved mostly in reaction to the absence of solutions and approach at the national level to handle new boundary institutions of contract law. Last but not least another major policy concern raised in relation to the instrumentalization of private law to market aims is its deep reach into society. *Reich and Micklitz* capture this ongoing phenomenon in unfair terms law, where the consumers and the judiciary see the CJEU as a last instance guardian of rights and justice, whereas the CJEU is not an appeal court, and so consumers become dissatisfied when realising that the national impact of the CJEU ruling is less favourable to them in the context of national political and judicial realities than in the understanding of the CJEU.[106]

IV. c) The system of European Private Law

The multilayer structure of the European private law implies systemic particularities unknown to the national systems of continental private law.

First, the private law directives do not provide for a complete legal order, not even in the particular legal questions they govern. Directive 93/13/EC does not provide solutions to the national enforcement authorities and courts on a series of issues that directly impact enforcement. As such, to make the provisions of the Directive enforceable domestic law instruments are needed, that may exceed the field of private law directly affected by he Directive, such as procedural rules. *Micklitz* talks directly of the "*deconstruction of national state private law patterns in a market state European perspective"*[107].

Then *pluralism of legal sources* brings private law into a different paradigm on how those legal sources are to be related towards another and towards the case at hand.[108]The plurality of sources manifests at both national and supranational level in the field of unfair terms law. Implementation and enforcement of unfair terms law implies the consideration of secondary EU law (the Directive); the case law of the CJEU, the EU Charter of Fundamental Rights, the general principles of European private law, the implementing rules of the Directive, general provisions of the national contract law, national regulatory law, sector specific mandatory contract law, national civil procedural law and national administrative law.

Because of this multiplicity of sources, comparative law increasingly defines European Private Law as a *hybrid system* in its attempt to delimit it from national private law. *Hybridisation* means that the legal character of the respective rules is neither European nor national; it bears elements of both orders.[109] This is in fact an old form of coexistence of legal orders, characteristic of mixed legal systems. The concern for hybridisation is increasing in comparative law literature.[110] Most recently, Sammut discusses at length the consequences of

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[104] R. van Gestel and H.-W. Micklitz, 'Comparative Law and EU-Legislation: Inspiration, Evaluation or Justification?', in M. Adams and D. Heirbaut (eds), *The Method and Culture of Comparative Law, Essays in Honour of Marc van Hoecke*, Hart Publishing, 2014, pp. 301–319.

[105] J. Stuyck, The Transformation of Consumer Law in the EU in the Last 20 Years, 20 *Maastricht Journal of European and Comparative Law* (*MJ)* (2013) p. 393.

[106] H.-W. Micklitz, N. Reich, The Court and the Sleeping Beauty: The Revival of the Unfair Contract Terms Directive (UCTD), *Common Market Law Review*, 51 (2014) 3, p. 805.

[107] H.-W. Micklitz, Monistic Ideology versus Pluralistic Reality: Towards a Normative Design for European Private Law, in L. Niglia (ed.) *Pluralism and European Private Law*, Hart, 2013, p. 47

[108] R van Gestel. H.- W. Micklitz, M. P. Maduro, *Methodology in the New Legal World*, EUI Working Paper Law 2012/13, p. 15.

[109] H. -W Micklitz, in L. Niglia (ed.) *Pluralism and European Private Law*, Hart, 2013, p. 47.

[110] J. Smits, *The Making of European Private Law. Towards a Ius Commune Europaeum as Mixed Legal System, Intersentia*, 2002.

hybridisation and its impact on enforcement. [111] Remedies are an obvious example of hybridisation, where national private law, constitutional law and fundamental rights may provide the solution together. Multiplicity of sources thus also causes a disturbance to the purity of the civil law institutions of national private law, shaking the system in its fundaments.

Second, the regulatory style of the private law acquis of the EU causes further difficulties at the national implementation and enforcement level. This concerns above all the level of harmonisation and the principles-based and general clause-based regulatory approach of the EU. Directive 93/13/EC, like many other private law directives is based on minimal and partial (incomplete) harmonisation while leaving remedies at Member State level. It harmonised those areas of national consumer law where existing differences could affect the Internal Market.[112] This technique needs a functional and organic integration of the European rules into the system of Member States' domestic private law in order to become fully functional and enforceable, which may even exceed the limits of transposition obligations stemming directly from the Directive, such as procedural law. It also supposes voluntary adjustments of the structure and system of private law out of the reach of the Directive. The need for such legislative or judicial adjustments of the domestic legal system usually become evident only upon the transposition of the EU legal act into domestic law, during the process of enforcement. Thus behind the *'visible hand of European regulatory private law'*[113], the harmonisation technique reaches deeper dimensions than the substantive, institutional or procedural scope of the Directive. I call this impact the *'invisible reach of European regulatory private law'*. By the 'visible hand' of European regulatory private law, *Micklitz* refers to the normative dimension of the invisible hand of the market.[114]

Third, *principles based rules*, such as the definition of unfairness or the provision on the consequences of unfairness in Directive 93/13/EC drives during enforcement to a new division of functions between the legislative and the judiciary. In case of these rules *delimitation between interpretation and law-framing* is not clear. Interpretation is a kind of control of the competence between Member States and the EU and in this context the question of competence of the EU in private law also arises.

Last but not least it could constitute the subject of a whole study the interpretation and enforcement difficulties resulting from the interplay between domestic 'legal culture'[115] and 'judicial culture'[116] with the regulatory contract law of the EU that pursues market aims.

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[111] I. Sammut, *Constructing Modern European Private Law: A Hybrid System*, Cambridge Scholar Publishing, 2016.

[112] Ch. Twigg-Flessner, *Europeanisation of Contract Law, Current Controversies in Law*, Routledge, 2013, p. 34

[113] H. -W. Micklitz, *The Visible Hand of European Regulatory Private Law*. *The Transformation of European Private Law from Autonomy to Functionalism in Competition and Regulation,* EUI Working Paper Law No. 2008/14.

[114] H. -W. Micklitz, op .cit., EUI Working Paper Law. No. 2008/14, p. 1.

[115] Th. Wilhelmsson, E. Paunio, A. Pohjolainen (eds) *Private Law and the Many Cultures of Europe,* Kluwer Law International, 2013; R. Zimmermann, The Present State of European Private Law, (34) *American Journal of Comparative Law*, Spring 2009, pp. 479- 512.

