



European
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DEPARTMENT
OF LAW

The CJEU as a “Laboratory” of Comparative Analysis

A Theoretical and Case-Based Study of the
Europeanisation of Private Law

Stephanie Law

Thesis submitted for assessment with a view to obtaining
the degree of Doctor of Laws of the European University Institute

Florence, September 2014 (Defence)

European University Institute
Department of Law

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THESIS SUMMARY

This thesis seeks to determine whether, and if so, in what form, comparative analysis constitutes a theoretical and methodological component of the Europeanisation of private law; following a review of legislative efforts at harmonisation, the thesis evaluates the CJEU as a “comparative laboratory”. It begins with an exploration of the nature of Europeanisation and integration, which highlights the significance of the political, economic and legal as well as social and cultural contexts in which these processes occur. In light of this initial analysis, from which the significance of the national foundations of private law also comes to the fore, the European space is advanced as one of commonality and diversity of legal cultures and traditions. Recognising the unlikelihood of the codification of private law, the thesis makes a plea for the recognition of a shift in the perspective of legal development, to one which acknowledges the dynamic nature of private law as it emerges within a pluralist, multi-level construct of regulation. Against this background and in light of the contextual perspective to which it gives rise, the thesis argues that comparative analysis might facilitate the development of such a perspective, particularly in light of the role of the courts, both national and European. Notwithstanding this potential, a critical assessment of contemporary comparative law reveals its theoretical and methodological poverty and illustrates the need for a developed understanding of “complex” comparison, engaging this aforementioned shift in perspective. The foundations of the evaluation of the CJEU as a “comparative laboratory” are brought to light via a socio-legal assessment of its constitution and jurisdiction; the evaluation thereafter intertwines the theoretical and case-based analyses, engaging the preliminary reference procedure as a fundamental epistemological standpoint and concretising the discourse with three case examples of CJEU jurisprudence, in which conflicts of a private law nature arise. These case analyses provide the foundations for the construction of two classifications, namely of the sources of comparison in the CJEU and of the context and purposes for which comparison is engaged, both of which illustrate the existence of comparative analysis as a tool of interpretation. A second round of evaluation advances and facilitates the understanding of the relevance of comparative analysis not only as a tool of interpretation but also as a second-order device, in respect of the CJEU’s development of its “meta-mechanisms” of Europeanisation and integration, essentially building on the analysis undertaken to ask why comparative analysis should be engaged by the Luxembourg Court.

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ABBREVIATIONS

AFSJ	Area of Freedom, Security and Justice
AG	Advocate General
<i>BVerfG</i>	<i>Bundesverfassungsgericht</i> : German Federal Constitutional Court
CESL	Common European Sales Law
CISG	United Nations Convention on Contracts for the International Sale of Goods
CFR	Charter of Fundamental Rights
CRD	Consumer Rights Directive
CSD	Consumer Sales Directive
CJEU	Court of Justice of the European Union ¹
DCFR	Draft Common Frame of Reference
DGT	<i>direction générale de la traduction</i>
DRD	<i>direction de la bibliothèque, recherche et documentation</i>
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
ESC	European Social Charter
EU	European Union ²
ICJ	International Court of Justice
MS	Member State
OMC	Open Method of Coordination
pCESL	Proposal for a Regulation on the Common European Sales Law
pCRD	Proposal for a Consumer Rights Directive
PECL	Principles of European Contract Law
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
UCTD	Unfair Contract Terms Directive
UKSC	United Kingdom Supreme Court
UN	United Nations
UNCESCR	United Nations Committee on Economic Social and Cultural Rights
UNCHR	United Nations Commission on Human Rights
VCLT	Vienna Convention on the Law of Treaties

¹ Following the Treaty of Lisbon, the term Court of Justice of the CJEU has been employed; for consistency purposes, the term CJEU is used throughout this thesis to refer to the Luxembourg Court, even in reference to cases heard before the Treaty entered into Force in December 2009.

² For the same reason, namely consistency, the term “Union law” or “EU law” is employed throughout, regardless of whether the law referred to came into force prior or subsequent to the Treaty of Lisbon.

INTRODUCTION

I. Outlining the Research Question and Setting the Scene of the Research

Against the background of a review of legislative efforts at harmonisation, and the increasing scope for interactions between courts, this thesis aims to determine whether, and if so, in what form, comparative analysis can be understood to constitute a methodological component of the Europeanisation of private law, by evaluating the CJEU as a “comparative laboratory”³.

The thesis has two key dimensions. The first constitutes the foundations of the study, in light of which it is recognised that as the codification of private law is unlikely in the future, a plea for a shift in the perspective of legal development must be advanced. At the outset, the thesis therefore aims to explore the nature of Europeanisation and integration so as to emphasise the relevant legal, political, cultural and socio-economic contexts in which these processes occur. Against this background and in light of the origins of private law in the national legal cultures and traditions, one can begin to uncover the foundations of the Europeanisation of private law as it occurs in the context of integration and in light of the interdependencies of the national, European and transnational orders to which these processes have given rise⁴. The second dimension of the thesis seeks to uncover the assertion – recognising the limits of legislative development – that the engagement of comparative analysis⁵ by the courts might facilitate the aforementioned shift in perspective, from one focused on harmonisation via legislation to one which acknowledges both the scope for the dynamic nature of private law as it emerges within a multi-level construct of regulation and the significance of the pluralism which defines the European space. While the thesis thus engages the methodological discourses shaping the Europeanisation of private law, it intends neither to provide a general overview of the methodologies engaged by the legislature, nor of the interpretative methodologies of

³ The notion of “comparative laboratory” is derived from M. Hilf, ‘The Role of Comparative Law in the Jurisprudence of the Court of Justice of the European Communities’ in A.L.C. De Mestral *et al* (eds.), *The Limitation of Human Rights in Comparative Constitutional Law* (Les éditions Tvon Blais, Cowansville; 1986), pp.549-574, p.550.

⁴ The legal orders are understood to be interdependent, where “[I]nterdependency does not require unifying our different systems, nor dissipating every understanding as to the meaning of common principles”; M. Delmas-Marty, ‘Comparative Law and International Law: Methods for Ordering Pluralism’, p.13 (<http://w7.ens-lyon.fr/amrieu/IMG/pdf/Delmas-M_Comp_Int_Law_10-05-2.pdf>; Last Accessed: 27.10.2011).

⁵ The terms comparative “methodology” and “analysis” are used interchangeably throughout the thesis; “comparative law” is used only in the context of its critique to describe the broader discourse.

the CJEU⁶. Rather, it essentially begs the question of why the CJEU should engage comparative analysis as a tool of the Europeanisation of private law. This question is embedded in a preliminary critical assessment of contemporary comparative law in light of which an understanding of the potentialities of “complex”⁷ comparison is advanced. This part of the thesis firstly purports to determine whether, and in what form, comparative analysis can be identified as a component of the methodological framework of Europeanisation; this discourse is concretised via an evaluation of three case examples relevant to private law development, which allows for conclusions to be drawn as to the existence and nature of comparative legal reasoning in the CJEU. Thereafter, this case-based analysis provides the foundations for a second round of evaluation, exploring further the question of why the CJEU should engage comparative analysis, in respect of which it is advanced that it might be understood not only as a tool of interpretation but also as a “second order” device of Europeanisation.

The question of “why comparative analysis” arises throughout the thesis; at the outset, it is worthwhile to provide a brief outline of the rationales underpinning the focus, at this specific time, on the putative relevance of comparative analysis, in particular, as a dimension of the CJEU’s Europeanisation of private law. There have arguably been assumptions, within and outwith legal scholarship, as to the “obvious” relevance of the engagement of comparative analysis by national, European and international courts; however, it is not satisfactory to rest on these laurels. The following paragraph therefore outlines diverse factors shaping the context of European private law development and responding to the question of “why comparative analysis”. Conflicts of a private law nature, as will be seen in Chapter 1, emerge increasingly within national legal orders, perhaps revealing the limits of European legislative efforts, and are reflected in the proliferation in the number of requests for preliminary rulings with a private law dimension; this echoes, as will become evident in Chapter 3, in the expansion, not only of the CJEU’s jurisdiction and role, but also of the scope for its interaction with national courts. Moreover, the CJEU must render interpretations that are

⁶ Such a task extends far beyond the scope of this thesis; further, there exist already a number of excellent contributions to this effort including most recently, G. Conway, *The Limits of Legal Reasoning and the European Court of Justice* (CUP, Cambridge; 2012) and G. Beck, *The Legal Reasoning of the Court of Justice of the EU* (OUP, Oxford; 2012).

⁷ The engagement of the characterisation of “complex comparison” derives from V. Gessner *et al*, ‘Introduction to the Patchwork of Legal Cultures in Europe’ in V. Gessner *et al* (eds.), *European Legal Cultures* (Dartmouth, Aldershot; 1996), pp.245-269 and M. Van Hoecke, ‘Deep Level Comparative Law’ in M. Van Hoecke (ed.) *Epistemology and Methodology of Comparative Law* (Hart, Oxford; 2004), pp.165-195.

deemed applicable not only within the courts of the referring legal tradition or culture but across the Member States, shaped by the need for the legitimacy and effectiveness of Union (private) law. Against this background, one can identify reference to diverse sources of law and mechanisms of legal development, including principles of law, transfer and judicial dialogue, notwithstanding the almost scant explication of their foundations. Furthermore, the hypothesis posited broadly advances that the engagement and analysis of (one of a number of) putatively relevant methodological discourses⁸ allows for the identification evolution of a necessarily normative approach to legal development, one which, in the context of this thesis, emerges in light of the legal and economic but also the – rarely fully explored – diverse social, political and cultural contexts of integration, and thus might facilitate the identification of a balance between Europeanisation, on the one hand, and respect for the diversity that permeates the European space, on the other. It is trite to proclaim that the European space and European legal development are characterised by a dichotomy of commonality and diversity; this is identifiable not only in respect of legal norms but also of values, identities, experiences and “ways of life”. The focus on commonality underpins the scope for economic cooperation, that is, the facilitation of the internal market, while the recognition of diversity reflects the breadth of national and potentially transnational, legal orders, cultures and traditions. The former is arguably quelled and the latter simultaneously engendered, by the diminishing significance of national boundaries and thus of territorially defined units of (legal) analysis.

It is submitted that the commonality/diversity dichotomy thus permeates the scope for the Europeanisation of private law. The nature of European private law development and the purpose for which it has been engaged, that is, the facilitation of the internal market, dictates that the discourse has long focused on the construction of a “new” *ius commune*, that is, on the legislative development and implementation of a uniform body of norms via a harmonised civil code. Similarly, calls have long been made for the development of a distinct European (legal) culture as a prerequisite to legal development. This focus on commonality finds its foundations in the very roots of the European order, that is, the existence of diversity that was, and still is, understood to undermine the development of the common market. The existence of diversity, whether legal, cultural, political or socio-economic, national, European,

⁸ A broad conceptualisation of methodological framework is adopted, reflecting the understanding that the methodologies underpinning and shaping legal development are comprised of multiple processes, not only of a practical but also a theoretical character.

international or transnational, and the recognition of the need for respect thereof, is often positioned in contrast to harmonisation, which is advanced as a means by which diversity might be eliminated, and thus the obstacles that it poses, overcome. That is to say, diversity is frequently conceived as undesirable, breeding uncertainty, incoherence and messiness; harmonisation, reflected in the convergence/divergence discourse⁹, attempts to counter this. It therefore aims to eliminate differences, and to create a more blank canvas (assuming that a blank canvas can never truly be realised¹⁰) via the promulgation and application of Union norms, on the basis of which the internal market can be facilitated, where otherwise its functioning would be undermined by the diversity - particularly that of national norms – existing across the European space¹¹. Furthermore, the relevance of the commonality and diversity discourse also extends to the cultures and traditions¹² permeating the European and global sphere, and thus to the interdependency of the national, Union and international institutions. It is therefore reflected in structural and institutional concerns, and particularly - for the purposes of this thesis – the legislative and judicial approaches to European legal development. With regard to the former, the focus on harmonisation has generally fallen on the shift from minimum to maximum harmonisation, with an apparent settling, at least for the time being, on "targeted" maximum harmonisation. However, it is submitted that legal development can be ensured only via the CJEU and the national courts, and not by the Union or national legislatures alone. While national legislatures are obliged to transpose EU legislation or risk liability, they remain free – within the bounds of primary Union law – to choose the form and method of transposition; the CJEU plays an interpretative role arising via the preliminary reference procedure, the fruits of which the domestic courts are expected to apply in a uniform manner across the Member States. Notwithstanding this framework, aiming at uniformity and thus commonality, the diversities that continue to exist dictate that the uniform implementation, interpretation and application of Union norms across the

⁹ U. Mattei and L.G. Pes, 'Civil Law and Common Law: Toward Convergence?' in K.E. Whittington, R.D. Kelemen and G.A. Caldeira (eds.), *The Oxford Handbook of Law and Politics* (OUP, Oxford; 2008), pp.267-280; R.B Schlesinger, 'The Past and Future of Comparative Law' (1995) 43 *AJCL* 477, p.477.

¹⁰ Consider the discussion in respect of the influence of the background of legal culture on legal actors in Chapter 4.

¹¹ See, G. de Búrca and J. Scott, 'Introduction' in G. de Búrca and J. Scott (eds.), *Constitutional Change in the EU: From Uniformity to Flexibility* (Hart, Oxford 2000), pp.1-8, p.2.

¹² It is on this basis that the idea of a threat to diversity, resulting from the emergence of the European legal order, and the focus on uniformity and commonality therein, arises. The notion of a "threat" is often adopted in the context of EU constitutional law, the aim of which is often billed at the national level as a discourse which aims to draw attention to the "destruction" or "disintegration" of nation state sovereignty, resulting from the "intrusion" arising from the implementation, interpretation and application of European law, not only via the legislatures but also via the courts. This idea of a threat permeates the three case examples explored below.

European space might never constitute a reality. Thus, while the Union legislature increasingly legislates on matters affecting private law, it nevertheless finds its foundations and continues to develop within the national legal orders; private law development is, it is submitted, necessarily embedded within particular historical, social, cultural, political and economic parameters, at both the national and European levels, shaped by the courts. It is for this reason that the analysis initially engages the legislative development of Union law, and subsequently shifts to the CJEU's jurisprudence.

In the context of the Europeanisation of private law, and the implementation, interpretation and application of norms contributing thereto, it is the existence of a plurality of sources of norms and dispute resolution bodies, between and amongst national, European and global societies, that establishes the link between diversity and pluralism, the existence of the former invoking the characterisation of the latter. Like diversity, pluralism is descriptive and also potentially normative¹³. Thus, it is not simply of abstract concern but rather finds its foundations in empirically verifiable fact. To take a fundamental example, one can refer to the increasingly broad body of actors engaged in the EU's evolving governance role resulting from the expansion of its functional competences; perhaps more immediately evident is the enlargement of the EU itself, a process which results in an increasingly broad (geographically, most evidently) body of Member States. It is submitted that pluralism allows for the adoption of a perspective whereby it is recognised that while diversity must be managed in some way, the European legal space need not be understood as one in which diversity must necessarily be quashed in favour of commonality or uniformity¹⁴. The different attitudes towards the manner and extent to which the respect for and protection of diversity should be afforded reflect the often-conflicting ideological underpinnings shaping and framing the Europeanisation of private law. As noted, the focus has fallen on the elimination of diversity and the promotion of commonality, fostered by the harmonisation efforts of the Union legislature and the (principally) integration-orientated interpretative approach of the CJEU. Within this thesis, the scope for an alternative is advanced, which adheres neither to the focus on commonality nor necessarily to that on diversity. Pluralism is engaged as the

¹³ Following Schiff Berman (P. Schiff Berman, 'Global Legal Pluralism' (2007) 80 *S.Cal.L.Rev.* 1237), Tuori engages with legal pluralism as both a descriptive and normative understanding, "purportedly able to tack between the shoals of old-time state sovereigntism and potentially difference-levelling universalism"; K. Tuori, 'Towards a Theory of Transnational Law: A Very First Draft' (2010) (on file with the author), p.17.

¹⁴ Indeed, the notion of "managing" requires comparative law is not understood as apolitical, per D. Kennedy, 'The Methods and the Politics of Comparative Law' in M. Bussani and U. Mattei (eds.), *The Common Core of European Private Law: Essays on the Project* (Kluwer, The Hague; 2003), pp.345-433, pp.409 *et seq.*

epistemological footing of the research project, broadly shaping the perspective adopted and supporting the understanding that legal analysis and development should avoid rigid adherence to orthodox parameters, and be bound neither by fixed conceptualisations nor static assumptions. This consideration thus rejects the confines that might limit the analysis to that which is purely legal to the exclusion of an interdisciplinary approach; more specifically, it engages the focus, in the postnational context, on the nation state, the adherence to which results in methodologies which are predominantly tied to Western legal, political and socio-economic orders and out-dated understandings of legal (and human) development¹⁵. It is therefore advanced that the EU order rests at the centre of a pluralist, multi-level system, and atop diverse national orders, cultures and traditions. The considerations outlining the background and setting the scene of the research suggest that that a contextual framework is required, one which permits consideration of the legal, cultural, political and socio-economic parameters within which the Europeanisation of private law occurs.

Against this background, the thesis seeks to uncover the relevance and use of comparative analysis, as part of a broader resurrection of the methodological discourse, in light of the understanding that “there is a structural factor in the EU which supports the necessity to compare: the complexity of the EU legal order”¹⁶. From a first order perspective, the research examines and evaluates the theoretical and methodological dimensions of comparative analysis as it has evolved, in general, and specifically in light of the emergence of Europeanisation. Notwithstanding the apparent suitability of the comparative methodology, the appropriateness of the comparative framework as it currently exists is not taken for granted; rather, the thesis engages a critical approach. This analysis calls into question the appropriateness of comparative analysis as it is currently conceived, particularly as to the extent to which it propagates the predominance of the nation state and the significance of territorial, that is, national, boundaries delineating the legal order, determinations which shape not only the identification of what is compared but also the context in which the comparative analysis is undertaken. Thereafter, in light of the identification of the locus in which Europeanisation and integration occurs and of the shifting nature of private law therein, the thesis advances a developed, complex conceptualisation of comparison, which purports to

¹⁵ R. Vogler, ‘Making International Criminal Procedure Work: From Theory to Practice’ in R. Henham and M. Findlay (eds.), *Exploring the Boundaries of International Criminal Justice* (Ashgate, Farnham; 2011), pp.105-127, p.112.

¹⁶ G. Martinico, ‘Comparative Legal Studies and European Integration: Looking at the Origins of the Debate’ (2008) 122 *Boletín Mexicano de Derecho Comparado* 859, p.879.

facilitate the analysis of legal development beyond the state. Thereafter, the thesis aims to identify, via an analysis of key case examples fundamental to Union law, whether – and if so, the way in which – comparative analysis is employed in the CJEU. This permits an examination of the CJEU as a “comparative laboratory”, that is, comparative analysis and the role and jurisdiction of the CJEU as tools of Europeanisation and integration. Before outlining the structure of the thesis, it is necessary firstly to examine its methodological approach.

II. Summarising the Methodology and the Structure of the Thesis

While the thesis cannot claim to be truly interdisciplinary, the focus on the methodological discourse underpinning Europeanisation permits an approach which engages the experiences and insights of other disciplines¹⁷ and in particular, a critical “law and...”¹⁸ evaluation of European private law development. The thesis aims to adopt a critical approach in light of the exponential expansion of the analysis of European private law development in recent years¹⁹, which has fuelled the debate and given rise to calls for a second-generation of legal scholarship²⁰. Yet it is submitted that legal scholarship alone struggles to attribute sufficient consideration to the context in which the Europeanisation of private law emerges; rather, a necessarily interdisciplinary perspective should be adopted, permitting the further elaboration of this context and of the interactions between the different legal orders arising therefrom. Furthermore, it is considered that the better understanding of this context would be facilitated by an initial re-evaluation of the traditional doctrinal, theoretical and conceptual premises upon which the Europeanisation endeavour is founded, revealing and divulging the assumptions and biases underlying its evolution²¹.

¹⁷ Following the understanding of interdisciplinarity set out by de Búrca, in G. de Búrca, 'Rethinking Law in Neofunctionalist Theory' (2005) 12 *J.Eur.Pub.Pol.* 310. Indeed, the methodological concerns associated with legal scholarship therein, at p.314, are also borne in mind here.

¹⁸ R. Van Gestel and H-W. Micklitz, 'Revitalising Doctrinal Legal Research in Europe: What About Methodology?' in U. Neergaard *et al* (eds.), *European Legal Method: Paradoxes and Revitalisation* (Djøf Publishing, Copenhagen; 2012), pp.25-74.

¹⁹ Recent developments, including the publication of the Draft Common Frame of Reference, the drafting and implementation of the Consumer Rights Directive and the drafting of the proposal for a Common European Sales Law, hereinafter, the DCFR, CRD and pCESL, respectively.

²⁰ F. Cafaggi and H-W. Micklitz, (eds.), *European Private Law After the Common Frame of Reference* (Edward Elgar, Cheltenham; 2010), pr.ix.

²¹ This line of thinking has been facilitated by the series of ‘Why...’ seminars at the EUI, in Florence.

Thus, the lines of analysis that emerge from the exploration of the nature of integration and Europeanisation in Part I advocate a socio-legal approach to the analysis of European legal development. It transpires that this approach is relevant not only in respect of the acknowledgement of the context of integration and Europeanisation, in light of the pluralism that permeates the European space but also for the understanding of complex comparison advanced, and the assessment of the constitution and jurisdiction of the CJEU. The thesis therefore aims to further develop the contextual perspective and in doing so, makes the argument for the adoption of a more open yet necessarily more complex understanding of comparison – than those outlined and critiqued in the first section of Chapter 3 - in order to better understand the Europeanisation of private law and the context, not only in which it occurs but in which comparative analysis might be engaged in its development. Explored in more detail below²², the legal cultural perspective is advanced as an alternative point of reference both in respect of the determination of what is being compared and the way in which it is compared, and the perspective adopted in respect of legal development, more broadly. For these purposes, the exploration of the conceptualisations of culture – general and legal – and tradition is deemed to be relevant; this is particularly true in respect of two dimensions of the comparative methodology – namely, the unit of analysis (that is, what is being compared), and the way, or context, in which comparison is undertaken – but also permeates the thesis as a whole, reflecting the need for a contextual framework, as outlined above. The terms of culture, legal culture and tradition are frequently used interchangeably; thus, it seems necessary to provide some clarification as to the way in which they will be employed for the purposes of the thesis.

As has been outlined above and as will become clear from Parts I and II, the nation state has long constituted the predominant reference point in both private and comparative law; that is to say, for the purposes of micro-comparative legal analysis, the focus has been on the component parts of the national legal system, namely doctrinal legal rules, concepts, decisions and institutions. These legal systems have been classified – by virtue of divergent factors²³ -

²² See Chapter 2.

²³ Most significantly, R. David and J.E.C. Brierley, *Major Legal Systems of the World Today: An Introduction to the Comparative Study of Law* (The Legal Classics Library, Delran; 3rd edn., 2000), (considering the “parent” tradition of the legal system); and thereafter, K. Zweigert and H. Kötz, *Introduction to Comparative Law* (T. Weir trans.) (OUP, Oxford; 3rd edn., 1998), pp.66-68 (employing the notion of “legal style” to characterise systems). See, more recently, J.M. Smits, 'Law Making in the European Union - On Globalization and Contract Law in Divergent Legal Cultures' (2007) 67 *La.L.Rev* 1181, p.1183, who looks to “common history, their sources of law and their predominant mode of legal thought”.

as legal families via macro-comparative analysis. While it is recognised that the legal families approach attributes consideration to the scope for the increasing interdependence of legal orders, cultures and traditions, defining one legal order in terms of the other, it is not adopted as a point of reference herein²⁴; rather, the disadvantages of classification in general, and of the legal families taxonomy in particular - namely their Eurocentric, reductivist, overly-positivist and generalising nature - as epistemological tools²⁵ are recognised. Furthermore, it is considered that the notion of legal system or order alone fails to provide for an appreciation of legal development in context; this is reflected in Merryman's distinction between system, understood as "an operating set of legal institutions, procedures and rules" and tradition, as "a set of deeply rooted, historically conditioned attitudes, about the nature of law, about the role of law in society and the polity, about the proper organisation and operation of a legal system...the legal tradition relates the legal system to the culture of which it is a partial expression. It puts the development of the legal system in cultural perspective"²⁶. In particular, it is submitted that the reference to legal system or order alone fails to bring to the fore the significance of shifting conceptualisations of (private) law as they emerge in the socio-economic, political and cultural, as well as legal, contexts of Europeanisation.

Legal culture and tradition are often employed interchangeably; thus, at the outset, it seems worthwhile to consider the way in which both are understood. Patrick Glenn's insightful text on legal traditions forms the basis for the distinction engaged for the purposes of this thesis. He rejects, in favour of legal tradition, both legal system and legal culture as points of reference, predominantly on the basis of the vagueness and ambiguity inherent in culture and the understanding that both culture and system are "eminently reifiable concept[s]"²⁷. Patrick Glenn advances that tradition encompasses four dimensions, namely its core, its rationale, the

²⁴ Merely as one of the "broad epistemic matrix of macro-comparative law" that exist; J. Husa, 'Legal Families' in J.M. Smits (ed.), *Elgar Encyclopedia of Comparative Law* (Edward Elgar, Cheltenham; 2006), pp.382-392, p.384.

²⁵ H. Patrick Glenn, 'Comparative Legal Families and Comparative Legal Traditions' in M. Reimann and R. Zimmermann (eds.), *The Oxford Handbook of Comparative Law* (OUP, Oxford; 2006), pp.421-440.

²⁶ J.H. Merryman and R. Pérez-Perdomo, *The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America* (Stanford University Press, Stanford; 3rd edn., 2007), p.2. See also, significantly, H. Patrick Glen, *Legal Traditions of the World: Sustainable Diversity in Law* (OUP, Oxford; 4th edn., 2010).

²⁷ Patrick Glenn defines culture and tradition as "contrasting concept[s]" with "important epistemological differences" and tradition as "captured information"; H. Patrick Glenn, 'Legal Cultures and Legal Traditions' in M. Van Hoecke (ed.), *Epistemology and Methodology of Comparative Law* (Hart Publishing, Oxford; 2004), pp.7-20, p.10.

way in which it understands change, and the manner in which it relates to other traditions²⁸; similarity and commonality, in terms of processes, are deemed to be identifiable between legal traditions, particularly in respect of their institutions, principles and rules, features and historical development²⁹. Historical development is of particular significance, in light of its connection – in terms of continuity – with the past³⁰. That is to say, it is via the communication of ideas and “normative information”³¹ that the past can be connected to the present and from which tradition derives its dynamic nature; underscoring this link, Patrick Glenn identifies tradition in “the content and flow of large bodies of normative information over time and over space”³². It is on this basis that tradition must be understood to extend beyond the state and the focus on the norms derived therefrom³³; broadly, it shapes societies and identities³⁴, which evidently might exist beyond the state. Notwithstanding, one key difficulty is identifiable, which would limit the engagement of tradition for the purpose of this thesis, in respect of the Europeanisation of private law broadly, and the development of the comparative methodology in particular; that is to say, and as Patrick Glenn recognises, while tradition does extend beyond the “facts” of which the system is constituted, it does not encompass the entirety of normative content³⁵. The focus on the flow of information and ideas is maintained to the disregard of “law in action” and the significance of behaviour more broadly. Thus, to the extent that the thesis aims to “open up” comparative analysis as part of the methodology of European legal development - and particularly in respect of judicial development as it occurs within a broader global context - it is submitted that the notion of tradition is too narrow to be engaged alone.

From a methodological perspective, and particularly that of comparative analysis, the significance attributed to culture will shape the context in which the analysis is undertaken, highlighting the scope for an analysis beyond legal rules and on “law in context”. It is

²⁸ Patrick Glenn, *Legal Traditions of the World* (n.26), pr.xxxvi.

²⁹ Patrick Glenn, *Legal Traditions of the World* (n.26), p.12.

³⁰ Not in the negative, static sense in which it might have come to be used; i.e. in light of colonisation. Patrick Glenn, *Legal Traditions of the World* (n.26), p.12, and M. Krygier, ‘Law as Tradition’ (1986) 5 *Law and Philosophy* 237.

³¹ H. Patrick Glenn, ‘A Western Legal Tradition?’ *International Association of Procedural Law* 2009, p.7; Patrick Glenn, ‘Comparative Legal Families and Comparative Legal Traditions’ in Reimann and Zimmermann, *The Oxford Handbook of Comparative Law* (n.25), notably at p.438 for the “monothetic” nature of the taxonomic process, or “limited feature classification”.

³² H. Patrick Glenn, ‘A Concept of Legal Tradition’ (2008) 34 *Queens.L.J.* 427, p.431.

³³ Patrick Glenn, ‘A Concept of Legal Tradition’ (n.32), pp.438-440.

³⁴ Patrick Glenn, *Legal Traditions of the World* (n.26), pp.33-38.

³⁵ H. Patrick Glenn, ‘Comparing’ in E. Özüncü and D. Nelken (eds.), *Comparative Law: A Handbook* (Hart, Oxford; 2007), pp.91-108, p.104.

therefore submitted that culture, tradition and identity should be deemed relevant to the identification of what is being compared; for the purposes of highlighting the perspective of the contextual framework within which legal orders interact, reference is also made to the notion of culture. Notwithstanding, it is recognised that general culture is notoriously difficult to define and brings to the fore various conceptual difficulties; this is evidently clear from, for example, the attempts of the United Nations' committees to define and conceptualise culture³⁶. Broadly, it has been conceived as a "way of life"³⁷ or as "a context, something within which [events, behaviors, institutions and processes can be intelligibly] – that is, thickly – described"³⁸. As culture is employed as a tool to explain the shaping of political and ideological aims, it is distinguished from that which is determined biologically; it is understood as "those aspects of human activity, which are socially rather than genetically transmitted"³⁹. It is a difficult concept to "pin down" given that it has developed over a number of years and has come to escape concrete definition⁴⁰. The problematics of culture arise from its lack of clarity and the context in which it has predominantly been conceived. In respect of its potential to provide a contextual perspective of legal development, it has been asserted on the one hand that the notion of (legal) culture is too vague to be of any satisfactory use⁴¹, and on the other that "it is as good as any other"⁴². With regard to the context in which it has evolved, the problematic dimension of engaging culture for the purpose of the thesis arises from the inherent, mutual connection between culture and the emergence of the nation state; one function of culture has been, and continues to be, the propagation of commonality, reflected in the notion of the unity of the group which is ultimately conceived – within the state – as nationality. It is on this basis that the potential

³⁶ For example, UNCHR, 'General Comment 23' on the Rights of Minorities (08.04.1994), UN Doc. CCPR/C/21/Rev.1/Add.5: "culture manifests itself in many forms".

³⁷ The UNESCO Declaration on Cultural Diversity, UNESCO General Conference, 31st Session, 02.11.2001, the Preamble of which defines culture as "the set of distinctive spiritual, material; intellectual and emotional features of society or a social group...in addition to art and literature, lifestyles, ways of living together, values systems, traditions and beliefs", existing "at the heart of contemporary debates about identity, social cohesion, and the development of a knowledge-based economy". See also, UNCESCR, 'General Discussion' on the Right to Take Part in Cultural Life, 7th Session, UN Doc E/C.12/1992/2, para.213 and Art.15 International Covenant on Economic, Social and Cultural Rights (16.12.1966) A/RES/21/2200 in respect of "culture as a way of life".

³⁸ C. Geertz, *The Interpretation of Cultures: Selected Essays* (Basic Books, NY; 1973), p.14.

³⁹ A. O'Hear, 'Culture' in E. Craig (ed.), *Routledge Encyclopedia of Philosophy* (Routledge, London; 1998), pp.185-186, p.185.

⁴⁰ Patrick Glenn, 'Legal Cultures and Legal Traditions' in Van Hoecke, *Epistemology and Methodology of Comparative Law* (n.27), pp.8-10.

⁴¹ Patrick Glenn, 'Legal Cultures and Legal Traditions' in Van Hoecke, *Epistemology and Methodology of Comparative Law* (n.27), p.11.

⁴² L.M. Friedman, *The Republic of Choice – Law, Authority and Culture* (HUP, Cambridge; 1990), p.213; see also, J. Bell, 'English Law and French Law – Not So Different?' (1995) 48 *Current Legal Problems* 63, p.64.

reification of culture arises, that is, as static, caught in its 19th century conceptualisations⁴³.

Legal culture is conceived as merely one dimension of a broader understanding of culture. By invoking the notion of legal culture, culture can be understood as being “conditioned” within a particular context; that is to say, it is contextualised in order to understand “how individual decision-making is conditioned by the language of normative discussion, the set of historical reference points, the range of solutions proposed in the past, the institutional norms taken for granted, given a particular context of repeated social interaction”⁴⁴. It is submitted that both culture and legal culture are constantly changing and dynamic; as such, neither need be conceived within national confines⁴⁵ as European law emerges within an increasingly globalised context and as boundaries and territorial lines become increasingly blurred. Culture is therefore advanced as a perspective, open to the socio-economic, political, legal and cultural dimensions of law, having the broader potential of uncovering “law in context”, “law in action” or ‘living law’⁴⁶; it is therefore engaged as a flexible reference point, reflecting cultural prejudices that exist, which are inherently connected to the dominant understandings and interpretations of society⁴⁷.

Moreover, different “societal cultures” exist, accounting for “the full range of human activities, encompassing both public and private life. These societal cultures are typically associated with national groups”⁴⁸. At the national level, societal culture invokes notions of citizenship; however, as noted, the focus need not be on the national. Rather, culture can be bound in the values of the individual or group of individuals, which make up the “collective”: “culture...is always a collective phenomenon, because it is at least partly shared with people who live or lived within the same social environment where it was learned”⁴⁹. When social

⁴³ Patrick Glenn, ‘Legal Cultures and Legal Traditions’ in Van Hoecke, *Epistemology and Methodology of Comparative Law* (n.27), p.10.

⁴⁴ J. Webber, ‘Culture, Legal Culture and Legal Reasoning: A Comment on Nelken’ (2004) 29 *Aus.J.Leg.Phil.* 25, p.32.

⁴⁵ Friedman, drawing a distinction between internal, the legal culture of the specialised, and external, the legal culture of the general, rejects any assertion of the strict autonomy of law, to the extent that law need not be specifically tied to the nation state; Friedman, *The Republic of Choice* (n.42), pp.3-4.

⁴⁶ D. Nelken, ‘Law in Action or Living Law? Back to the Beginning in Sociology of Law’ (1984) 4 *Legal Studies* 157, pp.169 *et seq.*

⁴⁷ A. Watson, ‘Legal Culture v. Legal Tradition’ in M. van Hoecke (ed.), *Epistemology and Methodology of Comparative Law* (Hart, Oxford; 2004), pp.1-6.

⁴⁸ W. Kymlicka, *Multicultural Citizenship* (OUP, Oxford; 1995), p.75.

⁴⁹ G. Hofstede, *Cultures and Organizations - Software of the Mind* (Profile Books, London; 1991), p.5. It is worth noting that Patrick Glenn’s understanding of tradition find connections with the notion of localised or contextualised culture, to the extent that it must be consistently felt in a particular context; further, the notion of

relations are considered, there is greater scope for understanding the way in which culture is shaped by local practices undertaken in everyday life and the way in which individuals, forming part of certain groups whether national or otherwise, might affect the development of the law, not only in relation to the formation and promulgation of norms but in respect of their interpretation and application, that is, law in practice. Thus, it is possible to identify contexts, with varying rationales (political, social, economic), in which (legal and other) actors and private citizens can come together to influence and shape legal development; these groups might arise in legal practice, or might include civil society groups, and public and private organisations, for example, consumer organisations and trade unions⁵⁰. These groups need not necessarily exist within the nation state; rather, their constitution, membership and operation might cut across national boundaries, attributing a regional or transnational character thereto. Indeed, general culture has been invoked as knowledge or as “mental software”⁵¹ following Hofstede’s concept of culture, encompassing that which has been learned⁵² through thinking and acting⁵³ and is subsequently reflected in “the integrated system of learned behaviour patterns which are characteristic of the members of a society”⁵⁴. Legrand’s elaboration on the notion of *mentalité*, per Hoebel, is developed below⁵⁵; it is engaged in the analysis of the constitution and composition of the CJEU – encompassing the backgrounds and experiences of the judges and AGs, the *référéndaires*, the lawyers appearing before the CJEU, the members of the Council and the Commission, the national judges who refer and the private parties who bring actions before national courts – as a space for comparative analysis, in Chapter 4.

Given that culture has a breadth of objectives, which might differ depending on the purpose for which it is engaged, it is submitted that it is sufficiently flexible to be instrumentalised for

“consistency” allows for a connection to be drawn with Hofstede’s understanding of culture as a learned phenomenon.

⁵⁰ R. Sefton-Green, ‘The European Union, Law and Society: Making the Societal-Cultural Difference’ in T. Wilhelmsson *et al* (eds.), *Private Law and the Many Cultures of Europe* (Kluwer, The Hague; 2007), pp.37-55, p.38, referencing the French strikes against *le droit*, 2006-296, 31.03.2006, on “*contrats première embauche*” and “*contrats nouvelle embauche*” (labour contracts of an indeterminate period).

⁵¹ This is also true in legal scholarship: J. Smits, ‘Legal Culture as Mental Software: Or, How to Overcome National Legal Culture?’ in T. Wilhelmsson *et al* (eds.), *Private Law and the Many Cultures of Europe* (Kluwer, The Hague; 2007), pp.141-151.

⁵² Hofstede, *Cultures and Organizations* (n.49), p.5.

⁵³ Hofstede, *Cultures and Organizations* (n.49).

⁵⁴ E.A. Hoebel, *Anthropology: The Study of Man* (McGraw-Hill, NY; 3rd edn., 1966), p.5.

⁵⁵ P. Legrand, ‘Antiqui Juris Civilis Fabulas’ (1995) 45 *Univ.T.L.J.* 311, p.317, following the work of Lévy-Brühl; M. Vovelle, *Idéologies et Mentalités* (Galimard, Paris; 1982), p.22.

the purposes of the analysis undertaken in the thesis⁵⁶. As Hendry highlights, for example, culture might facilitate unity on the one hand, and diversity on the other; this can be derived from one communication of the Commission in which it provides that the EU has not only the goal of “preserv[ing] the specific aspects of Europe’s many cultures” but “develop[ing] a feeling of belonging to a shared culture”⁵⁷. Herein, culture is also invoked with identity and the (subjective, objective⁵⁸ or “intersubjective”) notion of “belonging”. For the purposes of the demand advanced for a developed understanding of complex comparison in respect of the Europeanisation of private law, the concept of culture is engaged in two respects: on the one hand, as a putative component part of the identification of what is being compared, and on the other, as a perspective allowing for the determination of the context in which comparison is and should be undertaken, against the background of the European space as a construct of commonality and diversity. The legal-cultural perspective to which reference is made throughout therefore forms part of the outcome, as well as part of the starting point of the analysis; the understanding of comparison advanced in Chapter 3 engages the cultural perspective as a component part, yet its evaluation also affords scope for this perspective to be developed. Thus, throughout the thesis, an attempt is made to integrate the two dimensions of analysis, and to draw distinctions where relevant.

The analysis is theoretical and case-based; this explains the structure of the thesis, and the “two rounds” of analysis undertaken. In light of the background advanced in Part I, comparative analysis is engaged as a potential tool of legal development, that is, of Europeanisation (of private law in particular) and integration; comparative analysis, as it is currently conceived is evaluated in Chapter 3, following which a developed understanding of

⁵⁶ For example, Ewick and Silbey engage culture as a means of paving roads into research on institutional and social change (P. Ewick and S.S. Silbey, ‘The Structure of Legality – The Cultural Contradictions of Social Institutions’ in R.A. Kagan, M. Krygier and K. Winston (eds.), *Legality and Community – On the Intellectual Legacy of Philip Selznick* (U.Cal. Press, Berkeley; 2002), pp.149-165); similarly, the World Bank, engages culture as a means of determining the extent to which “people’s attitudes, beliefs, and assumptions determine their social environment, and how much does the social environment determine their attitude, beliefs, and assumptions?” (World Bank, ‘Legal Culture and Judicial Reform’ (<<http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTLAWJUSTINST/0,,contentMDK:23115500~menuPK:2035153~pagePK:210058~piPK:210062~theSitePK:1974062~isCURL:Y,00.html>>; Last Accessed: 14.08.2013); its understanding of the putative influence and impact of culture lacks clarity (or is very flexible): it makes reference to the notion that “cultural inertia will always inhibit rapid change”, yet on the other hand, asserts that “culture is quite malleable”.

⁵⁷ European Commission, ‘A Community of Cultures: The European Union and the Arts’ (European Commission, Brussels; 2002), p.5 and J. Hendry, *Unitas in Diversitate? On Legal Cultures and the Europeanisation of Law*, PhD Thesis (EUI, Florence; 2009), p.18.

⁵⁸ J. Carens, *Culture, Citizenship and Community: A Contextual Exploration of Justice as Even-Handedness* (OUP, Oxford; 2000), p.15.

complex comparison is advanced. Following the case-based analysis, a second round of analysis, wherein the CJEU is evaluated as a “comparative laboratory”, is undertaken.

The first part of the thesis therefore locates the Europeanisation of national private law in the context of European integration and an initial attempt is made to uncover the various dimensions of integration – including those of a legal, economic, social, political and cultural nature – relevant to its Europeanisation. The nation state foundations of private law are explored, embedding private law development in the national orders, cultures and traditions. The legislative construction of European private law, in the *acquis* and as part of the framework of PIL rules, is outlined, and its limitations set out. The commonality and diversity that permeates the European space is recognised, which gives rise to the exploration of the need for a single and distinct European culture or tradition as a prerequisite to European legal development. A pluralist perspective, one which engages the multi-level structure of private law and which aims to avoid methodological nationalism, is instead advanced. This background provides the foundations for a preliminary exploration of the shifting understandings of private law. It is in this context that an initial evaluation of the use of comparative analysis as a tool of Europeanisation and integration is undertaken. An outline is then provided of the development of approaches to comparative analysis; their broad theoretical and methodological merits and deficits are analysed, both in general, and as these appertain to European private law development. While it is recognised that these approaches have been studied, critiqued and refined over time, it is submitted that the current conceptualisations of comparative analysis retain certain problematics – particularly in respect of the identification of what is compared and the context in which comparison is undertaken – which undermine its potential as a tool of legal development. Thus, a developed approach of complex comparison is advanced; this approach does not constitute a model but rather, a framework. At this stage, it is recognised that the role of the legislature must be complemented by the roles adopted by other actors, including the courts, academics, private parties and increasingly, civil society bodies. Thus, the focus shifts to the scope for the judicial development of private law, beginning with an outline of the jurisdiction and role, as well as structure and constitution, of the CJEU. European private law has been described as “a stipulative not a legislative definition”⁵⁹; that is to say, the manner in which private law is

⁵⁹ F. Cafaggi, ‘The Making of European Private Law: Governance Design’ in F. Cafaggi and H. Muir-Watt (eds.), *Making European Private Law: Governance Design* (Edward Elgar, Cheltenham; 2008), pp.289-351, p.289.

understood, conceptualised and evolves, is largely dependent on the interpretation of norms by the CJEU and their application and enforcement in the national courts, as well as scholarly analysis and evaluation. The preliminary reference procedure is engaged as a context in which the interactions between the national and EU levels can be identified and analysed, the CJEU providing a forum for dispute resolution beyond the nation state⁶⁰; the rationale underlying this choice is explored in more detail in Chapter 4. The “spaces” of interaction to which the preliminary reference procedure gives rise are explored via three case examples (on state liability, consumer contract law and fundamental rights). Each case example is situated at the crossroads of national private and European law, and at the crossroads of law, politics, culture and society⁶¹. The case examples provide the basis for analysis and beg the question of whether the Europeanisation of private law via the CJEU provides for an appropriate, epistemological lens through which such development can be evaluated and on the basis of which the most appropriate manner for its evolution can be developed⁶². Against the background of the analysis of the case examples, the legal sources of comparative analysis are outlined, the rationales underpinning its engagement identified and the relevance of comparison to the CJEU’s engagement with its “meta-mechanisms” of private law development evaluated. Essentially, this analysis constitutes a second round of evaluation, that is, of the CJEU as a “comparative laboratory”⁶³, which returns the focus to the question of “why comparative analysis” and facilitates the understanding of comparison as a component theoretical and methodological device of the Europeanisation of private law. The concluding chapter aims to bring together the various dimensions of analysis, allowing for conclusions to be drawn as to the engagement with comparison, particularly as it is employed by the CJEU, as a tool of Europeanisation and integration.

⁶⁰ S. Sassen, ‘The Participation of States and Citizens in Global Governance’ (2003) 10 *Ind.J.Glob.Leg.Stud* 5, p.12; R.S. Wai, ‘The Interlegality of Transnational Private Law’ (2008) 71 *Law and Contemporary Problems* 107, p.119.

⁶¹ See for example, A. Bakardjieva-Engelbrekt, ‘Institutional Theories, EU Law and the Role of Courts for Developing a European Social Model’ in U. Neergaard *et al* (eds.), *The Role of Courts in Developing a European Social Model: Theoretical and Methodological Perspectives* (Djøf Publishing, Copenhagen; 2010), pp.299-351, pp.319-320. The identification of the “crossroads” dimension is perhaps not obvious at first glance, and more easily identifiable in certain areas than in others; the relationship between the (private) individual, the state and the market permeates.

⁶² R. Zimmermann, ‘Europeanization of Private Law’ in M. Reimann and R. Zimmermann (eds.), *The Oxford Handbook of Comparative Law* (OUP, Oxford; 2006), pp.539-578, p.545

⁶³ “Comparative laboratory” is engaged from Hilf ‘The Role of Comparative Law in the Jurisprudence of the Court of Justice of the European Communities’ in De Mestral *et al*, *The Limitation of Human Rights in Comparative Constitutional Law* (n.3); see also, Cafaggi, ‘The Making of European Private Law’ in Cafaggi and Muir Watt, *The Making of European Private Law* (n.59), p.291.

PART ONE: LOCATING THE EUROPEANISATION OF PRIVATE LAW IN THE FRAMEWORK OF EUROPEAN INTEGRATION

Chapter 1. Articulating the Europeanisation of Private Law in the Context of the Integration Endeavour

In light of the changes substantiated in the Lisbon Treaty, it is now timely to undertake an evaluation of the evolution of the Europeanisation of private law, and elaborate on the foundations and normative perspective underpinning its legislative construction and judicial elaboration, in the context of the form and substance of European integration.

Integration and Europeanisation should be distinguished, as they are by no means analogous; notwithstanding, there exists no coherent or settled understanding of either. It is submitted that both must be construed as interdisciplinary, embedded in the contexts – political, cultural, socio-economic and legal – of the Member States. Integration is economic⁶⁴, political⁶⁵, social⁶⁶ and legal⁶⁷ and cultural; these dimensions are potentially conflicting on the one hand, and increasingly intertwined and interdependent on the other. A (necessarily incomprehensive) outline of the primary theories of European integration will be provided immediately below, integrating these dimensions; the aims of integration are multiple, and cannot be said to be only economic or legal or political, or some combination thereof. Thereafter, the nation state foundations of private law are explored, and the understanding of the embeddedness of private law in the nation state is uncovered. Against this background, the legislative basis of the European private law project is set out, engaging this embeddedness, and in particular, the commonality and diversity discourse outlined in the introduction, the limitations of the former and the existence of the latter, reflecting key rationales for the initial engagement of the relevance of comparative analysis.

⁶⁴ B. Balassa, *The Theory of Economic Integration* (R.D. Irwin, Homewood; 1961).

⁶⁵ E. Haas, *The Uniting of Europe* (Stanford University Press, Stanford; 1958).

⁶⁶ É. Durkheim, *The Division of Labor in Society* (W.D. Halls trans.) (Free Press, NY; 1984).

⁶⁷ P. Pescatore, *The Law of Integration: Emergence of a New Phenomenon in International Relations Based on the Experience of the European Communities* (Sijthoff, Leiden; 1974), published in French in 1972 and re-published with preface in 2005 as P. Pescatore, *Le droit de l'intégration: Emergence d'un phénomène nouveau dans les relations internationales selon l'expérience des Communautés Européennes* (Bruylant, Bruxelles; 2005).

I. From National Foundations: The Evolution of European Integration and the Europeanisation of Private Law

i. From Paris With...?

The roots upon which European integration is founded, the aims and objective underlying and the mechanisms by which it is promoted, have been transformed and reformed in the past sixty years. Multiple and divergent theories of integration have been advanced, and from the outset, the incomplete and contested nature of the integration project has been highlighted⁶⁸. This section briefly outlines these orthodox theories to highlight the diverse dimensions – legal, political, cultural and socio-economic – of integration, for the purposes of establishing the pertinent context of Europeanisation and illustrating the changing character of the European private law project.

The Treaty of Paris⁶⁹, signed in 1951 by the six founding Member States of what is now the EU namely France, the Federal Republic of Germany, Belgium, Italy the Netherlands and Luxembourg, came into force in July 1952 and established the European Coal and Steel Community. By bringing the states together functionally and economically in “a large and dynamic common market”⁷⁰ – Schuman having advocated the creation of a Europe at the heart of which was the construction of political and economic ties⁷¹ – the Treaty purported to facilitate a shift in the relationship between the previously isolated nation states, undercutting nationalist tendencies; states were forced to cooperate in a shared political discourse to ensure that there would never again be war within Europe⁷²: “*L'Europe n'a pas été faite, nous avons*

⁶⁸ Z. Bañkowski and E. Christodoulidis, ‘The European Union as an Essentially Contested Project’ in Z. Bañkowski and A. Scott (eds.), *The European Union and its Order: The Legal Theory of European Integration* (Blackwell, London; 2000), pp.17-30.

⁶⁹ Treaty Establishing the European Coal and Steel Community, 18.04.1951 (hereinafter, ECSC Treaty).

⁷⁰ J. Monnet, ‘A Ferment of Change’ (1962) 1 *J.Com.Mar.Stud.* 203, p.205.

⁷¹ “Franco-German production of coal and steel as a whole place under a common High Authority, within the framework of an organisation open to the participation of the other countries of Europe”; Déclaration Schuman du 9 mai 1950, (<http://www.robert-schuman.eu/pdf/Declaration_du_9_mai_1950.pdf>; Last Accessed: 18.01.2013); One of the founding documents of the EU, alongside the ‘Political Resolution’ of the Hague Congress of May 1948.

⁷² See D. Mitrany, ‘Working Peace System’ (The Fabian Society, London; 1943), on the one hand, on avoiding war, not through federation but through the diminishing of the significance of nationalism via the non-political transfer of powers, and the creation of various and diverse international organisations with functional purpose, including shipping, aviation and rail; this approach can be compared with the federalists, with their roots earlier but rising again from resistance movements (see the Ventotene Manifesto of 1941), who were also functional, but who advocated the transfer of political power from the nation state to establish, post-WWII, a break from the previous order of nation states. Mitrany deemed Monnet a “federal functionalist” D. Mitrany, ‘Working Peace

eu la guerre”⁷³. This purported “ideal” vision of Europe reflects one dimension of Weiler’s “political messianism” legitimising European integration (in addition to input and output legitimacy)⁷⁴. The Treaty Establishing the European Economic Community and that Establishing the European Atomic Energy Community, were signed in Rome in March 1957⁷⁵. The Treaties of 1957 (in force 1958)⁷⁶ and 1965 (in force 1967)⁷⁷ merged the institutions of these three communities; the European Economic Community became the European Community in 1993 per the Treaty on the European Union.

The consequent (necessary) interaction between states required their surrender of national sovereignty in certain policy areas. It became clear that existing international relations theories were inadequate to explain European integration; since the outset, neofunctionalism and intergovernmentalism have been engaged. Neofunctionalist approaches were developed by Haas in the 1950s, and subsequently, by Stone Sweet and others in the 1990s. Haas understood European integration to reflect the construction of the EU polity, by virtue of which “political actors in several distinct national settings are persuaded to shift their loyalties, expectations and political activities towards a new centre...the end result of a process of political integration is a new political community, superimposed over the pre-existing ones”⁷⁸; Lindberg developed a similar “political” understanding, stopping short of reference to an “end result”⁷⁹. Neofunctionalism predominantly sought to uncover the rationale and manner of interaction between states⁸⁰; engaging the critique of the realism – the focus on the security of the state – of IR scholarship of the 1950s⁸¹, it was considered that the construction of greater economic interdependence amongst states, as well as increased social, and political interdependence (in respect of the free movement of goods, services, capital and

System’ (The Fabian Society, London; 1943), to the extent that he aimed similarly at placing control in the High Authority of the ECSC, later to become the Commission.

⁷³ “A united Europe was not made and we had war”; Déclaration Schuman du 9 mai 1950, (<http://www.robert-schuman.eu/pdf/Declaration_du_9_mai_1950.pdf>; Last Accessed: 18.01.2013).

⁷⁴ J.H.H. Weiler, ‘The Political and Legal Culture of European Integration: An Exploratory Essay’ (2011) 9 *Int.J.Const.Law* 678. See also, G. de Búrca, ‘Europe’s Raison d’être?’ (2011) 18 *Maas.J.Eur.Comp.Law* 418.

⁷⁵ Treaty Establishing the European Economic Community and Treaty Establishing the European Atomic Energy Community, 25.03.1957 (hereinafter, EEC Treaty and Euratom Treaty).

⁷⁶ Convention on Certain Institutions Common to the European Communities, 25.03.1957.

⁷⁷ Treaty Establishing a Single Council and Single Commission of the European Communities, 08.04.1965.

⁷⁸ Haas, *The Uniting of Europe* (n.65), p.16.

⁷⁹ L. Lindberg, *The Political Dynamics of European Economic Integration* (Stanford University Press, Stanford; 1963), p.149.

⁸⁰ E. Haas, ‘The Study of Regional Integration: Reflections on the Joy and Anguish of Pretheorizing’ (1970) 24 *International Organization* 606, p.610.

⁸¹ R. Jackson and G. Sørensen, *Introduction to International Relations: Theories and Approaches* (OUP, Oxford; 3rd edn., 2007), p.39.

labour) would generate further integration through “spillover” effects, both political and functional in their nature⁸². Spillovers of transnational activities of supranational actors seemingly promotes further integration eventually leading to increased centralisation⁸³, and thereafter, the gradual emergence of the EU as an independent, self-interested⁸⁴ and self-sustaining, supranational political body. Reconceptualisations of neofunctionalism in the 1980s and 1990s highlighted the legal dimension of integration, with key European legal principles “penetrating” or “overlying” national norms, shaping the interrelation between the national and EU legal orders⁸⁵.

Neofunctionalism attributed little significance to the power of the state; it has typically been contrasted with intergovernmentalist theories, developed primarily by Hoffman in the 1960s⁸⁶. The political context of the 1960s was relevant, as a period during which the Member States realised they could exercise “resistance” in respect of transfers of sovereignty. Intergovernmentalism therefore engaged with integration’s reliance on nation state “preferences”, the state being “obstinate” not “obsolete”⁸⁷. Like neofunctionalism, it emerged from political science and specifically, realist IR accounts, but with a different focus, namely one that highlighted the self-interested and rational behaviour of nation states, and their role in controlling the international political order (as opposed to the dominance of international organisations). In the 1990s, Moravcsik revisited the theory of intergovernmentalism in his explication of liberal intergovernmentalism, where integration “can best be explained as a series of rational choices made by national leaders”⁸⁸, determined predominantly by (diverging) economic considerations. These preferences reveal policy discourses (reflecting “societal objectives”) arising in and between the Member States, reflecting the spread of power in intergovernmental bargaining, concretised initially in the treaties⁸⁹.

⁸² Lindberg, *The Political Dynamics of European Economic Integration* (n.79), p.10.

⁸³ R. Dehousse and J.H.H. Weiler, ‘The Legal Dimension’ in W. Wallace (ed.) *The Dynamics of European Integration* (Pinter, London; 1990), pp.242-260, pp.243-246.

⁸⁴ I. Bache *et al*, *Politics in the European Union* (OUP, Oxford; 3rd edn., 2011), p.10.

⁸⁵ A-M. Burley and W. Mattli, ‘Europe Before the Court: A Political Theory of Legal Integration’ (1993) 47 *International Organizations* 41, p.43.

⁸⁶ S. Hoffman, ‘Obstinate or Obsolete? The Fate of the Nation State and the Case of Western Europe’ (1966) 95 *Daedalus* 862.

⁸⁷ Hoffman, ‘Obstinate or Obsolete?’ (n.86).

⁸⁸ A. Moravcsik, *The Choice for Europe: Social Purpose and State Power from Messina to Maastricht* (Cornell University Press, Ithaca; 1998), p18. It is worth noting that Moravcsik rather attempted to develop Hoffmann’s theory, by recognising and dealing with the criticisms advanced against neofunctionalism; A. Moravcsik, ‘Preferences and Power in the European Community: A Liberal Intergovernmentalist Approach’ (1993) 31 *J.Com.Mar.Stud.* 473; his theory is rather characterised as “liberal intergovernmentalism”.

⁸⁹ Moravcsik, *The Choice for Europe* (n.88), pp.18 et seq.

Supranational governance scholarship of the 1980s and 1990s, which revisited neofunctionalism⁹⁰ (and attempted to cut through the dichotomy of intergovernmentalism⁹¹), identified three component parts: “(1) actors and groups with transnational goals and interests (which we label “transnational society), (2) supranational organizations with autonomous capacity to resolve disputes and to make rules, and (3) the rule system (or normative structure) that defines the polity”⁹². Transnational society encompasses actors engaging in transnational activity, for which European rules are necessary; trade is of particular significance. The EU constitutes a set of functionally differentiated regimes within which different degrees of supranationalism exist as transnational society emerges at different speeds in different policy areas. The role of institutions is highlighted; thus, through empirical analysis, Sandholtz and Stone Sweet examined the role of the CJEU and the Commission, considering how integration facilitated therein differs that to which the Member States alone would necessarily facilitate, these institutions being understood “not [as] simple agents of the Member States, but trustees exercising fiduciary responsibilities under the treaties”⁹³. Institutionalism, developed initially in the US, whereby institutions are conceived as sets or systems of rules⁹⁴, highlights the importance of institutions and their influence on political outcomes⁹⁵ and further the manner in which multiple institutional membership affects substance and participation in decision making, interests and identity⁹⁶. Over time, the role attributed to the nation state decreases: “integration is the process by which the EC gradually but comprehensively replaces the nation state in all its functions”⁹⁷.

⁹⁰ The key pieces being, Burley and Mattli, ‘Europe Before the Court: A Political Theory of Legal Integration’ (n.85); W. Mattli and A-M. Slaughter, ‘Law and Politics in the European Union: A Reply to Garrett’ (1995) 49 *International Organization* 183 and W. Mattli and A-M. Slaughter, ‘Revisiting the European Court of Justice’ (1998) 52 *International Organization* 177.

⁹¹ With liberal intergovernmentalism understood as the key “rival” to supranational governance; W. Sandholtz and A. Stone Sweet, ‘Neo-Functionalism and Supranational Governance’ in S. Weatherill *et al* (eds.), *The Oxford Handbook of the European Union* (OUP, Oxford; 2012), pp.18-33, p.28.

⁹² Sandholtz and Stone Sweet, ‘Neo-Functionalism and Supranational Governance’ in Weatherill *et al*, *The Oxford Handbook of the European Union* (n.91), p.20.

⁹³ Sandholtz and Stone Sweet, ‘Neo-Functionalism and Supranational Governance’ in Weatherill *et al*, *The Oxford Handbook of the European Union* (n.91), p.22.

⁹⁴ D.C. North, *Institutions, Institutional Change and Economic Performance* (CUP, Cambridge; 1991), p.3.

⁹⁵ B. Rosamond, *Theories of European Integration* (MacMillan, Houndsmills; 2000), p.113.

⁹⁶ T. Christiansen *et al*, ‘The Social Construction of Europe’ (1999) *Journal of European Public Policy* 528, p.529.

⁹⁷ A. Stone Sweet and W. Sandholtz, ‘European Integration and Supranational Governance’ (1997) *Journal of European Public Policy* 297, p.299.

The focus now turns to the theorising of legal integration. In the early 1970s European law was initially conceptualised as “*le droit de l’intégration*”⁹⁸ following which the “integration through law” school emerged at the European University Institute in Florence. Weiler *et al* highlighted, in the context of the existing neofunctionalist, intergovernmentalist and supranationalist scholarship, the “dual character of supranationalism”, namely, the intertwining of legal and political processes⁹⁹; law is understood as “both the object and agent of integration”, (that is, integration of law, and integration through law, respectively¹⁰⁰) and as “one of many social instruments harnessed to achieve a wider societal objective”, highlighting the need to understand “the relationship between law and society in the understanding of the instrumental character of law in ordering and reacting to societal experiences”¹⁰¹. The social and cultural dimensions of legal integration are often neglected, owing to (and resulting in) the focus on facilitation of the internal market, via negative and positive integration. The hierarchical and federalist nature of the “integration through law” project is identifiable in the legislative and judicial institutions through the focus on centralised government, and consequently, the aim of imposing, in the national systems, a uniform European law. Weiler and Dehousse subsequently began to identify different “parameters of integration”¹⁰², based on diverging degrees of centralisation, hierarchy and uniformity. While “politics” has been advanced as the “dependent variable”¹⁰³ in integration, law is understood as the “independent variable”, shaping the context in which various actors (legal, political and social) act, the effect of this conduct, and the way in which such conduct is relevant to law as social ordering. Thus while the “law and integration” discourse finds its foundations in positivism (also true of neofunctionalism), it highlights the need to understand better the relationship between law, politics and society.

Stone Sweet, engaging the import of the CJEU, conceives of European integration in three stages¹⁰⁴. From the Treaty of Rome, the period of 1958-1970 reflects the undertaking of structure and institution building, and the emergence of constitutionalisation as a process

⁹⁸ Pescatore, *Le Droit de l’intégration* (n.67).

⁹⁹ J.H.H. Weiler, ‘The Community System: The Dual Character of Supranationalism’ (1981) *Y.Eur.Law* 267.

¹⁰⁰ Dehousse and Weiler, ‘The Legal Dimension’ in Wallace, *The Dynamics of European Integration* (n.83), pp.243-246.

¹⁰¹ M. Cappelletti, M. Secombe and J.H.H. Weiler (eds.), *Integration Through Law: Europe and the American Federal Experience* (de Gruyter, Berlin; 1985), p.42 and p.50, respectively.

¹⁰² Dehousse and Weiler, ‘The Legal Dimension’ in Wallace, *The Dynamics of European Integration* (n.83), pp.243-246.

¹⁰³ de Búrca, ‘Rethinking Law’ (n.17), p.314.

¹⁰⁴ A. Stone Sweet, ‘Integration and the Europeanisation of Law’, *Queen’s Papers on Europeanisation*, No 2/2002, pp.3-5.

through the construction of the principles of supremacy and direct effect. Thereafter, until the mid-1980s, the development of the internal market was facilitated through negative integration, that is, by a number of CJEU judgements enforcing the prohibition of “quantitative restrictions on imports and all measures having equivalent effect”¹⁰⁵ in the Treaty of Rome and removing national barriers to trade¹⁰⁶. The passing of the Single European Act in 1986, introducing Art.100A¹⁰⁷ into the Treaty of Rome and providing for a shift from unanimity to qualified majority in legislative activity, reflected the emergence of positive integration. Stone Sweet *et al* attempted to illustrate the significance of the activist CJEU in the construction and shaping of supranational governance, and thereafter the influence of judicial power on markets and politics in promoting further economic activity and leading to ever-deeper integration¹⁰⁸. Placing this discussion in the context of EU law, Stone Sweet conceptualises integration as “a self-reinforcing, causal system that has driven integration and given the EU its fundamentally expansionary character”¹⁰⁹. Increased trade leads to a higher number of preliminary references, through which the litigants in the case can challenge national compliance with EU law, with the expectation that the CJEU will require compliance, or remove barriers, thus increasing the potential for trade; the process is then circular or “self-sustaining”¹¹⁰. The extent to which law and politics are satisfactorily understood in neofunctionalist, intergovernmentalist and supranational governance discourses has been challenged¹¹¹ (considering in particular, the predominant focus has been on the CJEU, perhaps at the expense of other actors, including the EU legislature)¹¹². The “activist” CJEU has long been relevant¹¹³, increasingly in respect of the construction of an area of freedom, security and justice. The reciprocal nature of CJEU activities, via the preliminary

¹⁰⁵ Art.30 EEC, (and exports, in Art.34 EEC); now Art.34 and 35 TFEU, respectively.

¹⁰⁶ Measures having equivalent effect as quantitative restrictions - C-8/74 *Procureur du Roi v Dassonville* [1974] ECR 837; Discussing of justified restrictions - C-120/78 *Cassis de Dijon* [1979] ECR 649.

¹⁰⁷ Art.100A EEC subsequently became Art.95 EC and is now Art.114 TFEU.

¹⁰⁸ A. Stone Sweet, *The Judicial Construction of Europe* (OUP, Oxford; 2004), and the chapters therein, with Brunell on ‘Constructing a Supranational Constitution’, and thereafter on the trade, sex equality and environmental protection.

¹⁰⁹ Stone Sweet, *The Judicial Construction of Europe* (n.108), p.14.

¹¹⁰ Stone Sweet, ‘Integration and the Europeanisation of Law’ (n.104), pp.7-12.

¹¹¹ In addition, there is no clear understanding of the conception of law with which there is engagement, although it seems to be largely positivist; de Búrca, ‘Rethinking Law’ (n.17), p.318.

¹¹² Although, see G. Tsebelis and G. Garrett, ‘The Institutional Foundations of Intergovernmentalism and Supranationalism in the European Union’ (2001) 55 *International Organization* 357, which focuses on the CJEU, the Commission, the Parliament and the Council, in respect of their interactions and the changing significance of their roles, and the developing Treaty foundations of the EU.

¹¹³ L. Azoulay and R. Dehousse, ‘The ECJ and the Legal Dynamics of Integration’ in S. Weatherill *et al* (eds.), *The Oxford Handbook of the European Union* (OUP, Oxford; 2012), pp.350-364.

reference in Art.267 TFEU¹¹⁴, creates a particular incentive relationship on both the European court and the national courts to develop EU law, simultaneously justifying politically the actions of each. The jurisdiction and role of the CJEU is further explored in Part II.

This brief outline of integration theories can be developed to encompass those in which weightier significance is attributed to the social and cultural dimensions of the European project, broadly understood. Constructivism – while also subject to critique from sociology itself¹¹⁵ – highlights the “social construction” of Europe; “simply put, constructivism claims that social ideas and discourses matter for European integration”¹¹⁶. Thus, these “social discourses” which underpin national and European identities, render the social embeddedness of actors and institutions relevant as dependent variables. The social and cultural perspectives are reflected in institutionalist theories¹¹⁷, in respect of which the focus on the development of Europeanised bodies of rules via transnational societies brings to the fore questions concerning the relationship between these actors and networks¹¹⁸. Notwithstanding the assertion that the EU is “the most densely institutionalized international organization in the world”¹¹⁹, its formally institutionalised nature is rarely deemed wholly satisfactory from a sociological perspective. Moreover multi-level governance is one of the more recent theories that purport to engage with the significance of relevant actors and institutions¹²⁰. Broadly, its proponents argue that no single theory comprehensively explains integration, but that its complexity and dynamic nature can only be contemplated in respect of the (non-hierarchical) engagement with and exercise of power and authority¹²¹. The EU is understood as a space in which various actors and institutions are engaged in a diverse range of policy-processes at multiple levels; as such, it is unsatisfactory to consider only the national and supranational levels at the expense of sub-national and regional governance spaces.

¹¹⁴ Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012 (hereinafter, TFEU).

¹¹⁵ See S. Saurugger and F. Mérand, ‘Does European Integration Theory Need Sociology?’ (2010) 8 *Comparative European Politics* 1, p.5.

¹¹⁶ F. Schimmelfennig, ‘Constructivist Approaches’ in S. Weatherill *et al* (eds.), *The Oxford Handbook of the European Union* (OUP, Oxford; 2012), pp.34-47, p.35

¹¹⁷ In particular, broad reference can be made to the rational choice, sociological and historical aspects of “new institutionalism”.

¹¹⁸ Saurugger and Mérand, ‘Does European Integration Theory Need Sociology?’ (n.115), p.7.

¹¹⁹ M. Pollack, ‘New Institutionalism’ in A. Wiener and T. Diez (eds.), *European Integration Theory* (OUP, Oxford; 2004), pp.125-143, p.137.

¹²⁰ G. Marks *et al*, ‘European Integration from the 1980s: State-Centric v. Multi-level Governance’, (1996) 34 *J.Com.Mark.Stud.* 341.

¹²¹ A. Héritier, *Policy-Making and Diversity in Europe* (CUP, Cambridge; 1999).

While it has been criticised as “always out of step with society”¹²², law promotes social change and itself can be changed, reflecting social development. The same is true of society; it not only promotes legal change but changes itself with legal developments. This interdependence is diverse and concerns not only the relationship between law and society, and the acceptance of each in both, but also more specifically, the interrelation of the national and the European in the formation, interpretation and application of Union law. It has been recognised that “integration through law in the European Union will only be effective if positive legal rules connect with a socio-cultural environment that can bolster their claim to social validity”¹²³. Thus, Bohannon claims that for law to be socially valid, it must be “doubly institutionalised”, as legal and social norms¹²⁴, existing within a particular political context, namely that of the nation state, which constitutes the relevant “cultural unit” as the authoritative figure facilitating the institutionalisation¹²⁵. Beyond the state, this “unitary” cultural dimension cannot be said to exist in the same form. The interaction of the national and supranational reflects the continuing existence of a diverse body of legal cultures and traditions¹²⁶. The national socio-economic and cultural context, beyond a “positivistic” legal perspective¹²⁷, must be recognised as relevant in the context of the Europeanisation of private law, and the methodologies of legal development, particularly in respect of ensuring the effective implementation of EU (private) law in the national systems.

Shifts in the understanding of integration over the past fifty years are clearly identifiable, from the theorising of European integration in international relations scholarship to the subsequent engagement of the legal dimension of integration in the supranational governance theories of Stone Sweet *et al* and the “integration through law” framework of the Florence School. The economic, political and legal dimensions are evident in and transcend these shifts, arguably expected, given the context in which they were developed and linked, both

¹²² P. Bohannon, ‘The Differing Realms of Law’ (1965) 67 *American Anthropologist* 33, p.37.

¹²³ D. Augenstein, ‘Identifying the European Union: Legal Integration and European Communities’ in D. Augenstein (ed.), *Integration Through Law’ Revisited: The Making of the European Polity* (Ashgate, London; 2012), pp.99-112, p.102.

¹²⁴ Bohannon, ‘The Differing Realms of Law’ (n.122).

¹²⁵ Bohannon, ‘The Differing Realms of Law’ (n.122), p.38.

¹²⁶ However it should be noted that Bohannon, writing in relation to the ‘treble institutionalisation’ of international law in the mid-1960s, still advances a dualist conception of international law, which is subject to much critique today.

¹²⁷ The focus on positivism is reflected in the dominance of convergence in European private law development, although it can similarly be reflected in the notion of the EU as an independent, functionalist order; as expressed unforgettably in C-6/64 *Costa* [1964] ECR 585, Judgement, para.593; “...the EEC Treaty has created its own legal system which, on entry into force of the treaty, became an integral part of the legal systems of the Member States, which their courts are bound to apply...[as an] independent source of law”.

temporally, and disciplinary. It is clear that the other dimensions of integration, namely the legal, social and cultural perspectives¹²⁸ must be considered, particularly in respect of the scope for a common identity, underpinning which is the (arguable) need for the existence of a European culture, as a putative precondition of integration¹²⁹.

In both respects, the breadth of the legal, political, cultural and socio-economic diversities of the legal cultures and traditions is relevant. Herein, enlargement, discussed where relevant throughout the thesis, is significant. The Fifth Enlargement, the largest in its history, saw the ten countries joining the EU in 2004¹³⁰, followed by two more in 2007¹³¹; in July 2013, Croatia became the 28th state to accede¹³². The political dimensions of each stage of enlargement are clear; enlargement constitutes a period of transition and transformation for both the new and “old” Member States. Democratic change, particularly relevant in the most recent phase, often precedes and underpins enlargement¹³³; the recently transitioned democracies of the former Communist states were brought into the European order within the context of the peace-building function of the Union, and the broader aim of creating greater democratic stability and improving the relationship between the former Eastern bloc and the West. From an economic perspective, enlargement (constituting a reciprocal opening up of markets) aims to engender trade (the Fifth Enlargement increased the EU’s population of consumers and traders by more than 100 million). However these dimensions are not only political and economic; agreement to contribute and develop a European identity constitutes one of the basic conditions of membership, alongside demonstration of democratic status and

¹²⁸ Thus, for example, Hooghe and Marks, who, in arguing that there is a need to move beyond the economic dimensions of integration, on which neo-institutionalists and intergovernmentalists seem to focus, attempt to engage with the political, social and cultural dimensions of integration, and in particular, the significance of community and identity; L. Hooghe and G. Marks, ‘A Post-Functionalist Theory of European Integration: From Permissive Consensus to Constraining Dissensus’ (2008) 39 *Brit.J.Pol.Sci.* 1.

¹²⁹ The scope for the dialogue discourse, discussed in detail in Chapter 9, to be engaged arises with regard to the focus on interaction, interdependence and impact, i.e. spillovers. It has therefore been advanced that dialogue reflects neofunctionalist – and particularly, revised legal-orientated – understandings of integration. Thus, for example, the idea of a European identity, and the values underlying, is relevant to neofunctionalist accounts of integration; the existence of distinct national identities – and the desire to preserve these – is reflected in intergovernmentalism (in respect of delineating integration); furthermore, the idea of the “socialisation” of actors constituting the transnational community is of inherent relevance to supranational governance, building on neofunctionalism.

¹³⁰ Namely, Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, and Slovenia.

¹³¹ Namely, Romania and Bulgaria, according to the Commission, these countries constitute part of the Fifth (2004) Enlargement (http://ec.europa.eu/enlargement/5th_enlargement/index_en.htm; Last Accessed: 18.04.2013).

¹³² Treaty Concerning the Accession of the Republic of Croatia to the EU, OJ L 112, 24.04.2012.

¹³³ This can be identified in the candidate states: Turkey, Iceland, Macedonia, Montenegro, Serbia and those recognised as potential candidates, including Kosovo.

illustration of respect for human rights¹³⁴. The satisfaction of such values is deemed necessary as “the new Member States will defend their national values not necessarily as an attempt to promote protectionist aims, as sometimes still happens in the former Member States, and will likewise occur in these new countries, but rather in order to make the Community rules workable in the context of their different market conditions, and in the context of their social, legal, and cultural values”¹³⁵. In this respect, enlargement as a process might operate to highlight considerations – including diversities in rules, policies and values between national traditions and the EU – which might otherwise have been dismissed given the dominant focus on economic integration, facilitated by the construction of a uniform body of EU norms¹³⁶. The significance of these considerations are brought to the fore in light of the shift in understanding of the EU from that of a purely economic order to a public one in which fundamental rights are key¹³⁷, reflecting hand-in-hand the realities of EU legal development, namely the rise of rights, values and constitutional pluralism and the Europeanisation of private law.

The following section takes one step back and explores the nation state foundations of private law, which allows for the clarification of the link between the development of the nation state, the emergence of national culture and tradition and the evolution of private law. The multiplicity of Member States in the European space dictates that this embeddedness is multiplied. The European space comes to constitute one of conflict (reflected in the foundations and rationale of the commonality/diversity discourse outlined in the introduction), not only of legal orders (and the norms applicable therefrom) but also of cultures and traditions more broadly. The nature of these conflicts is set out, with references to examples arising from the Europeanisation of private law; the way in which conflicts of

¹³⁴ Conditionality for EU membership includes Copenhagen Criteria and the implementation of the *acquis* (European Commission, ‘Preparation of the Associated Countries of Central and Eastern Europe for Integration into the Internal Market of the Union – White Paper’ COM(1995) 163 final, 3.05.1995) with the EU being in a predominantly dominant position, having the political power and establishing the necessary requirements to be satisfied. The key dimensions of the Copenhagen Criteria include stability of institutions: guarantee of democracy, of the rule of law and of human rights; a market economy, encompassing “destatization” and ensuring the existence of privately-owned enterprises; ability to cope with competition and market forces of the Union; ability to engage membership obligations (the *acquis communautaire*), ensuring satisfaction of the aims of EMU (economic and monetary union) and political union.

¹³⁵ M Józson, ‘The Enlarged EU and Mandatory Requirements’ (2005) 11 *ELJ* 549, p.549.

¹³⁶ G. de Búrca and J. Scott, *Constitutional Change in the EU: From Uniformity to Flexibility?* (Hart, Oxford; 2000).

¹³⁷ Azoulai and Dehousse, ‘The ECJ and the Legal Dynamics of Integration’ in Weatherill *et al*, *The Oxford Handbook of the European Union*, (n.113).

applicable law and jurisdiction are normally resolved – that is, via private international law¹³⁸ norms – is explored in light of Europeanisation. This brings the discussion to the legislative foundations of European private law development in Chapter 1, following which the thesis aims to bring the recognition of the – legal, political, cultural and socio-economic – embeddedness, not only of national private law but also of the Europeanisation of national private law, to the fore.

ii. Recalling the Nation State at the Core of Private Law

This section engages with the national foundations of private law, identifying its significance in contemporary private law development. The nation state may be understood as a relatively recent (and for some, relatively short-lived) phenomenon; “proto-states” (city states and multi-ethnic states) existed prior to the emergence of the “nation states” of the 18th and 19th centuries. The political, cultural and socio-economic context shaping the emergence of the nation state has significantly influenced the way in which law has been understood and developed within territorial confines. Of particular relevance in the context of private law was the significance of the *ius commune*, which emerged from the evolution of legal thought throughout the late 11th and early 12th centuries, following the rediscovery of the *Corpus Juris Civilis*. Bologna, boasting the first modern university¹³⁹, reigned as the centre of “transnational” legal education¹⁴⁰ and facilitated the dissemination of knowledge and legal reasoning skills (of the styles of the Glossators and Commentators) by lawyers in their native environments¹⁴¹. The authority of this education and the common body of law that emerged (of common legal language and style of thought), together with the breadth of its influence across Europe, provided the foundations for the development of the *ius commune*¹⁴². Subsequent to the demise of the Holy Roman Empire, the subsequent emergence of the state-nation from the city-state and thereafter the rise of the nation state and national law, paralleled the demise of the *ius commune*. Particular geographical areas experienced the “reception” of Roman law. Merryman notes that this process was “formal” in some environments with Roman law forming part of domestic law as binding law; in others, it was informal and

¹³⁸ Hereinafter PIL.

¹³⁹ J.H. Merryman, *The Civil Law Tradition* (Stanford University Press, Stanford; 2nd edn., 1985), p.9.

¹⁴⁰ P.G. Stein, *Roman Law in European History* (CUP, Cambridge; 2005), pp.53-54.

¹⁴¹ P.G. Stein, *Roman Law in European History* (CUP, Cambridge; 2005), pp.53-54; Merryman, *The Civil Law Tradition* (n.139), p.9.

¹⁴² Merryman, *The Civil Law Tradition* (n.139), p.9.

received via education on the basis of its “intellectual superiority”¹⁴³. Nationalistic tendencies engendered the entrenchment of national law; the 19th century saw a wave of successful codification movements across the continent. The significance of the *ius commune* has generated support both for the construction of a new *ius commune*¹⁴⁴ and assertions that what can be identified as “law beyond the state” is really nothing new but reflects what previously existed, e.g. the *lex mercatoria*. The nation state came to signify a jurisdiction delineated by national borders, the authority within which identifies itself – by virtue of its sovereignty – as having exclusive control over the exercise and enforcement of their power within this territory. It is a two-fold concept, the geopolitical dimension of which is reflected in the territorially defined notion of state, and the cultural or ethnic¹⁴⁵ dimension in that of nation, both of which are understood to coincide¹⁴⁶.

Within this context, the relevant concept of law, of legal “system”¹⁴⁷, of authority, legality¹⁴⁸ and normativity¹⁴⁹, comes to the fore. Authority has been attributed to the nation state in various guises and rationales since its emergence. For Kelsen, the sovereign state was authoritative; “law” was understood to find its validity in a single basic norm (*Grundnorm*), which derived its validity from the sovereignty of the state. Law making was therefore limited to the state, its legislature and administrators; the courts could act, where so authorised, in their capacity as state institutions, to attribute legal recognition to custom¹⁵⁰. Hart understood authority in terms of primary and secondary rules of recognition attributed to the state¹⁵¹ but did not explicitly base his conception of law on the state. He also conceived of norms existing prior to the emergence of the state as law, attributing a rule of recognition to legal texts. Indeed, for Alexy, doctrinal legal writing and scholarship – if authoritative

¹⁴³ Merryman, *The Civil Law Tradition* (n.139), p.9.

¹⁴⁴ R. Zimmerman, ‘Savigny’s Legacy: Legal History, Comparative Law and the Emergence of a European Legal Science’ (1996) 112 *LQR* 576.

¹⁴⁵ In reality, these terms should not be mixed; for purposes of brevity, the distinctions are not explored.

¹⁴⁶ J. Dhanapala, ‘Globalization and the Nation State’, University of Colorado at Boulder, Colorado, 07.03.2001 (<http://www.un.org/disarmament/HomePage/HR/docs/2001/2001Apr07_Colorado.pdf>; Last Accessed: 14.04.2012).

¹⁴⁷ M. Hesselink, ‘A European Legal Method?’ (2009) 15 *ELJ* 20, p.42. The CJEU nevertheless highlights the significance of the concept of legal system: “...an international agreement cannot affect...the autonomy of the Community legal system, observance of which is ensured by the Court...”; Joined Cases C-402-415/05 *Kadi* [2008] ECR I-6351, Judgement, para.282.

¹⁴⁸ Pescatore considers that primary and secondary Union law must exist within a broader context of a “Community legality”: Pescatore, *The Law of Integration* (n.67), p.75.

¹⁴⁹ H. Kelsen *The Pure Theory of Law* (M. Knight trans.) (U.Cal. Press, Berkeley: 2nd edn., 1967), chps.V-VII, esp. pp.214-217.

¹⁵⁰ N. Jansen, *The Making of Legal Authority: Non-Legislative Codifications in Historical and Comparative Perspective* (OUP, Oxford; 2010), p.2.

¹⁵¹ H.L.A. Hart, *The Concept of Law* (Clarendon Press, Oxford; 2nd edn., 1994), pp.79 *et seq.*

imperio rationis – is relevant, even if only persuasive, where there are gaps in the legislative text¹⁵². Hart engaged the notion of a hierarchy of norms, where one norm or set of norms must be deemed supreme; the basic rule of recognition was intended to unify (a plurality of) legal systems. Such unification was only possible in the state context, prior to which a plurality of sets of norms existed but could not be so ordered due to the absence of hierarchy¹⁵³. As the power and significance of the legislature increased with the emergence of the state and contemporaneous codification movements, it was the existence of gaps in legislation that determined the role of institutions, and particularly that of the courts (which, at the time, differed across legal systems¹⁵⁴) in law-making¹⁵⁵.