[116] P. Rott, Effective Enforcement and Different Enforcement Cultures in Europe, in Th. Wilhelmsson, E. Paunio, A. Pohjolainen (eds) *Private Law and the Many Cultures of Europe,* Kluwer Law International, 2013, pp. 306-321; H.-W. Micklitz, The ECJ Between the Individual and the Member States-A Plea for the Judge –Made European Law on Remedies, in H. -W. Micklitz, B. de Witte, *The European Court of Justice and the Autonomy of the Member States*, Intersentia, 2012; V. Trstenjak, The 'instruments' for implementing European Private Law-The Influence of the ECJ Case Law on the Development and Formation of European Private Law, in L. Moccia (ed.) *The Making of European Private Law: Why, How, What, Who,* Sellier, 2013, pp. 77-91; .G. H. Roth, P. Hilpold (eds) Die EUGH und die Sourveranität der Mitgliedstaaten. Eine Kritische Analyse richterlicher Rechtsschöpfüng auf ausgewahlten Rechtsgebieten; H.-W. Mickliz, The Transformation of Enforcement in European Private Law, 2015, *ERPL*, Vol. 23, Issue 4, pp. 491-524; U. Neergaard, R. Nilsen, Where Did the Spirit and Its Friends Go? On the European Legal Method(s) and the Interpretational Style of the Court of Justice of the European Union, in R Nielsen, L Roseberry & U Neergaard (eds), *European Legal Method: Paradoxes and*

However, this aspect will not be treated in details here.

Furthermore, the *sui generis nature* of what we call European Private Law not only is given from the plurality of legal sources but also because it functions differently, as a system, than national private law. *Reich* emphasises that a fundamental difference between the private law acquis of the EU and Member State private law is that the European rules are not system-embedded, but are market and function dependent, whereas national private law is system and values oriented. [117] We therefore have to deal with closed national systems of private law and a structurally open, transversal and goal-oriented European system. [118] With this very explanation, the same author also questions whether it is appropriate to borrow the methodological solutions of common law or the civil law system to analyse and conceptualize over the private law body of the European Union.[119]

In the same line of thinking, *Baldus* identifies four main differences between national civil law and European private law (understood as the *private law acquis*): first, the private law of the EU does not function as a closed system, it is a functional tool in service of those aims for which the EU established the private law way of achieving it; second, there are delimitation of functions within the EU, but there is no separation of powers as in the Member States, this following from its nature as a community of goals; third, the body of law labelled as private law of the EU is not the will of the parties concerned or the will of the states in the form of norms expected from private parties, but it is supranational law that, by enforcement, promotes cross-border interests; fourth, the wording of the laws raises additional problems, as methods of interpretation at national level are so many. [120] According to *Baldus,* all these make unsuitable an interpretation of European Private Law guided by the wording of the laws. [121]

IV. d) Tools developed by the CJEU for bridging the European and national levels of private law governance

One may ask what mechanisms hold together all these different sources, based on different values, concepts and preferences to make them workable; what are the driving forces of developments and at which layer? As such, one should not wonder why national courts cope so hard with the hybrid unfair terms law. The reality is that both EU law and national private law are experimenting with solutions. As a result, parallel developments are taking place from top-down and bottom-up. The majority of the preliminary references reflect that for system conflicts there is a need for approaches *from within the national systems, from bottom –up,* since unfair terms law is implemented and enforced through national mechanisms, a reality not yet fully acknowledged by the jurisdictions most affected by mass practice of unfair contract terms.

Over time, the CJEU elaborated its *fundamental principles in private law* as a tool aimed at binding the two layers. *Reich* identifies three principles of substantive nature (autonomy, protection of the weaker party and non-discrimination), one remedial principle (effectiveness), two methodological (balancing and proportionality) and a 'half 'principle, good faith.[122] Comparative case-law assessment on the impact of the private law principles of the CJEU (effectiveness, persuasiveness and proportionality) reveals that national courts do operate less with such principles in consumer law, but stay strongly bound to the traditional principles of

Revitalisation. Djøf / Jurist- og Økonomforbundet, København, 2011, pp. 95-185; G. Beck, *The Legal Reasoning of the Court of Justice of the EU*, Hart. 2012.

[117] N. Reich, *General Principles of EU Civil Law*, Intersentia, 2013, p. 145.

[118] C. Baldus, in K. Riesenhuber (Hrsg.), *Europäische Methodenlehre* (2010), p. 103.

[119] N. Reich, op. cit., 2013, p. 145.

[120] C. Baldus, in K. Riesenhuber (Hrgs.), *Europäische Methodenlehre* (2010) pp. 101-102.

[121] Ibidem.

[122] N. Reich, op. cit., 2013, p. 203.

domestic civil law. The principles of European Private Law[123] meant to work as binding chains between the private law of the national states and '*regulatory private law'*[124] did not bring yet the expected results in balancing between the two systems. The CJEU's *own principles* may deviate from those of the Member States, which further 'irritates an autonomous systematisation of national law'[125]. Whereas *Reich* has seen in the principles of civil law a real tool with integrative function, [126] others remain sceptical. *Weatherill* considers that CJEU's use of its general principles may lead to more coherence in EU law at the cost of a less coherent system at the national level, considering bluntly this as a destructive outcome. [127] *Hesselink* challenges the integrative potential of the principles with the main argument that general principles are always based on value judgements of the system from which they emanate and therefore is difficult to confer them wide application.[128]

The case law of the CJEU in unfair terms law shows that these principles are interpreted according to market considerations and are not system neutral, although this would be a way of connecting the private law rules of the consumer acquis to the traditional principles and values of private law. Above all, substantive justice supposes a clear and consistent approach on values. System-neutral tools are needed for the hybrid system of European Private Law, to develop its own values and method(s). In this process, the research on common principles stemming from the civil law traditions may significantly support the efforts to find solutions.

Constitutionalization is another instrument in the search to bind the two layers of private law.[129] It had not occurred via an institutional framework, but via the establishment of constitutional and human rights. *Micklitz* views the '*constitutionalized consumer'* as: a means of last resort- not only to overcome marketization and fragmentation- but also to save consumer protection, since the emphasis could be again placed on protection, which would revitalise the social dimension which was lost in the process of marketization and fragmentation[130]. However, the constitutionalization of consumer law should not be equated with problem-solving, since the courts can do no more than to set incentives for the political agenda; the CJEU is not in a position to solve conflicts, says the author. [131] Nevertheless via fundamental rights, the CJEU has a tool in hand with which may impact on national policy.

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[123]A. Hartkamp, *European Law and National Private Law*, Intersentia, 2016; N. Reich, *General Principles of EU Civil Law*, Intersentia, 2013; M. Hesselink, *The General Principles of Civil Law, Their Nature, Roles and Ligitimacy*, in D. Leczykiewicz, S. Weatherill (eds) *The Involvement of EU Law and Private Law Relationships*, 2013; U. Bernitz, X. Groussot, F.Schulyok, *General Principles of EU Law and European Private Law*, Kluwer Law International, 2013; A. Hartkamp, The General Principles of EU Law and Private Law, (2011) 75 *RabelsZ*, 241; S. Weatherill, The Principles of Civil Law as a Basis for Interpreting the Legislative Acquis, (2010) *ERCL*, 74; A. Metzger, *Extra legem, intra ius: Allgemeine Rechtsgrundsatze im Europaischen Privatrecht*, Mohr Siebeck, 2009.

[124] The concept originates from H. -W. Micklitz, Monistic Ideology versus Pluralistic Reality: Towards a Normative Design for European Private Law, in L. Niglia (ed.) *Pluralism and European Private Law*, Hart, 2013. pp. 47-51.

[125] R. van Gestel, H.-W. Micklitz, *Revitalizing Doctrinal Legal Research in Europe: What About Methodology*? op. cit., p. 67.

[126] N. Reich, op. cit., 2013.

[127] S. Weatherill, The 'Principles of Civil Law' as a basis for interpreting the legislative acquis, *ERCL*, 2010, p. 80.

[128] M. Hesselink, in D. Leczykiewicz, S. Weatherill (eds) *The Involvement of EU law in Private Law Relationships*, 2013, p. 17.

[129] On the constitutionalization debate of European Private Law: K. Gutman, *The Constitutional Foundations of European Contract Law: A Comparative Perspective*, Oxford University Press, 2014; H.-W. Micklitz (ed.), *Constitutionalization of European Private Law*, Oxford University Press, 2014; S. de Vries, U. Bernitz, S. Weatherill (eds), *The EU Charter of Fundamental Rights as a Binding Instrument: Five Years Old and Growing*, Hart, Oxford, 2012.

[130] H.-W. Micklitz, The Consumer, Marketized, Fragmented, Constitutionalized, in S. Weatherill, D. Leczykiewicz (eds) *The Images of Consumer in EU Law: Legislation, Free Movement and Competition,* 2016, p. 35-36.

[131] Ibidem.

This type of constitutionalization of private law takes a different form at European level because of the "market-state form of the EU" as Micklitz defines the EU, whereas in a national context, constitutionalization is embedded in the national legal, economic and social environment; thus the rulings of the CJEU are perceived in a totally different economic and social environments.[132] This questions the effectiveness of constitutionalization in terms of trying to deliver more substantive justice for consumers. However, in this context, it is not a negligible development that, in parallel with European constitutionalization, a process of constitutionalization of private law at national level is in progress. This started when the proponents of constitutionalization referred to constitutional rights to intervene in private law litigation to enhance the social dimensions in private law matters.[133] This tendency has accelerated in Central Eastern Europe in two forms in relation to unfair terms law. On one hand, constitutional courts are often asked by business entities to balance the obligation of the courts to proceed on own motion against other fundamental rights, such as freedom to conduct business, right to ownership and access to a fair trial, pursued by business entities. This is indicative of the weak internalisation of consumer interest as a public interest in these societies. On the other hand, the judiciaries of the Member States also increasingly promote constitutionalization at EU level by bringing the procedural rights of private persons (both of the consumer and of business entities) into the discourse on contract fairness when national procedural law puts obstacles in the way of the enforcement of substantive rights of consumers or when national regulatory contract law conflicts with procedural law. *In this way, one can establish that constitutionalization takes place both top-down and bottom-up, with different aims and concepts,* and as such constitutionalization is not free of conflicts, which diminishes its integrative potential. This is why it could not yet contribute to the redefinition of values and, without a value-framing function, it has proved to be a weak instrument for solving system conflicts in private law. Private law instead has been driven to increasing proceduralization. [134]

Proceduralization of private law is just another balancing attempt but without a real problem-solving capacity. Regulation by general clauses and principles-based rules was the other channel of proceduralization which, together with constitutionalization, has driven the further fractures in private law. Under the impact of Directive 93/13, European contract law is merging substantive and procedural law, overstepping the structural concept of private law.

Micklitz elaborates at length on the interplay between marketization, fragmentation and constitutionalization. [135]In his view, marketization constitutes a necessary prerequisite for fragmentation.[136] This is the consequence of the type and extent of harmonisation on one hand and of the style of regulation on the other hand, that implies a systemic through considering of the private law and civil procedural law.

The consumer law literature is divided on the issue of private law fragmentation.[137] Some consider it a necessary consequence, in response to developing a European Civil Code

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[132] Idem., pp. 26-27.

[133] C. Mak, *Fundamental Rights in European Contract Law, A Comparison of the Impact of Fundamental Rights on Contractual Relationships in Germany, Italy and England*, Kluwer Law International, 2008.

[134] M. Tulibacka, Proceduralization of EU consumer law and its impact on European consumers, *European Review of Administrative Law* (2015) Volume 8, pp. 51-74. O. Dubos, The Origin of Proceduralization of EU law: A Grey Area of European Federalism, *European Review of Administrative Law* (2015) Volume 8, pp. 7-21. H. -W. Micklitz, B.Witte (eds), *The European Court of Justice and the Autonomy of the Member States*, Intersentia, 2012; Ch. Joerges, C. Smidt, *Towards Proceduralization of Private Law in the European Mulitlevel System*, in A. S. Hartkamp et al., *Towards a European Civil Code*, Kluwer Law International, 2011, pp. 277-309.

[135] H. -W. Micklitz, The Consumer: Marketized, Fragmentized, Constitutionalized, in D. Leczykiewicz, S. Weatherill (eds) *The Images of Consumer in EU law: Legislation, Free Movement and Competition*, 2016.

[136] Idem, p. 26.

[137] Th. Wilhelmsson, Private law in the EU: Harmonized or Fragmented Europeanisation (2002) 10 *ERPL*; P. Letto-Vanamo, J. Smits (eds), *Coherence and Fragmentation in European Private Law*, Sellier, 2012; L. Niglia, Of Harmonization and Fragmentation: The Problem of Legal Transplants in the Europeanisation of Private Law,

[138]and challenge whether fragmentation would be a problem, at least at EU level. [139] Others consider that constitutionalization is another form of or an extension of marketization.[140] *Bartl* understands constitutionalization as an extension of fragmentation and marketization, as more market-driven logic of the EU, whereas *Leczykiewizcz* sees in constitutinalization another variant of fragmentation. [141]

Certainly, fragmentation of unfair terms law is not only an issue for enforcement. Fragmentation of consumer law is strongly related to marketization, [142] and by this it indeed affects the relationship between the EU and the Member States, where the EU is the enabling state - the market state - and consumer participation is also fragmented in decision making and political choice, says Micklitz.[143] All these features of the European Private Law (its system, regulatory approach based on general clauses and its own principles) *challenge the idea of legal certainty.* The two layers pursue different interests and different values. Eventually the market values based interpretation of the CJEU may satisfy policy preferences at Member State level from time to time, but it cannot be used as a legal solution; policy reasoning it remains a policy response in most cases.