The emergence of the unified nation state brings to the fore the significance of coherence and systemisation in (private) law. The 19th century saw the emergence of codification in continental European legal orders; while aiming to promote systemisation and coherence, the codification process operated to indirectly emphasise existing divergences (in substance and procedure), both within and between national legal systems. The “era of codification” emerged contemporaneously to the nation state; its strength throughout the 20th century has provided the predominant basis for the maintenance of these distinctions and for the divergent appreciations of (private) law at the national level; a circular reasoning exists: the “state-making” role of private law¹⁵⁶ on the one hand, and state instrumentalism¹⁵⁷, on the other. The *Code civil* of 1804 constituted an important dimension of Napoleon’s state-making process and further entrenched the relationship between the state and private law¹⁵⁸ via the promotion of private activities supported by private law principles (including individual freedom and private property). Germany should be considered as a special case, owing to the

¹⁵² R. Alexy, *Theorie der juristischen Argumentation* (Suhrkamp Verlag, Berlin; 1983), pp.334 *et seq.*

¹⁵³ Jansen, *The Making of Legal Authority* (n.150), p.3.

¹⁵⁴ For example, following the French Revolution, the dominance of the judge (and particular, the community from which the judge derived), was challenged. This led to a destruction of the previously strong role of the judge; even today, jurisprudence is not officially acknowledged as an authorised source of law (Merryman, *The Civil Law Tradition* (n.139), pp.36-43; cf. M. de S.-O.-l’E. Lasser, ‘The European Pasteurization of French Law’ (2005) 90 *Cornell.L.Rev.* 995). The English state experienced no analogous revolutionary period; rather the judiciary retained and developed its law-making power.

¹⁵⁵ Jansen, *The Making of Legal Authority* (n.150), pp.1-2.

¹⁵⁶ See Caruso who makes reference to “State-making” (development of postnational institutions) and state-making (re the nation state); D. Caruso, ‘Private Law and State-Making in the Age of Globalisation’ (2006) 39 *NYU.J.Int.Law.Pol.* 1.

¹⁵⁷ R. Michaels and N. Jansen, ‘Private Law Beyond the State? Europeanization, Globalization, Privatization’ (2006) 54 *AJCL* 843; furthermore, states could use their law for the goals they identified as relevant, the determination of which also came to shape private law: T. Wilhelmsson, ‘Varieties of Welfarism in Contract Law’ (2004) 10 *ELJ* 712.

¹⁵⁸ J. Gordley, ‘Myths of the French Civil Code’ (1994) 42 *AJCL* 459.

fact that its civil code, the BGB, was developed several decades after German unification¹⁵⁹. Unity and coherence, of particular significance in the German legal system, given the dominance of Pandectism, which embraced “the ethics of autonomy with which Kant endowed the renaissance legal science around 1800”¹⁶⁰ could not be said to derive from the BGB (itself a product of legal scholarship) but rather from the evolution of German legal scholarship throughout the 19th century. Codification allowed disputes to be categorised, engendering greater predictability and certainty in dispute resolution and ultimately promoting knowledge of the law and its dissemination¹⁶¹. The understanding of the civil code as a fundamental structural characteristic of any civilian tradition reflects a broad generalisation. While the continental traditions were, and often continue to be, defined by practices of deduction and analogical reasoning from the text of their civil codes, the common law is described as an “organic creature”, rejecting codified law¹⁶² - and its accompanying certainty and predictability – in favour of gradual, case-by-case development¹⁶³. Yet these features cannot definitively distinguish the civilian system from the common law. Nor is it true that the sole source of the civilian law is the legislature, and that of the common law, the judiciary¹⁶⁴; if such a claim could ever be verified, it must now be understood as a fallacy. It was anticipated that the civil code would provide a coherent, systematised and comprehensive account of the law¹⁶⁵; it is questionable whether this expectation has been realised¹⁶⁶. The manner in which one understands the aspirations of codification depends on the significance one attributes to the potentially unrestrained, “exaggerated and unrealistic expectations”¹⁶⁷ of

¹⁵⁹ C. Joerges, ‘The Science of Private Law and the Nation State’ in F. Snyder (ed.), *The Europeanisation of Law – The Legal Effects of European Integration* (Hart, Oxford; 2000), pp.47-82, pp.47-48.

¹⁶⁰ F. Wieacker, *A History of Private Law in Europe with Particular Reference to Germany* (T. Weir trans.) (Clarendon Press, Oxford; 1995), pp.341-349 and p.484.

¹⁶¹ Caruso highlights, that via this reference to “organising categories...codification allowed the incipient state to perform an allegedly essential function of government”; Caruso, ‘Private Law and State-Making in the Age of Globalisation’ (n.156), p.25.

¹⁶² The efforts of Bentham being ultimately unsuccessful; see J. Bentham, *Legislator of the World: Writings on Codification, Law and Education*, (P. Scholfield and J. Harris, eds.) (Clarendon, Oxford; 1998).

¹⁶³ F.A. Hayek, *Law, Legislation and Liberty: Rules and Order* (U.Chicago Press, Chicago; 1973), pp.134-136.

¹⁶⁴ For example, Zweigert and Kötz’s discussion on the sources of law is based on the supposed common law/case law and civil law/legislation distinction: see, Zweigert and Kötz, *Introduction to Comparative Law* (n.23), p.71.

¹⁶⁵ The idea that national legislation is authoritative “*rationae imperii*” (provided legislated for by an authoritative body, and the proclamation of Ulpian that that which is explicated by the emperor has legal force: “*quod principi placuit, legis habet vigorem*” (Ulpian, D.I.4.I., pr.); R. Alexy *et al*, *Begriff und Geltung des Rechts* (Karl, Berlin; 2002), pp.142 *et seq.*

¹⁶⁶ For reference to this notion, see arguments cited within R. Zimmermann, ‘Codification: History and Present Significance of an Idea’ (1995) 3 *ERPL* 95, pp.103-105. Zimmermann, referring to Eastern European codification, highlights the continuing relevance of codification, appertaining to the understanding of law’s “systematic whole”.

¹⁶⁷ Zimmermann, ‘Codification’ (n.166), pp.109-110.

the postmodern context.

The focus on coherence and systemisation constitutes one reflection of the conception of the technical, that is, apolitical, nature of private law norms. Yet, law making within the state is neither merely technical nor apolitical but encompasses political, socio-economic and cultural dimensions. A circularity also exists between the development and concretisation of the nation state, the identity that arises therein, the significance of culture and legal development. The interdependence between law, culture and the unity of the state has been highlighted by different means and in divergent political, socio-economic and cultural contexts¹⁶⁸, both in France by Montesquieu, as the product of the spirit of the people, cultural and political environment¹⁶⁹, and in Germany by Savigny, in respect of the *Volksgeist*. Different attributes of general culture (and legal culture, as a localised understanding) have been invoked in state-building processes. That which was deemed common within the delineated space of the nation state was invoked as “legal culture”, utilised and concretised through codification (the civil codes having “cultural status”¹⁷⁰) or through practice (in the English courts), further consolidating the identity of nation and therein, its power, lending legitimacy and promoting coherence in the identifiable, national, bounded space¹⁷¹.

With reference to identity, Hardt and Negri engage with the construction of the people, grouped on the basis of race, that is, the imposition of the identity “representative” of the whole as “a hegemonic group, race or class”¹⁷², not only as allowing for the extinguishing of divergences within the nation, but for the construction of identity, to be distinguished from “the other”. Thus, the notion of “us” as an identity became inherently important for the construction of the nation state, for the distinction between “us” and the “other” allowed for the distinction between nations. Identity, conceived with regard to otherness (as the opposite of same), is necessarily defined in terms of what constitutes the self. It allows for boundaries to be established, including those delineating national identity; thus, self need not be understood in terms of the individual but can constitute a collective unit. Identity is deemed

¹⁶⁸ H. Dedek, ‘Law as Culture/Rights as Culture: Some Historical Thoughts on the ‘Western’ Legal Tradition’, Paper Presented at Conference on European Legal Culture, University of Oxford, (16.12. 2011) (on file with author).

¹⁶⁹ C. de Secondat, Baron de Montesquieu, *De l’esprit des lois*, Livre IX, Chapitre VI, (Barrillot, Paris; 1750).

¹⁷⁰ Merryman, *The Civil Law Tradition* (n.139), pp.31-32.

¹⁷¹ D. Patterson *et al*, ‘Statecraft, the Market State and the Development of European Legal Culture’ *EUI WP 2010/10*, p.4.

¹⁷² M. Hardt and A. Negri, *Empire* (HUP, Cambridge; 2000), pp.103-104.

to derive from shared culture; “nationhood, especially as conceived by the nationalists of early-nineteenth-century Europe, was explicitly cultural”¹⁷³. Exploring this circularity begs a number of questions. The first is structural: what are the component parts of shared culture? Arendt identifies shared culture as that “which makes it bearable to live with other people, strangers forever, in the same world, and makes it possible for them to live with us”¹⁷⁴. The criteria for the identification of that which is shared is unclear¹⁷⁵. For Arendt, it is necessary to have more than mere knowledge of the other, and more than “direct experience”. The second question is related, and is contextual and temporal: when is a shared culture recognised as such? Arguably, that which is shared is only identifiable in context: “[p]eople who belong to the same place, profession or generation do not thereby form a culture; they do so only when they begin to share...”¹⁷⁶. Law (and private law in particular) must be conceived as embedded in the plural political, historical, cultural and economic diversities of the Member States. The existence of these divergences cannot be said to be all-encompassing or perpetual; indeed, as Habermas has asserted “[o]ld loyalties fade, new loyalties develop, traditions change and nations, like all other comparable referents, are not natural givens either”¹⁷⁷. Yet the need to attribute greater recognition to “the deeply political, sociological and cultural dimensions of law”¹⁷⁸ is relevant throughout the thesis both in respect of the normative perspective of legal development and particularly, the theoretical and methodological foundations of comparative analysis. This reflects another rationale responding to the question of “why comparative analysis”. Indeed, it has been considered that the notion of “*unité dans la diversité s’imposant, le juge a dû trouver un équilibre entre le processus d’intégration et le respect des identités nationales...la méthode comparative lui a permis de contribuer à trouver cet équilibre*”¹⁷⁹.

¹⁷³ M. Herzfeld, *Cultural Intimacy: Social Poetics in the Nation-State* (Routledge, NY; 2nd edn., 2005), p.75.

¹⁷⁴ H. Arendt, ‘Understanding and Politics (The Difficulties in Understanding)’ in H. Arendt, *Essays in Understanding, 1930-1954: Formation, Exile and Totalitarianism* (J. Kohn ed.) (Schocken Books, NY; 1994), pp.307-327.

¹⁷⁵ P. Schiff Berman, *Global Legal Pluralism: A Jurisprudence of Law Beyond Borders* (CUP, Cambridge; 2012), p.144.

¹⁷⁶ T. Eagleton, *The Idea of Culture* (Blackwell, Oxford; 2000), p.37.

¹⁷⁷ J. Habermas, ‘Europe’s Post-Democratic Era’, *The Guardian*, Thursday 10.11.2011 (<<http://www.guardian.co.uk/commentisfree/2011/nov/10/jurgen-habermas-europe-post-democratic>>; Last Accessed: 19.09.2012).

¹⁷⁸ P. Zumbansen, ‘The Future of Legal Theory’ [2010] 6 *CLPE Research Paper Series* 3, p.8.

¹⁷⁹ J-D. Mouton, ‘Preface’ in R. Titigira, *La comparaison, technique essentielle du juge européen* (l’Harmattan, Paris; 2011), pr.9.

The existence of a multiplicity of legal orders within the European legal space provides that the relevant national, European and transnational institutions work within a context defined by the existence of cultures and traditions which continue to exist within the territorial boundaries of the nation state but which increasingly emerge beyond such confines. The normative perspective adopted throughout this thesis, and constructed in the preliminary chapters, asserts that the integration and legal development is not merely legal but also social, economic, political and cultural. The Europeanisation of private law is understood to emerge in a multi-level, pluralistic space (the understanding of which is explored in the following chapter), within which the scope for conflict arises¹⁸⁰.

These conflicts might arise within and between legal systems (“systemic conflicts”¹⁸¹), cultures and traditions, and between sources of law in respect of their diverse interpretations and applications in a multiplicity of dispute resolution bodies. Within legal systems, vertical conflicts¹⁸² can be identified at the national level, between lower and supreme courts; these become relevant to the development of Union law where the matter concerns Union law, and particularly where a reference is made to the CJEU. The conflict itself might shape the basis upon which the reference is made. This will be discussed in more detail below with regard to the empowering of the national court¹⁸³; reference can be made to the scope for “pitting” lower and supreme courts against each other (where, for example, lower courts are required to rule on the liability of the latter)¹⁸⁴. Within national systems, conflicts might also arise between the courts and the legislature; the obligation of the national court to ensure compliance with Union law might give rise to a conflict with that provided in domestic law by the national legislature. Reference can be made to the CJEU’s development of the national courts’ obligations to review contract terms *ex officio*, which might conflict with national

¹⁸⁰ Augenstein has highlighted that “[r]egarding law as an agent of integration, conflicts between national legal systems often reflect deeper tensions among their respective conceptions of society that European law seems unable to reconcile”, in Augenstein, ‘Identifying the European Union’ in Augenstein, *Integration Through Law Revisited* (n.123), p.102. See also N. Walker, ‘Legal Theory and the EU – A 25th Anniversary Essay’ (2005) 25 *OJLS* 581.

¹⁸¹ Conflicts which eventually contribute to the development of the system, as “positive and natural” conflicts: D. Halberstam, ‘Constitutional Heterarchy: the Centrality of Conflict in the European Union and the United States’ in J.L. Dunoff and J.P. Trachtman (eds.), *Ruling the World? Constitutionalism, International Law, and Global Governance* (CUP, Cambridge; 2009), pp.326-355.

¹⁸² Deemed vertical because of the hierarchy existing, ultimately depending on the judicial structure within the national system.

¹⁸³ For example, the national court (i.e. the lower court) might anticipate and facilitate change in the domestic order, “jumping over” the Supreme Court.

¹⁸⁴ Reference is made below to the consequences of the *Köbler* case in the state liability case example; C-224/01 *Köbler* [2003] ECR I-10239.

procedural law, and public policy. Conflicting interpretations of national and EU law might also arise and invoke the jurisdiction of the CJEU. The national courts will be obliged under certain circumstances to refer to the CJEU under Art.267 TFEU, and on the basis of consistent interpretation, to set aside national norms conflicting with the interpretation of EU law and to adapt national law to ensure compliance¹⁸⁵. “Vertical” conflicts might also arise between the national orders and the ECHR (e.g. conflicts between national rules and fundamental rights); this is outwith the scope of the thesis. However, the scope for “horizontal” conflicts at the supranational level, that is, between the ECHR and the EU, is especially relevant following the EU’s accession to the ECHR and the ECtHR’s extended scope for review. The case examples below further illustrate the scope for such conflicts; in the state liability cases, this is identified in the conflict between national norms, EU norms, and fundamental rights¹⁸⁶, and in the fundamental rights cases, between fundamental rights and freedoms.

These types of conflicts are uncovered in more detail throughout the thesis. At this stage, it is necessary firstly to consider the way in which the scope for conflict has traditionally been dealt with in the European context. It is in the area of PIL that conflicts of jurisdiction and of applicable laws have traditionally arisen and been resolved. The existence of a plurality of jurisdictions and applicable laws has therefore long been referred to PIL; thus for the conflicts lawyer, the scope for conflict is “nothing new”. However, as the Europeanisation of law continues, and as a plurality of norms continue to emerge, it is not clear that PIL can adequately deal with the breadth and nature of conflicts arising.

The limitation of the perspective derives from the orthodox understanding of PIL. On the one hand, it has long been conceived as national international private law¹⁸⁷; that is to say, while the discipline is one in which the interactions between different legal orders has been recognised, not only have these orders found their origins in the state but the rules regulating their potential conflict have also derived from the state. Furthermore, the interrelationship between PIL and politics has given rise to challenges. In the “European” context, Savigny

¹⁸⁵ For example, in *Brasserie* and *Factortame* neither under German (Art.839 BGB/Art.34 *Grundgesetz*) nor English law were the parties claiming to have suffered harm able to claim a right to reparation. Thus, at the national level, no remedy existed; consequently, the case is deemed to introduce a new remedy to national law.

¹⁸⁶ Joined Cases C-46-48/93 *Brasserie du Pêcheur* [1996] ECR I-1029, Opinion of AG Tesauero, para.49 (hereinafter, *Brasserie*); *Köbler* (n.184), Opinion of AG Léger, para.67.

¹⁸⁷ At least until the Amsterdam Treaty (Treaty of Amsterdam, OJ C 340, 02.10.1997); now Title V, TFEU.

claimed to rationalise and neutralise PIL by virtue of “technical” rules; this precluded the necessity of reference to power in favour of a logical approach to the resolution of conflicts. For the purposes of highlighting the scope for the shift in understanding of PIL from apolitical to political, it is worth noting that the nature of PIL in Europe and the conflicts of laws in the US have diverged since the American conflicts of law revolution of the mid-1900s. While European private international law remained “in the closet”¹⁸⁸, technical and ultimately, neutral, US conflict of laws was infiltrated by public and political interests, the functional dimension becoming evident with the emphasis on its regulatory character¹⁸⁹. The political dimension, condensed in the notion of power, and encompassing notions of public policy, private authority and indigenous elements (including other cultural dimensions within the national system itself), is excluded when PIL closes (the closet) on itself. In this sense, PIL constitutes a tool of the state, like private law itself.

Increasingly, PIL rules are emerging beyond the state, either in conventions (particularly those deriving from the Hague Conferences) and via the Europeanisation of PIL rules legislated at the Union level. The European *acquis* and European PIL rules reflect two key foundational elements of the legislative Europeanisation of law. It has been suggested that a shift in the approach of the EU legislature can be identified, in light of the Commission’s adoption of Option Four of the 2010 Green Paper¹⁹⁰, from one based on the codification of private law rules, to an emerging European private law based on the one hand, on the continual construction of the *acquis*, and on the other, on the notion of “optionality” as it exists in the Proposal for a Common European Sales Law¹⁹¹. PIL has long allowed parties to choose the law applicable to govern their relationship, a source of pluralism in addition to

¹⁸⁸ H. Muir Watt, ‘Private International Law as Global Governance: Beyond the Schism, from Closet to Planet’ (<http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=horatia_muir-watt>; Last Accessed: 13.05.2013).

¹⁸⁹ Muir Watt, ‘Private International Law as Global Governance’ (n.188).

¹⁹⁰ European Commission, ‘Green Paper on Policy Options for Progress Towards a European Contract Law for Consumers and Businesses’, COM(2010) 348, Option Four. Considered in more detail at the end of this Chapter.

¹⁹¹ Hereinafter, pCESL. If the parties agree to use the CESL, the choice must be one made pursuant to the within the scope of the respective national law which is applicable pursuant to Regulation (EC) No 593/2008 or, in relation to pre-contractual information duties, pursuant to Regulation (EC) No 864/2007; Preamble (10) to the ‘Proposal on a Common European Sales Law’, COM(2011) 635 final. The CESL is intended to cover the entire life-cycle of a contract; on this basis, it will also govern pre-contractual information duties (Preamble (26) to the Proposal on a Common European Sales Law). Further, Art.11 of the Proposal for a Regulation on a CESL provides that a choice of the CESL as the applicable law will cover compliance with and the remedies arising from failure to comply with pre-contractual information duties.

national, European and private regulation¹⁹². The application of the pCESL relies on the framework of PIL rules; the parties must choose the pCESL as the law applicable to govern their relationship¹⁹³. Thus, in the context of a multi-level private law, the pCESL adds another level of complexity and of necessary interrelation between with the European *acquis* and national law. For example, the Commission has stipulated that the connection between European consumer protection law and the pCESL must be maintained, arguing for their contemporaneous development¹⁹⁴. The pCESL has, in February 2014, been adopted by the European Parliament, and will pass to the Council of Ministers, in line with the co-decision procedure¹⁹⁵. The pCESL, which is based on Art.114 TFEU and recognises the cultural divergences existing between the national systems as “obstacles to cross-border trade”, derived from the sales component of the DCFR, which was itself based on a comprehensive and comparative academic analysis of national rules, encompassing extensive comparative notes, released post-publication. Yet the need to protect the diversities between the national systems is also recognised; it is considered that the pCESL’s optionality might allow for this. Indeed, the Communication accompanying the proposal provides: “[i]t is also an innovative approach because, in line with the principle of proportionality, it preserves Member States’ legal traditions and cultures whilst giving the choice to businesses to use it”¹⁹⁶. Herein, the significance attached to legal culture provides an alternative point of reference, distinct from the economic rationale underlying the European integration project; the “deeply embedded” cultural dimension of national contract law is thus brought to the fore¹⁹⁷, which seems to envisage a balancing between legal and economic, and political, social and cultural interests.

Having introduced the foundations of the legislative harmonisation of PIL norms, the next section examines the role of private law in European integration more generally, and sets out

¹⁹² J. Smits, ‘Plurality of Sources in European Private Law, or: How to Live With Legal Diversity?’ in R. Brownsword *et al* (eds.), *The Foundations of European Private Law* (Hart, Oxford; 2011), pp.323-336.

¹⁹³ In relation to the way in which the CESL might be engaged by the exercise of choice, two approaches were initially advanced: one, where by CESL would be understood as a regime which exists in addition to the sales laws available throughout the EU (i.e. as a (now, including Croatia) 29th regime) and another – which is the one which seems to have been followed, per recital 9 of the proposal – is based on the notion that the CESL constitutes a *lex specialis*, that is, a second regime within each national legal system. For a more detailed discussion, see G. Rühl, ‘The Common European Sales Law: 28th Regime, 2nd Regime or 1st Regime?’ (2012) 19 *Maas.J.Eur.Comp.L.* 148.

¹⁹⁴ European Commission, ‘A CESL to Facilitate Cross-Border Transactions in the Single Market’ COM(2011) 636 final, para.2.3.

¹⁹⁵ Text adopted available at: <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2014-0159+0+DOC+XML+V0//EN&language=EN>>; Last Accessed: 02.03.2014.

¹⁹⁶ European Commission, ‘A CESL to Facilitate Cross-Border Transactions in the Single Market’ COM(2011) 636 final.

¹⁹⁷ European Commission, ‘Common European Sales Law’, Brussels, 11.10.2011 COM(2011) 636 final, p.9.

the foundations of European private law development via the Union legislature before exploring the reach – and limitations – of these efforts; this analysis subsequently engages the role of the CJEU in Europeanisation in Chapter 4.

II. The Role of Private Law in European Integration

i. The Foundations of European Legislative Development

European integration finds its basis in the Union Treaty¹⁹⁸ and is facilitated via the Union's legislative acts, which encompasses the Europeanisation of law. The Treaty of Rome initially referenced the notion of a "Citizens' Europe", understood to encompass a focus on health and safety, and environmental and consumer protection. There exists no explicit private law legitimacy basis; the principle of subsidiarity¹⁹⁹, establishing that the EU can only act on the basis that regulation is more appropriate at the EU level than the national one, shapes EU competence²⁰⁰. Thus, private law initially developed outwith the established and explicit competences of the Union²⁰¹; the legislature has focused on general contract law (and increasingly, areas characterised as "regulatory" private law, including consumer protection). Building on Art.153 EC, and Art.3 of the Maastricht Treaty, Art.2C TEU and Art.4(2)(f) TFEU now provide that consumer protection is a matter of shared competence between the Member States and the Union²⁰². The integration of consumer protection into the Treaties has remained significant²⁰³; the provisions (with the exception perhaps of Art.38 CFR²⁰⁴) all reflect the functional connection, long drawn between consumer protection and the facilitation of the internal market²⁰⁵. The volume of secondary "private law" legislation has significantly increased since the 1990s. Building on Art.100A, EEC Treaty, the EC Treaty provided, in

¹⁹⁸ For a comprehensive overview, see P.P. Craig and G. De Búrca (eds.), *The Evolution of EU Law* (OUP, Oxford; 2nd edn., 2011).

¹⁹⁹ Art.5(1) TFEU provides that the principle of conferral shall govern the limits of the competences of the EU (limited by the principles of subsidiarity and proportionality), under which, as provided by Art.5(2) TFEU, the EU is competent to act only within the limits of the competences conferred on it by the Member States in the Treaties for the purpose of achieving particular aims and objectives. See also, C-376/98 *Germany v Parliament and Council* [2000] ECR I-08419, para.84: private law directives should aim "to contribute to the proper functioning of the internal market and achieve a high level of consumer protection by approximating laws".

²⁰⁰ Art.5, TFEU.

²⁰¹ See amongst others, S. Weatherill, *EC Consumer Law and Policy* (Longman, London; 1997).

²⁰² Art.2C(2)(f) Treaty of Lisbon, OJ C 306, 17.12.2007.

²⁰³ Consider Art.12 TFEU, Art.1114 TFEU and Art.169 TFEU.

²⁰⁴ Charter of Fundamental Rights of the European Union OJ C 326, 26.10.2012.

²⁰⁵ EEC, 'Preliminary Programme of the European Economic Community for a Consumer Protection and Information Policy', OJ C 92/2, 25.04.1975, II.B.19(a)(i), providing that 'purchasers of good or services should be protected against the abuse of power by the seller...".

respect of Arts.94 and 95 EC, for the approximation of laws for the promotion of the internal market (now, Art.114 TFEU). Most “private law” legislation now finds its basis in the facilitation of the internal market, via Art.114 TFEU. The drafting of European legislation involves a multiplicity of participants; the three main institutions of the EU - the Commission, Parliament and Council – prepare and agree upon legislative norms via the ordinary legislative (previously co-decision) procedure²⁰⁶, while the European Economic and Social Committee and the Committee of the Regions provide consultative opinions throughout the drafting process. Fundamentally, the Commission proposes draft laws, which are negotiated and thereafter adopted by the Council of the EU and Parliament. The Commission promotes the interests of the EU broadly²⁰⁷, while the Council promotes its political priorities. The Parliament and Council (comprised of national heads of state and allowing national governments to set out their own interests) review drafts, propose amendments and adopt proposals; adopted laws are then implemented at the national level, and the Commission, together with the CJEU via the infringement procedure, ensures that laws are satisfactorily implemented and compliance is satisfied. Primary law, establishing the framework of the Union Treaty structure, provides the legitimacy basis for secondary EU legislation; the latter body, constituting regulations, directives and decisions, must therefore reflect the principles and aims of the EU as set out in the Treaty structure. Evidently, many of the issues arising are inherently related to EU competences in the area of private law; this is an issue extending far beyond the boundaries of this part, however it is worth providing a rudimentary outline of Union competence in this context.

The EU legal order, with its own sources of law, is intended to be autonomous in its nature, distinct from international and national law and yet forms a key part of each. With the removal of the pillar structure, the Union acquired international legal personality, it having previously been reserved under the first pillar. Post-Lisbon, Art.288 TFEU establishes the "legal acts" of the Union, namely, regulations, directives, decisions, recommendations and opinions, adopted by virtue of the "Community method" (on the basis of the same procedure within the Council upon which internal legislative action is adopted; that is, the ordinary

²⁰⁶ The “co-decision” procedure was introduced in 1993, following the Maastricht Treaty (Treaty on the EU – Maastricht Treaty, OJ C 191, 29.07.1992) in Art.251 EC. The legislative areas in relation to which the ordinary legislative procedure must be followed have been extended in the Lisbon Treaty, giving the Parliament and Council greater powers in the drafting process and for the purposes of facilitating greater transparency; see Rules of Procedure: Rules 37, 38a, 41, 43, and 53-74, and Art.289 and 294 TFEU on the ordinary legislative procedure.

²⁰⁷ Art.17 TEU (Treaty on the European Union, OJ C 326, 26.10.2012, hereinafter TEU).

legislative procedure, via qualified majority voting), and removing the other instruments which previously existed under the pillar structure, excluding those concerning foreign, security and defence policies (in respect of which the intergovernmental decision-making procedure remains applicable). Regulations, aiming to ensure the uniform application of Union law across the Member States by replacing incompatible national laws, are generally applicable, binding and of direct effect against private individuals, Union institutions and the Member States from the date on which they enter into force. There is no need for their transposition via national law. Directives are binding, not as regulations, but as to the result to be achieved; thus, the national legislatures enjoy a degree of flexibility in terms of the transposing legislation, but must effect this transposition within the time period established therein, and in line with the obligation of sincere cooperation in Art.4(3) TEU. Generally, directives are not directly applicable - this will be the case only of certain provisions which satisfy the CJEU's criteria²⁰⁸. The second case example on the UCTD focuses on directives. While decisions are fully binding in respect of those to whom they are addressed (Member States, legal persons or private individuals; in respect of the latter, the Member State must have transposed the decision into national law), recommendations and opinions are not binding and confer neither rights nor obligations.

The determination of the preferred legislative act, from those identified in Art.288 TFEU, is for the Union institutions on a case-by-case basis per Art.296(1) TFEU. The scope held by the Union in respect of any of these acts is defined by the Treaty structure, and in particular, the division of competences - exclusive, shared and supporting (per Arts.3, 4 and 6 TFEU, respectively) - between the Union and the Member States and the principle of referral in Art.5(1) TEU. Art.5 TEU sets out the basis of the Union's legislative powers, that is, of attributed competency, which dictates that the Union has competence only in so far as the Treaties provide. The exercise of Union competences is shaped by the principles established therein: 1) the principle of conferral (the Union only enjoys the competences conferred upon it by the Treaties); 2) the principle of proportionality (the exercise of competences must not exceed that which is necessary to achieve the objectives of the Treaties) and 3) the principle of subsidiarity, which provides that in respect of shared competences, the EU can intervene

²⁰⁸ The CJEU has been reluctant to engage with the horizontal direct effect of the directives: *C-91/92 Faccini Dori* [1994] ECR I-3325, Judgement, para.25. Further consideration is given to state liability in the case example below, developed to promote the effectiveness of EU law, ensure the legal protection of individuals and preclude the violation of Union law.

only where it is capable of acting more effectively than the Member States²⁰⁹; these principles fit with the notion of a multi-level system of Union (private) law, aiming to ensure that the lowest level of governance is engaged. The extent to which this limited competence can be employed to develop a coherent body of law via harmonisation has been called into question and is explored further below²¹⁰.

The absence of uniformity, or the existence of divergences, between Member States' norms neither invokes Art.114 TFEU nor constitutes a legislative basis in itself; this has been confirmed by the CJEU in *Tobacco Advertising*²¹¹, in which the Court held that “a mere finding of disparities between national rules and the abstract risk of obstacles to the exercise of fundamental freedoms or of distortions of competition liable to result there from, [is not] sufficient to justify the choice of [then] Art.100a as a legal basis as a legal basis...The measure must actually contribute to the improvement of the internal market”. It has become clear that neither the legislature nor the CJEU will exercise the self-restraint to operate within such limits, leading to what has been termed the "competency creep" in EU law²¹². Yet the competency creep can only extend so far: the national legislatures must transpose and implement Union law and the national courts must enforce it, as the EU's enforcement powers are evidently limited. The Member States are bound by Art.291(1) TFEU to adopt all necessary measures in national law in order to implement binding Union legislation. The breadth and relevance of this obligation of compatibility stretches beyond the mere transposition of EU law; it must be done in line with EU law²¹³. In enforcement, the national courts – and particularly, constitutional courts, where they exist – constitute a kind of checkpoint for transfers of competences via national constitutional law and the Treaty

²⁰⁹ For example, in respect of the CRD, it is considered that these principles are protected in respect of recitals 4 - “The harmonisation of certain aspects of consumer distance and off-premises contracts is necessary for the promotion of a real consumer internal market striking the right balance between a high level of consumer protection and the competitiveness of enterprises, while ensuring respect for the principle of subsidiarity”- and 65 - “Since the objective of this Directive, namely, through the achievement of a high level of consumer protection, to contribute to the proper functioning of the internal market, cannot be sufficiently achieved by the Member States and can therefore be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Art.5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that objective”. From the CJEU case law, it is clear that the Court will only consider EU legislation to violate these principles when it is “manifestly inappropriate” in respect of its aims: C-344/04 *IATA and ELFAA v Department for Transport* [2006] ECR I-403, Judgement, para.80.

²¹⁰ Consider Van Gerven, and compare with J. Basedow, ‘A Common Contract Law for the Common Market’ (1996) 33 *CMLR* 1169, pp.1186 *et seq.*

²¹¹ C-376/98 *Germany v. European Parliament and Council* 2000 [ECR] I-8419, Judgement, para.23.

²¹² P.P. Craig and G. de Búrca, *EU Law: Texts, Cases and Materials* (OUP, Oxford; 5th edn., 2011), p.92.

²¹³ Including fundamental rights - at the narrowest, the Member State must ensure compliance in respect of the CFR, in "implementing EU law" (per Art.51(1) CFR) - to interpretation, explored in more detail below.

structure. It is in this context that a key scope for conflict arises; the principle of supremacy of EU law in shaping the relationship between the national and Union orders is largely accepted but the national courts nevertheless consider that they “retain a power of constitutional review over measures of EC law”²¹⁴.

Directives have been characterised as *sui generis* in their character²¹⁵ and are significant in shaping the nature of the interactions between the national and Union orders, being firstly drafted and enacted at the EU level, and subsequently transposed and applied in the national jurisdictions by the relevant national bodies, per Art.288 TFEU. The characterisation of this relationship might diverge, shaping the manner in which the national legal systems will engage with the EU in this context. In transposing directives, the national legislatures have scope to modify what emerges initially as an EU norm; Dickson argues that “...directives are norms coming from outwith the national legal system intended to guide the development of norms within that distinct system” such that these directives can arguably be understood as being part of the EU legal system (that is to say, it is not the directive itself which becomes part of the national system but that amended version, as it is transposed by the national bodies)²¹⁶. She develops her categorisation, articulating three types of relationship between national and EU law: 1) the “27 plus 1” model; 2) the EU law as part of Member State legal system”; and 3) “one legal system”. Dickson argues that it is the second model which best reflects the nature of the interaction, with “distinct but interacting systems model of relations”²¹⁷. This also reflects Lenaerts and Corthaut’s understanding, in respect of which directives constitute norms external to the national legal system which might nevertheless be enforceable therein and thus have an impact on the system itself; this effect is nonetheless subject to certain restrictions of both an internal (i.e. norms must be clear, precise and unconditional) and external character (concerning the nature of the legal instrument having such an effect)²¹⁸. Of course, this relationship is also shaped by the jurisprudence of the

²¹⁴ Craig and de Búrca, *EU Law* (n.212), p.344.

²¹⁵ S. Prechal, *Directives in EC Law* (OUP, Oxford; 2nd edn., 2005), p.1.

²¹⁶ J. Dickson, ‘Directives in EU Legal Systems: Whose Norms Are They Anyway?’ (2011) 17 *ELJ* 190, pp.194-195.

²¹⁷ Dickson, ‘Directives in EU Legal Systems’ (n.216), pp.193 and 211.

²¹⁸ K. Lenaerts and T. Corthaut, ‘Of Birds and Hedges: The Role of Primacy in Invoking Norms of EU Law’ (2006) 31 *ELJ* 287. See also, M. Dougan, ‘When Worlds Collide! Competing Visions of the Relationship Between Direct Effect and Supremacy’ (2007) 44 *CMLR* 931, p.934, who understands there is a need for a “trigger” before the supremacy doctrine applies “conflict resolution tool in situations of conflicts between EU law and national law, and which operates when, “...Community law has been rendered cognizable before the domestic courts, by satisfying the threshold criteria for enjoying direct effect”, facilitating the “distinct legal systems” understanding.

CJEU. Prechal argues that, on the basis of the CJEU jurisprudence (including *Costa*, *Van Gend en Loos*, and *Francovich*²¹⁹, and the jurisprudence establishing the principle of direct effect), EU law should be understood to form part of national law; thus Prechal argues that from their enactment, directives automatically become part of the national system²²⁰. Raz further highlights the significance of the courts. For Raz, the norms that actually form part of a legal system are determined by reference to what the “primary norm-applying organs” (that is courts and other judicial bodies) of that system, are bound to apply²²¹, drawing a distinction between what is actually part of the legal system and what is binding, according to that legal system²²².

To return to enlargement and the potential significance of cultures and traditions, it is worth noting that prior to accession, candidate states are required to implement the entire *acquis*, an approach which differs to that required of existing Member States; the difference is essentially between a voluntary and mandatory approach. It has been questioned whether the latter reflects an appropriate foundation for the relationship between the national and European orders, to the extent that it reflects hierarchy and coercion as opposed to “tolerance” and coordination²²³. One study – undertaken by Faulkner and Treib – has identified, in contrast to the expectations of the researchers, no kind of “revenge” on the part of the new Member States in respect of this Union-imposed conditionality²²⁴. Rather, they determined that the difficulties for these “new” Member States arise in respect of the application of EU norms and not in the transposition of the *acquis* itself²²⁵. This seems to reinforce the significance of a “law in context” approach to legal scholarship, as opposed to one merely focusing on legal rules.

²¹⁹ C-6/64 *Costa* [1964] ECR I-1141, C-32/84 *Van Gend en Loos* [1985] ECR I-0779 and C-6-9/90 *Francovich and Bonifaci and Others v Italy* [1991] I-5357 (hereinafter, *Francovich*).

²²⁰ Prechal, *Directives in EC Law* (n.215), pp.92 *et seq.*

²²¹ While Raz also highlights that: “Quite often the courts have an obligation to apply laws of other legal systems, rules of private associations and so on, although these were not and do not become part of the legal system”; J. Raz, *The Authority of Law* (OUP, Oxford; 2nd edn., 2009), p.109.

²²² Raz, *The Authority of Law* (n.221), pp.109 *et seq.*

²²³ O. Pollicino, ‘The New Relationship between National and the European Courts after the Enlargement of Europe: Towards a Unitary Theory of Jurisprudential Supranational Law?’ (2010) 29 *Y.Eur.Law* 65, p.71.

²²⁴ They looked at Slovakia, Slovenia, Hungary and the Czech Republic, and the Working Time Directive, 2003/88/EC, the Equal Treatment Directive (76/207/EEC, amended by 2002/73/EC) and the Employment Framework Directive (2000/ 78/EC).

²²⁵ G. Faulkner and O. Treib, ‘Three Worlds of Compliance or Four? The EU-15 Compared to New Member States’ (2008) 46 *JCMS* 293, pp.307-308.

Where it does not have the competence to harmonise (where harmonisation is deemed to lead to uniformity of national rules), or where it might want to be seen to limit itself to operating within the restraints established by the Treaty structure and the CJEU, other avenues are open to the Union legislature. It might, instead of or in addition to harmonisation, look to measures of "better regulation" to generate convergence as opposed to engaging only in harmonisation²²⁶. The open method of coordination²²⁷ finds its basis in the Lisbon Treaty as the paradigm of a "new mode of governance", based on the notion of cooperation between actors and institutions operating at different levels. The OMC purports to facilitate the development of voluntary, non-binding norms via processes of policy negotiation between the Commission, the Council of the EU and the Member States, facilitating an approach which permits not only the emergence of solutions that can be adapted to the different Member States but further promotes "learning from experiences" between states²²⁸. This trend might be more reflective of a more general shift in perspectives of legal development, proposed at the outset of the thesis.

The Commission, prior to communicating a proposal, initially engages with interested bodies (including national parliaments and civil society groups amongst others), in drafting "impact assessments"²²⁹ in order to determine the possible economic, social and political consequences²³⁰ of legislation. As part of the "better regulation" approach, it aims to legislate on the basis of "transparent, comprehensive and balanced evidence"²³¹. At the impact assessment stage, a determination as to the necessity of Union legislation and the satisfaction of the subsidiarity principle must be made²³². The proposal as drafted by the Commission, the Commission having the "right of initiative", is then communicated²³³ to the Council and Parliament, who undertake a review; a second reading is undertaken if both fail to agree on

²²⁶ W. van Gerven, 'The Open Method of Convergence' (2008) 13 *Juridica International* 32, pp.33-34.

²²⁷ Hereinafter, OMC.

²²⁸ See W. van Gerven, 'Bringing (Private) Laws Closer to Each Other at the European Level' in F. Cafaggi (ed.), *The Institutional Framework of European Private Law* (OUP, Oxford; 2009), pp.37-78, p.60.

²²⁹ European Commission, 'Impact Assessment Guidelines', SEC(2009) 92.

²³⁰ Presidency Conclusions, Göteborg European Council, 15 and 16.06.2001, SN 200/1/01 REV 1, para.35.

²³¹ Commission, 'Impact Assessment Guidelines' (n.229), p.4; see also, Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, 'A Strategic Review of Better Regulation in the European Union', 14.11.2006, COM(2006) 689 final; Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'Second Strategic Review of Better Regulation in the European Union', 30.01.2008, COM(2008) 32 final.

²³² Thus, Impact Assessments will also be relevant to the determination of the most appropriate avenue (European Commission: Impact Assessment, COM(2002) 276 final; Impact Assessment—Next Steps, SEC(2004) 1377; Better Regulation and Enhanced Impact Assessment, SEC(2007) 926.

²³³ Providing it has the support of at least 14 of the 28 Commissioners.

the amendments proposed. Further disagreement will lead to the establishment of a conciliation committee, which will be asked to provide a resolution; at this stage, the Council and the Parliament can block the proposal. The European Parliament has been attributed an increased role, post-Lisbon, in European law-making, with the Treaty's extension of the application of the co-decision procedure to a number of policy areas; essentially, co-decision is now the ordinary legislative procedure. It works via committees and on the basis of reports prepared therein, at which stage comparative analysis might become relevant. Where legislation is based on the existence of divergences between the laws of the Member States, which is understood to undermine the functioning of the internal market, such a justification seemingly requires a comparative assessment of the different norms in the given area. This analysis must transcend a consideration of rules and encompass an assessment of policy considerations. Furthermore, comparative analysis seems to be necessary to the extent that the Commissioners must be independent of their Member States in the undertaking of their tasks²³⁴; that is to say, the Commission cannot simply follow the approach of one Member State. Given their composition, the committees can be understood to provide a context in which comparison of the existing EU *acquis* and national law can be undertaken. This is particularly important given that the Council is composed of representatives of each of the Member States who then assess the proposal, employing the Commission's reports²³⁵; the national perspective is therefore deemed to be of relevance at this stage, with the Council providing a context in which the scope for conflicts between national legal orders can be dealt with. The Council employs questionnaires, which allow for explanations of the divergent norms of the Member States. For example, in relation to the proposed Consumer Credit Directive, the Council issued a questionnaire in order to identify the controversial dimensions of the proposal and allow Member States to set out their own positions²³⁶. In particular, such an activity permits a preliminary identification of those areas in which the national and European norms might conflict, in their textual construction, interpretation and application. It

²³⁴ Art.245 TEU.

²³⁵ Art.16 TEU.

²³⁶ European Credit Research Institute, Newsletter 13, Third Quarter, 2004. (<www.ecri.eu/new/system/files/Commentary_13.pdf>; Last Accessed: 21.10.2012). The Council also issued a questionnaire in respect of the DCFR; see Council of the European Union, 'Note from the General Secretariat to the Committee on Civil Law Matters (Contract Law)', *Draft Report to the Council on the Setting Up of a Common Frame of Reference for European Contract Law - Compilation of the Comments from Delegations*, 9117/09, JUSTCIV 102 – CONSOM 89, 27.04.2009. (<http://register.consilium.europa.eu/servlet/driver?page=Result&lang=EN&ssf=DATE_DOCUMENT+DESC&fc=REGAISEN&srm=25&md=400&typ=Simple&cmsid=638&ff_COTE_DOCUMENT=&ff_TITRE=%22common+frame+of+reference%22&ff_FT_TEXT=&ff_SOUS_COTE_MATIERE=&dd_DATE_REUNION=&single_comparator=&single_date=&from_date=&to_date=>>; Last Accessed: 21.10.2012).

is important to note that the interests of the legislative making bodies are not limited to the rules themselves; language and translation are also significant at this stage. Following the agreement of the Parliament and Council, the proposal can be adopted. The process of drafting EU legislation is therefore a complex one; the parties involved dictate this to be the case. The interests of the Member States are broad and potentially diverge between the national orders; the various stages of negotiation highlight the “compromise” nature of the legislative process. In particular, as will be discussed in more detail below, not all parties attribute the same significance to ensuring the development of a coherent system of law, at least at the stage of drafting. Rather, the emphasis on coherence seems to derive from the Commission²³⁷.

Against this background, the Commission has been engaged for more than ten years in a review and appraisal of the contract law *acquis* and in the development of a Common Frame of Reference²³⁸, with the aim of promoting a “significantly higher degree of coherence in European contract law”²³⁹. This has been paralleled by the shift in the scope and reach of legislation, the programme of maximum harmonisation having been set out in the 2007 Green Paper²⁴⁰ for the very purpose of promoting coherence²⁴¹.

ii. The Reach of Harmonisation Efforts: A Stretch Too Far or Not Far Enough?

The shifts in the reach of harmonisation are reflected in the focus on minimum, maximum and subsequently, targeted maximum harmonisation. Minimum harmonisation establishes a minimum level of protection with which the Member States must comply, without precluding the introduction of more restrictive norms at the national level. Both the minimum rules and

²³⁷ European Commission, 'Communication from the Commission to the European Parliament and the Council on a More Coherent European Contract Law: An Action Plan' COM(2003) 68.

²³⁸ Initiated by the European Commission, 'Communication from the Commission to the European Parliament and the Council on European Contract Law' COM(2001) 398.

²³⁹ D. Staudenmayer, 'The Place of Consumer Contract Law Within the Process on European Contract Law' (2004) 27 *J.Con.Pol.* 269, p.277.

²⁴⁰ European Commission, 'Green Paper on the Review of the Consumer *Acquis*' COM(2006) 744.

²⁴¹ The desire – in the legislature and CJEU – for coherence at the EU level arguably may come at the expense of national coherence; Weatherill references the CJEU's “adventurous reading of EU measures” in this respect: S. Weatherill, 'Consumer Policy' in P.P. Craig and G. De Búrca (eds.), *The Evolution of EU Law* (OUP, Oxford; 2nd edn., 2011), pp.837-868, p.865 citing C-168/05 *Mostaza Claro* [2006] ECR I-10421; C-404/06 *Quelle* [2008] ECR I-2685; C-183/00 *Gonzalez Sanchez* [2002] ECR I-3901. Consider V. Mak, 'A Systemisation of European Private Law Through EU Law' (2011) 17 *ELJ* 403, who considers that there should be a shift in focus from the national to the EU level, and in particular, that principles of Union law could facilitate coherence. This is discussed in more detail in Chapters 8 and 9.

those which go beyond the protection established via European legislation are subject to Treaty requirements. The scope of Union legislation is established with reference to its provisions; for example, Art.8(1) and Art.8(2) CSD – the ‘minimum harmonisation’ provision – provide that national legal orders can legislate for rules which generate a higher degree of protection for the consumer. The primary problematic of minimum harmonisation is thus the absence of uniformity, to which EU legislation generally aims to give rise. In particular therefore, with regard to remedies, these CSD provisions provide that consumers can choose to seek a remedy in national contract law, without making reference to the directive itself. Furthermore, minimum harmonisation dictates that while a minimum standard of protection must be established, the Member States continue to have scope to engage in a “race to the bottom”, in terms of the level of protection offered.

Maximum harmonisation essentially removes the discretion of the Member States and expands that of the Union. Legislation of a maximum nature purports to establish a set of rules uniformly applicable across the Member States; there exists no freedom for divergent norms of either a more or less stringent standard, such that the Member States cannot avoid the reach of European legislation²⁴². National legislatures and courts must therefore understand the scope of the directive before it is implemented in order to identify the national rules that need to be repealed and to ensure compliant and effective implementation. The processes of implementation and transposition must be closely monitored by the Union institutions, a requirement which potentially creates pragmatic problems therein, both where the level of Union protection is higher and lower than that established in the national context.

A number of shifts in the EU’s legislative approach are identifiable. As it was promulgating minimum harmonisation, the Commission also sought to develop a civil code, the realisation of which aimed at the abolition of diversity in favour of uniformity and unification via the harmonisation of private law norms. It was at this stage that uniformity and unity became confused; unification will not arise from the construction of a uniform body of norms via harmonisation. It was subsequently recognised that as the notion of uniformity came to

²⁴² For example, increased consumer protection is not a sufficient justification – consider the infringement procedure in *C-52/00 Commission v France* [2002] ECR I-3827; see, however Art.114(4) and (5) TFEU which make reference to national rules to be introduced in relation to “major needs referred to in Art.36, or relating to the protection of the environment or the working environment”; rather, depending on their intentions, Member States might be able to circumvent the maximum harmonisation provisions of European directives, for example, if national legislation is developed, intending to overlap with European legislation, but on a different basis; V. Mak, ‘Review of the Consumer Acquis: Towards Maximum Harmonisation’ (2009) 17 *ERPL* 55, pp.58-61.

constitute something like a constitutional principle, creating resistance and conflict, a harmonised, coherent system of private law applicable in a uniform manner in all states could not be achieved by virtue of a civil code²⁴³. As it became clear that the civil code would no longer be feasible, the Commission's preference for a maximum harmonisation approach emerged; in the early 2000s, the Commission's harmonisation policy thus shifted from minimum to maximum harmonisation, reflected in its consumer policy programme of 2002-2006²⁴⁴, and legislatively enshrined in the Product Liability Directive 85/374/EC, the Distance Marketing of Financial Services Directive 2002/65/EC and the Unfair Commercial Practices Directive 2005/29/EC. Thereafter, a shift from maximum to targeted maximum harmonisation became identifiable, reflected concretely in the Consumer Rights Directive²⁴⁵. The CRD initially intended to provide for full harmonisation, as is clear from its initial draft published in 2008, which provided for regulation "in a systematic fashion, simplifying and updating the existing rules, removing inconsistencies and closing gaps"²⁴⁶. Much of the criticism surrounding the pCRD concerned its reach²⁴⁷, and in particular the envisaged lack of flexibility in respect of its transposition and consequent application in the Member States²⁴⁸. "Targeted" full harmonisation was then identified as an alternative to blanket maximum harmonisation by the authors of the Consumer Law Compendium, who advocated the preliminary identification of the key areas in which barriers to trade have arisen consequent to minimum harmonisation and the imposition of fully harmonised norms and standards of protection therein²⁴⁹. These areas included "pre-contractual information duties...and the information of the consumer about his right of withdrawal"²⁵⁰. Similarly, the Schwab Report and Wallis Opinion highlighted the need for the harmonisation of information requirements

²⁴³ Indeed, Caruso advances the notion that the reluctance of the Member States to harmonisation, that is, the "guard[ing] [of private law] in the jealous hands of national institutions"... "is a key factor which is making possible the States' ultimate acceptance of Brussels rule"; D. Caruso, 'The Missing View of the Cathedral: The Private Law Paradigm of European Legal Integration' (1997) 3 *ELJ* 3, p.4.

²⁴⁴ European Commission, 'EC Consumer Policy Strategy 2002-2006' COM(2002) 208, para.3.1.2.1.

²⁴⁵ Hereinafter, CRD.

²⁴⁶ European Commission, 'Proposal for a Directive on Consumer Rights', COM(2008) 614 final.

²⁴⁷ The criticism of maximum harmonisation approaches in various pieces of legislation has arisen from academia and the judiciary; in particular, reference can be made to the Opinion of AG Geelhoed in a number of cases, including *Commission v. France* (n.242); C-154/00 *Commission v Greece* [2002] I-3879 and Case C-183/00 *González Sánchez* [2002] ECR I-3901.

²⁴⁸ A. Johnston and H. Unberath, 'European Private Law by Directives: Approach and Challenges' in C. Twigg-Flesner (ed.), *The Cambridge Companion to European Union Private Law* (CUP, Cambridge; 2011), pp.85-100, p.89.

²⁴⁹ H. Schulte-Nölke *et al* (eds.), *EC Consumer Law Compendium: Comparative Analysis* (Sellier, München; 2008), p.797.

²⁵⁰ Schulte-Nölke *et al*, *EC Consumer Law Compendium* (n.249), p.797.

for distance and off-premises contracts; the Wallis Opinion²⁵¹ favoured minimum harmonisation except for withdrawal rights while the Schwab Report²⁵² favoured maximum harmonisation of withdrawal rights and general information duties but with regard to the latter, only in respect of distance and off-premises contracts and with a substantial number of exceptions²⁵³. The final CRD thus provides for “targeted” full harmonisation²⁵⁴. The shift from minimum to maximum to targeted maximum harmonisation is now reflected in the Commission’s policy; previously, it had arisen in the arguably political judgements as to Union competence rendered by the CJEU, discussed below²⁵⁵.

A multiplicity of potential effects arises from the choice of reach of harmonisation. It is often assumed that the drafting of a uniform body of norms at the EU level decrees the uniform implementation and application of the same norms at the national level; consequently, maximum harmonisation should “accelerate integration through the adoption of common rules”²⁵⁶. The shift in the approach of the Commission is one reflection of Schmid’s (over-)“instrumentalisation” of private law for integration purposes, where the focus is not necessarily on the balance between the protection of the interests of parties but predominantly on the facilitation of the market via the establishment of a uniform regime of norms and the satisfaction of the needs of the bigger market players²⁵⁷. Maximum harmonisation dictates that the level of consumer protection “takes a hit” because the Member States are precluded from introducing or maintaining higher degrees of protection. Thus, the determination of the reach of legislation “also [...] require[s] that the EU choose the quality of that common (re)regulatory regime [which] forces choices to be made about the EU’s view of the function

²⁵¹ The Draft Opinion of the Legal Committee submitted by Mrs. Diane Wallis, MEP of 24.8.2010 (the Wallis Opinion).

²⁵² The Draft Report of the Committee on the Internal Market and Consumer Protection submitted by Mr. Andreas Schwab, MEP of 9.6.2010 (the ‘Schwab Report’).

²⁵³ See the DG for Internal Policies, Citizens’ Rights and Constitutional Affairs, ‘Note: Extent of Harmonisation in Consumer Contract Law’ (2010), PE 432.728, pp.19-22 for more information.

²⁵⁴ The shift to targeted full harmonisation can be identified in the amended Art.4 of the pCRD: “1. Save as otherwise provided by this Directive, Member States may not maintain or introduce, in their national law, provisions diverging from those laid down in this Directive, including more or less stringent provisions to ensure a different level of consumer protection. Member States shall forward the text of diverging provisions of national law to the Commission” and the final version, “Member States shall not maintain or introduce, in their national law, provisions diverging from those laid down in this Directive, including more or less stringent provisions to ensure a different level of consumer protection, unless otherwise provided for in this Directive”.

²⁵⁵ C-376/98 *Germany v Parliament and Council* [2000] ECR I-8419.

²⁵⁶ Weatherill, ‘Consumer Policy’ in Craig and de Búrca, *The Evolution of EU Law* (n.241), p.848.

²⁵⁷ C. Schmid, *Die Instrumentalisierung des Privatrechts durch die Europäische Union* (Nomos, Baden-Baden; 2010), and specifically C. Schmid, ‘The Thesis of the Instrumentalisation of Private Law by the EU in a Nutshell’ in C. Joerges and T. Ralli (eds.), *European Constitutionalism Without Private Law: Private Law Without Democracy*, Recon Report No.14 (Arena, 2011), pp.17-36, p.18.

of consumer law”²⁵⁸. Furthermore, the level at which such choices are made is significant, reflecting “a debate about the redistribution of regulatory competence ‘upwards’ in favour of the EU...[reflecting] a preference for centralization and uniformity and the dilution of local autonomy and diversity”²⁵⁹. To the extent that the determination of the reach of legislative efforts “defin[es] the outer EU constitutional limits”²⁶⁰ of Union competences, the discourse is clearly of a “constitutional” nature.

Another set of consequences can be said to reflect the constitutional dimension of legislative harmonisation efforts, to the extent that they create a pre-emptive effective in respect of which a shift of powers from the Member States to the Union transpires, and on the basis of which, the CJEU acquires significant jurisdiction and power in the interpretation of EU law²⁶¹. The reach of legislation will shape the interpretative approach adopted by the CJEU, which will not hesitate to find national law incompatible with Union law²⁶². Where the directive provides for full harmonisation, the CJEU will assess national legislation only in light of the relevant directive and not in light of primary law²⁶³. However where the CJEU assesses domestic law in light of an applicable minimum directive, the CJEU will also look to determine if the national legislation complies with primary EU law (including free movements)²⁶⁴. Furthermore, the reach of legislation will also shape the relationship between the national and Luxembourg courts as it arises per Art.267 TFEU. There might be a greater incentive for national courts to refer to the CJEU where the relevant Union legislation is of a maximum nature however, in respect of minimum harmonisation, the national courts might refer only where domestic law tethers on the line of the minimum Union standard, and not

²⁵⁸ Weatherill, ‘Consumer Policy’ in Craig and de Búrca, *The Evolution of EU Law* (n.241), p.848.

²⁵⁹ L. Miller, *The Emergence of EU Contract Law: Exploring Europeanization* (OUP, Oxford; 2011), p.81. See also Weatherill, ‘Consumer Policy’ in Craig and de Búrca, *The Evolution of EU Law* (n.241), p.851: “a priority for market-making to the exclusion of local regulatory autonomy”.

²⁶⁰ C. Barnard and O. Odudu (eds.), *The Outer Limits of European Union Law* (Hart, Oxford; 2009).

²⁶¹ H-W. Micklitz and N. Reich, ‘Crónica de una muerte anunciada: The Commission Proposal for a “Directive on Consumer Rights”’ (2009) 46 *CMLR* 471, pp.478-479.

²⁶² See for example, Joined Cases C-261-299/07 *VTB* [2009] ECR I-12949. In *VTB*, while the relevant directive had the aim of full harmonisation, concerns were raised by Member States, in the period before the Directive came into force, in respect of its coverage of sales promotions measures. As such, the Directive did not comprehensively deal with such measures. The Court nevertheless based its decision on a maximum harmonisation approach and held that national prohibitions on sales promotions measures went beyond the liberal approach of the directives.

²⁶³ C-495/10 *Dutruieux* nyr, Judgement, para.22.

²⁶⁴ C-205/07 *Gysbrechts* [2008] ECR I-9947, Judgement, para.33, citing C-322/01 *Deutscher Apothekerverband* [2003] ECR I-14887, Judgement, para.64.

where a higher level of consumer protection is established in the national system²⁶⁵. The shifting policy approach of the Commission is perhaps therefore responsible for the trends that can be identified in preliminary references in recent years, that is, an increase in those having a private law dimension.

The CJEU judgement in *Tobacco Advertising*²⁶⁶ is well known and has been afforded a number of divergent academic interpretations, particularly in respect of the compatibility of the minimum harmonisation approach with legislative measures adopted under Art.114. The Commission seemed to argue that maximum harmonisation is the only approach available and justifiable under Art.114, in line with the country of origin principle²⁶⁷. It is generally understood that the judgement condemns EU legislation of a minimum harmonisation nature, which lacks a market access clause. Higher or stricter standards should be applicable only by virtue of Art.114(4-9). It was the notion that Member States might impose higher standards in respect of goods entering domestic markets, thereby restricting the circulation of products and services that established the rationale for the interpretation. The divergent interpretations following *Tobacco Advertising* have thus given rise to uncertainty as to the “constitutional status” of minimum harmonisation per Art.114; this is evident in private law legislation. With regard to the UCTD, and in respect of the Spanish government’s non-implementation of Art.4(2) UCTD, the CJEU seemed to (although by no means clearly) support minimum harmonisation legislation adopted on the basis of Art.114²⁶⁸. In *Gysbrechts*, the CJEU appeared to draw the same conclusion²⁶⁹, notwithstanding that the *Tobacco Advertising* case was not cited.

Furthermore, the determination of the reach of legislation, and the shift from minimum to (targeted) maximum harmonisation, also potentially reflects a preference for uniformity over

²⁶⁵ P. Rott, 'What is the Role of the CJEU in EC Private Law? - A Comment on the CJEU judgements in *Océano Grupo, Freiburger Kommunalbauten, Leitner and Veedfeldt*' (2005) 1 *Hanse.L.R.* 6, p.15; C-237/02 *Freiburger Kommunalbauten* [2004] ECR I-3403, Opinion of A.G. Geelhoed, para.19.

²⁶⁶ C-376/98 *Germany v Parliament and Council* [2000] ECR I-8419, Judgement, para.84.

²⁶⁷ H-W. Micklitz, 'Social Justice and Access Justice' *EUI WP 2011/02*, p.34.

²⁶⁸ C-484/08 *Caja de Ahorros* [2010] ECR I-4785, discussed in more detail in the case examples. In not implementing this provision, the Spanish government was intending to provide greater consumer protection since it would mean that all “core terms” would be subject to review and could be struck down. The directive takes a minimum harmonisation approach (Art.8); the CJEU held that Art.4(2) does not relate to the *ratione materiae* of the UCTD and as such Art.8 could be applied to Art.4(2).

²⁶⁹ C-205/07 *Gysbrechts* [2008] ECR I-9947.

respect for “Europe’s cherished diversity”²⁷⁰. Diversity constitutes a matter of constitutional significance within the Union, given that *unitas in diversitate* subsists as its *de facto* motto, despite having been written out of the Lisbon Treaty following its inclusion in the ill-fated Draft Treaty Establishing a Constitution for Europe. The choice of legislative approach not only affects those issues which are more evidently constitutional, for example, as Miller suggests, the allocation of power enshrined in the autonomy of the national legislatures and moreover, in the structure of private law, resulting in “a more hierarchical, less cooperative pattern”²⁷¹ but also shapes the significance attached to the diversity of policy decisions inherently tied to regulatory decision-making within the different Member States; in particular, maximum harmonisation might undermine attempts to create a dynamic, multi-level private law, capable of developing in line with shifting societal, political, economic and technological positions by “freez[ing]” protection, particularly, for example, in the domain of consumer law²⁷².

Moving beyond the reach of harmonisation via directives, the other mechanisms of Europeanisation engaged by the Union legislature should be set out. In 2008, the Commission published its Proposal for a Consumer Rights Directive, constituting the outcome of its *acquis* review, which found its legal basis in Art.95 EC (now Art.114 TFEU)²⁷³. The final version was adopted in October 2011, in a vastly reduced form of the original proposal. The Draft Common Frame of Reference²⁷⁴ was published in its outline edition in 2008 and in its full edition in 2009²⁷⁵, building on the Principles of European

²⁷⁰ S. Weatherill, ‘Interpretation of the Directives: The Role of the Court’ in A.S. Hartkamp *et al* (eds.), *Towards a European Civil Code* (Kluwer, The Hague; 4th edn., 2011), pp.185-203, p.187, that is, “pointless bureaucratic exercise in seeking to bring together what is irretrievably culturally separate”, p.187.

²⁷¹ Miller, *The Emergence of EU Contract Law* (n.259), p.81; H. Collins, *The European Civil Code: The Way Forward* (CUP, Cambridge; 2008), citing S. Weatherill, ‘The Constitutional Competence of the EU to Deliver Social Justice’ (2006) 2 *ERCL* 136, p.156.

²⁷² H. Beale and G. Howells, ‘Pre-Contractual Information Duties in the Optional Instrument’ in R. Schulze and J. Stuyck (eds.), *Towards a European Contract Law* (Sellier, München; 2011), pp.49-64, p.51.

²⁷³ European Commission, ‘Proposal for a Consumer Rights Directive’ COM(2008) 614.

²⁷⁴ The Common Frame of Reference has its roots in the aspirations of the European Parliament ((1989) OJ C 158/400 and again in (1994) OJ C 205/518), and the Commission (European Commission, ‘Communication from the Commission to the Council and the European Parliament on European Contract Law’ COM(2001) 398; Commission, ‘Communication on a More Coherent European Contract Law’ (n.237); European Commission, ‘Communication from the Commission to the Council and the European Parliament on European Contract Law and the Revision of the *Acquis*: The Way Forward’ COM(2004) 651; European Commission, ‘Call for Expression of Interest with a View to Setting Up a Network of Stakeholder Experts on the Common Frame of Reference in the Areas of European Contract Law’ (2004) OJ S 148).

²⁷⁵ C. Von Bar *et al* (eds.), *Principles, Definition and Model Rules of European Private Law: Draft Common Frame of Reference* (DCFR, Outline Edition) (Sellier, München; 2009).

Contract Law developed by Ole Lando in the 1990s²⁷⁶. Thereafter, the European Commission published its ‘Green Paper on Policy Options for Progress Towards a European Contract Law for Consumers and Businesses’, setting out possible approaches to the development of private law, establishing a consultation period and inviting public response²⁷⁷. The Expert Group, established by the Commission in April 2010²⁷⁸, published its ‘Feasibility Study on European Contract Law’²⁷⁹ in May 2011. Building on Option Four of the 2010 Green Paper²⁸⁰ and engaging PIL, the Commission advanced a Proposal for a Common European Sales Law in October 2011²⁸¹, outlined above, as an optional instrument applicable only when chosen by the contracting parties.

Until recently, the development of a civil code still seemed like a possibility, if no longer a likely probability. The different mechanisms engaged by the Union legislature seem to confirm the absence of an urgent drive towards codification, allowing rather for the understanding of a fragmented, Union private law as an archipelago, or a “European law continent surrounded by an ever smaller sea of national contract law”²⁸². Thus the prospect of codification has been all but extinguished with merely the embers of desire emanating from a few camps. It must be assumed that the *acquis* will continue to develop – within the context of the minimum/maximum harmonisation discourse, which remains as ambiguous as ever – and exist alongside the pCESL (which brings into consideration the application of PIL rules, potentially pulling the perspective back to that formed in the national orders).

Chapter 1. Concluding Remarks

This preliminary chapter has had three broad aims: to draw and uncover the connection between national private law development, the state and the context in which the

²⁷⁶ O. Lando and H. Beale (eds.), *The Principles of European Contract Law: Parts One and Two* (Kluwer; The Hague; 2000) and *The Principles of European Contract Law: Part Three* (Kluwer; The Hague; 2003).

²⁷⁷ Commission, ‘Green Paper on Policy Options for Progress Towards a European Contract Law’ (n.190).

²⁷⁸ Commission Decision 2010/233/EU of 26.04.2010, ‘Setting Up the Expert Group on a Common Frame of Reference in the Area of European Contract Law’, OJ L 105, 27.4.2010, pp.109-111.

²⁷⁹ IP/11/523, <http://ec.europa.eu/justice/policies/consumer/policies_consumer_intro_en.htm>; Last Accessed: 01.03.2012.

²⁸⁰ Option Four, Commission, ‘Green Paper on Policy Options for Progress Towards a European Contract Law’ (n.190).

²⁸¹ European Commission, ‘Proposal for Regulation of the European Parliament and of the Council on a Common European Sales Law’ COM(2011) 635 final.

²⁸² C. Schmid, *Die Instrumentalisierung des Privatrechts durch die Europäische Union: Privatrecht und Privatrechtskonzeptionen in der Entwicklung der Europäischen Integrationsverfassung* (Nomos, Baden-Baden; 2010), p.212.

Europeanisation of private law and European integration occurs, to engage these connections to establish the significance of the perspective of culture and tradition in the Europeanisation of private law and to explicate the legislative foundations of European legal development. These dimensions of analysis have aimed to establish the grounds upon which the Europeanisation of private law and European integration can be understood as sets of processes, and in respect of which, the relevance of comparative analysis can be uncovered and evaluated in the next chapters.

The first section of the chapter has briefly outlined the relevant theories of integration and has tracked their emergence from IR to legal scholarship. It has begun with those of IR, attributing particular attention to the understanding of the close relationship between the state and the evolving Union order; from the realist theories of the 1950s and the neofunctionalism of the 1960s, following which emerged intergovernmentalism (the latter two having been revisited in the 1980s and 1990s, respectively) and supranationalism, it has become clear that the focus of the exploration of these relationships has shifted from the security of the state, to the centralisation of state loyalties and the emergence of greater interdependence, to the power of the state, its preferences and its potential exercise of resistance to such transfer, and subsequently, to the understanding of the EU as a set of functionally-differentiated regimes from which divergent transnational societies emerge. Thereafter, the analysis has focused on the theorising of legal integration, in respect of which, in the context of existing IR theories, the intertwining of legal and political processes is advanced by virtue of the integration through law approach of Weiler *et al*; against this background, it is considered that the functionalist role of law in integration is deemed to demand consideration of the connection between legal development and integration in its socio-economic, cultural and political context. A similar acknowledgment is also identifiable in the supranationalist theories of Stone Sweet *et al*, developed via the analysis of the Union institutions, and especially the CJEU, and furthermore in the (diverse) constructivist, institutionalist and multi-level governance theories, which aim to bring to the fore the social construction of Europe and the emergence of transnational networks of actors and societies.

Thereafter, the chapter has aimed to place the theoretical discussion in the context of the thesis; it has taken one step back and explored the nation state foundations of private law, an analysis which reinforces the significance of the distinct legal, political, cultural and socio-

economic contexts of the diverse nation states, and establishes the foundations for the explication of the socio-economic, political and cultural dimensions of Union legal development, and particularly, the Europeanisation of private law. The embeddedness – evident in the mutual influences between the emergence of the nation state, the emergence of national culture and the emergence of national private law – exists, more or less, in each Member State; against this background, the European sphere is advanced as a context of commonality and diversity of legal orders, as has been outlined in the introduction. The European space has therefore been conceived as one ripe for conflict; the nature of the conflicts arising at the national and European levels have briefly been set out with particular reference to those of a private law character. This has allowed for a preliminary engagement with PIL norms, which are normally deemed applicable for the resolution of conflicts – predominantly of jurisdiction and applicable law – in the European space. The limited potential for PIL norms to resolve the breath of conflicts arising within the context of the Europeanisation of private law is considered to be a consequence of its national foundations and the attribution within this context of a neutral character to such rules; the emergence of PIL rules “beyond the state”, as a fundamental (initial) component of harmonisation, has brought to the fore the foundations of the legislative Europeanisation of private law.

The exploration in the second section of the chapter of the rationales underpinning, as well as the processes constituting, the legislative development of European private law has allowed for consideration of the breadth of actors, and thus, the diversity of interests and preferences, that shape the determination of the legislative route eventually adopted. These determinations necessarily delineate the reach of harmonisation efforts and their potential impact in the national legal orders, not only on the substance of national legal norms but also on the diversity of cultures and traditions existing across the European space. From this analysis, it has been advanced that legislative legal development can only go so far; while the Union legislature drafts and adopts legislation which the national legislatures are bound to implement, the interpretation and application of Union norms is dependent on the CJEU and the national courts. These lines of analysis – particularly, in respect of the focus on the harmonisation of national private law norms for the purposes of the facilitation of the internal market via the Union *acquis* and PIL rules – have highlighted two interrelated lines of discourse: the evolving nature of the relationship between the national and Union legal orders and the institutions operating therein, and furthermore, the putative need for the emergence of

a single or distinct European culture²⁸³ as a prerequisite to legal development, to the extent that this is deemed to lend justification (somewhat circularly²⁸⁴, legally, politically, socially and culturally) to the emergence of a body or system of European private law.

In the following chapter, the preparation of the groundwork leading to the demand for a developed understanding of comparison as part of the methodology of the Europeanisation of private law is undertaken; as noted, it requires a critical approach, which in turn demands an understanding of the context in which Europeanisation occurs. The analysis in Chapter 1 has aimed to establish these preliminary foundations. Chapter 2 purports to uncover the relevant dimensions of the Union's apparent motto of *unitas in diversitate* and furthermore, the significance of culture, tradition and identity to the Europeanisation of private law. On the basis of this analysis, the need for a single European legal culture – one which is necessarily common - as a prerequisite of Europeanisation, is called into question.

²⁸³ On the notion of the re-emergence of a European culture from that existing in Roman law and subsequently, the *ius commune*, and the continuing significance of this “common heritage” on civil law, see the writings of Zimmermann; and most recently, R. Zimmermann, ‘Derecho Romano y Cultura Europea’ (2010) 18 *Revista de Derecho Privado* 5.

²⁸⁴ The circularity to which Hesselink alludes where he noted that European law might operate to “thicken[...]” the moral dimension of European identity”; M.W. Hesselink, ‘The Case for a Common European Sales Law in an Age of Rising Nationalism’, *Centre for the Study of European Contract Law Working Paper Series No 2012-01* (<http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1998174>; Last Accessed: 14.12.2012).

Chapter 2. Absorbing the Legal, Political, Cultural and Socio-economic Dimensions of the Europeanisation of Private Law

Building on the outline of the legislative process, and the reach of European legislation, this chapter explores the harmonisation effort from the perspective of *unitas in diversitate* and aims to uncover the relevant dimensions of this “motto”. Thereafter, the focus shifts to the consideration of the need for a European (legal) culture, which engages also the construction of a European identity, as a precondition to the Europeanisation of private law²⁸⁵. The scope for the emergence of private law within a multi-level, pluralist space is then analysed, and the recognition of potentially shifting conceptualisations of private law are explored. In this context, the hazards – in theory and practice – of methodological nationalism in the Europeanisation of private law discourse, are uncovered.

I. Via Unitas in Diversitate to a Europeanised (Legal) Culture

i. The Harmonisation of Private Law and *Unitas in Diversitate*: Revisiting Culture and Identity in Europeanisation

This section aims to uncover the relevant dimensions of the notion of *unitas in diversitate*, pertinent to integration in general and the Europeanisation of private law in particular, with reference to the discourse explored above on the reciprocal influences of culture, state-building and legal development. Indeed, the significance of commonality and diversity permeates the development of national and European legal culture, reflected in the notion of *unitas in diversitate*²⁸⁶, which provides the basis for the respect, protection and maintenance of the traditions, customs, cultures and languages of Member States. Building on the outline in the introduction, two dimensions of culture can be identified in the Treaties, in its substantive form, and with regard to the foundations of respect for the diversities of the cultures of the Member States in legal development (broadly encompassing norm formation, interpretation, application and enforcement). While Treaty structure provides for the

²⁸⁵ Thus, as noted, in respect of enlargement, the acceptance of European identity is one of the fundamental requirements of EU membership application.

²⁸⁶ The catchphrase of the ill-fated European constitution, Art.I-8, Draft European Constitutional Treaty, OJ C 310/1, 16.12.2004. See further, J. Hendry, “‘Unity in Diversity’: Questions of (Legal) Culture in the European Union” (2008) 3 *Journal of Comparative Law* 289. Joerges has argued that the notion of *unitas in diversitate* can be maintained by virtue of engagement with the notion of understanding European private law as a type of conflicts law: C. Joerges, ‘Unity in Diversity as Europe’s Vocation and Conflicts Law as Europe’s Constitutional Form’ (2010) *LSE ‘Europe in Question’ Series, LEQS, 2010/28*, p.1.

construction of a European cultural policy²⁸⁷, the focus herein falls on the latter. The Treaties also aim to promote the protection of the Member States' cultures via the notion of *unitas in diversitate*. The focus therefore extends to the protection of diversities shaping the legal, economic, political and social dynamics of European integration. The Preamble to the TEU provides that the Treaties have the aim, "drawing inspiration from the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy equality and the rule of law"... "to deepen the solidarity between their peoples while respecting their history, their culture and their traditions". These provisions seem to provide not only the foundations for the respect for these diversities on the part of the Union institutions, including the legislature and the CJEU but also for more overtly positive action on the part of the same institutions. In particular, Art.3 TEU requires the institutions facilitate the "promotion of peace, its values and the well-being of its peoples", the construction of an internal market and the establishment of an area of freedom, security and justice, the promotion of social justice and protection, solidarity and "economic, social and territorial cohesion", within the context of the respect of cultural and linguistic diversity, "ensur[ing] that Europe's cultural heritage is safeguarded and enhanced". Thus, there is recognition not only of the cultural but also of the economic, in terms of the construction of the internal market and the promotion of social cohesion, the political, with reference to the promotion of peace and territorial cohesion, the social, in respect of the promotion of social justice, and protection, solidarity, and social cohesion and the legal, with reference to the area of freedom, security and justice. Furthermore, Art.67(1) TFEU provides that "[t]he Union shall constitute an area of freedom, security and justice, with respect for fundamental rights and the different legal systems and traditions of the Member States". The individuality/commonality "balance" became identifiable in (then) Art.6 TEU; while Art.6(3) explicitly stated that "the Union shall respect the national identities of its Member States", Art.6(1) provided that "the Union is founded on the principles of liberty, democracy, respect for human rights, fundamental freedoms and the rule of law, principles which are common to the Member States". The national identities of Member States are recognised as being worthy of protection under Art.167 TFEU, which following Art.151 EC, obliges the EU to "contribute to the flowering of the cultures of the

²⁸⁷ R. Crauford-Smith, 'Cultural Policy' in P.P. Craig and G. de Búrca, (eds.), *The Evolution of EU Law* (OUP, Oxford; 2nd edn., 2011), pp.869-894. Notwithstanding the absence (until the early 1990s) of a European cultural policy, alongside the broad division of competences between the EU and Member States, it has become a matter of increasing significance at both the EU and national levels. The Maastricht Treaty (Art.151(1) EC) initially introduced the notion of a European cultural policy into the Treaty structure.

Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore”.

It is submitted that the two dimensions overlap in the following way: reference is made to the protection of the diverse, predominantly national cultures in the communications of the Union institutions while at the same time, that which is common has been advanced via the promotion of the “common heritage” of the Member States²⁸⁸. Clearly, these considerations are not limited to the notion of the development of a cultural policy (the competence of which is established in Art.6 TEU) but extend across processes of integration, and therefore the formation, interpretation and application of EU law; this is clear from Art.167(4) and (5)²⁸⁹. Following the amendments of the Lisbon Treaty, the Treaty structure continues to promote the respect and maintenance of diversity between Member States. This suggests that the European project should not be conceived as promoting commonality, neither via the development of a European cultural policy nor via a uniform body of norms, at the expense of all other virtues of the European order. This, according to Hendry, reflects the *unitas in diversitate* paradox²⁹⁰. The divergent attitudes towards the manner in which these two dimensions should be engaged reflect the different ideological underpinnings framing European integration and the Europeanisation of law, one promoting a discretion on the part of the Member States allowing for the preservation of the diversities existing between legal cultures and tradition, and the other removing all discretion via the harmonisation of uniform norms and thus, much of the scope for the preservation of diversities. One reflection of this is identifiable in the reach of harmonisation – whether minimum, or maximum, or targeted maximum – explicated above.

Building on the discussion above, the following paragraphs attempt to concretise the discourse with reference to an example, namely, the evolution of one key concept of European private law: the consumer. Fundamentally, the European concept of the consumer introduced in Union legislation, and putatively clarified in the CRD, allows for the minimum/maximum harmonisation discourse to be linked with the principle of *unitas in*

²⁸⁸ Declaration on European Identity, 1973 (12 Bull. EC 118).

²⁸⁹ Art.167(4) and (5) TEU, which provide “4. The Union shall take cultural aspects into account in its action under other provisions of the Treaties, in particular in order to respect and to promote the diversity of its cultures...and “5. ...to contribute...the Council.. shall adopt incentive measures, excluding any harmonisation of the laws and regulations of the Member States”.

²⁹⁰ See Hendry, “Unity in Diversity” (n.286) and J. Hendry, *Unitas in Diversitate? On Legal Cultures and the Europeanisation of Law*, PhD Thesis (EUI, Florence; 2009), p.18.

diversitate. Moreover, it engages the scope for the emergence of a European culture; the exploration of the concept of consumer also brings to the fore membership of identity and group (or rather, a multiplicity of groups) as it exists within the nation state and beyond. The notion of consumer emerged initially within the context of the state; consequently, it encompassed determinations of local preference, and came to reflect a national conceptualisation deriving from “consumer culture” and general culture. This embeddedness suggests that an attempt to transfer the concept beyond the national context to, for example, the Union level, necessarily brings cultural diversities to the fore.

The nature of contract and the appreciation of the role of law, related more generally to the liberal conception of the nation state and the market, dictated a rather delayed explicit recognition that particular contracting parties required specific protection. Where previously there existed little scope for the characterisation of a particular individual as a “consumer”, the shift in paradigm from status to contract²⁹¹ further ensured that in light of contract law development, there emerged little scope for consideration of divergent standards of protection for different contracting parties. The strict adherence to the ideal of contractual equality, enshrined in the formal understanding (contrasted against the later materialisation²⁹²) of contract law, rejected the notion that contracting parties be identified as belonging to certain groups requiring different levels of protection. Inherent in this understanding, reflected in freedom of contract, is the conceptualisation of a technical, apolitical private law, understood to have little or no social function. With the materialisation of contract, mechanisms for the protection of contracting parties evolved in national legal orders; a nationally-embedded concept of consumer existing alongside “notions of national citizenship”, emerged within divergent national markets, “whereby national regulation and law would dictate the mode of national production, the extent and character of goods and services on offer within that market, as well as the terms and conditions under which such goods and services might or might not be purchased”²⁹³. Consequently, divergent conceptions of the consumer and consumer culture more broadly, became identifiable across national cultures and traditions.

²⁹¹ H.S. Maine, ‘From Status to Contract’ in *Ancient Law* (Murray, London; 1861).

²⁹² Trends of materialisation of law were discussed in Weber’s analysis of legal systems M. Weber, *Economic and Sociology, Vol.II* (G. Roth and C. Wittig edn.) (Berkeley Press, Berkeley; 1969); notwithstanding, the development of the discourse, between the formalists, promoting the maintenance of the autonomy of law, in respect of political and social concerns, and those promoting an understanding of law, incorporating concerns as to social justice arising in modern society, really came to the fore with critical legal scholarship.

²⁹³ M. Everson, ‘Legal Constructions of the Consumer’ in F. Trentmann (ed.), *The Making of the Consumer: Knowledge, Power and Identity in the Modern World* (Berg, Oxford; 2006), pp.99-121, p.107.

Furthermore, it has been asserted that “...the consumer role model of a particular legal system can be seen as a mirror of this society’s vision of its market and social system”²⁹⁴. Not only might the consumer be formally conceptualised differently across national legal systems, but cultural divergences are also reflected in the way in which consumers tend to respond to the information with which they are provided²⁹⁵. Empirical research supports such an assertion and indicates that “national cultural variation”²⁹⁶ may have an impact on consumer culture generally, and on the manner in which consumers behave; these divergences might relate, for example, to the approach of consumers to certain communications, to their ability to trust and their exercise of rationality in their decision-making processes²⁹⁷. From this perspective, two primary views on the relationship between law and society can be identified. The first, elaborating on the scholarship from Durkheim to Luhmann²⁹⁸, posits that law plays a key role in devising a solution to the problems associated with complexity in society. Law provides a particular framework, established at the level of society, on the basis of which people can determine their own behaviour²⁹⁹. Society is deemed to be “without centre or apex”³⁰⁰ while the position that the state has come to hold in society is “historically embedded and contingent”. When the ties between law and the state are so understood, law can be conceived as reflection of the changing nature of society³⁰¹. The second understanding

²⁹⁴ 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 *et al* (eds.), *The Foundations of European Private Law* (Hart, Oxford; 2011), pp.89-113, p.106.

²⁹⁵ In the case law of the CJEU, it is provided that the consumer is defined with reference to the “social, cultural and linguistic factors” which are relevant. Wilhelmsson has made an argument for greater consideration of the cultural dimension: T. Wilhelmsson, ‘The European Average Consumer – a Legal Fiction?’ in T. Wilhelmsson *et al* (eds.), *Private Law and the Many Cultures of Europe* (Kluwer, The Hague; 2007), pp.243-268.

²⁹⁶ Often in cross-cultural analysis, Hofstede’s dimensions of national culture are employed: a) power distance (the manner in which inequality is dealt with); b) uncertainty avoidance (how uncertainty is dealt with); c) individualism and collectivism (the individual/collective relationship); d) masculinity and femininity and e) long-term versus short-term orientation: G. Hofstede, *Culture’s Consequences: Comparing Values, Behaviours, Institutions and Organizations Across Nations* (Sage Publications, London; 2nd edn., 2001). It has also been recognised that this framework for analysis might be useful in the European context: M. de Mooij, *Consumer Behaviour and Culture: Consequences for Global Marketing and Advertising* (Sage Publications, London; 2004), p.36.

²⁹⁷ T. Wilhelmsson, ‘Harmonizing Unfair Commercial Practices Law: The Cultural and Social Dimensions’ (2006) 44 *Os.Hall.L.J.* 461. Wilhelmsson also makes reference to M. Solomon, G. Bamossy and S. Askegaard (eds.), *Consumer Behaviour, A European Perspective* (Prentice Hall, Upper Saddle Hall; 1999), noting also the global perspective.