IV.e) Implications of the regulatory policy at level of the judicial methodology of the CJEU

Judicial method is also an important ingredient of the judicial governance of the CJEU. Enforcement of consumer law is not only a key regulatory issue but raises a broader set of theoretical questions concerning the relationship between the states and the market. [144] Unfair terms law merges old and new types of law enforcement. The EU is based on the concept of an open 'enforcement federalism'[145] while the incomplete enforcement mechanisms are partly compensated for by judicial activism, as happens in unfair terms law. One main reason for this is that Member States' remedies and procedures do not always suffice to guarantee effective legal protection as required under EU law.

Second, the strong economic goal orientation of European private law also has its methodological implications. It has driven the CJEU to *policy type reasoning* in response to the questions referred by national courts within the procedure of preliminary reference. The policy type reasoning, mostly based on the aims of the Directive, is a consequence of the regulatory function of unfair terms law. The CJEU uses the scope –tool paradigm (*Zweck-Mittel paradigm*,) which works with the thesis that interpretation is a relevant factor in the achievement of the aim of the legal provision.[146] Such policy-based (goal oriented) interpretations may prove to be deficient, especially when the aims are not consistently detailed and where the room for judicial law-making is broad; as such, can redefine the borders between the power of the legislative and the judiciary.[147]

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17 *Maastricht J. Eur. and Comparative Law* 116 (2010); H. W.-Micklitz, The Consumer: Marketized, Fragmentized, Constitutionalized, in D. Leczykiewicz, S. Weatherill (eds) *The Images of Consumer in EU law: Legislation, Free Movement and Competition*, 2016.

[138] J. Stuyck, Consumer Concepts in EU Secondary Law, in F. Klinck, K. Riesenhuber, *Verbraucherleitbilder: Interdisziplinare und europaische Perspektiven,* 2015; pp. 131-143.

[139] T. Wilhelmsson, Private Law in the EU. Harmonized or Fragmented Europeanization? (2002) 10 *ERPL*, p. 77.

[140] H.-W. Micklitz, op. cit., EUI Working Paper Law, No. 2008/14

[141] H.-W. Micklitz, The Consumer, Marketized, Fragmented, Constitutionalized, in D. Leczykiewicz, S. Weatherill (eds) *The Images of Consumer in EU Law: Legislation, Free Movement and Competition,* 2016, p. 39.

[142] Idem., p. 26.

[143] Idem., p. 24.

[144] F. Cafaggi, H. -W. Mikclitz, *New Frontiers of Consumer Protection, The Interplay Between Private and Public Emforcement,* Intersentia, 2009, p. 1.

[145] The term is used by H. –W. Micklitz, in op.cit., EUI Working Paper Law, No. 2008/14

[146] C. Kirchner, in K. Reisenhuber (Hrgs.), *Europäische Methodenlehre* (2010), pp. 136-140.

[147] Idem., p. 140.

Principles-based or general clause-based regulation is another important governance measure in the hands of the CJEU. The legal literature often uses the two terms as synonyms, however, I consider a distinction between the two concepts to be necessary since they have different content. In my understanding, principles-based regulations are those which refer to general principles in defining rights and obligations (such as Article 3(1) of Directive 93/13/EC) whereas general clauses or clauses that needs clarifications are worded in general terms without concrete substantive criteria allowing for a large degree of adjudication in the process of enforcement. Such provisions usually refer to circumstances. Both categories of provisions allow the courts not only large discretion if the legislative does not make use of its leeway under this approach to exploit the possibility to concretise and/or adapt the principle-based provisions and general clauses to the system conditionality of national private law. If such concepts are only replicated, as so often was the case in unfair terms law, this implies not only a methodological problem for enforcement but it also causes a relocation of competence between the legislative and the courts. Courts may react very differently to this regulatory approach depending how much of a law-framing role they may have by statute under their national law.

The task of the courts is further complicated where, in addition to the principles-based rules and general clauses of the Directive, the CJEU developed its judicial rules along the same concept for fixing the interpretation problems connected to the style of regulation, as in unfair terms law. Such principles still do not help the process of concretisation, if not translated by national courts into the toolbox of their domestic private law. Research conducted in 2016 on both public and private enforcement of unfair terms law reveals that jurisdictions, from where stem most of the preliminary questions, have difficulties in handling the principles-based regulatory approach and the undefined concepts of Directive 93/13/EC. The reason for this is to be found in the differences between such concepts and the type of concepts with which domestic civil law operates. Whereas the general principles of continental civil law reflect the basic values of society, in a broader sense, projected to private relations, the general principles of European Private Law are market efficiency-driven and the two may be in conflict. Differences are not so much in the wording or framing, but in the aims, scopes and policies beyond the principles of good faith, proportionality, effectiveness and persuasiveness, which are interpreted by the CJEU in the light of the regulatory aim and scope of the Directive.

The question is to what extent this is legal interpretation or law-framing, considering that enforcement requires value judgement at the same time. Such a situation raises not only methodological questions but also *competence questions*. [148] Undefined concepts may work in practice as competence delegation norms.[149] A further question is whether such competence delegation concerns the national courts or the CJEU. In *Röthel's* opinion, Article 3 (1) of Directive 93/13/EC raises this question.[150] In his view, law-framing aimed at concretising undefined concepts (whether principles-based or general clauses) should be considered in the context of the institutional framework of EU law, even in private law issues, and in line with the principle of conferred powers it should apply not only in the relationship between the EU and the Member States but also in the relationships between the institutions of the EU, including the CJEU. [151]

The question whether the CJEU has a law framing competence with regard to those provisions of Directive 93/13/EC which need further concretisation is extensively debated in

[148] A. Röthel, in K. Riesenhuber (Hrsg.), *Europäische Methodenlehre* (2010) pp. 350-351.
[149] Idem., p. 351.
[150] On the doctrinal debate: A. Röthler, *Normkonkretisierung im Europäischen Privatrecht*, Mohr Siebeck, 2004, pp. 353-379.
[151] Ibidem.