²⁹⁸ That is, in terms of the concept of functional differentiation: the demand for law from the social, Durkheim, *The Division of Labor in Society* (n.66); “What is, then, the practical cause of the genesis of law? It is, replies the author, the need to guarantee the conditions of existence of society”: É Durkheim, ‘La science positive de la morale en Allemagne’, (1887) 24 *Extrait de la Revue philosophique*, pp.33-142; 275-284 (English translation, ‘Jurists?’ (1986) 15 *Economy and Society* 346, pp.348-349); N. Luhmann, *Die Gesellschaft der Gesellschaft* (Suhrkamp Verlag, Berlin; 1997).

²⁹⁹ N. Luhmann, *A Sociological Theory of Law* (Routledge, London; 1985), p.105.

³⁰⁰ N. Luhmann, *Political Theory in the Welfare State* (J. Bednarz Jr. trans.) (de Gruyter, Berlin; 1990).

³⁰¹ P. Zumbansen, ‘Transnational Comparative Theory and Practice’, *Osgoode Hall Working Paper 1-2012*, p.12.

reflects a certain cynicism with regard to the role of law, advancing the notion that it operates in the background of society, without necessarily playing a prominent role in the way in which people organise and live their lives³⁰².

Difficulties might arise for the Member States in the delineation of the scope of the CRD, and furthermore, with regard to the changes required in national law to ensure satisfactory implementation and compliance with Union norms³⁰³. At the European level, the focus on the removal of national barriers to trade and the promotion of the internal market sets a high threshold for national provisions, which at once constitute barriers to trade and promote the protection of consumer interests. Two considerations arise, concerning the reach of European legislation and the level of protection afforded to consumers in a multi-level construct, shaped by the values discussion underlying the market and the social. On the one hand, one might consider that the level of consumer protection and the rationale underpinning, might diverge across the Member States, shaped by social and justice considerations therein; on the other hand, the emergence of the consumer group and consumer culture existing beyond the state underpins the idea of a European consumer. The very existence of divergent standards of protection across the Member States begs the question of whether a European understanding of consumer is even identifiable³⁰⁴. Wilhelmsson rather considers that the divergent understandings of consumer culture permeating the national orders requires not only recognition of different standards of protection but also a broader and more transparent appreciation of the significance of national “social, cultural or linguistic factors”³⁰⁵ at the European level. As the textual construction of the legislative provision of consumer must be read in light of the interpretations rendered by the CJEU³⁰⁶, its interpretative approach is significant. It seems that the AGs will more readily engage the existence of linguistic,

³⁰² In the context of business contract relations, see S. Macauley, ‘Non-Contractual Relations in Business’ (1963) 28 *Am.Soc.Rev.* 55.

³⁰³ DG for Internal Policies, Policy Department: Citizens’ Rights and Constitutional Affairs, ‘The Potential Impact of the Consumer Rights Directive on Member States’ Contract Law’ (n.253), p.14.

³⁰⁴ Wilhelmsson questions to what extent it is appropriate that these notions be “Europeanised”: Wilhelmsson, ‘The European Average Consumer – a Legal Fiction?’ in Wilhelmsson *et al*, *Private Law and the Many Cultures of Europe* (n.295), p.245, and whether, in reality, it might be the case that such differences exist between national notions of (average) consumer that it is useless to make reference to a European notion.

³⁰⁵ T. Wilhelmsson, ‘Introduction: Harmonization and National Cultures’ in T. Wilhelmsson, E. Paunio and A. Pohjolainen (eds.), *Private Law and the Many Cultures of Europe* (Kluwer, The Hague; 2007), pp.3-20, pp.15-16. The “social, cultural or linguistic factors” as highlighted in *C-220/98 Estée Lauder Cosmetics GmbH & Co OHG v Lancaster Group GmbH* [2000] ECR I-1117, para.29.

³⁰⁶ S.2(1), as “any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business, craft or profession”, CRD.

cultural and social diversities in the development of a European notion of consumer³⁰⁷. This might suggest that in rendering interpretations of such concepts, the Court is more reluctant than the AG to make reference to the building blocks from which divergent national cultures traditions have been constructed, and which underpin concepts which might be transferred beyond the nation state. However, this understanding is too simple; indeed, implicit references to the relevance of “social, cultural or linguistic factors” in the interpretation of the consumer *acquis* can be identified in the Court’s judgements³⁰⁸. The scope for taking cultural diversities into account in developing the understanding of the European consumer must be acknowledged as being shaped by the broader context of the intended reach of European legislation. Minimum harmonisation allows Member States to extend the concept of consumer beyond that provided in the directive; essentially, this allows for different levels of consumer protection (above a minimum). The maximum harmonisation approach, strictly understood, removes the latitude permitting the Member States to establish or maintain a more stringent level of protection. Thus, the maximum harmonisation approach itself undermines the scope for the consideration of relevant national divergences within the CJEU. Notwithstanding, even where European legislation provides for maximum harmonisation, the CJEU has held that “a margin for manoeuvre” exists which “authorises [Member States] to maintain or introduce particular rules for specific situations”³⁰⁹.

With regard to the CRD, which provides for “targeted full harmonisation”³¹⁰, there is a lack of clarity as to whether the CJEU’s interpretation should provide for a common, Europeanised³¹¹ notion of consumer at the expense of the social, cultural and linguistic considerations of national legal orders. While the CJEU has arguably fostered divergence in the national systems by allowing for interpretations of “consumer” dependent on the context of the particular case heard before the national court³¹², it is likely that, as with maximum harmonisation in general, the CJEU will have to provide for a Europeanised understanding of

³⁰⁷ C-315/92 *Verband Sozialer Wettbewerb eV v Clinique Laboratoires and Estée Lauder Cosmetics* [1994] ECR I-317, Opinion of AG Gulmann, para.18.

³⁰⁸ *Estée Lauder Cosmetics* (n.305), Judgement, para.29: “...in particular, it must be determined whether social, cultural or linguistic factors may justify the term ‘lifting’, used in connection with a firming cream, meaning something different to the German consumer as opposed to consumers in other Member States...”. As noted above, reference is made to the notion in the Unfair Commercial Practices Directive, at Recital 18.

³⁰⁹ C-101/01 *Lindqvist* [2003] ECR I-12971, Judgement, para.98.

³¹⁰ Per Art.4 CRD.

³¹¹ Wilhelmsson, ‘The European Average Consumer – a Legal Fiction?’ in Wilhelmsson *et al*, *Private Law and the Many Cultures of Europe* (n.295).

³¹² V. Mak, ‘Standards of Protection: In Search of the “Average Consumer” of EU Law in the Proposal for a Consumer Rights Directive’ (2011) 19 *ERPL* 25, p.29.

consumer, applicable across the Member States. Furthermore, the CJEU's scope for engaging in comparative, "cross-directive" reasoning³¹³ in which it has aimed to achieve coherence between the various consumer directives, would dictate that this Europeanised approach is soon extended across the Union *acquis*. This would seem to be the case against the background of the broader balancing exercise of consumer protection and market facilitation undertaken within the jurisdiction of the CJEU and the national courts³¹⁴. It has been said that the CRD "unlike the CFR and all other national private-law instruments...deviate[s] from the classic ethical concept of private law, which pursues justice between parties in the individual case (normally communicative, sometimes also distributive justice) as the highest objective. Instead, the CRD sacrifices justice between the parties in favour of providing European businesses with a basic, but uniform, regulatory framework for market transactions with consumers"³¹⁵. Thus, as noted above, the issue is a constitutional one; as Schmid understands it, the instrumentalisation of private law³¹⁶ dictates that the significance attributed to social justice and the "the immaterial interests of consumers" (deriving from the national traditions)³¹⁷, on the one hand, and the promotion of the internal market, on the other, will never be equal, as preference is necessarily attributed to the facilitation of the internal market as the *effet utile* of European law via the EU legislature and the CJEU's "one-sided teleological" approach³¹⁸. As such, while it might be expected that consumer protection might be understood as an "overarching interpretative meta-principle"³¹⁹, Schmid rejects the notion that the CJEU "pursue[s] a coherent consumer model". The interpretation of consumer in the CRD will therefore be key³²⁰; as noted, it is not clear whether a restrictive interpretation

³¹³ V. Mak, 'Harmonisation through 'Directive-Related' and ' Cross-Directive' Interpretation- the Role of the ECJ in the Development of European Consumer Law' *Tilburg.WP 2008/08*, pp.19 *et seq.*

³¹⁴ This is explored in greater detail in the case example below, especially in respect of the conflict between fundamental rights and freedoms.

³¹⁵ C. Joerges and C. Schmid, 'Towards Proceduralization of Private Law in the European Multi-Level System' in A. Hartkamp *et al* (eds.), *Towards a European Civil Code* (Kluwer, The Hague; 4th edn., 2011), pp.277-309, p.280.

³¹⁶ Schmid, 'The Thesis of the Instrumentalisation of Private Law by the EU in a Nutshell' in Joerges and Ralli, *European Constitutionalism Without Private Law* (n.257), pp.26-27.

³¹⁷ Lurger, 'Old and New Insights for the Protection of Consumers' in Brownsword *et al*, *The Foundations of European Private Law* (n.294), p.107.

³¹⁸ C. Schmid, 'The ECJ as a Constitutional and a Private Law Court- A Methodological Comparison', (2006) 4 *ZERP Diskussionspapier*, pp.11-12.

³¹⁹ Schmid, 'The ECJ as a Constitutional and a Private Law Court' (n.318), p.22.

³²⁰ It is submitted that a connection can be drawn between this consideration and Unberath and Johnston's analysis of the CJEU's "double-headed" approach: while in cases of negative harmonisation the Court has elucidated its reluctance to allow for national provisions based on standards of consumer protection (which might also constitute a restriction to free movement, and ultimately, free trade), in relation to positive European harmonisation, the CJEU has sought to ensure a wide application: H. Unberath and A. Johnston, 'The Double-Headed Approach of the ECJ Concerning Consumer Protection' (2007) 44 *CMLR* 1237, pp.1281-1282.

will dictate that the national conceptualisations necessarily fall foul of the European notion³²¹. Notwithstanding, even the recognition of the promise of a European concept of consumer need not exclude all reference to consumer culture as it continues to exist within the state (or beyond, outwith even the European space); such a pluralist perspective rather suggests that national conceptualisations of consumer might shape (that is, as opposed to be merely transferred to the European level) consumer culture, as it emerges beyond the nation and even beyond Europe. Furthermore, neither the national nor the European consumer constitutes a mere legal concept but also a dimension of identity deriving from culture and tradition, in the context of cross-border consumerism.

This section has provided an outline of *unitas in diversitate* and has attempted to concretise this discourse with reference to the emergence and conceptualisation of the consumer, key to the Europeanisation of private law. The notion of *unitas in diversitate* engages the institutionalisation of the protection of diversities existing within Member States in the context of the construction of a uniform body of Union norms via harmonisation. With regard to Europeanisation, it should allow for consideration of the reciprocal influences of culture and tradition, the evolution of the nation state, and the legal development occurring within and beyond these territorial boundaries; this can be engaged via comparative analysis, as will be explored below. Moreover, the reference to the evolution of the concept of the consumer allows for the engagement of a broader culture within which the development of an identity and membership of a group (or rather, a multiplicity of identifications) can be uncovered. Against this background, the following section explores the need for the emergence of a European (legal) culture as a precondition to integration and Europeanisation.

ii. Questioning the Need for a European (Legal) Culture as a Prerequisite to the Europeanisation of Law

While this discussion of culture, tradition, and therein identity, might seem to be beyond the scope of the research, it is submitted that it is vital, in terms of the perspective adopted, the methodology and the substantive focus of the thesis. As noted above, the rationales, manifestations and contexts of Union legislative activities have shifted, reflected in the policies of the Commission, both in terms of the declining focus on codification, and the

³²¹ Mak sets out the difficulties that might be faced in national system should any attempt to lower consumer protection become necessary: Mak, 'Standards of Protection' (n.312), pp.37-38.

reach of harmonisation. Private law development has been inherently tied to that of the state, and thus, to the cultures and traditions that have evolved within the context of the nation (in respect of which, as discussed, the notions of “self” and “other” have been of vital significance). As considered above, the significance of these cultures and traditions and the respect of the commonality and diversity thereof, are reflected in the acceptance of the plurality of the European space. On the one hand, the manifestations of diversity are deemed worthy of protection, and on the other, are deemed to undermine, principally, the functioning of the market; in legal terms, harmonisation aims to eliminate – to differing degrees, depending on its reach – these diversities. The recognition and acceptance of pluralism is reflected, and its significance amplified, by the absence of an explicit European (legal) culture. This section aims to uncover whether a single (and necessarily common) European (legal) culture – one which purports to facilitate the unification of private law – should constitute a precondition to European legal development, or whether the pluralist perspective (which might putatively encompass a common or shared culture at the European level) is not more favourable in light of the context of Europeanisation and the dynamic evolution of private law.

While the significance of actual divergences is often negated, the need for the “bridging” of gaps between national legal cultures³²² and traditions has long been a lingering concern in private law scholarship³²³. This bridging is arguably facilitated by the contemporary emergence of a type of European (or transnational) culture; two possibilities have been advanced. On the one hand, reference is made to the need for a single European culture (deriving from the commonality that seemingly subsists from the *ius commune* and providing the foundations for the unification of private law) as a prerequisite of European legal development. On the other, it is considered that the existence of a plurality of legal cultures within and beyond the European sphere³²⁴ (and the scope for maintenance of the diversity to

³²² For the purposes of this thesis, legal culture is understood to constitute a localised understanding of culture: thus, the connection of legal culture with a particular community can be used in order to forge an understanding of collective identity; R. Michaels, ‘Legal Culture’ in J. Basedow *et al* (eds.), *Max Planck Encyclopedia of European Private Law* (OUP, Oxford; 2012), pp.1059-1063, p.1060.

³²³ R. Zimmermann, ‘The Present State of European Private Law’ (2009) 57 *AJCL* 479. More recently, see the speech of Commission Reding at the Opening of the European Law Institute: V. Reding, ‘The European Law Institute: Tracing the Path Towards a European Legal Culture’, Speech 11/764; Vienna, 17.11.2011.

³²⁴ For example, there is an interesting body of literature on the diversity of legal cultures in relation to the development of international law, and particularly, international criminal law. Indeed, the clash of legal cultures was something, which, while of course not at the forefront of the proceedings at Nuremberg, was particularly relevant. See ‘The “Flick” Case’, *Nazi War Crime Trials: Nuremberg Military Tribunal*, The Green Series,

which this perspective gives rise) should be recognised as forming part of any emerging European culture. For the purposes of this thesis, legal culture is engaged as an alternative point of reference, at once distinct from and inherently related to the rationale[s] underlying the European integration project³²⁵. Thus, as Micklitz has asserted, “[t]he point is rather [instead of highlighting the idea that the EU is the product of law, governed through law] to redefine the role of European law, in light of economisation and politicisation, thereby taking into consideration different legal and cultural traditions”³²⁶.

The emergence of the European construct is conceived not as a single process but rather as a number of reflexive processes shaped by determinations of, amongst others, “identity, power, will, order, and becoming”³²⁷. The difficulties in coherently defining and conceptualising culture and tradition, and furthermore, identity and community, have been explored in the introduction and Part I³²⁸. With the creation of a community of European states, the idea of a “whole” European identity, either conflicting with or existing alongside a plurality of – not necessarily national or territorial³²⁹ – identities, has emerged but has been difficult to conceive, initially and also following enlargement. Indeed, the EU itself has been described as an “unimagined community”, a reflection of Benedict Anderson’s *Imagined Communities*, the result of an “inadequately imagined...half revolution”³³⁰. Allott has argued for the “public mind of Europe, of a collective consciousness which can process the concepts, the ideals, the values, the purposes, the policies, the priorities, the hopes and fears of the people and peoples of Europe”³³¹. On the one hand, the European identity, existing within that community, is formed from the multiplicity of identities existing within the Member States,

Vol.VI, p.119 and ‘The “Justice” Case’, *Nazi War Crime Trials: Nuremberg Military Tribunal*, The Green Series, Vol.III, p.108.

³²⁵ On the notion of “integration through law” generally, see Cappelletti, Seccombe and Weiler, *Integration Through Law* (n.101).

³²⁶ H.W. Micklitz, ‘The Visible Hand of European Regulatory Private Law’, *EUI WP 2008/14*, p.15.

³²⁷ P. Allott, ‘The Concept of European Union’ (1999) 2 *Cam.YB.Eur.Leg.Stud.* 31, p.49.

³²⁸ For this purpose, the thesis has looked to the emergence of the European from its post-War foundations, and attempted to integrate this analysis in the specific context of private law, with reference to the development of the latter in the nation states. There is a body of literature – summarised in R. Swedberg, ‘The Idea of ‘Europe’ and the Origin of the European Union – A Sociological Approach’ (1994) 23 *Zeitschrift für Soziologie* 378 – which looks to the notion of the “European idea”, with its origins in “a very much more distant past – often stretching as far back as the Middle Ages or even to Antiquity”, p.378. Analogies can be drawn in this respect with the notion of the development of a common legal culture from the *lex mercatoria*, see Zimmermann, ‘Derecho Romano y Cultura Europea’ (n.283).

³²⁹ At least within Europe, where both the jurisdiction of Europe, and the EU exist.

³³⁰ Allott, ‘The Concept of European Union’ (n.327), pp.31-32, citing B. Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (Verso, London; 1991). p.224.

³³¹ P. Allott, ‘The Crisis of European Constitutionalism: Reflections on the Revolution in Europe’ (1997) 34 *CMLR* 439, p.489.

each of which is understood as “self” and “other” within the European space. However, the European identity also constitutes a “self”, in itself³³²; thus, not only has the European identity been shaped by the “other” from within (that is, the diversities existing between the Member States) but also, in the context of globalisation, it increasingly interacts with the external “other”. Consequently, where European identity is set against the external “other”, it might potentially follow the pattern within the nation state: with “nationality as referent for interpersonal relations and the human alienating effect of us and them are brought back again, simply transferred from their previous intra-Community context to a new inter-Community one”³³³. If, as considered above, it is the existence of a shared culture in the nation state context that founds the construction of national identity, these cultures must be understood to belong to modernity, suggesting that – despite apparent divergences – national legal cultures nevertheless share similar features. Clearly, neither culture nor identity is tied solely to the nation; that is to say, the recognition of the existence of a plurality of cultures (and identities) within one territorial space removes the precondition of a specific connection between culture (or identity) and state³³⁴, bringing to the fore the scope for European and transnational understandings. Thus, if ever a European identity or culture could be said to exist, it is unlikely that it would entirely replace affiliation with national identity; individual, group and community identity must be distinguished, allowing individuals (or the “European man” to which Collins refers³³⁵) to establish and maintain close ties to a number of different communities and thus adopt the identity of divergent social constructions. Moreover, like identities in general, identities within the European context could be conceived as multiple and plural, depending on perception³³⁶; any European identity would therefore form part of the notion of a shared European culture, existing alongside the national. This understanding brings to the fore the question of how this multiplicity of identities and belonging to communities might be organised within the European context also comes to the fore. Indeed, while Sen engages the notion of membership in his work on identity and the scope for plurality thereof, he highlights the need to provide for a hierarchical organisation of the

³³² Allott, 'The Concept of European Union' (n.327), p.32.

³³³ J.H.H. Weiler, 'The Transformation of Europe' in J.H.H. Weiler (ed.), *The Constitution of Europe: 'Do the New Clothes Have an Emperor?' And Other Essays on European Integration* (CUP, Cambridge; 1999), pp.10-101, p.95.

³³⁴ Friedman, *The Republic of Choice* (n.42), pp.3-4.

³³⁵ H. Collins, 'European Private Law and the Cultural Identity of States' (1995) 3 *ERPL* 353, p.357.

³³⁶ It has been asserted that culture is formed on the basis of what is perceived – “the identity...of any culture is thus aspectival rather than essential”, such that identity, therefrom deriving can be plural: J. Tully, *Strange Multiplicity – Constitutionalism in an Age of Diversity* (CUP, Cambridge; 1995), p.10.

divergent conceptions of identity in respect of those of one particular individual³³⁷. In the European context, Bańkowski has rejected reference to a vertical, “Russian Doll-type” interaction of identities, whereby each would exist within the other; rather, he supports the notion of a dynamic, “horizontal interlocking” where the “larger” does not necessarily subsume the smaller³³⁸. This supports the understanding of the European space as multi-level in its nature³³⁹, and refutes the need for a single common identity, or more broadly, culture.

As discussed above, the state has reflected the core of national private law; while the nineteenth century development of private law within particular nation states might be considered to have been abstracted from society and its culture, with reference to scope for apolitical, universalist principles (facilitating the dominance of the autonomous private law system), this abstractedness has fallen away from the development of private law in recent years. Private law norms have come to represent “local society”, shaping behaviour and shaped itself by the social, moral, political as well as economic values underlying³⁴⁰; in particular, reference can be made to the potentially diverse understandings of social justice, which necessarily influence national as well as European private law³⁴¹. As Collins has asserted, private law as “the constitution of civil society...often displays the bright colours and markings of a national flag: an affirmation of national identity, solidarity, and civility”³⁴². This “local society” might therefore reflect the national context, a more local context within the national, or exist beyond the state; to the extent that individuals connect their identity to these moral bases, a focus on uniformity or commonality – whether of norms or cultures – might potentially undermine these foundations and consequently, the means by which individuals construct one dimension of their identity. The difficulty with facilitating the potential replacement of this locality with a single European one is that it might potentially negate the diversity of values underlying; this difficulty, particularly in light of the dominance of European market-orientated values, is reflected in the assertion of Sefton-Green, who endeavours to highlight that private law cannot only be concerned with economic matters

³³⁷ A. Sen, *Identity and Violence: The Illusion of Destiny* (W.W. Norton & Co., NY; 2006), pp.18 *et seq.*

³³⁸ Z. Bańkowski, ‘The Journey of the European Ideal’ in A. Morton and J. Francis (eds.), *A Europe of Neighbours? Religious Social Thought and the Reshaping of a Pluralist Europe* (The University of Edinburgh, Edinburgh; 1999), pp.149-172, p.167.

³³⁹ Collins, ‘European Private Law and the Cultural Identity of States’ (n. 335), pp.358-359; for example, it is not clear that what is for Europe (predominantly, the market) can necessarily be disentangled from what is for the local - it cannot be said that the market is for the European while the social is for the local, nor can it be said that culture can be concerned only with the non-economic; this is too simplistic.

³⁴⁰ N. Fraser, *Qu’est-ce que la justice sociale?* (E. Ferrarese trans.) (La Découverte, Paris; 2005).

³⁴¹ Study Group, ‘Social Justice in European Contract Law: a Manifesto’ (2004) 10 *ELJ* 653.

³⁴² H. Collins, ‘Cosmopolitanism and Transnational Private Law’ (2012) 8 *ERCL* 311, p.312.

(namely, the facilitation of the internal market) but must also engage social and moral considerations, as “both a vehicle for our values and a means of implementing economic arrangements”³⁴³.

It is worth considering how culture has been conceived and structured within and beyond the state. Tuori advances a three-level analysis of legal culture: the surface level (legislation and case law), the middle level (methodology and techniques of adjudication) and the deep structure (fundamental normative principles of law) of legal culture, at which *Vorverständnis* exists³⁴⁴. He argues that “epistemic communities”, reflected in “transnational” legal communities, are identifiable at the “micro level”; thus, for example, reference can be made to epistemic communities and “third” legal cultures, including international trade³⁴⁵, civil society and the legal profession. For Tuori, EU legislation and case law reflects European legal culture existing at the surface and perhaps the middle level³⁴⁶, having a “general role...in legal practices, of the functioning of legal concepts, principles and theories as a filter through which surface-level legal material is cognized and interpreted”³⁴⁷. Arguably, legal culture is facilitated primarily through such institutional interaction and the professional elite of legal practice³⁴⁸, that is, through cooperative networks of legal scholars and legal professionals, including those of lawyers and judges. These interactions – the sharing of knowledge and experiences³⁴⁹ - are necessarily influenced by the legal cultural backgrounds of the relevant actors operating in the relevant *fora*, whether at the national or European level,

³⁴³ R. Sefton-Green, ‘Social Justice and European Identity in European Contract Law’ (2006) *ERCL* 275, p.285.

³⁴⁴ K. Tuori, ‘EC Law: An Independent Legal Order or a Post-Modern Jack-in-the-Box?’ in L.D. Eriksson and S. Hurri (eds.), *Dialectic of Law and Reality: Readings in Finnish Legal Theory* (Helsinki Faculty of Law, Helsinki; 1999), pp.359-415.

³⁴⁵ F. Snyder, ‘Governing Economic Globalisation – Global Legal Pluralism and European Law’ (1999) 5 *ELJ* 334.

³⁴⁶ For an elaboration of this view, see T. Wilhelmsson, ‘Private Law in the EU: Harmonised or Fragmentised Europeanisation?’ (2002) 10 *ERPL* 77.

³⁴⁷ K. Tuori, ‘Towards a Theory of Transnational Law: A Very First Draft’ (2010) (on file with the author), p.23.

³⁴⁸ Wilhelmsson, ‘Introduction’ in Wilhelmsson *et al*, *Private Law and the Many Cultures of Europe* (n.305), pp.6-7. See especially, K. Tuori, ‘Legal Culture and General Societal Culture’ in T. Wilhelmsson *et al* (eds.), *Private Law and the Many Cultures of Europe* (Kluwer, The Hague; 2007), pp.23-35, p.26, on the basis of the notion of law as *Volksrecht* developed by Savigny; F.K. Savigny, *System des heutigen römischen Rechts I* (Neudruck der Ausgabe, 1840; Scientia Verlag, 1981); Tuori asserts that the “fast-moving” nature of legal practice generates a gap between legal culture and general societal culture.

³⁴⁹ This development and exchange of knowledge and information is vital; reference is made by Commissioner Reding (below) to the flagship initiative of the “innovation union” under Europe 2020, which looks to establish “knowledge alliances”; European Commission, ‘Communication, Europe 2020: A Strategy for Smart, Sustainable and Inclusive Growth’ COM(2010) 2020 final, 03.03.2010, pp.12-13 for a summary.

including the CJEU, the ECtHR, the national courts, scholars, private individuals and civil society bodies - ³⁵⁰.

In respect of the substantive development of Union law, Kennedy, for example, has highlighted the significance of the identity and rights discourses across almost the entire breadth of law³⁵¹. It has long been recognised that the people of Europe are “interested parties” in the construction of an EU legal order; in *Van Gend en Loos*, the CJEU highlights that the “Treaty is more than an agreement which merely creates mutual obligations between the Contracting States...confirmed by the Preamble to the Treaty which refers not only to governments but to peoples... the nationals of the States brought together in the Community are called upon to”³⁵². Individuals enjoy rights as European citizens, expressly through the Treaty and via the obligations imposed on individuals, Member States and EU institutions³⁵³. On this basis, individuals might organise themselves (or be organised), from which an identity is derived or provided. This is particularly clear in relation to contract; distinctions are made between workers³⁵⁴, consumers, and tenants, amongst others inherently connected to the (either local, national or transnational) community; in the consumer contract case example, it is the “identity” of the consumer which gives rise to the protection via the engagement of UCTD norms. In the CJEU jurisprudence discussed below, the significance of the individual’s rights in the cross-border facilitation of the European market can be identified, on the one hand, within the nation state, and on the other, where the individual is freed from the ties binding him to his nationally-constructed identity³⁵⁵. This notion of the “freeing” of the individual has also been highlighted by Patterson *et al*, in respect of the development of the “market state” which “allows us also to cope with European pluralism as a main feature of EU law: As the ‘market-state’ is process-orientated...it is also in principle accessible to all

³⁵⁰ Further consideration is made of the socio-legal, cultural constitution of the CJEU in Chapter 4; however, this analytical dimension does not constitute the focus of the thesis. Rather, reference can be made to T. Lundmark, *Charting the Divide Between Common and Civil Law* (OUP, Oxford; 2012), especially Chapter 4 *et seq*.

³⁵¹ D. Kennedy, ‘Three Globalizations of Law and Legal Thought: 1850-2000’ in D.M. Trubek and A. Santos (eds.), *The New Law and Economic Development: A Critical Appraisal* (CUP, Cambridge; 2006), pp.19-73, p.63.

³⁵² *Van Gend en Loos* (n.219), Judgement, para.12.

³⁵³ *Van Gend en Loos* (n.219), Judgement, para.112.

³⁵⁴ Case 75/63 *Hoekstra* [1964] ECR 177.

³⁵⁵ Micklitz, in respect of *Viking* and *Laval*, ties this to Durkheim’s “cult of the individual”. H-W. Micklitz, ‘Three Questions to the Opponents of the Viking and Laval Judgements’ *Opinion Paper, Observatoire social européen 2012-08*. (C-341/05 *Laval v Svenska Byggnadsarbetareförbundet* [2007] ECR I-11767 and C-438/05 *International Transport Workers’ Federation and Finnish Seamen’s Union v Viking Line* [2007] ECR I-10779).

societies which has the consequence of disregarding the concept of the individual as state-national”³⁵⁶.

For Patterson *et al*, the “market state” culture therefore constitutes one significant reflection of culture deriving from European integration and the tension arising between European legislation and Member State sovereignty, reflected in the significance attached to “market-state features in EU law”³⁵⁷, the shift from welfare to market (as embodied in the GATT, and in notions of “embedded liberalism”), and the increasing interdependence of the markets and states, particularly in light of the Eurozone crisis. The notion of European culture as “market culture” not only reflects the significance attached to transnationalism and that which exists, decentralised³⁵⁸ beyond the state, but also the significance of the diversity of the heritages of the nation states: “This ‘market state’ faces a diffuse, interdependent and intertwined larger market that cuts across boundaries and while formally sovereign to establish their welfare systems, those states are in practice required to coordinate entitlements and regulation with other market states”³⁵⁹. The focus in this understanding of culture is not on identity as conceived above but rather on “whether they function to create and govern markets”, using “market-mechanisms to influence behaviour”³⁶⁰. This conception clearly has links with the initial construction of the ECSC, namely the function of creating economic union and a “pro-trade” culture³⁶¹, the fundamental “commonality” shared by the relevant nation states being the development of the common market; it is now clear that other considerations encompassing the social, cultural, political and legal dimensions of integration should be engaged to reflect its whole.

The significance of culture, tradition, identity and community are also identifiable in the case law of the national courts on Europeanisation of law and integration. Culture is explicitly linked to identity in the Lisbon Treaty judgement of the German *BVerfG*³⁶², in which it asserted that the national political determination as to economic, social and cultural standards within the Member States should be respected in the context of European integration, in those “areas which shape the citizens’ living conditions, in particular the private sphere of their own

³⁵⁶ Patterson *et al*, ‘Statecraft, the Market State and the Development of European Legal Culture’ (n.171), p.16.

³⁵⁷ Patterson *et al*, ‘Statecraft, the Market State and the Development of European Legal Culture’ (n.171), p.1.

³⁵⁸ Patterson *et al*, ‘Statecraft, the Market State and the Development of European Legal Culture’ (n.171), p.18.

³⁵⁹ Patterson *et al*, ‘Statecraft, the Market State and the Development of European Legal Culture’ (n.171), p.3.

³⁶⁰ Patterson *et al*, ‘Statecraft, the Market State and the Development of European Legal Culture’ (n.171), pp.2-3.

³⁶¹ As is clear also from the jurisprudence of the CJEU, including *Dassonville* (n.106).

³⁶² Also in the Maastricht decision: *BVerfG* 89, 155; 2 BvR 2134, 2159/92; 12.10.1993.

responsibility and of political and social security, protected by fundamental rights, as well as in respect of political decisions that rely especially on cultural, historical and linguistic perceptions”³⁶³. The *BVerfG* highlights that “essential areas of formative action” encompass various cultural dimensions, including language, family and education, freedom of opinion, of the press, of association, and of religion. It is the reference to the protection of the constitutional identities of the Member States per Art.4(2) TEU³⁶⁴ that engages national culture and identity, invoking Art.79(3) *Grundgesetz*, and delineating the potential reach of European integration³⁶⁵. These discourses, on the plurality of cultures and identities existing in the European space, have been relevant to the supremacy and primacy discourses at the national level, shaping the responses and reactions of the national courts to the reach of integration³⁶⁶.

This brief outline has aimed to emphasise that culture and its component parts are clearly pertinent to Europeanisation and integration, and take a breadth of forms, existing within and beyond the state at the European and transnational levels. Notwithstanding, it is not evident that a single European culture necessarily constitutes a prerequisite to the Europeanisation of law. Instead, the next section explores the conception of the Europeanisation of private law as a pluralist, multi-level construct, wherein it is suggested that the pluralism necessarily characterising the European space can be engaged not as a hurdle of legal development but as a key characteristic thereof. A strict adherence to the identification of a single perspective is rejected in favour of recognition of the scope for pluralism, which is understood to “facilitate[...] analysis of both interdependence with other systems and the self-identity of a particular system”³⁶⁷.

³⁶³ With reference to the notion of the “democratic formative action”, derived from the principle of democracy, encompassed in the rule of law principles, set out in Art.1 and 20 of the Basic Law, to be protected in line with the eternity clause in Art.79(3), even where constitutional changes are made, for example, in respect of Germany’s membership of the EU; *BVerfG*, 2 BvE 2/08, 30.06.2009, para.249.

³⁶⁴ *BVerfG*, 2 BvE 2/08, 30.06.2009, paras.240-241.

³⁶⁵ H-W. Micklitz, ‘German Constitutional Court (*Bundesverfassungsgericht BVerfG*) 2 BvE 2/08, 30.6.2009 – Organstreit Proceedings Between Members of the German Parliament and the Federal Government’ (2011) 7 *ERCL* 528.

³⁶⁶ See recently, a particularly interesting article dealing with the cases discussed: A. von Bogdandy and S. Schill, ‘Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty’ (2011) 48 *CMLR* 1.

³⁶⁷ M. Davies, ‘Legal Pluralism’ in P. Cane and H.M. Kritzer (eds.), *The Oxford Handbook of Empirical Legal Research* (OUP, Oxford; 2010), pp.805-827, p.814.

II. The Europeanisation of Private Law in a Pluralist, Multi-Level Space: A Plea for An Evolving Paradigm of Legal Development

This section aims to ascertain a normative and conceptual space within which it is submitted that private law might evolve. Reference has been made above to the notion of multi-level structure; it derives from the recognition – initially within the social sciences³⁶⁸ – of the need for an appropriate framework in which governance, and policy coordination (where states cannot establish their own policy on sovereign state authority but engage in a coordinative effort), exists at different levels within a given space. European private law can be understood as a multi-level system, which not only demands analysis beyond the national confines of its origins, but also therein, to the extent that it remains reliant on the “local” or national level for its application and enforcement³⁶⁹ as will be illustrated in greater detail below. As problems tend to be conceptualised functionally, they consequently cut across different levels including national, European, international and transnational orders, within which different (legal) actors, including legislatures, courts, agencies, regulators, civil society bodies, scholars and private individuals, operate.

i. The Engagement and Development of the Pluralist Perspective of Europeanisation

The pluralist perspective is adopted at the outset, maintained and promoted throughout this thesis. The adoption of the pluralist perspective and the understanding of pluralism both reflect a normative choice. The intention here is to set out the basis of the pluralist perspective, both methodological and theoretical, in the context of private law. Pluralism is a matter of structure and shapes the relevant regime; legal pluralism is broadly understood as the existence of more than one “law” within a territorially-defined space³⁷⁰ and dictates that authority is not centralised in a single authority but is found in diverse authoritative spaces.

³⁶⁸ The notion was devised by G. Marks, ‘Structural Policy in the European Community’ in A. Sbragia (ed.), *Europolitics, Institutions and Policymaking in the “New” European Community* (The Brookings Institution, Washington DC; 1992), pp.191-225 and G. Marks, ‘Structural Policy and Multi-level Governance in the EC’ in A. Cafurny and G. Rosenthal (eds.), *The State of the European Community: The Maastricht Debate and Beyond* (Lynne Rienner Publications, Boulder; 1993), pp.391-411.

³⁶⁹ That is to say, as Sassen has advanced with regard to global governance, private law, and European private law, necessitates the local and national levels; it is dependent on them. See S. Sassen, ‘Globalization or Denationalization?’ (2003) 10 *Rev.Int.Pol.Econ.* 1.

³⁷⁰ Davies, ‘Legal Pluralism’ in Cane and Kritzer, *The Oxford Handbook of Empirical Legal Research* (n.367), p.805.

The degree of pluralism in any given environment arises with the rejection of the strict dichotomy of centralism and pluralism³⁷¹. It finds its foundations in the interaction between “Western” systems of norms and “indigenous” systems of norms, and in particular, in the colonial and post-colonial spaces; the imposition of the external system on the existing system of “law” (whether customary, or religious or another form of indigenous) gave rise to interactions and interdependences, which continue to this day. Legal pluralism reflects an empirical determination, often asserted to be a matter of fact to the extent that the absence of plurality reflects a “myth, an ideal, a claim, an illusion”³⁷²; it thus arguably characterises any context in which there is a multiplicity of norms³⁷³.

The ties between law, positivism and the significance of the role of the state, engender the difficulty in conceptualising the European space as a pluralistic one³⁷⁴, because of the strong ties between the state and law, even if these are disintegrating. Yet putative pluralities can be identified as existing within the European space; these encompass legal orders, cultures and traditions³⁷⁵, sources of law and their natures (national, supranational, transnational, public, private or a combination thereof), dispute resolution bodies³⁷⁶, and legal actors³⁷⁷ (and the identities they hold). Furthermore, consideration must also be attributed to private law making and regulation - including self-regulation, co-regulation, the development of codes of conduct, and the standardisation of contracts - against the background of the declining and diminishing state³⁷⁸. National, state-made norms, norm-production at the European and international levels, and “private global norm-production”³⁷⁹ - including “non-legislative

³⁷¹ Arguably reflected in an understanding of state versus non-state: B. de Sousa Santos, *Toward a New Legal Common Sense* (Butterworths, London; 2nd edn., 2002), p.156.

³⁷² J. Griffiths, ‘What is Legal Pluralism?’ (1986) 24 *Journal of Legal Pluralism* 1, p.4.

³⁷³ S. Engle Merry, ‘Legal Pluralism’ (1988) 22 *Law and Society Review* 869, p.873-874; Engle Merry distinguishes the different contexts in which legal pluralism might arise, with reference to different challenges and different scholarly foundations. Thus, pluralism might also arise within national – and it is submitted – postnational contexts. The national contexts typically explored include Australia, New Zealand and Canada.

³⁷⁴ B.Z. Tamanaha, ‘Understanding Legal Pluralism: Past to Present, Local to Global’ (2008) 30 *Syd.Law.Rev.* 375, pp.377-386, looking at legal pluralism in medieval Europe and in respect of colonisation.

³⁷⁵ G. Teubner, ‘Global Bukowina: Legal Pluralism in the World Society’ in G. Teubner (ed.), *Global Law Without a State* (Dartmouth, Aldershot; 1997), pp.3-28.

³⁷⁶ B. de Sousa Santos, *Toward a New Legal Common Sense* (Butterworths, London; 2nd edn., 2002), pp.200 *et seq.*

³⁷⁷ R.A. McDonald and D. Sandomierski, ‘Against Nomopolies’ (2006) 57 *North.Ireland.Leg.Q.* 610, p.614.

³⁷⁸ “Already at first glance it becomes clear that many examples of a ‘global law without a state’ do not in fact contain a flat-out rejection of state-based official law”: G-P. Calliess and P. Zumbansen, *Rough Consensus and Running Code: A Theory of Transnational Private Law* (Hart, Oxford; 2010), p.19 (footnotes omitted).

³⁷⁹ For the use of this term, see G. Teubner, ‘Breaking Frames: The Global Interplay of Legal and Social Systems’ (1997) 45 *AJCL* 149, p.157.

codification”³⁸⁰ (legal rules, values and principles drafted by academics and other bodies acting “in pursuit of what they perceive as the common good”³⁸¹), the “old” and “new” *lex mercatoria* (supplemented by the *lex laboris* and *lex sportiva*), the self-and co-regulatory standards of international organisations and multi-national corporations, (for example, the WTO, World Bank and the IMF³⁸²) - must be considered in the context of the plurality of cultures, legal actors, norm-formation and dispute resolution³⁸³. The very emergence of these norm-generating orders in general, and particularly within the context of European law making, extends beyond the scope of this thesis. However, it is worth noting that it might reflect Joerges’ assertion that European integration “can be understood and re-constructed as a response to the failures of the Weberian nation state”³⁸⁴. In any case, it is submitted that this plurality must be considered in light of the significance of the role of the state.

Thus, to the extent that the Europeanisation of private law within a pluralist, multi-level order requires recognition of the idea that “[t]he overlapping spheres of competence among the supranational, national and subnational levels of governance, produce plural sites of norm creation, operation and enforcement, resulting in what has been described as an entity of ‘interlocking normative spheres’ where no particular one is privileged”³⁸⁵, pluralism has the potential to undermine the connection between normativity and the state. In particular, it questions the engagement with the state as the pertinent reference point, particularly with regard to authority and legitimacy, as generally – to avoid becoming embroiled in broader constitutional discourses which extend beyond the thesis – European law is understood to be authoritative and have normative force, without existing or operating within specific territorial boundaries. While the focus remains on the Member States, enduring as the “masters of the Treaties”, pluralism rather promotes the notion of interdependence in respect of the

³⁸⁰ Jansen, *The Making of Legal Authority* (n.150), p.7, instead of applying the term “private actor” to describe, for example, academics.

³⁸¹ For example, of UNDRIT, the Lando Commission, and the *Acquis* Group (Acquis Group (eds.), *Contract I: Pre-Contractual Obligations, Conclusion of Contract, Unfair Terms* (Sellier, München; 2007); Acquis Group (eds.), *Contract II: General Provisions, Delivery of Goods, Package Travel and Payment Services* (Sellier, München; 2009)).

³⁸² A-M. Slaughter, ‘International Law in a World of Liberal States’ (1995) 6 *EJIL* 503, p.518

³⁸³ The majority of this scholarship having been driven by Cafaggi. See, for example, F. Cafaggi, ‘Private Regulation in European Private Law’ *EUI WP RSCAS 2009/31* and F. Cafaggi, ‘Private Law-Making and European Integration: Where Do They Meet, When Do They Conflict?’ in D. Oliver, T. Prosser and R. Rawlings (eds.), *The Regulatory State* (OUP, Oxford; 2010), pp.201-228.

³⁸⁴ Joerges, ‘Unity in Diversity as Europe’s Vocation’ (n.286), p.6.

³⁸⁵ Miller, *The Emergence of EU Contract Law* (n.259), p.155, citing N. MacCormick, ‘Democracy, Subsidiarity and Citizenship in the European Commonwealth’ (1997) 16 *Law and Philosophy* 331.

relationship of legal orders, these being not “mutually exclusive but intertwined, with no legal system being especially privileged”³⁸⁶.

Yet legal pluralism is by no means unproblematic as a perspective for legal development; not only does it give rise to concerns with regard to fragmentation and coherence but until recently, there had been little development of a plausible theory of (the management of) legal pluralism³⁸⁷. Fragmentation has come back to the fore time and again since the publication of Koskenniemi’s ILC Report in 2006³⁸⁸. The discourse is significant to the Europeanisation of private law, the national model of private law having reflected one governed by hierarchy and unity, order and coherence, which has subsequently begun to fragment within³⁸⁹ and beyond the nation state. For example, the justification for European legislative action, especially in the case of the CRD, often derives from the need to establish coherence and certainty and to overcome fragmentation³⁹⁰ on the basis that what exists across the national and European levels is “a fragmented regulatory framework across the Community which causes significant compliance costs for businesses wishing to trade cross-border”³⁹¹ that cannot be managed via orthodox mechanisms of conflict resolution (that is, primarily PIL rules)³⁹². Pluralism as empirical fact is further reflected – in the private law context – in the scope for conflict – of a vertical and horizontal nature – outlined in Chapter 1; this also reveals the absence of hierarchy in the regulation of conflicts, which arise as a result of the multiplicity of legal sources and of the claims of dispute resolution bodies to decide and regulate. The desire for coherence between EU and national law is reflected in the principle of primacy, and the precedence of Union law over national law, an understanding which provided for the notion

³⁸⁶ Augenstein, ‘Identifying the European Union’ in Augenstein, *Integration Through Law’ Revisited* (n.123), p.108.

³⁸⁷ Schiff Berman, *Global Legal Pluralism* (n.175).

³⁸⁸ In 2005, Koskenniemi set out his normative concerns with the notion of global legal pluralism, and in particular, increasing fragmentation in M. Koskenniemi, ‘Global Legal Pluralism: Multiple Regimes and Multiple Modes of Thought’, Harvard University, Keynote Speech, 05.03.2005; <[http://www.helsinki.fi/eci/Publications/Koskenniemi/MKPluralism-Harvard-05d\[1\].pdf](http://www.helsinki.fi/eci/Publications/Koskenniemi/MKPluralism-Harvard-05d[1].pdf)>; Last Accessed: 10.04.2012); see also, M. Koskenniemi, ‘Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law’ (2006) UN.A/CN.4/L.682.

³⁸⁹ The impact of fragmentation will also diverge across the Member States; *prima facie*, if coherence and systemisation is more important in civil law countries, based on the almost-complete private codifications where gaps filled by the relevant (generally legislative) authorities, arguably they will be more affected than the common law systems by the fragmentation engendered by the Europeanisation of private law.

³⁹⁰ CRD, 2011/83/EU, Recitals 6 and 7.

³⁹¹ European Commission, ‘Proposal for a Directive on Consumer Rights’ COM(2008) 614, p.2.

³⁹² F. Cafaggi, ‘Introduction’ in F. Cafaggi (ed.), *The Institutional Framework of European Private Law* (OUP, Oxford; 2006), p.6. Other means of conflict resolution would include, for example, the open method of coordination as a means of governance; van Gerven, ‘Bringing (Private) Laws Closer to Each Other at the European Level’ in Cafaggi, *The Institutional Framework of European Private Law* (n.228), p.60.

of conform interpretation, initially developed in relation to conformity of specific legal rules between national and Union law in *Marleasing*³⁹³ and extended in later case law to cover the entire system, for the purposes of promoting consistency. The doctrine, initially developed in relation to the (then) first pillar of EU law (subsequently extended to the third pillar³⁹⁴) requires that the national judge must consider the national legal system in its entirety so as to render it compatible with Union law³⁹⁵: “the obligation of ‘conform’ interpretation is no longer seen as an application of the principle of primacy, but has been gradually transformed into a holistic principle of ‘consistent’ (or ‘harmonious’) interpretation of the whole legal order at all levels; and secondly, that the emphasis is no longer – or no longer merely – on the ‘hierarchy’ of legal norms, or legal orders but rather on consistency between levels of regulation”³⁹⁶. Thus, the acceptance of pluralism – and constitutional pluralism³⁹⁷ in particular – calls into question whether an attempt should be made to promote European private law as a coherent and ordered “system” of law and otherwise, how this fragmentation and lack of coherence might be managed.

Having attempted to set out the pluralist, multi-level structure within which European private law emerges and exists, the next section aims to identify its shifting conceptualisations in the context of European integration.

ii. The Shifting Conceptualisations of Private Law and the Dangers of “Methodological Nationalism”

The connection between the emergence of private law and the emergence of the nation state has been explored in Chapter 1; the evolution of private law beyond the nation state is reflected in the following statement of Caruso:

In a purely intranational, self-referential setting, legal actors usually perceive their municipal private law as an ideologically neutral set of adjudicatory rules and principles, so much so that even very dramatic changes in political regimes may leave civil codes and private law doctrines fundamentally untouched. On an

³⁹³ C-106/89 *Marleasing* [1990] ECR I-4135.

³⁹⁴ C-105/03 *Pupino* [2005] ECR I-5285.

³⁹⁵ Joined Cases C-397-401/01 *Pfeiffer* [2004] ECR I-8835.

³⁹⁶ W. van Gerven, ‘Private Law in a Federal Perspective’ in R. Brownsword *et al* (eds.), *The Foundations of European Private Law* (Hart, Oxford; 2011), pp.337-351, pp.345-346.

³⁹⁷ N. Walker, ‘The Idea of Constitutional Pluralism’ (2002) 65 *MLR* 317; M.P. Maduro, ‘Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism’ (2007) 1 *EJLS*.

international stage, by contrast, a State's control over its private law is laden with ideological significance and tied historically to the very notion of sovereignty³⁹⁸.

As the Europeanisation of private law occurs within the context of integration, it becomes increasingly necessary to take into account the intertwining of these two considerations, which results in a shift in the way in which private law might be understood in the national, as well as European and international contexts³⁹⁹. At the Union level, private law has initially been predominantly functional, engaged for the purposes of the facilitation of the internal market. On this basis, the EU legislature initially focused predominantly⁴⁰⁰ on codification, making the assumption that the construction of a European *ius commune* or a legislative European civil code would facilitate the emergence of a uniform (and as mistakenly understood, unified) European private law, and thus, the operation of the market. Not only is such a deduction highly dubious but furthermore, the focus on codification efforts in the Union legislature has provided little scope for developing the understanding of private law in its entirety⁴⁰¹.

Essentially, the Europeanisation of private law is understood to provide for integration via the functioning of transnational market, dissolving the links between the state and private law⁴⁰². The changing nature of private law is reflected in its constitutionalisation, materialisation⁴⁰³ and regulation. The constitutionalisation of private law reflects the notion that, with regard to fundamental rights constituting limitations on private autonomy and freedom of contract in particular, private laws can no longer be understood as distinct or “self-standing legal orders but are rather embedded in a higher legal order, the national constitution, against which the values underpinning private law can be measured”⁴⁰⁴, rendering private law more “just” as a

³⁹⁸ Caruso, ‘The Missing View of the Cathedral’ (n.243), p.5.

³⁹⁹ Caruso, ‘The Missing View of the Cathedral’ (n.243), p.5.

⁴⁰⁰ The focus on codification has been largely dominant until recently. That is to say, both the Parliament and the Commission have adopted a considerably more sedate tone in recent years; see, European Commission, ‘Green Paper from the Commission on Policy Options for Progress Towards a European Contract Law for Consumers and Businesses of 1.07.2010’, COM(2010) 348 final.

⁴⁰¹ Cafaggi, ‘Private Law-Making and European Integration’ in Oliver *et al*, *The Regulatory State* (n.383), especially, p.205. The notion that law operating within a multi-level, pluralist context and the scope for the engagement of comparative analysis therein – for these purposes - cannot be understood comprehensively in the context of a discourse in which law is conceived within the boundaries of the state resonates in the discourse on the emergence of “new” legal orders (including the *lex mercatoria*, regimes of self-regulation, ICANN and so on).

⁴⁰² Joerges and Schmid, ‘Towards Proceduralization’ in Hartkamp *et al*, *Towards a European Civil Code* (n.315), p.288.

⁴⁰³ Materialisation is understood broadly to reflect the drafting of norms for a particular purpose.

⁴⁰⁴ H-W. Micklitz (ed.), *The Constitutionalization of Private Law* (OUP, Oxford; 2014), p.1.

result of this integration. While the civil codes were developed within the national context for the purposes of giving effect to individual freedom and private autonomy, the constitutions were intended to guarantee and protect the fundamental rights of individuals, predominantly against the state⁴⁰⁵. The notion that states should be obliged, positively, to protect its citizens from each other began to emerge and take shape via ECHR case law⁴⁰⁶. Moreover, from the CJEU's interpretation of Union law, in the context of the construction of an "Area of Freedom, Security and Justice" post-Lisbon⁴⁰⁷, the stretch of Union law beyond the economic heart of the Union, into areas traditionally regulated by the nation state can be identified⁴⁰⁸, bearing in mind the lack of constitution at the Union level. This phenomenon will be explored in more depth by virtue of the case examples of Part III. For the purposes of this section, it is worth noting that national courts have gradually been empowered by the CJEU to balance different freedoms and rights⁴⁰⁹, bringing a necessarily political dimension to private law⁴¹⁰. As private law has taken an interest in, for example, anti-discrimination, regulated markets, product and food safety, as well as consumer protection, it has become less technical and increasingly regulatory. As a result, it has made "incursions into the classical territory of private law", leading to the "disintegration" of the latter⁴¹¹ and underpinning the coherence that has been engaged and advanced as a key characterisation within and across the national contexts. European integration and Europeanisation together constitute a "transformative process"⁴¹², or rather, sets of processes, occurring within an increasingly globalised space⁴¹³, challenging the unity that has seemingly been concretised therein and bringing to the fore the divergences between the legal, cultural and economic dynamics in the nation states and

⁴⁰⁵ Private autonomy needs to be limited in respect of fundamental rights, including, predominantly, those that generally formally fell within constitutionally-protected considerations. This understanding can allow for a connection to be drawn within consumer law to the extent that an analogy might be drawn between the parties traditionally protected by the constitution (the weak citizens, in respect of the stronger state) and those protected by consumer law (the weak consumer, in respect of the stronger seller/supplier).

⁴⁰⁶ Reference can be made, for example, to the Art.8 right to privacy: *Campbell v Mirror Group Newspapers Ltd* [2004] UKHL 22.

⁴⁰⁷ P.P. Craig, *The Lisbon Treaty: Law, Politics and Treaty Reform* (OUP, Oxford; 2011), and in particular, Chapter 5 on competences, pp.155-192.

⁴⁰⁸ Now, increasingly, the phenomenon of private regulation is becoming increasingly significant. To the extent that private law making is relevant to European private law, this will be highlighted throughout the thesis.

⁴⁰⁹ F. Werro (ed.), *Droit civil et convention européenne des droits de l'homme* (Schulthess, Zurich; 2006), pp.135 *et seq.*

⁴¹⁰ See Part I above.

⁴¹¹ Wieacker, *A History of Private Law in Europe* (n.160), pp.434-438.

⁴¹² Miller, *The Emergence of EU Contract Law* (n.259), p.3.

⁴¹³ H. Peterson *et al* (eds.), *Paradoxes of European Legal Integration* (Ashgate, London; 2008), p.4, making reference to four paradoxes of European integration namely, constitutionalisation and democratisation, institution-building and market-making, language as a source of legal understanding and misunderstanding and exceptionalism and normalisation.

beyond. The potential impact of the Europeanisation of private law dictates that private law must be understood as flexible and dynamic.

As private law has developed beyond the market, and as it has “opened itself up” to social values via the socialisation of private law⁴¹⁴, it becomes clear that its developing role also shapes the types of conflicts that might arise. Indeed, as Kennedy notes, the notion of “social” lacks “proper system and conceptual clarity” in terms of its application and use⁴¹⁵. In each of the Member States, different understandings of social justice have developed, based on “different conceptions of the social or welfare state, the different attitudes towards social ideals and, in turn, the degree of distrust regarding state intervention”⁴¹⁶. As Micklitz sets out, initially there were attempts to identify and coordinate different national social policy programmes, highlighting the implementation of what were, and still remain, divergent national conceptions of social justice, and the significance of national social values in the emerging European law⁴¹⁷. However, as the focus fell predominantly on the internal market, policy conflicts were perhaps initially less frequent in private law than in other areas of EU law, to the extent that within the national systems the need for shared (at least economic) policy was recognised for the purposes of market construction. Thus, until recently, when the private law indeed begun to “open itself up”, there had been little significance attributed to the emergence of a new, or at least distinct, value order in European private law⁴¹⁸, given the focus on “EU consumer law [as] market behaviour law”⁴¹⁹, that is, as fundamentally instrumental⁴²⁰.

⁴¹⁴ M. Kumm, ‘Who is Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalisation of Private Law’ (2006) 7 *GLJ* 341. It is worth noting that, with regard to Kumm’s broader thesis, this thesis, having set out the nation state foundations of private law, does not really adhere to the view that private law can exist entirely in its constitutional construction alone.

⁴¹⁵ D. Kennedy, ‘Thoughts on Coherence, Social Values and National Tradition in Private Law’ in M. Hesselink (ed.), *The Politics of a European Civil Code* (Kluwer, The Hague; 2006), pp.9-31, p.9.

⁴¹⁶ H. Rösler, ‘The Transformation of Contractual Justice: A Historical and Comparative Account of the Impact of Consumption’ in H-W. Micklitz (ed.), *The Many Concepts of Social Justice in European Private Law* (Edward Elgar, Cheltenham; 2011), pp.327-358.

⁴¹⁷ H-W. Micklitz, ‘Judicial Activism of the European Court of Justice and the Development of the European Social Model in Anti-Discrimination and Consumer Law’ *EUI WP 2009/19*, p.8.

⁴¹⁸ H-W. Micklitz, ‘European Private Regulatory Law: A Plea for New Thinking’, pp.15 *et seq* (on file with author).

⁴¹⁹ J.G.I. Rinkes, ‘European Consumer Law: Making Sense’ in C. Twigg-Flesner *et al* (eds.), *The Yearbook of Consumer Law 2008* (Ashgate, Aldershot, 2007), pp.3-18, p.3: “The question, however, is whether consumer law is market behaviour law, or law for the benefit of the consumer?”

⁴²⁰ C. Schmid, ‘The Instrumentalist Conception of the *Acquis Communautaire* in Consumer Law and its Implications on a European Contract Law Code’ (2005) 1 *ERCL* 211; C. Schmid, *Die Instrumentalisierung des Privatrechts durch die Europäische Union: Privatrecht und Privatrechtskonzeptionen in der Entwicklung der Europäischen Integrationsverfassung* (Nomos, Baden Baden; 2010).

As Collins has asserted, “private law has become a synthesis that combines both its traditional concerns about corrective justice between individuals and instrumental concerns about steering markets towards distributive justice”⁴²¹. On this basis, he argues that the “interlegality or intertextuality” of private law must be considered. The notion of the interlegality⁴²² of legal orders brings to the fore the determination of their autonomous nature. As Amstutz notes, European private law cannot be understood as an entirely autonomous order; while it is *sui generis* in its nature, the EU order – and private law in particular, in respect of its development of rights and obligations affecting private relationships - is dependent on the national legal systems for its effect⁴²³. Essentially, this dictates the need for the analysis of the interaction between the national, European and potentially, international legal orders, which forms a broader consideration of this thesis, with a particular focus on the courts via the preliminary reference procedure.

The thesis explores these interactions, against the background of the shifting nature of private law, as part of the rationale underpinning the need for the casting of an analytical eye on the appreciation (or lack thereof) of methodology. There is a need to ensure that as European private law develops – in the Union legislature and via the interpretation of Union norms in the CJEU – there exists a way to understand and appreciate the potential for these interrelations and this plurality of norms and dispute resolution bodies, and consequently, to engage a “epistemology of conciliation”⁴²⁴ in respect of the conflict putatively arising. The focus herein lies on the engagement of one distinct methodology, namely comparative analysis, which is explored in greater detail in Chapter 3. It is submitted that the comparative methodology might reflect one way in which the dynamic nature of private law can be understood, and in which its evolution can be facilitated in this multi-level context to the extent that it can, in a developed form, allow not only for the understanding of legal norms as they appear to exist but an understanding of the way in which they have developed, the values attached thereto, the relevant policy considerations, and the potential impact of one

⁴²¹ H. Collins, ‘Governance Implications for the European Union of the Changing Nature of Private Law’ in F. Cafaggi and H. Muir Watt (eds.), *Making European Private Law: Governance Design* (Edward Elgar, Cheltenham; 2008), pp.269-286, pp.278-279.

⁴²² B. de Sousa Santos, *Towards a New Legal Common Sense: Law, Globalization and Emancipation* (Butterworths, London; 2nd edn., 2002), pp.436-437.

⁴²³ M. Amstutz, ‘Interlegality in European Private Law: A Question of Method?’ in C. Joerges and T. Ralli (eds.), *European Constitutionalism Without Private Law: Private Law Without Democracy*, Recon Report No.14 (Arena, Oslo; 2011), pp.55-69.

⁴²⁴ H. Patrick Glenn, ‘Com-paring’ in E. Örucü and D. Nelken (eds.), *Comparative Law: A Handbook* (Hart, Oxford; 2007), pp.91-108, p.98.

interpretation over another. However, as will become clear below – the theoretical and methodological dimensions of comparison, as well as the critique of its current conceptualisations are explored in Chapter 3 - comparison as it exists, is lacking in its provision of an appropriate framework for European legal development. Thus, the thesis aims to cast a critical eye on the theoretical and methodological dimensions of comparative analysis as it is engaged by the CJEU in the Europeanisation of private law, explored via case examples in Part III. The analytical focus has two dimensions: 1) the better understanding of the role of the CJEU in the Europeanisation of private law and integration, via the use of comparative analysis, and 2) the better understanding of comparative analysis as a “second order” tool to enhance the Europeanisation of private law and European legal integration.

For the moment, it is necessary to consider one methodological and theoretical concern that must be highlighted from the outset as it is fundamental to the consideration of the methodological discourse and the substantive topic of the thesis. The theoretical perspective of methodological nationalism affects the understanding of the relationship between national law, the development of European law via harmonisation and the concept of the state and shapes the context in which these relationships arise; its impact in two contexts are outlined, intertwining its theoretical and methodological conceptualisations, namely, integration and Europeanisation, and the foundations of the methodological framework of the Europeanisation of private law. As to the former, methodological nationalism has dominated the understanding of European integration, and the Europeanisation of law. State legal systems are territorially and nationally defined; EU law is functionally differentiated and delineated. In the 1980s, the EU was conceptualised neither as a state nor an international organisation⁴²⁵, neither as a federation nor a regime⁴²⁶. This understanding continues to exist despite attempts at federalisation; moreover, as attempts at fiscal union continue to falter, it is evident that, like the European civil code, there remains little prospect of the “United States of Europe”, despite there being scope for true political union⁴²⁷. Yet the embers of the state’s dominance continue to burn much more brightly than those of the code. Globalisation and the apparent decline of the Westphalian state model, and the recognition of European integration in the context of the former, as well as the surge in respect for pluralism and diversity, has of

⁴²⁵ N. MacCormick, *Constructing Legal Systems: ‘European Union’ in Legal Theory* (Springer, Berlin; 1997) and Weiler, ‘The Transformation of Europe’ in Weiler (ed.), *The Constitution of Europe* (n.333).

⁴²⁶ W. Wallace, ‘Less Than a Federation. More Than a Regime: The Community as a Political System’ in H. Wallace and W. Wallace (eds.), *Policy-Making in the European Community* (OUP, Oxford; 1983), pp.403-436.

⁴²⁷ See V. Reding, ‘2014: Time to Make a Choice’, KPN New Year’s Reception, Brussels, 07.01.2014.

course stifled these vestiges. Yet methodologically, the consistent focus on the state and the methodological nationalism to which this gives rise, as a consequence of the failure of law and other disciplines ensures that potentially progressive considerations come to shape the orthodox understanding of integration.

Integration and the Europeanisation of law have led to assertions of the EU as a “post-national constellation”⁴²⁸ or transnational construct, existing in a “post-democratic era”⁴²⁹. It is clear that the recognition and acceptance of pluralism has not resulted in the decline of political or legal nationalism⁴³⁰ but rather, it has been argued that the “pluralism of Europe and its cultures have become a shield to protect nationalistic thinking”⁴³¹. There thus exists a danger in invoking notions of culture and tradition, and more specifically, identity, as such considerations might be conceived merely as permitting recourse to nationalistic tendencies; it must be highlighted that this perspective is not adopted herein⁴³². As noted above, a pluralistic space will always rouse scope for conflict; divergences between (legal) cultures and traditions come to constitute kindling and spark the fires of conflict. Furthermore, the meaning of postnational and transnational are unclear; Schaffer referring to “transnational legal ordering”⁴³³ and by highlighting the “considerable variation within national contexts in light of different institutional and socio-cultural legacies and configurations of power”, conveys a preference for the “transnational”⁴³⁴. Yet the notion of transnational itself lacks clarity; it has been considered that it reflects “neither national nor international nor public nor private at the same time as being both national and international, as well as public and private”⁴³⁵. For Zumbansen, transnational law rather reflects one perspective, “a methodological lens” which allows for the analysis of legal institutions and legal development in a multi-level space⁴³⁶. This “methodological lens” reveals certain assumptions about the

⁴²⁸ The term was originally expressed by Habermas, J. Habermas, *Die postnationale Konstellation und die Zukunft der Demokratie* (Grin Verlag, Berlin; 2003).

⁴²⁹ Habermas, ‘Europe’s Post-Democratic Era’ (n.177).

⁴³⁰ In the context of the economic crisis, in particular, increasing nationalist tendencies can be identified, not only in law but elsewhere. For example, consider the surge of Euroscepticism in the UK in recent months, and in those countries affected directly by austerity measures imposed at the EU level, including Spain and Greece.

⁴³¹ Patterson *et al*, ‘Statecraft, the Market State and the Development of European Legal Culture’ (n.171), p.1.

⁴³² Consider for example, the *Bundesverfassungsgericht’s* Lisbon judgement, *BVerfG*, 2 BvE 2/08 vom 30.6.2009, Absatz-Nr. (260), http://www.bverfg.de/entscheidungen/es20090630_2bve000208en.html., discussed in more detail below.

⁴³³ One of his key criticisms of Krisch is that his analysis is focused on the European system; this criticism, given the nature of the research, is obviously also applicable here. Consider the Schaffer piece, cited below.

⁴³⁴ G. Schaffer, ‘A Transnational Take on Krisch’s Pluralist Postnational Law’ (2012) *EJIL* 565, p.579.

⁴³⁵ C. Scott, “‘Transnational Law’ as Proto-Concept: Three Conceptions’ (2009) *GLJ* 859, pp.870 and 873.

⁴³⁶ P. Zumbansen, ‘Transnational Legal Pluralism’ (2010) 1 *Transnational Legal Theory* 141, p.150.

way in which law is understood; these assumptions, depending on their nature, might derive from individual (or group) understandings of law, shaped by the *Vorverständnis* of a particular legal culture or tradition, distinct from any exclusively national understanding. Indeed, they might be reflective of a broader set of understandings which, cutting across national cultures or traditions⁴³⁷, are particularly prevalent in certain social, cultural, economic and (territorially-defined) geographical contexts.

In respect of the latter – the methodological framework - the nationalist focus constitutes a key dimension of the critique advanced against the theoretical and methodological approach to legal development, and of the conceptualisation of comparison generally, the identification of what is being compared and the nature of the outcomes of comparative analysis. As the case examples below illustrate, there have been transfers in legal institutions and ideas, unintentional or the result of sociological and legal engineering, via copying, borrowing or imposition, which transcend a methodological nationalist approach, and which will have an impact within and beyond the state. For Joerges, the dominance of comparative analysis in emphasising that which is similar or that which is different, or equivalents in a functionalist approach, has “cultivated traditions of ‘methodological nationalism’ which are not well prepared to understand denationalization processes, the interaction between the formerly more autonomous legal systems and their links to transnational levels of governance”⁴³⁸. Within the European context, methodological nationalism also informs the dominance of the Western legal culture and tradition (and Eurocentricism, as the European order emerges in an increasingly globalised context); as is evident from the case examples, the scope for “East/West conflicts” should not be underestimated, especially in the context of enlargement.

Chapter 2. Concluding Remarks

Chapter 2 has initially aimed to uncover the meaning of the notion of *unitas in diversitate* and to examine the dimensions relevant to the Europeanisation of private law; in light of the Treaty provisions, this analysis has allowed for the exploration of that which Hendry has deemed the paradox of *unitas in diversitate*, that is, the promotion of respect for and

⁴³⁷ K. Tuori, ‘Towards a Theory of Transnational Law: A Very First Draft’ (2010) (on file with the author).

⁴³⁸ C. Joerges, ‘The Challenges of Europeanisation in the Realm of Private Law: A Plea for a New Legal Discipline’ (2004) 14 *Duke.J.Int.Comp.L* 155, p.160; similarly, the necessary boundedness of private international law by methodological nationalism is highlighted.

protection of diversities on the one hand, and the promotion of that which is common (and which potentially leads to unification) on the other. This chapter has located this paradox in light of the reach of Union private law harmonisation, which illustrates – with specific reference to the concept of the consumer – the ideological underpinnings of these approaches and their reflection in private law development. The exploration of the scope for the emergence of a single European concept of the consumer – via legislative provision and judicial interpretation – has confirmed, building on the outline in the introduction, the influence of national (but also European and transnational) culture and tradition on the development and evolution of a plurality thereof (and more specifically, identities) that exist beyond the nation state. The focus of the analysis on one specific private law concept has bridged the discussion of *unitas in diversitate* with that in the second section of the chapter, which engages and examines the notion of whether a single European culture (and therein, identity) should constitute a prerequisite for the Europeanisation of private law in the broader context of integration.

The European space has been advanced as one within which a plurality of cultures and traditions (and thus, identities) exist, and within which these can be established as “self” and interact with the “other”, increasingly within a globalised space⁴³⁹. The understanding that has been advanced in light of the analysis undertaken suggests that neither culture nor identity requires, as a prerequisite for its formation, a connection with the state. It similarly confirms that, given the interactions arising, both within and beyond the European space, neither culture nor identity should be understood as single but rather as multiple; this is the first consideration that calls into question the need for one European identity or culture and particularly, the notion that this conceptualisation should be single and distinct. The refutation of this need has been advanced in two respects. On the one hand, the potential breadth of conceptions of European (legal) culture has been recognised; reference is made to just two key dimensions of the potential content of a European culture. Similarly, it has been acknowledged that a plurality of conceptualisations of culture and identity exist in the national contexts, underpinning which are diverse values, which – it has increasingly come to be recognised - shape private law development at the national and Union levels, and

⁴³⁹ In respect of the significance of boundaries, reference can be made to Lindahl, who conceives of a legal regime as one necessarily defined by its borders but in respect of which there is a “permeability”, such that what is excluded is necessarily also included; H. Lindahl, 'A-Legality- Postnationalism and the Question of Legal Boundaries' (2010) 73 *MLR* 30, p.55.

potentially beyond, and the protection of which might be undermined if a sufficiently high standard is not established at the Union level. These preliminary conclusions neither suggest that the building blocks of a European (legal) culture cannot be identified, nor that there exists no scope for them to emerge and be refined. Rather, these conclusions are engaged and advanced to support the argument that there does not exist a basis upon which a single legal culture or identity should be advanced as a prerequisite of legal development, to the exclusion of those existing within the European space.

Instead of aiming to identify a single concept of culture at the European level, which permeates the national, Union and potentially international levels of regulation, it has rather been suggested that the plurality of cultures and identities should be engaged as a defining characteristic of European legal development as opposed to a hurdle to its evolution. A common culture might nevertheless develop at the Union level, and influence the others existing. The pluralist perspective is understood to underpin the scope for the private law development within a multi-level structure; its foundations are reflected empirically in the multiplicity of orders, cultures and traditions, sources of law, dispute resolution bodies and legal actors. It has been recognised that as a perspective of legal development, pluralism is not unproblematic; rather, it reflects and promotes vertical and horizontal conflicts of the nature set out in Chapter 1, and furthermore gives rise to concerns of fragmentation arising from a lack of coherence, both of which are deemed to be particularly problematic beyond the nation state, that is, given the absence of a grounded framework lending a degree of systemisation.

This understanding of the European space characterises the context in which the shifting conceptualisations of private law can be explored. It is submitted that in the absence of this pluralist perspective – reflected in the focus on the promotion of uniformity (and thus commonality) via the harmonisation, and previously codification, of legal norms – the potential to appreciate the dynamic nature and shifting conceptualisations of private law is undermined, even to the extent that such developments have emerged as result of Union legislation and its subsequent interpretation in the CJEU. These changing conceptualisations of private law have therefore been deemed to be consequent to its constitutionalisation, materialisation and regulation, the processes of which might also give rise to conflicts of the nature outlined in Chapter 1 and to the fragmentation and disintegration of classical (national)

private law, as detailed above. The key consideration that has been advanced is that private law has developed beyond its role in regulating private relationships and in facilitating the functioning of the internal market; it has “opened itself up” to the social, which requires that its social, cultural and political dimensions be acknowledged and appreciated in its development. Notwithstanding, as it emerges at the European level via Union legislation, its interpretation in the CJEU and application in the national courts, private law also continues to exist and develop within the Member States via the national legislature and national courts, giving rise to the significance of the multi-level interdependency of the relations between legal orders. This understanding gives rise to a preliminary consideration of the dangers of methodological nationalism as these considerations permeate the thesis as a whole, and the methodological discourse in particular. The analysis in this chapter has therefore aimed to develop the perspective adopted for the understanding and reconsideration of the methodological discourse advanced, and particularly the focus on comparison. While comparative analysis is indeed advanced as a possible tool of Europeanisation, as a fundamental dimension of its methodological framework, its conceptualisation is not taken for granted; in the next chapter, a critical assessment of comparison as it is currently understood is undertaken and an understanding of complex comparison is advanced, which provides the basis for the assessment its use by virtue of the case examples.

PART TWO: UNCOVERING THE SCOPE FOR COMPARATIVE ANALYSIS IN THE JUDICIAL EUROPEANISATION OF PRIVATE LAW

The first chapter reviews the development of approaches to comparison by virtue of which the theoretical and methodological poverty of mainstream comparative law is uncovered and scrutinised; this critique is further refined in light of the evolution of comparison in respect of European private law development. It is submitted that while comparative analysis has certainly developed, and while it is recognised that it evidences potential as a tool of Europeanisation and integration, it retains key problematics as it is currently conceived. The second section of Chapter 3 outlines the normative scope for the development of complex comparative analysis, in light of the evaluation of its current conceptualisations. Chapter 4 summarises the role of the CJEU in the Europeanisation of private law, that is, in respect of its development of a body of European private law via the interpretation of Union norms and their application in the national courts. The structure and composition of the CJEU are set out, which allows for a socio-legal understanding of the constitution of the CJEU. Thereafter, its evolving private law jurisdiction is identified; this constitutes the basis for the examination of the preliminary reference procedure as a space for the evaluation of the CJEU's contribution to European integration, and the broad proposal advanced within the thesis, namely that comparative analysis constitutes a tool of Europeanisation and integration.

Chapter 3. Introducing Comparative Analysis as a Tool of the Europeanisation of Law

Chapter 3 initially takes one step back and looks to identify the foundations and critique of comparative law; this critique is of a theoretical and methodological nature and is fundamental to the reconceptualisation and evolution of comparison.

While comparison as a process has existed for as long as the study and analysis of law has been undertaken, the emergence of comparative law as it exists, evolves and is criticised today, is generally said to parallel the nationalisation of law at the end of the 19th and beginning of the 20th centuries, having enjoyed its “inauguration” at the 1900 Paris Congress of the *Société de législation comparée*. Notwithstanding this apparently limited existence, its

deep and considerable history, which stretches far beyond the past one hundred years, has generated a breadth of divergent conceptualisations, processes and practices to which reference will be made in this analysis. As a methodology, comparative analysis has grown from the seeds of comparison; its aims and objectives are scattered across disciplines relevant to law, including that underpinning Aristotle's study of the different constitutions of the world in his quest for "perfection", and that engaged in Machiavelli's foundations of modern political science. Furthermore, reference can be made to Montesquieu's *De l'esprit des lois*. At the time of the *lex mercatoria*, the reference to foreign law was made merely as another source of law forming part of the broader *ius commune*. References to foreign law were frequently made in the construction and drafting of national constitutions and civil codes⁴⁴⁰; indeed, in its contemporary academic incarnation, comparison is understood to have emerged as "a response to the fragmentation of European laws following the 19th century codifications"⁴⁴¹. Comparative law also evolved with a focus on historical development (located firmly within the German historical school), finding its roots in local traditions and in the beliefs of a people⁴⁴². This understanding supported the strengthening of national laws and the contemporaneous emergence of the nation state⁴⁴³; in particular, this was true for those countries "with Western legal heritage [that] shared the Roman legacy along with Savigny's Germans"⁴⁴⁴. The engagement with foreign law was also relevant to processes of colonisation when attempts were made to impose settler legal orders on the indigenous normative orders of the colonised. Post-1900, and during the period of "the social", characterised by Kennedy as the "second globalization", comparison gave rise to challenges to law's autonomy, by making clear the putative connections between law, politics and society⁴⁴⁵. The "socialisation" of private law emerges in the case examples, shaping the relationships between the courts. Salleilles in particular looked to identify a "*droit commun a*

⁴⁴⁰ The interest in comparison, broadly, and in particular relation to law, flourished with the drafting of national constitutions. Eventually, the existence of positive national constitutions rendered reference to foreign law less significant: A. von Bogdandy, 'Comparative Constitutional Law: A Contested Domain' in M. Rosenfeld and A. Sajo (eds.), *The Oxford Handbook of Comparative Constitutional Law* (OUP, Oxford; 2012), pp.25-53, pp.27 *et al.*

⁴⁴¹ H. Patrick Glenn, 'Aims of Comparative Law' in J.M. Smits (ed.), *Elgar Encyclopedia of Comparative Law* (Edward Elgar, Cheltenham; 2006), pp.57-65, p.58. See also David and Brierley, *Major Legal Systems of the World Today* (n.23), p.2.

⁴⁴² See W. Ewald, 'Comparative Jurisprudence (I): What was it Like to Try a Rat?' (1995) 143 *U.Penn.L.Rev.* 1189, p.2012 on the role of Savigny: K. von Savigny, *Ueberden Zweckdieser Zeitschrift*, Zt.ges. Rw. 1815, 6.

⁴⁴³ Explored in Part I.

⁴⁴⁴ Kennedy, 'Three Globalizations of Law and Legal Thought' in Trubek and Santos, *The New Law and Economic Development*, (n.351), p.31.

⁴⁴⁵ G. Marini, 'Taking Comparative Law Lightly: On Some Uses of Comparative Law in the Third Globalization' (2012) 3 *Comp.L.Rev.* 1, p.13.

l'humanité civilisée”, on the basis of which law could be developed with a social form⁴⁴⁶. At Kennedy’s “third globalization”, comparative law took what is arguably an epistemological turn, focusing on what comparative analysis is and how it should be done⁴⁴⁷.

I. The Prevailing Trends in Comparative Law Scholarship: A Critical Evaluation

The critique of comparative law is epistemological and methodological, theoretical and practical; it is the “lack of methodological reflection and theoretical foundation”⁴⁴⁸ that continues to permeate the roots of many problems of contemporary comparative analysis.

i. An Outline of the Current Conceptualisations of Comparison

This long history has engendered inconsistent, staggered and often incoherent development, which dictates that the theoretical and methodological dimensions of comparative analysis are varied, diverse and complex; it is the uncertainty surrounding the conceptualisation of comparison which provides an entrance point for the critique. The rationales of comparative analysis are varied and detailed in the first section of this chapter, and explored following the case examples in Chapter 8. The initial allocation of aims of comparison promoted the notion that comparative law might be a discipline distinct from law itself. Comparison has the potential to allow for the aggregation of knowledge that can be used in different ways. It also potentially allows for the identification of similarities and differences, and thus for the identification of that which is common, and that which is general; furthermore, it underpins the identification of “best solutions”. Moreover, comparison putatively facilitates an exploration of the ways in which different orders interact in a multi-level context; this understanding substantiates the ties between comparative and private law, and the Europeanisation of the national by the national and European courts in the context of European integration.

This section provides a short overview of the doctrinal and functional approaches, which, deriving from the practice and scholarship of comparison, have emerged as predominant in

⁴⁴⁶ R. Salleilles, ‘Conception et objet de la science du droit comparé’ (1900) *Bull.leg.comp.* 383.

⁴⁴⁷ Kennedy, ‘Three Globalizations of Law and Legal Thought’ in Trubek and Santos, *The New Law and Economic Development*, (n.351), pp.19-73.

⁴⁴⁸ U. Mattei and M. Reimann, ‘Introduction’ (1998) 46 *AJCL* 597, p.597.

the course of the past century. The doctrinal approach is considered because it necessarily underpins almost every approach to comparison, and indeed, almost any approach to legal scholarship. Similarly, functionalism has come to constitute “the focal point of almost all discussions about the field of comparative law as a whole”⁴⁴⁹; this is also true in relation to private and European law. Notwithstanding, it is clear that both approaches have evolved, and can no longer be understood in their orthodox conceptualisations. Thereafter, in the first section of the next chapter, an outline is provided of those approaches advanced which attempt to develop comparative analysis as it is relevant to the Europeanisation of private law; reference will be made to concrete examples to illustrate the effects that different approaches might have on Europeanisation and integration. While recognising that these approaches emerged and developed as part of the critique of orthodox comparison, it is submitted that, for the purpose of this thesis, they are still lacking; the focus then shifts to the poverty of the methodological and theoretical dimensions of comparative analysis, for the purposes of facilitating its further evolution.

a) The Legal Doctrinal Approach to Comparative Analysis

It has generally been understood that doctrinal comparative analysis encompasses the identification and comparison of legal rules at the national level. Despite the scope for the development and rethinking of comparison in recent decades, the doctrinal focus has constantly continued to dominate. In particular, the focus in traditional comparative law has been (although not exclusively) on the identification and accentuation of similarities (and of differences, but only for the purpose of their repression) existing between national legal systems, predominantly with a view to reform within one national system itself. The pragmatic and utilitarian aims of comparative analysis are especially clear when it is examined through the “national law prism”, which came to dominate with nationalism. Subsequently, with the emergence of European integration, the focus partially shifted to the promotion of the Europeanisation project⁴⁵⁰; however, the national law prism continues to dominate in this light, particularly considering the focus on harmonisation. It is on this basis that comparison focused on the construction or elimination of similarities and differences between norms, as opposed to consideration of the relevant social or cultural context in which

⁴⁴⁹ R. Michaels, ‘The Functional Method of Comparative Law’ in M. Reimann and R. Zimmermann (eds.), *Oxford Handbook of Comparative Law* (OUP, Oxford; 2008), pp.339-382, p.340.

⁴⁵⁰ ‘Il circolo di Trento; Initial Thesis’ (Universita degli studi di Trento, Trento; 1987).

these norms emerge, are interpreted and applied. This conceptualisation, of the technical and rationale character of comparison, (mutually) reinforces also the conceptualisation of (private) law as a body of technical and rationale rules, left wanting for an ideological foundation; both conceptualisations are reinforced further via the functional approach to comparative analysis, discussed in more detail below.

Essentially concerned with the analysis of legal rules for the purposes of devising legal concepts and doctrine⁴⁵¹, doctrinal scholarship encapsulates an essential part of any legal system, and allows for the establishment of a framework within which the law can be structured⁴⁵². It encompasses consideration of the content of law, as identified from primary sources, including case law, statute and custom, and reflects the positivist notion of “law as rules”⁴⁵³. The positivist character of the legal doctrinal approach is often taken for granted. Notwithstanding, one might ask whether doctrinal analysis can also be considered to be normative⁴⁵⁴; depending on its aims, it must be understood as such. Doctrinal legal scholarship is not limited to the analysis of “law as rules”; rather, as Van Hoecke asserts, it encompasses normative dimensions, including the description and systemisation of the law, that is, the identification of the content of the various rules found in legal sources (and the choice as to the systems and particular norms to be analysed) and the subsequent categorisation by virtue of theories and doctrine⁴⁵⁵. Fundamentally, a rule which is deemed to be legally valid, gives rise to an enforceable obligation and thus prescribes particular behaviour; thus, the very subject of the analysis – the rule itself – encompasses some degree of normativity⁴⁵⁶. The normativity permeating the analysis is also evident from the perspective adopted by the researcher; Dworkin distinguishes between “inside out” and

⁴⁵¹ P. Chynoweth, ‘Legal Scholarship in the Built Environment: Epistemological Considerations and Cultural Challenges’ (Annual Research Conference of the Royal Institution of Chartered Surveyors, September 2006), p.5.

⁴⁵² M. Van Hoecke and M. Warrington, ‘Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law’ (1998) 71 *ICLQ* 495, p.522.