the academic literature, with such competence being rejected[152], although the leading opinion is that the CJEU has general competence for concretising abstract rules of EU law, since it has the highest authority to interpret EU law, and Article 267 (1) b) TFEU refers to any explanation of abstract content or meaning of the Community Law, including the concretisation of abstract concepts. [153] The reality is that one can indeed establish a "*hypertophiation of the concretisation competence of the CJEU"* after 2010, starting with *Oceano[154] Freiburg Kommunalbauten[155]* and continuing with later cases as well.[156] In this process, the CJEU has been consistently encouraged by the referring national courts to test the limits of its competence, a reality that should not be ignored, although it has consistently emphasised in its rulings that is for the Member States judiciary to assess unfairness, taking all circumstances of the concrete case into account. However, it provided the national courts with market policy arguments and principles to handle the undefined concepts. Thus, by making intensive use of the procedure of preliminary reference and asking substantive criteria for the concretisation of the general concepts of the Directive, the referring national courts became central actors of law-framing, actively participating in the relocation of competence at national level, between the judiciary and the legislative on one hand and also between the national and European judiciary, on the other hand. This is how *judicial governance* has taken increasing land from regulatory governance.

Fear of the type that the *CJEU may turn into another motor of integration*, to a certain extent taking this role over from the Commission by the method of interpretation it employs[157], are not fully unfounded in the light of the product of judicial law-framing from Luxemburg in the field of contract fairness law. *Micklitz,* albeit cautiously, raises the issue of "growing preparedness of the CJEU to take on the role of a societal agent, which compensates for societal deficits in European law-making, just like the Warren Court of the US" and talks of raising societal support coming from certain Member States, such as Spain in this direction. [158] He pleaded well in advance before such a tendency evolved, almost at the same time as *Wilhelmsson* did, in 2008, for a 'structural new reorientation of (European) private law, which takes into account the transformation of European private law from autonomy to functionalism in competition and regulation and emphasised the need for an approach based on a clear delimitation of which norms need to be developed and enforced, at what level and by whom, within the process of multi-level governance in private law. [159] *Micklitz* and *Cafaggi* advocate for the need to rationalise and coordinate the judicial enforcement of European law and to address spill-over onto areas which are not technically within the competence of the EU. [160]

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[152] S. Weatherill, Prospects for the Development of European Private Law through " Europeanisation " in the European Court-The Case of the Directive on Unfair Terms in Consumer Contracts, *ERPL 3* (1995) p 316; K. Riesenhuber, *System und Prinzipien des Europäischen Vertragsrecht*, De Gruyter, 2003, 77 ff; N. Reich, Die Vorlagepflicht auf teilharmonisierten Rechtsgebieten am Beispiel der Richtlinien zum Verbraucherschutz, *RablesZ*, 66 (2002) p. 544.; S. Grundmann, The General Clause in the EC Contract Law Directives- A Survey on Some Important Legal Measures in EC Law, in S. Grundmann, D. Mazeaud (eds) *General Clauses and Standards in European Contract Law*, Kluwer Law International, 2006, p. 141.

[153] M. Franzen, *Privatrechtsangleichung durch die Europäische Gemeinschaft*, 1990, p. 536.

[154] Case C-240/98 *Océano Grupo Editorial SA v Roció Murciano Quintero*

[155] Case C-237/02 *Freiburg Kommunalbauten v Hofstetter*

[156] A. Röthel, in K. Riesenhuber (Hrsg.), *Europäische Methodenlehre* (2010), p. 359.

[157] C. Kirchner, in K. Riesenhuber (Hrsg.), *Europäische Methodenlehre* (2010), p. 140.

[158] H. -W. Micklitz, The Consumer: Marketized, Fragmented, Constitutionalized, in D. Leczykiewicz, S. Weatherill (eds) *The Images of Consumer in the EU law. Legislation, Free Movement and Competition*, Hart, 2016, p. 38.

[159] H. -W. Micklitz, *The Visible Hand of European Regulatory Private Law. The Transformation of European Private Law from Autonomy to Functionalism in Competition and Regulation,* EUI Working Paper Law No. 2008/14, p. 3.

[160] H. W. Micklitz, F. Cafaggi, *European Private Law after the Common Frame of Reference*, Edward Elgar, 2010, p. xiii.

Specific measures are needed for coordination, both among regulators and between them and the national judiciaries, stress the same authors. [161] This, I add, supposes conceptualisation of the ongoing processes and understanding the *dynamics of the multilevel private law governance*. This needs a methodology able to capture the multi-layer process, which is missing today and this to a large extent weakens the ability of the Member State to develop balancing policies, tools and mechanisms that would bridge the different levels of governance and impact on the factors driving the system.

IV.f) The role and share of legal theory and the method of European Private Law in the development of unfair contract terms law

The Europeanisation of private law via European contract law occurred largely without much concern and without much awareness of the methodological implications of the changing function of law as a means of transforming society. [162] When it comes to methodology and elaborating legal theories on the body of law resulting from the interplay between national civil law and the private law *acquis*, comparatists (comparative lawyers) and national civilists (civil law lawyers) tend the be trapped by the cultural embeddedness of private law and question the existence of such a legal field as European private law. This is so because, to a certain extent the paradigm of the 19th century that '*private law is apolitical*' still prevails; the developments of the 20th century (such as instrumentalization, constitutionalization and proceduralization) of private law are mostly ignored or considered an intrusion into the ideal private law.[163] For this reason, the interplay between national private law and regulatory (European) private law is even today unwelcome.[164] This paradigm may be one of the reasons that national books on the theory of law and civil law and most commentaries on European Law and European Private Law dedicate little or no room to the methodology of the interplay between national and European Private Law. [165] *Walker* talks of the lack of theoretical self-consciousness in EU legal scholarship.[166] For these reasons, the Member State legislative, executive, judiciary and also the legal practitioners, are mainly without doctrinal tools for handling interpretation difficulties arising from the system impacts of European Private Law on national law. *Jansen* strongly warns that the "Europeanisation of private law, by subordinating the values beyond the law to the supranational regulatory policy aim of European rules, is slowly emptying the law from its scientific content, in which way we experience a phenomenon similar to that caused by the nationalization of law in the nineteenth century"[167].
This state of art of the doctrinal paradigm is specifically true for the field of unfair terms law. Although the mass use of unfair terms has impacted large segments of society in countries severely affected by the global economic crisis and, as consequence the judiciary of these countries faced manifold enforcement difficulties, legal theory and doctrine did not and could not assist enforcement. In most countries, the developments are even today not conceptualised or, when it did happen, it was the judiciary which came up with doctrinal clarifications and not