⁴⁵³ J.N. Adams and R. Brownsword, *Understanding the Law* (Sweet and Maxwell, London; 4th edn., 2006), pp.2-5.

⁴⁵⁴ Chynoweth, ‘Legal Scholarship in the Built Environment: Epistemological Considerations and Cultural Challenges’ (n.451), p.6. However this notion of normativity does not negate the positivist distinction between law and morals; see M.D.A. Freedman, *Lloyd’s Introduction to Jurisprudence* (Sweet and Maxwell, London; 7th edn., 2001), pp.47-48.

⁴⁵⁵ Van Hoecke, ‘Deep Level Comparative Law’ in Van Hoecke, *Epistemology and Methodology of Comparative Law* (n.7), pp.172-174, p.166.

⁴⁵⁶ D. Beylveeld and R. Brownsword, ‘Normative Positivism: The Mirage of the Middle-Way’ (1989) 9 *OJLS* 463, p.463.

“outside in” critique⁴⁵⁷. An “inside out” approach requires that the researcher adopt a position “within” the legal system: the critique is made of the relevant doctrine or concept against the background of the values espoused in that particular jurisdiction, namely consideration of the law from the perspective of legal actors (or legal officials) within the system. Brownsword asserts that different areas of the law are based on different ideological considerations⁴⁵⁸, which the researcher, taking an internal point of view, might try to identify or exploit in order to ascertain underlying patterns maintained by those within the system. An “outside in” approach entails that a position outwith the legal system is adopted. The viewpoint adopted will differ, depending on the context of the research and the rule (or more broadly, doctrine) under consideration and might include, a rights-based perspective might be taken⁴⁵⁹ or a utilitarian approach adopted⁴⁶⁰, for example. If one seeks to identify and facilitate an understanding of legal doctrine – adopting what Chynoweth considers an “expository tradition in legal research”⁴⁶¹ – an inside-out or internal, arguably neutral approach is adopted⁴⁶². In reality, the approach, deemed to be black-letter, cannot be truly neutral because the researcher’s analysis (even of his own legal system) is inherently skewed by his own background assumptions and prejudices. These considerations are particularly relevant to the position of the national and European judge explored in Chapter 4.

b) The Functional Approaches to Comparison

The foundations of the functional approach, developed initially by Rabel⁴⁶³, subsequently by Rheinstein⁴⁶⁴, and thereafter predominantly by Zweigert and Kötz, is based on the notion of *praesumptio similitudinis*. It is the apparent coincidence of function and problem – functional equivalence – that underpins comparison, facilitates its practice and the satisfaction of its key aim, that is, the identification of a solution to a given problem. The way in which the relevant

⁴⁵⁷ R.M. Dworkin, *Life's Dominion* (Harper Collins, London; 1993), p.29.

⁴⁵⁸ R. Brownsword, *An Introduction to Legal Research* (2006), p.14 (<www.wellcome.ac.uk/assets/wtx030897.pdf>; Last Accessed: 12.08.2013).

⁴⁵⁹ See for example, J. Rawls, *A Theory of Justice* (OUP, Oxford; 1972).

⁴⁶⁰ See for example, J. Bentham, *An Introduction to the Principles of Morals and Legislation* (J.H. Burns and H.L.A. Hart, eds.) (University of London Press, London; 1970).

⁴⁶¹ Chynoweth, ‘Legal Scholarship in the Built Environment: Epistemological Considerations and Cultural Challenges’ (n.451), p.7.

⁴⁶² See also Hart, *The Concept of Law* (n.151), pp.89-90.

⁴⁶³ E. Rabel, *The Law of the Sale of Goods: A Comparative Study, Vol.I.* (Gruyter & Co., Berlin; 1936-58), p.67.

⁴⁶⁴ M. Rheinstein, ‘Comparative Law and Conflict of Laws in Germany’ (1934) 2 *Univ.Chic.L.Rev.* 232, p.258-260.

rules are applied in order to solve the given problems might diverge and thus give rise to similar or different results⁴⁶⁵; this dictates that functionalism concerns fact, which arises when rules are applied, and recognises the connection between law and the role it plays in society. Functionalism assumes that social problems arising in liberal legal systems are similar. It is the existence of the similarity as to problem which gives rise to the scope for comparison⁴⁶⁶; thereafter, the function of different rules and concepts must be identified to ensure that equivalents are being compared⁴⁶⁷. Rabel's conception of functionalism – the comparison of the resolution of practical disputes in different legal orders – is intended to leave little scope for a normative discourse on domestic law⁴⁶⁸; this suggests that only the practical application of the rules are compared while even doctrinal and conceptual considerations are disregarded⁴⁶⁹. Yet functional comparison must rely on doctrinal scholarship: the identification of the way in which a specific problem might be resolved in the system under consideration can only be identified via an examination of the relevant rule as it is promulgated via legislation, as it is analysed in black-letter scholarship and as it is interpreted and applied in courts and by private parties.

At its foundations, functionalism is therefore inherently concerned with similarity and difference: it reveals similarities between legal orders as to the problems arising therein, and differences as to the solutions identifiable across (national) legal orders. The focus on similarities and differences necessitates that similarities are highlighted and differences eliminated⁴⁷⁰, based on the early twentieth century notion of universality, which advanced the notion that comparisons of the rules and concepts of different legal systems will ultimately disclose universal legal principles; this was advanced in private law with the focus on unification via harmonisation. Thus, within functionalism there is always an assumption of some similarity between legal systems, even if rules appear to diverge on the surface. The development of functionalism does not stop at the identification of similarity and difference

⁴⁶⁵ In opposition to Legrand: P. Legrand, 'The Impossibility of Legal Transplants' (1997) 4 *Maas.J.Eur.Comp.L.* 111, p.123; see also P. Legrand, 'How to Compare Now?' (1996) 16 *Legal Studies* 232.

⁴⁶⁶ Zweigert and Kötz, *Introduction to Comparative Law* (n.23), pp.33-34.

⁴⁶⁷ Zweigert and Kötz, *Introduction to Comparative Law* (n.23), pp.33-34.

⁴⁶⁸ R. Hyland, 'Comparative Law' in D. Patterson (ed.), *A Companion to the Philosophy of Law and Legal Theory* (Blackwell, Cambridge; 1996), pp.184-199, p.187.

⁴⁶⁹ Zweigert and Kötz, *Introduction to Comparative Law* (n.23), p.44.

⁴⁷⁰ Consider C. von Bar *et al* (eds.), *Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference: Outline Edition* (Seller, München; 2009).

but it is clear that, not only are there various functional approaches in various disciplines⁴⁷¹ (this outline will not deal with all) but the function itself means different things, which explains why the notion of function can be engaged to explain a breadth of comparative analyses. Thus, the function can be the understanding of law, the development of coherence, the determination of commonality, and thus of harmonisation (where this constitutes a broader purpose of comparative analysis), as well, arguably, of the determination of that which is “best”⁴⁷². These functions are identifiable in the CJEU and explored in Chapter 8.

From Schlesinger’s engagement with functionalism, in respect of which he identified fact patterns or problems within one system, and compared the reactions within different legal systems as part of the “living law” therein⁴⁷³, Sacco developed his legal formants approach under the banner of structuralism. The comparatist must identify the specific tools (formants⁴⁷⁴) of a legal system, which include its practices, the rules shaping judicial decisions, arguments and justifications, and the discourse in which lawyers engage, in order to explain and analyse how they fit with the legal system as a whole. Sacco understands that the past (and also future) development of the law can be explained via an uncovering of the interaction between these formants; they cannot be understood separately but only as part of the system’s broader structure⁴⁷⁵. These are to be examined within a single country, and one rule is to be derived from a process of interpretation: however, there is neither an assumption that one single rule exists nor that one interpretation exists (in this sense, Sacco engages with the potential for difference⁴⁷⁶) nor that this process of interpretation removes the scope for conflict⁴⁷⁷. Structuralism aims to promote, via scientific method, the understanding of the legal system by uncovering the way in which the structures from which it is made interrelate. While the approach is one which focuses on the “elements at work” within a legal system⁴⁷⁸, it is intended to be scientific, that is to say, it aims, like positivism to draw a distinction between “is” and “ought”; thus, while the context in which the system of law is placed is deemed to be pertinent, structural analysis does not engage with the relationships between law

⁴⁷¹ Rather, see Michaels, ‘The Functional Method’ in Reimann and Zimmermann, *Oxford Handbook of Comparative Law* (n.449), pp.345-363.

⁴⁷² Zweigert and Kötz, *Introduction to Comparative Law* (n.23), p.47.

⁴⁷³ Schlesinger, ‘The Past and Future of Comparative Law’ (n.9).

⁴⁷⁴ Structuralism and the notion of formant, find their foundations outside of law, in the theory of learning and language.

⁴⁷⁵ R. Sacco, ‘Legal Formants: A Dynamic Approach to Comparative Law (Instalment I of II)’ (1991) 39 *AJCL* 1 and ‘Legal Formants: A Dynamic Approach to Comparative Law (Instalment II of II)’ (1991) 39 *AJCL* 343.

⁴⁷⁶ Sacco, ‘Legal Formants (Instalment I of II)’ (n.475), p.21.

⁴⁷⁷ Sacco, ‘Legal Formants (Instalment I of II)’ (n.475), p.22-23.

⁴⁷⁸ Sacco, ‘Legal Formants (Instalment II of II)’ (n.475), p.343.

and this political, cultural or socio-economic context⁴⁷⁹. By highlighting the “elements at work” dimension of functionalism, Sacco highlighted one of the fundamental shortcomings of comparison, that is, the absence of a perspective which allows for the dynamic nature of law to be understood. In the context of this thesis, this emerges in respect of the lack of scope for the dynamic nature of private law to be fully appreciated by current conceptualisations of comparison. A similar understanding forms the foundation of the Common Core of Private Law project⁴⁸⁰. While there are broader goals underpinning the project – including the promotion of a common culture – the predominant aim is the identification of the common core of European private law for the purposes of identifying a “map of the law of Europe”. While they recognise that the project might have other consequences, including its use as a tool of harmonisation⁴⁸¹, Mattei and Bussani highlight that “[w]hile we believe that cultural diversity is an asset, we do not wish to take a preservationist approach. Nor do we wish to push in the direction of uniformity”⁴⁸². In this sense, while the Trento project consider difference, they do not look for difference; rather, they look – factually, via questionnaires - to identify commonality and unity, regardless – as we will see below – of its use beyond scholarship. This type of assumption depoliticises comparative law (and private law) and attributes to the methodology and the relevant norms an apparently technical, apolitical character.

The similarities and differences identified might constitute the foundation of the recognition of principles of Union law by the CJEU. Furthermore, similarity and difference might be engaged as the basis of, and further even shaping, the normative determination as to the “best solution”⁴⁸³; this identification is often engaged as the basis of an ideal law⁴⁸⁴. These considerations are explored in Chapter 9. In respect of the latter two considerations, functionalism gives rise to the understanding of law as instrumental, and to the “social engineering” role that law might play, either where there exists a determination of what

⁴⁷⁹ However, neither Schlesinger, nor Sacco, adhered to the positivist, nation-state based understanding of law.

⁴⁸⁰ M. Bussani and U. Mattei (eds.), *Making European Law. Essays on the Common Core Project* (Quaderni del Dipartimento di Scienze Giuridiche, Trento; 2000); A. Peters and H. Schwenke, ‘Comparative Law Beyond Post-Modernism’ (2000) 49 *ICLQ* 800, pp.809-810.

⁴⁸¹ M. Bussani and U. Mattei, ‘The Common Core Approach to European Private Law’ (1997-1998) 3 *Col.J.Eur.L.* 339, pp.339-341.

⁴⁸² Bussani and Mattei, *Making European Law* (n.480), pp.1-2.

⁴⁸³ W. Menski, *Comparative Law in a Global Context* (CUP, Cambridge; 2nd edn., 2006), p.46.

⁴⁸⁴ Hyland, ‘Comparative Law’ in Patterson, *A Companion to the Philosophy of Law and Legal Theory* (n.468), pp.185-187.

purpose to be achieved or not⁴⁸⁵. Comparison might therefore often be used in processes of harmonisation, for the purposes of promoting similarity, overcoming difference or identifying “best solutions”⁴⁸⁶; however, as will be explored below, comparison – as it currently exists – does not provide the tools to make such a determination. The pinnacle of these combined approaches is the DCFR. This normativity might also be engaged in the judiciary. Functional comparative analysis is not just about description but about identifying and determining the arguments for and against the recognition of or following of specific rules, principles, values, or ideologies. These determinations are shaped by factors which extend far beyond positivist understandings underlying legal doctrine; indeed, as to the latter, Brownsword and Adams highlight the fundamental distinction in adjudicative ideologies, namely between a formalist ideology, whereby the judiciary strives to uphold the law as expressed in statute and precedent, and a realist ideology, on the basis of which the courts seek to achieve the “correct” (or “best”) result⁴⁸⁷. Thus, functionalism neither merely concerned with the practical application of rules nor is it merely doctrinal. It promotes the positivist distinction between descriptive and normative comparison, between the “is” (the apolitical) and the “ought” (the political)⁴⁸⁸. Functionalism itself must therefore necessarily be understood as necessary political, finding its origins in a particular understanding of justice established on the basis of natural law⁴⁸⁹.

c) Shifts in Comparative Legal Scholarship

The critique of comparative methodology and theory is developed in the following section, in respect of the theoretical and methodological deficits of comparison. Firstly, the above evaluation is placed in a context which allows for the integration of the evolution of comparative analysis in consideration of broader shifting critique in scholarship, particularly to the extent that these discourses call into question the predominance of doctrinal and functional comparison. Critical legal studies⁴⁹⁰ as it originates in the USA, finds its foundations in progressive “leftist” political thinking and legal realism, wherein law is

⁴⁸⁵ Michaels, ‘The Functional Method’ in Reimann and Zimmermann, *Oxford Handbook of Comparative Law* (n.449), p.351.

⁴⁸⁶ Menski, *Comparative Law in a Global Context* (n.483), p.46.

⁴⁸⁷ Adams and Brownsword, *Understanding the Law* (n.453), pp.142-147.

⁴⁸⁸ U. Mattei, ‘The Art and Science of Critical Scholarship. Postmodernism and International Style in the Legal Architecture of Europe’ (2001) *75 Tul.L.Rev.* 1053, p.1082.

⁴⁸⁹ J. Hill ‘Comparative Law, Law Reform and Legal Theory’ (1989) *OJLS* 101, p.103.

⁴⁹⁰ Hereinafter, “CLS”; G. Frankenberg, ‘Critical Comparison: Re-Thinking Comparative Law’ (1985) *26 Harv.Int.L.J.* 411.

understood to form part of a “complex normative system”. A distinction must be drawn between the US and Europe, as the danger of “importing” US ideology generates assertions concerning the Americanisation of Europe. As Mattei notes, critical scholarship is not new to European scholars; notwithstanding, European scholarship has largely confined itself to the mainstream, politically-speaking. In Europe, CLS finds connections in postmodernism, which has not been “leftist” as such. The understanding of the postmodern and the “political implications of the postmodern condition in the making of European law”⁴⁹¹ continue to lack clarity⁴⁹². The postmodern critique of functional and doctrinal comparison is based on the rejection of a politically neutral, universalist approach and calls for the analysis to take account of its necessarily political, socio-economic and cultural background⁴⁹³. It is only on such a basis that comparative analysis can be engaged, its subject deconstructed and reconstructed and its processes and mechanisms examined. Furthermore, the hermeneutic dimension of postmodernism underpins the understanding of comparison as subjective, entirely uprooted from any scientific foundations. The engagement and analysis is necessarily subjective, formed through discourse between the relevant institutions; this will be explored in greater detail in Chapter 9 with regard to the emergence and evolution of judicial dialogue.

Both CLS and postmodernism reject the focus on universalism and the idea of neutrality. From the CLS perspective, comparative analysis must move beyond the focus on positivism, functionalism and structuralism⁴⁹⁴; it must transcend the predominant (albeit not exclusive, as noted) focus on similarity (or the mere consideration of difference for the purposes of its repression). Thus, the putative – yet unclear - legal, political, socio-economic and cultural consequences of postmodernism are of considerable significance where legal scholars are considered as “actors in a political game”⁴⁹⁵. From this perspective, the connection between CLS and new legal realism can be drawn; the latter is concerned with the transformation of the state and state-focused law, and thus promotes the need for the engagement of sociological and empirical assessment and the analysis of the pluralist characters of

⁴⁹¹ Mattei, 'The Art and Science of Critical Scholarship' (n.488), p.1055.

⁴⁹² To the extent that postmodern scholarship broadly constitutes a challenge to the certainty of pre-existing understandings of reality, it necessarily calls into question existing assumptions as to coherence and clarity; indeed, one of the key criticisms of postmodernism challenges its vagueness and absence of content.

⁴⁹³ P. Legrand, 'Paradoxically, Derrida' (2005) 27 *Cardozo Law Review* 631, p.662.

⁴⁹⁴ The latter retained its focus on similarity and difference, with the Third Thesis of the Trento Group, and the notion that “there is no comparative science without measurement of the differences and similarities”.

⁴⁹⁵ Mattei, 'The Art and Science of Critical Scholarship' (n.488).

developing legal orders⁴⁹⁶. Yet while CLS challenges the *status quo*, it differs from new legal realism to the extent that it retains its links to positivism, understood as positive law supported by the state; the link between law and the state continues to exist because the Critics understand their battle as a political one, existing within a territorially-defined space⁴⁹⁷.

The postmodern analysis brings to the fore the need for a reconsideration of the understanding of law as apolitical, the collary of which is the characterisation of legal rules as “technical”. A shift from this understanding requires, particularly in relation to comparative law and the Europeanisation of private law by the judiciary, that the significant political dimensions of the notions of culture, tradition and identity, and in particular, the references to “self” and “other”, are recognised. However, a critical approach must nevertheless be adopted; legal scholarship – especially that on comparative law, and in particular, from a postmodern perspective – remains overtly conservative, avoiding paying due recognition to the diversities of legal cultures and traditions as well the consequences of as legal and cultural change, rather accepting or even promoting cultural and legal staticism. Furthermore, the reference to the diversity of cultures, traditions and therein, identities, is frequently engaged in right-wing rhetoric as a means of promoting nationalistic tendencies; this is also true in the European context in respect of the “protection” (read: insulation) of “self”, i.e. the “national”, from the influence of the “other”. While these concepts – and tradition in particular – might be understood to invoke notions of continuity and stability, of passing something along a chain and thus rooted in the past, giving rise to broad notions of embeddedness, it has been submitted that, if understood within and also beyond the national context, the notions of belonging and thus of identity, which find their roots in these notions of culture and tradition are multiple, that is to say, not exclusive. This adheres to the assertion made in Chapter 2 that any European culture need not be single or distinct but should rather engage the plurality existing across the European space.

ii. The Poverty of Mainstream Comparative Analysis: Theoretical and Methodological Deficits

⁴⁹⁶ G. Shaffer and V. Nourse, 'Varieties of New Legal Realism: Can A New World Order Prompt A New Legal Theory?' (2009) 61 *Cornell.L.Rev.* 61.

⁴⁹⁷ Mattei, 'The Art and Science of Critical Scholarship' (n.488), p.1082.

The critique of comparative law is not difficult to identify, neither in legal discourse generally, nor in respect of the methodological discourse particularly. In this section, an attempt is made to bring together the theoretical - while Legrand refers to “the poverty of legal theory in the comparative field”⁴⁹⁸, Van Hoecke highlights the discord between “naive epistemological optimism” and “strong epistemological pessimism”⁴⁹⁹ - and practical sufferings of comparative law, and to engage these considerations with regard to the particularities of the Europeanisation of private law.

There is no lack of recognition of the neglect of the subject’s theoretical underpinnings; a discussion re-ignited recently in the context of postmodern discourses within and beyond law⁵⁰⁰. Two strands of critique are explored herein, underpinning the lack of theoretical framework: the absence of understanding as to what comparative analysis is and what it is for, and the reluctance of comparatists to engage with theoretical considerations. Örücü identifies an epistemological categorisation of two variations of comparative law – the first, which represents comparative law as an independent discipline or legal science, and the second, which represents comparative law as a “mere” methodology⁵⁰¹. With regard to the former, reference can be made to the marginal status generally accorded to comparative law⁵⁰² and the lack of appreciation of comparative law as a distinct scientific discipline, particularly in legal education⁵⁰³. With regard to the latter, the debate surrounding the very nature of comparative analysis continues, as it is generally accepted that it must constitute more than a mere methodology employed in legal research. There is a risk inherent in attaching oneself too rigidly to one of these polar opposite variations. On the one hand, an exceptionally broad conception of comparison, one that conceives of comparison as, for example, any process of study of foreign or international legal elements, arguably cannot constitute comparative

⁴⁹⁸ P. Legrand, ‘John Henry Merryman and Comparative Legal Studies: A Dialogue’ (1999) 47 *AJCL* 3, p.36.

⁴⁹⁹ Van Hoecke, ‘Deep Level Comparative Law’ in Van Hoecke, *Epistemology and Methodology of Comparative Law* (n.7), pp.172-174.

⁵⁰⁰ See for example, Peters and Schwenke, ‘Comparative Law Beyond Post-Modernism’ (n.480). Yet, postmodernism is necessarily negative; that is to say, it is reactionary in countering modernism. Yet within its definition, the notion of modernism is inherent, which can be problematic as it therefore reveals more about what it is not, than what it is; J. Habermas, *The Philosophical Discourse of Modernity: Twelve Lectures* (MIT Press, Cambridge; 1990), and J. Habermas, ‘Modernity: An Incomplete Project’, in P. Rabinow and W.M. Sullivan (eds.), *Interpretative Social Science: A Second Look* (U.Cal. Press, Berkeley; 1987), pp.141-156.

⁵⁰¹ E. Örücü, *The Enigma of Comparative Law: Variations on a Theme for the Twenty-First Century* (Martinus Nijhoff, Leiden; 2004), pp.10-18.

⁵⁰² M. Reimann, ‘The End of Comparative Law as an Autonomous Subject’ (1996) 11 *Tul.Eur.&Civ.Law.Forum* 49, p.52.

⁵⁰³ See generally, B. Fauvarque-Cosson, *The Rise of Comparative Law: a Challenge for Legal Education in Europe* (Europa Law Publishing, Groningen; 2007).

analysis proper. At the other extreme, an understanding of comparison which “would confine comparative law to a purely speculative science – an ‘exercise in hermeneutics’ or the object of a theoretical reflection, especially on the epistemological level”⁵⁰⁴, is unduly narrow. There is a very clear need to conceive of comparison in a manner that achieves a satisfactory balance between these two extremes and recognises that the variation employed may differ depending on the identity of the comparatist, the nature of the research being undertaken and the context in which this is done⁵⁰⁵.

As Örüçü understands the acquisition of new knowledge to reflect the foremost purpose of comparative law⁵⁰⁶, Reimann asserts that it must be understood as more than a method of inquiry given the substantial body of knowledge to which academic scholarship and the practice of comparison throughout the 20th century has given rise. This knowledge concerns the nature, purposes and processes of comparison itself⁵⁰⁷, the structure and content of foreign norms which has allowed for the mapping of different constructs including that of legal families. Sacco, in the context of structuralism, has considered that “comparative law remains a science as long as it acquires knowledge and regardless of whether or not the knowledge is put to any further use”⁵⁰⁸; he thus seems to suggest that the use of comparative analysis can be justified regardless of any practical benefit arising. Thus, the Trento Group highlights that comparison “understood as a science, necessarily aims at the better understanding of legal data. Ulterior tasks, such as the improvement of the law or interpretation are worthy of the greatest consideration but nevertheless are only secondary ends of comparative research”⁵⁰⁹. The fundamental “product” of comparison is the acquisition of knowledge; the more pragmatic aims of comparative law are deemed to be “ulterior”. While the “fruits” of comparative law may be of use to those in practice, for the purposes of law reform and the harmonisation of law, these fruits are nevertheless produced via comparative law as a legal science, predominantly an academic pursuit and the concern of those involved in legal

⁵⁰⁴ X. Blanc-Jouvan, ‘Centennial World Congress on Comparative Law: Closing Remarks’ (2001) 75 *Tul.L.Rev.* 1235, p.1236.

⁵⁰⁵ Blanc-Jouvan, ‘Centennial World Congress on Comparative Law’ (n.504), p.1236.

⁵⁰⁶ E. Örüçü, *The Enigma of Comparative Law: Variations on a Theme for the Twenty-First Century* (Martinus Nijhoff, Leiden; 2004), pp.10-11.

⁵⁰⁷ M. Reimann, ‘The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century’ (2002) 50 *AJCL* 671, pp.675-683.

⁵⁰⁸ R. Sacco ‘Legal Formants: A Dynamic Approach to Comparative Law, Part I’ (1991) 39 *AJCL* 1, 4.

⁵⁰⁹ ‘Il circolo di Trento; Initial Thesis’ (Universita degli studi di Trento, Trento; 1987); See also, the Second Thesis, and the significance of comparison in generating knowledge of that which has occurred such that comparison can be understood as a historical science, and R.H.S. Tur, ‘The Dialectic of General Jurisprudence and Comparative Law’ (1977) *J.R.* 238, pp.238-240.

scholarship⁵¹⁰. In this respect - as comparative analysis is a “quest for knowledge”⁵¹¹ - it must necessarily be understood that “comparative law, properly pursued, is an essentially philosophical activity”⁵¹²; an epistemological dimension, which engages both legal theory and the methodological discourses of comparison, is identifiable. However, the opposite of Sacco’s assertion – the notion that the numerous practical purposes, to which the knowledge gained can be put, can single-handedly provide a satisfactory justification of comparison – is controversial⁵¹³. Generally, the pragmatic aims of comparison are often advanced over and above the arguably more abstract notion of the “acquisition of knowledge”, notwithstanding that this is underpinning; these include the facilitation of legal practice, law reform (by the national legislature, the European legislature, international bodies and private actors, including civil society organisations and private individuals), the promotion of harmonisation and unification (particularly at the European and transnational levels)⁵¹⁴ and furthermore, the filling of gaps via judicial law-making (in both national and European courts). In discussing the practice of comparative analysis, it seems appropriate to highlight the (almost unique)⁵¹⁵ nature of law in terms of the two realisms of reasoning with which comparatists must necessarily be concerned: on the one hand, law as a form of practical reasoning, reflects primary reason, informs lawyers of how to practice law, and is institutionalised in the legal profession; underlying this first order reasoning is secondary reasoning, constituting reflections on the practice of law. Within legal scholarship and practice, lawyers must be concerned with both.

The second of the fiercest criticisms in relation to the absence of a theoretical framework of comparison stems from the idea that comparatists should not concern themselves with philosophical considerations and provides a connection with the methodological deficit of comparison. To return to Van Hoecke’s distinction between epistemological optimism and epistemological pessimism, those who adhere to the latter assert that cultural divergence

⁵¹⁰ Sacco, ‘Legal Formants (Instalment I of II)’ (n.475), p.1.

⁵¹¹ E. Örüçü, *The Enigma of Comparative Law: Variations on a Theme for the Twenty-First Century* (Martinus Nijhoff, Leiden; 2004), p.10.

⁵¹² Ewald, ‘Comparative Jurisprudence (I)’ (n.442), p.2145.

⁵¹³ Tur, ‘The Dialectic of General Jurisprudence and Comparative Law’ (n.509), p.239.

⁵¹⁴ E. Örüçü, ‘Critical Comparative Law, Considering Paradoxes for Legal Systems in Transition’ (2000) 4(1) *EJCL*.

⁵¹⁵ For example, L. Wittgenstein, *Philosophical Investigations* (G.E.A. Anscombe trans.) (WileyBlackwell, Oxford; 3rd edn., 2001), para.126-127. Wittgenstein sets out the non-dogmatic nature of philosophy. There is no profession unlike in law. The same is true of other social sciences.

between legal systems⁵¹⁶ precludes a comparatist from being able to understand the specificities (including the normative content, character and assumptions) of the jurisdiction for the purposes of facilitating worthwhile comparison. It can be said that inherent in epistemological pessimism is a “perfectionist view of ‘understanding’”⁵¹⁷ such that nothing less than unqualified understanding will suffice; if the methodologies engaged and the knowledge derived are not absolute, this will preclude efficient comparison. Those who fall within the former attach little importance to a supposedly debilitating theoretical reflection of comparative methodologies. An observation of the German legal philosopher Gustav Radbruch has been adopted by Zweigert and Kötz⁵¹⁸ to highlight this line of reasoning: “obsession with one’s own wellbeing is a sign of sickness in people as well as in scholarship”⁵¹⁹. The reluctance to engage with the theoretical considerations can also be identified in Weir’s rejection of the suggestion that theory necessarily underpins every legal institution⁵²⁰: “it is possible for us, like Hamlet, to tell a hawk from a handsaw and to do so without a complete theory of aerial predators or an exhaustive inventory of the carpenter’s toolbox”⁵²¹. From this perspective, comparatists seek to renounce philosophical reflection as a concern of legal theorists and instead seek to concentrate on “doing” comparative analysis.

Thus, not only is it clear that the foundations of comparative law are reflected in a theoretically unstable ideological basis, which comes to influence its aims and purposes⁵²², but it is also criticised for its methodological deficits. These considerations are necessarily intertwined. As Reimann notes, there is a severe lack of scholarship on how we actually “do” comparison⁵²³, concerning not only the identification and determination of what is being compared, namely the determination of the relevant unit of analysis, but also the manner in which comparison is undertaken, the notion of comparative analysis in context being of particular significance. What we seem to have are acceptances of insights adopted by

⁵¹⁶ See P. Legrand, ‘European Legal Systems Are Not Converging’ (1996) 45 *ICLQ* 45, esp. p.52.

⁵¹⁷ Van Hoecke, ‘Deep Level Comparative Law’ in Van Hoecke, *Epistemology and Methodology of Comparative Law* (n.7), p.173.

⁵¹⁸ K. Zweigert and H. Kötz, *Introduction to Comparative Law* (T. Weir trans.) (OUP, Oxford; 3rd edn., 1998), p.33.

⁵¹⁹ G. Radbruch, *Einführung in die Rechtswissenschaft*, (Quelle & Mayer, Leipzig; 13th edn., 1982).

⁵²⁰ G. Samuel, ‘Comparative Law and Jurisprudence’ (1998) 47 *ICLQ* 817, p.826; notwithstanding, Weir’s statement begs the question: of whether this “anti-theory” stance is nevertheless theoretical.

⁵²¹ T. Weir, ‘Contracts in Rome and England’ (1992) 66 *Tul.L.Rev.* 1615, p.1616

⁵²² O. Kahn-Freund, ‘On Use and Misuse of Comparative Law’ (1974) 37 *MLR* 1; Patrick Glenn, ‘Legal Cultures and Legal Traditions’ in Van Hoecke, *Epistemology and Methodology of Comparative Law* (n.27).

⁵²³ M. Reimann, ‘The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century’ (2002) 50 *AJCL*. 671, p.689.

comparatists in the past⁵²⁴. Thus, it is now generally accepted that in comparing legal systems we need to compare in context, and so we must go beyond a consideration of what is provided for in the rulebooks and identify the way in which the legal rules are applied in practice. A significant consideration underlying the lack of guidance as to comparative analysis as a process must relate to its “laissez-faire” characterisation. Notwithstanding the interactions inherent between theory and practice, there exists a breadth of reasoning which suggests why – as a general rule – comparatists are reluctant to undertake philosophical reflection on their practice, a reluctance which necessarily undermines any reflection on its methodology. Comparatists who reject theoretical considerations are perhaps wary and apprehensive as to the difficulties inherent in a dalliance with legal theory⁵²⁵; indeed, it has been suggested that delving into a theoretical reflection of comparative analysis, with the potential of giving rise to a conceptualisation of comparison which looks beyond study of rules to the “law in action” and recognising the need to consider the context within which the rules exist, sets an “unrealistic and unattainable standard...entirely unworkable at the practical level”⁵²⁶. This latter consideration is of particular relevance in respect of the workload of the CJEU (and national courts). The theoretically “laissez-faire” approach to the development of comparison has also attributed to comparatists a wide scope, which they might be reluctant to relinquish. Kahn-Freund considered that comparatists had been afforded the “gift of freedom”⁵²⁷ such that they could decide exactly what they should compare and how they should go about doing it; each scholar thus seemed to develop his own methodology of comparative analysis with the result that it is now extremely difficult to concretely identify the dimensions of the comparative methodology.

Having sketched the doctrinal and functional approaches to comparison, this subsection looks to briefly outline the key approaches advanced in respect of the Europeanisation of private law. Thereafter, the scope for a reconceptualised understanding of comparison is explored.

II. “Complex” Comparative Analysis in Light of the Scope for the Europeanisation of Private Law

⁵²⁴ E. Rabel, *Gesammelte Aufstage* (Vol. III), pp.3-6.

⁵²⁵ M. Reimann, ‘The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century’ (2002) 50 *AJCL* 671, p.688.

⁵²⁶ V.V. Palmer, ‘From Lerotholi to Lando: Some Examples of Comparative Law Methodology’ (2005) 53 *AJCL* 262, p.263.

⁵²⁷ O. Kahn-Freund, ‘Comparative Law as an Academic Subject’ (1966) 82 *LQR* 40, p.41.

i. A Critical Evaluation of the Orthodox Approaches to Comparative Analysis

a) From Orthodox to Complex Comparison via Legal Scholarship

Many of the contributions to comparative law pertaining to European private law development have been advanced in the context of legal scholarship. The PECL and the DCFR, developed by the Lando Commission and the Study Group on a European Civil Code respectively, have been outlined above. Reference might be made to other scholarly undertakings, including the Common Core and Kötz's project on European Contract Law⁵²⁸, both of which engaged the functionalist approach. Underpinning these scholarly activities, although perhaps neither explicit nor intended, has been a focus on harmonisation. The PECL, which is composed of three books and provides sets of principles - essentially in a codified form - on general contract law (without providing for the *acquis*), was developed by national reporters, and drafted, discussed and refined by drafting and editing groups, beyond any one national system. It had the purpose of facilitating trade and the internal market and thus, while identifying similarities and difficulties (with the aim of overcoming the latter), the identification of a set of neutral rules. The PECL has come to be relevant to national law reform⁵²⁹, the revision of the *acquis* and furthermore, the approaches of the DCFR Study and *Acquis* groups.

In its revision of the *acquis*, the Commission advocated an approach based on comparative analysis, one which steered clear in so far as possible from a focus on one particular legal order but which nevertheless adhered to a state-based understanding of the role of comparative analysis in the Europeanisation of law⁵³⁰. Two key approaches can be identified and are explored in more detail through the thesis. Firstly, the comparative analysis has largely focused on the identification of norms shared across national systems, that is, the "common core"⁵³¹. This approach has developed contemporaneously with the Commission's

⁵²⁸ H. Kötz, *European Contract Law* (T. Weir trans.) (OUP, Oxford; 1998).

⁵²⁹ Used in certain national courts as a source of inspiration and a driver of change. See the examples of Spanish and Dutch case law in C. Vendrell Cervantes, 'The Application of the Principles of European Contract Law by Spanish Courts' (2008) 16 *Zeitschrift für Europäisches Privatrecht* 534 and D. Busch, 'The Principles of European Contract Law Before the Supreme Court of the Netherlands' (2008) 16 *Zeitschrift für Europäisches Privatrecht* 549.

⁵³⁰ The most noteworthy critique is relates to the significance of normative determination in comparative law and the idea that mere comparison of legal rules is insufficient. Approaches to comparative law which purport to provide a solution to this issue, for example the functional approach advocated by Zweigert and Kötz: Zweigert and Kötz, *Introduction to Comparative Law* (n.23), pp.34 *et seq* - have not been accepted without critique.

⁵³¹ See Bussani and Mattei, *Making European Law* (n.480).

request that the Common Frame of Reference should elaborate the “best solutions found in Member States’ legal orders”⁵³² by determining “clear definitions of legal terms, fundamental principles and coherent model rules of contract law, drawing on the *acquis communautaire* (the secondary legislation already in place)”⁵³³. The pinnacle of these combined approaches is identifiable in the DCFR⁵³⁴, the academic drafters of which engaged in a comparative analysis of the norms, including rules, principles and concepts, and “the lessons of national experience”⁵³⁵ for the purposes of identifying the “best solutions”⁵³⁶ and the principles underlying Union law⁵³⁷. The DCFR followed a code-based structure notwithstanding the absence of support for the construction of a European civil code⁵³⁸.

Yet comparative scholarship has been developed beyond the DCFR. In light of the evolution of functionalist and instrumentalist approaches, one might also refer to comparative law and economics scholarship, which engages a discipline external to law, strictly understood, and the legal origins theory to which it has given rise. The former is of specific relevance to the legal transplants discourse, based on one particular function of legal norms, namely, efficiency, which it is anticipated will eventually lead to convergence⁵³⁹. The identification of different solutions to problems in divergent legal systems gives rise to a “market” of solutions⁵⁴⁰, the most efficient of which is “adopted”. The latter explores, via empirical analysis, the impact of legal origin on legal development, essentially in respect of the freedom

⁵³² In particular, those of “developed” legal orders; European Commission, ‘Action Plan on European Contract Law: A More Coherent European Contract Law’ COM(2003) 63 final, p.17.

⁵³³ Commission, ‘Communication on European Contract Law and the Revision of the *Acquis*’ (n.274), p.3.

⁵³⁴ Part of which, namely, the sales contract section, now constitutes the foundation of the pCESL.

⁵³⁵ J. Mummery, ‘Links with National Courts’ in P. Moser and K. Sawyer (eds.), *Making Community Law: The Legacy of AG Jacobs at the ECJ* (Edward Elgar, Cheltenham; 2008), pp.100-114, p.109.

⁵³⁶ In particular, the focus of the Study Group: C. von Bar *et al* (eds.), *Principles, Definition and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR, Outline Edition)* (Sellier, München; 2009); the sales part of the DCFR has come to form the Proposal for a CESL: European Commission, ‘Proposal for a Regulation on a Common European Sales Law’ COM(2011) 635 final.

⁵³⁷ The focus of the *Acquis* Group.

⁵³⁸ Considering in particular, as Schulze highlights, the difficulty in the mere transfer of what exists at the national level to the EU level: “e.g. with regard to different competences and tasks of a state on the one hand, and a supranational union on the other; with respect to European private law’s specific tasks concerning the realisation and functioning of the Internal Market and with regard to the new role of EU fundamental rights in the field of private law”; R. Schulze, ‘Contours of European Private Law’ in R. Schulze and H. Schulte-Nölke (eds.), *European Private Law: Current Status and Perspectives* (Sellier, München; 2011), pp.3-26, p.6.

⁵³⁹ On the basis of the Coase theorem, that is, “that the more efficient legal theories and solutions would spread around in a world with zero transaction costs”, U. Mattei, *Comparative Law and Economics* (U. Michigan, Ann Arbor; 1997), p.219.

⁵⁴⁰ A. Ogus, ‘Competition Between National Legal Systems: A Contribution of Economic Analysis to Comparative Law’ (1999) 48 *ICLQ* 405.

attributed to legal actors on the basis of these different origins⁵⁴¹. The legal origins discourse has been linked to the World Bank's Doing Business reports⁵⁴² in respect of the impact on policy reform⁵⁴³. The comparative law and economics, legal origins and World Bank discourses challenge orthodox understandings of comparative law, as each extends beyond legal discourse (to the extent that it has tended to preclude analysis to economic analysis and the notion of competition between legal systems⁵⁴⁴). However, these approaches necessarily retain a state-centred focus, reflected - particularly in the legal origins understanding - in the civil and common law divide⁵⁴⁵. Furthermore, neither attributes sufficient consideration to the cultural context of law; rather, the focus falls on the legal solution deriving from economic efficiency. This is particularly true of the World Bank reports, which is required by its Charter, to adopt an apolitical understanding of legal development. Furthermore, it initially adopted a "one size fits all" method where not only problems but also solutions were identified as universal, regardless of legal, political, cultural or socio-economic context; the World Bank has only recently moved away from this orthodoxy⁵⁴⁶. In light of the approach to comparative analysis advanced below, which pleads for a context-orientated perspective, this understanding does not fit well with the perspective of legal development adopted herein.

In line with the notion of the existence of a variety of solutions, Smits' theory of comparative law provides that private individuals should be able to choose the law applicable to their relations. Challenging the pervasiveness of the economic rationale underpinning legislative harmonisation, he rather favours a "bottom up" approach to the drafting of legislative norms. The parties' choice of norms might eventually lead to harmonisation but this is rather

⁵⁴¹ R. la Porta *et al*, 'Law and Finance' (1998) 106 *Journal of Political Economy* 113; R. la Porta *et al*, 'The Economic Consequences of Legal Origins' (2008) 46 *Journal of Economic Literature* 286.

⁵⁴² World Bank, *Doing Business 2014 Report* (World Bank, Washington D.C.; 2013); The World Bank Doing Business Reports purports to develop "modernisation processes based on benchmark techniques and best practice indicators"; for the purposes of identifying "best practices in business" regulation, there exist (now) eleven sets of indicators, each of which measures the extensiveness of the regulatory environment in which a business exists at any given time.

⁵⁴³ See for example R. Michaels, 'The Functionalism of Legal Origins' in M. Faure and J.M. Smits (eds.), *Does Law Matter? On Law and Economic Growth* (Intersentia, Groningen; 2011), pp.21-40.

⁵⁴⁴ With the potential for consideration of the idea of "measuring" those systems in light of the relevant social and historical background, including pertinent policy considerations. For an approach favouring a neoinstitutional approach over orthodox neoclassical economic theory, see R. Caterina, 'Comparative Law and Economics', in J.M. Smits (ed.), *Elgar Encyclopedia of Comparative Law* (Edward Elgar, Cheltenham; 2006), pp.161-171.

⁵⁴⁵ R. Michaels, 'Comparative Law By Numbers? Legal Origins Thesis, Doing Business Reports, And the Silence of Traditional Comparative Law' (2009) 57 *AJCL* 765.

⁵⁴⁶ R. Zoellick, 'Democratizing Development Economics' 29.09.2010, Georgetown University, wherein he noted: "The record of development has shown that one size won't fit all" <<http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:22716997~pagePK:34370~piPK:42770~theSitePK:4607,00.html>>; Last Accessed: 01.04.2014).

spontaneous, occurring gradually in line with the emergence of a European legal culture as individuals become more educated about what occurs at the European level. His focus on private actors and their behaviour shifts his analysis beyond the state⁵⁴⁷; furthermore, he looks to learn from outside of the Union, particularly from those “mixed legal systems” that reflect a mixture of legal cultures and traditions⁵⁴⁸. While Smits’ emphasis falls neither wholly on unification nor on the identification of similarity over divergence, the fundamental difficulty with Smits’ approach arises from the lack of clarification as to the significance attributed to cultural context. While it seems that his approach attributes greater significance to culture for the purposes of identifying the relationship between law and culture⁵⁴⁹, he also asserts that “linking law to other societal and cultural phenomena of a specific country would be impossible”⁵⁵⁰.

While these approaches reflect shifts in the conceptualisations of comparison beyond doctrinalism and functionalism, it is submitted that they remain problematic for a number of reasons. In particular, two dimensions of comparative analysis come to the fore: on the one hand, the focus on the identification of commonalities for the purposes of promoting unification via codification⁵⁵¹ or harmonisation, notwithstanding that, as is submitted below, harmonisation – as is clear in light of its different reaches, evaluated above – does not preclude diversity, and on the other hand, the rationale and determinative factors for the identification of “best solutions”. These dimensions have been recognised in the CJEU and are explicated in greater detail in Chapters 8 and 9⁵⁵².

⁵⁴⁷ J.M. Smits, *Private Law 2.0: On the Role of Private Actors in a Post-National Society*, Inaugural Lecture Maastricht-HiiL Chair (HiiL, The Hague, 2011).

⁵⁴⁸ J.M. Smits (ed.), *The Contribution of Mixed Legal Systems to European Private Law* (Intersentia, Groningen; 2001).

⁵⁴⁹ J.M. Smits, ‘European Private Law and the Comparative Method’ in C. Twigg-Flesner (ed.), *The Cambridge Companion to European Union Private Law* (CUP, Cambridge; 2010), pp.33-43, p.42.

⁵⁵⁰ J.M. Smits, ‘The Harmonisation of Private Law in Europe: Some Insights From Evolutionary Theory’ (2002) 31 *Georg.J.Int.Comp.L.* 79, p.80.

⁵⁵¹ Largely dominant, until recently, as note above, while the Commission has taken a more “sedate” approach recently: European Commission, ‘Green Paper from the Commission on Policy Options for Progress Towards a European Contract Law for Consumers and Businesses of 1 July 2010’, COM(2010) 348 final.

⁵⁵² See, for example, the reference to these projects in the Opinions of the AG and judgements of the Court; it seems that, at least initially, the AGs have been more open to engaging such sources: for example, reference can be made to C-412/06 *Annelore Hamilton v Volksbank Filder* [2008] ECR I-02383, Opinion of AG Maduro, para.24, fn.48-49 (limitation of actions as a common principle, general reference to PECL and DCFR); *Quelle* (n.241), Opinion of AG Trstenjak, fn.28 (duty of specific performance and its limitations, reference to Art.9.102 (1) and (2) PECL).

As to the latter, the “best solution” is identified in response to a particular problematic, from the aggregation of knowledge engendered by comparative analysis. It derives from the functionalist approach, which dictates that the theoretical foundations of mainstream comparison are inherently related to the identification of solutions to comparable practical problems⁵⁵³. The existence of a solution in a number – even a majority of systems – cannot provide a basis upon which a determination of that which is “best” can be made; furthermore, functionalism itself does not provide any relevant criteria for such a determination. For Michaels, who considers that it “provides surprisingly limited tools for evaluation”, there must be “something else”, which need not necessarily be found in law, and less so, in a single dimension of the methodological approach adopted⁵⁵⁴. The identification of the “best/better” solution necessarily invokes a value-based, normative judgement, revealing the ideological appreciation not only shaping the comparative analysis adopted but also underpinning the particular decision made⁵⁵⁵; however current understandings of comparative analysis do not provide a satisfactory metric by which a normative determination can be made. Yet it has been submitted that even the mere consideration of foreign rules and case law, which might reflect a *laissez-faire* or neoliberal approach to comparative analysis, reflect essentially political activities, even with a (albeit, potentially implicit) focus on harmonisation; they have a normative determination which necessarily involves evaluation, and which thus renders it as an essentially political process, shaped by policy considerations.

The former consideration reflects “comparative law’s habitual focus on identifying commonalities”⁵⁵⁶ for the purpose of facilitating unification via harmonisation; even if this is neither expressly stated, nor expressly intended, it necessarily shapes the comparison undertaken. The focus on similarity has the potential to set limits to comparative analysis. On the one hand, it often leads to the study of similar legal orders⁵⁵⁷ at the expense of others; furthermore, as Zimmermann notes, the underlying purpose of harmonisation advanced an approach, which predominantly (but not necessarily exclusively) dictates that similarities are

⁵⁵³ Frankenberg, ‘Critical Comparison’ (n.490), p.418-421.

⁵⁵⁴ Michaels, ‘The Functional Method’ in Reimann and Zimmermann, *Oxford Handbook of Comparative Law* (n.449), p.374.

⁵⁵⁵ Hill, ‘Comparative Law, Law Reform and Legal Theory’ (n.489), p.102.

⁵⁵⁶ V.G. Curran, ‘Dealing in Difference: Comparative Law’s Potential for Broadening Legal Perspectives’ (1998) 46 *AJCL* 657, p.666.

⁵⁵⁷ G. Dannemann, ‘Comparative Law: Study of Similarity or Difference?’ in M. Reimann and R. Zimmermann (eds.), *Oxford Handbook of Comparative Law* (OUP, Oxford; 2008), pp.383-419, p.387.

identified and promoted for the purpose of advancing unification⁵⁵⁸, while differences are identified merely for the purpose of their repression⁵⁵⁹. This critique has been met in critical comparison, which – building on Gutteridge’s assertion that comparison should look to divergence as well as similarity⁵⁶⁰ - emerged in Frankenberg’s promotion of the difference theory, which challenged the neutrality of functionalism (given our inherent, culturally-derived assumptions) and urged comparatists to understand themselves as “participant observers”⁵⁶¹. The “difference theory” not only dictates that there exists no level at which differences between national cultures and traditions are, or can be, entirely absent⁵⁶² but further advances that these divergences should neither be disregarded nor eliminated for the purposes of facilitating a smoother path towards the harmonisation, and subsequent unification, of law⁵⁶³; it also aims to promote engagement with that which is different – the “other” – recognising the relevant socio-economic, political, and cultural context⁵⁶⁴. The difference theory is engaged – with the cultural perspective underpinning – in the scholarship on legal transfers, discussed below.

b) The Legal Transfers Discourse

The legal transfers discourse reflects one key dimension of the relevance of comparative analysis to the Europeanisation of private law. The Watson and Legrand discourse occupies a continuum. At one end of the spectrum, Legrand asserts that “legal transplants” are impossible. Rules, he asserts, cannot be separated from legal culture, the latter shaped by economic, social, cultural and political context. Legal culture and tradition are products of creation and considerable experience, which cannot be easily replicated and is not the same in every legal context; as such, rules cannot survive transplantation. By highlighting the

⁵⁵⁸ Zimmermann, ‘Europeanization of Private Law’ in Reimann and Zimmermann, *The Oxford Handbook of Comparative Law* (n.62).

⁵⁵⁹ Which is to say, as a matter of practice, while divergence of legal norms will not legitimise legislative activity in itself, Art.114 TFEU nevertheless requires the existence of divergences, operating to undermine the functioning of the internal market. It is for the European legislature to identify the scope, existence and impact of such divergence, and adopt the most appropriate legal instrument; the engagement with Art.114 TFEU therefore requires a preliminary analysis of the relevant national norms, dictating that comparative analysis – deemed to be a “harmonising handmaiden” (Menski, *Comparative Law in a Global Context* (n.483), p.46) is necessarily fundamental to the legislative development of private law

⁵⁶⁰ H.C. Gutteridge, *Comparative Law* (CUP, Cambridge; 1946), pp.8-9.

⁵⁶¹ See also, Hyland, ‘Comparative Law’ in Patterson, *A Companion to the Philosophy of Law and Legal Theory* (n.468).

⁵⁶² Hyland, ‘Comparative Law’ in Patterson, *A Companion to the Philosophy of Law and Legal Theory* (n.468), p.193-197.

⁵⁶³ Legrand, ‘European Legal Systems Are Not Converging’ (n.516); Frankenberg, ‘Critical Comparison’ (n.490), p.434-440.

⁵⁶⁴ Frankenberg, ‘Critical Comparison’ (n.490), p.443.

significance of context in legal development, Legrand asserts that where there is evidence of “legal transplantation”, the rule may be transferred but in the process, it loses its meaning; it is the cultural context, from which the rule, institution or principle derives its meaning. The loss of this context renders the transfer unsuccessful because that which is transferred loses its original meaning or its meaning is changed⁵⁶⁵. This discourse, to the extent that it can be said to promote the notion that the successful⁵⁶⁶ legal transfer must not only “fit” the “receiving” legal system⁵⁶⁷ but also retain its shape and content, necessitates consensus on the understanding, assessment and determination of “success”, which is lacking⁵⁶⁸. The appearance of convergence merely “papers over” the unbridgeable deep structures which remain⁵⁶⁹.

If one follows this continuum to its opposite pole, Watson understands that transfers can be made between comparatively different legal systems through the cross-border activities of the legal profession, as it is understood that there exists little connection between law and societal background⁵⁷⁰. Watson’s “legal transplants” theory challenges the “mirror theory” of legal development, advocating that law develops from internal, not external pressure, such that the cross-cultural transfer of rules, institutions and principles across societies is possible. Thus norms can be separated from the “spirit of the law”; it is understood that law, which derives its own character from the characteristics and nature of the legal profession, is neither embedded in culture, nor does it necessarily have to be understood as being connected to social, political or economic evolution but is rather autonomous. Watson’s thesis is based on empirical evidence of the transfer of legal rules, institutions and principles, primarily deriving from an analysis of Roman laws transplanted in bulk into the continental systems, and constituting the foundation for national – predominantly those which subsequently came to be identified as continental, notwithstanding exceptions⁵⁷¹ - legal systems. On the basis of this

⁵⁶⁵ Legrand, ‘The Impossibility of Legal Transplants’ (n.465), p.117.

⁵⁶⁶ The arguments on which the facilitation or avoidance of social change are based are relevant to the determination of the success of legal transplants: D. Nelken, ‘Beyond the Metaphor of Legal Transplants? Consequences of Autopoietic Theory for the Study of Cross-Cultural Legal Adaptation’ in J. Priban and D. Nelken (eds.), *Law’s New Boundaries: The Consequences of Legal Autopoiesis* (Ashgate, Aldershot; 2001), pp.265-302, p.295.

⁵⁶⁷ M. van Hoecke, *Law as Communication* (OUP, Oxford; 2002), pp.37-29.

⁵⁶⁸ J. Gillespie, ‘Towards a Discourse Analysis of Legal Transfers into Developing East Asia’ (2008) 40 *NYU.J.Int.L.Pol.* 666, p.676.

⁵⁶⁹ Legrand, ‘European Legal Systems Are Not Converging’ (n.516).

⁵⁷⁰ A. Watson, ‘Comparative Law and Legal Change’ (1978) 37 *CLJ* 313, pp.314-315.

⁵⁷¹ Namely those systems deemed to be “mixed”; see, amongst others, K.G.C. Reid, ‘The Idea of Mixed Legal Systems’ (2003) 78 *Tul.L.Rev.* 5.

“domination of transfer”, Watson asserts that comparison is not only the equivalent of transplantation but should also be centrally concerned with legal transplants. For Watson, “[l]aw is treated...as existing in its own right...[and] has to be justified in its own terms; hence authority has to be sought and found. That authority (in some form, which may be perverted) must already exist; hence law is typically back-ward-looking”⁵⁷². Watson rejects the mirror theory of law; lawyers are deemed to be bound by tradition, by authority and by precedent, in respect of which they must look only to legal analysis⁵⁷³. While he has strongly voiced his support for the claim that a sociological analysis of law is irrelevant for legal development, he recognises scope for assertions as to the inevitability of some connection between law and society⁵⁷⁴. Watson nevertheless argues that legal transplants are “socially easy”⁵⁷⁵, such that while legal problems arise in specific societal contexts, “the weight of the investigation will always be primarily on the comparability of the problem, only secondarily on the comparability of the law”⁵⁷⁶. Drawing a distinction between internal and external influences, he attempts to justify his exclusion of the socio-legal perspective of comparison (rather focusing on comparative legal history and the borrowing of legal ideas) on the basis that such a perspective is external; as such, it contributes nothing to the legal profession⁵⁷⁷. This understanding has been subject to criticism⁵⁷⁸ and does not explain – even if the internal/external distinction were to be accepted by legal actors, including courts and scholars – why they should also reject the sociological analysis of the internal⁵⁷⁹. By largely disregarding key elements of society, Watson essentially neglects to consider various norms – of a political, religious, and social nature – thus limiting his examination to one based on a

⁵⁷² A. Watson, *The Evolution of Law* (John Hopkins University Press, Baltimore; 1985), p.119 cited in W. Ewald, ‘Comparative Jurisprudence (II): The Logic of Legal Transplants’ (1995) 43 *AJCL* 489, p.499.

⁵⁷³ Ewald, ‘Comparative Jurisprudence (II)’ (n.572), p.500.

⁵⁷⁴ Watson, ‘Comparative Law and Legal Change’ (n.570), p.321.

⁵⁷⁵ A. Watson, *Legal Transplants* (University of Georgia Press, Georgia; 2nd edn., 1993). See also, Ewald, ‘Comparative Jurisprudence (II)’ (n.572). Ewald makes the claim for an ‘inner’ perspective of the law, that is, in terms of the manner in which the law is understood by the actors within a system. See also, W. Ewald, ‘Legal History and Comparative Law’ (1999) *Zeitschrift für Europäisches Privatrecht* 533.

⁵⁷⁶ Watson, *Legal Transplants* (n.575), p.5.

⁵⁷⁷ Watson, *The Evolution of Law* (n.572), pp.21-22.

⁵⁷⁸ See R.B. Seidman, ‘Book Review’ (1975) 55 *Bos.U.L.R.* 682.

⁵⁷⁹ For example, even in relation to a narrow understanding of what is internal to the law, in terms of what affects the legal profession, namely, clients, experiences etc. See R. Cotterrell, ‘Comparatists and Sociology’ in P. Legrand and R. Munday (eds.), *Comparative Legal Studies – Traditions and Transitions* (CUP, Cambridge; 2003), pp.131-153, p.145.

black-box concept of law⁵⁸⁰, arguing: “sovereign power determines legal change in all contexts”⁵⁸¹. This is discussed further in Chapter 9.

The analysis of the legal transfer discourse - and its relevance to comparative analysis in respect of its understanding as a tool of integration and the Europeanisation of private law – requires that the breadth of legal autonomy perspectives, which encompasses a range of understandings as to the extent of law’s autonomy from society, are considered. Where a strong link is drawn between law, society and culture, within or beyond the state, legal transfers, if they can be empirically established, must advance a particular understanding of legal change, shaped and facilitated by factors external to law⁵⁸². This can be identified Durkheim’s – at least initial assertion – that law mirrors society⁵⁸³ and in Montesquieu’s understanding of the relationship between law and society, and particularly, with regard to movements between systems⁵⁸⁴. Montesquieu proposed that “[the political and civil laws of each nation] should be so closely tailored to the people for whom they are made, that it would be pure chance [*un grand hazard*] if the laws of one nation could meet the needs of another...They should be relative to the geography of the country; to its climate whether cold or tropical or temperate; to the quality of the land, its situation, and its extent; to the form of life of the people, whether farmers, hunters, or shepherds; they should be relative to the degree of liberty that the constitution can tolerate; to the religion of the inhabitants, to their inclinations, wealth, number, commerce, customs, manners”⁵⁸⁵.

At the other end of the spectrum, law is understood as being entirely autonomous from the societal background in which it exists; it essentially constitutes a set of propositional statements. Recent explications of legal evolution focus on social as well as economic efficiency, which dictates that legal actors engaging comparative law methodologies in order

⁵⁸⁰ W. Twining, *Globalisation and Legal Theory* (Northwestern University Press, Evanston; 2000).

⁵⁸¹ A. Watson, *Roman Law and Comparative Law* (University of Georgia Press, Athens; 1991), p.97; M. Graziadei, ‘Comparative Law as the Study of Transplants and Receptions’ in M. Reimann and R. Zimmermann (eds.), *The Oxford Handbook of Comparative Law* (OUP, Oxford; 2006), pp.441-476, p.463.

⁵⁸² For example, consider Weber’s understanding of legal development in terms of other social developments, including free movement, private wealth, freedom of work and so on: M. Weber, *Economy and Society* (U.Cal. Press; Berkeley; 1968), pp.695-699; and further, U. Mattei, ‘Efficiency in Legal Transplants: An Essay in Comparative Law and Economics’ (1994) 14 *Int.Rev.L.and.Econ.* 3.

⁵⁸³ Durkheim, *The Division of Labor in Society* (n.66).

⁵⁸⁴ C. de Secondat, Baron de Montesquieu, *De l’esprit des lois*, Livre I, Chapitre 3, (Barrillot, Paris; 1748).

⁵⁸⁵ C. de Secondat, Baron de Montesquieu, *De l’esprit des lois*, Livre I, Chapitre III, (Barrillot, Paris; 1748).

to facilitate legal development will necessarily (and rationally⁵⁸⁶) adopt the most socially or most economically efficient rules, institutions and structures⁵⁸⁷. As a consequence of the broader desire to achieve social or economic efficiency (and the rational thinking underpinning), this understanding purports that legal orders will necessarily and eventually converge. While such an understanding might explain why actors engage with transfer, and their identification of what is transferrable from a number of putative choices, it fails to recognise the significance of path dependency, and ultimately, the significance of legal culture⁵⁸⁸.

More closely connected to the evolutionary understanding of transfers are limited autonomy theories, which propose that there is some degree of connection between law and its social, political, cultural and economic background. Limited autonomy reflects the “mirror theory of law, i.e., the theory that law is the mirror of some set of forces (social, political, economic) external to the law”⁵⁸⁹, which promotes the idea that law is not entirely autonomous but instead is relative to economic and social dynamics⁵⁹⁰. Thus, *prima facie*, limited autonomy rejects any notion that transfer necessarily occurs; however, confronted with Watson’s empirical evidence, there have been attempts to deal with these phenomena. Thus, there exists a scale in respect of the strength of the relationship between law and the relevant factors in society, from a universalist understanding which asserts that the shape of legal rules, institutions and structures find their origins in society, to an understanding in which the relationship between law and society is considerably weaker. Thus, Kahn-Freund has advocated a revised understanding of Montesquieu’s theory, in which the idea that law may be “more or less” embedded in a nation and as such may be “more or less” capable of transplantation⁵⁹¹. Essentially, Kahn-Freund supports the notion of a continuum, at one end of which, rules may well break free of their economic, social, political and cultural ties, and at the other end, rules “designed to allocate power, rule making, decision making, and above all, policy making power” remain bound to their relevant background⁵⁹².

⁵⁸⁶ S. Deakin, ‘Legal Evolution: Integrating Economic and Systemic Approaches’ *Centre for Business Research, University of Cambridge Working Paper 424/2011*.

⁵⁸⁷ Mattei, ‘Efficiency in Legal Transplants’ (n.582).

⁵⁸⁸ A. Breton *et al* (eds.), *Multijuralism: Manifestations, Causes and Consequences* (Ashgate, Farnham; 2009).

⁵⁸⁹ Ewald, ‘Comparative Jurisprudence (II)’ (n.572), p.491

⁵⁹⁰ Ewald, ‘Comparative Jurisprudence (II)’ (n.572), p.493.

⁵⁹¹ Kahn-Freund, ‘On Use and Misuse of Comparative Law’ (n.522), pp.6-7

⁵⁹² Kahn-Freund, ‘On Use and Misuse of Comparative Law’ (n.522), p.17.

The transfer discourse is not satisfactory and requires – as explored in greater detail in Chapter 9 - extension, in respect of the autopoiesis theory developed by Luhmann, and in the context of transfer, by Teubner. Like the other approaches to comparative analysis advanced in light of Europeanisation and integration, both Watson and Legrand limit their study by focusing on law deriving from the state and the role of state-based actors in the “transfer phenomenon”, in relation to the relationship between law and authority, and law and culture. While the transplants discourse attributes import to the role of culture, and emphasises that this focus is functional⁵⁹³, and not new, Watson and Legrand occupy positions at two ends of a continuum (this is relevant both in respect of their understanding of the relationship between law and culture, and law and authority), which dictates – like those other approaches above – that their understanding of culture and tradition derives predominantly from the state; comparatists must avoid adhering to either approach too rigidly⁵⁹⁴. The exception is perhaps identifiable in the contribution of Smits, whose understanding of the relationship between law and culture is unclear but who highlights the significance of private actors in the Europeanisation of private law. The transfers discourse also illustrates the lack of clarity as to the purposes of comparison, which is also identifiable, as noted, in other approaches; the absence of such clarity (or a lack of assumption otherwise) leads to a focus on harmonisation and unification. This can be identified in the scholarly contributions of the 1990s and 2000s; in certain approaches (the PECL/DCFR projects), the harmonisation aim was explicit while in others (the Common Core project), it was neither explicit nor necessarily intended but nevertheless came to delineate the nature and reach of the comparative analysis. This focus necessarily shapes the way in which – particularly in relation to private law development, in respect of which harmonisation is not an end in itself but related to the very emergence of a body of European private law – the CJEU might employ comparative analysis, that is to say, in identifying commonality or similarity at the expense of the recognition and engagement of divergence. More broadly, this attributes little consideration to the context in which comparison is undertaken, which not only undermines the potential to track the shifting nature

⁵⁹³ Other cultural-based approaches retain their focus on functionalism; this can be identified in Lasser’s comparative analysis, based on *mentalité*, of judicial style where those judicial styles are categorised according to their function: M. de S.O.I.E. Lasser, *Judicial Deliberations: A Comparative Analysis of Judicial Transparency and Legitimacy* (OUP, Oxford; 2004), p.299.

⁵⁹⁴ It is worth noting that Watson, in particular, recognises the two sides of the discourse: Watson, *Legal Transplants* (n.575), p.21.

of private law and integration⁵⁹⁵ but also the scope to engage the pluralist perspective shaping the way in which private law is understood to emerge in a multi-level space.

ii. The Reconceptualisation of Comparison for Europeanisation and Integration Purposes: What Should Be Compared and How Should It Be Compared?

The analysis in the first two parts of the thesis aims to illustrate – and this consideration is reiterated in the analysis of the case examples below – that the nature of private law in light of its Europeanisation is shifting; while the potential relevance of comparison as a tool of Europeanisation and integration is recognised from the analysis above, it is submitted that a refined conceptualisation of comparative analysis might provide for an approach which allows these theoretical and practical dimensions of private law development to be engaged. Indeed, the analysis above – and similarly, the case examples below – illustrate that there indeed already exists scope for the engagement of comparison in legal development. However, on the basis of this analysis, it is further submitted that comparison itself, as it is currently understood, does not provide a satisfactory framework for the use of comparative analysis as a tool of Europeanisation and integration. It is necessary to ensure that, as the Europeanisation of private law emerges – in the Union legislature, via the interpretation of Union norms in the CJEU and their application in the national courts – there exists a way to understand and appreciate the potential for this dynamic evolution. As noted above, similar to national private law, comparative law has long been tied to the nation state, understood as technical and apolitical. These preliminary conclusions drawn from the analysis undertaken above do not advance the assertion that “orthodox” comparative law has not been subject to critique or that it has not evolved, indeed it has; however even as comparative analysis has progressed (for example, in respect of the refined approaches advanced in the context of the European private law project), it nevertheless retains some of the problematics of “mainstream” comparison, which undermine its potential as it might be engaged by the CJEU as a tool of Europeanisation and integration. These problematics are theoretical and methodological and relate to: 1) the identification of what is being compared, particularly against the background of the focus on national legal rules and the resulting absence of consideration of culture and tradition; and 2) a lack of understanding and appreciation not

⁵⁹⁵ As outlined in Chapters 1 and 2.

only of the context in which comparative analysis is undertaken but moreover, as to the purposes of comparison.

An acknowledgement should be made at the outset. There are different views as to whether the identification of a single methodology necessarily underpins comparative analysis. For example, Lasser asserts that “the comparatist must choose a methodology”⁵⁹⁶ while Zweigert and Kötz, as noted above, engage functionalism as the “the basic methodological principle of all comparative law”⁵⁹⁷. On the other hand, Patrick Glenn rejects the totality of any single method, noting that “much can be said about the virtues, and defects, of different models”⁵⁹⁸, while Legrand has highlighted the “negative and potentially stultifying impact [of methodology] on comparative law as an intellectual discipline”⁵⁹⁹. Thus, for the purposes of this thesis, the assertion that it is necessary to consider the methodological dimensions of comparative law should not be read as a call for an absolute requirement of method. Indeed, in light of the breadth of research questions in respect of which comparative analysis might be relevant, and against the background of the notion that the methodological approach must be shaped by the nature of these questions and the issues to which they give rise, it is unlikely that a “one-size-fits-all” methodological framework for comparative analysis is identifiable. Rather, one might proceed on the basis of the plurality of methods of comparison, “mak[ing] use of the full range of reasoning methods, schemes of intelligibility, paradigms and epistemological approaches”⁶⁰⁰. That it to say, this thesis does not aim to propose a single model of comparison; it is recognised that the approach advanced below does not adhere rigidly to the understanding of comparison as a scientific endeavour from which the truth can be derived and on the basis of which, the highly selective nature of comparative analysis can be avoided and predictability and coherence can be established. Furthermore, it is recognised that – as the case examples illustrate – the scholarly conceptualisations of comparison necessarily diverge from the way in which comparative analysis is engaged pragmatically in the courts. Thus, as Bobek has considered, traditionally, “[t]he key question for a law-making judge is ‘could an idea like work here in the future?’ It is not ‘did I contextualize my reading of the foreign model sufficiently deeply within the historical, socio-economic, cultural and all

⁵⁹⁶ M. de S.O.I’E. Lasser, ‘The Question of Understanding’ in P. Legrand and R. Munday (eds.), *Comparative Legal Studies – Traditions and Transitions* (CUP, Cambridge; 2003), pp.197-239, p.234.

⁵⁹⁷ Zweigert and Kötz, *Introduction to Comparative Law* (n.23), p.34.

⁵⁹⁸ Patrick Glenn, *Legal Traditions of the World* (n.26), p.7

⁵⁹⁹ P. Legrand, ‘Beyond Method: Comparative Law as Perspective’ (1988) 36 *AJCL* 788, p.789.

⁶⁰⁰ G. Samuel, ‘Taking Methods Seriously (Part Two)’ (2007) 2 *JCL* 210, p.236.

other characteristics of the law in country X, in order to obtain a full and truthful account of the legal situation in country X?”⁶⁰¹. This chapter rather intends to provide for the evolution of the perspective adopted of comparative analysis, which does not require that the courts engage these questions explicitly but that the understanding of comparative analysis engaged by, for example, the AG or the judge, is one that allows for recognition in itself, of the significance of contextualisation.

Against this background, it is submitted that a complex understanding of comparative analysis⁶⁰² reflects one way in which the dynamic nature of private law can be understood, and in which its evolution can be facilitated in light of this pluralist, multi-level context⁶⁰³. It is necessary to consider the dimensions outlined above, namely, what is being compared and the manner – that is, context and purpose – in which it compared. As the analysis above aims to illustrate, despite perhaps having the appearance of operating within a transnational space, and notwithstanding its evolution in light of European private law, comparative analysis has predominantly been limited - in its conceptualisation and scope - to the confines established by, and reflected in, the nation state. This is particularly true of the determination of what is to be compared; most of the approaches advanced have engaged with that which derives from the nation state. It is inherently related to a more fundamental, more preliminary question, which requires consideration and which integrates the theoretical and practical dimensions of critique noted above: comparatists must understand what “law” is; at the outset, one questions whether one can identify a single, general conceptualisation of law which is applicable, and satisfactory, in all contexts. Herein, one connection - the frequent absence of a theoretical approach having been noted above⁶⁰⁴ - between legal theory, which has as its primary epistemological concern the determination of what law is, and comparative law, which is, at its very foundation, concerned with the determination of what should be compared, attains a degree of clarity: both beg the analytical jurisprudential question of “what is law?” and that of normative jurisprudence, of “what should the law be?” While the concepts of law developed within the context of legal theory are wide-ranging⁶⁰⁵, the key distinction is one between

⁶⁰¹ M. Bobek, *Comparative Reasoning in European Supreme Courts* (OUP, Oxford; 2013), pp.245-246.

⁶⁰² As noted, the notion of “complexity” is taken from Gessner *et al*, ‘Introduction to the Patchwork’ in Gessner *et al*, *European Legal Cultures* (n.7), and Van Hoecke, ‘Deep Level Comparative Law’ in Van Hoecke, *Epistemology and Methodology of Comparative Law* (n.7).

⁶⁰³ As outlined in Chapters 1 and 2.

⁶⁰⁴ Legrand, ‘How to Compare Now?’ (n.465), p.232.

⁶⁰⁵ These theories range from natural law theories, which provide that law must adhere as closely as possible to those laws immanent or inherent in nature and uphold an intrinsic connection between law and morality (M.T.

normative and positive legal theory, as advanced by Marmor⁶⁰⁶. While most of the approaches above no longer adhere to the positivist notion of “law as rules”, they continue to focus on legal development within the context of the state, and the state’s power to make law⁶⁰⁷. Positivism can be overbearing; in Örüçü’s words, research will undoubtedly “bear the prejudices of positivism”⁶⁰⁸ if we fail to transcend the study of law as it appears on the surface of the national legal system, and fail to try to account for a wider, global context of normativity⁶⁰⁹. If it can be considered that the significance of the nation state, along with its territorial boundaries, are in a process of figurative disintegration, which calls for the abandonment of these orthodox nation-state based sources of analysis, such an assumption cannot continue to be justified. In this context, any reference to comparison, which continues to engage this nation-focused approach, necessarily drags the discourse back to the confines of the nation state⁶¹⁰. The relevant unit of comparative analysis for comparison cannot (only) be identified on the basis of a rigid set of territorial boundaries⁶¹¹.

The approach to comparative analysis is similarly deemed to be limited where the analysis engages culture or tradition as a reference point that also derives from the state. On the one hand, the notion of culture or tradition transcends positivist approaches to law. As noted above, the link between law and culture remains tied to functionalism⁶¹² and to the “realist

Cicero, *De re publica* (C.W.Keyes trans.) (Heinemann, London; 1928), Bk.3, Chp.22, S.33), to theories within which the separation of law and morality is fundamental, asserted in classical positivism and maintained in modern positivism (H.L.A. Hart, ‘Positivism and the Separation of Law and Morals’ (1958) 71 *Harv.L.Rev.* 593, pp.594-600).

⁶⁰⁶ A. Marmor, ‘Legal Positivism: Still Descriptive and Morally Neutral’ (2006) 26 *OJLS* 683, pp.683-684, which brief is reflected in the notion that the positivist understanding dictates that the law can be identified distinctly from moral considerations while a non-positivist understanding prescribes that moral judgement is inherent in the identification and determination of the law.

⁶⁰⁷ H. Patrick Glenn ‘A Transnational Concept of Law’ in P. Cane and M. Tushnet (eds.), *The Oxford Handbook of Legal Studies* (OUP, Oxford; 2003), pp.839-862, p.839

⁶⁰⁸ E. Örüçü, *The Enigma of Comparative Law: Variations on a Theme for the Twenty-First Century* (Martinus Nijhoff, Leiden; 2004), p.11.

⁶⁰⁹ G. Teubner, ‘Fragmented Foundations: Societal Constitutionalism beyond the Nation State’ in P. Dobner and M. Loughlin (eds.), *The Twilight of Constitutionalism?* (OUP, Oxford; 2010), pp.327-341, p.328: “Is constitutional theory able to generalize the ideas it developed for the nation state and to re-specify them for today’s problems? In other words, can we make the tradition of nation-state constitutionalism fruitful and redesign it in order to cope with phenomena of privatization and globalization?”

⁶¹⁰ P. Zumbansen, ‘Comparative, Global and Transnational Constitutionalism: The Emergence of a Transnational Legal-Pluralist Order’ (2012) 1 *Global Constitutionalism* 16, p.26.

⁶¹¹ See in particular, the work on the notion of legal tradition by H. Patrick Glenn, and the discussion in the introduction above.

⁶¹² Hyland, ‘Comparative Law’ in Patterson, *A Companion to the Philosophy of Law and Legal Theory* (n.468), p.188.

conception of the law as an instrument for challenging or modifying human behaviour⁶¹³. Thus, while the engagement with even national culture and tradition arguably constitutes progress from a complete absence of social-cultural consideration, Augenstein nevertheless highlights that this approach is limited because it is “static”, to the extent that “it treats legally orientated patterns of social behaviour as historically determined and culturally entrenched” and “exclusive” because it “posits sharply demarcated units, in the European context mainly the nation states, as object of comparative analysis...as an exclusive unit of legal integration”⁶¹⁴.

This criticism is not to assert that comparative analysis which engages with sources of analysis of national norms - at the very extreme, the (technical) comparison of (technical) legal rules - is not useful. Rather, it is intended to highlight that there must also exist something more, which can account for the different dimensions of European private law as it continues to emerge in the context of integration. Thus, the fundamental assertion identified for the purposes of this thesis is that the unit of analysis engaged by the CJEU should be understood broadly; it might, but need not, be limited to that which emerges from the national legal system⁶¹⁵, including national legal rules, national case law and aspects of national culture and tradition. Rather, it might encompass aspects of culture and tradition arising beyond the nation state, the *travaux préparatoires* of EU legislation, Union norms (cross-referencing between areas of Union law), decisions of the courts and tribunals other than those of the Member States, international law, “non-state” norms and legal scholarship. Essentially, there is a rejection of the “totality” of any single unit of comparative analysis.

Furthermore, it is necessary to understand how comparative analysis emerges in a pluralist, multi-level context, in which there exists a diversity of sources of private law and a number of courts, interpreting and applying the norms arising from those sources (albeit predominantly in respect of the national courts and the CJEU) and which thus constitutes a space of conflict. Thus, the context in which Europeanisation occurs must be appreciated; to adopt the well-worn notion, one must move beyond what is provided for in the rulebooks. As outlined, mere

⁶¹³ Hyland, ‘Comparative Law’ in Patterson, *A Companion to the Philosophy of Law and Legal Theory* (n.468), p.188.

⁶¹⁴ Augenstein, ‘Identifying the European Union’ in Augenstein, *Integration Through Law’ Revisited* (n.123), p.104.

⁶¹⁵ That is to say, strictly understood, norms deriving from the national legislature or courts, not including, for example, norms of international or European law.

propositional knowledge, or knowledge only of legal rules, is inadequate for comparison; the structure and organisation, as well as the normative and conceptual dimensions underpinning an area of law, are relevant to its understanding⁶¹⁶. While much comparative analysis focuses on description and self-reflection for the purposes of generating and advancing knowledge and understanding, Hirschl asserts that it can transcend this purpose to explanation, with “the aspiration to make valid causal claims based on comparative research”⁶¹⁷; the difficulty in achieving this, according to Hirschl, as noted above, is the absence of consideration of “basic methodological principles of controlled comparison, research design, and case selection”⁶¹⁸. Indeed, Hirschl’s fourth type of comparative analysis builds on his third type, which advances the notion of “concept thickening through multiple description”⁶¹⁹; it “attempts to move beyond the level of thick description and concept formation toward the ultimate goal of social inquiry: theory building through causal inference. It is based on the notion that a good theory requires clarifying concepts as well as offering causal explanations for observed phenomena”⁶²⁰. It should allow for hypotheses as to causal links to be established, tested⁶²¹ and proven or disproven on the basis of “inductive reference”⁶²², “in order to assess change, explain dynamics, and make inferences about cause and effect through systematic case selection and analysis of data”⁶²³, and thus, to allow for the avoidance of cherry picking of case-selection of comparative analysis⁶²⁴. The aim of this kind of comparative analysis fits with the complex approach advanced herein, having the aim of explanation as well as the description of “variance in legal phenomena across polities”, which could help to explain the Europeanisation of law in and across the Member States, including, for example, public policy considerations, but also, as will be discussed in more detail throughout the thesis, the existence of commonality and divergence and the absence thereof, the identification of best solutions, the recognition of principles and the scope arising for transfer and dialogue.

⁶¹⁶ J.C. Reitz, ‘How to Do Comparative Law’ (1998) 46 *AJCL* 617, pp.625-627.

⁶¹⁷ R. Hirschl, ‘The Question of Case Selection in Comparative Constitutional Law’ (2005) 53 *AJCL* 125, p.126.

⁶¹⁸ Hirschl, ‘The Question of Case Selection’ (n.617), p.125.

⁶¹⁹ The first type involves a single country study, often, he asserts, misunderstood as comparative analysis, simply on the basis that the culture or tradition being examined is different from that of the “home system”; the second amounts to comparative analysis for the purposes of self-reflection, on the basis of which solutions to problems are identified. The third type encompasses the “generat[ion] of rich concepts and analytical frameworks for thinking critically about constitutional norms and practices”, for the purposes of “sharpening” our understanding of “concept formation” via the identification of similarities and differences in terms of how similarly problems are dealt with across different political, social, economic and cultural contexts, that is “multiple description”; Hirschl, ‘The Question of Case Selection’ (n.617), pp.126-130.

⁶²⁰ Hirschl, ‘The Question of Case Selection’ (n.617), p.131.

⁶²¹ In respect of the scope for the CJEU to advance such hypotheses, see below at pp.279-280.

⁶²² Hirschl, ‘The Question of Case Selection’ (n.617), p.132.

⁶²³ Hirschl, ‘The Question of Case Selection’ (n.617), p.126.

⁶²⁴ Hirschl, ‘The Question of Case Selection’ (n.617), p.153.

Against this background, the stages of comparative analysis can be explicated, the significance of which might differ depending on the purposes for which comparative analysis is employed. The preparatory stage involves the identification of the aims and objectives for which comparison is engaged against the background of the pertinent legal issue of the case and the determination of the relevant hypotheses of the CJEU. The first stage of the comparison should encompass the selection of legal orders and the determination of what is to be compared, i.e. the unit(s) of analysis. The second stage encompasses the description and explanation of the comparative analysis, shaped by the aforementioned hypotheses and ultimately shaping the context and purposes for which the analysis is engaged. For example, it might have two dimensions: the identification and description of the similarities and differences, and thereafter, the explanation of these similarities and differences (where they exist). The latter dimension concerns the determination of those considerations on which the similarities are based, the considerations on which lack of similarity are based, the nature of the similarities and the nature of the absence of similarity, and ultimately, what these similarities and differences reveal in light of the hypotheses initially developed. Thereafter, there follows, depending on the nature of analysis and the purposes for which the comparative analysis is engaged, an evaluation stage⁶²⁵. This should allow for the determination of the need to prove, disprove or revisit the initial hypotheses, and to determine the light that the comparative analysis sheds on the matter of interpretation and the CJEU's development of "meta-mechanisms" of Europeanisation.

It is submitted that, in the context of Europeanisation, this approach must attribute adequate significance to, and take account of, the socio-economic, political and cultural, as well as legal dimensions, of Europeanisation and integration, to allow for the link between theory and practice to be established⁶²⁶. The manner in which comparison is undertaken – that is, its context – must allow firstly for the consideration of law in context (which is related to the determination of the unit of comparative analysis) and secondly, for the consideration of the

⁶²⁵ It has been suggested that this stage arises only where the engagement of comparative analysis is normative: M. Oderkerk, 'The Need for a Methodological Framework for Comparative Legal Research: Sense and Nonsense of 'Methodological Pluralism' in Comparative Law' *Centre for the Study of European Contract Law WP 2014/04*, pp.9-10, however, as noted above, it is submitted that even if comparison is descriptive, there permeates a normative thread through the analysis.

⁶²⁶ As Gessner has asserted: "failing to take such an approach leads to "the development of a system of norms which is far removed from practice and therefore largely ineffective": Gessner *et al*, 'Introduction to the Patchwork' in Gessner *et al*, *European Legal Cultures* (n.7), p.251.

context within which the CJEU operates. This latter concern engages the exploration of the self-understanding of the CJEU's jurisdiction and highlights, in particular, the relationship between "self" and "other", arising from the recognition, outlined above, that comparison should not focus merely on the identification of similarities and differences. Indeed, Geertz has proposed that "the comparative study of law cannot be a matter of reducing concrete differences to abstract commonalities...it cannot be a matter of locating identical phenomena masquerading under different names"⁶²⁷, rather, as Legrand asserts, it must facilitate "our" understanding, to the extent that "through the mediation of an other, the self can become more explicit to itself"⁶²⁸. In a pragmatic context, this should ensure – while neither removing the selectivity that necessarily permeates the identification of that which is being compared nor replacing it with objective determinative factors – that the AG and the Court can avoid "cherry-picking", in respect of what is compared, of the context engaged and perspective adopted⁶²⁹.

It is submitted that these dimensions advocate a legal-cultural perspective of complex comparative analysis, engaging and promoting the significance previously attributed to culture and tradition in the shaping and construction of national law but which has largely "fallen by the wayside" in respect of European legal development. The significance attached to culture and tradition might be reflective of the interaction between different legal orders; that is to say, the harmonisation of legal norms at the expense of legal culture and tradition arguably undermines the scope for bridging gaps and avoiding cultural relativism: "the task of those who understand the significance of human culture is to make sense of it without sealing cultures off from one another and making interplay between them impossible"⁶³⁰. The alternative – a "universalist harmonisation approach"⁶³¹ – advances a focus on the identification of commonalities, per the Common Core project, (same/self) in contrast to the recognition and acceptance of differences (contextualist/other), per Legrand⁶³²;

⁶²⁷ Geertz, *The Interpretation of Cultures* (n.38), pp.215-216. Indeed, the need for an uncovering and examination both of similarities and differences extends far beyond law. M. Weber, *Agrarian Sociology of Ancient Civilizations* (trans. R.I. Frank) (Verso, NY; 1998), p.385: Weber has provided that "A comparative study should not aim at finding 'analogies' and 'parallels'... The aim should rather be precisely the opposite – to identify and define the individuality of each development, the characteristics which made the one conclude in a manner so different from that of the other".

⁶²⁸ P. Legrand, 'Comparative Law' in D.S. Clark (ed.), *Encyclopaedia of Law and Society* (Sage, Los Angeles; 2007), pp.220-223, pp.222-223.

⁶²⁹ Curran, 'Dealing in Difference' (n.556), p.659.

⁶³⁰ O'Hear, 'Culture' in Craig, *Routledge Encyclopedia of Philosophy* (n.39), p.185.

⁶³¹ Schiff Berman, *Global Legal Pluralism* (n.175), p.144.

⁶³² Schiff Berman, *Global Legal Pluralism* (n.175), p.142.

the perspective adopted⁶³³ dictates whether scope for convergence is deemed to be possible or not⁶³⁴.

The “dangers” of this approach are recognised. As established in the introduction, it is difficult to define culture, both in its legal form – understood as a localised conceptualisation – and its general form. Furthermore, there is a danger in “damaging” both law and culture: “law is so deeply embedded in the particularities of each culture that carving it out as a separate domain and only later making note of its cultural connections distorts the nature of both law and culture”⁶³⁵. These perspectives have been explored, in respect of the approach to comparison based on *mentalité*⁶³⁶, an approach of particular significance to legal development via the interrelations of the national and European courts. This is inherently linked to culture, extending beyond the legal sphere, building on the anthropological scholarship of Lévy-Bruhl, who focused on the component parts that shape the way in which people think; this has been applied in a legal context to uncover the way in which these components parts influence the means of legal reasoning, of understandings of rules, rights and facts, and the extent to which coherence and structure is deemed to be significant⁶³⁷. In the context of the constitution of the CJEU and its influence on its reasoning, this can be linked with the notion of knowledge as “mental software” and Hofstede’s understanding of culture as “a collective phenomenon, because it is at least partly shared with people who live or lived within the same social environment where it was learned”⁶³⁸. Similarly, Geertz’s suggestion of the need for “thick description” in order to understand culture⁶³⁹ can arguably be analogised in legal scholarship with Curran’s reference to “immersion comparison”⁶⁴⁰. A *mentalité*-based approach opens up a kind of unconsciousness, underlying the legal structures and legal “cognitive experiences”. *Mentalité* concerns memory, or a kind of “*une identité préservée*”⁶⁴¹; in terms of experience, the engagement of *mentalité* brings to the fore the

⁶³³ Smits, ‘Law Making in the European Union’ (n. 23), p.1195.

⁶³⁴ P. Legrand, ‘Against a European Civil Code’ (1997) 60 *MLR* 44, p.44; Legrand, ‘European Legal Systems Are Not Converging’ (n.516), pp.61–62.

⁶³⁵ L. Rosen, *Law as Culture: An Invitation* (Princeton University Press, Princeton; 2006), pr.xii.

⁶³⁶ Legrand, ‘Antiqui Juris Civilis Fabulas’ (n.55), p.312.

⁶³⁷ J. Bell, *French Legal Cultures* (CUP, Cambridge; 2001), p.15.

⁶³⁸ Hofstede, *Cultures and Organizations* (n.49), p.5. It is worth noting that Patrick Glenn’s understanding of tradition find connections with the notion of localised or contextualised culture, to the extent that it must be consistently felt in a particular context; further, the notion of “consistency” allows for a connection to be drawn with Hofstede’s understanding of culture as a learned phenomenon.

⁶³⁹ C. Geertz, *The Interpretation of Cultures* (Fontana, London; 1993) pp.6-10.

⁶⁴⁰ V.G. Curran, ‘Cultural Immersion, Difference and Categories in US Comparative Law’ (1998) 46 *AJCL* 43, p.91.

⁶⁴¹ Vovelle, *Idéologies et Mentalités* (n.55), p.22.

“unspoken” component parts of the law⁶⁴², namely, the culture or tradition of the legal profession. Indeed, Descartes asserts that the “notion of self is established as a ‘positioning tool’; the Cartesian understanding of the ‘transcendental self’ provides a means by which the notion of truth can be linked with understanding of “accurate representations”⁶⁴³. That is to say, the notion of self and other provides the basis upon which comparison can be undertaken. Thus, it is recognised that the position of the judge (and indeed, the AG) might shape the way in which he undertakes comparative analysis; only through this positioning can the “other” be identified; this will be explored further in relation to the constitution of the CJEU in the following chapter.

For the moment, it is worth noting that on the one hand, Descartes asserts that man’s understanding derives from “pure thought”, as opposed to understanding in its entirety, which requires that epistemologically, man should be free or purified from all bias and emotional attachment and subjectivity⁶⁴⁴. Kötz’s comparative law is understood by Legrand to constitute an “actualized version of Descartes”⁶⁴⁵, in terms of the development of a “universal science”, whereby both endeavour to promote via a certain notion of system and logical structure, the purification of the subjective, reflected in Descartes’ rejection of knowledge that is only probable⁶⁴⁶ or insufficiently precise, and Kötz’s reluctance to consider culture and tradition, as it exists beyond that which is “legal”, narrowly understood and not at all embedded⁶⁴⁷. On the other hand, Heidegger asserts that man is a “historical being”; historicity, and temporality establish his context, forming part of his very being, determining and shaping his options and decisions⁶⁴⁸. As such, he rejects the notion that truth can be separated from historical experience in the way advocated by Descartes, considering there to be scope only to uncover the truth – via the interpretation of phenomena – on the basis of a deep level of understanding, which can only be shaped by “situated-ness”.

⁶⁴² Legrand, 'Antiqui Juris Civilis Fabulas' (n.55), p.312.

⁶⁴³ Legrand, 'Comparative Law' in Clark, *Encyclopaedia of Law and Society* (n.628), p.223.

⁶⁴⁴ R. Descartes, 'Méditation sixième' in R. Descartes, *Oeuvres philosophiques*, F. Alquié edn. (Bordas, Garnier, Paris; 3 vols., 1963-1973), p.480. The body being the “unclean part” in the distinction between mind and body, the assumption is made that purification of the mind is possible; it not necessary to expunge experience and background entirely but to ensure that experience is understood as an “object”, which can be separated and made external; this is what leads to the truth, from which propositional statements are derived.

⁶⁴⁵ Legrand, 'Paradoxically, Derrida' (n.493), p.648.

⁶⁴⁶ R. Descartes, *Règles pour la direction de l'esprit* (Vrin, Paris; 1997), p.80

⁶⁴⁷ Zweigert and Kötz, *Introduction to Comparative Law* (n.23), pp.35-36.

⁶⁴⁸ P. Legrand, 'Heidegger' in D.S. Clark (ed.), *Encyclopedia of Law and Society – Vol.II* (Sage, Los Angeles; 2007), pp.700-701, p.700.

Thus, one might question whether it is possible for the judges and AG to disregard their own national background – to “cleanse” their experiences as Descartes proposes – for the purposes of affording autonomous interpretations of Union law, as their role arguably requires⁶⁴⁹. One might consider whether method facilitates this objectivity. However, there is nothing in method itself which renders it objective; method – “marked at its very core by an irresistible historicity which is constitutive of it”⁶⁵⁰ – is necessarily lacking in objectivity. Moreover, in the CJEU, it is necessarily subjective for the very reason of its structure and composition. Indeed, a number of determinations might be shaped by factors underpinning this experience, including the model of comparison adopted and the aims and objectives sought. These determinations might be shaped by the availability of materials of certain legal orders⁶⁵¹, the national order of which the judge has the greatest personal knowledge, whether this is their “culture or tradition of origin” or that in which they were educated, have practiced or taught law⁶⁵². Moreover, it is submitted that such disengagement might not be necessary. It is generally understood that the cultural perspective is difficult for judges and AGs to identify and engage individually; as Curran asserts, a cultural perspective requires “an immersion into the political, historical, economic and linguistic contexts that molded the legal system”. Thus, as Frankenberg asserted, comparatists are outsiders⁶⁵³. While the judge might not be able to achieve this individually, the at least dual, national and European, identity of the European judge and AG and the collective identity of the CJEU, might rather promote the possible scope for this positioning; it is considered – as will be explained in the following chapter – that if there is any institution in which such “cultural immersion” can occur, the CJEU constitutes the most appropriate space, given the diversity of its construction and its interrelation with the national courts.

It should be clear from the analysis engaged thus far that there exists a multiplicity of conceptualisations of comparison, giving rise to diverse perspectives; furthermore, the scope for and conceptualisations, i.e. nature, of comparison might differ across areas of law. It

⁶⁴⁹ See Chapter 8, for more on autonomous interpretation.

⁶⁵⁰ S. Glanert, ‘Method’ in P. Montaneri (ed.), *Methods of Comparative Law* (Edward Elgar, Cheltenham; 2012), pp.61-81, p.68.

⁶⁵¹ Consider in the international criminal law context, the Opinions of Judge McDonald and Vohrah, in which they highlighted the necessity of analysing the case law of the systems which could be deemed, “as a practical matter, accessible”; *Prosecutor v Erdemović, Judgement, Joint Separate Opinion of Judge McDonald and Judge Vohrah*, Case No.IT-96-22-A, App.Ch., 07.10.1997, s.57.

⁶⁵² M. Delmas-Marty, ‘The Contribution of Comparative Law to a Pluralist Conception of International Criminal Law’ (2003) 1 *JICJ* 13, p.18. This is often particularly clear in the Opinions of AG Trstenjak.

⁶⁵³ Curran, ‘Cultural Immersion’ (n.640), p.51.

would therefore be inaccurate to assume that the comparative methodology is a single one; rather, the understanding of complex comparative analysis should allow for the incremental development of the methodology, not only at T1 but developed, tested and refined over time.

These abstracted considerations are placed in a concrete context, arising at different levels of regulation (national, European and even transnational)⁶⁵⁴ via the case examples examined in Part III. Where comparative analysis is identifiable, its manifestation, the rationale upon which it is based and the reason for its engagement are noted, for the purposes of constructing the two classifications outlined in Chapter 8. Thereafter, these considerations are further explored in the subsequent evaluation of the CJEU as a laboratory of comparative analysis.

Chapter 3. Concluding Remarks

Chapter 3 has aimed to advance an understanding of complex comparative analysis introduced in Part I of the thesis. From the initial review of the foundations and development of understandings of comparative analysis, that is of doctrinal and functional comparison, it becomes clear that it has long suffered from an absence of theoretical and methodological evaluation. These considerations are deemed to be necessary not only to the extent that they inform the understandings of the rationales, strengths and limitations of comparative analysis but also because they inform the determination of what is being compared, and the way, that is, the context in which and the purposes for which, comparison is undertaken.

The evaluation in the first section of Chapter 3 has focused on the evolution of comparative law as it might be engaged in the Europeanisation of private law; it has illustrated that while these understandings certainly transcend the orthodox conceptualisations of comparison, they nevertheless continue to suffer from certain theoretical and methodological problematics, relating to: 1) the determination of what is being compared, i.e. the relevant unit of analysis, which remains predominantly tied to the nation state, and thus attributes little scope to the significance of culture or tradition; and 2) the lack of understanding of the manner, including the context (which also engages the significance of the cultural perspective) in which and the purposes for which comparison is undertaken. It is submitted that the existence of these deficits should be read in line with the analysis undertaken in the previous chapters and

⁶⁵⁴ C. Joerges, 'The Impact of European Integration: Reductionist Perceptions, True Conflicts and a New Constitutional Perspective' (1997) 3 *ELJ* 378.

particularly Chapter 2, in light of which it is submitted that the current conceptualisations of comparative analysis are not the most satisfactory as tools of Europeanisation and integration. These preliminary conclusion have been drawn, on the one hand, from the continuing (theoretical and methodological) focus on the nation state as the predominant reference point of analysis, in a context characterised by its potential “post-nationalism”, and particularly, the pluralist, multi-level nature of private law outlined above, and on the other, consequent to the lack of consideration of the cultural perspective – at the national level but also beyond the state – in respect of the determination of the pertinent reference point of analysis and the context in which comparative analysis might be undertaken.

It has been submitted that comparative analysis evidences the potential to be engaged as a tool for Europeanisation and integration; yet, if it is to be employed so as to attribute adequate significance to and take account of the socio-economic, political and cultural, legal and economic contexts in which Europeanisation occurs, as well as the shifting nature of private law via its materialisation, constitutionalisation and regulation, its conceptualisation must be reconsidered. This need arises in light of two key problematics of comparative analysis as it has been predominantly advanced: 1) the determination of what is to be compared; and 2) the manner – the context in which and the purposes for which – comparison is engaged. On this basis, certain aspects of a refined understanding of complex comparison have been proposed; these form part of a broader framework and are not intended to constitute a definitive model of comparative analysis. As to the determination of what is compared, the “totality” of any unit of analysis has been rejected to the extent that this implies rigidity and staticism; fundamentally, it should not be limited only to rules or jurisprudence arising from the nation state (which is not to suggest that such sources of analysis are entirely irrelevant) but should engage diverse sources of normativity. This preliminary determination shapes the context in which comparative analysis is undertaken and the purposes for which it is engaged by the CJEU. These determinations should also be dynamic so as to reflect the character of legal development within and beyond the state, that is, by the national and European courts. On the one hand, this is deemed to necessitate a more open engagement with the rationales underlying comparison, particularly for the purposes of transcending the functionalist approach and the focus on harmonisation, and therein, the identification of similarities and divergences for the purposes of promoting the former and repressing the latter. On the other hand, it must also engage a contextualist approach, not only in terms of the relevance of the

socio-economic, cultural, political, social and legal context of Europeanisation and the interdependence of private law emerging within a pluralist, multi-level construct, but also the significance of the CJEU itself as a space of comparison. This is the focus of the following chapter.

Chapter 4. Revisiting the CJEU as a Tool of European Integration

The Court was established in 1952 on the basis of the ECSC Treaty. It now finds its legal basis in Art.19 TEU and Arts.251-281 TFEU. Depicted as the international court *par excellence*⁶⁵⁵, the CJEU is situated at the crest of the EU judicial structure⁶⁵⁶, hearing preliminary references from the national courts, infringement procedures initiated by the Commission and appeals, on points of law arising from violations of EU law, from the General Court⁶⁵⁷. Following the exploration of the foundations of the jurisdiction of the Luxembourg Court, the focus shifts to the relationship arising between it and the national courts via the preliminary reference procedure and the potential impact of these interrelations on the framework of comparative analysis engaged by the former.

I. The CJEU as a Space for Comparison: Examining its Dynamic Composition, Jurisdiction and Interpretative Role

i. The Structure, Composition and Interpretative Role of the CJEU

Initially, the Court was comprised of seven judges and one AG; it is now made up of twenty-eight judges – of each Member State⁶⁵⁸ - and nine AGs, all appointed for a renewable, six-year period. Judges and AGs are appointed on the “common accord” of the Member States; nominations are advanced, and subsequently reviewed by the “Judicial Appointments Committee”⁶⁵⁹. The most recent increase in the number of judges paralleled the 2004 enlargement; the CJEU can also request an increase in the number of judges and AGs via the Council⁶⁶⁰. The CJEU has recently made a call, one that has been recognised by the Commission, for an increase in the number of judges at the Court by twelve⁶⁶¹, reflecting its increasing docket of cases and fears as to the consequences of its “crisis of workload”. In

⁶⁵⁵ K. Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe* (OUP, Oxford; 2011).

⁶⁵⁶ Which also includes the Civil Service Tribunal.

⁶⁵⁷ Art.256(1)(1)(2) TFEU.

⁶⁵⁸ Art.252 TFEU.

⁶⁵⁹ Art.255 TFEU; a group composed of seven persons (including one proposed by the European Parliament).

⁶⁶⁰ Art.19 TEU and Art.252 TFEU.

⁶⁶¹ See the Letter of Judge Skouris of 28.03.2011, President of the CJEU to the President of the European Parliament and President of the Council, (<http://curia.europa.eu/jcms/upload/docs/application/pdf/2011-04/projet_en.pdf>; Last Accessed: 11.02.2012).

May 2012, the European Parliament separated this particular request from other proposals⁶⁶², a decision reflecting the political significance and potential controversy arising from a change in the composition of the CJEU, relating to the background of the judges (their nationality, and their professional background, the latter relevant to the need to ensure a satisfactory breadth of knowledge and expertise across the institution, particularly in private law matters⁶⁶³).

Neither the Treaty of Paris nor the Treaty of Rome provided for any specific requirements for the appointment of individuals to the Court; judges and AGs are therefore recruited from across the legal profession, including national judiciaries and governments, Union institutions and academia⁶⁶⁴. The CJEU's composition is understood to reflect a representative sample from across the Member States (of what can arguably be deemed as "representative" legal cultures and traditions⁶⁶⁵). The evolution of the structure and composition of the EU judicial structure itself⁶⁶⁶ is shaped by the enlargement of the EU⁶⁶⁷ and has changed considerably in the past two decades; these changes are reflected not only in size but also in terms of the diversification of its social profile.

In the first part of the thesis, the notion that the methodological lens adopted in scholarship will be shaped by those assumptions that constitute the *Vorverständnis* of a legal actor was introduced⁶⁶⁸. It was suggested that manifestations of these cultures are identifiable within but also beyond the nation state. Legal actors can be conceived as "products of specific

⁶⁶² Such a proposal requires amendment of the Statute of the Court and must therefore go through the ordinary legislative procedure; EP's Committee on Legal Affairs (JURI), on 21.06.2011 (<http://www.europarl.europa.eu/document/activities/cont/201106/20110620ATT21704/20110620ATT21704E_N.pdf>; Last Accessed: 11.02.2012); See also, Library Briefing of the European Parliament; <[http://www.europarl.europa.eu/RegData/bibliotheque/briefing/2012/120301/LDM_BRI\(2012\)120301_REV1_EN.pdf](http://www.europarl.europa.eu/RegData/bibliotheque/briefing/2012/120301/LDM_BRI(2012)120301_REV1_EN.pdf)>; Last Accessed: 11.02.2012).

⁶⁶³ It is important to bear in mind that almost all of the CJEU judges and AGs, with the exception of AGs Safjan and Wahl, more recently AG Szpunar and previously AG Trstenjak, come from a public, as opposed to private law background (<http://curia.europa.eu/jcms/jcms/Jo2_7026/>; Last Accessed: 14.08.2014).

⁶⁶⁴ A. Cohen and A. Vauchez, 'The Social Construction of Law – The European Court of Justice and its Legal Revolution Revisited' (2011) 7 *Ann.Rev.Law.Soc.Sci.* 417, p.421; A. Cohen, 'Scarlet Robes, Dark Suits – The Social Recruitment of the European Court of Justice' *EUI WP 2008/35*.

⁶⁶⁵ This has been recognised in the context of the ICJ: J. Barberis, *Formación del derecho internacional* (Abaco, Buenos Aires; 1996), p.246.

⁶⁶⁶ V. Perju, 'Reason and Authority in the ECJ' (2009) 49 *V.J.Int.Law* 307, pp.329-332 and generally, J.H.H. Weiler, 'The Transformation of Europe' (1991) 100 *Yale.L.J.* 2403.

⁶⁶⁷ Especially in the 1970s with the accession of the UK and Ireland and the appearance of the first "common law" trained AGs and judges in the CJEU, it is assumed that the balance of the Court might have changed in some particularly fundamental way. This might also be reflected in the most recent enlargement.

⁶⁶⁸ Therein, reference was made to Tuori's understanding of the three levels of legal culture, and the deep structure at which *Vorverständnis* exists.

national legal systems”⁶⁶⁹; their development is shaped by multi-faceted variables, including the nature of legal education and the legal profession. Bell references three perspectives which significantly influence judges, namely: “the personal perspective...the way individuals perceive their role and career”, “the institutional perspective...the way in which the structures of the career and organisation of judges, as well as legal processes affect the judiciary as a social institution” and “the external perspective...of its impact on the external world”⁶⁷⁰. While tending to be national, legal education is not confined to the learning of national legal norms but extends to EU law, international law and increasingly, transnational law; indeed, comparative legal education is becoming increasingly significant⁶⁷¹. The way in which legal reasoning is “taught” is perhaps more restricted and is often conceived in terms of “formal versus pragmatic, deductive versus inductive, abstract versus contextual” approaches⁶⁷². While the legal profession has also tended to be national, increasingly, societies and networks of students, academics, scholars and judges are emerging⁶⁷³; furthermore, training for judges also exists beyond the nation state, in particular, in relation to European law⁶⁷⁴. These endeavours potentially engender an internationalised or transnationalised professional legal culture.

It is generally considered that national judges engage with the interpretation of national rules in the context of their own legal culture - “internalized in the course of legal socialization”⁶⁷⁵, being a product of the very education, practice and communication with which legal actors

⁶⁶⁹ W. Mattli and A-M. Slaughter, ‘The Role of National Courts in the Process of European Integration: Accounting for Judicial Preferences and Constraints’ in A-M. Slaughter, A. Stone Sweet and J.H.H. Weiler (eds.), *The European Court and National Courts—Doctrine and Jurisprudence* (OUP, Oxford; 1998), pp.253-276, p.271.

⁶⁷⁰ J. Bell, *Judiciaries Within Europe: A Comparative Review* (CUP, Cambridge; 2006), p.2.

⁶⁷¹ C. Valcke, ‘Global Legal Education’ (2004) 54 *J.Leg.Ed.* 160; see also the special issue of the German Law Journal on the ‘Transnationalization of Legal Education’ at (2009) 10 *GLJ*, and the “Transsystemic Legal Education” Programme at McGill University, Montréal.

⁶⁷² Mattli and Slaughter, ‘The Role of National Courts in the Process of European Integration’ in Slaughter *et al.*, *The European Court and National Courts* (n.669), pp.253-276, p.272.

⁶⁷³ Including amongst others: the European Law Students’ Association; the Expert Group on a Common Frame of Reference (established by Commission Decision 2010/233); the European Judicial Network (established by Council Decision 2001/470); the European Networks of Councils for the Judiciary; the Network of the Presidents of the Supreme Courts of the European Union, and those which combine different actors, including the European Law Institute. Similar networks exist outwith the European context, for example, in the African region; OHADA, *l’Organisation pour l’Harmonisation en Afrique du Droit des Affaires*, and *l’École Régionale Supérieure de la Magistrature*, established by Art.41 OHADA Treaty.

⁶⁷⁴ Including the European Judicial Training Network, supported by the EU. The EU has also recently adopted a Communication: European Commission, ‘Building Trust in EU-Wide Justice: A New Dimension to EU-Wide Training’ COM(2011) 551 final.

⁶⁷⁵ K. Tuori, ‘Towards a Theory of Transnational Law: A Very First Draft’ (2010) (on file with the author), p.23.

are engaged – such that national judges interpreting and applying EU norms will also be influenced by this similar national perspective. On this basis, AGs and judges of the Luxembourg Court offering interpretations of Union norms must continue to be influenced by their national background. The precise influence of legal tradition on legal reasoning is extremely difficult to prove⁶⁷⁶, at the national, EU and international levels. This is particularly true of the CJEU, where a single opinion is rendered on behalf of all judges; in international courts, dissenting opinions are often rendered. There exists some evidence in the area of international criminal law that the style and tone of the proceedings in different chambers of the International Criminal Tribunal for the Former Yugoslavia and International Criminal Tribunal for Rwanda might diverge, as might voting patterns and the manner in which decisions are written (either in the short, syllogistical civilian law style, or in the longer, more personal style prevalent in the common law⁶⁷⁷) depending on the judges' backgrounds⁶⁷⁸. Notwithstanding, the bifurcated nature of the AG Opinions and judgements of the Court might provide a basis to determine whether the approach adopted differs according to the diverging background legal cultures and traditions⁶⁷⁹. While the role derives from the *avocats généraux* as an institution of the French legal system⁶⁸⁰, the AG of the CJEU has been described as *sui generis*⁶⁸¹. The Opinions of the AG and the judgements of the court are therefore considered separately in the case examples, an approach which facilitates consideration of the influence of legal culture and tradition on engagement with comparative analysis⁶⁸².

While there exists a breadth of legal and political science scholarship on the CJEU's composition and jurisdiction, little consideration has been attributed to the CJEU in its

⁶⁷⁶ As Mégret notes in F. Mégret, 'International Criminal Law: A New Legal Hybrid?' (<http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1269382>; Last Accessed: 12.09.2012).

⁶⁷⁷ M. Delmas-Marty, 'L'influence du droit comparé sur l'activité des Tribunaux pénaux internationaux' in A. Cassese and M. Delmas-Marty (eds.), *Crimes internationaux et juridictions internationales* (PUF, Paris; 2002), pp.95-128.

⁶⁷⁸ See the papers from the conference, 'Common Civility: Criminal Law as a Cultural Hybrid', 28 & 29.01.2011 T.M.C. Asser Institute, The Hague.

⁶⁷⁹ On this notion broadly in the CJEU, see Lasser, *Judicial Deliberations* (n.593), pp.145-240.

⁶⁸⁰ P. Gori, 'L'avocat général à la cour de justice des Communautés européennes' (1976) *Cahiers de Droit Européen* 375.

⁶⁸¹ N. Fenelly, 'Reflections of an Irish Advocate General' (1996) *Irish Journal of European Law* 5.

⁶⁸² As will be explored in more detail below, reference can be made to comparative analyses – while perhaps not extensive – in cases including the Opinion of AG Saggio in *Océano* (Joined Cases C-240-244/98 *Océano* [2000] ECR I-04941), AG Ruiz-Jarabo Colomer in *KB* (C-117/01 *KB v The National Health Service Pensions Agency and the Secretary of State for Health* [2004] ECR I-00541) and AG Roemer in *Stauder* (C-29/69 *Stauder* [1969] ECR I-00419).

relevant legal-cultural, socio-economic and political context⁶⁸³; the Cohen and Vauchez piece is one of the first to consider the socio-professional “profile” of the Court, including the divergent backgrounds of the AGs and judges⁶⁸⁴. Fundamentally, the CJEU has been described as a “site of contention where a number of legal professionals struggle over the very definition of the nature and future of the Court”⁶⁸⁵. With reference to the evolution of Union law following *Van Gend en Loos*, Cohen and Vauchez note that the actors directly involved in the CJEU (including judges, AGs and *référéndaires*) engaged in a “collective interpretive process, turning a mere legal case into a common cognitive form, a ‘judicial theory of European integration’ emerged in which the Court of Justice gained a renewed institutional identity as a cardinal institution in the political process of European unification”⁶⁸⁶. The evolution of the CJEU has arguably led to its gradual institutionalisation and the construction of its own institutional identity. This identity can be identified, for example, in the role of language and translation in the functioning of the CJEU (one of the most significant challenges to the CJEU’s workload⁶⁸⁷); the CJEU works with twenty-three official languages, which allows most participants to partake in their mother tongue. Notwithstanding, the working language - in which the *juge rapporteur* presents his preliminary report, and in which the judgement is initially drafted - is French.

Moreover, given that the CJEU sits outside of any particular jurisdiction in which the participants share a common tradition⁶⁸⁸, the plurality of legal cultures and traditions permeating its constitution has been deemed to constitute part of an emerging European culture (in contrast to the focus on commonality at the expense of diversity); this chimes with the notion of pluralism as advanced in Chapter 2. The acceptance of such plurality and its promulgation by the CJEU depends on the manner in which its role is understood, that is,

⁶⁸³ Cohen and Vauchez, ‘The Social Construction of Law – The European Court of Justice and its Legal Revolution Revisited’ (n.664), p.418.

⁶⁸⁴ See also, H. Schepel and R. Wesseling, ‘The Legal Community – Judges, Lawyers, Officials and Clerks in the Writing of Europe’ (1997) 3 *ELJ* 165 and S.J. Kenney, ‘The Members of the Court of the European Communities’ (1998) 5 *Col.J.Eur.Law* 101.

⁶⁸⁵ Cohen and Vauchez, ‘The Social Construction of Law – The European Court of Justice and its Legal Revolution Revisited’ (n.664), p.419.

⁶⁸⁶ Cohen and Vauchez, ‘The Social Construction of Law – The European Court of Justice and its Legal Revolution Revisited’ (n.664), p.426.

⁶⁸⁷ House of Lords EU Select Committee, ‘The Workload of the Court of Justice of the European Union’, 14th Report of Session 2010-2011 (The Stationery Office, London; 2011), Appendix 5, ‘Evidence of AG Sharpston’, para.1.6.

⁶⁸⁸ E. Stein, ‘Lawyers, Judges and the Making of a Transnational Constitution’ (1981) 75 *AJIL* 1; M. Shapiro, ‘The Success of Judicial Review and Authority’ in A. Stone Sweet and M. Shapiro (eds.), *On Law, Politics and Judicialization* (OUP, Oxford; 2002), pp.149-184.

whether it is conceived as an institution that acts on behalf of the European (or international) community and which should therefore adopt a *sui generis* European approach providing a uniquely European outcome, or whether the CJEU is conceived as a meeting point of divergent cultures and a laboratory of diversity⁶⁸⁹. It is submitted that the existence of a plurality of different legal cultures and traditions within a single legal tribunal is a characteristic worthy of being embraced and fostered. The composition of the CJEU, and the plurality of legal cultures and traditions that define the EU judicial space, must also shape the determination of the methodological approaches adopted, and in particular, the scope for comparative analysis. Furthermore, it has been suggested that the representation of the national legal cultures and traditions by judges and AGs increases the public acceptability of the CJEU in the national systems⁶⁹⁰.

Against this background, it is necessary to consider the manner in which complex comparative analysis might fit with the dominant methodologies and approaches of interpretation and reasoning employed by the CJEU. In particular, there is some recognition of the notion that comparative analysis generally fits with the predominant – namely, the teleological – interpretative approaches of the CJEU. AG Kokott has highlighted that a developed understanding of comparison must engage perspective and “must take due account, in particular, not only of the aims and tasks of the European Union but also of the special nature of European integration and of EU law”⁶⁹¹. For the moment, it is worth outlining briefly the fundamental dimensions of these teleological, textual, historical and contextual approaches. The determination of the interpretative approach adopted by the CJEU not only shapes the understanding of the breadth of its jurisdiction but also its approach to legal reasoning and decision-making (whether, for example, it acts as a legislature, exercising a judicial law-making function and furthering what is arguably predominantly political).

Furthermore, the scope for the interaction of the national and European judiciaries comes to the fore indirectly in light of the origins of these approaches to legal reasoning being arguably identifiable in the national orders. The historical-originalist approach, engaged

⁶⁸⁹ In respect of which, the notion of laboratory dictates that these cultures must be engaged and “in some way” processed within this context.

⁶⁹⁰ C. Tomuschat, ‘National Representation of Judges and Legitimacy of International Jurisdictions: Lessons from ICJ to European Court of Justice?’ in I. Pernice, J. Kokott and C. Saunders (eds.), *The Future of the European Judicial System in Comparative Perspective* (Nomos, Baden-Baden; 2006), pp.183-190.

⁶⁹¹ C-550/07 *Akzo* [2010] ECR I-8301, Opinion of AG Kokott, para.95; G. Conway, ‘Levels of Generality in the Legal Reasoning of the European Court of Justice’ (2008) 14 *ELJ* 787, p.793.

infrequently⁶⁹² (rarely identifiable, neither in respect of an explicit nor implicit reference to the drafters' intentions, including specific declaration made in the drafting of the relevant legal provision⁶⁹³) can be deemed to have a “fossilising effect”, and set in contrast with the teleological approach, which is engaged more frequently and is deemed to be more dynamic and progressive in the scope it offers for the facilitation of integration. A pure literal approach is also rare; deriving from the French *Conseil d'État*, and frequently employed by the common law courts, it engages concise and deductive reasoning, and succinct and formalist determinations as to the “ordinary meaning” text of the relevant provision⁶⁹⁴. It reflects the assertion of Montesquieu that the judge should constitute merely the mouth of the law. Contextual interpretation requires references to the context in which the relevant norms exist. The CJEU might consider the context in which the rule operates in the national tradition or culture, the international sphere or the private regime. The teleological approach has dominated within the CJEU, and involves reference to the “spirit, the general scheme and the wording” of the text of the legislative provision⁶⁹⁵. The teleological approach finds its foundations in the methodology of the French *Conseil d'État*, and more generally in the nation's post-revolutionary legal system⁶⁹⁶. This is very much reflected in the argumentation and reasoning processes of the CJEU, and the distinct and formalistic nature of its decisions, identifiable even from its earliest jurisprudence⁶⁹⁷. It follows the international law approach to interpretation, set out in Art.31(1) of the Vienna Convention of the Law of Treaties⁶⁹⁸. This approach is functionalist and goal-orientated; it purports to facilitate the relevant aims of the Union order, as determined by primary and secondary law. While the focus has predominantly been on the development of the internal market⁶⁹⁹, it is clear that the EU is

⁶⁹² C-149/79 *Commission v Belgium* [1980] ECR 3881, Judgement, para.3890. It should be noted that the CJEU will not make reference to the minutes of the Commission, the Council or the European Parliament when providing its interpretation: *Quelle* (n.241), Judgement, para.32.

⁶⁹³ C-2/74 *Reyners v Belgium* [1974] ECR 631, Judgement, para.666.

⁶⁹⁴ The CJEU has maintained that it is not bound by this kind of “proper meaning” of the words of the legal language, i.e., the technical meaning of the legal concepts as it results from the legal culture of the Member States. The CJEU has thus vindicated its power to create a new “proper meaning,” a meaning which is specific to Community law and which best fit to its enforcement: “Community law uses terminology which is peculiar to it”, C-283/91 *CILFIT* [1982] ECR I-3415, para.19.

⁶⁹⁵ *Faccini Dori* (n.208)

⁶⁹⁶ C. de Secondat, Baron de Montesquieu, *De l'esprit des lois*, Livre IX, Chapitre VI, (Barrillot, Paris; 1750).

⁶⁹⁷ *Van Gend en Loos* (n.219), Judgement, para.12.

⁶⁹⁸ Art.31(1) provides that Treaties should be interpreted “in good faith in accordance with the ordinary meaning to be given to the terms of the Treaty in their context and in the light of its object and purpose”; Vienna Convention on the Law of Treaties, May 23 1969, 1155 UNTS 331. It is also worth noting that Art.32 provides for explicit reference to be made to the *travaux préparatoires* of the Treaties.

⁶⁹⁹ Art.114 TFEU (ex Art.95 EC). See also, C-376/98 *Germany v Parliament and Council* [2000] ECR I-08419, para.84: private law directives should aim “to contribute to the proper functioning of the internal market and achieve a high level of consumer protection by approximating laws”.

concerned not only with economic development centred on the internal market but increasingly with considerations of a social nature⁷⁰⁰. Since the 1970s, the CJEU has recognised that the protection of social rights must “be ensured within the framework of the structure and objectives of the Community”⁷⁰¹. Yet the significance of the CJEU’s role in social protection has evolved, particularly in respect of the construction of the AFSJ, in line with the “the idea that European integration should not be pursued to the detriment of the integrity of the social systems of the Member States”⁷⁰². While the CJEU has therefore seemingly worked to balance⁷⁰³ the protection of social rights and market integration objectives, it continues to be predominantly understood – in itself and by others - as a “market-building court”⁷⁰⁴. Moreover, notwithstanding that teleology has generally been accepted, there has never been advanced an explicit normative justification for the judicial activism to which it might give rise⁷⁰⁵. The dominance of the teleological approach arguably reduces the scope for the CJEU’s engagement with a “consequentialist” approach, or more generally, with the social and political dimensions of Europeanisation⁷⁰⁶. Hesselink notes that the analysis of the aim or objective of the directive in itself will be of little determinative value where disputes arise as to the content of the directive and the rights and obligations to which it gives rise⁷⁰⁷; rather, he considers that it is necessary for the CJEU to move beyond a method of reasoning, which provides only for consideration of the purposes or objectives of EU law and “develop its own general rules or principles of private law”⁷⁰⁸. The teleological approach alone is potentially limited to certain conceptualisations of private law and lacks the necessary tools to deal appropriately with the shifts outlined above, and the development of private law, within a pluralist, multi-level space. The interpretative approaches and methodologies of the CJEU must evolve in line with the changing nature of private law, concerned not only with its classical conceptualisation but with fundamental rights, the public

⁷⁰⁰ *Laval* (n.355), Judgement, para.105.

⁷⁰¹ C-44/79 *Hauer* [1979] ECR I-3727.

⁷⁰² Azoulai and Dehousse, ‘The ECJ and the Legal Dynamics of Integration’ in Weatherill *et al*, *The Oxford Handbook of the European Union*, (n.113), p.360.

⁷⁰³ M.P. Maduro, *We the Court: The European Court of Justice and the European Economic Constitution* (Hart, Oxford; 1998).

⁷⁰⁴ Azoulai and Dehousse, ‘The ECJ and the Legal Dynamics of Integration’ in Weatherill *et al*, *The Oxford Handbook of the European Union*, (n.113), p.360.

⁷⁰⁵ N.K. Komesar, *Law’s Limit: the Rule of Law and the Supply and Demand of Rights* (CUP, Cambridge; 2001).

⁷⁰⁶ C. Schmid, ‘The CJEU as a Constitutional and Private Law Court: A Methodological Comparison’ *Zentrum für Europäische Rechtspolitik*, DP 4/2006, p.19.

⁷⁰⁷ M.W. Hesselink, ‘A Toolbox for European Judges’ *Centre for the Study of European Contract Law, University van Amsterdam*, WP 2010/07, pp.17-18.

⁷⁰⁸ Hesselink, ‘A Toolbox for European Judges’ (n.707), p.19 (footnotes omitted).

dimensions of law, reflected particularly in the “policy-orientated, instrumental character of regulation”⁷⁰⁹ and increasingly, privately made law.

Moreover, the evolution of the CJEU’s jurisdiction in line with its orthodox teleological approach has given rise to the notion of the emergence of a European teleology, which should bind the CJEU’s interpretation of Union law with the political, cultural and socio-economic dimensions of integration process; that is to say, interpretation should be made, not only with reference to the text of the provisions themselves but in the broader context of integration. Azoulai and Dehousse have drawn a connection between the emergence of a European teleology and the construction of a coherent and ordered, European system of law⁷¹⁰. The extent to which the CJEU should have a role not only in the management of the incoherence and fragmentation⁷¹¹ which arises from the Europeanisation of national law via legislation but also in the development of a coherent system of law remains unclear; it is shaped by the CJEU’s activism, or alternatively, its exercise of self-restraint. Both the AGs and judges have recognised the need for consistency in CJEU jurisprudence: “after the declarations of principles of the 1960s, which definitively put Community law on the right track, came the period of profound immersion in the practical problems that we, the judges of the second or third generation, will have to manage”⁷¹². On the one hand, (as will be explored in Parts III and IV below) the CJEU articulates commonality and generality in its reasoning and judgement via its recognition of general and common principles of private and Union law; this arguably facilitates coherence by establishing the scope for consistency along lines of jurisprudence. On the other hand, the increasing jurisdiction of the CJEU creates a problematic to the extent that the lack of clarity underpinning its articulation of its own role in the Europeanisation of private law leads to the inconsistent and unsystematic evolution of its jurisdiction, particularly in respect of its relationship with national courts. Indeed, Weatherill notes that the more interventionist an approach the CJEU adopts for the purposes of

⁷⁰⁹ Collins, ‘Governance Implications’ in Cafaggi and Muir Watt, *Making European Private Law* (n.421), p.276.

⁷¹⁰ Azoulai and Dehousse, ‘The ECJ and the Legal Dynamics of Integration’ in Weatherill *et al*, *The Oxford Handbook of the European Union*, (n.113).

⁷¹¹ Zimmermann, ‘Europeanization of Private Law’ in Reimann and Zimmermann, *The Oxford Handbook of Comparative Law* (n.62), p.545

⁷¹² P. Pescatore, ‘Address delivered at the formal sitting held on 30.10.1980 on the occasion of the retirement of the president, Mr. Hans Kutscher’ in Curia (ed.) *Formal Sitting of the European Court of Justice* (Curia, Luxembourg; 1980), pp. 20–25, p.25.

systematising European private law, the greater its potential to undermine the systematic nature of national private law⁷¹³.

ii. The Dynamic Character of the Luxembourg Court: The Evolution of the CJEU from an Administrative Body to a Private Law Court

The CJEU was originally intended to constitute an administrative body, with jurisdiction to review administrative decisions of the High Authority, where the validity of such actions were called into question before national courts⁷¹⁴; the CJEU adopted this role for the purpose of “ensuring that in the interpretation and application of the Treaties, the law is observed”⁷¹⁵, being entrusted with powers of review in respect of the infringement procedure under Art.258 TFEU, annulment actions under Art.263 TFEU, and the preliminary reference procedure under Art.267 TFEU⁷¹⁶. Administrative and constitutional law constitute the established yet continually growing branches of its jurisdiction⁷¹⁷ and private law, the young, sprouting branch. This “branching out” has been characterised as a “juridical *coup d’état*”⁷¹⁸ to the extent that the Member States did not expect that the CJEU would, or necessarily should, develop its jurisdiction in such a way.

The CJEU has distinguished the EU from other international legal regimes as “its own legal system, which, on the entry into force of the treaty, became an integral part of the legal systems of the Member States”⁷¹⁹. The EU’s identity as a new legal order⁷²⁰ reflects the *sui generis* character of the Luxembourg Court itself⁷²¹, in respect of its constitution and construction, methodology and reasoning. As the Treaty itself does not provide for a framework of interpretation of primary and secondary EU law, the CJEU has self-engineered

⁷¹³ S. Weatherill ‘Interpretation of the Directives: The Role of the Court’ in A.S. Hartkamp *et al* (eds.), *Towards a European Civil Code* (Kluwer, The Hague; 4th edn., 2011), pp.185-203, p.189.

⁷¹⁴ Art.41 ECSC.

⁷¹⁵ Now, per Art.19 TEU.

⁷¹⁶ Commission infringement procedure under Art.258 TFEU; preliminary reference procedure under Art.267 TFEU; further, Member States or parties with appropriate *locus standi* may challenge the legitimacy of a directive under Art.263 TFEU.

⁷¹⁷ See, Schmid, ‘The ECJ as a Constitutional and a Private Law Court’ (n.318).

⁷¹⁸ A. Stone Sweet, ‘The Juridical *coup d’état* and the Problem of Authority’ (2007) 8 *GLJ* 915.

⁷¹⁹ C-6/64 *Costa v ENEL* 1964 ECR I-1141.

⁷²⁰ Opinion of the Court: Opinion 1/91 on the Draft Treaty on a European Economic Area [1991] ECR I-1061.

⁷²¹ See Stone Sweet, *The Judicial Construction of Europe* (n.108); and also, A. Stone Sweet and M. McCown, ‘Discretion and Precedent in European Law’ in O. Wiklund (ed.), *Judicial Discretion in European Perspective* (Kluwer, The Hague; 2003), pp.84-115, p.92: “...the legal system, as it is understood by the actors that use it, is a product of judicial discretion. Most obviously, the Court supplemented Art.234 with supremacy, direct effect, and related ‘constitutional’ doctrines...”.

its own jurisdiction under Art.19 TEU, and by virtue of a process of constitutionalisation⁷²², a specific role in line with its teleological method of interpretation⁷²³. The CJEU has also developed the key principles shaping its relationship with the national courts in the development of EU law, namely, of direct effect⁷²⁴ and supremacy⁷²⁵.

As highlighted, the Union has limited legislative competence⁷²⁶; this is reflected in the arguably “piecemeal” character of European private law as a body of law. The CJEU’s jurisdiction is inherently linked to the furtherance of European integration via the effective implementation of EU law⁷²⁷, yet it appears unwilling to limit its role to one that involves the simple restatement of EU legislation⁷²⁸. It has recognised strict standards for implementation⁷²⁹, providing minimal latitude for the national legislatures to distinguish between the effect of directives and of regulations⁷³⁰, thereby reducing scope for national variation. The infringement procedure, and increasingly the preliminary reference procedure, allows the CJEU (and in respect of the latter, the national courts) to “police” Member States’ implementation⁷³¹. The CJEU’s reluctance to limit its jurisdiction reflects the Commission’s vision for the future development of private law, and in particular, its apparent preference for maximum (targeted) harmonisation. Indeed, the CJEU’s jurisdiction via Art.267 TFEU is inherently shaped by the reach of Union harmonisation; where legislation provides for minimum harmonisation, national courts are not obliged to make a reference to the CJEU if the national standard is above the minimum established by the legislature. Union legislation

⁷²² Reflected significantly and explored in more detail in the fundamental rights and unfair contract terms case examples.

⁷²³ C-83/94 *Leifer and Others* [1995] ECR I-3231 and *CILFIT* (n.694).

⁷²⁴ *Van Gend en Loos* (n.219). Via the principle of direct effect, the CJEU has broadened the body of parties that can become engaged in the legal dimension of integration, extending these participants beyond public institutions to private individuals, companies and other interest groups; Azoulai and Dehousse, ‘The ECJ and the Legal Dynamics of Integration’ in Weatherill *et al*, *The Oxford Handbook of the European Union*, (n.113), p.356.

⁷²⁵ Case 6/64 *Costa v ENEL* [1964] ECR 585.

⁷²⁶ Art.5(1) TFEU (ex Art.5 EC) provides that the principle of conferral shall govern the limits of the competences of the EU (limited by the principles of subsidiarity and proportionality), under which, as provided by Art.5(2) TFEU, the EU is competent to act only within the limits of the competences conferred on it by the Member States in the Treaties for the purpose of achieving particular aims and objectives.

⁷²⁷ Cafaggi, ‘The Making of European Private Law’ in Cafaggi and Muir Watt, *The Making of European Private Law* (n.59), p.325-329.

⁷²⁸ Consider C-168/00 *Leitner* [2002] ECR I-2631, in which the Court clearly goes beyond the – albeit unclear – explicit provisions within the Package Travel Directive, 90/314, especially Art.5.

⁷²⁹ C-144/99 *Commission v Netherlands* [2001] ECR I-3541, in relation to Directive 93/13.

⁷³⁰ Johnston and Unberath, ‘European Private Law by Directives’ in Twigg-Flesner, *The Cambridge Companion to European Union Private Law* (n.248), p.99.

⁷³¹ Johnston and Unberath, ‘European Private Law by Directives’ in Twigg-Flesner, *The Cambridge Companion to European Union Private Law* (n.248), p.98.

of a maximum (targeted or otherwise) nature, necessarily requires the national courts to refer where the relevant national standard operates at the borderline of the level of protection established at the EU level⁷³².

Whether the jurisdiction of the CJEU is deemed to be appropriate is ultimately dependent on attitudes towards Europe, including public⁷³³, political and policy considerations⁷³⁴ expressed predominantly via academic and increasingly, media (rolling press and internet) coverage⁷³⁵. This appertains not only to perceptions of Europe in general (for example, in the context of the Eurocrisis), but more specifically to EU and private law in particular. It is foreseeable that as the CJEU's jurisdiction in the private law sphere evolves and consequently, the scope for its influence on private party relationships becomes increasingly significant⁷³⁶, "normal" citizens will become increasingly aware of and interested in the Luxembourg Court. There seems to be some recognition of such "public legitimacy" in Art.13 TFEU, which requires the CJEU as part of the "institutional framework" of the Union to "aim to promote its values, advance its objectives, serve its interests, those of its citizens and those of the Member States, and ensure the consistency, effectiveness and continuity of its policies and actions"⁷³⁷. The specific effects and consequences of this obligation are unclear⁷³⁸ and may have a number of structural and organisational, as well as normative, consequences. Solanke has considered that Art.13, TFEU might require a higher degree of transparency in CJEU undertakings in order to facilitate legitimacy via the trust that EU citizens place in the judicial system⁷³⁹. This consideration of legitimacy reflects more broadly the notion that the EU can be conceived as

⁷³² Rott, 'What is the Role of the ECJ in EC Private Law?' (n.265), p.15.

⁷³³ From an understanding of the CJEU "tucked away in the fairyland Duchy of Luxembourg": E. Stein, 'Lawyers, Judges and the Making of a Transnational Constitution' (1981) 75 *AJIL* 1, p.1 and C. Timmermans, 'The European Union's Judicial System' (2004) 41 *CMLR* 393, p.394) to an increased "public visibility" of the CJEU, as recognised by Weiler (J.H.H. Weiler, *The Constitution of Europe* (CUP, Cambridge; 1999), p.207: "...its overall visibility is bound to grow and it will be judged by a media and public opinion far more informed than before").

⁷³⁴ See, for example, the article by the former President of the German *Bundesverfassungsgericht* and former President of Germany, R. Herzog, 'Stoppt den Europäischen Gerichtshof', *FAZ*, 8.9.2008; (<http://www.cep.eu/fileadmin/user_upload/Pressemappe/CEP_in_den_Medien/Herzog-EuGH-Webseite.pdf>; Last Accessed: 25.06.2013).

⁷³⁵ Weiler, *The Constitution of Europe* (n.733), p.207: "...its overall visibility is bound to grow and it will be judged by a media and public opinion far more informed than before". Reference can be made, as above, to the *Viking* and *Laval* cases: *Viking* (n. 355) and *Laval* (n.355).

⁷³⁶ Reference can be made to the papers presented at 'The Involvement of EU Law in Private Law Relationships', 28th-29.09.2011, St Anne's College, Oxford.

⁷³⁷ Art.13 TFEU.

⁷³⁸ I. Solanke, 'The AG – Securing Trust in the European Union Court of Justice?' (2011) *CELS WP*, p.2.

⁷³⁹ For example, any changes deemed necessary could also facilitate the understanding and promotion of notions of democracy in the European order.

essentially a “judge-made order”⁷⁴⁰ via requests for preliminary rulings from the national courts.

Furthermore, it should be recognised that the jurisdiction and role adopted by the CJEU is embedded in a particular political context which is also broadly temporal in its nature. The CJEU might at times be accused of being activist, or of being too influenced by policy considerations in fulfilling its interpretive role⁷⁴¹; at other times, it might exercise restraint, explicitly limiting itself. It is not clear whether this choice is conscious or unconscious; the CJEU cannot choose the cases that come before it. Moreover, it has been suggested that the legislature leaves gaps on purpose, due to a lack of political consensus. The legislature can expect that the problematic dimension of such gaps will arise at some point after the implementation of the legislation and that the CJEU will be required to deal with the issues which have not been finalised by the legislature. Thus, the CJEU contributes to the policy considerations and aims set out in the Treaty structure and developed by the Commission and Parliament (and in particular pieces of legislation, as discussed above). The political bodies of the EU will focus on a particular policy area (or more than one) in each piece of legislation; the CJEU focuses on the legal issues arising from this area. The CJEU’s engagement with comparative analysis for the purpose of this kind of “gap-filling” is identifiable in the case examples explored below, most evidently following the legislature’s silence on fundamental rights protection and the CJEU’s role in engaging in the development of this protection between the national, European (including CoE) and international levels. Additionally, a more specific example can be identified in the *Leitner* case, in which the Union legislature refrained from stating explicitly the understanding of “damage” between different Union directives⁷⁴²; when a conflict arose within the Austrian courts, the CJEU provided an autonomous interpretation of damage (including compensation for non-material loss).

Broadly speaking⁷⁴³, the legitimacy of the EU as a judge-made legal order must necessarily derive from the Member States; that is to say, the scope for judicial activism at the level of the CJEU is inherently facilitated, and also restricted, by social, political and economic attitudes at the national level. Essentially, the jurisdiction of the Luxembourg Court is dependent on

⁷⁴⁰ Maduro, *We the Court* (n.703).

⁷⁴¹ T.C. Hartley, *The Foundations of European Community Law*, (OUP, Oxford; 5th edn., 2003), p.52; p.80.

⁷⁴² *Leitner* (n.728), in respect of Directive 85/374 and Directive 90/314.

⁷⁴³ In order to avoid a discussion on authority and legitimacy, at this stage.

references from national judicial bodies, whether lower or supreme courts⁷⁴⁴, and the application of the interpretations rendered by the CJEU in the national jurisdictions (and in particular, in respect of the scope for cross-border and cross-sectoral impact). Broadly, this consideration of the rationale underlying the making of the reference is relevant, and is explored in the next section, in the context of the interactions between the national and European Court. For the moment, it is worth noting that the question referred to the CJEU might be understood as a specific version, shaped by the perspective of a particular legal tradition, of what might be a more generic European problem; similarly, the final determination might be made differently in diverse orders, following Sefton Green's assertion that the way in which moral and legal issues are understood by individuals and communities constitutes "a cultural phenomenon, so it can be inferred that they form part of our cultural identity"⁷⁴⁵.

The following section explores further the pertinence of the inter-judicial relationships – and the scope for comparative analysis to which they give rise – arising from the preliminary reference procedure, which has been identified as an appropriate analytical space, both for the purposes of choosing the case studies examined below, and limiting the breadth of the analysis and evaluation undertaken. Thus, the preliminary reference procedure provides the framework for the interrelation of the national and European courts for the purposes of this thesis.

II. The Preliminary Reference Procedure as an "Analytical Space"

The preliminary reference procedure has existed in some form within the complex judicial structure that permeates the EU legal order since the ECSC Treaty was established in 1951⁷⁴⁶. Subsequent to the coming into force of the Treaty of Rome in 1958⁷⁴⁷, the preliminary reference system was extended, thereby permitting the CJEU to engage in the interpretation of Union law even in the absence of challenges to its validity.

⁷⁴⁴ Micklitz, 'Judicial Activism of the European Court of Justice' (n.417), p.20.

⁷⁴⁵ Sefton-Green, 'Social Justice and European Identity' (n.343), p.276.

⁷⁴⁶ Art.41 ECSC Treaty.

⁷⁴⁷ Initially Art.177 EEC in 1958.

i. The Evolution of the Preliminary Reference Procedure Post-Lisbon

Prior to the Lisbon Treaty, the founding of the CJEU's jurisdiction with regard to matters of freedom, security and justice, was contingent on the classification of those matters within either the First Pillar (Community)⁷⁴⁸ or the Third Pillar (Justice and Home Affairs). In respect of the former, the CJEU's jurisdiction was expansive; with regards to the latter, it was considerably more limited⁷⁴⁹. Following the abandonment of the pillar structure, post-Lisbon⁷⁵⁰, the CJEU's jurisdiction arising from the preliminary reference procedure has been enlarged; it can now hear cases concerning all matters relating to freedom, security and justice⁷⁵¹. The number of preliminary references concerning private law matters is increasing⁷⁵² however there are still comparatively few cases of such a nature⁷⁵³.

Per Art.267(2) TFEU⁷⁵⁴, the CJEU can hear preliminary references from all national courts⁷⁵⁵ on issues relating to the interpretation of primary and secondary EU law⁷⁵⁶ and the validity of the latter⁷⁵⁷. Broberg and Fenger predicted, writing in 2009, that the extension of the scope for referrals – from supreme courts, to courts and tribunals⁷⁵⁸ operating at all levels – would constitute one of two key changes in procedure arising from the Lisbon Treaty⁷⁵⁹. There

⁷⁴⁸ Thus, in respect of Title IV, TEC, the CJEU had jurisdiction in respect of applications for annulments of EC legislation (Art.230 TEC), actions for failure to act re the Council, Parliament or Commission (Art.232 TEC), in infringement actions against Member States for failure to satisfy obligations (Art.226-227 TEC) and also in respect of preliminary references from the state (under Art.234 TEC).

⁷⁴⁹ In respect of third pillar matters, the CJEU has jurisdiction in relation to annulment, and not infringement, proceedings (under Art.35 TEU). The CJEU has jurisdiction in respect of preliminary references in relation to matters referred to in Art.35 TEU, from any court of the Member States, where that state has so agreed.

⁷⁵⁰ Still the CJEU does not have jurisdiction, with limited exceptions, in respect of what was the second pillar, that is, on Common Foreign and Security Policy, as per Art.275 TFEU.

⁷⁵¹ This jurisdiction also arises in respect of annulment, infringement and “failure to act” proceedings.

⁷⁵² Consider the *Zeitschrift für Europäisches Privatrecht* reports on private law cases before the CJEU, published every year since 1995, C.H. Kohler, ‘Gemeinschaftsrecht und Privatrecht: Zur Rechtsprechung des EuGH im Jahre 1994’ (1995) 3 *Zeitschrift für Europäisches Privatrecht* 482.

⁷⁵³ Johnston and Unberath suggest that in some cases, national courts are confident that they can solve the issue and are unprepared to wait for a reply from CJEU. It may also be true that with the increasing breadth of alternative dispute resolution processes, and private dispute resolution, in particular, there is greater scope for private law cases to be decided out of court: Johnston and Unberath, ‘European Private Law by Directives’ in Twigg-Flesner, *The Cambridge Companion to European Union Private Law* (n.248).

⁷⁵⁴ Originally Art.177 EEC, and subsequently Art.234 EC Treaty, as amended by the Treaty of Amsterdam.

⁷⁵⁵ See previously, unless so agreed, Art.68(1) TEC provided that preliminary references could only be made from those national courts from which there was no judicial remedy in national law (i.e. essentially, courts of final appeal).

⁷⁵⁶ Art.267(1)(a) and (b) TFEU.

⁷⁵⁷ Art.267(1)(b) TFEU.

⁷⁵⁸ Broberg and Fenger explore the institutions that “qualify” as “courts or tribunals”; M. Broberg and N. Fenger, *Preliminary References to the European Court of Justice* (OUP, Oxford; 2010), pp.71-93, including judicial bodies, administrative authorities and ombudsmen and private bodies.

⁷⁵⁹ Broberg and Fenger, *Preliminary References to the European Court of Justice* (n.758).

remains a lack of explicit guidance in respect of the criteria to be engaged by national courts in deciding whether to request a preliminary ruling from the CJEU. Under Art.267(3), courts have a duty to refer⁷⁶⁰ where there exists no judicial remedy in national law; this includes not only the availability of remedies before supreme courts but before all courts of (in practice) last instance⁷⁶¹. The limited guidance provided by the CJEU, explicated in the *CILFIT* judgement, essentially constitutes the exceptions to the obligation to refer⁷⁶². Thus, the circumstances in which preliminary references are appropriate and those in which they are not, remain unclear. It is for the national judge to determine that “a decision on the question is necessary to enable it to give judgement”. It is not for the CJEU to question the national court’s rationale for the reference; the CJEU is obliged to provide a judgement where the reference concerns the interpretation of acts of the Union⁷⁶³ and is necessary for the resolution of the main (national) proceedings⁷⁶⁴. References cannot be made in respect of questions as to the validity or interpretation of national law in general, or in respect of the law applicable to the particular case before the national court. In *Wiener*, AG Jacobs attempted to further clarify the “*CILFIT* criteria”, distinguishing between references from courts of last instance and those from other courts⁷⁶⁵. As to requests from the latter, these should be made where the ruling is one of “general importance and where the ruling is likely to promote the uniform application of the law” rather than in those cases in which “there is an established body of case law which could readily be transposed to the facts of the instant case; or where the question turns on a narrow point considered in the light of a very specific set of facts”;

Broberg and Fenger, *Preliminary References to the European Court of Justice* (n.758), p.14. The second change concerned references in criminal law and policing, and broadly justice and home affairs (previously, the Third Pillar).

⁷⁶⁰ Broberg and Fenger, *Preliminary References to the European Court of Justice* (n.758), pp.223 *et seq.*

⁷⁶¹ Sanctions can be imposed for failure to satisfy this obligation; infringement proceedings can be brought (Opinion 1/09 of 8/3/2011, para.87); action for damages on breach of EU law (C-173/03 *Traghetti del Mediterraneo* [2006] ECR I-5177 and Opinion 1/09, [2011] ECR I-1137, para.86); consequences can arise under Art.6, ECHR. See also, Broberg and Fenger, *Preliminary References to the European Court of Justice* (n.758), pp.265-273.

⁷⁶² *CILFIT* (n.694), Judgement, para.21.

⁷⁶³ C-231/89 *Gmurzynska-Bscher* [1990] ECR I-4003 and C-244/80 *Foglia v Novello* [1981] ECR I-3045, Judgement, paras.16 and 20.

⁷⁶⁴ C-62/93 *BP Supergaz* [1995] ECR I-1883, Judgement, para.9, where it is “quite obvious” that the interpretation is not relevant for deciding the case before the national court, “a court or tribunal against whose decisions there is no judicial remedy under national law is required, where a question of community law is raised before it, to comply with its obligation to bring the matter before the Court of Justice, unless it has established that the question raised is irrelevant or that the Community provision in question has already been interpreted by the Court or that the correct application of Community law is so obvious as to leave no scope for any reasonable doubt. The existence of such a possibility must be assessed in the light of the specific characteristics of Community law, the particular difficulties to which its interpretation gives rise and the risk of divergences in judicial decisions within the Community”.

⁷⁶⁵ C-338/96 *Wiener* [1998] ECR I-6495, Opinion of AG Jacobs, paras.59-60.

clearly, a vast body of cases exists in between⁷⁶⁶. In respect of references from courts of last instance, AG Jacobs notes that rigid adherence to the *CILFIT* criteria would result in the referral of all questions of Community law; he pleads instead for an “evolutionary approach” with national courts referring only cases of general importance⁷⁶⁷. However, it is not necessarily clear how these criteria should be engaged. This issue is one of caseload, which concerns not only the strictly legal dimensions of the case (i.e. the processes involving the *juge rapporteur*, the AG and the chambers allocated to hear the reference) but which is also relevant in terms of the necessary legal translation, research and documentation processes. Unsurprisingly, there is concern that the increasing number of preliminary references coming before the CJEU will result in a “gridlocked” system⁷⁶⁸, which might dissuade national courts from referring matters significant to the evolution of Union law⁷⁶⁹. The CJEU has adopted certain mechanisms to facilitate a speedier judicial process including: 1) the acceptance of the criteria for reference outlined above; 2) the rules of procedure provide that an Opinion will only be provided by the AG in those cases in which a new issue of law has arisen⁷⁷⁰; 3) national courts are encouraged to set out a possible answer to their own question⁷⁷¹ and 4) the construction of a new urgent procedure. In many cases, there will be no oral hearing, while in others, a reasoned order will be rendered by virtue of a simplified procedure⁷⁷². A number of other, more expansive, structural changes have also been proposed⁷⁷³; many of these are under discussion but have not yet been implemented⁷⁷⁴.

ii. The Preliminary Reference Procedure as a Reflection of the Inter-judicial Relationship Between the National and European Courts

The preliminary reference procedure is a purposively built and skilfully developed legal institution, underpinning which are various rationales and objectives. Most of the cases

⁷⁶⁶ *Wiener* (n.765), Opinion of AG Jacobs, paras.59-60.

⁷⁶⁷ *Wiener* (n.765), Opinion of AG Jacobs, paras.60-61.

⁷⁶⁸ Broberg and Fenger, *Preliminary References to the European Court of Justice* (n.758), p.7.

⁷⁶⁹ EP Resolution of 9.07.2008 on the role of the national judge in the European judicial system (A6-0224/2008), points F and 25 (<<http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P6-TA-2008-0352>>; Last Accessed: 04.10.2013).

⁷⁷⁰ Art.20 Protocol No.3, Statute of the CJEU, C 83/210.

⁷⁷¹ ‘Information Note On References From National Courts for a Preliminary Ruling’, OJ [2005] C-143/01.

⁷⁷² Art.104(3) Rules of Procedure of the CJEU, OJ L265/25, 29.09.2012.. See also, the accelerated procedures in respect of the Brussels II Bis Regulation; for example, concerning the return of an illegally retained child – C-195/08 *Rinau* [2008] ECR I-5271.

⁷⁷³ Broberg and Fenger, *Preliminary References to the European Court of Justice* (n.758), pp.25-36.

⁷⁷⁴ F.G. Jacobs, ‘Possibilities for Further Reforming the Preliminary Ruling Procedure’ (2004), *Papers from the Colloquium on the Judicial Architecture of the European Union*, 15.11.2004.

examined below come before the CJEU as preliminary references; these cases arise from a diversity of Member States, and thus provide interesting examples of interactions between legal cultures and traditions, allowing scope for the exploration and perhaps identification of the locations at which the plurality of legal cultures and traditions might affect the methodology and reasoning of the CJEU. Via the preliminary reference procedure, the CJEU has developed a number of key principles that have come to shape the relationship between the national courts, as institutional actors in the multi-level system of EU law, the European and international courts. The national courts are confined not only by the operation of the supremacy principle⁷⁷⁵ but also by the doctrines established in *Simmenthal*⁷⁷⁶ (whereby national norms conflicting with EU law must be set aside), *Marleasing*⁷⁷⁷ (on the basis of which national law must be interpreted and applied, insofar as possible, so as to avoid a conflict with an EU norm) and *Von Kolson*⁷⁷⁸ (which imposes an obligation on the national courts to interpret national law in such a manner that it conforms with EU law). It is clear that these principles do not preclude the existence of conflicts arising in respect of the formation, interpretation and application of norms, the nature of which have been outlined above and which ultimately underpin the making of the preliminary reference.

Before considering the rationale and character of the reference procedure, and the relationship to which it gives rise, it is worth considering the way in which a case proceeds through the CJEU. On receipt of the reference⁷⁷⁹, the *greffe* prepares the *fiche objet* wherein he identifies and summarises the key issues of the reference, identifies other relevant (open or closed) cases (in order to refer the case to the same AG or *juge rapporteur*), and outlines various procedural questions⁷⁸⁰. At the same time, the case is sent to the *direction de la bibliothèque, recherche et documentation*⁷⁸¹, which prepares a *fiche préexamen* and provides "second thoughts" on issues of competence, admissibility and procedure. Furthermore, the *DRD*

⁷⁷⁵ Case 6/64 *Costa v ENEL* [1964] ECR 585.

⁷⁷⁶ C-106/77 *Simmenthal* [1977] ECR I-62.

⁷⁷⁷ *Marleasing* (n.393).

⁷⁷⁸ C-14/83 *Von Colson and Kamann v. Land Nordrhein-Westfalen* [1984] ECR I-1891.

⁷⁷⁹ The reference itself might have its foundations in comparative analysis; in *Leitner*, the *Landesgericht* (Landesgericht Linz, Beschluß vom 06/04/2000) made a comparison between the state of the law in Austria (The Directive had been transposed into Austrian law by virtue of Art.31(b)-(f) of the *Konsumentenschutzgesetz* (KSchG; Law of Consumer Protection) of 1993) and that of Germany, noting that the German legislature had legislated expressly to provide a basis for compensation for non-material damage, and that this provision had been applied and further refined by the German courts (Arts.253 and 651(f), BGB).

⁷⁸⁰ Including those on the competence of the CJEU, the admissibility of the reference, the need for an accelerated, simplified or urgent procedure, and the scope - in light of previous jurisprudence - to deal with the case by virtue of the making of an *ordonnance*.

⁷⁸¹ Hereinafter, DRD.

identifies the essential subject matter of the reference in the context of existing CJEU jurisprudence, as regards relevant Union, international and national issues, facilitating the identification of the relevant questions referred, of the context in which the request has been made and of the referring court's procedure. This allows the court to understand whether there exists an opinion of the national government on the matter, or an existing body of controversial case law or scholarship. It also provides a key opportunity to locate the case in the context of relevant contemporary legal issues as well as for the identification of pertinent socio-economic, political and cultural considerations. Thereafter, the *greffe* sends the *fiche* to the president of the CJEU and the *premier AG*; the case is then allocated to the *juge rapporteur* and the AG⁷⁸². At the beginning of the written procedure, an "informal" but important relationship is established between the AG and the *juge rapporteur*; both can communicate with each other and the president in respect of procedural questions, can request clarification of the reference per Art.101(1) of the procedural rules of the CJEU, the translation of additional documents by the *direction générale de la traduction*⁷⁸³ (via the *greffe*) and the completion of the *fiche préexamen* by the *DRD*.

The *juge rapporteur* prepares the *rapport préalable* alone (or rather, with his or her *référéndaires*)⁷⁸⁴. It is split into three sections and a set of annexes. The first part sets out the basic information of the case, including key words and a brief history of the procedure. The second part refers to the relevant legal rules and the facts, and includes a synthesis of the parties' arguments, and of the written observations advanced. The third part outlines - in order to facilitate procedural decisions (at the *réunion générale*) - a brief outline of the case and the key legal issues and questions. At this stage, the legal problem must be categorised and the applicable rules, that is all sources that might be relevant to the case, identified. This stage should therefore consist of the taking of an "inventory" of the relevant knowledge and information, on the basis of which it is necessary to identify the additional information required to supplement and complement that which already exists if there is a gap, either in terms of what is included in the reference from the national court or that which is brought to the attention of the AG and the Court in the submissions of the relevant parties, including the Union institutions and national states, or in respect of the relevant legal provisions applicable. The nature of the information identified as relevant necessarily forms part of, and shapes the

⁷⁸² Arts.15 and 16, Protocol No.3, Statute of the CJEU, C 83/210.

⁷⁸³ Hereinafter, DGT.

⁷⁸⁴ Art.59, Protocol No.3, Statute of the CJEU, C 83/210.

methodological approach adopted. At an initial stage, the *juge rapporteur* sets out his recommendations as to procedure, that is, the chamber to hear the case, the need for an AG Opinion⁷⁸⁵, whether the case should be joined with others, whether a hearing should be held (the *rapport* should include a request of concentration and an indication of length; the reasons for the absence of a procedure should be stated) and his preliminary determinations as to the resolution of the case. The *juge rapporteur* may request clarification or a *note de recherche* from the *DRD*; its scope and the issues to be explored should be set out precisely in the annex. He (and if relevant, the AG) can engage with the *DRD* in advance of the publication of the *rapport*; this should be done informally. These procedural decisions must be approved in the *réunion générale*, occurring before the hearing. Interested parties⁷⁸⁶ can participate in the hearing; further, Art.25 of the Statute of the Court, permits it to "entrust any individual, body, authority, committee or other organization it chooses with the task of giving an expert opinion". Similarly, per Art.24 "the Court may also require the Member States and institutions, bodies, offices and agencies not being parties to the case to supply all information which the Court considers necessary for the proceedings".

The date on which the AG's Opinion will be delivered is announced – in most cases – at the end of the hearing, and is normally rendered as soon as possible, or at the latest, ten weeks after the hearing (or the *réunion générale*). The AG normally prepares the document in German, English, Spanish, French or Italian; account should be taken of the need for translation. As a general rule, the judgement is pronounced within 16 weeks of the Opinion. The *juge rapporteur* highlights his intentions to the other judges within one week; if there are no other objections, he reveals his *projet de motif* in conformity with the AG; if he is in disagreement with the AG, he either requests that the president of the chamber organises a *tour de table* for which he will prepare a note, or indicates that he will present a *projet de motif* to open the *deliberé*. Other members of the chambers may request a *tour de table*, introducing their rationale in a note. In the absence of an AG Opinion, the *tour de table* normally occurs immediately after the hearing. Within the *rapport*, the *juge rapporteur* makes a preliminary determination as to whether it is necessary, within the *deliberé* (undertaken in secret), to interpret the relevant norms, where the “interpreter” (i.e. the AG or the Court) has to determine the norm is sufficiently clear from the ordinary meaning of its

⁷⁸⁵ If necessary, the focus should be outlined and the new points of law identified; if not, the absence of new law should be indicated.

⁷⁸⁶ By virtue of Art.23, Protocol No.3, Statute of the CJEU, C 83/210.

terms to be applicable, or if doubt persists in the absence of settled case law⁷⁸⁷. At this stage, the chamber will consider the appropriateness of the norms deemed to be applicable, and once there is agreement, will identify the relevant interpretative approaches. These may not be identifiable in the written judgement; at this stage, there is scope for a revisiting of preliminary conclusions⁷⁸⁸, which “takes us into a broader sphere of practical argumentation where the values and principles appropriate to the institutions of the societies, the states and the supranational and international communities are taken into account”⁷⁸⁹. Evidently, it is the key stage at which comparative analysis might arise which might find its foundations in the *rapport* of the *juge rapporteur* or indirectly in the note of the *DRD*.

Once an interpretation has been identified and agreed upon, it must then – against the background of the understanding that the facts, and the final judgement are for the national court – be identified in light of a ratio, so as to potentially be applicable across the Union⁷⁹⁰. At the end of the *deliberé*, the date on which the judgement will be pronounced is agreed; the *juge rapporteur* sets out his *projet d'arrêt*. At the *deliberé*, if it is decided that part of the project should be subject to written procedure, the other judges present their written observations and the *juge rapporteur* must integrate these where appropriate and agreed. In each version, the changes should be indicated, reviewed and checked. The *juge rapporteur* then sends the final draft to all other members of the CJEU, and the final version to the appropriate departments (*DRD*, *DGT*, *UPI*) for translation and correction.

The rationales underlying, and the objectives overarching the preliminary reference system, are multi-faceted. Primarily, the procedure allows for the resolution of potential conflicts relating to ambiguous interpretations of EU law provisions; thus, it should facilitate the uniform and effective application of EU law and broadly promote European integration⁷⁹¹. There is a breadth of empirical evidence that, per Stone Sweet, the “Europeanisation of

⁷⁸⁷ J. Bengoetxea, N. MacCormick and L. Moral Soriano, ‘Integration and Integrity in the Legal Reasoning of the European Court of Justice’ in G. de Búrca and J.H.H. Weiler (eds.), *The European Court of Justice* (OUP, Oxford; 2001), pp.43-85, p.55.

⁷⁸⁸ Bengoetxea, MacCormick and Moral Soriano ‘Integration and Integrity in the Legal Reasoning of the European Court of Justice’ in de Búrca and Weiler, *The European Court of Justice* (n.787), p.56 and 60.

⁷⁸⁹ Bengoetxea, MacCormick and Moral Soriano ‘Integration and Integrity in the Legal Reasoning of the European Court of Justice’ in de Búrca and Weiler, *The European Court of Justice* (n.787), p.57.

⁷⁹⁰ Bengoetxea, MacCormick and Moral Soriano ‘Integration and Integrity in the Legal Reasoning of the European Court of Justice’ in de Búrca and Weiler, *The European Court of Justice* (n.787), pp.43-85, p.60.

⁷⁹¹ *Van Gend en Loos* (n.219); Case 6/64 *Costa v ENEL* [1964] ECR 585; C-4/73 *Nold v Commission* [1974] ECR 491. Further, the CJEU has asserted that the interpretation of the Treaties should not be undertaken in a strict manner but in light of the aim of the integration process and the Treaty objectives.

national law' has been determined, or at least meaningfully conditioned by, processes and outcomes generated through Art.234⁷⁹². Weiler considers that the procedure has been key in facilitating the understanding of the "reciprocal" nature of EU integration, establishing an incentive relationship on the part of both the CJEU and the national courts not only to engage in the development of EU law and its uniform application in Member States, but at the same time to attempt establish the legitimacy and political justification for their actions. This justificatory rationale, and the relevance of comparative analysis thereto, is considered further in Part IV.

Initially – in line with the neofunctionalist characterisation of integration – the preliminary reference procedure was established in the Treaties as one of cooperation. Indeed, this is an understanding to which the both the AGs⁷⁹³ and the Court⁷⁹⁴ continue to attach significance. As noted, where the national court cannot resolve the issue in compatibility with EU law, it is obliged to refer the case to the CJEU for an interpretative statement. The nature of the preliminary reference procedure must be understood in light of the judicially-developed principles outlined above, and in particular, the doctrine of state liability, particularly as developed in *Köbler*⁷⁹⁵; the imposition of an obligation on the national courts to refer can be understood to reflect a relationship based on hierarchy. It is submitted that *Köbler*, from the perspective of the evolution of the preliminary reference procedure, might operate to establish a degree of hierarchy, on the one hand, and actually promote cooperation and trust between the national courts and the CJEU, on the other; that is to say, it highlights the significance of the effective and compliant application of EU law to the construction of a cooperative relationship, especially, as Komarek has noted, with regard to the introduction of the new CEE judiciaries within the EU judicial sphere. The alternative to the preliminary reference procedure is the infringement procedure, which has been criticised to the extent that, while proceedings are raised by the Commission, it might operate to undermine any notion of cooperation in the relationship between the courts⁷⁹⁶. The structure of the preliminary reference system might also be understood to undermine the notion of hierarchy to the extent

⁷⁹² Stone Sweet, 'Integration and the Europeanisation of Law' (n.104), p.13.

⁷⁹³ C-306/99 *BIAO* [2003] ECR I-1, Opinion of AG Jacobs, para.44.

⁷⁹⁴ C-445/06 *Danske Slagtierier v Bundesrepublik Deutschland* [2009] ECR I-2119 Judgement, para.65.

⁷⁹⁵ *Köbler* (n.184).

⁷⁹⁶ J. Komarek, 'Inter-Court Constitutional Dialogue after the Enlargement – Implication of the Case of Professor Köbler' (2005) 1 *Croatian Yearbook of European Law* 75, p.87.

that post-Lisbon, courts other than those of last instance are able and in some cases, obliged to refer.

The hierarchy/cooperation distinction is relevant with regard to the assertion that the preliminary reference procedure necessarily shapes the methodological framework underpinning the Europeanisation of law and establishes an environment of cooperation and coordination in which dialogue and discourse can be fostered. The emphasis on coordination and cooperation has been characterised as something akin to a public relations effort on the part of the (both European, and in some cases, national) courts, which have the aim of justifying their jurisdiction and activities, the operation of the preliminary reference procedure and the interaction to which it gives rise⁷⁹⁷. While it has been asserted that it has predominantly been the CJEU that has exerted efforts to “cultivate” relations for the purposes of keeping the national judiciaries “onside”⁷⁹⁸, the control of the preliminary reference procedure nevertheless lies largely with the national courts. Within the confines of their obligation to refer under Art.267(3) TFEU, and the requirements of a reference order⁷⁹⁹, it is the national court that decides whether to make a reference, when to make a reference⁸⁰⁰, the content of the question referred⁸⁰¹ and significantly, determines the manner in which the CJEU’s judgement is engaged in the national sphere. Thus, even the Court has recognised that “[t]he system of references for a preliminary ruling is based on a dialogue between one court and another, the initiation of which depends entirely on the national court’s assessment as to whether a reference is appropriate and necessary”⁸⁰².

Furthermore, the obligation of lower courts to refer dictates that there is scope for these courts to engage with the CJEU on the basis of various rationales; these rationales might undermine the hierarchy of the national judicial structure and allow the lower court to interact with its own legislature – should an incompatibility or conflict between national and EU norms be

⁷⁹⁷ Mummery, ‘Links with National Courts in Moser and Sawyer, *Making Community Law* (n.535).

⁷⁹⁸ Azoulai and Dehousse, ‘The ECJ and the Legal Dynamics of Integration’ in Weatherill *et al*, *The Oxford Handbook of the European Union*, (n.113), p.358.

⁷⁹⁹ CJEU Information Note, OJ 2011 C 160, 1.

⁸⁰⁰ In general, there are no time limits for a reference; the exception applies in relation to timelines for reviews of legality as per Art.263(6) TFEU.

⁸⁰¹ The CJEU will review the question referred and if necessary, reformulate the reference, requesting clarifications and confirmation from the national court, where necessary; Art.101 Rules of Procedure of the CJEU, OJ L265/25, 29.09.2012.

⁸⁰² C-2/06 *Kempter* [2008] ECR I-411, Judgement, para.42.

established – without involving its supreme court⁸⁰³. This also engages the judicial empowerment and competition of courts hypotheses of Weiler⁸⁰⁴, Alter⁸⁰⁵ *et al*, relating to the empowerment of lower national courts through the reference procedure. According to MacCormick, national courts find their obligations to apply Union law not in Union law itself but in national constitutional law⁸⁰⁶. MacCormick advocated a pluralistic conception of this judicial interaction, understanding the principle of supremacy not as one dictating the “subordination” of national law, but rather as establishing a space of interaction in which both the CJEU and the highest national courts might be engaged; avoiding conflict is deemed to be:

a matter for circumspection and for political as much as legal judgment. The ECJ ought not to reach its interpretative judgments without regard to their potential impact on national constitutions. National courts ought not to interpret laws or constitutions without regard to the resolution of their compatriots to take full part in European Union and European Community⁸⁰⁷.

Indeed, the national courts can therefore use the preliminary reference procedure – both in the ascent and descent of the case – to modernise and develop the law of the Member State⁸⁰⁸; that is, in line with the principles of direct effect and superiority, the national court can refer to the CJEU to induce an interpretation of EU law which creates an incompatibility with national law and invokes scope for legislative or judicial change therein⁸⁰⁹. It is clear, for example, from the state liability jurisprudence, that the preliminary reference procedure provides a means for lower national courts to engage indirectly with the national legislature, “skipping” the supreme courts.

⁸⁰³ A-M. Slaughter, *A New World Order* (Princeton University Press, Princeton; 2004), p.146.

⁸⁰⁴ J.H.H. Weiler, ‘A Quiet Revolution: The European Court of Justice and its Interlocutors’ (1994) 26 *Comparative Political Studies* 510, pp.521–3.

⁸⁰⁵ Alter, *Establishing the Supremacy of European Law* (n.655), pp.47-48, and K. Alter, ‘Explaining National Court Acceptance of European Court Jurisprudence: A Critical Evaluation of Theories of Legal Integration’ in A-M. Slaughter, A. Stone Sweet, and J.H.H. Weiler (eds.), *The European Court and National Courts—Doctrine and Jurisprudence* (Hart, Oxford; 1997), pp.227-252, pp.241-242.

⁸⁰⁶ N. MacCormick, *Questioning Sovereignty: Law, State and Nation in the European Commonwealth* (OUP, Oxford; 1999), p.110.

⁸⁰⁷ MacCormick, *Questioning Sovereignty* (n.806), pp.119-120.

⁸⁰⁸ J. Basedow, ‘The Court of Justice and Private Law: Vacillations, General Principles and the Architecture of the European Judiciary’ (2010) 18 *ERPL* 443, pp.447-448.

⁸⁰⁹ Basedow, ‘The Court of Justice and Private Law’ (n.808), p.448.

Yet, drawing a strict and rigid distinction between a characterisation that is “hierarchical” and one that is “cooperative”⁸¹⁰ might also be problematic (in the alternative, de la Mare has considered that a shift can be identified from “cooperation” to “coordination”⁸¹¹). Instead, Slaughter understands the relationship between the national and European courts as a fundamental aspect of the “vertical network”, which exists, alongside horizontal networks within a “networked world order”⁸¹²: “[t]he possibility of direct relations between a supranational court and national courts, or between a supranational regulatory agency and its domestic equivalent, pierces the shell of state sovereignty and creates a channel whereby supranational officials can harness the coercive power of national officials”⁸¹³. The characterisation of the relationship in respect of the relevance of comparative analysis is a consideration to which further reference will be made throughout the case examples for the purposes of identifying a degree of clarity in a concretised context. It is submitted that an abstract analysis of the norms structuring the preliminary reference system can only provide a framework of understanding; it is necessary to examine the bases upon which such references are made (or not made, as the case may be⁸¹⁴), the methodology and reasoning of the European court in examining conflicts that arise, the relationship with the national courts in the preliminary reference procedure, and the return of the case to the national court. While the interpretation of EU law is for the CJEU, the national courts are charged with the task of applying the law in the domestic context and rendering the final decision on the resolution of a dispute; the CJEU does not go so far as to apply national law, or to make a judgement in the context of the particular case. This allocation of tasks is necessarily reflected in a “division of labour” which characterises the EU legal order; it dictates that the interpretation and application of norms are distinct processes undertaken by different institutions operating in diverse traditions and further reflects the limitation of the jurisdiction and role of the Luxembourg Court⁸¹⁵. The CJEU’s activity is seemingly facilitated and legitimated because

⁸¹⁰ In the second edition, T. de la Mare and C. Donnelly, ‘Preliminary Rulings and EU Legal Integration: Evolution and Stasis’ in P.P. Craig and G. de Búrca (eds.), *The Evolution of EU Law* (OUP, Oxford; 2nd edn., 2011), pp.363-407.