[161] Ibidem.
[162] H. -W. Micklitz, On the Politics of Legal Methodology, 21 *Maastricht Journal of European and Comparative Law*, (2014) p. 591.
[163] R. Michaels, in J.Basedow, K.J. Hopt, R, Zimmermann (Hrsg.) *Handwörterbuch des Europäischen Privatrecht*, Band I, Mohr Siebeck, 2009, p. 1267.
[164] Ibidem.
[165] On criticism concerning the German legal literature: A. Schwartze, in K. Riesenhuber (Hrsg.) *Europäische Methodenlehre* (2010), p. 115 and 123.
[166] N. Walker 'Legal Theory and the European Union: A 25th Anniversary Essay', *Oxford Journal of Legal Studies* 25, pp. 581-601 (2005).
[167] The concept of "Entwissentschaftlichung" is used by N. Jansen, Dogmatik, Erkenntniss und Theorie im Europäischen Privatrecht, (2005) *Zeitschrift für Europäisches Privatrecht (ZEuP),* p. 756.

legal scholars.[168] Thus, while the transformation of private law is a given national legal theorists and comparative lawyers remain behind.

Koziol called upon the academic community in 2007 in general terms that "(…) one has to accept that unification and harmonization of law in the EU is already a fact which cannot be denied and we have to come to terms with that development. Thus, the agenda is not whether there should be a unification of the law, but rather how and to what extent unification should take place"[169] , whereas *Wilhelmsson* did this specifically for the field of unfair terms law in 2008, drawing to the attention of the academic field and policy makers that Directive 93/13/EC needs further theoretical clarification and elaboration regarding the type of justice, and hence the type of values, it promotes.[170]

Today's European legal theory is far behind the developments of unfair terms law, it does not touch sufficiently on the system-level processes with their actors and factors, although leading scholars in the field of European private law, such as *Micklitz* and *Cafaggi,* have framed the need for second generation research on multilevel governance in private law.[171] It seems that for now it is left to comparative private law to raise the importance of the *ex post* theoretisation and conceptualisation of European private law as a product of the interaction between the European rules and the strongly culture-embedded private law systems of the national states in Europe. This *ex post* job is difficult, since mainstream comparative law, that looks from the interior of the national systems at the rules and the process, does not have the means of assessing the multilayer private law governance taking place in Europe. [172]

In my opinion one main omission of the '*Professorenrecht'*[173] involved for more than two decades in researching the common roots of national private law systems and developing uniform principles in various areas of private law almost at the same time as the body of private law directives evolved, is that missed the moments to contribute to the development of the legal doctrinal background of these EU rules in line with the assimilative capacity of the continental private law, which has its cultural, economic and legal limits. Later has also missed to conceptualise developments in living law and develop tools and mechanisms that may bridge the European and national dimensions of private law governance. This is not to say that the common core research projects do not assist the systemic integration of the European institutions and that over time have lost their legitimacy as the unification projects have failed. Developments in European and national judicial law on consumer contract fairness indeed

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[168] M. Józon, The Methodology of Judicial Cooperation in Unfair Contract Terms Law, in F. Cafaggi, S. Law (eds) *Judicial Methodology in European Private Law*, Edwards Elgar, 2017, pp. 129-166.

[169] H. Koziol, Comparative Law –A Must in the European Union: Demonstrated by Tort law Example, *Journal of Tort Law*, Vol. 1, 2007, Issue 3, p. 1.

[170] Th. Wilhelmsson, Various Approaches to Unfair Terms and their Background Philosophies, *Juridica International* XIV (2008) No.1, pp.51-57.

[171] H. -W. Micklitz, F. Cafaggi (eds) *European Private Law after the Common Frame of Reference*, 2010, p. Xiii.

[172] J. M. Smits, Rethinking Methods in European Private Law, in M. Adams, J. Bomhoff (eds) *Practice and Theory in Comparative Law*, 2012, pp. 170-185; J. M. Smits, European Private Law and the Comparative Method, in Ch.Twigg- Flessner (ed.) *The Cambridge Companion to European Private Law*, 2011, pp. 33-43; R. van Gestel, H.-W. Micklitz, Comparative Law and EU Legislation, Inspiration, Evaluation or Justification? in M. Adams, D. Heirbaut (eds) *The Method and Culture of Comparative Law, Essays in Honour of Mark van Hoecke*, 2014, pp. 301-318; R. Zimmermann, Comparative Law and Europeanization of Private Law, in: M. Reimann, R. Zimmermann (eds), *The Oxford Handbook of Comparative Law*, Oxford University Press, 2006, pp. 539 – 578; E. Örücü, *The Enigma of Comparative Law, Variations of Theme for the Twenty First Century,* Martinus Nijhof, 2004; M van Hoecke, *Epistemology and Methodology of Comparative Law*, Hart, 2004; E. Örücü, A General View of Legal Families and of „Mixing Systems", in E. Örücü, D. Nelken, *Comparative Law,* Hart, 2007, pp. 169-187; P. de Cruz, *Comparative Law in a Changing World,* Rougets, 2006*;* A. Riles (ed.) *Rethinking the Masters of Comparative Law*, Hart, 2001; M. Schillig, *The Contribution of Law and Economics as a Method of Legal Reasoning in European Private Law*, *ERPL*, Volume 5, 2009, pp. 853-893.

[173] H.- W. Micklitz, F. Cafaggi, Introduction, in H.- W. Micklitz, F. Cafaggi (eds) *European Private Law after the Common Frame of Reference*, 2010, iix, xxv-xxvi.

continue to justify such academic agenda. The *acquis commun* (common core principles) has a strong eroding and integrating role at the same time, a reality which should not be underestimated as an important factor framing developments in contemporary private law in Europe. A reverse process of integration of the newcomer European legal institutions into the domestic private law system starts by implementation and enforcement when the scope and aim of the European secondary law may be significantly overwritten by the method and tools of implementation and enforcement. On the other hand, the *acquis commun* of the Member States helps the systemic integration of the solutions advanced by individual Member States via horizontal judicial dialogue.

The debate on methodology is developing slowly, not only in unfair terms law but also in general terms regarding the methodological conceptualisation of the private law of the EU. The very few academic writings on the methodology of European Private Law in general mostly focus on the issue of why conceptualising EU law is difficult. The debate is still about conceptual clarifications on what should be called methodology, the sources of the methodology, whose task it would be, and what should be the aim of a European Private Law methodology. The theory of European Private Law still mostly struggles with defining its legitimacy. One cannot say yet that an intense debate characterised by confrontation between various approaches is ongoing; instead, isolated attempts can be reported in search of a conceptualisation of a method.