⁸¹¹ la Mare and Donnelly, ‘Preliminary Rulings and EU Legal Integration’ in Craig and de Búrca, *The Evolution of EU Law* (n.810), p.377.

⁸¹² Slaughter, *A New World Order* (n.803), pp.131-165.

⁸¹³ Slaughter, *A New World Order* (n.803), p.145.

⁸¹⁴ Consider for example, the *acte clair* doctrine, which is used often by Member States’ courts to avoid making a reference; this is especially true in relation to the French *Conseil d’État* - See the General Report on ‘The Preliminary Reference Procedure to the Court of Justice of the European Communities’, *18th Colloquium of the Association of the Councils of State and Supreme Administrative Jurisdictions of the EU*, Helsinki, May 2002.

⁸¹⁵ K. Lenaerts, ‘Interpretation and the Court of Justice – A Basis for Comparative Reflection’ (2007) 41 *Int.Lawyer* 1011, p.1012.

it is relevant through the national courts; at the same time, within the national system, the national court can justify the measures that it takes on the basis of its EU obligations, firstly to refer, and secondly, to implement the CJEU judgement⁸¹⁶. Essentially therefore, the national and European courts derive their power to act via the preliminary reference procedure; the exercise of this power is reflected in the communication that arises between the courts.

The preliminary reference procedure is engaged as a space for interaction and contestation within the European sphere, one in which national, European (and potentially international and transnational) levels of regulation come together and which is ripe for communication between the diverse dimensions – political, social, economic, cultural and legal – of European integration and the Europeanisation of law. The interpretation and application of EU law within the Member States gives rise to conflicts (identified above, and in the case studies), the resolution of which is for the CJEU and the national courts via the preliminary reference procedure. It seems intuitively necessary that the CJEU engage with the resolution of conflicts in a way that would be deemed acceptable across the plurality of legal cultures and traditions of the Member States. Methodologically, there is a lack of clarity as to the extent to which, and the means by which, the CJEU takes into consideration these divergent cultures and traditions⁸¹⁷. This thesis explores the relevance of comparative analysis and its engagement by the CJEU in managing conflicts arising before the national courts within the context of the Europeanisation of private law and coming before it via the preliminary reference procedure; the relevance of comparison is examined not only descriptively but also normatively, to the extent that an attempt is made to frame its theoretical and methodological dimensions in light of the evolving nature of the Europeanisation of private law within a pluralistic, multi-level space and the critical assessment of comparison undertaken in Chapter 3⁸¹⁸.

Chapter 4. Concluding Remarks

⁸¹⁶ Weiler, 'The Dual Character of Supranationalism' (n.99); 'The Transformation of Europe' (1991) 100 *Yale.L.J.* 2403; 'A Quiet Revolution: The European Court and Its Interlocutors' (1994) 26 *Comparative Political Studies* 510.

⁸¹⁷ Cafaggi, 'The Making of European Private Law' in Cafaggi and Muir Watt, *The Making of European Private Law* (n.59), p.329.

⁸¹⁸ Maduro, 'Interpreting European Law' (n.397).

Building on the examination of the Union legislature's role in the Europeanisation of private law in Chapter 1 and the evaluation in Chapter 2 of the need to absorb the legal, socio-economic, cultural and political dimensions of private law development, it has been recognised that Europeanisation and integration, more generally, cannot emerge only from legislative activities. Rather judicial development and thus the interrelation of the national and European courts, is key. Ultimately, Chapter 4 has aimed to facilitate the analytical shift from a legislative to a judicial focus. The analysis in Chapter 4 has outlined, from a legal-cultural and sociological perspective, the constitution and construction of the CJEU and thereafter, the evolution of its interpretative jurisdiction and role in private law; to the extent that this jurisdiction arises predominantly via the preliminary reference procedure, it necessarily engages the significance of the relationship between the national courts and the CJEU. Fundamentally, this evaluation aims to allow for this space of interaction – not only between the courts but also more broadly between national, European and international legal orders within a plural, multi-level space – to be established as one within which the scope for comparative analysis arises. Against this background and building on Chapter 3, in which different conceptualisations of comparative analysis have been critically assessed, Chapter 4 aims to outline the key dimensions of these interjudicial relationships that potentially shape the framework of comparative analysis engaged by the CJEU. These key dimensions derive from the dynamic character and structure of the Europeanisation of private law and are evident in light of the case examples evaluated in Part III; consequently, they permeate the analysis which follows in Parts III and IV. They include: the multi-level construct of private law development in itself, the relevance of which permeates the three case examples; the constitution of the courts, including the background culture and tradition of its participants; the notion of a division of labour between the courts, which arises, *inter alia*, in respect of the *ex officio* regulation of contract terms and the erosion of national procedural autonomy and finally, the dynamic and shifting role of the courts, reflected, *inter alia*, in the notion of balancing, identifiable in the fundamental rights cases.

PART THREE: A CASE-BASED ANALYSIS OF THE JURISDICTION AND ROLE OF THE CJEU

The Selection and Methodology of the Case Examples

This part of the thesis engages a thorough examination of three areas of case law, predominantly emerging through the preliminary reference procedure and key to the Europeanisation of law. While it cannot be deemed to be comprehensive, as the jurisprudence examined does not cover the entirety of European private law, this analysis aims to explore and uncover the fundamental dimensions of the Europeanisation of private law, which permeate and overarch the substantive content of the case examples. Furthermore, in light of the reasoning of the CJEU and the exploration of the relevance of comparative analysis in the Opinions of the AG and judgements of the Court, this part aims to uncover the relationships between the different legal orders within the European sphere, including national, EU and international law. The aim is to concretise the discourse launched in Chapters 3 and 4 via the evaluation of key areas of jurisprudence.

The rationales underpinning the identification of the relevant case examples are various. For the purposes of integrating the observations as to the jurisdiction and structure of the CJEU arising from the legal-cultural and sociological assessment in the previous chapter, the analysis focuses on the jurisprudence coming before the CJEU via the preliminary reference procedure; where relevant, cases arising by other means are also discussed. Broadly, this part aspires to bring together diverse yet connected areas of EU law, within each of which conflicts of the nature outlined above are potentially generated and at least one dimension of a private law nature arises. The purpose of these case examples is not to scrutinise the substance of the CJEU's decisions as such⁸¹⁹ but to examine the approach and methodology adopted by the CJEU in each of these areas. Each area reflects, to a greater or lesser degree, the different competences of the Union. Three areas are identified and the structure of each follows broadly the same pattern; a number of cases have been chosen in each area for the purposes of lending the analysis a degree of systemisation. The first case example focuses on the CJEU's recognition of state liability as a principle of EU law. As state liability constitutes a sector in which the CJEU's judgements establish the foundations of

⁸¹⁹ That is, the "rightness" or "wrongness" of the decision.

legal development, it permits a focus on the judicial development of European law; consequently, the preliminary reference procedure has been attributed particular significance, both in respect of the national courts' engagement with the procedure and the scope arising for interinstitutional dialogue. In contrast to the first, the second case example on the regulation of contract terms allows for reflection on the CJEU's jurisdiction and role in an area predominantly finding its foundations in the activities of the European and national legislatures. As the relevant cases also arise predominantly via the preliminary reference system from different national courts, the case example also illustrates that, in respect of contract term regulation, the scope and rationale of the national courts' engagement in dialogue with the CJEU diverge, allowing for consideration of the extent to which the national courts, by referring to Luxembourg, become willing participants in the Europeanisation of domestic civil procedure. The final case example deals with conflicts arising between different sets of EU and national norms, namely those with their basis in the EU Treaty structure, fundamental freedoms, and those arising from national constitutional and international law, and subsequently Union law, and their judicial construction, fundamental rights.

Chapter 5. The CJEU's Elaboration of a Regime of State Liability: The Interrelation of National, European and International Law

Accepting their Treaty obligations⁸²⁰, the Member States must adhere to, comply with and avoid infringing primary and secondary Union law. The evaluation of this case example aims to uncover the methodological approaches and reasoning engaged by the AG and Court in the development of a regime of state liability and recognition of state liability as a principle of Union law. The regime is firstly uncovered as it derives from *Francovich* and thereafter, the way in which the *Francovich* doctrine has been elaborated is explored via the analysis of two key cases, namely, *Brasserie du Pêcheur*⁸²¹ and *Köbler*⁸²². *Francovich*⁸²³ concerned the Italian legislature's non-implementation of Directive 80/987/EEC, the correct implementation of which would have provided payment protection to workers on the insolvency of their employer. Thereafter the employers brought a claim before the *pretore di Vicenza* and *pretore di Bassano del Grappa* for compensation in respect of their loss, suffered consequent to the legislature's non-implementation. The questions referred concerned the effect of the directive, and further, in the event that the directive could not be so relied upon against the state, the claim in damages before the court. The predominant issue of referral was deemed to concern the existence of the state's obligation to make reparation in respect of the liability of the legislature for breach of EU law⁸²⁴. While the principle of state immunity was already disintegrating in the 1980s and 1990s and by no means remained intact across the Union at the time of *Francovich*⁸²⁵, in only a few national systems was the legislature liable in damages before the courts in respect of breaches of law arising from its acts and omissions⁸²⁶. Reflecting a broad constitutional law conflict, *Francovich* also brought to light a number of private law issues concerning the conditions underpinning and shaping the obligation (serious

⁸²⁰ These obligations were broadly recognised almost at the birth of the European legal order in *C-6/60 Humblet v Belgium* [1960] ECR 559, Judgement, para.36.

⁸²¹ *Brasserie* (n.186).

⁸²² *Köbler* (n.184).

⁸²³ *Francovich* (n.219).

⁸²⁴ M. Claes, *The National Courts' Mandate in the European Constitution* (Hart, Oxford; 2006), p.286.

⁸²⁵ See in Ireland, *Byrne v Ireland* [1972] IR 241 and in England, the "King can do no wrong" principle was substantially amended by the Crown Proceedings Act 1947; also in the English context, for example, the so-called public/private divide, arguably a key element of English legal tradition, could have operated as an obstacle to the acceptance of state liability. See P.P. Craig, 'Once More Unto the Breach: The Community, the State and Damages Liability' (1997) 113 *LQR* 67, pp.70-71. Despite the 1947 Act, pre-*Francovich*, the English court were nevertheless reluctant to impose an obligation to repair loss suffered; *Hoffman-Laroche v Secretary of State for Trade and Industry* [1975] AC 295, p.359, per Wilberforce LJ in respect of administrative action, and *Bourdin SA v Ministry of Agriculture, Fisheries and Food* [1986] QB 716, p.790 per Nourse LJ.

⁸²⁶ J. Bell and A.W. Bradley, *Governmental Liability: A Comparative Study* (UK Comparative Law Studies, Glasgow; 1991).

breach and causation) to make reparation (quantification and the availability of damages for pure economic loss). While the Court did not undertake a comparative analysis of the applicable national norms, the AG examined the arguments of the intervening governments against the availability of such damages and highlighted the distinction between the national and European context and the divergent scope for liability arising therein⁸²⁷. The Court rather engaged predominantly with systematic reasoning, deriving the obligation to repair loss from the need to ensure the full effectiveness of the *sui generis* Union legal order⁸²⁸ and the rights conferred thereby on individuals⁸²⁹ (the satisfaction of which it considered would otherwise be undermined if individuals could not obtain damages before the courts for loss caused by the state's breach), highlighting that the obligation to repair finds its foundations in Art.4(3) TFEU⁸³⁰ (then, Art.5 EEC; subsequently, Art.10, EC)⁸³¹. State liability was therefore recognised by the Court as a principle of Union law "inherent in the system of the EC Treaty"⁸³². In *Francovich*, it therefore recognised Member State liability for infringement of EU law without elaborating on the conditions underpinning; these determinations were left entirely to the national court in line with its procedural autonomy⁸³³, providing that effective protection was afforded⁸³⁴. In *Brasserie*⁸³⁵, the CJEU elaborated on the criteria upon which liability is based. The assessment of the satisfaction of the conditions for liability and the determination and enforcement of awards, including the identification of heads of damage⁸³⁶

⁸²⁷ *Francovich* (n.219), Opinion of AG Mischo, paras.43 *et seq* for a discussion of the arguments of the national governments and para.47 in particular.

⁸²⁸ *Simmmenthal* (n.776). See now, Art.19(1) TEU, which provides that "Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law".

⁸²⁹ *Van Gend en Loos* (n.219) and Case 6/64 *Costa v ENEL* [1964] ECR 585.

⁸³⁰ Art.4(3) TFEU provides, "Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives."

⁸³¹ *Francovich* (n.219), Judgement, para.35.

⁸³² *Francovich* (n.219), Judgement, para.35.

⁸³³ C-33/76 *Rewe-Zentral* [1976] ECR 1989, Judgement, para.13.

⁸³⁴ See *Humblet* (n.820), Judgement, p.569, J. Steiner, 'From Direct Effects to *Francovich*: Shifting Means of Enforcement of Community Law' (2003) 18 *European Law Review* 3. Other remedies might have been available via other mechanisms, including actions for annulment and recovery against the EU institutions.

⁸³⁵ *Brasserie* (n.186).

⁸³⁶ A question asked by the English court - W. van Gerven, 'Bridging the Unbridgeable - Community and National Tort Laws After *Francovich* and *Brasserie*' (1996) 45 *ICLQ* 507, p.520 - explored further below in respect of AG Tesaurò's Opinion, *Brasserie* (n.186), Opinion of AG Tesaurò, paras.70 *et seq*. See in respect of the non-contractual liability of the EU institutions, C-28/92 *Banks* [1994] ECR I-1212, Opinion of AG van Gerven, para.2.

and the quantification of damages⁸³⁷ remains a task for the Member State courts⁸³⁸ in accordance with the principles of equivalence and effectiveness⁸³⁹.

Following *Francovich* and *Brasserie*, the CJEU has recognised that liability might arise where there is non-compliance with primary law, an absence⁸⁴⁰ or incorrect transposition of legislation⁸⁴¹, or infringement of another nature by the national legislature, national administrative body⁸⁴² or national court⁸⁴³, to the extent that liability potentially arises “whichever public authority is responsible for the breach”⁸⁴⁴. The extension of state liability to the acts and omissions of the courts was made in *Köbler*. Köbler⁸⁴⁵, an Austrian professor, had claimed an increase in his pension contribution in line with Austrian law, following fifteen years of work in an Austrian public university. The Austrian state, Köbler’s employer, refused to award the increase on the basis that while he had worked in the universities of Member States for more than fifteen years, those universities were not Austrian. This decision was challenged, in respect of (now) Art.45 TFEU on the free movement of workers, and the *Verwaltungsgerichtshof* – the Austrian Supreme Administrative Court – referred to the CJEU. Following the CJEU’s judgement on a similar matter⁸⁴⁶, which would have resolved the issue in favour of Köbler if applied correctly in the Austrian context, the *Verwaltungsgerichtshof* withdrew its reference. The Supreme Court, from which there was no appeal, subsequently applied the judgement incorrectly to the *Köbler* facts, considering the increment as a bonus of a sort (contrary to its previous interpretation), the nature of which allowed for derogations from the fundamental freedom. Köbler then brought another action before the *Landesgericht Wien*, a court of first instance in civil matters, claiming that the *Verwaltungsgerichtshof*’s failure to refer, and its incorrect application of the CJEU

⁸³⁷ *Brasserie* (n.186), Opinion of AG Tesouro, paras.105 *et seq.* Guidance on the quantification of damages was sought by both courts.

⁸³⁸ C-302/97 *Konle* [1999] ECR I-3099; the Court, in contrast to the AG, and moving away from its approach in previous jurisprudence, refused to apply the conditions in *Factortame* to the case before it, highlighting the task was one for the national court.

⁸³⁹ *Brasserie* (n.186), Judgement, para.67. The amount of compensation must be adequate, with deterrent effect – *Von Colson* (n.778) and C-271/91 *Marshall v Southampton and South-West Hampshire Area Health Authority* [1993] ECR I-4367, Judgement, para.24.

⁸⁴⁰ As in *Francovich*. See also, Joined Cases C-178-179 and C-188-190/94 *Dillenkofer v Germany* [1996] ECR I-4845, in which the CJEU held that failure to transpose a directive satisfies the sufficiently serious requirement, constituting a manifest and grave disregard of the limits of the Member State’s discretion.

⁸⁴¹ As in C-392/93 *R v HM Treasury, ex p British Telecommunications* [1996] ECR I-1631, even within the correct time period.

⁸⁴² C-5/94 *R v Ministry of Agriculture, Fisheries and Food, ex p Hedley Lomas* [1996] ECR I-2553.

⁸⁴³ *Köbler* (n.184); the court must have acted so as to “manifestly” breach EU law, Judgement, para.53.

⁸⁴⁴ *Konle* (n.838), Judgement, para.62.

⁸⁴⁵ *Köbler* (n.184).

⁸⁴⁶ C-15/96 *Schoning-Koigebetopoulou* [1998] ECR I-47.

judgement, constituted a breach of EU law; he sought *Francovich* damages. The CJEU extended state liability, having found that the acts or omissions of a court of last instance in breach of Union law could give rise to liability and an obligation to repair loss.

I. The Construction of a Regime of State Liability from Francovich

It is clear from this brief outline of the jurisprudence that as EU law neither made provision for state liability generally nor for the conditions underpinning, the elaboration thereof necessarily fell to the CJEU⁸⁴⁷. Two dimensions of the reasoning of the AG and the Court – relevant to methodology generally, and comparison, in particular – can be identified, and permeate both the Opinions and the judgements in *Brasserie* and *Köbler*. Building on the outline of the elaboration of liability, the analysis which follows focuses on the very attribution of liability to the state and the specific elements of its obligation to make reparation of loss arising in respect of its breach. The diversity of national tort law rules – including the putative requirements of fault, causation, defences and the preclusion of concurrent liability – is reflected in the complexity of the CJEU’s explication and clarification of the specificities of the conditions of liability and the obligation to repair, that is, the variables delineating the duty and the scope for recovery. Thereafter, the CJEU’s identification and recognition of state liability as a principle of Union law is uncovered, and the scope for commonality and generality is explored⁸⁴⁸ in light of the interrelationship between national legal cultures and traditions, EU and international law. These two dimensions of analysis facilitate the subsequent exploration of the attempt to attribute coherence to the multi-level construct of state liability, the uncovering of the nature of the impact of the CJEU jurisprudence on the Europeanisation of private law and European integration, and identification of the division of tasks between the national and Luxembourg courts.

i. The Diversity of National Tort Law Rules as a Point of Departure: The Conditions of Liability

The CJEU initially left the determination of liability – in terms of the identification and application of the conditions underpinning and shaping the state’s obligation to compensate

⁸⁴⁷ Prechal, *Directives in EC Law* (n.215), p. 271.

⁸⁴⁸ The scope for a distinction between commonality and generality is explored in Chapter 8 and 9.

the injured party – to the domestic courts, in the context of the national order. Post-*Francovich*, it became necessary to clarify these conditions; they were explicated by the CJEU in *Brasserie*⁸⁴⁹ and elaborated upon in *Köbler*, as the doctrine of liability developed. Notwithstanding the putative clarity created, the CJEU’s jurisdiction and role has been a matter of contention; in particular, the German government asserted in *Brasserie* that the elaboration of the conditions of liability should fall to the Union legislature⁸⁵⁰. Moreover, and contrary to this assertion, there is support for the notion that the task is one which falls within the CJEU’s jurisdiction⁸⁵¹; both the AG and Court in *Brasserie*⁸⁵² engaged, in support of such an understanding, the predominantly judicial character of the development of state liability within the national context (where such liability exists)⁸⁵³, a determination which reflects the recognition in *Francovich* that “in many national systems the essentials of the legal rules governing state liability have been developed by the courts”⁸⁵⁴.

The broader issue is rather reflected in the notion that “the question is whether the rules on Community liability can be grafted to an embryonic system of national delictual liability; and if it is possible, whether it is desirable”⁸⁵⁵; that is to say, the concern arises in respect of the interrelation of the national and Union (and potentially, international) orders of liability, and the putative conflict arising therefrom. Where reparation for liability is recognised in the national legal systems, certain conditions are identifiable therein for the purposes of delineating the scope for liability, and where relevant, the subsequent quantification of damages. These determinations are reflective of national tort regimes, and thus, of national tort and compensation cultures, and necessarily differ between the Member States. Indeed, the German court in *Brasserie* referred the case to the CJEU in respect of the relevant conditions delineating liability, and particularly, that of fault as a pre-requisite. The AG recognised that “the individual States employ differing concepts” for the purposes of shaping liability and the obligation to repair⁸⁵⁶. The CJEU has taken the opportunity in the cases above, amongst others, to identify and elaborate upon the conditions of state liability; the following paragraphs examine these conditions in detail. In consensus with the AG, the Court

⁸⁴⁹ *Brasserie* (n.186), Judgement, para.51.

⁸⁵⁰ *Brasserie* (n.186), Judgement, para.24

⁸⁵¹ *Banks* (n.836), Opinion of AG van Gerven, paras.49 *et seq* and *Hedley Lomas* (n.842).

⁸⁵² *Brasserie* (n.186), Judgement, paras.24-25.

⁸⁵³ *Brasserie* (n.186), Judgement, paras.29-30.

⁸⁵⁴ *Francovich* (n.219), Judgement, paras.29-30.

⁸⁵⁵ R. Lane, ‘The Fisherman’s Tale: National Liability for Breaches of Community Law’ (1996) 1 *Edin.L.Rev.* 91, p.98.

⁸⁵⁶ *Brasserie* (n.186), Opinion of AG Tesauero, para.71.

in *Brasserie* made reference to the need for unlawful conduct, the existence of harm and a causal link⁸⁵⁷, and highlighting that limitations to liability cannot be stricter than those imposed under national law, assuming the principles of equivalence and effectiveness are satisfied; the applicable national norms should not make it “impossible or excessively difficult to obtain reparation”⁸⁵⁸. As it appears that there is no single context in which these rules are best explicated and applied, there is reference throughout the jurisprudence to the intertwinement of both the CJEU and national courts in the elucidation, explication and enforcement of the rights and remedies attributed to the individual. This “division of labour” is further explored below.

In respect of the damage arising from the breach, AG Tesauro referred to the notion that it should be real, i.e. certain and actual. Rejecting the submissions of the French government, he similarly dismissed the assertion that reference should be made to a number of conditions, in respect of the nature and extent of the damage, for the purposes of limiting the scope for reparation⁸⁵⁹, even though this might be the approach adopted in some of the Member States⁸⁶⁰. Rather, there was an apparent search for a common approach between the domestic systems; the AG noted that if a degree of commonality could be identified “that approach consists in not making compensation depend on the scale of the damage”⁸⁶¹. As to the heads of damage and the quantification of reparation, both the AG and the Court highlighted that these matters are generally for the national courts “in the absence of relevant Community provisions”⁸⁶² and in line with national procedural autonomy. Notwithstanding this division of competences, explored below in respect of its effect on the character of the regime, the national courts, bound by the principles of effectiveness and equivalence, must be obliged to ensure that all loss is repaired⁸⁶³. In the case itself, as the infringements of EU law were attributable to the legislature, neither in England nor Germany was compensation available; the fundamental issue therefore concerned whether a finding of liability on the legislature in respect of its own acts or omissions could establish an obligation on the part of the state to

⁸⁵⁷ *Brasserie* (n.186), Judgement, paras.59 *et seq.*

⁸⁵⁸ *Brasserie* (n.186), Judgement, para.74. In line with the limitation on procedural autonomy, C-33/76 *Rewe-Zentral* [1976] ECR 1989, Judgement, para.13.

⁸⁵⁹ A distinction is made between lawful and unlawful conduct, both in respect of the liability of states and of the Union, *Brasserie* (n.186), Opinion of AG Tesauro, para.96.

⁸⁶⁰ *Brasserie* (n.186), Opinion of AG Tesauro, para.93.

⁸⁶¹ *Brasserie* (n.186), Opinion of AG Tesauro, para.94.

⁸⁶² *Brasserie* (n.186), Judgement, para.83.

⁸⁶³ *Brasserie* (n.186), Opinion of AG Tesauro, paras.109-111 and Judgement, para.67.

compensate loss suffered⁸⁶⁴. With regard to the harm caused, neither in German nor in English law was the national legislature deemed to owe a duty of care to the general public so as to give rise to liability and an obligation to repair loss. The availability of damages for such loss is determined by legal rules but is similarly shaped by policy considerations; as such, there is broad potential for divergences across the national orders⁸⁶⁵. Pure economic loss was not deemed to be recoverable under the common law of negligence⁸⁶⁶ or Art.823, BGB, to the extent that it does not reflect a legally protected interest. On the facts of *Brasserie*, other Member States would have provided for such recovery; for example, under French law, Art.1382 *Code civil* as interpreted by the *Cour de cassation* and *Conseil d'État*, provided that pure economic loss must be understood as a protected interest, in respect of which a remedy is available⁸⁶⁷. The Court recognised recoverability for pure economic loss, acknowledging that infringements of Union law often lead to damage of such a nature⁸⁶⁸. While full reparation should generally be made, national rules limiting reparation might nevertheless apply⁸⁶⁹ and might similarly be recognised at the Union level. Thus, for example, while the identification of the causal link has always been considered to be a matter for the national court⁸⁷⁰, the principle of mitigation – that the “national court may inquire whether the injured person showed reasonable diligence” – is recognised at the EU level as common to the Member States⁸⁷¹. Other relevant factors might include time limits, the identification of the body obliged to make the reparation and more generally, the adequacy of the reparation⁸⁷².

With regard to fault, the Court highlighted that “as is clear from the case file, the concept of fault does not have the same content in the various legal systems” but that “certain objective and subjective factors” might be relevant in the determination of the serious nature of the

⁸⁶⁴ *Brasserie* (n.186), Opinion of AG Tesauro, para.35.

⁸⁶⁵ In particular, the “floodgate” argument is especially significant in English law.

⁸⁶⁶ *Spartan Steel & Alloys Ltd v. Martin & Co. (Contractors) Ltd* [1973] 1 QB 27. These general negations of availability of damages are subject to exceptions, including the right to recovery in English law for breach of a statutory duty; consider also the evolution of the case law in respect of the scope for the existence of a duty of care owed by public authorities in negligence – until *Anns v Merton London Borough Council* [1978] AC 728, reversed by *Murphy v Brentwood D.C.* [1991] 1 AC 398.

⁸⁶⁷ A.J.D.A. 1972 II Jur. 356 with the opinion of the *Commissaire du gouvernement*, M. Bertrand.

⁸⁶⁸ *Brasserie* (n.186), Judgement, para.87.

⁸⁶⁹ *Brasserie* (n.186), Judgement, para.84.

⁸⁷⁰ *Brasserie* (n.186), Opinion of AG Tesauro, para.97.

⁸⁷¹ *Brasserie* (n.186), Opinion of AG Tesauro, para.98 and Judgement, paras.84-85, as recognised in Joined Cases C-104/89-C-37/90 *Mulder v Council and Commission* [1992] ECR I-3061, Judgement, para.33.

⁸⁷² See European Commission, ‘Case Law of the CJEU Connected With Claims for Damages Relating to Breaches of EU Law by Member States’, Brussels, 15.07.2009, p.14-15.

infringement⁸⁷³. While noting that fault is a contentious issue, AG Tesauo in *Brasserie* held that “it must be acknowledged that most national systems still refer to fault as the basis for liability”⁸⁷⁴. In particular, reference was made to the decisions of the French⁸⁷⁵ and Italian courts, and the Spanish system as an exception⁸⁷⁶. In order to attribute to fault an increasingly objective as opposed to subjective understanding, the AG engaged with the divergent manner of the development of these norms in different cultures and traditions⁸⁷⁷. Thus, he noted that while fault “has ended up by losing every subjective connotation” in the systems of Belgium, Luxembourg, Portugal and Denmark, in England⁸⁷⁸, it is still deemed to be a subjective element of the unlawful act. The “increasingly objectified” understanding of fault was engaged by the CJEU in relation to the non-contractual liability of the Union, that is, as a basis upon which the unlawful conduct could be identified; the AG therefore considered that “there is no relevance in inquiring into the existence of fault as a subjective component of the unlawful conduct”⁸⁷⁹. As such, it was considered that the concept of fault, differing in its conception amongst the Member States - with reference to the Italian *illecito*, the French *faute*, the German *Verschulden* and the English concept of duty of care or misfeasance⁸⁸⁰ - could not be employed (the AG thus rendering an explicit answer to the German court) as a delineating variable of state liability as it derives from EU law, as it restricts liability to too great an extent⁸⁸¹. As the Court highlighted, in order to ensure the right to reparation is protected, “reparation of loss or damage cannot be made conditional upon fault (intentional or negligent)”⁸⁸²; the Court instead engaged the notion of the “serious nature” of the breach.

The CJEU has developed the notion of serious breach⁸⁸³ - understood as the state body’s manifest and grave disregard - as a means of determining the “wrong” nature of the act or

⁸⁷³ *Brasserie* (n.186), Judgement, paras.76-78.

⁸⁷⁴ *Brasserie* (n.186), Opinion of AG Tesauo, para.86.

⁸⁷⁵ For example, fault is required in French law, by virtue of Art.1382 *Code civil*.

⁸⁷⁶ The approach in the German domestic system is less clear; in BGHA 146, 153, the claim failed based on the absence of fault; in other cases, including BGHZ 74, 156, where the BGH looks more to the existence and nature of discretion.

⁸⁷⁷ *Brasserie* (n.186), Opinion of AG Tesauo, paras.86-87.

⁸⁷⁸ *Brasserie* (n.186), Opinion of AG Tesauo, paras.86-87, with reference to specific case law at fn.90.

⁸⁷⁹ *Brasserie* (n.186), Opinion of AG Tesauo, para.89, fn.92.

⁸⁸⁰ *Brasserie* (n.186), Opinion of AG Tesauo, fn.74.

⁸⁸¹ *Brasserie* (n.186), Judgement, para.79.

⁸⁸² *Brasserie* (n.186), Judgement, para.79.

⁸⁸³ *Hedley Lomas* (n.842). The case did not concern the exercise of discretion of the Member State; rather, where there is little or no discretion, the CJEU suggested that the very infringement of EU law could satisfy the “sufficiently serious” condition. However, this will not necessarily be the case, but be for the national court, as in C-424/97 *Haim v KVN* [2000] ECR I-5123. It has been asserted that the broader the discretion, the more difficult it is to establish that the breach is of a sufficiently serious nature, and vice versa; see Prechal, *Directives*

omission, where the Member State exercises broad discretion. The discretion provides a means by which policy considerations diverging across the Member States can be engaged, the extent of which will now dictate how easily the breach can be established⁸⁸⁴; generally, where there is reduced or no discretion on the part of the Member State, the condition will be satisfied by the mere infringement of EU law. The concept of “sufficiently serious” exists in a number of legal systems, albeit in different forms⁸⁸⁵. The test can be identified as having been transferred from the case law of the Court on non-contractual liability of the Union under Art.340 TFEU. The principles identified from this case law - based on, as explicitly stated in the Treaties, the national legal cultures and traditions – should be applicable in the context of reparation for the liability of the state “in like circumstances”, “in a comparable situation” and in “given equal situations”⁸⁸⁶. If this notion of “sufficiently serious” can be identified as common, the national courts will continue to enjoy a degree of flexibility, to the extent that a test stricter than the sufficiently serious breach test can be applied; notwithstanding, there is a lack of clarity as to the way in which this operates alongside the principle of uniform application of Union law across the Member States. It might be suggested that even if a higher standard is not adopted, the regime of state liability in respect of European law is understood to constitute a hybrid of national and European law; as Lane has noted “the instinct of the national courts will be to call upon principles that the judges know best...in order to determine what is a “sufficiently serious” breach of Community law”.

Previously – in respect of the establishment of Union liability – a distinction was drawn between administrative and legislative action; thus, a “flagrant violation of a superior rule of law” was required in respect of legislative breach⁸⁸⁷. In *Bergaderm*⁸⁸⁸ the CJEU neglected such a requirement, attributing less consideration to the administrative-legislative distinction

in *EC Law* (n.215), p.289. As non-implementation or defective implementation will be considered sufficiently serious, and as the Member States enjoy no discretion in respect of whether a directive should be implemented (and properly implemented), it might be argued that discretion cannot be understood to be decisive but one factor. This is recognised by AG Léger in *Köbler*; *Köbler* (n.184), Opinion of AG Léger, paras.132 *et seq*, esp. para.138.

⁸⁸⁴ The various factors relevant in this determination are set out - *Brasserie* (n.186), Judgement, paras.51, 55–56; following *Köbler*, these criteria also include non-compliance of a court of last instance with its duty to render a preliminary reference under Art.267 - *Köbler* (n.184), Judgement, para.55.

⁸⁸⁵ M. Künnecke, ‘Divergence and the Francovich Remedy in German and English Courts’ in S. Prechal and B. van Roermund (eds.), *The Coherence of EU Law: The Search for Unity in Divergent Concepts* (OUP, Oxford; 2008), pp.233-254, pp.243-249, and the cases cited therein.

⁸⁸⁶ As recognised in Lane, ‘The Fisherman’s Tale’ (n.855), p.102; *Brasserie* (n.186), Judgement, paras.42 and 47, and Opinion of AG Tesouro, para.68, respectively.

⁸⁸⁷ As established in Case 5/71 *Schöppenstedt v Council* [1971] ECR 975.

⁸⁸⁸ C-352/98 *Bergaderm v Commission* [2000] ECR I-5291.

and more to the three *Brasserie* conditions. Notwithstanding, the Court in *Köbler* elaborated upon the conditions set out in *Brasserie*⁸⁸⁹ and recognised the particular and potentially sensitive nature of liability arising from breach on the part of the judiciary, a consideration which suggests that the Court referred to the laws of the Member States, in light of the recognition of such liability only in a few systems⁸⁹⁰. With regard to this sensitivity and the need - per *res judicata* - for certainty, the Court expressed that the notion of “sufficiently serious breach”⁸⁹¹, with regard to the nature of the conduct of the body causing the harm, must be understood to establish a higher “standard” of infringement; thus, “state liability for an infringement of Community law by a decision of a national court...can be incurred only in the exceptional case where the court has manifestly infringed the applicable law”⁸⁹². Furthermore, it referred to an additional criterion applicable to establish liability arising from the acts or omissions of the national courts, namely, the non-compliance with the duty to make a preliminary reference⁸⁹³. While this determination remains for the national court, the Court seemingly aimed to provide some (apparently non-exhaustive) guidance as to relevant factors in the determination of the existence of a manifest infringement, noting that:

the degree of clarity and the precision of the rule infringed, whether infringement was intention, whether the error of law was excusable or inexcusable, the position taken, where applicable, by a Community institution, and non-compliance by the court in question with its

⁸⁸⁹ *Köbler* (n.184), Judgement, para.52.

⁸⁹⁰ The approaches and the determination of the serious nature differ. For example, in Dutch law, the liability for the incorrect application of the law (either national or EU) is very limited under Art.6.162 the *Burgerlijk Wetboek* Dutch Civil Code; broadly, there must be a breach (not necessarily manifest) of a fundamental principle, for example, as Wissink notes, Art.6 ECHR; M.H. Wissink, ‘Dutch Case Note’ (2005) 13 *ERCL* 419, p.422, citing amongst other cases, 18.03.2005, *RvdW Rechtspraak van de Week*, 2005, *State of the Netherlands v M and Others*. Further, in England, the Crown Proceedings Act 1947 indeed amended considerably the principle of sovereign immunity; yet s.2(5) of that same Act basically excludes the liability of the state in respect of the acts or omissions of the Crown in “discharging or purporting to discharge any responsibilities of a judicial nature vested in him”; the Austrian case of the *Verfassungsgerichtshof*, 13.10.2004, A5/04 – the non-referral to the CJEU did not constitute a manifest violation of EU law (in Sweden, the “reminder” to the national courts, following *Köbler*, of their obligation to make a reference, might suggest the contrary - ‘Swedish Law Relative to Preliminary Rulings from the EC Court’ 24.05.2006, *Svensk författningssamling*, 14.06.2006, SFS:502; cited in A. Rosas, ‘The European Court of Justice in Context- Forms and Patterns of Judicial Dialogue’ (2007) 1 *EJLS* (<<http://www.ejls.eu/2/24UK.pdf>>; Last Accessed: 03.03.2011), p.7.; in French law, the courts seemed to require “*faute lourde*” – as in *Conseil d’État*, 28.06.2002, *Ministre de la Justice v. Mr Magiera*; the “*faute lourde*” requirement will depend on the nature of the judicial activity, and also where the case falls within Art.6 ECHR.

⁸⁹¹ The various factors relevant in this determination are set out - *Brasserie* (n.186), Judgement, paras.51, 55–56. It is worth noting that the determination will of course, be for the national court. In the *Brasserie* case, returning to the national system, the *Bundesgerichtshof*, applying the conditions determined that conduct of the German state, amounting to breach, could not be deemed to give rise to a remedy - See *Zivilsachen* Bd. 134, p.30, *Entscheidung* der 24.10.1996; BGHZ 134, 30.

⁸⁹² *Köbler* (n.184), Judgement, para.35.

⁸⁹³ *Köbler* (n.184), Judgement, paras.55-56.

obligation to make a reference for a preliminary ruling....will be serious where the decision concerned was made in manifest breach of the case law of the Court of Justice in the matter⁸⁹⁴.

With reference to the final condition set out in *Brasserie*, the CJEU in *Francovich* merely referred to the notion of causation⁸⁹⁵; neither the AG nor the Court elaborated on the nature of the causal link or the way in which it should be identified. In *Brasserie*, the Court provided some additional specificity, noting that the link should be direct⁸⁹⁶. The concept of directness is one which must be considered in light of national norms; for example, in *Manfredi*, in respect of infringement of competition law norms, no reference was made to the need for a direct link but to the need to refer to domestic norms to identify “the detailed rules...including those on the application of the concept of ‘causal relationship’”⁸⁹⁷. The Court in *Brasserie* has adopted the same approach, noting that the identification of the causal link is for the national court on the basis of national law⁸⁹⁸. While the notion of “directness” can be found in most national legal orders⁸⁹⁹, and notwithstanding certain assertions to the contrary⁹⁰⁰, there does not appear to have been recognised an EU concept of causation.

While Van Gerven has drawn an analogy between the conditions elaborated in *Brasserie* and the French approach, in respect of Art.1382 *Code civil*, which, provides “[t]out fait quelconque de l’homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé à le réparer”, with reference to a causal link, fault, and the existence of damage, it is not necessarily clear from the Opinion that the approach formulated derives from a single legal culture or tradition (indeed, as noted above, fault is not required per the CJEU). Following *Brasserie*, it rather seems that the elaboration of the conditions (without explication of the content) was based on that deemed to be common; where no commonality could be identified, the CJEU will not engage the concept at the Union level as a common one. Thus, the national court should refer to that which is common where possible and where it is not, to national norms, in line with Union law.

⁸⁹⁴ *Köbler* (n.184), Judgement, paras.52 *et seq.*

⁸⁹⁵ *Francovich* (n.219), Judgement, para.37.

⁸⁹⁶ This finds support from the AG in *Köbler*: *Köbler* (n.184), Opinion of AG Léger, para.157.

⁸⁹⁷ Joined Cases C-295-298/04 *Manfredi* [2006] ECR I-6619, Judgement, para.64.

⁸⁹⁸ *Brasserie* (n.186), Judgement, paras.51-65.

⁸⁹⁹ A distinction can be drawn between actual and proximate causation.

⁹⁰⁰ N. Reich, ‘Horizontal Liability in EC Law: Hybridization of Remedies for Compensation in Case of Breaches of EC Rights’ (2007) 44 *CMLR* 705, pp.727-728.

In the absence of an explicitly common approach, deriving from the lack of provision in the Treaty structure and the CJEU's initial reluctance to provide guidance, and further, as a result of the national courts holding the reins in respect of the identification and delineation of liability and obligation to repair, the reach of liability has necessarily diverged across the Member States⁹⁰¹ undermining the scope for the recognition of an "EU-wide" remedy of damages in respect of harm arising from the infringement of Union law. Notwithstanding, the right to reparation for loss arising from breach is established as a right at the Union level, deriving from the recognition of state liability as a principle of Union law.

ii. From Diversity to Generality and Commonality: State Liability as a Principle of Union Law

For the better understanding of the interrelationship between national, Union and international law and the recognition of state liability as a principle of Union law, two key considerations arise: the scope for cross-referencing between areas of Union law and between international and EU law, and the recognition, in certain national cultures and traditions, of a "new" remedy arising from the recognition of state liability. As noted above, it could not have been said at the time of *Brasserie* or *Köbler* that reparation for loss would have been available in all national orders; thus, the CJEU judgement provided the foundations for the availability of a remedy either unknown or generally unavailable in a particular domestic legal system, in respect of breaches attributable to the national legislature, and subsequently, the national court. AG Tesauro highlighted in *Brasserie* that the issue had similarly been raised in *Factortame I*⁹⁰² and *Simmenthal*⁹⁰³, and further, that the Union legislature had previously been willing to introduce when "faced with a large variety of solutions in the Member States' legal systems... a system – which was certainly novel to a good many national systems – of damages..."⁹⁰⁴. The AG clearly recognised the diversity existing between the Member States and the potential impact of the CJEU's decision in the domestic context, which might "require the Member State concerned to adopt a judicial remedy not available under its legal system"⁹⁰⁵.

⁹⁰¹ W. van Gerven, 'Of Rights, Remedies and Procedures' (2000) 37 *CMLR* 501, pp.509-510.

⁹⁰² Re interim relief, C-213/89 *The Queen v. Secretary of State for Transport, ex parte: Factortame Ltd and others* [1990] ECR I-2433.

⁹⁰³ *Simmenthal* (n.776).

⁹⁰⁴ *Brasserie* (n.186), Opinion of AG Tesauro, para.46.

⁹⁰⁵ *Brasserie* (n.186), Opinion of AG Tesauro, para.14, paras.43-47.

In respect of the cross-referencing between areas of Union law, both the AG⁹⁰⁶ and the Court⁹⁰⁷ in *Brasserie* engaged with CJEU jurisprudence arising in other areas of EU law and particularly on that concerning the non-contractual liability of the Union⁹⁰⁸, the doctrine of which finds its basis in Art.340 TFEU (ex Art.215 EEC). The Treaty provision on non-contractual liability essentially afforded the legislative basis for the use of comparative analysis by the CJEU, providing that “in the case of non-contractual liability, the Union shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties”. AG Tesauro⁹⁰⁹ asserted – in fact, he stated it was “not acceptable”⁹¹⁰ - that the criteria for determining the obligation to make reparation might diverge depending on whether the body infringing EU law is an EU or a state institution; the level of protection afforded to individuals should not diverge⁹¹¹. Without having engaged in explicit comparative evaluation, Tesauro cited a comparative study of the national laws on the enforcement of Union law⁹¹². The AG evidently, while not explicit in the text, engaged comparative analysis, making an admittedly “a rapid appraisal of the rules in force in the national legal systems on liability on the part of public authorities ...” noting that “the substantive preconditions for liability are more or less the same everywhere”⁹¹³, namely unlawful conduct - the notion of a sufficiently serious breach⁹¹⁴ (in respect of the state’s

⁹⁰⁶ *Brasserie* (n.186), Opinion of AG Tesauro, paras.61 *et seq.*, with reference to “the general principles common to the laws of the Member States” an considering, “the absence of a uniform set of rules in this field, a useful frame of reference for common rules on State liability”; para.61.

⁹⁰⁷ *Brasserie* (n.186), Judgement, para.42 – “the conditions under which the State may incur liability for damage caused to individuals by a breach of Community law cannot, in the absence of particular justification, differ from those governing the liability of the Community in like circumstances”. Van Gerven also makes a broad claim for engagement with the non-contractual liability of the Union case law, van Gerven, ‘Of Rights, Remedies and Procedures’ (n.901), p.511.

⁹⁰⁸ In particular, Joined Cases 83, 94/76-4, 15 and 40/77 *Bayerische HNL v Council* [1978] ECR 1209, at *Brasserie* (n.186), Judgement, paras.28–43.

⁹⁰⁹ *Brasserie* (n.186), Opinion of AG Tesauro, paras.61 *et seq.*, with reference to “the general principles common to the laws of the Member States” an considering, “the absence of a uniform set of rules in this field, a useful frame of reference for common rules on State liability”; para.61.

⁹¹⁰ *Brasserie* (n.186), Opinion of AG Tesauro, para.66.

⁹¹¹ Essentially he argues “...I consider that there is no reason for applying different criteria – naturally in like situations – depending on whether the infringement of Community law in question is attributable to a State or Community institution”; *Brasserie* (n.186), Opinion of AG Tesauro, para.67.

⁹¹² The Reports of the 1992 FIDE Congress: Volume II, ‘La sanction des infractions au droit communautaire’ (FIDE, Lisbon; 1992), at fn.73.

⁹¹³ *Brasserie* (n.186), Opinion of AG Tesauro, para.53.

⁹¹⁴ *Hedley Lomas* (n.842). The case did not concern the exercise of discretion of the Member State; rather, where there is little or no discretion, the CJEU suggested that the very infringement of EU law could satisfy the “sufficiently serious” condition. However, this will not necessarily be the case, but be for the national court, as in *Haim* (n.883). It has been asserted that the broader the discretion, the more difficult it is to establish that the

manifest and grave disregard for the limits of its discretion⁹¹⁵) - on the part of the body causing the damage, the existence of harm, and a causal link⁹¹⁶. His conclusion as to the potential similarity of the national “general conditions for liability” reflects a focus on and comparison of (although perhaps a limited one, looking only to identify similarities) national norms, for the purposes of “enabling a common definition to be found of the conditions in question”⁹¹⁷.

Detailing the conditions underpinning the obligation to repair, the Court similarly engaged its own jurisprudence on the non-contractual liability of the Union, referring to the “general principles common to the laws of the Member States, from which, in the absence of written rules, the Court...draws inspiration”⁹¹⁸. While it engaged no direct comparative analysis of the national laws, the reference to the non-contractual liability jurisprudence established an indirect connection. The Court, following the proposal of AG Mischo in *Francovich*, attempted to bring together and intertwine the rules on state and Union liability, to the extent that “the conditions under which the State may incur liability for damages caused to individuals by a breach of Community law cannot, in the absence of particular justification, differ from those governing the liability of the Community in like circumstances”; it recognised the significance of the consistent protection of rights which “cannot vary depending on whether a national authority or a Community authority is responsible for the damage”⁹¹⁹. It is worth noting that since *Brasserie*, the conditions upon which the obligation to make reparation in respect of state and Union liability have become almost identical⁹²⁰, there having been a clear process of cross-referencing between both bodies of law. While AG Léger has spoken of “an alignment between the two systems” in *Köbler*⁹²¹, one important distinction must be drawn in respect of the understanding of the state institution whose acts or

breach is of a sufficiently serious nature, and *vice versa*, Prechal, *Directives in EC Law* (n.215), p.289. As non-implementation or defective implementation will be considered sufficiently serious, and as the Member States enjoy no discretion in respect of whether a directive should be implemented (and properly implemented), it might be argued that discretion cannot be understood to be decisive but one factor; see C-472/00 P, *Commission v. Fresh Marine AS* [2003] ECR I-7541.

⁹¹⁵ The various factors relevant in this determination are set out - *Brasserie* (n.186), Judgement, paras.51, 55–56; following *Köbler*, these criteria also include non-compliance of a court of last instance with its duty to render a preliminary reference under Art.267 - *Köbler* (n.184), Judgement, para.55.

⁹¹⁶ *Brasserie* (n.186), Opinion of AG Tesauro, para.53.

⁹¹⁷ *Brasserie* (n.186), Opinion of AG Tesauro, para.54.

⁹¹⁸ *Brasserie* (n.186), Judgement, para.41.

⁹¹⁹ *Brasserie* (n.186), Judgement, para.42.

⁹²⁰ T. Tridimas, ‘Liability for Breaches of Community Law: Growing Up and Mellowing Down’ (2001) 38 *CMLR* 301.

⁹²¹ *Köbler* (n.184), Opinion of AG Léger, para.127.

omissions are of relevance; this concerns the conceptualisation of the state, the determination of which is reflected in the CJEU's reference to international law, in comparison with national and Union norms.

The determination of the bodies, in respect of whose acts and omissions the state can be deemed to be liable, is a constitutional issue, essentially concerning the scope and “unity” of the state⁹²². The AG in *Brasserie* considered that in order to determine the institutions in respect of which liability might arise, it was necessary to conceptualise the meaning of the state. For this purpose, he referred to international law⁹²³ and with regard to the liability of different bodies, the recognition by the French *Conseil d'État* of the liability of administrative bodies acting, on the basis of domestic law, contrary to EU law⁹²⁴. Similarly, the Court in *Köbler* considered that in order to determine whether the institutions of the judiciary might be conceived as falling within the category of “state institution”, it was necessary to conceptualise the meaning of the “state”. It looked to international law⁹²⁵, in which liability arises from the state as it is understood as a single entity, irrespective of whether the breach generating loss is attributable to the legislature, the judiciary or the executive. It was deemed that this principle must apply *a fortiori* in the Community legal order⁹²⁶. In addition, under the broad banner of international law, the Court further referred to the jurisprudence of the ECtHR for the purposes of attributing further foundation to the imposition of state liability for the acts or omissions of the highest domestic courts; the ECtHR has recognised that an obligation to repair loss can arise in respect of breaches arising from the acts or omissions of the supreme courts⁹²⁷. Similarly, AG Léger engaged in a comparison between EU and international law, with explicit reference to legal scholarship⁹²⁸, legal doctrine⁹²⁹ and case law⁹³⁰, for the purpose of developing the scope for bridging gaps between different areas of laws and different legal orders; he recognised that in the absence of an EU understanding of

⁹²² W. van Gerven, J. Lever and P. Larouche, *Cases, Materials and Text on National, Supranational and International Tort Law* (Hart, Oxford; 2nd edn., 2000), p.392. See also, Claes, *The National Courts' Mandate in the European Constitution* (n.824), pp.301-313.

⁹²³ *Brasserie* (n.186), Opinion of AG Tesauro, para.38 and fn.42.

⁹²⁴ *Brasserie* (n.186), Opinion of AG Tesauro, para.42 with reference to the Judgement of 28.02.1992, *Arizona Tobacco Products*, (1992) AJDA 210.

⁹²⁵ *Köbler* (n.184), Judgement, para.32.

⁹²⁶ *Köbler* (n.184), Judgement, paras.33-34.

⁹²⁷ *Köbler* (n.184), Judgement, para.49, citing *Dulaurans v. France* of 21.03.2000, (2001) 33 EHRR 45.

⁹²⁸ *Köbler* (n.184), Opinion of AG Léger, para.45.

⁹²⁹ *Köbler* (n.184), Opinion of AG Léger, paras.42-44.

⁹³⁰ *Köbler* (n.184), Opinion of AG Léger, fns.46-47.

the “unity of the state”⁹³¹, reference could be made to international law, moving beyond the “system of the Treaty”⁹³². The cases reflect the willingness of the CJEU to engage, in the absence of an EU provision, with the scope for the transfer of concepts (in this case, of the state), not only between areas of Union law, but similarly, between international, Union, and thereafter, necessarily, the national orders.

Building on this consideration, AG Léger analysed in *Köbler* the divergent national approaches to the imposition of liability for the acts of the judiciary. While he did not explicitly set out the applicable norms of the different Member States, an examination of the relevant national provisions is evident; in particular, reference to French scholarship (reflecting the influence of AG Léger’s own legal culture and tradition) led AG Léger to conclude that state liability for the acts and omissions of the judiciary must have been understood as “already implied” in the *Brasserie* decision⁹³³. Further, a more developed “comparative legal analysis”⁹³⁴, which encompassed a consideration of legislation and case law, of similarities and divergences and, further, of the impact in the national orders of European adjudication generated via the preliminary reference procedure, is identifiable in the Opinion. Similarities and differences were identified; in particular, consideration was made of those systems (namely, the UK and the Netherlands) in which a finding of liability was limited to breaches of rules of a fundamental nature (including Art.5 ECHR, deprivation of liberty, and Art.6 ECHR, right to a fair hearing), those systems in which no distinction is made as to the nature of the rule breached and those (including Austria and Sweden) in which liability arises only in respect the acts and omissions of ordinary courts, to the exclusion of supreme courts⁹³⁵.

On this basis and despite the fact that such liability could not be established in all orders, AG Léger recognised state liability as a general principle of Union law, legitimising the recognition of such a principle where absolute commonality between the relevant cultures and traditions could not be established. He considered that as “it is settled case law...that Court does not require that the rule be a feature of all the national legal systems”, it is no barrier to recognition of a principle of Union law that the manner and scope of the rules might differ in

⁹³¹ *Köbler* (n.184), Opinion of AG Léger, para.44.

⁹³² *Köbler* (n.184), Opinion of AG Léger, para.42, citing *Brasserie* (n.186), Judgement, para.31.

⁹³³ *Köbler* (n.184), Opinion of AG Léger, para.51 and 52.

⁹³⁴ *Köbler* (n.184), Opinion of AG Léger, para.82.

⁹³⁵ *Köbler* (n.184), Opinion of AG Léger, paras.77-81.

the national systems⁹³⁶. Having recognised that there existed considerable support across the Member States for the notion that individuals should be able to seek reparation for injury incurred as a result of the acts of the courts, AG Léger asserted that “the principle of State liability for the acts or omissions of supreme courts can be acknowledged as a general principle of Community law”⁹³⁷. Similarly, the Court’s rationale for its recognition of state liability for breaches arising from the acts and omissions of judicial bodies also derived from a comparative analysis. While there was no explicit reference to the national norms in the text of the judgement, the Court did seem to consider the approaches in the domestic orders to liability arising in respect of the erroneous decisions of the domestic courts, and recognised the scope for liability in the absence of commonality in all orders. That is to say, it considered that “the application of the principle of state liability to judicial decisions has been accepted in one form or another by most of the Member States”⁹³⁸.

Indeed, AG Léger afforded a level of abstraction to his reasoning in *Köbler* by highlighting the existence of national and European courts operating “at the crossroads of a number of legal systems”⁹³⁹. He considered that one of the most significant questions concerned the level, either the national or the European, at which the “definition of the substantive conditions determining such liability” should be explicated. Here, he explicitly advocated a mixture of national and European law; he noted, with support deriving from previous case law⁹⁴⁰, that for the purposes of promoting the effective judicial protection of rights, reference neither to European nor to national law alone is sufficient as the rights derive from EU law and must be engaged at the national level. The AG’s broad acceptance of the notion of mixture as a starting point for understanding the development of the Union system is significant and can be said to underpin what has been deemed to be “the progressive development of a ‘Community judicial ethic’”⁹⁴¹. This notion might indeed reflect the emergence of a European judicial identity, which has the potential to affect also the way in which the national courts must necessarily operate as European courts, or rather as a hybrid of a national and European court. Via *Von Colson*⁹⁴², *Simmenthal*⁹⁴³, *Marleasing*⁹⁴⁴ et al it

⁹³⁶ *Köbler* (n.184), Opinion of AG Léger, para.85.

⁹³⁷ *Köbler* (n.184), Opinion of AG Léger, para.85.

⁹³⁸ *Köbler* (n.184), Judgement, para.48.

⁹³⁹ *Köbler* (n.184), Opinion of AG Léger, para.53.

⁹⁴⁰ *Brasserie* (n.186), Opinion of AG Tesauro, para.49.

⁹⁴¹ *Köbler* (n.184), Opinion of AG Léger, fn.51.

⁹⁴² *Von Colson* (n.778).

⁹⁴³ *Simmenthal* (n.776).

might arguably be deemed that the national judge must undertake a comparison of his own domestic law with that which is established at the EU level, in order to dis-apply or amend national law in line with EU law in those cases in which conflicts arise. In respect of state liability, this might arise, for example, in respect of the non-availability of a remedy, reflected in the absence of an obligation to repair loss. With a particular focus on French and German case law, the AG in *Köbler* has illustrated that the national courts have engaged with this role even in an *ex officio* manner⁹⁴⁵, where the effective protection of rights, recognised as a general principle of Union law arising from the “constitutional traditions common to the Member States...also laid down in Articles 6 and 13 of the ECHR”⁹⁴⁶, is afforded significance.

As noted above, there is a clear reference, particularly in the Opinions of the AGs but also in the judgements of the Court in *Brasserie* and *Köbler*, of the scope for the transfer of norms – for example, of the conditions of liability and of the understanding of the unity of the state – from one area of EU law to another, and between the international, Union and national spheres. Building on the approach in *Brasserie*, Léger referred in *Köbler* to the transfer of developments between different areas of the law, noting that the conditions underpinning the obligation to repair and the CJEU’s previous jurisprudence could be “fully transferable”⁹⁴⁷ from one area of law (liability arising from the acts or omissions of the legislature) to another (liability arising from the acts or omissions of the judiciary), justified by the CJEU’s broad systemising interpretation, and the effective protection of individual rights. These processes are not recognised as mere transfer; indeed, AG Léger has asserted that there is a need for more than mere transposition – of, for example, the conditions – from one context to another⁹⁴⁸ “because of the specific nature of the judicial function”⁹⁴⁹. Indeed, an additional dimension is necessary, which could amount to a process like cross-referencing, undertaken in consideration of the need for system and coherence across EU law; consideration of the cultural, socio-economic and political contexts in which the norms are and will be applicable, in light of the nature of the judicial function, is identifiable. Divergent understandings of

⁹⁴⁴ *Marleasing* (n.393).

⁹⁴⁵ *Köbler* (n.184), Opinion of AG Léger, fns.72-73.

⁹⁴⁶ *Köbler* (n.184), Opinion of AG Léger, para.67.

⁹⁴⁷ *Köbler* (n.184)Opinion of AG Léger, para.36.

⁹⁴⁸ *Köbler* (n.184), Opinion of AG Léger, para.122. Indeed, he recognised, the transfer might be more easily undertaken in respect of certain conditions than others (for example, concerning the nature of the rule infringed, he rejected the notion that there should be a distinction drawn in respect of hierarchy of norms; *Köbler* (n.184), Opinion of AG Léger, paras.122-129.

⁹⁴⁹ *Köbler* (n.184), Opinion of AG Léger, para.122.

comparative analysis are identifiable in the Opinions of the AGs and judgements of the Court. A variety of sources of law – national law, EU law, the ECHR, and international law – are identified as being relevant; the identification of these norms is only possible through an engagement, on the part of the CJEU – although, as is clear from the above analysis, predominantly on the part of the AG – of the comparative methodology. The engagement with comparative analysis differs between the cases; it is neither limited to a consideration of national laws nor to a finding of commonality or difference for the purpose of facilitating uniformity, by virtue of the promotion of the former and repression of the latter (for the purposes of which, it seems, as explored above, comparative analysis is largely – although not exclusively – engaged).

From the analysis of the jurisprudence, and of the specificities underlying state liability, it becomes clear that the CJEU has not constructed a uniform scheme of reparation for state liability arising from a breach of EU law. Instead, it has recognised state liability as a principle of Union law and set out three basic conditions delineating liability, the determination of the satisfaction of which is left to the national courts, applying the relevant norms specific to the domestic legal order in line with Union law.

II. The Establishment and Enforcement of Liability: State Liability as a Multi-Level Construct

The following section examines the interactions between national, EU and international law, considering the multi-level nature of the regime of state liability within the broader context of the European legal order, and the endeavour to promote coherence, in respect of the division of labour and the protection of rights at the national level.

i. The Interrelation of the European and National Courts: European Rights and National Remedies

The idea that European law should constitute a coherent system of rights and remedies is a judicial construction which permeates the “division of labour” between the national and European courts (explored below) and which finds one significant dimension in the CJEU’s recognition of the need to ensure effective judicial protection of individuals; the Treaties do

not provide for such an understanding. Notwithstanding, the Treaty structure requires the Member States adhere to and comply with primary and secondary Union law. This not only requires that the Member States do not act or omit to act in such a way as to breach Union law but also that national courts ensure, by virtue of national law, that individuals can invoke the rights they obtain from Union law⁹⁵⁰. The Member States are required by virtue of Art.4 TEU to take all measures necessary to ensure that obligations arising from EU law can be fulfilled, and by virtue of Art.29(1) TFEU, to ensure that EU law is implemented by any measure of national law the adoption of which is deemed necessary. The national courts must ensure that individuals can pursue claims before them; this is clear from *Johnston*, in which the Court held that “the requirement of judicial control...reflects a general principle of law which underlies the constitutional traditions of the Member States”⁹⁵¹. This is ultimately safeguarded by the Luxembourg Court; the CJEU concluded in *Brasserie* and *Köbler*, in respect of its jurisdiction in the elaboration of the conditions of liability, that ultimately “...it falls to the Court to review the degree of adequacy of the protection afforded by the national legal systems”⁹⁵². Even where Union law makes no explicit provision, the Court must, in line with its Treaty obligations, provide judgement on the basis of the “generally accepted methods of interpretation, in particular with reference to the fundamental principles of the Community legal system and, where necessary, general principles common to the Member States”⁹⁵³.

Indeed, *Francovich* has been characterised as a piece in the “judge-made jigsaw of protection”, where there is a need for the judiciary to ensure protection which is otherwise unavailable due to the limits of Union and national law and the deficiencies that might arise in respect of the duty to interpret national law in line with Union law⁹⁵⁴, and furthermore, the absence of the direct effect of directives⁹⁵⁵. While at its core *Brasserie* concerned the

⁹⁵⁰ C-222/84 *Johnston* [1986] ECR I-1651, Judgement, para.1683.

⁹⁵¹ *Johnston* (n.950), Judgement, para.1683. That is, in respect of discrimination claims in relation to Art.6 Directive 76/207, Member States must take measures to ensure that individuals can pursue claims before the national courts.

⁹⁵² *Brasserie* (n.186), Opinion of AG Tesauro, para.14, paras.43-47.

⁹⁵³ The invocation of “where necessary”, to which AG Tesauro made no reference, arguably reflects the Court’s reluctance to engage in a distillation of principles via the comparison of norms applicable across the national cultures and traditions; *Brasserie* (n.186), Judgement, para.27.

⁹⁵⁴ M. Ross, ‘Beyond *Francovich*’ (1993) 56 *MLR* 55, p.55.

⁹⁵⁵ The formulation of the two questions of the Italian court reflect the direct effect issue in general; the first question concerned the direct effect of the directive while the second question concerned the liability of the state, as an alternative, in the case that the directive could not be relied upon against the state directly

development of state liability, it also highlighted, following *Francovich*⁹⁵⁶, the consequences of the absence of the direct effect of directives and the need to ensure effective judicial protection: "the obligations of the Member States and of the Community institutions are directed above all, in the system which the Community system has sought and sets out to be, to the creation of rights of individuals"⁹⁵⁷. State liability, and the obligation of states to compensate for loss arising from an infringement of Union law, is characterised as a concern of individual rights, that is, as the protection of (a right of) the individual, established at the Union level and subsequently invoked at the national level⁹⁵⁸. The recognition of the legal protection of the rights of individuals in the Treaty and the need to ensure effective judicial protection per Art.267(3) TFEU - giving rise to the notion that "individuals cannot be deprived of the possibility of rendering the state liable in order in that way to obtain legal protection of their rights"⁹⁵⁹ - further provides the basis for the extension of state liability to the highest national courts by the Court in *Köbler*, which acknowledged that, as a court of last instance, the supreme court provides the final opportunity for the protection of individual rights (in the sense that there is no scope for "correction" following its decision).

The reference to the protection of the individual might be conceived differently and be determined by reference to diverse factors of a substantive and factual nature across the European space⁹⁶⁰; thus, the effect of individual rights established in the national orders⁹⁶¹ - whether by virtue of Union directives, or by the national legislation transposing the EU legislation - might differ between the Member States. An example of this broad divergence can be identified in the recognition of rights giving rise to remedies in the civilian tradition (to the extent that it might be said that there exists no distinct category of remedies⁹⁶²), compared to the system of causes of action⁹⁶³ from which remedies are derived in the common law. As such, the distinction (at least initially) drawn at the EU level can be said to be more "at home"

⁹⁵⁶ *Francovich* (n.219), Judgement, para.11.

⁹⁵⁷ *Francovich* (n.219), Opinion of AG Tesouro, para.39.

⁹⁵⁸ *Francovich* (n.219), Judgement, para.40 and *Brasserie* (n.186), Judgement, para.51.

⁹⁵⁹ *Köbler* (n.184), Judgement, para.36.

⁹⁶⁰ Consider, M. Ruffert, 'Rights and Remedies in European Community Law: A Comparative View' (1997) 34 *CMLR* 307, pp.325-327.

⁹⁶¹ In this context, one might also engage with the notion of the identity of the individual.

⁹⁶² Consider, for example, the German approach: Zentrum für Europäisches Wirtschaftsrecht, *Vorträge und Berichte* (U.Bonn, Bonn; 1993), p.9.

⁹⁶³ M. Brealey and M. Hoskins, *Remedies in EC Law - Law and Practice in the English and EC Courts* (Sweet and Maxwell, London; 1994), pp.75 *et seq.* They suggest that the possible causes of action are: (1) misfeasance in public office; (2) breach of statutory duty; (3) innominate tort; and (4) negligence. See also the cases of *Garden Cottage Foods v. Milk Marketing Board* [1984] AC 130 and *Bourgoin v. MAFF* [1985] 3 All ER 585, in which the courts look to identify the relevant cause of action.

in the latter "introducing at the continental level a style of legal thinking which was characteristic of common law rather than civil law systems"⁹⁶⁴. In principle, rights and remedies might be considered separately while in reality, there is a clear interaction between the two. The rights and remedies discussion, and the considerations falling within each (apparently distinct) category, should be anchored in the context of the cultures and traditions of the Member States, of the Union and where relevant, the international law context.

Francovich and subsequent cases have had a considerable impact on the national legal cultures and traditions. Notwithstanding the recognition of state liability as a principle of Union law, the diversity of national norms, outlined above, dictates that the effects of the CJEU jurisprudence may not be identical across the national orders. There is an interlacing of international, European and national norms in respect of the recognition of state liability, and interaction between the European and national courts with regard to the availability of the remedy. The CJEU only provides for the basic conditions underlying the establishment of liability and the availability of the remedy; its provision and enforcement is for the national court, in line with Union law. Consequently, the implementation of the state liability regime, and the system of remedies may differ between national cultures and traditions. With reference to the relevant national context of *Brasserie*, a clear divergence can be identified in the English and German orders, shaping the interaction between national, Union and international law⁹⁶⁵. In the German system, state liability arising from breach of EU law is distinguished from state liability generally (per Art.34 *Grundgesetz*). The remedy arising from the former is therefore understood to be European, and the latter, national; distinct European and national heads⁹⁶⁶ of tort liability are therefore identifiable⁹⁶⁷. In the English system, prior to *Francovich*, the courts considered liability for breach of EU law to derive as a breach of a statutory duty per the European Communities Act 1972⁹⁶⁸. On this basis, state

⁹⁶⁴ R. Caranta, 'Judicial Protection Against Member States: A New *ius commune* Takes Shape' (1995) 32 *CMLR* 703, p.717.

⁹⁶⁵ Further, Künnecke, 'Divergence and the *Francovich* Remedy in German and English Courts' in Prechal and van Roermund, *The Coherence of EU Law*, (n.885), pp.233-254.

⁹⁶⁶ The conditions for liability as mentioned above, discussed under the *Brasserie* case – Art.34 *Grundgesetz* and Art.839 BGB.

⁹⁶⁷ BGH BGHZ 146, 153 14.11.2000 (a case of *Fleischhygienegesetz* – the BGH looked to both EU and national heads of tort, finding that no breach of EU law had occurred – the Court also negated to make a reference to the CJEU; then looked to the conditions under national law, ultimately finding that fault could not be established.

⁹⁶⁸ *Garden Cottage Foods Ltd v Milk Marketing Board* [1984] AC 130.

liability was integrated into national law, corresponding to a breach of a statutory duty⁹⁶⁹. One potential impact in the domestic order has arisen where no remedy has been recognised for state liability or where the remedy available has been more limited than that envisaged at the Union level for the protection of the right. As anticipated by AG Tesauro in *Brasserie*, the CJEU's development of state liability has led to the adoption of a remedy otherwise unavailable in many national systems⁹⁷⁰. Such a development might be understood as a transfer of a remedy from the European level to the national, piercing the principle of the "remedial autonomy" of the Member States⁹⁷¹. The impact may not amount to the recognition of an entirely new remedy; rather, as Van Gerven considers, existing national remedies might be developed to ensure the satisfactory protection of the Union right⁹⁷². That is to say, the national remedial norms themselves will be amended, in light of Union and international norms, to provide for what is required at the Union level⁹⁷³.

Regardless of their specificities, national rules must be applied in a way that is compatible with the aims of EU law. As such, where national law would otherwise limit liability or the availability of the remedy to an extent greater than that anticipated at the Union level, it must be interpreted and applied in light of the objectives of Union law. Such consequences can be identified in respect of *Traghetti*⁹⁷⁴, in which the CJEU provided that where loss arises from the acts or omissions of the state (in this case, the judiciary), national legislation which dictates that damages are unavailable in respect of loss arising from a national court's breach of EU law deriving from the interpretation of legal provisions, of facts or of evidence, or which provides for serious fault as a requirement, cannot be maintained. Furthermore, the CJEU has rejected that certain heads of damage – namely, loss of profit – can be excluded entirely. This determination is exemplified in respect of the English rules excluding the availability of reparation for pure economic loss; these include, as expressly stated by the Court, rules which provide for the "total exclusion of loss of profit"⁹⁷⁵. Other provisions which might limit the scope for liability – for example, those found in Art.839 BGB and

⁹⁶⁹ Künnecke, 'Divergence and the Francovich Remedy in German and English Courts' in Prechal and van Roermund, *The Coherence of EU Law*, (n.885), p.242; *Three Rivers District Council and Ors v Bank of England* [2001] UKHL 16 (the House of Lords decided not to make a reference to the CJEU).

⁹⁷⁰ *Brasserie* (n.186), Opinion of AG Tesauro, para.14.

⁹⁷¹ Consider, C-158/80 *Rewe* [1981] ECR I-1805, Judgement, para.44, which highlights the notion of remedial autonomy, and the recognition of the CJEU that where no remedy exists in national law, the remedy has to be introduced, C-432/05 *Unibet* [2007] ECR I-2271, Judgement, para.41.

⁹⁷² van Gerven, 'Of Rights, Remedies and Procedures' (n.901), p.517.

⁹⁷³ N. Reich, 'Hybridisation of Remedies' (2007) 44 *CMLR* 705, pp.708-9.

⁹⁷⁴ *Traghetti* (n.761).

⁹⁷⁵ *Brasserie* (n.186), Judgement, para.87.

Art.34 Grundgesetz – which provide that the obligation to repair will arise only where the duty breached is referable to a third party⁹⁷⁶, must be deemed inapplicable for the reason that their application would undoubtedly undermine the effectiveness of the protection afforded to the individual; the Court recognised that in respect of Union law, the duty may not necessarily (and will not generally) be referable to a third party, neither to an individual nor to a class of individuals, and will thus rarely satisfy this requirement⁹⁷⁷. Thus, following *Brasserie*, national rules which "generally limit[s] the obligation to make reparation to damage done to certain, specifically protected individual interests" or those which might make it "impossible or extremely difficult to obtain effective reparation for loss or damage resulting from a breach of Community law" cannot remain applicable⁹⁷⁸.

Consequent to *Francovich*, and the cases following, the CJEU has increasingly rendered interpretations which potentially impact what were previously wholly national norms providing for national remedies; it has arguably become engaged in a process of Europeanisation not limited to the interpretation of substantive rules, but also making inroads into national systems of civil procedure⁹⁷⁹. This can be identified broadly in the assertion that the predominant consequence of *Francovich* is to establish a new European remedy of damages, albeit one which is to be provided for at the national level, similar to the way in which the first *Factortame* case gave rise to the possibility of a injunction, i.e. interim relief⁹⁸⁰. Thus, the CJEU seems to have little hesitation in adopting such "interventionist" steps where they are deemed necessary for the purposes of ensuring that the rights of individuals are protected. The interpretative statements of the CJEU have, as Dougan notes, created spillover effects in national systems giving rise to concerns that "Union law is interfering with the local, political, social and cultural preferences embodied in the national systems of judicial protection, which command greater legitimacy than choices made by the Court of Justice, and should not be reduced to the status of mere obstacles to the greater effectiveness and uniform application of the Treaty"⁹⁸¹. Notwithstanding, the CJEU

⁹⁷⁶ See, for example, BGHZ 56, 40.

⁹⁷⁷ *Brasserie* (n.186), Opinion of AG Tesauero, para.4.

⁹⁷⁸ *Brasserie* (n.186), Judgement, paras.71 and 73. See also C-470/03 *AGM-COS.MET* [2007] ECR I-2749, Judgement, para.90.

⁹⁷⁹ This will be discussed in greater detail in the case example on the *ex officio* application of directives.

⁹⁸⁰ *The Queen v. Secretary of State for Transport, ex parte: Factortame* (n.902).

⁹⁸¹ M. Dougan, 'The Vissicitudes of Life at the Coalface: Remedies and Procedures for Enforcing Union Law Before the National Courts' in P.P. Craig and G. de Búrca (eds.), *The Evolution of EU Law* (OUP, Oxford; 2nd edn., 2011), pp.407-438, p.417, citing *M v Home Office* [1994] 1 AC 377, in respect of the influence of the *Factortame* decisions.

maintains broadly that the provision of the remedy is a determination for the national court to be undertaken in the context of the domestic culture and tradition, in line with the application of domestic procedural rules; the court must nevertheless interpret and apply these norms in line with Union law. The alternative approach for the CJEU would be to create a judicial order of rights and remedies, operating on the basis of a harmonised set of EU procedural rules⁹⁸². As is clear from above, it does not seem willing to go so far but rather provides for the “division of labour” between the national and European courts.

ii. The Articulation of the Judicial Division of Labour and the Bridging of National, Union and International Law in the Name of Coherence

Essentially, the Union system lacks an enforcement mechanism. As such, it must “defer in the first instance to the existing domestic judicial systems for the decentralised enforcement of Treaty norms”⁹⁸³. The absence of EU norms, and especially of rules of enforcement, invokes the principle of procedural autonomy⁹⁸⁴; the principle is expressed in *Francovich* and dictates that where Union law does not make provision for rules, it is for the Member States to set out the norms governing the procedural dimensions of legal proceedings in which individuals endeavour to invoke their Union rights before the national courts⁹⁸⁵. Essentially, it is for the national courts, applying domestic law, to ensure subjective EU rights can be invoked and enforced, in line with the principles of equivalence and effectiveness⁹⁸⁶. The distinction between substance and procedure is also relevant in respect of the jurisdiction, role and interaction of the national and European courts. On the one hand, procedural autonomy and the role reserved for the national courts in applying national law in a manner compatible with EU law can be said to “cushion” the impact of EU law on Member States⁹⁸⁷. On the other hand, the interaction between the national and European courts – facilitated broadly by the preliminary reference procedure – has rendered the boundary between substance and

⁹⁸² For a more in-depth discussion see, M.E. Storme, ‘Harmonisation of Civil Procedure and its Interaction With Substantive Private Law’ in X. Kramer & R. van Rhee (eds.), *Civil Litigation in a Globalizing World* (TMC Asser Press, the Hague; 2012), p.141-156.

⁹⁸³ M. Dougan, *National Remedies Before the Court of Justice: Issues of Harmonisation and Differentiation* (Hart, Oxford; 2004), pp.19-20.

⁹⁸⁴ Case 33/76 *Rewe-Zentralfinanz and Rewe-Zentral*, [1976] ECR 1989.

⁹⁸⁵ *Francovich* (n.219), Judgement, para.42.

⁹⁸⁶ There is a wider discussion of procedural autonomy below, within the *ex officio* case example.

⁹⁸⁷ G. van Harten, ‘Chapter 11 and the Francovich Doctrine: Comparing State Liability under NAFTA and EC Law’ (2003) *Cahier de recherche, Centre Études internationales et Mondialisation*, p.18.

procedure increasingly blurred⁹⁸⁸, to the extent that it has been claimed there exists no such principle⁹⁸⁹.

Thus, due to the incomplete nature of the EU legal order, the CJEU necessarily leaves certain tasks to the national courts constructing a kind of “division of labour” between the national and EU levels. It is for the national judge to identify the foundations of the claim arising in respect of state liability; as noted, if necessary, the national courts might look to establish a new cause of action or remedy or develop one that already exists. It is here that the German and English differ⁹⁹⁰. As AG Tesauo noted, “state liability is a creation of case law” in respect of which there has been a kind of transfer - he explicitly uses the word “lend” - between general civil liability and the liability of public authorities⁹⁹¹. The determination of the satisfaction of the conditions of liability, the relevant heads of damage and the quantification of reparation is for the national court. Yet, the CJEU has provided that the award “must be commensurate with the loss or damage sustained so as to ensure the effective protection for their rights”⁹⁹². Notwithstanding the notion of “division of labour”, in reality it is not as rigid as it might appear, *prima facie*. The CJEU has attempted to provide some guidance in a number of cases, particularly, as noted above, in respect of the determination of a “sufficiently serious” breach. As noted above, in *Brasserie*, the relevant factors were set out⁹⁹³; in certain – generally exceptional – cases, including *British Telecom*⁹⁹⁴ and *Köbler*⁹⁹⁵, the CJEU has made the determination itself, considering that it had the information before it to do so. This, not-quite-rigid division of labour suggests that the relationship between the

⁹⁸⁸ Storme, ‘Harmonisation of Civil Procedure and its Interaction With Substantive Private Law’ in Kramer and van Rhee, *Civil Litigation in a Globalizing World* (n.982); see, for example, Storme’s reference to Joined Cases C-87-89/90 *Verholen* [1992] ECR I-3757, and the idea that “civil procedure should have rather open rules which, to a large extent, leave [e.g.] the question of standing to substantive law”, fn.7.

⁹⁸⁹ M. Bobek, ‘Why There Is No Principle of Procedural Autonomy of the Member States’ in B. de Witte and H-W. Micklitz (eds.), *The European Court of Justice and the Autonomy of the Member States* (Intersentia, Antwerp; 2011), pp. 305-324. Yet Bobek notes, despite the seemingly broad intervention of *Francovich* into the national procedural regime, in the case itself, *Francovich* was unable to obtain damages before the Italian courts, at p.311.

⁹⁹⁰ See the discussion of Künnecke, ‘Divergence and the *Francovich* Remedy in German and English Courts’ in Prechal and van Roermund, *The Coherence of EU Law*, (n.885).

⁹⁹¹ *Brasserie* (n.186), Opinion of AG Tesauo, para.7.

⁹⁹² *Brasserie* (n.186), Judgement, para.82.

⁹⁹³ *Brasserie* (n.186), Judgement, paras.56 and 58. See also the text accompanying n.894 above (the factors set out in *Köbler*). These considerations were further developed in *Dillenkorf*, in which it considered that the failure of a Member State to take action to transpose a directive in the time period would constitute a serious breach; *Dillenkofer* (n.840), Judgement, para.29.

⁹⁹⁴ *Ex p British Telecommunications* (n.841), Judgement, para.41.

⁹⁹⁵ *Köbler* (n.184), Judgement, para.101.

European and national courts is perhaps best characterised as an intertwining of the legal orders.

On the one hand, the CJEU has sought to promote the significance of the coherent and uniform application of Union law for the purposes of ensuring effective judicial protection. Yet this uniformity is deemed to be undermined both by the lack of clarity in the judgements of the CJEU (in respect of the terms employed and its elaboration - or lack thereof - of the understanding of certain concepts⁹⁹⁶), and the procedural autonomy of the national courts, outlined above. The CJEU has highlighted that procedural autonomy must be limited by the principles of effectiveness and equivalence, in order to avoid divergent applications of Union norms across the Member States, and thus promote a uniform level of protection throughout the Union; that is to say, it is on the application of this test of equivalence and effectiveness that the CJEU determines whether it can intervene in procedural autonomy, a consideration explored in greater detail in relation to the UCTD jurisprudence below. On the other hand, it is recognised that uniformity is nevertheless difficult to achieve given the limits of the European order; as van Gerven notes, “that objective can be achieved only if the European Court is willing, in the absence of action by the Community legislature, to lay down the procedural, and more important, the substantive conditions of legal remedies”⁹⁹⁷. From the analysis of the jurisprudence above, the CJEU does not appear to be so willing.

Rather, the law of state liability exemplifies the type of situation in which national courts must act as both national and European courts, giving rise to a context in which “Community law and national law are hence intertwined and blurred in a very complex manner...”⁹⁹⁸. This intertwining might in fact lead to a situation in which the task of the national courts changes. Thus, to the extent that “national law operates as the vehicle carrying the application of the action in damages”⁹⁹⁹, the criticism with which Harlow charges the national courts, namely that the national courts are being understood more as administrative, as

⁹⁹⁶ For example, the way in which the Court dealt with the notion of causation in *Brasserie* has been criticised (see F. Smith and L. Woods, ‘Causation in Francovich: The Neglected Problem’ 1997) 46 *ICLQ* 925, p.928, *Brasserie* (n.186), Judgement, para.79.

⁹⁹⁷ van Gerven, ‘Bridging the Unbridgeable’ (n.836), p.515.

⁹⁹⁸ Claes, *The National Courts’ Mandate in the European Constitution* (n.824), p.382.

⁹⁹⁹ Claes, *The National Courts’ Mandate in the European Constitution* (n.824), p.280.

opposed to dispute resolution bodies, seems to hold true¹⁰⁰⁰. Similarly, Weatherill has considered that in this area “national law is simply too deep-rooted and complex to permit immediate accommodation...” of changes¹⁰⁰¹; this suggests that the way in which these doctrines will be dealt with in different systems will depend on the rules already embedded in the particular social, political and economic contexts, which dictates that the courts must be understood as more than simply administrative bodies. While the rights derive from the EU level, enforcement - “a particularly significant instrument for their realization”¹⁰⁰² - is a task which necessarily falls to the national courts¹⁰⁰³. The “structural deficiencies of the Union” and its “judicial architecture” necessarily dictates this is the case¹⁰⁰⁴. The limited jurisdiction of the CJEU derives from its function as it was initially established, where the focus was not on the invocation of rights by individuals but on the protection of freedoms necessary for the functioning of the market. It is in this context of European legal development and integration, in which the Europeanisation of private law occurs, that the development of substantive and procedural norms at the EU level has been fundamental, in particular, to the extent that it has provided individuals with (subjective as opposed to procedural) rights.

Snyder has recognised that this interaction between the European institutions and national courts, legislatures and administrative authorities, is necessary not only for the practical functioning of a system of remedies but also for its acceptance within the particular national culture or tradition. The right and the availability of the remedy is established at the European level, and as such, the national institutions are necessarily reliant on what occurs there; yet the European institutions alone are not competent “to ensure the effectiveness of Community law in the broader social sense, in particular, in so far as it entails the commitment of citizens, popular participation and political legitimacy”¹⁰⁰⁵. The EU institutions are similarly reliant on what occurs within the national systems. On the one hand it might therefore be suggested that the CJEU engages with the national courts, and national law, in line with the principles of effectiveness and equivalence, and – albeit implicitly –

¹⁰⁰⁰ C. Harlow, ‘Francovich and the Problem of the Disobedient State’ (1996) 2 *ELJ* 199. Indeed the criticism of Harlow is much broader; she challenges the theoretical foundations of liability as developed by the CJEU, and the influence on the national courts, an impact she characterises as “cross-infection”.

¹⁰⁰¹ Weatherill, ‘Interpretation of the Directives’ in Hartkamp *et al*, *Towards a European Civil Code* (n.270), p.195.