Jansen stresses that it must be first clarified what is to be meant under dogmatic development ("dogmatischen Theoriebildung") in European private law, admitting the difficulty of such an undertaking since these terms are strongly embedded in conceptually closed national systems which may not fit easily to the European Law.[174] *Vogenauer*, pleading for the need for detailed rules, principles and structure of a common European theory of private law, considers that it is the task of comparative law to map the common methodological principles of a European method of law, and so it should not be invented from zero.[175] In line with this thought, *Jansen* supports the idea that conceptualisation and the description of common European values is the task of European legal science, hence legal theory should discover and explain the common founding rules and values of the individual legal systems of Europe.[176]

Other scholars are sceptical of the idea that the national methods could be applied to European law.[177] *Hesselink's* argument against a method developed from within the national private law systems is that traditional legal method tries to find answers with regard to questions of law according to a given system of law and, since normative questions always relate to a specific community where those norms apply, a new method is needed, to be adapted to European law. [178] *Van Gestel* and *Micklitz* also summaries the core arguments that would impose limits on the national doctrines to capture the systemically open European private law: "a) arguments are derived from authoritative sources, b) the law represents a system and legal doctrine that also aims to present the law as a coherent system, c) decision on individual cases have to fit into the system; d) deciding in hard cases implies that existing rules are always revisited in such a way that the system is coherent again"[179].

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[174] N. Jansen, Dogmatik, Erkenntnis und Theorie im europäischen Privatrecht, *Zeitschrift für Europäisches Privatrecht (ZEuP)*, 2005, 750-783.

[175] S. Vogenauer, Eine gemeineuropäische Methodenlehre des Rechts – Plädoye und Programm, (*ZEuP*) 2005, 234-263, p. 247.

[176] N. Jansen, Dogmatik, Erkenntnis und Theorie im europäischen Privatrecht, *ZEuP*, 2005, pp. 779-780.

[177] S. Vogenauer, in K. Riesenhuber (Hrsg.) *Europäische Methodenlehre*, (2010), p. 1.

[178] M. Hesselink, A European Legal Method? On European Private Law and Scientific Method, *European Law Journal* Vol. 15, No. 1. January, 2009, p. 39.

[179] R. van Gestel, H.-W. Micklitz, *Revitalizing Doctrinal Legal Research in Europe: What About Methodology?* EUI Working Paper Law, No. 2011/5, p. 65.

The above presented, still experimental, problem-phrasing of the legal theoretical attempts to define the concept, content and role of a methodology that would be able to conceptualise developments in private law under the impact of the private law acquis of the EU justifies to large extent the reluctance of national and comparative law literature to conceptualize the interplay between unfair terms law and national contract law from both layers of judicial governance, the national and the European.

However, there seems to be consensus among the few comparative law scholars concerned by the need for a methodology for European private law that a debate on the method has to be on its normative assumption[180]and also agree on the importance of clarification of values on which it is based. [181] According to *Hesselink*, "a legal method implies not only adopting a theory of law (and adjudication) but probably (depending on the theory of law) also a theory of justice, which should determine which role the law plays in achieving social justice and what courts should consider as a just outcome" [182].

Developments taking place in contract fairness law under the factors and actors described in Sections III and IV pretty much confirm the two major tasks of the legal theory of European private law: value setting (above all) and systematisation. Value setting may be a successful tool for re-anchoring the new developments into the national systems of national law. This would also assist conceptualisation. Once values are set, these will fix the scope and function of contract fairness and restore or create a new balance between deterrence and compensation in contract law. Value setting would be the way to depoliticise private law and return private law into the service of the citizens. It could also restore the relationship between the state and its citizens, which today is developing mainly under the impact of the private law acquis of the EU along market considerations. The next step, the systemic integration of the judicial developments, could then come.

In my view this should emanate from within the national private law systems of the Member States, because "who wins the battle over methodology lays the foundation of the whole paradigm"[183]. I doubt *Jansen's* view that "the future will be to functionally integrate into a uniform legal system the acquis communautaire and the acquis commun"[184], since private law remains strongly culture-embedded even if common values can be agreed among the Member States.

V. Proposals for a new research agenda in unfair terms law

Developments taking place in unfair contract terms law in Europe under the impact of increasing multilevel judicial governance raise a whole agenda of new research questions, not only for consumer law and policy, but above all for governance research and for legal theory and methodology.

Judicial governance drives to competence concerns at both national and European level, once the borderline between interpretation and law-framing becomes superfluous. This process has its roots in both the level (minimal, incomplete) and style (principles-based rules, general clauses) of the legal approximation by Directive 93/13/EC and still missing tools and mechanisms at national level to enable the courts to handle the hybrid law on unfair contract terms. Increasing judicial law via judicial dialogue between the national courts and the CJEU resulted in a new division of competence in law–framing between the legislative and judiciary

[180] M. Hesselink, op. cit., p. 44.
[181] N. Jansen, op. cit., p. 762.
[182] M. Hesselink, op. cit., p. 36.
[183] M. Hesselink, op.cit., p. 34.
[184] N. Jansen, in J, Basedow, K. J Hopt, R, Zimmermann (Hrsg.), *Handwörterbuch des Europäischen Privatrecht*, 2009, p. 551.

at national level, and between the CJEU and the Commission at EU level, while the CJEU is turning into a motor of integration and policy framer.

The European policy on consumer contract fairness is no longer decided in Brussels by the political decision-makers of the Member States under democratic mechanisms, but it is the product of spontaneous developments pursued by individual courts in the Member States. This development is less acknowledged so far at policy level, although it raises serious concerns of legitimacy, transparency and participation. Multilevel private law governance removed from democratic policy framing may have long term impacts on the relationships between the state and the market and the state and the society.

Paradoxically: the judicial dialogue evolved from bottom-up, as pursued by national courts in searching for solutions and mechanisms not available in national civil law, has caused greater legal integration along market considerations from bottom-up, and more disintegration of the national civil law system from top-down. As such, the question deserves more research attention from the pure private law perspective too, and not only because of governance policy concerns.