¹⁰⁰² S. Beljin, ‘Rights in EU Law’ in S. Prechal and B. van Roermund (eds.), *The Coherence of EU Law: The Search for Unity in Divergent Concepts* (OUP, Oxford; 2008), pp.91-122, p.96.

¹⁰⁰³ *Köbler* (n.184), Judgement, para.33.

¹⁰⁰⁴ Basedow, ‘The Court of Justice and Private Law’ (n.808), pp.471-472.

¹⁰⁰⁵ F. Snyder, ‘The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques’ (1993) 56 *MLR* 19, p.52.

facilitates the intertwining of the two levels for the purposes of ensuring effective judicial protection¹⁰⁰⁶. This implicit promotion, on the part of the CJEU, might also be said to have its roots in the recognition that ensuring such protection is available often demands that changes are made within the national system; on this basis, the interaction might also be understood as a means – per Snyder – of the need to promote and ensure the legitimacy of any impact in the national system.

Tridimas has considered that the evolution of the CJEU jurisprudence provides for the “universality of state liability”¹⁰⁰⁷. This notion of universality brings to the fore considerations of systemisation and coherence, which do indeed appear to be reflected in CJEU’s elaboration of state liability and its engagement of systematic reasoning, promoting the coherence of the Union regime¹⁰⁰⁸. In *Francovich*, the liability of the state and the availability of a remedy, were recognised by the Court “in the light of the general system of the Treaty and its fundamental principles” as “inherent in the system of the Treaty”¹⁰⁰⁹. Furthermore, as noted above, the AG and Court in *Brasserie* recognised the significance of coherence in bringing together, at least marginally in terms of the conditions underpinning, the regimes of state liability and the non-contractual liability of the Union institutions. AG Léger in *Köbler* has confirmed the predominance of the systematic approach¹⁰¹⁰. By concluding at the outset that the obligation to repair damage should extend to loss arising from the acts and omissions of the national courts, Léger engaged fully with the CJEU’s existing state liability jurisprudence, recognising the very “general” nature of the reasoning of the Court in *Francovich* reflected in its “systemising interpretation”¹⁰¹¹. This “system-based” interpretation underpins the three bodies of support identified by the AG – including CJEU case law, the significance of the role of the national court, and national law – for the purposes of dealing with, and ultimately rejecting, the arguments advanced by the intervening governments against the extension of liability and the obligation to repair¹⁰¹². This approach

¹⁰⁰⁶ *Unibet* (n.971), Judgement, para.37, in line with the traditions of the Member States, Art.47 CFR and Arts.6 and 13 ECHR.

¹⁰⁰⁷ T. Tridimas, ‘State Liability for Juridical Acts: Remedies Unlimited’ in P. Demaret *et al* (eds.), *Thirty Years of European Legal Studies at the College of Europe* (Peter Lang, Brussels; 2005), pp.147-159, p.149.

¹⁰⁰⁸ D. Edward, ‘The Role and Relevance of the Civil Law Tradition in the Work of the European Court of Justice’, in D.L. Carey Miller and R. Zimmermann, (eds.), *The Civilian Tradition and Scots Law, Aberdeen Quincentenary Essays* (Duncker & Humblot, Berlin; 1997), pp.309-20, p.318.

¹⁰⁰⁹ *Francovich* (n.219), Judgement, paras.30 and 35, respectively.

¹⁰¹⁰ *Köbler* (n.184), Opinion of AG Léger, paras.27 *et seq.*

¹⁰¹¹ *Köbler* (n.184), Opinion of AG Léger, paras.28 *et seq.*

¹⁰¹² These were predominantly based on the principle of *res judicata*, and the independence of the judiciary: *Köbler* (n.184), Opinion of AG Léger, paras.92 *et seq.* Further, the Court looked to the rules of the Member

reflects more broadly the CJEU's role in facilitating the systemisation of Union law, explored in greater detail in Part IV. For example, reference can be made to the Opinion of AG Lagrange in an early CJEU case, in which he highlighted the role of the Court in filling gaps in rendering interpretations where the text of legislation is silent: “[t]he text lays down a procedural requirement...but it fails to state by whom [it is to be accomplished]. It is therefore necessary to interpret the text in order to fill that lacuna. Even though the Code Napoléon is not applicable here I cannot refrain from recalling Article 4: *'le juge qui refusera de juger, sous prétexte du silence, de l'obscurité ou de l'insuffisance de la loi, pourra être poursuivi comme coupable de déni de justice'*”¹⁰¹³.

The cases illustrate the true multi-level character of EU law, evidenced by the interaction of the national, European and international. The post-*Francovich* judgements also highlight the potential for divergences in the reasoning (even if the final judgement is the same) of the AG and the Court, as well as the CJEU's initial engagement with generality – in its recognition of state liability as a “general principle” – and in its subsequent development of the specifics of the liability regime. The analysis above, which attempts to uncover the nature of the methodology, in particular, that of comparison, underpinning the Opinions and the judgements of the Court in two key cases of state liability, is engaged in the construction of the taxonomy of comparison in Part IV. For the moment, it is worth noting that there are numerous, interrelated rationales which support a more substantive comparative analysis on the part of the CJEU, which are cultural (the Treaty requires that the diversities between Member States are respected and maintained)¹⁰¹⁴, political (which could support the more active role of the CJEU in the development of European private law, and in particular, justify those interpretations of the Court which might be deemed contentious, including, *inter alia*, *Francovich*), economic and legal (in respect of recognising similarities and diversities between different the national cultures and tradition, and different areas of EU law, for the purposes of removing obstacles to trade, promoting coherence and the facilitation of the internal market)¹⁰¹⁵.

States in order to reject an argument against liability made on the basis of *res judicata*, on the one hand, and the independence of the courts, on the other.

¹⁰¹³ Case 8/55 *Fédération Charbonnière de Belgique v. High Authority* [1954 to 1956] ECR 245, Opinion of AG Lagrange, p.277

¹⁰¹⁴ Amongst others, Art.167 TFEU and Art.6 TEU.

¹⁰¹⁵ See W. Van Gerven, 'Rights and Remedies in the Enforcement of EC Law Before National Courts' in *Academy of European Law, Collected Courses of the Academy of European Law: 1997* (Kluwer, The Hague; 2001), pp.241-360, p.353.

Chapter 6. The Intertwining of EU Consumer Contract Law and National Procedural Law via the CJEU

The second case example concerns the CJEU's interpretation of the UCTD¹⁰¹⁶ and the regulation of contract terms in national courts. As the UCTD arguably constitutes the EU legislature's first foray into the "core" of private law¹⁰¹⁷, the analysis necessarily engages considerations concerning the reach of the Union legislature's activities, the jurisdiction of the CJEU, and the impact of its decisions in the national orders, especially on the cultures and traditions of procedural regimes. The jurisprudence analysed has arisen predominantly via the preliminary reference procedure from inconsistencies in the transposition¹⁰¹⁸, implementation and interpretation of the directive. The transposition of the minimum harmonisation directive has not been strictly uniform; in some Member States, it has been transposed by a single legislative instrument (as is the case in the UK), while in others, various pieces of new and existing legislation, of both a public and private nature, are engaged (in, for example, Slovakia)¹⁰¹⁹. Furthermore, the case example illustrates that the approaches of the national courts to the interpretation and application of the UCTD differ, potentially undermining the scope for the uniform application of Union law across the European space. Both analytical dimensions of the thesis are explored, that is, on the one hand, the CJEU's jurisdiction and role in its development of regulatory Union law that strikes at the heart of substantive national private law (and essentially, the scope for recognising the Europeanisation of national procedural law as a dimension of integration) and on the other, the relevance of the methodological discourse concerning the commonality and diversity that permeates the national cultures and traditions (and especially, those of procedural regimes).

At the outset, the CJEU jurisprudence on the *ex officio* regulation of contract terms is traced from the initial recognition of the power of the national courts to regulate contract terms *ex*

¹⁰¹⁶ The *ex officio* application of the UCTD also concerns the engagement the other potential "case examples", on liability for breach of EU law, on general clauses in private law, (in particular, on the substantive test of unfairness), and on remedies (the cases of *Invitel* and *Banco Español* could also be analysed in respect of the UCTD's *ex officio* application; C-472/10 *Invitel*, nyr and C-618/10 *Banco Español*, nyr). Given the high degree of intertwinement, the focus herein is as above, but cross-referencing will be made where relevant.

¹⁰¹⁷ H-W. Micklitz, 'AGB-Gesetz und die Richtlinie über mißbräuchliche Vertragsklauseln in Verbraucherverträgen' (1993) *ZEuP* 522, p.533.

¹⁰¹⁸ M. Ebers, 'Unfair Contract Terms Directive' in H. Schulte-Nölke *et al* (eds.), *Consumer Law Compendium; The Consumer Acquis and its Transposition in the Member States* (Sellier, München 2008), pp.197-261, pp.197 *et seq*; European Parliament, 'Unfair Contract Terms in Business-to-Consumer Contract in the pCESL: BEUC's Viewpoint' (2012) Policy Department (Legal and Parliamentary Affairs), Citizens' Rights and Constitutional Affairs, p.9.

¹⁰¹⁹ See further, J. Basedow, 'Grundlagen des Europäischen Privatrechts' (2004) *Juristische Schulung* 89, p.94.

officio, to the CJEU's construction of the national courts' duty to assess. The focus then shifts to the scope for conflicts arising within national orders and the expectations of the national courts in requesting preliminary rulings; thereafter, the putative emergence of a Europeanised civil procedure is explored. The jurisprudence concerns, predominantly but not exclusively, the UCTD (in respect of both jurisdiction and arbitration clauses¹⁰²⁰) while the scope for *ex officio* regulation arising from other directives, including the Doorstep Selling Directive¹⁰²¹, the Consumer Credit Directive¹⁰²² and the Unfair Commercial Practices Directive¹⁰²³, is identified where relevant.

The outline that follows does not aim to comprehensively examine the CJEU jurisprudence on contract term regulation; rather, it traces key cases and provides a foundation for the analysis that follows. The power of the national court to examine contract terms *ex officio* was established in *Océano*, seemingly - per the CJEU's reasoning - as it engenders the scope for the correction of any putative power imbalance between the parties; that is to say, in the absence of *ex officio* regulation, the effectiveness of consumer protection is undermined as inequalities between the parties might not be corrected¹⁰²⁴. This power was subsequently confirmed in *Cofidis*, a case concerning French procedural rules limiting, via prescription, the assessment of unfairness¹⁰²⁵. Subsequently, it has been considered that the CJEU's attribution to the national courts of a power to regulate contract terms also has its basis in the right to be heard, as established in the CJEU's jurisprudence, in Arts.6 and 13 ECHR, and Art.47 CFR per the constitutional traditions of the Member States¹⁰²⁶. This rationale highlights the significance of the relationship between the national courts and the CJEU, reflected in the relationship between national procedural law, the development of substantive Union law and the effective judicial protection of individual rights, and with particular reference to the UCTD, the obligations of the national courts per Arts.6 and 7¹⁰²⁷.

Subsequent to *Cofidis*, the CJEU has gradually "scratched away" at the understanding that the rigid procedural autonomy of the Member States remains intact in light of the principles of

¹⁰²⁰ C-243/08 *Pannon* [2010] ECR I-4713 and C-40/08 *Asturcom* [2010] ECR I-957, respectively.

¹⁰²¹ Directive 85/577/EEC; C-227/08 *Martin Martin* [2009] ECR I-11939.

¹⁰²² Directive 2008/48/EC; C-602/10 *Volksbank Romania*, nyr (from Romania) and C-429/05 *Rampion* [2007] ECR I-8017 (then Directive 87/102/EEC) (from France).

¹⁰²³ Directive 2005/29/EC; C-453/10 *Pereničová and Perenič*, nyr.

¹⁰²⁴ *Océano* (n.682), Judgement, paras.26-27; *Asturcom* (n.1020), Opinion of AG Trstenjak, para.64.

¹⁰²⁵ C-473/00 *Cofidis* [2002] ECR I-10875.

¹⁰²⁶ *Asturcom* (n.1020), Opinion of AG Trstenjak, para.61.

¹⁰²⁷ *Asturcom* (n.1020), Opinion of AG Trstenjak, paras.50-51 citing *Océano* (n.682), Judgement, paras.25-28.

equivalence and effectiveness¹⁰²⁸, thereafter reframing the power of the national courts as an obligation on their part to assess the contractual terms “of its own motion”. The shift in the understanding of the domestic courts’ role has its foundations in *Mostaza Claro*¹⁰²⁹; the “intrusion” into national procedural law has not been reflected in the establishment of the obligation as such but in the determination that where the consumer does not raise the unfairness issue initially in the arbitration proceedings but rather subsequently in the substantive (judicial) action, the national court must nevertheless return and assess the pertinent term as to its putative unfairness.

The issues arising are broadly similar but each case generates distinct, substantive and procedural considerations. Thus, *Asturcom* brought the nature of arbitration to the fore, extending the effect of *ex officio* regulation beyond judicial actions¹⁰³⁰. In *Caja de Ahorros*, the AG raised and for the first time engaged explicitly the economic rationale underpinning contract term regulation and demarcated the scope of contract term regulation with reference to the significance of party autonomy in respect of Art.4(2)¹⁰³¹. In *Pannon*, the Court delineated the obligation to assess, with reference to the need for the national courts to possess the facts “necessary” to make an assessment as to unfairness¹⁰³². In *Pénzügyi Lízing*, the AG engaged the significance of dialogue between the national and European courts, and considered the extent to which it might be affected by, and similarly affect, national procedure¹⁰³³. The consideration of impact extends beyond that which might arise by virtue of the relationship between the courts; thus, for example, *Pereničová and Perenič* concerned the consequences of a finding of unfairness on the coherence of distinct EU directives¹⁰³⁴. As a general rule, CJEU judgements are effective *inter parts* yet *Invitel* suggests an exception to this rule in relation to the UCTD. While the AG considered that a finding of unfairness is “accorded fairly wide applicability”, she did not seem to include third parties not party to the

¹⁰²⁸ To the extent that national rules “cannot be less favourable than those relating to similar actions of a domestic nature nor render virtually impossible or excessively difficult the exercise of rights conferred by Community law”: C-33/76 *Rewe-Zentral* [1976] ECR 1989, Judgement, para.13, the limitation – essentially based on the principle of equivalence and effectiveness to be applied, “by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national instances. In the light of that analysis the basic principles of the domestic judicial system, such as protection of the rights of the defence, the principle of legal certainty and the proper conduct of procedure, must, where appropriate, be taken into consideration”; C-312/93 *Peterbroeck* [1995] ECR I-4599, Judgement, para.14.

¹⁰²⁹ C-168/05 *Mostaza Claro* [2006] ECR I-10421, Judgement, para.38.

¹⁰³⁰ *Asturcom* (n.1020).

¹⁰³¹ *Caja de Ahorros* (n.268).

¹⁰³² *Pannon* (n.1020).

¹⁰³³ C-137/08 *Pénzügyi Lízing* [2010] ECR I-10847.

¹⁰³⁴ *Pereničová and Perenič* (n.1023), nyr.

action; the Court found that terms found to be unfair would bind neither the parties to the action nor those who have concluded a contract on the same terms with the same supplier¹⁰³⁵. Art.6(1) and 7(2) UCTD bring to the fore the connection between the CJEU's judgement, which is generally *inter partes*, the collective action (i.e. the injunction action) and the effect of the judgement on individual contracts containing the pertinent unfair term. Per Art.7, the need for adequate and effective protection seems to require that the effect of the judgement is not limited to the parties to the action but extended. This will be discussed in more detail below in light of the shifting relationship between the national and Luxembourg courts.

Aziz concerned the limited opportunity – as a result of the application of Spanish procedural rules - for the unfairness of contract terms to be pled in mortgage enforcement proceedings; the decision not only gave rise to the scope for the CJEU to provide guidelines to the national court in its assessment of contract terms¹⁰³⁶ but also raised significant social considerations (especially in relation to eviction from the home), bringing to the fore the relevance of the constitutionalisation of private law via CJEU jurisprudence, a consideration which will be returned to below¹⁰³⁷. Thereafter, the Court in *Banco Español*, following the AG, provided that national procedural norms must be deemed to be incompatible with Union legislation where their application renders the achievement of consumer protection established therein, “impossible or excessively difficult”, and thus violates the effectiveness principle. The Court further held that the national courts must ensure, where it identifies an unfair term, that it has no further binding effect, and provide, where possible, for the continuation of the contract¹⁰³⁸. In *Asbeek Brusse*¹⁰³⁹, the Court clarified that the UCTD applies also to tenancy contracts concluded with professional landlords and held that appellate courts, acting *ex officio* to

¹⁰³⁵ *Invitel* (n.1016), Opinion of AG Trstenjak, para.51; Judgement, para.38.

¹⁰³⁶ C-415/11 *Aziz*, nyr. This criteria for the national court is particular clear from AG Kokott's Opinion, to the extent that she examined particularly the significance of rules on unilateral determination of the amount owed by the debtor in default, in light of national procedural rules, while the Court predominantly made reference to unfairness deriving from the limitation to the consumer's right to a remedy, per point 1(q) Annex, UCTD. See H-W. Micklitz and N. Reich, ‘The Court and Sleeping Beauty: The Revival of the UCTD’ (2014) 51 *CMLR* 771, p.800.

¹⁰³⁷ “Hidden constitutionalisation” per Micklitz and Reich, ‘The Court and Sleeping Beauty’ (n.1036), pp.800 *et seq*, in light of the fact that while neither the AG nor the Court explicitly engaged the respect for housing, as found in Art.7 CFR, their reasoning did engage constitutional considerations, in the relationship between domestic proceedings and contract law regulation, Opinion, para.52, and the highlighting of the purpose for which the loan had been made, that is, the purchase of the home, Judgement, para.61.

¹⁰³⁸ *Banco Español* (n.1016), Judgement, para.65.

¹⁰³⁹ In line with the notion that the national court must have the “legal or factual elements” available, explored in more detail below; C-488/11 *Asbeek Brusse*, nyr, Judgement, paras.41-42. Similarly, in this case, like *Aziz*, noted above, the Court (there being no AG Opinion) raised the “social” issue of the “essential needs” of access to the home, Judgement, para.32.

enforce public policy considerations, must similarly assess contract terms even if the issue of unfairness was not raised at first instance. As to the consequences of unfairness, the Court followed *Banco Español* and held that the effective implementation of the directive requires a finding, ensured via national procedural rules, that the term is deemed never to have existed; any other determination must be understood to “weaken the dissuasive effect” of contract term regulation¹⁰⁴⁰.

More recently, the Court, rendering a preliminary ruling in response to a reference arising from a reimbursement claim concerning gas price hikes before the *Bundesgerichtshof*, has held that standard term provisions allowing for the unilateral modification of price (it being normal that price changes in long-term contracts), requires the clarity of the conditions under which the changes are determined and an effective right to terminate, in order to be valid per the UCTD¹⁰⁴¹. In *Banif Plus*, the Court confirmed that the consumer need not raise the issue to launch an assessment as to unfairness; rather, per Arts.6 and 7 UCTD, the court must ensure that both parties are informed and can launch a defence, the assessment being undertaken in consideration of all contract terms¹⁰⁴². AG Mengozzi has very recently rendered an Opinion in a Spanish reference not only concerning the compatibility of national procedural law with the UCTD and the CFR (in respect of which little consideration was rendered as the AG considered the key issue to be one of effectiveness) but essentially concerning the demarcation of the UCTD, in respect of the parties at whom it is aimed. Essentially, he held that the relevant Spanish jurisdiction rules must not completely preclude access to justice or render the enforcement of Union rights “impossible or excessively difficult” and furthermore, that the UCTD should be demarcated; in respect of the latter, he held that the effective protection of rights to which it gives rise must be aimed at consumers and does not extend to consumer organisations (nor can the latter’s budgetary difficulties be relevant with regard to the compatibility of national rules on the founding of jurisdiction)¹⁰⁴³.

This outline has briefly traced the CJEU’s development of the *ex officio* monitoring of contract terms in the national courts, from its recognition of a power on the part of the

¹⁰⁴⁰ *Asbeek Brusse* (n.1039) Judgement, para.58.

¹⁰⁴¹ C-92/11 *RWE Vertrieb*, nyr, Judgement, paras.28-29, paras.48-50. Final decision: the *Bundesgerichtshof* (case Az.: VIII ZR 162/09) awarded 25 consumers a total restitution of EUR 16,128.63 (<<http://www.vz-nrw.de/bgh-urteil--verbraucherzentrale-erfolgreich>>; Last Accessed: 16.10.2013).

¹⁰⁴² C-472/11 *Banif Plus Bank*, nyr, Judgement, paras.28-30 and para.41.

¹⁰⁴³ C-413/12 *ACICL v. Anuntis*, nyr, rejecting the scope for a consumer organisation to bring an action for an injunction in the courts of its place of business.

national court to the imposition of an obligation thereon. The following section firstly outlines the diversity of the national regimes of procedural law, and identifies the scope for conflict arising in the national contexts that might, if identified, generate requests for preliminary rulings; thereafter, the notion of the preliminary reference procedure as a tool of integration is examined and in particular, the ascent and descent of the references to the CJEU are analysed, and the expectations of the national courts as to the interpretations rendered by the Luxembourg Court are uncovered.

I. The Foundations of Procedural Law in the National Cultures and Traditions

The Union legislature's engagement with national civil procedure rules has broadly been limited to the norms of PIL, predominantly those concerning jurisdiction, the recognition and enforcement of judgements¹⁰⁴⁴ and the determination of applicable law¹⁰⁴⁵. Beyond PIL, civil procedure is an area in which there has been little explicit attempt at Europeanisation. Notwithstanding – and perhaps as a result of the absence of Union legislation, that is, the lack of clarity and the existence of gaps to which the non-action gives rise - a body of CJEU jurisprudence relating to procedural norms has emerged via the preliminary reference procedure hanging onto the coattails of the CJEU's interpretation of substantive Union measures. This jurisprudence, outlined above and from which the *ex officio* application of EU consumer protection directives derives, therefore establishes one distinct perspective of the Europeanisation of private law. Two dimensions of analysis come to the fore, concerning the diversity underpinning national procedural regimes, and the scope for conflict between those regimes and the rights and obligations arising and deriving from Union law, which might not necessarily be characterised as procedural but which might nevertheless affect procedural law.

The default position provides for adherence to the principle of procedural autonomy, underpinning which is a clear policy determination that permeates the national and Union

¹⁰⁴⁴ 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (consolidated version), O.J. 1998 C 27/1, subsequently repealed and replaced by the Brussels I Regulation 44/2001, OJ 2001 L 12.

¹⁰⁴⁵ In contractual and non-contractual relationships; Rome I Regulation 593/2008 on the law applicable to contractual obligations, OJ 2008 L 177 6 and Rome II Regulation 864/2007 on the law applicable to non-contractual obligations, OJ 2007 L 199 40. Reference can also be made to Brussels II Regulation 2201/2003 concerning jurisdiction and the recognition and enforcement of judgements in matrimonial matters and matters of parental responsibility, OJ 2003 L 338 1 and Rome III on the law applicable to divorce and legal separation, OJ 2010 L 343 10, and Rome IV Regulation 650/2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession, OJ 2012 L 201 107.

levels; that is, where EU law is silent, the matter is one reserved – at least for the time being – to the Member State. An analysis of the way in which national civil procedural norms reflects judicial cultures within and beyond the national context (and thus, the scope for diversities existing in the European sphere) facilitates the evaluation of the principle of procedural autonomy in the context of the interaction of national and European norms. The first section outlines the potentially divergent foundations of procedural regimes, their culture and tradition; furthermore, it aims to uncover and clarify the domestic courts’ engagement with the preliminary reference procedure, and in particular, their expectations as to the CJEU’s judgement and impact potentially arising therefrom (particularly to the extent that this might necessitate a shift in the role of the national court to a regulatory court). The rationales underpinning the obligation imposed on the national courts to assess contract terms *ex officio*, outlined above, are explored further, with reference in particular, to the mixing of the consumer protection and internal market rationales, and furthermore, to the pertinent public policy considerations arising therefrom. Thereafter, the focus shifts to the making of the preliminary reference (or the lack of reference as is the case in the example from the English court), and the expectations of the national judge.

i. The Scope for Conflict in the Diverse National Orders

While a putative distinction might be drawn between the procedural and substantive dimensions of the UCTD, it becomes clear that such a bright line distinction is a fallacy¹⁰⁴⁶; rather, both dimensions are intertwined. However, for the purposes of the analysis which follows, this distinction is drawn as it highlights that the focus is not on the test of unfairness but concerns the procedural dimension of contract term regulation in respect of which there has been little explicit attempt by the Union legislature at Europeanisation¹⁰⁴⁷.

The preliminary references analysed herein give rise to three pertinent considerations concerning the scope for conflict arising as private law is understood to develop within a

¹⁰⁴⁶ Storme, ‘Harmonisation of Civil Procedure and its Interaction With Substantive Private Law’ in Kramer and van Rhee, *Civil Litigation in a Globalizing World* (n.982), para.7.4.6; compare Storme who asserts that the obligations of national courts to apply directives *ex officio* should be understood as forming part of substantive European consumer law.

¹⁰⁴⁷ This distinction has also been recognised in the CJEU: *Pénzügyi Lízing* (n.1033), Opinion of AG Trstenjak, para.59: her focus in this case is not on the determination of what is meant by unfairness but on the “jurisdictional and institutional aspects of the complex cooperative relationship between the Court of Justice and the national courts”.

pluralist, multi-level space: 1) the scope for conflict within the national cultures and traditions, with references made by courts operating at different levels in the hierarchy of the national judicial structures, from district to supreme courts; and 2) the scope for conflict between the national orders, with references deriving from diverse legal cultures and traditions, including Spain and what have been termed the “South and Central Eastern European” Member States (in this context, namely, Hungary, Slovakia and Romania), and 3) the scope for conflict between regulation at the national and Union levels, in respect of the operation of national procedural law and the development of substantive Union law. The scope for conflict, outlined above, brings to the fore particular considerations related to the CJEU’s engagement of comparative analysis; in particular, the scope for dialogue between the national and EU courts and furthermore, between the national and EU legislatures (and additionally, administrative bodies within the national orders) arises. Furthermore, the relevance of legal culture and tradition, and particular, the judicial culture established therein, is explored in respect of both the ascent of the reference, the interpretation rendered by the CJEU and thereafter, the impact engendered by and reflected in the final decision of the national court; as to the latter, the extent to which both the national and CJEU courts are aware of the potential for cross-referencing and spillover effects, is a matter of relevance but one in respect of which it is difficult to draw conclusions in the absence of concrete empirical analysis.

A consideration of the foundations of the cultures and traditions of national procedural regimes should help to explain the operation of the principle of procedural autonomy and thus, the interaction of national and European norms, recognising the scope for commonality and diversity existing across the European sphere. The distinctions drawn between the systems are firstly uncovered in light of the cases evaluated above; thereafter, these distinctions are analysed in the context of the broader Europeanisation of private law. This analysis does not attempt to provide a comprehensive historical analysis but rather aims to allow for evolution of the rules of institutional and procedural law to be placed in context.

The CJEU’s shaping of the national courts’ role has been introduced via a tracing of its case law. The way in which this role is examined is reflected in the role of the national judge as an institution rooted in national culture and tradition generally, from which distinct judicial cultures might arise. Weatherill has considered that the role of the judge, the understanding

of justice, the role of private law (including party autonomy, the significance of performance and the protection of certainty in contract) in the facilitation of the internal market and the need to ensure effective consumer protection (underpinning which, as noted above, are fundamental rights considerations) are all issues that pertain to procedural regimes, at both the national and Union levels. Thus, he describes domestic procedural rules as “typically the product of careful shaping over time”¹⁰⁴⁸, suggesting that the relevance and application of these norms are necessarily shaped by the experiences underpinning the relevant judicial culture (including legal education and the legal profession), and the (procedural as opposed to substantive) norms that regulate the manner in which the profession functions, to the extent that divergent political, cultural and socio-economic development within the national cultures and traditions affects legal reasoning.

It has been asserted that given the “*particularismes nationaux*” of national institutions, any attempt to promote the uniformity of the role attributed thereto is necessarily a task of a “utopian” outlook: that is to say, “*on connaît de plus les mirages de l’uniformisation du droit*”¹⁰⁴⁹. The broad, arguably reductionist, distinction between the “inquisitorial versus accusatorial” and “investigative versus adversarial” character of the judge is engaged to articulate the way in which the power, then obligation, of the national court has been adopted therein. As is clear from, in particular, *Pannon* and *Pénzügyi Lízing*, this distinction, while broad, is nevertheless relevant. The context is also shaped by the scholasticism versus pragmatism distinction; that is, the preference for reference to precedent and for reasoning from the bottom-up in the common law, as opposed to a reliance on purposive interpretation, as in the civil law; this reluctance is reflected in the English judges’ unwillingness to refer to broad general principles and highlights, the relevance of the particular political, economic and social backgrounds, especially in relation to values, and the significance attributed to the role of law in achieving social justice¹⁰⁵⁰. The notion of judicial “passivity”, concerning the

¹⁰⁴⁸ S. Weatherill ‘Interpretation of the Directives: The Role of the Court’ in A.S. Hartkamp *et al* (eds.), *Towards a European Civil Code* (Kluwer, The Hague; 4th edn., 2011), pp.185-203,, p.195 .

¹⁰⁴⁹ M-L. Niboyet, ‘La réception du droit communautaire en droit judiciaire interne et international’ in J-S. Bergé and M-L. Niboyet (eds.), *La réception du droit communautaire en droit privé des États membres* (Bruylant, Brussels: 2003), pp.153-181, pp.153-4.

¹⁰⁵⁰ Discussed in more detail below in the section on common and general principles. For the moment, reference can be made to the non-recognition of a broad, overarching principle of good faith in English law. More generally, the acceptance of principles, such as good faith, has been understood to amount to a particular conceptual diversity, reflecting differently constituted societies; consequently, it has been asserted that it would constitute “an abuse of the comparative legal method” to impose a principle of good faith in the common law; J.H.M. van Erp, ‘The Pre-Contractual Stage’ in A.S. Hartkamp *et al* (eds.), *Towards a European Civil Code*

determination of the “legal and factual elements”¹⁰⁵¹ (as discussed in more detail below), is of inherent relevance in respect of the undertaking of the national courts. Thus the question arises as to whether the determination, or even the promulgation of these elements, is a task for the national court or for the parties. The allocation of this task depends, as noted above, on the understanding of the nature of the judge in any given judicial culture, that is, whether his character is understood as passive or investigative; should the judge rule only on what is put before the court, or is he entitled to engage in his own investigation? This determination will be shaped not only by specific rules of national procedure but also in the context of the general structure and culture of the judiciary; for example, in *Van Schijndel*, the CJEU recognised the significance of the principle of passivity in understanding the relationship between the state, the judiciary and the individual¹⁰⁵².

An analogy can be drawn with the principle of *jura novit curia* in PIL, which provides that it is for the judge to decide on the relevance of PIL norms in the determination of the applicable law as opposed to relying on a plea of foreign law by one of the parties. A broad distinction can be drawn between the common and civil law in this respect. In the former, law is generally treated as fact and must therefore be pled by the parties; English procedural law dictates, as a general rule, that the judge is deemed to have no independent knowledge of the law¹⁰⁵³. Broad exceptions have been adopted (see for example, the 1950s case in which Lord Denning admittedly “devoted the better part of a summer vacation” to legal research)¹⁰⁵⁴. Notwithstanding the changes facilitated by the Civil Procedure Rules (April 1999), the judge generally continues to entirely on the parties’ submissions. This understanding is one which reflects more broadly the nature of English legal proceedings, and for example, the influence of the lay jury in civil hearings which shaped the urgency of the proceedings, particularly in respect of oral discourse¹⁰⁵⁵.

The civil traditions – while differing – are generally more open to the principle of *jura novit*

(Kluwer, The Hague; 4th edn., 2011), pp.493-513, p.510 citing, M. Bridge, ‘Does Anglo-Canadian Contract Law Need a Doctrine of Good Faith?’ (1984) 9 *Canadian Business Law Journal* 385.

¹⁰⁵¹ *Pannon* (n.1020), Judgement, para.32.

¹⁰⁵² An approach followed in *Pénzügyi Lízing* (n.1033), Opinion of AG Trstenjak.

¹⁰⁵³ “The way of knowing foreign laws is by admitting them to be proved as facts”; *Mostyn v. Fabrigas* (1774), 1 Cowper’s King’s Bench Reports (Cowp.) 161, 174 per Lord Mansfield.

¹⁰⁵⁴ *Rahimtoola v. Nizam of Hyberabad* [1958] AC 379. This was an individual approach and the other judges did not take this information into account.

¹⁰⁵⁵ At least until 1998, when the institution was abolished via the Civil Procedure Rules.

*curia*¹⁰⁵⁶. Thus, in the German system, while the judge is considered to “know the law” (including PIL rules)¹⁰⁵⁷ - which is to say that even if a legal rule is not raised by the parties, the judges are required to engage with it of their own motion¹⁰⁵⁸ - the court can still request written submissions on the scope and substance of a rule from a number of different parties, including academics. In the civil systems, the absence of a jury contributes to the lack of immediacy in proceedings, allowing for the collecting of evidence to be understood as a task analogous to fact-finding, the process and fruits of which are subject to “piecemeal unfolding”¹⁰⁵⁹. The nature of the career judiciary, whereby judges are selected from the judiciary and legal practice, as well as from academia, similarly influences the role, responsibility and legitimacy attributed to the judge (including, for example, the power of the judge to select expert witnesses and allowing judges to develop expert knowledge via the splitting of the courts into particular specialised fields). In the French system, while judges are deemed “know the law”, there is a lack of consensus as to whether the judge can engage that which has not been raised by the parties to the proceedings¹⁰⁶⁰. In Hungary, the judge is similarly deemed to know the law but in reality this knowledge is limited to that which is inscribed in national law; thus, for international law to be “known” it must have firstly been transposed into national law¹⁰⁶¹. In contrast, Spanish legislation provides that foreign or international law is a matter of fact to be proven¹⁰⁶²; notwithstanding, it seems to be the case in practice that, by virtue of Art.281(2) of the civil procedural rules, the courts can engage in a process to identify the (putatively applicable) foreign law¹⁰⁶³.

¹⁰⁵⁶ It is worth noting that the opposite is true in the Canadian systems; in the “common law” jurisdictions, judicial notice is taken of international law while in the Québécois system, per Art.2807, *Code civil du Québec*, international law must be pled; S. Ferrerri, ‘Complexity of Transnational Sources’ in K.B. Brown and D.V. Snyder (eds.), *Rapports Généraux du XVIIIème Congrès de l’Académie Internationale de Droit Comparé* (Springer, Berlin; 2012), pp.29-56; Canadian Rapporteurs – H. Dedek and A. Carbone.

¹⁰⁵⁷ Art.293, *Zivilprozessordnung* (ZPO), with reference to the law of another state. BGH 23.06.2003, NJW 2003, 2685, 2686.

¹⁰⁵⁸ BGH, 29.11.1958, NJW 1958, p.1968.

¹⁰⁵⁹ M. Cappelletti, ‘Social and Political Aspects of Civil Procedure – Reforms and Trends in Western and Eastern Europe’ (1971) 69 *Mich.L.Rev.* 847.

¹⁰⁶⁰ Art.12(1) and (2), *Code de procédure civile*: “1) Le juge tranche le litige conformément aux règles de droit qui lui sont applicables; 2) Il doit donner ou restituer leur exacte qualification aux faits et actes litigieux sans s’arrêter à la dénomination que les parties en auraient proposé”; F. Ferrand *et al*, *Procédure civile, droit interne et droit communautaire* (Dalloz, Paris; 26th edn, 2006), paras.673 *et seq.* Previously, the court was not so required (Cass.civ. 12.05.1959, *Clunet* 1960, 810, note Sialelli) and subsequently, Cass.civ. 11.10.1988 and 18.10.1988 (arrêts Rebouh and Schule), *Clunet* 1989, 349, note Alexandre.

¹⁰⁶¹ Ferrerri, ‘Complexity of Transnational Sources’ in Brown and Snyder, *Rapports Généraux du XVIIIème Congrès de l’Académie Internationale de Droit Comparé* (n.1056); Hungarian Rapporteur – G. Suto Burger.

¹⁰⁶² Art.281(2), *Ley 1/2000*, 08.01.2000 *de Enjuiciamiento Civil*: “1) La prueba tendrá como objeto los hechos que guarden relación con la tutela judicial que se pretenda obtener en el proceso; 2) También serán objeto de prueba la costumbre y el derecho extranjero...”; Art.12(6), *Código Civil*.

¹⁰⁶³ *Sentencia del Tribunal Supremo, Auto de 24.06.2010* JUR 2010, 264354, in which the Supreme Court begins with the assertion that foreign law constitutes fact, and thereafter lessens this statement.

The nature of the institutions and actors engaged in dispute resolution processes, and the relevance of their cultural contexts might also be engaged in sector-specific evaluations of procedural rules, bringing to the fore the significance of comparative analysis for such a task. For example, Damaska analysed of models of criminal law in the 1970s; drawing a comparison between the crime control (repression of criminal conduct) and due process (control of the quality of the result) model adopted by Packer in the 1960s), he advanced a characterisation of the “ideal types” of dispute resolution processes in light of judicial cultures, as inquisitorial (control held in the non-partisan officials) versus adversarial (control held in the parties)¹⁰⁶⁴. This allowed Damaska to advance the notion that value judgements underpin both characterisations, noting that the latter has “tropes of rhetoric extolling the virtues of liberation administration of justice” and the former reflects an “antipodal authoritarian process”. Thus, rules of civil procedure, and in particular, the nuances of dispute resolution processes, including its substance and character, might be said to be particularly steeped in the cultures and traditions of those actors engaged, particularly in a multi-level construct.

ii. The Ascent and Descent of the Preliminary Reference: The Expectations of the National Courts

In light of the brief analysis, which attempts to place national procedural regimes and their potential Europeanisation in context, the focus shifts to the analysis of the ascent and descent of the preliminary reference. The preliminary references underpinning the cases analysed above derive from different national orders, and thus, it is submitted, reflect divergent legal cultures and traditions in which particular judicial cultures have developed and continue to evolve; that is to say, these cultures also shape the attitudes of the national courts to EU law, their engagement with the preliminary reference system and their expectations as to the interpretations rendered by the CJEU. From the outline of the jurisprudence, it is clear that the development of the *ex officio* regulation of contract terms has shaped the role of the national court and its relationship with the CJEU. The *ex officio* regulation of contract terms has attributed to the national court, at least initially, a power that might not have existed in national procedural law; the CJEU’s development of *ex officio* regulation might therefore be

¹⁰⁶⁴ M. Damaska, *The Faces of Justice and Authority* (Yale University Press, New Haven; 1986), p.4.

characterised as an empowerment tool, which not only promoted the scope for national courts to ensure compliance with Union legislation and CJEU jurisprudence but which also broadened the Europeanisation of national law beyond those areas in which the Union has explicitly legislated. The national court was potentially empowered not only within the national order, but also in respect of the litigant parties; that is to say, in relation to its potential jurisdiction to assess terms and practices beyond the claims advanced before the court by the parties. As the outline of the jurisprudence illustrates, this power has evolved into an obligation on the part of the national court. It is the shift to an obligation which limits the discretion of the national court and thus arguably removes the empowerment dimension, and which further potentially reflects the erosion of national civil procedure; national courts come to be understood to have a role, not only in providing access to justice but as a institution shaped by the CJEU as a market-regulating, private law instrument with the responsibility to regulate contract terms.

The analysis of the UCTD brings to the fore the shifts in recent years in the relationships between the national and European courts in light of the need for the effective enforcement of European consumer law within a multi-level construct; as Micklitz and Reich note, the effective application of the UCTD was initially “nearly impossible”¹⁰⁶⁵. As a result of the Union’s political institutions stopping short of remedying the UCTD’s inadequacies, the CJEU seems to have engaged a more activist role via the preliminary reference procedure, shaping the scope of the legislative instrument – particularly, as an instrument of consumer policy – in addition to rendering interpretations of its provisions. The national courts’ expectations in making the preliminary reference evidently transcend their engagement of *ex officio* regulation but also concern the scope and application of the substantive unfairness assessment; that is to say, in almost every reference, the domestic court seems eager to obtain more guidance from the CJEU against the background of the uncertainty deriving from the initial UCTD rulings, up to and including *Freiburger*, with national courts seeking guidance on contract term regulation in light of emerging conflicts, not only of a legal but also political and social nature¹⁰⁶⁶.

Notwithstanding, it is not clear that even if the Luxembourg Court were to provide, *obiter dictum*, such substantive assessment criteria on how to assess unfairness that the national

¹⁰⁶⁵ Micklitz and Reich, ‘The Court and Sleeping Beauty’ (n.1036), pp.773-774.

¹⁰⁶⁶ As is the case, for example, with *Aziz* (n.1036).

court would actually use it¹⁰⁶⁷. Nor is it clear that the national court anticipates “intrusions” into national (substantive or procedural) law; it is submitted that it must anticipate such effects, particularly in the line of UCTD cases, in which similar questions (of lesser and greater detail) have been and continue to be referred by courts across the Member States. With these considerations in mind, the rationales underpinning the reference are often ambiguous. The impact of the reference in the national order, and furthermore, its anticipation of its potential empowerment, via the CJEU’s interpretation might also shape the court’s attitude to Union law. That is to say, there are cases in which, in the alternative to referring to the CJEU, the national court could have - providing national procedural law allows¹⁰⁶⁸ - afforded leave to appeal to a higher domestic court. Rather, by referring to Luxembourg, the national court applies pressure in respect of the *status quo*, and thus generates scope for change in the national order. The national court might - the relevance of which has also been discussed in respect of the state liability case example – understand that the preliminary reference procedure allows it to engage indirectly with the national legislature, and thus, facilitate change while eluding the jurisdiction of the supreme court; in this respect, the national court anticipates its empowerment. The preliminary reference procedure also potentially allocates to the national court scope to shape the hearing of the case; that is to say, it might engage in a strategic approach, for example, by delaying cases through referral or alternatively, deciding not to refer to avoid being accused of engaging delaying tactics. Furthermore, the national court’s determination of whether to refer allows it to shape the interaction of the national and Union orders and the potential impact arising therefrom. Herein, it seems worthwhile to consider two cases – both arising in the English system – in which no reference has been made.

None of the cases examined above were referred from the English courts; notwithstanding, two of the key national cases concerning the scope of the UCTD’s putative application and the application of Art.4(2)¹⁰⁶⁹ (discussed in greater detail below) have arisen in the English

¹⁰⁶⁷ One might make reference to the *Aziz* case, in which the AG and Court provided more in depth guidance than previously, without going anywhere near so far as to establish the existence of an imbalance for Art.3 UCTD purposes; *Aziz* (n.1036).

¹⁰⁶⁸ Cf. Spain, where the lower courts are basically bound by national procedural law to make a reference; I am grateful to Judge Ignacio Sancho Gargallo for this reference.

¹⁰⁶⁹ Regulation 6(2)(b) as implemented in the national system: the directive was implemented in the legal systems of England and Wales, and Scotland, by Unfair Terms in Consumer Contracts Regulations 1994 SI 1994/3159 and subsequently through the Unfair Terms in Consumer Contracts Regulations 1999 SI 1999/2083.

system, namely, *Director General of Fair Trading v. First National Bank plc*¹⁰⁷⁰ and *The OFT v. Abbey National*¹⁰⁷¹. These cases reflect not only the scope for conflict between English procedural law and EU norms but also the scope for conflict at the highest levels of the English judiciary (the House of Lords as it then was, and the Supreme Court as it is now established) concerning, in particular, the delineation of contract term regulation. It is submitted that the foundations of the conflict arising between the House of Lords and the Supreme Court are more significant than the characterisation of the particular terms, and can be identified firstly, in the courts' approaches to the directive's purpose¹⁰⁷². The House of Lords emphasised the consumer protection dimension of contract term regulation, highlighting the need to protect the consumer from unreasonable terms¹⁰⁷³. To this extent, it seemed to support (and find support in) the CJEU jurisprudence¹⁰⁷⁴. The UKSC rather engaged the information paradigm, highlighting the importance of transparency underpinning the potential for consumer choice. Whether these approaches provide for the same level of protection is unclear; the notion of transparency as set out in the directive and as engaged by the UKSC is narrow, as transparency is otherwise deemed to "clearly go beyond plain and intelligible terms"¹⁰⁷⁵. The roots of conflict are further identifiable in the courts' construction of the Art.4(2) exclusion (although in both, there existed general consensus as to a narrow understanding). While the House of Lords distinguished core and incidental terms¹⁰⁷⁶, the UKSC adopted a broader understanding per Lord Walker who, while recognising its potential relevance, rejected the distinction¹⁰⁷⁷. The UKSC attempted to reconcile the diverse approaches with reference to the notion of "price", considering that in *First National*, the relevant "default" terms nevertheless fell outwith the scope of the Art.4(2) exclusion; the UKSC characterised the terms before it – charges for unarranged overdrafts – as part of the

¹⁰⁷⁰ *Director General of Fair Trading v. First National Bank plc* [2001] UKHL 52; [2002] 1 AC 481; see also, H-W. Micklitz, *The Politics of Judicial Co-operation in the EU: Sunday Trading Equal Treatment and Good Faith* (CUP, Cambridge; 2005), pp.401-423.

¹⁰⁷¹ *The OFT v. Abbey National* [2009] UKSC 6; [2010] 1 All E.R. 667.

¹⁰⁷² Including also the approach adopted in the determination of the nature of the terms; S. Whittaker, 'Unfair Contract Terms, Unfair Prices and Bank Charges' (2011) 74 *MLR* 106, pp.116-117.

¹⁰⁷³ *Director General of Fair Trading v. First National Bank plc* [2001] UKHL 52, para.34 per Lord Steyn and para.12 per Lord Bingham.

¹⁰⁷⁴ Consider in particular, *Mostaza Claro* in which the Court highlights the purpose of the directive "to strengthen consumer protection"; C-168/05 *Mostaza Claro* [2006] ECR I 10421, Judgement, para.37.

¹⁰⁷⁵ M. Chen-Wishart, 'Transparency and Fairness in Bank Charges' (2010) 126 *LQR* 157, p.160.

¹⁰⁷⁶ *Director General of Fair Trading v. First National Bank plc* [2001] UKHL 52, para.12 per Lord Bingham making a distinction between the "core terms" of the substance of the contract (which would fall within the exclusion) and "incidental (if important) terms which surround them" (which would not).

¹⁰⁷⁷ *The OFT v. Abbey National* [2009] UKSC 6, paras.41-46 per Lord Walker, and in the Court of Appeal, which restricted the exclusion to "core terms" (although obviously, little understanding of what "core terms" should mean); *The OFT v. Abbey National* [2009] EWCA Civ 116.

price, falling within the exclusion's scope¹⁰⁷⁸.

The UKSC approach therefore diverges from *Caja de Ahorros*¹⁰⁷⁹ (which had not then been decided), not only per the engagement of the exclusion but also as to the way in which the case builds on previous CJEU jurisprudence, in respect of the purpose of the directive (whereby the consumer deemed to be the weaker party). As this latter dimension is deemed to concern the “public interest underlying the protection which the Directive confers on consumers”¹⁰⁸⁰, it is inherently linked to public policy; consequently, its conceptualisation will potentially diverge across the national courts. Indeed, the UKSC's understanding of “price” reflects much more than a mere textual conceptualisation of the term; rather, it reflects the consumer, not as the weaker party as in the CJEU case law but as a “rational” actor, and thus, its understanding of the relationship between party autonomy and consumer protection in English contract law¹⁰⁸¹. The UKSC decision has been described as “very formal”¹⁰⁸², “very English” and “insufficiently” European¹⁰⁸³; indeed, it seems that the UKSC rather followed the national legislature on this issue¹⁰⁸⁴, reflecting the policy choices broadly established therein¹⁰⁸⁵. It was recognised that the bank charges cases engaged considerable social and economic dimensions, concerning the financial and banking industry in the UK, and particularly, the authority of regulatory bodies – namely, the Director General of Fair Trading¹⁰⁸⁶ and the OFT¹⁰⁸⁷ – to regulate contract terms as to their unfairness. That is to say,

¹⁰⁷⁸ *The OFT v. Abbey National* [2009] UKSC 6, para.43 per Lord Walker.

¹⁰⁷⁹ *Caja de Ahorros* (n.268).

¹⁰⁸⁰ C-168/05 *Mostaza Claro* [2006] ECR I 10421, Judgement, para.38.

¹⁰⁸¹ This is also true with regard to the understanding of good faith in the first case.

¹⁰⁸² P.P. Davies, “Bank Charges in the Supreme Court” (2010) 69 *CLJ* 21, p 22.

¹⁰⁸³ P. Morgan, ‘Bank Charges and the UTCCR 1999: The End of the Road for Consumers?’ [2010] *Lloyd's Maritime and Commercial Law Quarterly* 208, p 212.

¹⁰⁸⁴ Consider the opinion expressed by Lady Hale, in noting that the determination of the nature of consumer law – whether protecting the consumer from his own potentially “bad choices”, or establishing consumer choice, is “fortunately...for Parliament and not for this Court”.

¹⁰⁸⁵ It is worth noting that the approach adopted in the German system diverges significantly from that of the UKSC, as regards the Art.4(2) exception. The Art.4(2) exception was added on the instigation of German professors (H. Brandner and P. Ulmer, ‘The Community Directive on Unfair Terms in Consumer Contracts: Some Critical Remarks on the Proposal Submitted by the EC Commission’ (1991) 28 *CMLR* 647). This exclusion predates the UCTD, having been included in AGBG 1976. German law provides for a breadth of “default” rules such that all standard terms that are not default terms are subject to assessment; as there is no default rule on price/subject matter, a term cannot deviate from it and thus cannot be subject to the assessment (although ancillary terms will be accessible)¹⁰⁸⁵. The approaches of the German and English courts are interesting to the extent that they highlight the scope for the analysis of the divergences in the cultures and traditions of procedural regimes. See: BGH 21.10.1997, BGHZ 137, 43, NJW 1998, 309; BGH 30.11.1993, BGHZ 124, 254, NJW 1994, 318 (charges to withdraw cash from a teller than from an ATM); BGH 13.02.2001, BGHZ 146, 377, NJW 2001, 1419 (charge for being overdrawn); BGH 08.03.2005, NJW 2005, 1645, 1647 (charge for going back to debit following withdrawn status).

¹⁰⁸⁶ In respect of the UTCCR 1994.

for the UKSC, the UK legislature could have adopted a higher level of consumer protection in transposing the directive, as in Spain. Indeed, Lord Walker invited the Westminster Parliament to legislate on the issue, recognising the policy considerations underlying the issue¹⁰⁸⁸.

The cases not only reflected the scope for conflict between the highest English courts¹⁰⁸⁹ but also highlighted the lack of clarity in the lower courts as to the scope of contract term regulation¹⁰⁹⁰. The cases further emphasised the divergent approaches of the English courts and the CJEU, both as to the nature and purpose of the directive, and as to the scope of contract term regulation; despite the scope for such (vertical) conflicts, the UKSC nonetheless refused to refer to the Luxembourg Court, and thus, to engage explicitly in dialogue. Rather the acknowledgement of the influence of Union law on national procedural norms was indirect in both cases, with reference to the *travaux préparatoires* and other language versions of the directive. The rationale underlying the reluctance to refer to the CJEU is unclear; it might be characterised as reflecting “resistance” on the part of both the House of Lords and the UKSC, reflecting the preferences enshrined in the broader judicial culture (for example, with regard to the use of good faith for determining unfairness). There was a lack of consensus between the justices of the UKSC, as to: 1) the significance of the construction of Art.4(2) in the determination of the case; 2) the *acte clair* nature of Art.4(2); and ultimately 3) the need to refer to the CJEU, each of which remain, particularly in respect of the *acte clair* nature of the Art.4(2), an ambiguity which endures still¹⁰⁹¹, matters of contention across the European sphere.

II. The Putative Foundations of an Emerging Europeanised Regime of Civil Procedure

¹⁰⁸⁷ In particular, the authority of the OFT rested on whether the bank charges could be considered penalties.

¹⁰⁸⁸ *The OFT v. Abbey National* [2009] UKSC 6, para.52 per Lord Walker.

¹⁰⁸⁹ Notwithstanding that in the second case, the clauses were excluded from the unfairness test, and in the second case the terms were found not to be unfair.

¹⁰⁹⁰ Scottish and English Law Commissions, ‘Unfair Terms in Consumer Contracts: A New Approach?’ (Law Commission, London; 25.07.2012); the lack of clarity in the bank charges cases arises in respect of the application and scope of the directive itself. A lack of clarity also arises in respect of the application of the notion of good faith in the national system; see M. Furmston, *Cheshire, Fifoot and Furmston’s Law of Contract* (OUP, Oxford; 16th edn., 2012), pp.233 *et seq.*

¹⁰⁹¹ Thus, the case highlights the way in which the UKSC engages with the *acte clair* rule. *The OFT v. Abbey National* [2009] UKSC 6, para.91 per Lord Phillips; “I do not find the resolution of the narrow issues before the court to be *acte clair*. I agree, however, that it would not be appropriate to refer the issue to the European Court”.

i. The Contemporaneous Expansion and Delineation of Contract Term Regulation: The Judicial “Necessary Legal and Factual” Requirement and the Legislative Art.4(2) UCTD Exception

Following *Océano*, the domestic courts’ power to regulate *ex officio* contract terms could have been understood as an empowering mechanism, developed by the CJEU via its interpretative role. However, the subsequent imposition of an obligation necessarily limits the discretion initially attributed to the domestic courts via this power; consequently, the scope for conflict between national procedural law and Union law hurries to the fore, where it might previously have arisen only where the national court identified and engaged it. This understanding, which shapes the relationship between the national and European courts and the scope for the Europeanisation of procedural law to which this interaction might putatively give rise, engenders a preliminary consideration, namely whether an attempt to limit the scope of contract term regulation can be identified on the part of the CJEU. This section therefore explores the extent to which the judicially-developed requirement that the national courts have the “necessary legal and factual”¹⁰⁹² information to assess contract terms constitutes a condition of the role of the national courts and thus necessarily limits the scope of contract term regulation; thereafter, the operation and effect of the legislative limitation in Art.4(2) UCTD is uncovered.

The case of *Pannon*¹⁰⁹³ arose from the Hungarian *Budaörsi Városi Bíróság* (the municipal court of *Budaörsi*) and concerned a subscription for mobile phone services, the contract for which included a jurisdiction clause indicating the place of business of the service provider, Pannon but was not individually negotiated. Pannon brought a payment action in the district court situated in its own place of business, almost 300km from the consumer’s residence; the court considered that, per Hungarian procedural rules, in the absence of a jurisdiction clause, jurisdiction lies in the courts of the consumer’s place of residence. While acknowledging that the jurisdiction clause should be examined as to its fairness, the court considered that it was precluded from doing so as the consumer, having advanced a substantive defence, had submitted to its jurisdiction. Thus, recognising the need to examine the jurisdictional issue within the regulatory context established by the UCTD, it referred a number of questions to

¹⁰⁹² C-397/11 *Jörös nyr*, Judgement, para.27 citing *Banco Español* (n.1016), Judgement, paras.42-44 and *Banif Plus Bank* (n.1042), Judgement, paras.22-24.

¹⁰⁹³ *Pannon* (n.1020).

the CJEU, concerning: 1) the obligation to assess the nature of the term; 2) the relevant criteria for undertaking such an assessment; and 3) the consequences flowing from Art.6(1), namely, whether a term found to be unfair is non-binding as a matter of law, or only at the consumer's request¹⁰⁹⁴.

The Court in *Pannon* acknowledged the domestic courts' obligation to assess unfairness *ex officio*¹⁰⁹⁵ and continued to engage, as the rationale underpinning the obligation, the weaker position of the consumer and the need to provoke the restoration of equality between the parties¹⁰⁹⁶ deriving, via *Mostaza Claro*, from Art.6(1)¹⁰⁹⁷. One key dimension of the case concerns the understanding that the obligation to assess arises¹⁰⁹⁸ only where the national court has available to it the "necessary legal and factual" information to assess the fairness of contract terms¹⁰⁹⁹. This requirement gives rise to the considerations of culture and tradition outlined above, and in particular, questions concerning the role of the national judge, and particularly whether he is limited in his analysis to the facts submitted by the parties. While the Court did not seem to establish a "fact-finding" obligation on the part of the national court¹¹⁰⁰, the notion of "necessary for that task" suggests that the national court need not necessarily be limited to the fruits of the parties' labour, i.e. that advanced before the court. Notwithstanding, neither EU law nor the CJEU provides explicit guidance as to how the national judge should determine that he has such facts available to him, nor is any explicit guidance provided as to the need for an additional investigation by the national judge. Rather, these determinations must be for national law in which the consequences of these considerations - in particular, the latter - will chime differently in diverse legal cultures and traditions across the European space. The scope for the judge to be "active" as opposed to "passive" in identifying and undertaking his task is inherently related to the understanding of the role of the individual judge, in respect of the structure of the judiciary within the national orders, cultures and traditions of procedural law. Yet the CJEU confirmed that even if the national court would not otherwise, by virtue of national law, engage in an assessment of

¹⁰⁹⁴ In fact, the national court, referred the questions in the alternative order.

¹⁰⁹⁵ *Pannon* (n.1020), Judgement, para.30, citing *Cofidis* (n.1025).

¹⁰⁹⁶ *Pannon* (n.1020), Judgement, paras.25 and 31.

¹⁰⁹⁷ C-168/05 *Mostaza Claro* [2006] ECR I-10421, Judgement, para.37.

¹⁰⁹⁸ G. Straetmans and C. Cauffman, 'Legislatures, Courts and the Unfair Terms Directive' in P. Syrpis (ed.), *The Judiciary, the Legislature and the EU Internal Market* (CUP, Cambridge; 2012), pp.92-204, p.109.

¹⁰⁹⁹ *Pannon* (n.1020), Judgement, para.32.

¹¹⁰⁰ It is not necessarily clear that this amounts to "fact-finding"; it might be enough that the CJEU goes beyond the submissions of the parties, in so far as looking to the case file - A. Ancery and M. Wissink, 'Case Note - C-243/08, *Pannon*' (2010) 18 *ERPL* 307, p.314.

contract terms unless the consumer invokes unfairness, it should nevertheless do so where the UCTD applies, considering that “to this extent national courts are required to go beyond the ambit of the dispute”¹¹⁰¹.

Notwithstanding, in the absence of the explicit recognition of the scope for the national courts to engage in “fact-finding”, the Court in *Pannon* implicitly or rather, by default (that is, without undertaking an analysis of the relevant national procedural norms and the historically-shaped and culturally-determined understanding underpinning these norms), engaged the notion of passivity as it arises in certain legal cultures and traditions. “Passivity” finds its foundations in party autonomy and *pacta sunt servanda*, both of which also underpin the choice available to the consumer; that is to say, once a contract term has been found to be unfair, the national court is not obliged to acknowledge and enforce the non-binding nature of the term if the consumer does not wish the (nevertheless, unfair) term to be excluded. In this case, the term continues to be “applicable”¹¹⁰². This determination dictates that the role of the national court is to provide the consumer with information upon which he can choose to act or alternatively, choose not to act. The passivity of the courts on the one hand, and the autonomy of the consumer on the other, have been recognised as issues of public policy by the CJEU¹¹⁰³, the determination of which, it is submitted, can only be made by comparative analysis. Furthermore, this comparative analysis must be of the complex nature outlined above, to the extent that this passivity is shaped not only by legal rules but also by the significance of context, that is, judicial tradition and culture and the identity arising therefrom.

*Pénzügyi Lízing*¹¹⁰⁴ is another Hungarian case, decided subsequent to *Pannon*, which concerned a contract for a loan for the purchase of a vehicle. On the consumer’s failure to complete payment, an action was brought for termination and payment of outstanding amounts, not in the court of general jurisdiction (that of the defendant’s place of residence) but in the courts of the place close to that of the registered office of the service provider per the contract’s jurisdiction clause. The court of first instance made an order for payment; the consumer appealed. Staying the appeal, the *Budapesti II. És III. kerületi bíróság* – the district

¹¹⁰¹ Ancery and Wissink, ‘Case Note - C-243/08, *Pannon*’ (n.1100), p.313.

¹¹⁰² *Pannon* (n.1020), Judgement, para.33.

¹¹⁰³ C-168/05 *Mostaza Claro* [2006] ECR I-10421.

¹¹⁰⁴ *Pénzügyi Lízing* (n.1033).

court - referred a number of questions to the CJEU, amended and subsequently withdrew its referral in light of *Pannon*. Following the *Pannon* judgement, the court considered it relevant to clarify: 1) the compatibility with EU law of national procedural rules, which require that the Ministry of Justice is notified of preliminary references¹¹⁰⁵; 2) the meaning of “unfair” per Art.3; and 3) “what aspects the national court may or must take into account should the general criteria” in making its assessment and whether it “is obliged to undertake, of its own motion, an examination with a view to establishing the factual and legal elements necessary to that examination where the national procedural rules permit such an examination only if the parties so request”¹¹⁰⁶.

The Hungarian court’s referral concerns the interpretative jurisdiction of the CJEU, and its interaction with the domestic courts as it arises per Art.267 TFEU. The notion of unfair term, which has been deemed to “require[s] further legislative definition”¹¹⁰⁷, is one to which only the CJEU can attribute an autonomous interpretation. Per *Caja de Ahorros*¹¹⁰⁸, it must be recalled that this jurisdiction does not extend to the determination of the compatibility of a contractual term with the directive; rather, this determination is for the national courts in line with the “division of jurisdiction”¹¹⁰⁹. The AG in *Pénzügyi Lízing* recognised the private law dimensions underpinning the task of the national court, which raises the scope for “different legal consequences in different legal systems”¹¹¹⁰. Acknowledging the absence of a uniform civil code, while highlighting the significance of academic studies (including the DCFR), the AG considered the possibility that the CJEU might rather construct, on a case-by-case basis, a “common European legal denominator” for assessment; the assumption of this task must be considered in light of the fact that legal certainty might be undermined, as the CJEU is “forced into the role of a substitute civil legislature”¹¹¹¹.

The focus of this analysis falls on the final question referred by the Hungarian court, which arose following *Pannon*¹¹¹² and concerned not only the examination of the contractual terms *ex officio*, but the process of assessment, that is, its order, in the national court. It is clear that

¹¹⁰⁵ In particular, Article 155/A(2) of the Hungarian Code of Civil Procedure, which requires national courts also make a reference to its Ministry of Justice in making a CJEU reference.

¹¹⁰⁶ *Pénzügyi Lízing* (n.1033), Judgement, para.45.

¹¹⁰⁷ *Pénzügyi Lízing* (n.1033), Opinion of AG Trstenjak, paras.87-89.

¹¹⁰⁸ *Caja de Ahorros* (n.268), Opinion of AG Trstenjak, para.69.

¹¹⁰⁹ *Pénzügyi Lízing* (n.1033), Opinion of AG Trstenjak, paras.91-92.

¹¹¹⁰ *Pénzügyi Lízing* (n.1033), Opinion of AG Trstenjak, para.97.

¹¹¹¹ *Pénzügyi Lízing* (n.1033), Opinion of AG Trstenjak, fn.54.

¹¹¹² In particular, *Pannon* (n.1020), Judgement, paras.34-35.

procedural autonomy is not infallible; “*ad hoc* intrusions” by the CJEU are seemingly deemed to be permissible in line with the test of equivalence and effectiveness. This determination is essentially one concerning the balancing of party autonomy, on the one hand, and *ex officio* regulation on the other. Hungarian law provided that the court could only investigate unfairness if one of the parties so requested; that is to say, it could not be obliged to undertake an investigation to identify the relevant “legal and factual elements necessary”¹¹¹³. The CJEU ruling is one in which there was both consensus and dissensus between the AG’s Opinion and the Court’s judgement, both affirming the notion of “division of labour” between the courts. Both AG Trstenjak and the Court characterised the case as concerning the “clarification of certain jurisdictional and institutional aspects of the complex cooperative relationship between the Court of Justice and the national courts”¹¹¹⁴ reflecting, it seems, as noted above, the want of the national courts, post-*Freiburger*, of guidance on the scope of contract term regulation in light of emerging conflicts, not only of a legal but also a political and social nature; however, the AG diverged from the Court, which considered there to be a general obligation on the national court to review terms *ex officio*¹¹¹⁵.

The AG’s response – the rejection of a general obligation to assess¹¹¹⁶ - seems to have been influenced by two interrelated considerations: party autonomy, and practical policy considerations relating to judicial caseload. Deferring to national procedural law¹¹¹⁷, AG Trstenjak considered that the obligation of the domestic court arose only where there existed evidence of unfairness¹¹¹⁸, that is, where the parties had raised it in their arguments¹¹¹⁹. It seems that divergent public policy considerations underpin the Opinion and judgement and thus are deemed to shape the role of the national judge, and the extent to which he is required to firstly, engage in contract term regulation, and secondly, adopt an active approach in so doing. Substantive public policy dimensions therefore shape contract term regulation, in respect of “the extent to which public policy should qualify the private nature of substantive

¹¹¹³ *Pénzügyi Lízing* (n.1033), Opinion of AG Trstenjak, paras.110-111.

¹¹¹⁴ *Pénzügyi Lízing* (n.1033), Opinion of AG Trstenjak, para.59, and 73; Judgement, paras.31-32.

¹¹¹⁵ *Pénzügyi Lízing* (n.1033),

¹¹¹⁶ The AG further rejected the notion that a general obligation of this nature is necessary to satisfy either the principles of equivalence or effectiveness, or to establish effective judicial protection.

¹¹¹⁷ *Pénzügyi Lízing* (n.1033), Opinion of AG Trstenjak, paras.113-115.

¹¹¹⁸ *Pénzügyi Lízing* (n.1033), Opinion of AG Trstenjak, paras.109.

¹¹¹⁹ *Pénzügyi Lízing* (n.1033), Opinion of AG Trstenjak, paras.107-109. She also engages with a comparison of different language versions at fn.75.

individual rights”¹¹²⁰. Rejecting the existence of a general obligation to assess contract terms, the AG highlighted the significance of party autonomy, her understanding of which was informed by the civilian tradition in general¹¹²¹, and German law, in particular. The basis of the AG’s reasoning in national law is not explicit but finds expression in her references and the scholarship engaged, the majority of which was German. Notwithstanding, similarly, in the English tradition, the dispute is deemed to exist only as the parties identify it, that is to say, the judge is not obliged to consider the relationship of the parties beyond what they advance before the court. As such, the judge is not obliged to assess the relationship of the parties, and the legal consequences arising therefrom, beyond this identifiable dispute. That is to say, only in very limited circumstances – for example, in relation to issues of illegality – will the English court engage any entitlement to raise issues of law of its own motion¹¹²².

Contrary to the AG, the Court concluded that the national court should determine whether the term falls within the directive - that is, “in all cases and whatever the rules of its domestic law...whether or not the contested term was individually negotiated...”¹¹²³ - and in so far as it does, it must assess the term¹¹²⁴. While the Court’s ruling seems to suggest that the national court has a role in investigating the “legal and factual elements necessary”, its task nevertheless remains unclear as, in order to allow the national court to decide the case before it, the Court did not respond to the broader question referred as to the obligation of the national court to “investigate”. The Court engaged a public interest rationale in protecting the consumer as the weaker party. While the Court did not explicitly elaborate on what public interest encompasses, it seems to have been conceived as multi-faceted, providing a basis upon which the Court looked to the national court, “justifying an exception to the general principle of party initiative in civil litigation”¹¹²⁵. It was on this basis that the Court recognised, following its own precedent, a general obligation of the national courts to assess *ex officio* contract terms, that is, to “re-establish equality” between the parties¹¹²⁶. The approach of the AG also seems to be the one adopted by AG Wahl in a more recent case, in which he considers that consumers should “make the first move”; this must be appropriate

¹¹²⁰ S. Whittaker, ‘Who Determines What Civil Courts Decide? Private Rights, Public Policy and EU Law’ *Oxford Legal Studies Research Paper 2012/46*, p.48.

¹¹²¹ The notion that it is for the parties to the dispute to “take the initiative” can be found both in French and German law.

¹¹²² This is reflected in the submissions of the UK government.

¹¹²³ *Pénzügyi Lízing* (n.1033), Judgement, para.51.

¹¹²⁴ *Pénzügyi Lízing* (n.1033), Judgement, paras.56-57.

¹¹²⁵ Whittaker, ‘Who Determines What Civil Courts Decide?’ (n.1120).

¹¹²⁶ *Pénzügyi Lízing* (n.1033), Judgement, para.46-47.

against the background of the case¹¹²⁷, such that while the consumer cannot be protected against his will, the national court must ensure the consumer – generally understood as “passive” – has the opportunity to advance his position¹¹²⁸. In this sense, the notion of effectiveness – reflecting the constitutionalisation of private law via its engagement in these UCTD cases¹¹²⁹ - is deemed not necessarily to limit party autonomy but rather to facilitate its scope¹¹³⁰.

The second consideration as to the balancing of party autonomy and the *ex officio* regulation of contract terms concerns the Art.4(2) exception, the reach of which has been briefly introduced above. *Caja de Ahorros*¹¹³¹ concerned variable-rate, loan agreements for residential property, concluded between Caja de Ahorros and its clients, which contained clauses (not individually negotiated) providing for the bank’s setting of nominal interest rates, and in particular, the “rounding up” of rates to the nearest quarter percentage. The *Asociación de Usuarios de Servicios Bancarios* brought the case before the Spanish courts, its standing deriving from the Spanish constitution, which provides that public authorities shall guarantee the protection of consumers¹¹³². Having been subject to the appeals process, the case eventually came before the *Tribunal Supremo*¹¹³³. Art.4(2) UCTD provides that the contract term regulation should not extend to the assessment of core terms to the extent that such terms are expressed in plain, intelligible language. This provision was not transposed in Spanish law¹¹³⁴, which rather provides for the assessment of “all those terms not individually negotiated”¹¹³⁵, which are void if found to be unfair¹¹³⁶; that is to say, no distinction is made in respect of the character of contract terms. Notwithstanding, the *Tribunal Supremo* characterised the interest rate term as a core one in terms of Art.4(2), and subsequently

¹¹²⁷ The notion of “make the first move” is used by Micklitz and Reich, Micklitz and Reich, ‘The Court and Sleeping Beauty’ (n.1036), p.784, while AG Wahl has provided that - in a Slovakian reference concerning the fairness of a clause allowing for the extra-judicial enforcement of a loan, which would allow for the public auction of the security thereto (the home of the consumer), where Slovakian law does not require prior judicial review - a period of four months should allow the consumer to challenge the action and bring a judicial action to prevent the public auction; C-482/12 *Macinsky*, nyr, Opinion of AG Wahl, paras.62-65. At the end of December 2013, the Slovakian court withdrew its request for a preliminary ruling.

¹¹²⁸ *Pannon* (n.1020), Judgement, para.35.

¹¹²⁹ Finding explicit expression in Art.47(1) CFR and Art.19(1) TEU.

¹¹³⁰ S. Weatherill, *EU Consumer Law and Policy* (Edward Elgar, Cheltenham; 2nd edn., 2013), pp.310 and 314.

¹¹³¹ *Caja de Ahorros* (n.268).

¹¹³² Art.51: “ Los poderes públicos garantizarán la defensa de los consumidores y usuarios...”; *Constitución Española*, 1978.

¹¹³³ *Tribunal Supremo, Sala de lo Civil, Sección 1ª, Auto de 20.10.2008*, Ref. JUR 2008\387488.

¹¹³⁴ *Ley 26/1984*, 19.07.1985, *general para la defensa de consumidores y usuarios*, implemented by *Ley 7/1998*, 13.04.1998, *sobre los Condiciones Generales de la Contratación*, transposing the directive.

¹¹³⁵ Art.10a, *Ley 26/1984*, 19.07.1985.

¹¹³⁶ Art. 8(2), *Ley 7/1998*, 13.04.1998.

referred to the CJEU the question of whether national courts are precluded, by virtue of Arts.4(2) and 8 UCTD (the minimum harmonisation provision) from examining the nature of core contractual terms where these terms are in plain, intelligible language¹¹³⁷.

There existed general consensus between the Opinion of the AG and judgement of the Court, at least as to the final determinations. Per Art.8, the UCTD is of minimum reach, which allows for a more protective regime to be established within the national orders. In light of this minimum nature, the AG similarly referred to the existence of a “margin of discretion” on the part of the national court, particularly with regard to the satisfaction of its obligations per Arts.6 and 7 (that is, the consequences of a finding of unfairness¹¹³⁸). As suggested in Part I, the minimum reach of Union legislation shapes the intertwinement of national and EU law in the construction of a regime of contract term regulation. While the Court understood the consumer to be in a weak position as regards the seller, both in terms of his bargaining power and knowledge¹¹³⁹, the AG adopted a less consumer-orientated approach¹¹⁴⁰, characterising consumers as “typically weaker”¹¹⁴¹.

AG Trstenjak, having evaluated the *travaux préparatoires* of the directive, recognised that the initial drafts did not contain a provision similar to Art.4(2); she therefore characterised it as a “value-based decision of the Community legislature”¹¹⁴². In fact, the provision was adopted on the recommendation of two German academics¹¹⁴³. AG Trstenjak highlighted the public policy dimension underpinning her analysis, and focused on the compatibility – that is, consistency and coherence – of a comprehensive assessment of contract terms, promoting consumer protection, with “the principles of the open-market economy and free competition”¹¹⁴⁴. Art.4(2), excluding the need for assessment, was understood to restrict the

¹¹³⁷ The third question referred by the Spanish court was not necessary for the determination of the issue.

¹¹³⁸ *Caja de Ahorros* (n.268), Opinion of AG Trstenjak, paras.53-54.

¹¹³⁹ *Caja de Ahorros* (n.268), Judgement, para.27.

¹¹⁴⁰ For the first time, the AG explicitly highlights the significance of party autonomy in private law on the one hand, and consumer protection on the other; the approach thus differs from previous Opinions in respect of the significance attached to the economic rationale underlying the UCTD, that is to say, that the limitation on freedom of contract must correct “an imbalance in economic power”: *Caja de Ahorros* (n.268), Opinion of AG Trstenjak, paras.38-39.

¹¹⁴¹ *Caja de Ahorros* (n.268), Opinion of AG Trstenjak, para.38.

¹¹⁴² *Caja de Ahorros* (n.268), Opinion of AG Trstenjak, para.62.

¹¹⁴³ Brandner and Ulmer, ‘The Community Directive on Unfair Terms in Consumer Contracts: Some Critical Remarks on the Proposal Submitted by the EC Commission’ (n.1085). Nebbia has recognised that the Council derived the basis of Art.4(2) from the German law, namely what was then Art.8, AGBG and is now established in Art.307(3), BGB; P. Nebbia, *Unfair Contract Terms in European Law* (Hart, Oxford; 2007), pp.124-125.

¹¹⁴⁴ *Caja de Ahorros* (n.268), Opinion of AG Trstenjak, para.42.

directive's "put[ting] an end altogether to the parties' freedom"¹¹⁴⁵. The AG considered that it was the "unanimous view of legal theorists" that Art.4(2) provides for a "functioning market based on competition in respect of price and efficiency" based on the "principles of a liberal economic order". The concern arising from the characterisation of such a statement as "unanimous"¹¹⁴⁶ lies in the divergences in the rationales underpinning and the application of freedom of contract between national, European and potentially transnational, cultures and traditions. Trstenjak indeed recognised that the understanding of freedom of contract diverges and therefore made indirect reference to the significance of comparative analysis without actually undertaking a comprehensive analysis, engaging predominantly German but also French and Spanish scholarship on the legal theory of freedom of contract¹¹⁴⁷. She further acknowledged that freedom of contract is recognised as a principle of EU law; it seems that the unanimity derives from the existence of the principle across the national systems, notwithstanding that its application might diverge therein. Following the AG, the Court rejected *Caja de Ahorros'* argument that Art.4(2) should be understood to be excluded from the scope of Art.8. Furthermore, it considered that Art.4(2) could not constitute the *ratione materiae* of the directive¹¹⁴⁸ and therefore rejected the argument that it defines its scope; rather the Court considered Art.4(2) should be concerned with "establishing the detailed rules and the scope of the substantive assessment"¹¹⁴⁹. Thus, for the Court, the national court could not be precluded from adopting rules that aim to establish a higher degree of consumer protection; the national court must enjoy the power to engage in an assessment of the unfairness of even "core" terms.

Neither the directive itself nor the CJEU explicates what is meant by "core terms"; Art.4(2) merely refers to terms concerning the "main subject matter of the contract...and adequacy of the price and remuneration"¹¹⁵⁰. Even in Germany – the scholarly tradition from which, as Trstenjak notes, the exclusion derived – the distinction between non-core and core terms is unclear¹¹⁵¹. Thus, for the purposes of determining whether the stricter provisions of national law fell within the scope of the directive, AG Trstenjak asserted that the interpretation should

¹¹⁴⁵ *Caja de Ahorros* (n.268), Opinion of AG Trstenjak, para.40.

¹¹⁴⁶ *Caja de Ahorros* (n.268), Opinion of AG Trstenjak, paras.62-63, and fn.28.

¹¹⁴⁷ *Caja de Ahorros* (n.268), Opinion of AG Trstenjak, fn.9 and 12.

¹¹⁴⁸ *Caja de Ahorros* (n.268), Judgement, paras.28-29.

¹¹⁴⁹ *Caja de Ahorros* (n.268), Judgement, para.34.

¹¹⁵⁰ This provision is also made in the pCESL, Art.80(2).

¹¹⁵¹ See the cases arising in respect of Art.307(3) BGB, implementing the Art.4(2) exception (originally, s.8 AGBG); German law makes a distinction between price/subject matter (not subject to assessment because there exists no default rule) and ancillary terms (default rules exist, thus subject to assessment).

be made “using all the methods...available to the Court”, and in particular a historical and purposive approach¹¹⁵². Indeed, she recognised that price and remuneration might be understood in diverse ways, potentially both shaping and resulting from the different understandings as to the scope of the directive, the understanding of the concept of contract, and the conceptualisation of performance. As the determination of the term’s “core” nature is for the national court, it is inevitable that the way in which the exclusion is applied will differ between cultures and traditions across the European space¹¹⁵³. The lack of guidance as to the core/non-core distinction reflects, though unclearly, the attempt at a division of tasks between the national and EU courts. The CJEU does nothing more than “give abstract criteria”¹¹⁵⁴; to go further, it would have to engage in an assessment of all types of contract terms, which it is clearly unwilling to do.

As the litigation in *Caja de Ahorros* was abandoned following the CJEU’s judgement, the Spanish court did not render a final judgement¹¹⁵⁵; notwithstanding, subsequent cases seem to refer to it to support the determination that similar terms are ancillary in their nature¹¹⁵⁶. The judgement might also be understood to reflect the scope for the Member States to legislate - in line with primary Union law - for a higher degree of protection in contract regulation¹¹⁵⁷, an understanding apparently confirmed by the CJEU in respect of the Consumer Credit Directive¹¹⁵⁸. Writing extra-judicially, AG Trstenjak considers that the *Caja de Ahorros* judgement reflects “the general principle that Member States may derogate from minimum harmonization directives in the field of consumer protection by introducing or retaining remedies which go beyond what is required by those directives”¹¹⁵⁹. On the one hand, it is not necessarily clear that the judgement can be understood to reflect the recognition of a principle of Union law as opposed to simply, an interpretative statement of rules. The notions of commonality and generality, underpinning the recognition of principles of law, are

¹¹⁵² *Caja de Ahorros* (n.268), Opinion of AG Trstenjak, para.60.

¹¹⁵³ For example, the “supreme” English courts have attempted to provide some guidance within the English system, with a key divergence identified in two cases (discussed in more detail below).

¹¹⁵⁴ J. Stuyck, ‘Case Note – C-484/08, *Caja de Ahorros*’ (2010) 5 *ERCL* 459, p.465.

¹¹⁵⁵ *Tribunal Supremo, Sala de lo Civil, Sección Iª, Auto de 06.07.2010*. Ref. JUR 2010\264207

¹¹⁵⁶ *Tribunal Supremo, Sala de lo Civil, Auto de 01.07.2010* (insurance); *Tribunal Supremo, Sala de lo Civil, Autos de 29.10.2010 and 04.11.2011* (both on ‘round-up clauses’).

¹¹⁵⁷ C-205/07 *Gysbrechts* [2008] ECR I-9947, Judgement, paras.34 *et seq.*

¹¹⁵⁸ C-509/07 *Scarpelli* [2009] ECR I-3311 in relation to Directive 87/102/EEC, 22.12.1986 (now, Directive 2008/48/EC); the consequences in respect of a full harmonisation directive are identifiable in the CJEU’s interpretations of provisions of the Directive on Product Liability 85/374/EEC, 25.07.1985).

¹¹⁵⁹ V. Trstenjak and E. Beysen, ‘European Consumer Protection Law: Curia Semper Dabit Remedium?’ (2011) 48 *CMLR* 95, p.111.

explored in Part IV. Furthermore, as opposed to constituting a “derogation”, the understanding that a higher level of protection might be established within the national orders rather arises as the default position, that is, in the absence of Union norms; thus, as Trstenjak herself notes, the “margin of discretion of the Member States only exists in the absence of specific rules of EU law on the subject”¹¹⁶⁰. Only where the directive is of a full harmonisation nature does the EU legislature establish default rules of a substantive character¹¹⁶¹, usually interpreted by the CJEU in such a way as to provide that a higher degree of protection cannot be established by virtue of domestic law.

Both cases illustrate that the relationship between national procedural autonomy and EU law, in respect of its *ex officio* application, is complex; in the absence of European rules, the principle of procedural autonomy presupposes the application of national norms. Where express EU provision is made, the principle of direct effect necessitates its applicability; beyond this, the national rule endures, providing that it satisfies the principles of equivalence and effectiveness¹¹⁶². Yet it is clear that even where the Union regime does not explicitly, it might nevertheless implicitly affect national procedure; consequently, it is where an attempt at full adherence to each would necessarily create incompatibilities and result in non-compliance with both regimes, that complexities arise. Furthermore, this “test” of equivalence and effectiveness is similarly complex, not only in light of the ties between national legal traditions and cultures, and procedural law¹¹⁶³ but also, as Bobek notes, to the extent that while equivalence tends “towards the Member States’ national regime, effectiveness [pushes] towards a harmonised Euro-standard” giving rise to difficulties in

¹¹⁶⁰ Trstenjak and Beysen, ‘European Consumer Protection Law’ (n.1159), p.113.

¹¹⁶¹ C-183/00 *González Sánchez* [2002] ECR I-3901, Judgement, para.25 and C-358/08 *Aventis Pasteur* [2009] ECR I-11305, Judgement, paras.39 *et seq*, where it was considered that the national court could not circumvent the 10-year limitation period (Art.11) on producer’s liability (by way of substitution of parties), given the maximum harmonisation character of the directive.

¹¹⁶² *Simmenthal* (n.776), Judgement, paras.17 *et seq*; *Van Schijndel* (n.1193), Judgement, paras.13-14. Art.81 EC (now Art.101, TFEU) has been considered as a rule of public order by the CJEU, and thus – albeit, depending on the context - applicable by the national courts *ex officio*; *Manfredi* (n.897) and C-8/08 *T-Mobile* [2009] ECR I-4529.