The heart of the problem with partly exporting to EU level the enforcement problems of Directive 93/13/EC stemming from the concept and system of the national civil law and procedural law is that the solutions of the CJEU provide too few answers to too many interpretation and enforcement problems that deeply affect consumer justice today in Europe. Questions such as clear vision on substantive justice; how to deal with consumer vulnerability from the perspective of contract fairness; how should be designed effective remedies, and remedies for long-term social contracts (such as consumer mortgage loans); the ways to collective action when large-scale use of unfair terms affects large groups of society; acceptance of the *universal erga omnes* effect of finding unfairness instead of limiting its effects to the business entity in the litigation concerned, are still looking for answers. The tools developed by the CJEU (constitutionalization, principialization[185], proceduralization) within the dialogue to bridge the two layers of private law have not yet provided the expected answers from a substantive justice point of view. They generally provide justice along market considerations.

However, not only the national judiciaries are in search of solutions. The CJEU also continues experimenting with solutions, while *testing the borders of competence in the reverse direction as well*, when it cautiously but consistently draws the attention of the referring jurisdictions to the lines where national civil law can or may and should come up with its own solutions (as the rulings of the past 2 years reveal). As such, a closer study of the still unexplored regulatory gaps of the Directive is needed from within the national civil laws of the Member States, to make the 'seemingly unfinished work of the Directive'[186] fully functioning in line with national values and policy preferences on aspects where the room has been left for policy making and law-framing to the Member States. I would call this *sustainable legal approximation.* It is important to recall, as the CJEU has repeatedly emphasised in its rulings, that this room is for the national legislator, not for the judiciary, I should add. If developed along the system - and function conditionality of national private law, these gap-filling rules may also have a bridging function between the European and national layers. Exploring the room for legislative gap-filling and for further voluntary approximation between the receiving system and the European legal institution will certainly narrow the law–framing needs of the judiciary and the role of judicial dialogue in policy framing, and so may fix questions of governance as well.

[185] Term used by X. Groussot, H. Lidgrad, in U. Bernitz, et al., (ed.) *General Principles*, 2008, p. 155, referred in N. Reich, *General Principles of EU Civil Law*, 2013, p. 7.

[186] M. Józon, A bírói jog szerepe a válságkezelésben, in Auer Á, Papp T. (szrk.) A gazdasági világválság hatása egyes jogintézményekre Magyarországon és az Európai Unióban, 2016, p. 125.

National private law will also have to deal sooner or later with the domestic externalities of low judicial effectiveness, which forced the national legislatives to intervene in contract law via mandatory law or regulatory law to provide substantive justice. Such developments will need to be revisited in the future in line with developments taking place in regulatory law. Contract law and private law justice should get rid of their market policing role.

Systemic problems inherent to the enforcement process necessarily drive to the proceduralization of domestic private law, in response to the regulatory approach of Directive 93/13/EC, by making the border between substantive and procedural law superfluous. In response to this, solution-finding should advance also in the direction of the dogmatic exploration of solutions dealing with the procedural weakness of consumers, including the procedural tools enabling effective enforcement of substantive rights granted under Directive 93/13/EC. While this is not handled by domestic private law, fewer substantive rules and more judicial tools will be provided by the CJEU via its preliminary rulings in response to domestic interpretation problems. This ultimately implies that the judiciary will adopt a more active law-framing role, both at home and in Luxembourg.

The most fundamental issue of the research agenda of unfair terms law remains the development of the conceptual and methodological background of instruments for the internalisation of the rights granted to consumers under the Directive 93/13/EC into domestic civil law. Today, national courts have to struggle not only with the multiplicity of legal sources and conflicting principles but also with the lack of a methodology for interpreting hybrid legal institutions. We no longer live in a world of those civil law institutions, which for hundreds of years guarded the structure and concept of private law in Europe, but in a fragmented, marketized, hybrid private law constellation which is perceived as unmanageable by national and comparative law scholarship.

However, hybridisation of the legal system and hybridisation of private law are not a reality specific to Europeanisation only. It was always present in legal history when two legal systems merged and a dominant system, by proclaiming itself as such, impacted over another. It is there also in the fight for hegemony between legal families and legal systems, and there is also in the story of globalisation of law via uniform law, since uniform laws transplant both continental and common law solutions. However, hybridisation of national private law via global law (uniform law) has never been taken as an offence against the system and integrity of national private law. The civil codes usually found the means and tools of the functional reception of uniform law into the system of national civil law.

The study of mixed legal systems could offer a new perspective to legal-methodological research in European Private Law as a hybrid system. Although it was raised in comparative law more than three decades ago that European Law is a mixed system[187], the issue was not sufficiently further developed at the level of methodology. This is not to say that the method should be borrowed from mixed legal systems, since mixed jurisdictions have different forces of development than has private law under the process of Europeanisation.[188] However, the mechanism of coexistence should, indeed be studied.

Instrumentalization of private law to market purposes is also not an unknown development; this is just another stage of the economisation process of the law. In this context, a more clear differentiation is thus needed in positive law and doctrine on the function and systemic place of unfair terms law within the national private law. If not, contract law risks

[187] J. Smits, A European Private Law as a Mixed Legal System. Towards a Ius Commune through the Free Movement of Legal Rules, *Maastricht Journal of European and Comparative Law* 5 (1998), pp. 328-340; J. Smits, *The Contributions of Mixed Legal Systems to European Private Law*, Intersentia, 2001.

[188] I elaborated lengthy on the differencies in the forces of development of mixed legal systems and those of European Law, in M. Józon, Unification of Private Law in Europe and „Mixed Jurisdictions": a Model for Civil Codes in Central Europe, *The Journal of Comparative Law*, (2010) Volume 6, Issue 1, pp. 132-133.

being further marketized via unfair contract terms law developed by judicial way, which is not desired.

Hence, to some degree the current state of academic concern in over-estimating the difficulties in theoretisation and conceptualisation of the developments in unfair terms law and European private law in general, is surprising. Existing methodological approaches tend to confuse rather than support legal practice since they do not provide tools. The few authors concerned with the need of a methodology for European private law are more involved in issues of competence on methodology than in methodology itself, being stuck on the question of the level (European or national) at which such a theory should be elaborated and whether the methodologies of the European or the national level would be suitable for conceptualising the multiple level system. Some of them question the suitability for this purpose of existing national methods of interpretation; others doubt the capacity of the method of European law in general, while none of them explains how the patterns of a system-neutral methodology should be. There is only agreement on the need to establish the values and social justice model on which the methodology will be built.

In my view, such a system-neutral methodology may only evolve out of the common core principles of national private law systems. In this process, further *jus commune* research may have a significant role if its focus can be redirected also to more study on the impact of national civil law systems on the transposed European rules, or what we could call the assimilative capacity of domestic civil law systems.