¹¹⁶³ Adinolfi, ‘The “Procedural Autonomy” of Member States and the Constraints Stemming from the ECJ’s Case Law’ in de Witte and Micklitz, *The European Court of Justice and the Autonomy of the Member States* (n.1166), p.286. The relevance of national legal traditions and cultures on domestic rules on default interests is also recognised by both the AG and the CJEU in *Aziz* (n.1036), Opinion of AG Kokott, para.86 (noting, “The purposes lawfully pursued by default interest may be different from one Member State to the next. It is not the spirit and purpose of Directive 93/13 to level out differences between national legal cultures”) and Judgement, para.74.

identifying the correct balance between Union and Member States' interests¹¹⁶⁴.

ii. The Multi-Faceted Rationale of the *Ex Officio* Application of Union Law

The development of *ex officio* regulation arguably reflects one example of the CJEU's engagement with the preliminary reference procedure in such a way that the impact of its gap-filling and interpretative role (arguably, the former is more significant, given the absence of Union legislation), operates to open up the scope for Europeanisation in an area which falls outwith the explicit competences of the EU. Yet while there is no evidence of an explicit legislative shift towards Europeanisation, inward roads into national procedural autonomy can be identified¹¹⁶⁵, generating challenges as to its (continued) existence¹¹⁶⁶. While the evolution of the *ex officio* regulation (of contract terms, and as noted, of other directives) does not reflect, in itself, the Europeanisation – or perhaps rather part of the transnationalisation¹¹⁶⁷ - of procedural law, it does reflect shifts in the relationships between national and European courts, the relevance of comparative analysis and particularly, the division of labour in the interpretation and application of EU law. This latter consideration, for which the preliminary reference procedure is understood to provide a basis, engages private law as a multi-level construction: “[a]rticle 234 EC is based on cooperation which entails a division of duties between the national courts and the Court of Justice in the interest of the proper application and uniform interpretation of Community law throughout all the Member States”¹¹⁶⁸.

This multi-level characterisation fits with the notion that while the broad norms governing the regulation of unfair terms derive from the EU level, other substantive considerations including, for example, policy determinations, particularly those concerning justice, diverge

¹¹⁶⁴ Bobek, ‘Why There Is No Principle of Procedural Autonomy of the Member States’ in de Witte and Micklitz, *The European Court of Justice and the Autonomy of the Member States* (n.989), p.319 and p.312, respectively

¹¹⁶⁵ The notion that national procedural autonomy is a myth has been considered briefly in respect of the development of state liability, an observation that highlights the interconnections between the two case studies.

¹¹⁶⁶ Bobek, ‘Why There Is No Principle of Procedural Autonomy of the Member States’ in de Witte and Micklitz, *The European Court of Justice and the Autonomy of the Member States* (n.989) and A. Adinolfi, ‘The “Procedural Autonomy” of Member States and the Constraints Stemming from the ECJ’s Case Law’ in B. de Witte and H-W. Micklitz (eds.), *The European Court of Justice and the Autonomy of the Member States* (Intersentia, Antwerp; 2011), pp.281-304.

¹¹⁶⁷ Herein, reference can be made to the ALI/UNIDROIT Principles of Transnational Civil Procedure, published in 2004 and the commentary that it has received, including, amongst others, H. Patrick Glenn, ‘The ALI/UNIDROIT Principles of Transnational Civil Procedure as Global Standards for Adjudication?’ (2004) 9 *Uniform.L.Rev.* 829.

¹¹⁶⁸ C-244/80 *Foglia v Novello* [1981] ECR 3045, Judgement, para.14.

not only between cultures and traditions but also between the national and Union levels¹¹⁶⁹. The division of labour particularly finds support in the attribution to the national court of the determination of unfairness¹¹⁷⁰, showing “deference to the national court” as it is understood as a “functional Community court”¹¹⁷¹. AG Geelhoed has referred to the need to ensure the “interpretative monopoly” of the CJEU, on the one hand, and the “decentralisation” of the assessment of terms, on the other. As to the latter, the notion of the floodgates argument, and the “overload” of the CJEU’s docket, is relevant; he highlights the need for “the economic use of legal remedies”, and as to the former, the “need for a clear demarcation of powers as between the Community and the Member States”¹¹⁷². *Freiburger Kommunalbauten* not only confirmed that the determination of unfairness per Art.3 is a matter for the national courts but also provided that the interpretation of general clauses, such as those to which reference is made in the UCTD (good faith and significant imbalance) should be deferred to the national orders. Notwithstanding, it is rather the structure of the preliminary reference procedure which dictates that the final decision should be one for the national court; this does not in itself preclude the CJEU from playing a role in interpreting general clauses¹¹⁷³.

It should be noted that on the one hand, the CJEU confirms the notion of a “division of labour” between the national and Luxembourg Court in respect of the “policing” of unfair contract terms, noting that the former “is bound...to examine of its own motion all the contractual terms”; the same limitation - “where it has available to it the legal and factual elements necessary for that task” - applies¹¹⁷⁴. This cannot be a task for the CJEU; while the obligation is established at the Union level, it cannot be carried out there. The understanding of the domestic court as a functional court is integrated with the idea of the domestic courts having been attributed a role via the CJEU as regulatory actors, functionally empowered via the *ex officio* obligation, in the regulation of the market; this understanding broadens the court’s role beyond the protection of the specific consumer in the case before it. Notwithstanding, on the other hand, the role adopted by the CJEU, leading to the scope for an increasingly centralised approach to Union law enforcement, calls into question this division

¹¹⁶⁹ J. Basedow, ‘Der Europäische Gerichtshof und die Klauselrichtlinie 93/13: Der verweigerte Dialog’ in G. Müller *et al* (eds.), *Festschrift für Günter Hirsch zum 65. Geburtstag* (Beck, München; 2008), pp.51-62, p.61.

¹¹⁷⁰ The AG Opinion, at paras.21-22, having been followed by the Court in *Freiburger Kommunalbauten*, and in the cases dealing with the procedural dimensions of the UCTD, in those cases evaluated above, and in particular, by AG Trstenjak in *Pénzügyi Lízing: Pénzügyi Lízing* (n.1033), Opinion of AG Trstenjak, paras.93-97.

¹¹⁷¹ *Pénzügyi Lízing* (n.1033), Opinion of AG Trstenjak, para.59.

¹¹⁷² *Freiburger Kommunalbauten* (n.265), Opinion of AG Geelhoed, para.29.

¹¹⁷³ Micklitz and Reich, ‘The Court and Sleeping Beauty’ (n.1036), p.779.

¹¹⁷⁴ *Aziz* (n.1036), Judgement, para.41.

of labour, with levels of justice generated at the Union as opposed to national levels¹¹⁷⁵. There is little scope to consider the other cases in more detail here, but more recently, the CJEU has provided for the use of different mechanisms, predominantly, injunctions, and the scope for collective effect, allowing for the diffusion among a breadth of consumers of determinations of unfairness (per *Pannon*¹¹⁷⁶, *Invitel*¹¹⁷⁷ and *Pénzügyi Lízing*¹¹⁷⁸).

This section further builds on the analysis above, examining two interrelated rationales underpinning the *ex officio* application of Union law, namely the invocation of public policy and value considerations and the need to ensure effective judicial protection, against the background of the relevance of unfair contract term regulation to the constitutionalisation of a multi-level private law. Firstly, it is worth exploring the two rationales highlighted by Ebers concerning the rationale of the *ex officio* regulation of contract terms. On the one hand, it is the imbalance in the relationship between the parties to the contract that gives rise to the scope for the abuse of one party, and which thus underpins the *ex officio* regulation. The aim of contract term regulation is to ensure that this weaker group is protected, by removing any imbalance between the parties (in respect of their power and knowledge); on this basis, only B2C contract terms are subject to assessment¹¹⁷⁹. On the other hand, contract term regulation derives from the economic rationale underlying contract; that is to say, parties drafting standard clauses are understood to be better informed, not only as to the relevant transaction cost arguments (allowing for the - likely, efficient - dissemination of the costs of contracting) but as to the rights and obligations arising from contracting in general. An imbalance in knowledge can arise in both B2B and B2C contracts; as such, terms in both are subject to review¹¹⁸⁰.

¹¹⁷⁵ Micklitz and Reich, 'The Court and Sleeping Beauty' (n.1036), p.806.

¹¹⁷⁶ *Pannon* (n.1020).

¹¹⁷⁷ *Invitel* (n.1016).

¹¹⁷⁸ *Pénzügyi Lízing* (n.1033). Notwithstanding, it should be noted that the CJEU has also looked to draw a distinction between consumer organisations and consumers, aligning the former more with business organisations, notwithstanding their differences; for example, in *ACICL* (n.1043), the CJEU rejected that a consumer organisation could launch an action for an injunction in the courts of the place of its own business.

¹¹⁷⁹ The approach broadly followed in France, Belgium, Luxembourg, the Czech Republic, Latvia and Malta (in which both individually negotiated and standard terms in B2C contracts are subject to review); the UK, Ireland, Spain, Greece, Italy, Bulgaria, Cyprus, Poland, Romania, Slovakia (only non-negotiated terms in B2C contracts); see Ebers, 'Unfair Contract Terms Directive' in Schulte-Nölke, *EC Consumer Law Compendium* (n.1018), p.204.

¹¹⁸⁰ The approach broadly followed in Germany, Portugal, Austria, the Netherlands, Hungary, Lithuania, and Slovenia (in which standard terms in both B2B and B2C contracts, and individually negotiated terms in B2C contracts are subject to review. In the Scandinavian traditions, standard and negotiated terms in B2C and B2B contracts will be subject to review; See also, Ebers, 'Unfair Contract Terms Directive' in Schulte-Nölke, *EC Consumer Law Compendium* (n.1018), p.204.

The basis upon which the consumer is identified as the weaker party may differ, from that of market failure (where the market essentially fails to provide consumers with the information they require) to market unfairness (which in turn engages the diverse understandings of justice, where the market might allow for economic bargaining but does not provide for “redistribution of wealth” between the parties). These considerations give rise to the question of what the market is supposed to do and the role played by the consumer in its operation. It is clear from recital 9 of the UCTD that the EU legislature had taken account of both sets of rationale; it provides that the directive has the purpose of securing the protection of the weaker party, and the negation of the danger posed to the consumer with regard to the imbalance of knowledge, on the one hand, and with regard to the transaction cost, information-provision rationale, on the other (even though it applies only to B2C contracts)¹¹⁸¹. The reference to the protection of the consumer as the weaker party is frequent in the CJEU’s jurisprudence, providing the broad rationale for the operation of the directive and forming the starting point of the CJEU’s (and in particular, the Court’s) teleological interpretation¹¹⁸². Notwithstanding, from *Pereničová and Perenič*, it is clear that consumer protection is understood not as the CJEU’s sole consideration¹¹⁸³ but as one amongst many; it is rather balanced with other “objective” factors, including those of an economic nature, for example, the significance of contract as an instrument for the regulation of private relationships, and the need to ensure, where possible, its continuation¹¹⁸⁴.

While the notion of public policy or *ordre public* is frequently engaged by the CJEU, it has rarely been defined; this, in time, might become problematic as it differs between Member States, shaped by and embedded in the cultural, political and socio-economic contexts of the

¹¹⁸¹ See also, Ebers, ‘Unfair Contract Terms Directive’ in Schulte-Nölke, *EC Consumer Law Compendium* (n.1018), p.205.

¹¹⁸² Consider also the point made by Azoulai and Dehousse with regard to the emergence of a European teleology and the CJEU’s engagement in the development of a coherent system of EU law; Azoulai and Dehousse, ‘The ECJ and the Legal Dynamics of Integration’ in Weatherill *et al*, *The Oxford Handbook of the European Union*, (n.113), p.357.

¹¹⁸³ *Pereničová and Perenič* (n.1023), nyr, Opinion of AG Trstenjak, para.65.

¹¹⁸⁴ *Pereničová and Perenič* (n.1023), nyr, Opinion of AG Trstenjak, paras.63 *et seq*; citing examples from German scholarship, i.e. if the gaps left by the exclusion of the term are too big (at fn.19), and with reference to the different language versions (German, French, English, Italian and Spanish), if the contract can continue with in respect of its “purpose and legal nature” without the unfair term. More recently, the CJEU has provided that if a term is found to be unfair, while it is reluctant to provide that national courts can adjust the term itself, it can replace it with default rules in order to ensure the continuation of the contract; *C-26/13 Kásler*, nyr, Judgement, para.78 *et seq*.

national cultures and traditions (as is obvious from the *Rampion* case¹¹⁸⁵) and potentially beyond the state, for example, the policy of the group identified as European consumers, or more broadly, of European society and of international law, in addition, more ambiguously, to those underpinning norms which are privately-made. The origins of these policy and value considerations, including the principle of legal certainty, of national procedural autonomy and the balancing of protection and the market, are therefore national, European and international. These value concerns might also be attributed to a non-national, globalised community, including for example, the business community. The public policy dimensions underpinning the UCTD jurisprudence are diverse. At a fundamental level, the national courts' decisions to refer are shaped by policy and value considerations and by judicial culture in the relevant national contexts; these influences might be explicit or implied. For example, in Hungary, the national courts rarely engage with policy considerations as justifications for their reasoning; notwithstanding, the courts are required – as highlighted in *Pénzügyi Lizing* and *Invitel* – to notify the Ministry of Justice (and also the constitutional court), of its decision to refer to the CJEU.

The policy and value considerations invoked in the intertwining of fundamental rights and consumer contract law, as regards the *ex officio* application of secondary law, allows for consideration broadly, of the need for a high level of consumer protection at both the national and Union level, and more specifically, of the second strand of the rationale underpinning the CJEU's development of the *ex officio* application of Union law, namely ensuring access to justice and effective judicial protection. As to the former, in *Martin Martin*¹¹⁸⁶, AG Trstenjak engaged the CFR as the basis of her interpretation of the *ex officio* nature of the Doorstep Selling Directive¹¹⁸⁷. The case, which arose in the Spanish courts, concerned the scope for the national court to apply the directive *ex officio*, which would lead it to find the contract to

¹¹⁸⁵ Thus, for example, looking to the case law of the *Cour de cassation*, the Court explicitly recognises the distinction in the French system between: 1) those rules ordering society (*règles d'ordre public de direction*) and 2) those protecting specific interests (*règles d'ordre public de protection*); *Rampion* (n.1022), Judgement, para.58.

¹¹⁸⁶ *Martin Martin* (n.1021).

¹¹⁸⁷ Directive on Distance Sales 85/577/EEC, 20.12.1985, hereinafter DSD. The AG noted that while the provisions of the CFR could be employed “as an aid” to interpretation (referring to those cases in which either the AG or indeed the Court engaged the CFR¹¹⁸⁷), it is not “possible to rely on them in answering the question referred”; *Martin Martin* (n.1021), Opinion of AG Trstenjak, para.44, highlighting the Orders underpinning various cases: C-328/04 *Vajnai* [2005] ECR I-8577, para.13; C-361/07 *Polier* [2008] ECR I-0006, para.11. Indeed, a range of AG predominantly, from the national traditions, including AG Maduro, C-465/07 *Elgafaji* [2009] ECR I-0921, Opinion of AG Maduro, paras.21 and 23; AG Mengozzi, C-12/08 *Mono Car Styling* [2009] ECR I-6653, Opinion of AG Mengozzi, paras.49, 83, 95 and 97 and AG Kokott, C-75/08 *Mellor* [2009] ECR I-3799, Opinion of AG Kokott, paras.24, 25 and 33.

be void. The reference to the CFR – specifically, Art.38, which establishes that EU policies should ensure a high level of consumer protection - was raised initially by the *Audiencia Provincial de Salamanca*¹¹⁸⁸, along with other provisions of primary and secondary Union law, including then Art.153 EC, Art.3 and Art.95 EC. As to the latter consideration, the CJEU has consistently affirmed the principle of effective judicial protection, bounded by equivalence and effectiveness¹¹⁸⁹. In *Johnston*, the CJEU, recognising a general principle of law arising from the constitutional traditions of the Member States and the ECHR (and now also Art.19(1) TEU and Art.47 CFR), asserted that the Member States must ensure EU law can be relied upon in the national courts¹¹⁹⁰. The activist approach of the CJEU in this period culminated in the *Emmott* case, which initiated a retreat on the part of both the AG and Court¹¹⁹¹. While AG Maduro has considered that effective judicial protection, and effectiveness broadly, “does not impose a duty on national courts to raise a plea based on Community law of their own motion, even where this plea would concern a provision of fundamental importance to the Community legal order”¹¹⁹², such an approach – followed by the Court – cannot be true in all areas of law; certainly, the *ex officio* obligation has developed in the context of contract term regulation. In *Van Schijndel*, the Court proclaimed that the national court “can act of its own motion only in exceptional cases where the public interest requires its intervention”¹¹⁹³; not only does this understanding provide a rationale for the national courts to act *ex officio* but it also seems to support its transcending of the facts of the dispute as established before it by the parties¹¹⁹⁴.

The identification of the relevant policy considerations, which support the *ex officio* application of Union law, might differ between Member States and between the national and European levels¹¹⁹⁵. With regard to the impact of the need to ensure effective judicial protection within the domestic courts, AG Jacobs has attributed explicit consideration to the diversities underpinning the national cultures and traditions; indeed, he has asserted that the unbounded application of the principle of effective judicial protection, which would

¹¹⁸⁸ *Audiencia Provincial de Salamanca, Auto de 20.05.2008; Audiencia Provincial de Salamanca, Sección Ia; Sentencia núm. 79/2010 de 22.02.2010, Ref. JUR 2010\145869.*

¹¹⁸⁹ Cf. Ancery and Wissink, ‘Case Note - C-243/08, *Pannon*’ (n.1100), p.310.

¹¹⁹⁰ *Johnston* (n.950).

¹¹⁹¹ C-188/95 *Fantask* [1997] ECR I-6783.

¹¹⁹² Joined Cases C-222-225/05 *van der Weerd* [2007] ECR I-4233, Judgement, paras.39-40, Opinion of AG Maduro, para.29. See also, the Judgement, paras.39-40.

¹¹⁹³ Joined Cases C-430-431/93 *Van Schijndel* [1995] ECR I-4705, Judgement, para.21.

¹¹⁹⁴ *Pannon* (n.1020), Judgement, paras.20-22.

¹¹⁹⁵ Ebers, ‘Unfair Contract Terms Directive’ in Schulte-Nölke, *EC Consumer Law Compendium* (n.1018), p.203.

necessarily require the application of Union law in favour of national procedural law, could “unduly subvert established principles underlying the legal systems of the Member States”¹¹⁹⁶. The principle cannot merely be understood as a Union construction but rather must be conceived as one that permeates national cultures and traditions based on the rule of law, and international law. Public policy considerations also shape the operation of the principle of equivalence. The CJEU has considered that the national courts should conceive of rules of consumer protection as having the same status as rules of public policy in national systems¹¹⁹⁷; this understanding “indirectly obliges Member States to extend their most favourable procedural rules to actions for the enforcement of those consumer rights derived from EU law”¹¹⁹⁸. AG Trstenjak has considered in the context of contract regulation that “the enforcement of an arbitration award which is contrary to public policy is prohibited, in the light of the fact that in *Mostaza Claro* the Court implicitly ranked Community-law consumer protection provisions as rules capable of being governed by considerations of public policy”¹¹⁹⁹; thus consumer protection norms are deemed to have the same status as public policy rules, which might reflect a Union principle “recognised not only in international law but also in the legal orders of some European Union Member States”¹²⁰⁰. Thus, where a public policy determination engages national procedural rules, the application of which would oblige the court to intervene (that is, engage *ex officio* with regulation), a consumer protection determination might require the same action on the part of the domestic court.

The diversity of public policy considerations is further reflected, for example, in the scope for the delineation of contract term regulation, explored above. The floodgates argument is often engaged by the CJEU as one of the rationales underpinning the division of labour, in relation to the monitoring of contractual terms, and in particular the allocation of the assessment to the national court¹²⁰¹. Furthermore, it is identifiable in the CJEU’s the reluctance to recognise the *ex officio* application of EU norms providing for contract regulation across all areas of contract law; rather, the CJEU has limited the scope of *ex officio* regulation, engaging clearly with value considerations relevant to each area of regulation. The case law relating to consumer contract can therefore be compared with the approach adopted in commercial

¹¹⁹⁶ *Van Schijndel* (n.1193), Opinion of AG Jacobs, paras.38 and 27, respectively.

¹¹⁹⁷ *Asturcom* (n.1020), Judgement, paras.51 *et seq.*

¹¹⁹⁸ Trstenjak and Beysen, ‘European Consumer Protection Law’ (n.1159), p.121.

¹¹⁹⁹ *Asturcom* (n.1020), Opinion of AG Trstenjak, para.71, citing C-168/05 *Mostaza Claro* [2006] ECR I-10421, Judgement, para.38.

¹²⁰⁰ *Asturcom* (n.1020), Opinion of AG Trstenjak, para.70.

¹²⁰¹ *Pénzügyi Lízing* (n.1033), Opinion of AG Trstenjak, para.96.

arbitration, in which the CJEU has refused to impose an obligation on dispute resolution bodies to examine *ex officio*. The floodgates argument is similarly significant within the national courts. Following *Pannon*, the influence of the CJEU's interpretation can be identified in the legislative amendments made to Art.209B of the Hungarian Civil Code, and Art.41 of the Civil Procedural Code, the drafting of which had the purpose of avoiding judicial overload in the courts of Budapest¹²⁰². Not only does the need for effective judicial protection shape the breadth of contract term regulation, it also shapes the impact of the judgement, reflecting the division of labour between the courts. Thus it is the invocation of the effective protection of the consumer's rights that provides the basis upon which the CJEU deems the infiltration into national procedural law to be justifiable¹²⁰³; two considerations can be explored herein. On the one hand, the CJEU has held consistently that national courts must "establish all the consequences thereby arising under national law, in order to ensure that the consumer is not bound by that clause"¹²⁰⁴. The existence and scope of compensation and restitution depend on national law and perhaps most significantly, prescription rules, (for example, those German rules refined by the BGH¹²⁰⁵).

As Micklitz and Reich note, while prescription is a matter of procedural law and thus, following the notion of procedural autonomy, for the national courts, the application of such norms must nevertheless satisfy the principles of equivalence and effectiveness¹²⁰⁶. It remains to be seen whether such rules might be challenged under EU law. On the other hand, as noted above, CJEU judgements are generally effective *inter partes*; an exception has been advanced in *Invitel* in relation to the UCTD. However, neither the Opinion nor judgement are entirely clear, particularly in respect of the role of the national court with regard to the extension of the effect of the judgement to third parties. A term which has been deemed to be unfair is void as such, which dictates that this finding must be followed by national courts, *ex*

¹²⁰² Further, within the Hungarian system, following *Pannon* and *Pénzügyi Lizing*, the relationship between the lower courts and the Supreme Court has developed in an interesting way. The Supreme Court has thus far issued three (non-binding) opinions on the interpretation of Art.209B of the Hungarian Civil Code (by which the UCTD is implemented). These include: Opinion 3/2011. (XII. 12) on the issue of the national court acting of its own motion; Opinion 2/2011. (XII.12) on the consequences of a determination of nullity of a contract (including consequences of unfairness), and Opinion 2/2012 (XII. 10) on the interpretation of standard clauses applicable following unilateral amendment of contract terms by banks. I would like to thank Prof. Monika Józson for bringing these opinions to my attention.

¹²⁰³ Joined Cases C-222-225/05 *van der Weerd* [2007] ECR I-4233, Judgement, paras.39-40.

¹²⁰⁴ *Asturcom* (n.1020), Judgement, para.59.

¹²⁰⁵ Providing that the prescription period begins at the date when the average consumer could have brought a claim and not from that date on which the illegality has been found to exist.

¹²⁰⁶ Micklitz and Reich, 'The Court and Sleeping Beauty' (n.1036), pp.797-798.

officio, so that the term can no longer be relied upon. This must be a task for the national court, attributing thereto a degree of discretion¹²⁰⁷. Different theories have been advanced to justify the *erga omnes* effect of the judgement; in particular, it has been considered that it is justified not because the action reflects an individual right but rather because it is one supporting a public interest¹²⁰⁸.

Indeed, the public interest dimension of contract term regulation is coming increasingly to the fore; furthermore, the scope for constitutionalisation via the integration of value considerations has been introduced above in relation to *Aziz*, characterised as “public interest litigation”¹²⁰⁹. The Court in *Aziz* largely followed AG Kokott’s Opinion, which engaged fundamentally the notion of effective legal protection and undertook an assessment of the relevant contractual clauses¹²¹⁰. Both the AG and the Court drew connections between the nature of the terms – particularly the default interest and unilateral determination clauses – and national procedure, recognising that both are shaped by national legal cultures¹²¹¹. The Court not only followed the AG’s approach, providing guidance to the national courts on the assessment of unfairness but also went further, engaging a balancing exercise in respect of the determination of disproportionality; ultimately, it highlighted that the final decision is for the national judge¹²¹². *Aziz* is another example of the CJEU attempting to balance national rules of procedure with the *ex officio* obligation underpinning the regulation of contract terms, in line with the notion of effectiveness per Art.47 CFR and the national court’s role in providing a remedy, per Art.19(1) TEU. This balancing suggests the CJEU does not abandon the notion of procedural autonomy but rather recognises the multi-level nature of contract law regulation and consumer protection, particularly in light of the consumer as the weaker party¹²¹³. On the one hand, the CJEU therefore recognises the multi-level structure of the Europeanisation of private law. Yet on the other, by providing guidance on the assessment of terms, it not only impacts procedural autonomy but also calls into question the division of labour between the courts, where consumer protection might otherwise be undermined in enforcement at the national level. As a result, it shifts from establishing minimum standards to maximum,

¹²⁰⁷ Micklitz and Reich, ‘The Court and Sleeping Beauty’ (n.1036), p.795.

¹²⁰⁸ Micklitz and Reich, ‘The Court and Sleeping Beauty’ (n.1036), p.796, citing A. Halfmeier, *Popularklagen im Privatrecht* (Mohr, Tübingen; 2006), p.295.

¹²⁰⁹ Micklitz, *The Constitutionalization of Private Law* (n.404), p.4.

¹²¹⁰ *Aziz* (n.1036), Opinion of AG Kokott, para.57. The relevant clauses being the acceleration clause, the default interest clause and the clause providing for unilateral determination of the amount owed.

¹²¹¹ *Aziz* (n.1036), Opinion of AG Kokott, para.86; Judgement, para.84.

¹²¹² *Aziz* (n.1036), Judgement, para.53.

¹²¹³ *Pénzügyi Lízing* (n.1033), Judgement, para.46.

autonomous standards applicable across the Union, bringing to the fore the potential for increased centralised enforcement.

Following *Invitel*, *Aziz* brings the significance of the collective dimension of consumer protection to light once again. Described as a “test case” of the social dimension of the crisis, its facts bring to the fore, from the perspective of consumer protection, the context of the crisis, and the indebtedness of consumers, the significance of which diverges across the Member States. The facts of the case highlight the absence of potential for justice at the national level, within both the courts and political institutions and the absence of any explicit solution deriving from the Union legislature. The Spanish court’s reference puts the CJEU explicitly in the position of “social engineer”¹²¹⁴ whereby only it can protect those consumers who might not find protection elsewhere, whether as a result of national procedure or other factors¹²¹⁵. The CJEU essentially engages in a political undertaking with which the political institutions at both the Union and national levels seem unwilling to engage, balancing market interests with the social; in so doing, it seems to aim to remedy the “social and political constitutional deficit” arising therefrom, integrating value considerations into the interpretation and application – thus engaging the national courts – of Union and national norms¹²¹⁶.

The fact that these conflicts arise not in one Member State but across Member States dictates that the judgement rendered must be applicable across all national traditions and cultures, bearing in mind that it has the potential to affect not only the economic and legal foundations of the Union therein but also its political, social and cultural underpinnings. For example, in *Aziz*, the Spanish government, the Commission as well as other intervening parties supported the lender, stressing the significance of the clauses for effective and efficient enforcement within the national orders. The issue is essentially one of legitimacy, also raised by Micklitz and Reich. The relevance of comparative analysis for the purposes of rendering a decision which might be deemed acceptable and applicable by the national courts across the Member

¹²¹⁴ Micklitz, *The Constitutionalization of Private Law* (n.404), p.3.

¹²¹⁵ A recent case illustrates the limits of the UCTD. Art.1(2) provides that contractual terms reflecting national statutory and regulatory provisions are excluded from its scope; none of the provisions (which allowed for the the acquisition of the debtors’ home by the bank and an outstanding debt of over 100,000 euros) at issue in the case were contractual nor did they affect the role of the national court to assess contract terms. Rather they were statutory and regulatory, and thus excluded from the scope of the UCTD and the regime of protection to which it gives rise. See C-280/13 *Barclays Bank v Sanchez Garcia*, nyr, Judgement, paras.38 *et seq.*

¹²¹⁶ Micklitz, *The Constitutionalization of Private Law* (n.404), p.3.

States is explored in Chapters 8 and 9. Furthermore, the potential relevance of comparative analysis is identifiable in the fact that this social dimension, arising from the facts of the case, not only reflects the shifting nature of private law but more generally, the scope for the development of a European identity via the empowerment of the consumer. This identity emerges not from the top down but from the bottom up, via the preliminary reference system and the integration of fundamental rights into private law via, per Comandé, the “vehicle of economic freedoms”¹²¹⁷, which links individuals as citizens to community both within and beyond the Member States¹²¹⁸. This consideration, relevant, it is anticipated to Europeanisation, has been explored in Chapter 2.

The constitutionalisation dimension of *Aziz* derives therefore from the CJEU’s integration of value considerations into its judgement. Notwithstanding however that Art.7 CFR makes reference to “respect for his or her...home” – a principle per Art.52(5) – neither the AG nor the Court engaged the CFR in their reasoning. The rationale is unclear. It is reflective, according to Micklitz and Reich, of a hidden constitutionalisation of private law, which is to say that while the CJEU is aware of the constitutional aspect of the conflict, it is not explicitly recognised but rather integrated into its reasoning¹²¹⁹, with reference to the purpose for which the loan had been made, that is, the purchase of the family home¹²²⁰. Micklitz and Reich note that a more explicit acknowledgement of constitutionalisation would not only have required the CJEU to engage in a direct dialogue with the Spanish courts but to also explore the foundations – whether national, European or international – and nature – as a right or a principle – of the respect for the home, and its significance in context. The CJEU’s understanding could have been derived from engagement with national, Union and international sources of protection, as well as the CFR, via comparative analysis, an opportunity perhaps missed by the AG and Court. Notwithstanding, as Micklitz and Reich highlight, the CJEU’s “hidden” approach also reflects the CJEU’s acknowledgement of the danger of attributing a constitutional dimension to every private law conflict that comes before it¹²²¹.

¹²¹⁷ G. Comandé, ‘The Fifth European Union Freedom: Aggregating Citizenship ... around Private Law’ in Micklitz, *The Constitutionalization of Private Law* (n.404), pp.61-101.

¹²¹⁸ Micklitz, *The Constitutionalization of Private Law* (n.404), p.12.

¹²¹⁹ Micklitz and Reich, ‘The Court and Sleeping Beauty’ (n.1036), pp.800-801.

¹²²⁰ *Aziz* (n.1036), Opinion of AG Kokott, para.52; Judgement, para.61.

¹²²¹ Micklitz and Reich, ‘The Court and Sleeping Beauty’ (n.1036), p.801.

A more explicit engagement of the constitutional dimension by the CJEU could have further clarified not only the national courts' application of the CJEU's interpretation but the relationship between the courts generally in the context of Europeanisation and integration. On the one hand, a more explicit recognition of the constitutionalisation of private law, its advantages and disadvantages would have advanced the significance of the shifting nature of private law. It has generally been assumed that private law suffers from the same social deficits as the Union legal order; as noted in Parts I and II, private law has long been linked to the nation states, which late into the twentieth century, and to different extents, attempted to integrate "the social" via national legislation on labour law, tenancy law and consumer law. As a result and within the context of Europeanisation and integration, values are not only integrated into private law but private law itself is integrated into a higher (Union) legal order, undermining the notion of a (number of) distinct private law order(s)¹²²². This gives rise to a lack of clarity as to how these orders interact and the mechanisms that frame this intertwinement.

In this context, the broader question concerns whether the CJEU can really engage such a "social engineering" role in light of its relationship with the national courts. In the absence of provision at the national and Union level, it seems that the CJEU will "step in", which requires it goes further and at the same time facilitate the development of the European society. Yet, as noted, the CJEU might be criticised for being overly intrusive, undermining the role of the national court and the division of labour. The CJEU makes it clear that the final decision always remains for the national court, notwithstanding that enforcement might not ultimately be as effective as anticipated¹²²³. The relationship between the national courts and the CJEU within a multi-level construct of private law illustrates that "the CJEU may take strong positions, but the prime addressees of judgments are and should be the member states, their courts and their competent bodies in charge of 'applying' the European rules to the case at issue. Even the best and most promising 'just' constitutionalized rulings require the national enforcement authorities and courts to awaken the European rulings to life"¹²²⁴. Thus, it is clear that the national courts also have a role to play; this role might be itself "awakened"

¹²²² Micklitz, *The Constitutionalization of Private Law* (n.404), p.5.

¹²²³ Consider for example, the outcome of the *Heininger* case, and the lack of enforcement possible; C-481/99 *Heininger* [2001] ECR. I-9945,

¹²²⁴ Micklitz, *The Constitutionalization of Private Law* (n.404), p.22.

by virtue of the CJEU's engagement of comparative analysis in its rendering of interpretations, outlined in Chapters 3 and 4 and explored in the following Part.

The case study has highlighted the scope for conflict, arising as a result of the application of national procedural rules, between national law and the protection to be afforded to consumers via Union law. The case study has also illustrated the nature of the relationship that arises by means of the preliminary reference procedure between the national courts and the CJEU, the multi-level nature of contract term regulation and the potential for diverse impacts in national cultures and traditions (including, and beyond the Member State of the referring court). The analysis of the jurisprudence has allowed for explication of the diverse rationales underpinning the decision of the national court to refer (or not) a case to the CJEU; of particular interest is the empowerment hypothesis, which itself, constitutes an impact in the national cultures and traditions, and which is likely affect the depth of the impact of CJEU decisions in the national legal orders. The rationale underpinning the CJEU's development of the *ex officio* application of directives is inherently related, and shapes the role of the national court; as noted, it is hypothesised that the role of the court shifts to that of a functional dispute resolution body. The substance of these rationales, and the policy and value considerations underpinning, engage a number of considerations against the background of the constitutionalisation of private law, which might diverge between the national traditions, and also at the Union and international level; there is thus evidence of a comparative analysis – or scope for a comparative analysis – in the Opinions of the AG and judgements of the Court.

While it does not seem, as noted above, that there exists an established dialogue between the national courts, many of the questions referred concern similar issues, or slightly developed problematics of similar issues, which suggests that national judges are at least aware of references made by other courts and the descent of the CJEU's interpretations. The scope for such comparative analysis similarly brings to the fore the scope for diverse impacts in the national traditions and the potential significance of judicial dialogue (which is not only lacking explicitly but was rather implicitly avoided in, for example, *Aziz*) as part of a methodological framework for legal development within the broader political, cultural and socio-economic context of integration, which is to say that the engagement of complex comparison at the level of the CJEU might facilitate its engagement at the national level, such that comparison comes to constitute a mechanism for spillovers and thus, for Europeanisation

and integration.

Chapter 7. The Protection of Fundamental Rights in the Multi-Level Space of Europeanisation: Balancing Fundamental Rights and Freedoms

The interrelation of the sources and protection of fundamental rights¹²²⁵ of a national, Union and international origin, and national private law, reflects well the complexities arising from the overlapping of different spheres of law and the interdependences of legal orders¹²²⁶. In Parts I and II, private law is engaged as a multi-level construct, to the development of which, comparative analysis is advanced as pertinent; this chapter explores the relevance of this characterisation with regard to the interaction of fundamental rights and fundamental freedoms¹²²⁷ in the context of European integration. The Europeanisation of private law has largely highlighted its instrumental dimensions, in respect of integration in general, and the facilitation of the internal market, in particular. Consequently, private law rules have necessarily been connected with the fundamental Treaty freedoms, underpinning the market, and enshrined in the Treaty structure of the EU¹²²⁸. The fundamental freedoms were initially broadly aimed at the Member States (that is to say, national legislation that did not comply with economic freedoms could have been struck down¹²²⁹); by virtue of CJEU jurisprudence, *inter alia*, *Angonese*¹²³⁰ and *Bosman*¹²³¹, the putative scope for the influence - if not the precise context (i.e. whether vertical/horizontal and direct/indirect effect), and degree of impact - of EU law on private law relationships has arisen. The precise influence of fundamental rights (and the policy considerations inherent)¹²³² on private relationships is

¹²²⁵ For a historical overview of the development of fundamental rights law and policy in the EU context, see G. de Búrca, 'The Evolution of EU Human Rights Law' in P.P. Craig and G. de Búrca (eds.), *The Evolution of EU Law* (OUP, Oxford; 2nd edn., 2011), pp.464-497; de Búrca engages with a three-stage development.

¹²²⁶ Reference can be made to the preliminary cases of the CJEU in which the horizontal effect of freedoms and rights have been recognised, including C-127/73 *BRT* [1974] ECR 51 (direct horizontal effect of freedom of competition and right to fair competition in respect of articles of association and copyright agreements); C-155/73 *Sacchi* [1974] ECR 409 (direct horizontal effect of freedom of competition and right to fair competition – contracts for services); C-36/74 *Walrave* [1974] ECR 1405 (prohibition of discrimination on grounds of nationality in respect of collective labour agreements and rules of sports associations).

¹²²⁷ It is worth noting that the idea of a bright line distinction between fundamental rights and fundamental freedoms is becoming increasingly blurred; thus, in *Bosman*, and in other cases, the CJEU has recognised free movement as a fundamental right - C-415/93 *Bosman* [1995] ECR I-4921, Judgement, para.95. Further, Art.45, CFR engages freedom of movement and residence as fundamental rights.

¹²²⁸ Art.26(2) TFEU; free movement of capital: Art.63 TFEU; free movement of goods: Art.28 *et seq.* TFEU; free movement of services: Art.56 TFEU; free movement of persons: Arts.49-55 TFEU.

¹²²⁹ Consider the stages of the development of the CJEU's jurisdiction, above.

¹²³⁰ C-281/98 *Angonese* [2000] ECR I-4139.

¹²³¹ *Bosman* (n.1227).

¹²³² Chantal Mak comes to the conclusion in the first part of her book that "fundamental rights argumentation reveals the policy issues underlying"; this is built on here; C. Mak, *Fundamental Rights in European Contract Law: A Comparison of the Impact of Fundamental Rights on Contractual Relationships in Germany, the Netherlands, Italy and England* (Kluwer, The Hague; 2008), p.292, the "fundamental rights hypothesis" set out at pp.229-230.

ambiguous yet this interaction has not sprung up “out of the blue”. Fundamental rights have been recognised as principles of EU law¹²³³, and can be said to reflect one articulation, or part thereof, of that phrase to which much reference has been made in recent years, and to which reference is made throughout the case examples, namely, the “constitutionalisation of private law”.

With regard to the discourse elaborated upon in Parts I and II, the relevance of fundamental rights further underpins the need for the reconsideration, or at least the adaptation of the way in which private law is conceptualised, particularly in respect of its relevant regulatory dimension, social and political goals. This, and the following considerations are reflected in the analysis of the jurisprudence that follows. The “access points” at which fundamental rights might enter into private law are numerous; their significance ultimately depends on the manner in which, and how broadly, they are conceived. Fundamental rights are included in various bodies of regulation that govern relationships, whether public or private or mixed¹²³⁴ in their nature. The notion of horizontal effect (or *Drittwirkung*), which developed initially within national constitutional contexts, of fundamental freedoms and rights is key. A distinction must be drawn between direct (where rights are directly applicable, providing an individual with a legal basis for a claim) and indirect effect (where rights are relevant in respect of the application and interpretation of private law rules, the focus being on the role of the legislatures and courts)¹²³⁵. The political, cultural and socio-economic dimensions of horizontal effect - and particularly, its “liberal” foundations – further engage the shifting nature of the role of the state in private law¹²³⁶ and the increasing role of the individual¹²³⁷, either identifying as an individual or as part of a group, for example, of consumers. This further highlights that European integration must be understood to be concerned with more than the mere facilitation of the common market; economic integration is rather one

¹²³³ A. von Bogdandy, ‘The European Union as a Human Rights Organisation? Human Rights and the Core of the European Union’ (2000) 37 *CMLR* 1307, with a consideration of the critique advanced against the CJEU’s human rights protection, at pp.1320 *et seq.*

¹²³⁴ For example, labour regulation.

¹²³⁵ N. Ferreira *et al.*, ‘The Horizontal Effect of Fundamental Rights and Freedoms in EU Law’ in G. Brüggemeier *et al.* (eds.), *Fundamental Rights and Private Law in the European Union, Volume I: A Comparative Overview* (OUP, Oxford; 2010), pp.8-118, p.9.

¹²³⁶ Indeed, it is the nature of the understanding of the relationship between the state and the individual, which gives rise to the notion of horizontality versus verticality.

¹²³⁷ From Aristotle’s conception of the political character and participation of man, to Rousseau’s social contract, to the notion of civil society and order arising not solely through the state but through individuals.

dimension of a broader process, which is also political, social and cultural¹²³⁸. Indeed, the fundamental rights case examples, falling under the broad umbrella of the constitutionalisation of private law, further illustrate, as do the two case examples above, the nature of Europeanisation and integration and the context in which it occurs, as well as the scope for shifting understandings of private law.

The final case example engages with the putative conflict arising between those norms which are enshrined in the EU Treaty structure, namely fundamental freedoms, and those which find their origins in national constitutional law but have subsequently been interpreted by the CJEU and consolidated in primary Union law, that is, fundamental rights. Thus, these conflicts can be conceived as arising between national and Union norms, but also between EU norms. There exist diverse sources of fundamental rights, diverse levels of protection and interests underpinning and diverse rationales as to the level at which fundamental rights should be protected¹²³⁹. The cases bring to the fore the promise of consideration of the significance attached to the national and transnational interests shaping standards of protection of fundamental rights and thus to the cultural diversity that permeates the Union space; it seems that only comparative analysis can allow for this promise to be realised. Furthermore, a pertinent political dimension to the balancing of fundamental rights and freedoms is introduced, in respect of the significance attributed to economic interests underpinning the development of the free market, on the one hand, and to individual and group interests in the protection of weaker parties, on the other.

I. The Foundations and Consolidation of Fundamental Rights Protection

This section begins with an exploration of the foundations of fundamental rights protection in the national, European and international contexts; thereafter, the analysis shifts to the

¹²³⁸ Consider the two key papers of Joerges: C. Joerges, 'The Market Without the State? The "Economic Constitution" of the European Community and the Rebirth of Regulatory Politics' and 'States Without a Market? Comments on the German Constitutional Court's Maastricht-Judgement and a Plea for Interdisciplinary Discourses' *European Integration Online Papers* 1997/19 and 1997/20, respectively.

¹²³⁹ L. Azoulay, 'The Case of Fundamental Rights: A State of Ambivalence' in B. de Witte and H-W. Micklitz (eds.), *The European Court of Justice and the Autonomy of the Member States* (Intersentia, Antwerp; 2011), pp.207-218, who for example, references the German and Italian constitutional courts, which have argued that protection should be provided predominantly via national law: P. Pescatore, 'Les droits de l'homme et l'intégration de droit européenne' (1968) 4 *Cahiers de droit européen* 629, and significantly, *Internationale Handelsgesellschaft GmbH* ('Solange I') [1974] 2 *CMLR* 540; *Wünsche* ('Solange II') [1987] 3 *CMLR* 225.

engagement with fundamental rights in the private law relationships from which possible conflicts arise, particularly between the economic and social dimensions of the Union.

i. The Sources of Fundamental Rights Protection in Europe

This section engages with a consideration of the diverse foundations of fundamental rights protection within and beyond the national systems and the engagement of this protection at the Union level via the CJEU's recognition of common and general principles¹²⁴⁰, subsequently enshrined in primary law. The interaction of the diverse levels from which the sources of rights protection arise arguably necessitates the conceptualisation of this protection as existing as a multi-level structure, as it permeates the national, Union and international legal orders.

Unlike the fundamental freedoms, which find their basis in the text of the Treaties, no provision was explicitly made for fundamental rights protection, which developed judicially. In 1977, the Union institutions declared their support for the CJEU jurisprudence tackling this legislative silence¹²⁴¹, subsequently affirmed in the Maastricht Treaty¹²⁴². The addition of fundamental rights, and its diverse bases to the mix of relevant sources of the Europeanisation of private law, confirms the existence of multiple strands of interaction between national, European and international law. The origins and protection of fundamental rights appear to be of a multi-level character (explored further in the following section), comprising the constitutional traditions of the Member States, the CFR, the relevant international treaties, including the ECHR, and increasingly, transnational norms¹²⁴³.

At the European level (encompassing both the EU and the ECHR), fundamental civil and political liberties (the ECHR and CFR) and social and economic rights (CFR) are generally

¹²⁴⁰ To which further reference is made in Part IV.

¹²⁴¹ Following *Nold* (n.791), it became clear this gap would be filled by the CJEU.

¹²⁴² Joint Declaration by the European Parliament, the Council and the Commission Concerning the Protection of Fundamental Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms, OJ C 103 1, and thereafter Art.F TEU.

¹²⁴³ Art.6 TEU is of prominent significance. It not only provides the CFR with the status of the Treaties, in Art.6(1), but further, for the accession of the EU to the ECHR in Art.6(2). Art.6(3) then explicitly refers to fundamental rights as principles of EU law: "fundamental rights, as guaranteed by the European Convention of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions of the Member States, shall constitute the general principles of the Union's law".

distinguished¹²⁴⁴. One observation, which will be deepened below, relates to the seeming assumption that a distinction must be drawn between the protection of fundamental rights in international law, binding on the Council of Europe and its Contracting States and subject to the jurisdiction of the ECtHR, and the protection of fundamental rights within the context of the EU. The foundations of the CFR were established by the German presidency of the EU¹²⁴⁵ following the CJEU's Opinion 2/94¹²⁴⁶, in which it held that the then-EC was not competent to accede to the ECHR, on the basis of the flexibility clause of Art.352 TFEU (then Art.235 EC), responding somewhat it seems to the decision of the *BverfG* in *Brunner*¹²⁴⁷, in which the German court considered that Art.235 EC could not have effects similar to an extension of the Treaty¹²⁴⁸. As some Member States challenged the status of the Charter – for example, the UK argued it was political, as opposed to legal and constitutional, and without a place in the Treaty structure¹²⁴⁹ - it initially did not constitute binding primary

¹²⁴⁴ This is not the place for an in-depth analysis of the divergences between the ECHR and the CFR but for the purposes of the evaluation of the CJEU's engagement with comparative analysis, the nature of the interaction between these regimes of fundamental rights protection, particularly with regard to their function, should be briefly outlined. The ECHR is understood to be concerned with human rights, while the EU – and in particular, the CFR – with civil, social, economic and political rights. Yet, no strict distinction is clear in the jurisprudence; the CJEU recognises the significance of the ECHR, and the ECtHR adopts an “integrated approach” whereby Convention rights are considered and interpreted with some reference to social and economic rights. Consider the speech of the ex-President of the ECtHR, Jean-Paul Costa, who in 2008 highlighted the increasing inference of socio-economic rights by the Court, particularly via the European Social Charter, 1961 and the CFR, citing in particular, *Budina v. Russia*, A.45603/05, ECHR, 18.06.2009 (in the end, the Court held there was no evidence that pension/social benefits were so low as to give rise to a situation incompatible with Art.3, ECHR (prohibition of inhuman and degrading treatment); Speech of Jean-Paul Costa, *La Déclaration universelle des droits de l'homme (1948)*; *Les droits économiques, sociaux et culturels en question, Strasbourg*, 16.10.2008 (<http://www.echr.coe.int/NR/rdonlyres/42BD71A1-099A-4B88-B907-185CFF3B3968/0/2008_Strasbourg_colloque_declaration_universelle_16_10.pdf>; Last Accessed: 24.04.2013).

¹²⁴⁵ Cologne Presidency Conclusions, 03.06.1999 and 04.06.1999; (<http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/kolnen.htm>; Last Accessed: 11.06.2012).

¹²⁴⁶ Opinion 2/94 on the Accession by the Communities to the ECHR [1996] ECR I-1759.

¹²⁴⁷ *Brunner v European Union Treaty* [1994] 1 CMLR 57.

¹²⁴⁸ Indeed, this case provides an example of the nature of inter-institutional dialogue explored in Chapter 9, and the political consequences of a decision of the CJEU, reflected in the subsequent actions of the Union institutions.

¹²⁴⁹ G. de Búrca, ‘The Drafting of the European Union Charter of Fundamental Rights’ (2001) 26 *ELR* 126. It is also worth noting that per the protocols, Post-proclamation, the British Prime Minister, Tony Blair, rejected the notion that the CFR would provide a basis upon which actions could be founded in English and Scottish courts, that is, that it would “not be justiciable...or alter British law” (<<http://news.bbc.co.uk/2/hi/europe/6232540.stm>>; Last Accessed: 02.12.2013). The actual application of the protocol is unclear; that is to say, whether it will provoke little difference in the application of the CFR across the Member States, or whether does actually provide an “opt-out” for the UK, Poland and the Czech Republic; the EU Committee of the House of Lords has provided support for the former, stating that the protocol “should not lead to a different application of the Charter in the United Kingdom and Poland when compared with the rest of the Member States” (House of Lords, EU Select Committee, ‘The Impact of the Treaty on the European Institutions’ 10th Report of Session 2007-2008 (The Stationery Office, London; 2008), para.5.103). Very clearly, the English courts have attempted to hold that the CFR will not provide a basis for an action: *R(S) v Secretary of State for the Home Department* [2010] EWHC 705 Admin, para.58 per Cranston J. The CA referred a question to the CJEU essentially asking whether the protocol could be understood as a general “opt-

law but was deemed to be “solemnly proclaimed” by the EU. Following the Lisbon Treaty, which renders the CFR binding, and obliges the EU to accede to the ECHR, these dimensions have become interlinked. Thus, there is a need to consider the EU/national law mix and the international/national law mix, bearing in mind the “horizontal” interaction between the EU and the international. Negotiations to accession began in July 2010, and a draft agreement was finalised in April 2013¹²⁵⁰, arising from the deliberations of the Steering Committee for Human Rights of the Council of Europe (CDDH), and the European Commission¹²⁵¹. The CJEU will now provide its Opinion, as required under EU law (the accession constituting an international agreement, to which the Union is party)¹²⁵². The Council of the EU must then agree and the contracting parties of the ECHR must assent, following which the Commission will render a draft declaration, a draft Memorandum of Understanding and a draft explanatory report.

It is submitted that the cases analysed herein contribute to the understanding of integration as social and cultural, as well as legal, economic and political, in respect of the evolution of fundamental rights protection as it arises in the context of private law relationships. It has long been recognised that fundamental rights play a key role in European integration; prior to the CJEU jurisprudence discussed herein, the Commission President called for support of rights as principles of Union law¹²⁵³. The initial silence of the Treaties has been attributed to various rationales. In particular, the role of the national courts in the protection of national constitutional rights was significant; this has shaped the understanding of the rationale underpinning the CJEU’s engagement with fundamental rights protection. On the one hand, it has been considered that the CJEU’s engagement with principles derives from the need to maintain the supremacy of Union law; and in particular, as a means of managing the scope for

out” in respect of the validity in the UK and Poland; the AG and Court deemed this to be a question to be answered in the negative by the national court: C-411/10 *NS* [2011] ECR I-13905, Opinion of AG Trstenjak, paras.167-177, Judgement, para.116 *et seq.*

¹²⁵⁰ The draft agreement can be found in annex I, of the Final Report to the CDDH (<http://www.coe.int/t/dghl/standardsetting/hrpolicy/accession/Meeting_reports/47_1%282013%29008_final_report_EN.pdf>; Last Accessed: 17.04.2013),

¹²⁵¹ The group of “47+1”, which held five negotiation meetings with the European Commission, adopting a final report on the negotiation on 05.04.2013. The meeting report can be found here: http://www.coe.int/t/dghl/standardsetting/hrpolicy/accession/Meeting_reports/Web_47_1%282013%29R05_EN.pdf; Last Accessed: 17.04.2013.

¹²⁵² It should be recalled that the (then) ECJ earlier rejected the notion that the (then) EC was competent to accede to the ECHR: Opinion 2/94 (n.1246).

¹²⁵³ W. Hallstein, Speech on the Debate on the Dehousse Report (On the Primacy of Community Law Over the Municipal Law of the Member States), European Parliament, June Session, 1965 (<<http://aei.pitt.edu/13642/1/S69%2DS70.pdf>>; Last Accessed: 30.04.2013).

conflict between the CJEU and the German *BVerfG*¹²⁵⁴. The *Solange* jurisprudence reflected a kind of dialogue between both courts. In *Solange I*¹²⁵⁵, the *BVerfG* held that “as long as” the European integration process did not include fundamental rights protection, the German courts could, having requested a preliminary ruling, request that the *BVerfG* provide a ruling on the compatibility of Union (then EC) acts with the protection of fundamental rights under the German constitution. This understanding was fundamental to the CJEU’s assurance of the protection of fundamental rights as “an integral part of the general principles of law protected by the Court of Justice”. The Court further held that such protection “whilst inspired by the constitutional traditions common to the member states, must be ensured within the framework of the structure and objectives of the Community”¹²⁵⁶, thus setting out, in respect of the German court, the supremacy of Union law. Subsequently, in *Solange II* the *BVerfG* held that as long as the CJEU continue to protect fundamental rights against Union acts, it would no longer exercise its jurisdiction for reviewing Union acts with fundamental rights under the German constitution¹²⁵⁷. Arguably – as explored in more detail below - the CJEU also looked to “fill a threatening gap in the legal protection of individuals by formulating its own doctrine of the protection of fundamental rights as an unwritten part of the Community legal order”¹²⁵⁸. Indeed, de Witte rejects the dominance of the supremacy analysis and rather considers that the CJEU’s recognition of fundamental rights as principles of Union law is rather “closely modelled on, and possibly inspired by” the approach of the French *Conseil constitutionnel*. Similar to the Treaties of the Union, the 1958 Constitution made little express reference to fundamental rights but the *Conseil constitutionnel* rather subsequently engaged and set out the unwritten principles “of the law of the Republic”¹²⁵⁹.

The CJEU has thus long recognised fundamental rights as principles of Union law, which find their basis in that which is shared by the Member States. That which is shared reflects a “philosophical, political and legal substratum” deemed to be common, from which “an unwritten Community law emerges”¹²⁶⁰; it is submitted that this substratum must exist not

¹²⁵⁴ For more on the German foundations of fundamental rights protection, reference can be made to O. Jouanjan, ‘La théorie allemande des droits fondamentaux’ (1998) *Annuaire français de droit administrative* 44.

¹²⁵⁵ *Internationale Handelsgesellschaft GmbH* (‘*Solange I*’) [1974] 2 CMLR 540; *BVerfG* 37, 327.

¹²⁵⁶ C-11/70 *Internationale Handelsgesellschaft* [1970] ECR I-1125, Judgement, para.4.

¹²⁵⁷ *Wünsche* (‘*Solange II*’) [1987] 3 CMLR 225; *BVerfG* 73, 375.

¹²⁵⁸ B. de Witte, ‘The Past and Future Role of the ECJ in the Protection of Human Rights’ in P. Alston (ed.), *The EU and Human Rights* (OUP, Oxford; 1999), pp.859-897, p.863.

¹²⁵⁹ de Witte, ‘The Past and Future Role of the ECJ in the Protection of Human Rights’ in Alston, *The EU and Human Rights* (n.1258), pp.864-866.

¹²⁶⁰ *Internationale Handelsgesellschaft* (n.1256), Opinion of AG Dutheillet de Lamothe, paras.1146-1147.

only at the level of the national cultures or traditions but also at the Union level where it is engaged via the CJEU's jurisprudence. The CJEU's recognition of these fundamental rights as general or common finds its rationale in the need to "ensure the respect for the fundamental rights of the individual and respect for the fundamental rights which form the common heritage of the Member States"¹²⁶¹, which dictates that it is not necessarily the case that the approach followed by the CJEU is necessarily common, that is to say, unanimous; this is clear from *Werhahn*, where the AG rather advocated that the analysis engaged should lead to that which is the "most carefully considered"¹²⁶².

The CJEU makes reference to a breadth of sources, including the national regimes of fundamental rights protection, primary Union law (the CFR understood as an "inspiration"¹²⁶³) and the "guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories"¹²⁶⁴, reflected in the "special significance" of the ECHR¹²⁶⁵. The scope for cross-referencing between the ECHR and EU systems has long been recognised; in the 1980s, Frowein observed a dialectical development between the national systems, the (then) EC and the ECHR, and in his analysis, highlighted examples of cross-referencing, particularly of norms and principles of a "constitutional nature", underpinning fundamental rights development in the EU context¹²⁶⁶. The reference to the ECHR and the jurisprudence of the Strasbourg Court is perhaps gaining increasing importance in light of the EU accession to the ECHR, as outlined above¹²⁶⁷.

¹²⁶¹ *Internationale Handelsgesellschaft* (n.1256), Opinion of AG Dutheillet de Lamothe, paras.1146-1147.

¹²⁶² Joined Cases 63/72-69/72 *Werhahn* [1973] ECR 1229, Opinion of AG Roemer, para.1260.

¹²⁶³ As noted, a distinction can be drawn between the approach of the AGs and the Court to the CFR. While the AGs drew on the CFR as a source of inspiration very soon after its proclamation, the Court first made reference to the CFR in the "Family Reunification Directive" case, concerning Directive 2003/86/EC (C-540/03 *Parliament v Council (Family Reunification)* [2006] ECR I-6535, Judgement, para.38); subsequently, the latter's reluctance to refer to the CFR seems to have waned (*Unibet* (n.971), Judgement, para.37). See also, M.W. Hesselink, 'The Common Frame of Reference as a Source of European Private Law' (2009) 83 *Tul.L.Rev.* 919.

¹²⁶⁴ Opinion 2/94 (n.1246), para.33.

¹²⁶⁵ C-112/00 *Schmidberger* [2003] ECR I-5659, Judgement, para.71 and the cases cited therein, and specifically, C-46/87 *Hoechst AG v Commission* [1989] ECR I-3283, Judgement, para.13.

¹²⁶⁶ J.A. Frowein, 'Fundamental Human Rights as a Vehicle of Legal Integration in Europe' in J.H.H. Weiler *et al* (eds.), *Integration through Law. Europe and the American Federal Experience, Vol. I* (de Gruyter, Berlin; 1986), pp.231-344.

¹²⁶⁷ *Nold* (n.791), Judgement, paras.12-13 and for greater consideration, *Hauer* (n.701), Judgement, paras.13-23, and on the right to property, in particular, paras.17 *et seq.*

As noted above, in *Nold*, it became clear that the legislative silence of the Treaties would be filled judicially by the CJEU¹²⁶⁸. In the absence of fundamental rights concretised at the EU level, the CJEU thus engaged itself to fill relevant gaps to ensure the effective protection of rights; it used comparative analysis, referring to the common constitutional traditions of the Member States. The evolution of fundamental rights in the EU context thus reflects the willingness of the CJEU to adopt a role in attempting to facilitate coherence. On the one hand, the reference to the common traditions of the nation states engages value considerations and allows for the identification of common (or shared) fundamental legal values that might also play a systematising role in EU development. On the other, it also allows for the identification of diverging approaches to fundamental rights protection (particularly in respect of private law) to be engaged at the Union level. A connection therefore arises between a functional understanding of commonality and generality and the system of fundamental rights protection, engaging two interrelated purposes of comparative analysis, namely the engagement of comparative analysis for the purposes of interpretation, and furthermore and relatedly, for the “creation” of something that might not have previously existed in such a form (the recognition of general or common principles or the recognition of “best solutions”). There is evidence of both approaches in the early jurisprudence of the CJEU.

The German *Verwaltungsgericht*, referring the case of *Stauder*, questioned the compatibility of a contested Union measure with “the general legal principles of Community law in force”; for the national court, this referred to principles of national law. AG Roemer accepted the understanding advanced by “many writers” (of the time), who asserted that “general qualitative concepts of national constitutional law...which form an unwritten constituent part of Community law” must be identified by “a comparative valuation of laws”; it was considered that secondary legislation must comply with such concepts¹²⁶⁹. The Court followed this understanding¹²⁷⁰. An alternative approach – which does not rely on a finding of absolute commonality - can also be identified. In *Werhahn v Council*, a case following *Stauder*, German mill owners sought, on the basis of a claim of “legislative injustice”, compensatory damages from the Council and Commission in respect of the loss they incurred

¹²⁶⁸ *Nold* (n.791).

¹²⁶⁹ *Stauder* (n.682), Opinion of AG Roemer, p.428.

¹²⁷⁰ *Stauder* (n.682), Judgement, p.422; Noting that fundamental rights protection finds its basis in Arts.7 (non-discrimination on grounds of nationality) and 40(3) (exclusion of discrimination between producers and consumers in respect of the common agricultural policy) EEC Treaty and the “general principles of law in force in Member States”.

consequent to European legislation regulating the market for durum wheat. In an earlier case – *Schöppenstedt*¹²⁷¹ – the Court had referenced the “widespread existence” of the notion of liability for legislative injustice. The defendants argued, per Art.215 EC (now Art.340 TFEU) providing a basis for comparison, that following the accession of three new Member States, the acceptance of such basis of a claim could no longer be understood as “widespread”. The question arising concerned the scope for the continued relevance of pre-enlargement case law, post-enlargement, where the comparative analysis would identify an absence of commonality between the national systems. The Opinion is an interesting one, particularly in relation to enlargement; while the AG notes that the rules in the new systems should be taken into consideration, the fact that the addition of such considerations strips the previous finding of its unanimity need not be conclusive. The AG’s approach followed Zweigert’s comparative scholarship, an approach, termed “*wertende Rechtsvergleichung*”¹²⁷², wherein, “what might be highly relevant is to ascertain which legal system emerges as the most carefully considered”. It is not sufficient to consider the way in which the law exists but reference should be made to any “tendency to further development”. Essentially, such an approach, focusing – it seems - on the “best solution”, is functional – that is, identifying the most appropriate rule with regard to the particular issue – and necessarily normative, invoking value judgements on the part of the court. The AG, with reference to the “narrowing down of the gap”, clearly recognised the scope for cross-border impact, arising from the influence of the “more progressive” states; the structure and nature of the Union order, and the “strengthening by the Court of legal protection within the Community”, must be understood to be of relevance to the comparative analysis of the CJEU¹²⁷³.

Furthermore, the interpretation of primary and secondary EU law must comply with fundamental rights¹²⁷⁴, giving rise to scope for rights-led interpretations across Union law¹²⁷⁵. Union measures must comply with fundamental rights¹²⁷⁶; if the legislature does not engage with an assessment establishing compatibility *ex ante*, that is, taking measures to ensure that

¹²⁷¹ C-5/71 *Schöppenstedt v Council* [1971] ECR 975.

¹²⁷² The idea was introduced to EU law by Zweigert, K. Zweigert, ‘Der Einfluß des Europäischen Gemeinschaftsrechts auf die Rechtsordnungen der Mitgliedstaaten’ (1964) 28 *RebelsZ* 601.

¹²⁷³ *Werhahn* (n.1262), Opinion of AG Roemer, 1259-1260.

¹²⁷⁴ C-275/06 *Productores de Música de España (Promusicae)* [2008] ECR I-271, Judgement, para.68 and C-400/10 PPU *McB* [2010] ECR I-8965, Judgement, paras.51-52.

¹²⁷⁵ An interpretation which could potentially be proposed and explicated by the national court in its making of the reference: CJEU, ‘Recommendations to National Courts and Tribunals in Relation to the Initiation of Preliminary Ruling Proceedings’ OJ C 338, 6.11.2012, para.24.

¹²⁷⁶ As is clear from *Hauer* (n.701) and *Kadi* (n.147), Judgement, paras.283-285, citing *Schmidberger* (n.1265).

respect is attributed to fundamental rights in the drafting of EU legislation¹²⁷⁷, then the CJEU has jurisdiction to review European legislation *ex post*, in respect of its legality and compatibility with fundamental rights. Union legislation might explicitly provide that it should not affect the exercise of fundamental rights in the national systems¹²⁷⁸; furthermore, it might explicitly proclaim its respect for principles of Union law (including fundamental rights) or the principles set out in the CFR¹²⁷⁹. The CJEU has recognised that measures which do not comply with fundamental rights should not be accepted as having force¹²⁸⁰. Clearly, the national courts are also bound by fundamental rights in their interpretation and application of legal norms¹²⁸¹; they must "also make sure that they do not rely on an interpretation...which would be in conflict with those fundamental rights or with the other general principles of Community law"¹²⁸².

As noted above, the CJEU engages diverse sources of law. Evidently, national levels of protection might differ amongst each other, from the Union level of protection - reflected in the CFR¹²⁸³ - and also from the ECHR¹²⁸⁴; national courts can question the compatibility of Union measures with each. Such a challenge might provide an indication to the CJEU of possible rights violations, facilitating the latter's role in relation to rights protection while comparative analysis allows for the identification of such diverse standards of protection, as well as these indications. Of particular consideration as a source of law, shaping the multi-level character of rights protection, is the CFR. The negotiations and drafting of the CFR was

¹²⁷⁷ Since the CFR was proclaimed in 2000, it has broadly been provided within the Commission that it should be ensured in the proposal and drafting of legislation that it respects the fundamental rights as enshrined in the CFR (European Commission, 'Decision on the Application of the CFR of Fundamental Rights of the European Union' SEC (2001) 380/3); this has been recognised explicitly thereafter (European Commission, 'Communication from the Commission to the European Parliament and the Council on Compliance with the CFR of Fundamental Rights in Commission Legislative Proposals: Methodology for Systematic and Rigorous Monitoring', COM(2005)172, 27.04.2005).

¹²⁷⁸ For example, reference can be made to Art.1(7), Directive 2006/123/EC on Services in the Internal Market, OJ 2006 L 376/36.

¹²⁷⁹ For example, reference can be made to the Preamble of the Consumer Rights Directive, at recital 66, where it is provided that "This Directive respects the fundamental rights and observes the principles recognised in particular by the CFR of Fundamental Rights of the European Union".

¹²⁸⁰ C-260/89 *ERT* [1991] ECR I-2925, Judgement, para.41.

¹²⁸¹ *Schmidberger* (n.1265), Judgement, paras.64-94 and Opinion 2/94 (n.1246).

¹²⁸² Including *Lindqvist* (n.309), Judgement, para.87, C-275/06 *Promusicae* [2008] ECR I-271, Judgement, para.68 and *McB* (n.1274), Judgement, paras.51-52.

¹²⁸³ National constitutional norms which provide for a higher degree of protection than the CFR; L. Besselink, 'The Protection of Fundamental Rights Post-Lisbon' FIDE 2012, p.6.

¹²⁸⁴ National constitutional norms which provide for a higher degree of protection not found in the ECHR; L. Lazarus *et al.*, 'The Evolution of Fundamental Rights Charters and Case Law' Study for the European Parliament's Committee on Constitutional Affairs, PE 432.755 (European Parliament, Brussels; 2011), pp.182-187.

undertaken in two steps prior to the Treaty of Lisbon, via first and second Conventions, led by the Praesidium. The determination of the scope of the CFR constituted a fundamental dimension of these processes; the result is now found predominantly in Art.51(1) which provides that the CFR applies and operates to bind national courts "only when they are implementing Union law". The provision might be interpreted very narrowly – indeed the notion of "only" is significant – and indeed, it is narrower than "within the scope of application of the Treaties" as established in Art.18 TFEU. For CFR purposes, "acting within the scope of EU law" was rejected as too broad; ultimately, the drafters - essentially reflecting a political matter¹²⁸⁵ - adopted the wording used by the CJEU in respect of its delineation of the relevance of fundamental rights¹²⁸⁶. Art.51 has been interpreted in one of two cases – *Melloni*, concerning Art.53 CFR, and *Fransson* – shaping the application of the CFR and ultimately, the multi-level system of fundamental rights protection¹²⁸⁷. These cases will be set out immediately below while their affect on the notion of the multi-level system of rights protection will be analysed at the beginning of the next section on the synergies between the national and Luxembourg court in such a construct.

The CFR is deemed to be potentially applicable across all areas of Union competence. Art.51's lack of clarity derives from the divergence between its text, which makes reference to "implementing Union law" and its Explanations, which provide that the Member States are bound by fundamental rights "when they act within the scope of EU law". The CJEU engaged comparative analysis of sources to which reference is found in the Treaties as well as those to which no such reference is made and ultimately, drew a conclusion equating the scope of EU law with that of EU fundamental rights protection and thereby extending its own jurisdiction; consequently, where the Member State is deemed to act within the scope of matters "covered by EU law"¹²⁸⁸, it is necessarily bound by Union fundamental rights protection. The CJEU ultimately equated "implementing Union law" with the notion of "acting within its scope", following the Explanations¹²⁸⁹; on the facts of *Fransson* itself, it

¹²⁸⁵ Expressed particularly, as noted above, by the UK and evident from the European Ombudsman's release of internal Commission papers (Complaint 2293/2008/(BB)(FOR)TN against the European Commission).

¹²⁸⁶ Explanations on Art.51, citing the wording of the judgement C-292/97 *Karlsson* [2000] ECR I-2737, Judgement, para.37.

¹²⁸⁷ C-617/10 *Åkerberg Fransson* nyr, Judgement, para.22 and 29, citing C-399/11 *Melloni* nyr, Judgement, para.60.

¹²⁸⁸ *Åkerberg Fransson* (n.1287), Judgement, para.22 and 29 citing *Melloni* (n.1287), Judgement, para.60.

¹²⁸⁹ *Fransson* (n.1287), Judgement, paras.17-22.

found a connection “in part” in relation to the matter of VAT¹²⁹⁰.

Moreover, Art.53 CFR shapes the interaction of different rights regimes within the European space, which necessarily overlap, not only in terms of competence but also in “fields of application”. In *Melloni*, the Spanish court recognised the scope for the assessment of the relevant Union measure – the Framework Decision on the EAW - in light of Art.24(2) of its Constitution, and the notion, per Art.53 CFR, that it should not adversely affect or restrict the rights in the constitutional traditions. On the one hand, it considered that if Art.24 established a higher degree of protection¹²⁹¹ than that provided in Art.4a(1)(b) of the Framework Decision, Art.53 CFR should allow for the engagement of this higher protection¹²⁹². Evidently, the CJEU did not adopt this approach, considering that such an interpretation would undermine the effectiveness of Union law, the principles of primacy and supremacy. The CJEU therefore deemed that national norms might apply¹²⁹³ only where such principles would not be undermined. In *Melloni*, the CJEU did not engage the CFR’s Explanations but rather interpreted Art.53 in light of its previous jurisprudence¹²⁹⁴, holding that it does not provide that a national court can dis-apply a measure of EU law, which complies with EU rights protection, on the basis that it does not comply with the national regime.

Art.51 not only has the aim of establishing the addressees of the CFR, confirming the binding force of fundamental rights protection on EU institutions and Member States but further aims to ensure that the CFR cannot be engaged for the purposes of shifting or reallocating powers, or extending the field of application of EU law beyond that established in the Treaty structure¹²⁹⁵. Thus per Art.51(2), the CFR cannot provide the Commission with a legal basis for legislating¹²⁹⁶; the Union has no general competence in fundamental rights, even in respect of Art.352 TFEU and this remains true following the CFR¹²⁹⁷. It is also worth noting

¹²⁹⁰ *Fransson* (n.1287), Judgement, para.24.

¹²⁹¹ In the sense that extradition in cases of trial *in absentia* would be deemed conditional on a guarantee of retrial.

¹²⁹² The CJEU considered that the Spanish court had pre-determined its own approach; *Melloni* (n.1287), Judgement, para.56.

¹²⁹³ *Melloni* (n.1287), Judgement, para.60.

¹²⁹⁴ *Melloni* (n.1287), Judgement, para.63.

¹²⁹⁵ *NS* (n.1249), Opinion of AG Trstenjak, paras.71-83. This is explained in the Explanations and provided for in Art.51(2).

¹²⁹⁶ M. Petite, then Director-General of the Commission's Legal Service in Working Group II of the Second Convention, WD 13 of Working Group II, p.39 (<<http://european-convention.eu.int/docs/wd2/1821.pdf>>; Last Accessed: 29.09.2013). The CFR “does not extend the field of application of Union law beyond the powers of the Union, per Art.51(2) CFR.

¹²⁹⁷ Opinion 2/94 (n.1246) and Decision 2007/252, COM (2011) 758.

that a distinction between rights and principles is seemingly identifiable in Art.51(1) and 52(5)¹²⁹⁸. The scope for such a distinction has been engaged in the Opinion of AG Cruz Villalon, in respect of the consideration of social rights as rights or principles; the AG notes that “*Cependant, il est remarquable que la Charte ne classe pas les droits fondamentaux dans chacun des deux groupes, comme cela est habituel en droit comparé*”¹²⁹⁹. The AG further makes reference to the comparative foundations of such a distinction, as it arises in the national traditions and the role of principles – many of which were initially characterised as “social” - in “complementing” rights.

Notwithstanding, the CJEU’s understanding of the scope and application of the CFR seems to lack consistency. Its jurisprudence provides that in transposing directives¹³⁰⁰ Member States must ensure consistency with the Treaties and the ECHR and compliance with principles of EU law (including fundamental rights). Where the Member State legislates beyond the directive¹³⁰¹, or where it merely acts within a policy area in respect of which the EU has competence, this will not suffice to constitute “implementation”¹³⁰². Discretion conferred on Member States must be exercised in line with Union law, including fundamental rights¹³⁰³. AG Trstenjak, in an Opinion upheld by the Grand Chamber, has also confirmed that “decisions made by Member States on the basis of the discretion available to them under EU legislation are to be regarded as implementing measures for that EU legislation for the purposes of protection of fundamental rights under EU law”¹³⁰⁴.

¹²⁹⁸ Which makes reference to the obligation of national courts to “respect the rights, observe the principles” of the Charter. The distinction might be relevant for private law regulation; for example, Art.38 CFR is understood as a principle and not a right yet as a high level of consumer protection is now also established in the Treaties, it is unclear if such a distinction will affect the protection afforded. The CJEU has recently engaged the distinction, a shift in its previous case law in which it seemed reluctant to do so, in its separate proportionality reviews of the compatibility of Annex III, Directive 2006/126 with Arts.21 and 26 CFR, recognising the latter as a principle and not a right; C-356/12 *Glatzel*, nyr, Judgement, paras.41 and 74 and with reference to the CFR Explanations therein.

¹²⁹⁹ C-176/12 *Association de Médiation Sociale*, nyr, Opinion of AG Cruz Villalon, paras.42 *et seq.*

¹³⁰⁰ *Johnston* (n.950), Judgement, paras.13-21

¹³⁰¹ C-540/03 *Parliament v Council* [2006] ECR I-5769, Judgement, para.104.

¹³⁰² C-361/07 *Polier* [2009] ECR I-0006, Order, paras.13-15. Yet consider C-34/09 *Zambrano* [2011] ECR I-1177, Opinion of AG Sharpston, para.163 *et seq.*

¹³⁰³ C-5/88 *Wachauf* [1989] ECR I-2609 and *McB* (n.1274).

¹³⁰⁴ *NS* (n.1249), Opinion of AG Trstenjak, para.82; see also, C-540/03 *Parliament v Council* [2006] ECR I-5769, Judgement, para.104 and C-108/10 *Scattolon* [2011] ECR I-7491, Opinion of AG Bot, paras.110-118.

The original Explanations to the CFR referred to *Wachauf*¹³⁰⁵ and *ERT*¹³⁰⁶, to which the CJEU continues to refer, the former, in respect of the *stricto sensu* application of Union law in national courts, and the latter, in respect of the scope for derogation from the fundamental freedoms. Where fundamental freedoms are restricted, fundamental rights cannot be ignored but rather must constitute an essential aspect of a proportionality assessment, both where the restriction of the freedom also affects the fundamental rights of a person or a citizen (including *Familiapress*), and similarly, where the protection of the fundamental right is invoked to justify the restriction of the fundamental freedom (*Schmidberger* and *Omega*); this understanding has been confirmed in *NG* by AG Trstenjak¹³⁰⁷. The second Convention made further reference to *Annibaldi*, in which the CJEU denied the applicability of fundamental rights due to a lack of connection between EU and national law¹³⁰⁸. It has long been held that national laws will fall “within the scope of EU law” where these national provisions restrict the exercise of the Treaty freedoms¹³⁰⁹. More recently, the Court has provided that the fundamental rights dimension of analysis might be engaged when “a national measure...is connected in any other way with EU law”¹³¹⁰, an understanding which broadly opens up the connecting factors between the national dispute and the application of Union law¹³¹¹. Where the application of the CFR on the basis of the dispute having an EU law connection arises, the complexity of the relationship between the CFR, as a written source of fundamental rights, and the unwritten sources of fundamental rights protection, comes to the fore¹³¹². The CJEU recently overlooked the opportunity to provide some clarity as to this relationship; the case, concerning the parental rights of a third-country individual and custody of a Union citizen child, concerned the relationship between the application of unwritten sources of fundamental rights, and the CFR. The Court merely highlighted that Art.51 provides for the latter’s application only where EU law is relevant¹³¹³. The idea that the breadth of the CFR is

¹³⁰⁵ *Wachauf* (n.1303). *Wachauf* provides for the Member States as Union agents when they engage in the transposition and application of EU law; as such, they must be able to uphold the respect for EU law, and ensure in its application that fundamental rights are respected.

¹³⁰⁶ *ERT* (n.1280). From *ERT*, the Member State is understood to act not as an agent of EU law but in its own interest and in line with national law.

¹³⁰⁷ *NS* (n.1249), Opinion of AG Trstenjak, para.78.

¹³⁰⁸ C-309/96 *Annibaldi* [1997] ECR I-7493.

¹³⁰⁹ C-7/98 *Krombach* [2000] ECR I-1935, Judgement, paras.39-45.

¹³¹⁰ C-27/11 *Vinkov*, nyr, Judgement, para.59.

¹³¹¹ Consider the wide interpretation (not followed by the Court) rendered by AG Sharpston in *Zambrano*; proposing that the application of fundamental rights applies wherever the EU is competent to act – whether full or shared competence, C-34/09 *Zambrano* [2011] ECR I-1177, Opinion of AG Sharpston, para.163.

¹³¹² Editorial Comments, ‘The Scope of Application of the General Principles of Union Law: An Ever Expanding Union?’ (2010) 47 *CMLR* 1589, p.1595.

¹³¹³ C-40/11 *Iida*, nyr, but did not find a connection with Union law and so did not rule on this question.

deliberately attributed for the purposes of avoiding overlap and potential conflict between different layers of protection dictates that the various institutional actors are aware of the scope for conflict, and thus of the need for interaction, across levels and across sectors, where both private law and fundamental rights protection are conceived as multi-level orders. On the other hand, a broad understanding of the scope of the CFR could further increase the caseload of the CJEU; it also gives rise to questions of legitimacy, concerning in particular the CJEU's jurisdiction and role in rendering interpretations of Union law which potentially impact national law, even in cases in which the link with EU law is (relatively) narrow.

The CFR itself provides the foundations for judicial comparative analysis, with reference both to national constitutional traditions and to the Convention system of rights protection. Two provisions of Art.52 CFR are relevant: Art.52(4) provides that “in so far as this Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions”, while Art.52(6) establishes that “full account shall be taken of national laws and practices as specified in this Charter”. Both provisions derive from the processes of diplomacy and consensus building, leading to the “Explanations Relating to the CFR” in the drafting of which the Working Group on the Second Convention was engaged¹³¹⁴. The Explanations recognise that the reference in Art.52(4) to common constitutional traditions derives from Art.6(3) TEU, giving rise to an interpretative approach based on commonality. The article initially arose from the proposal of one Member State that the bases of the rights, principles and freedoms protected in the CFR should be expressed explicitly in the document, to allow for certain provisions to be traced back to the relevant international conventions or treaties, jurisprudence, or national constitutional traditions; the provisions which could not be so traced would be characterised as “non-justiciable principles”. While this proposal was rejected, Art.52(4) promotes the interpretation of CFR rights deriving from the common national constitutional traditions “in harmony” with those traditions, in order to avoid conflicts in the scope and meaning of rights identifiable from different sources.

The CFR aims to establish a high standard of protection, in line with both Union law and the national constitutional traditions and does not simply identify the lowest common

¹³¹⁴ Praesidium of the European Convention, ‘Explanations Relating to the Charter of Fundamental Rights’, 2007/C303/03, OJ C 303/17, 14.12.2007. The Explanations are not binding but are intended to constitute a “valuable tool of interpretation intended to clarify the provisions of the Charter”.

denominator¹³¹⁵; this suggests that the CJEU might also look to identify the “best solution” even where that solution is not necessarily “common”. From *Omega* – a pre-CFR case – it is clear that the CJEU will not necessarily seek commonality, in respect of the justification to an infringement or the operation of the proportionality test. Art.52(6) was inserted in respect of those CFR provisions that make reference to national laws and practices in line with the principle of subsidiarity¹³¹⁶; it is intended to deal with those provisions in respect of which there exists divergence in the national traditions, those in respect of which the competence of the EU to legislate was called into question and those which were particularly controversial. Yet it is not explicitly clear why similar provisions in different pieces of legislation refer to national law differently, or in some cases not at all. The Explanations provide no further explication or guidance on how Art.52(6) might be engaged.

Art.52(3) CFR provides that the same scope and meaning should be attributed to “corresponding” CFR and ECHR provisions. The CFR establishes that the Union can afford greater protection than that established by the Convention; essentially, Art.52(3) dictates that the ECHR reflects the minimum level of protection. It similarly aims to avoid conflicting interpretations as to meaning between the ECHR and CFR; “in order to ensure the necessary consistency”¹³¹⁷ the CJEU must – and indeed seems to¹³¹⁸ - refer not only to the relevant Convention provision but also to the meaning attributed thereto by the ECtHR. The CFR confirms the multi-level protection of fundamental rights, per Art.53 CFR, in respect of EU law, national constitutional laws, and international law, predominantly, the ECHR¹³¹⁹. The CJEU’s analysis confirms the scope for reference to the jurisprudence of the Strasbourg Court

¹³¹⁵ (Then) Judge Skouris similarly expressed that the CJEU “is not bound by the common constitutional traditions as such” and does not “mechanically transpose their lowest common denominator into the Community legal order”, but “merely draws inspiration from them in order to determine the level of protection appropriate within the Community legal order”; this has been characterised as “evaluative comparison”: Working Group II ‘Incorporation of the Charter/Accession to the ECHR’, Working Document 19, p. 8 (<<http://european-convention.eu.int/docs/wd2/3057.pdf>>, Last Accessed: 08.10.2013). For a recent confirmation of the Court's methodology of “evaluative comparison”, see Opinion of AG Kokott, *Akzo* (n.691), Opinion of AG Kokott, paras.93 *et seq* (in particular to para.104)

¹³¹⁶ Including, Arts.9, 10(2), 14(3), 16, 27, 28, 30, 34(1) and (3), 35, CFR. In respect of 52(6), reference can be made for example, to C-271/08 *Commission v Germany* [2010] ECR I-7091, Judgement, paras.38-39: “It is apparent from Article 28 of the Charter, read in conjunction with Article 52(6) thereof, that protection of the fundamental right to bargain collectively must take full account, in particular, of national laws and practices...Furthermore, by virtue of Article 152 TFEU the European Union recognises and promotes the role of the social partners at its level, taking into account the diversity of national systems”.

¹³¹⁷ Praesidium of the European Convention, ‘Explanations Relating to the Charter of Fundamental Rights’, 2007/C303/03, OJ C 303/17, 14.12.2007, Art.52.

¹³¹⁸ *McB* (n.1274), Judgement, para.54.

¹³¹⁹ Consider, for example, C-135/08 *Rottman* [2010] ECR I-1449, Judgement, para.55 which recognises a double layer of scrutiny in respect of the proportionality assessment.

where the relevant CFR right parallels that found in the ECHR, in respect of the determination of its scope and meaning¹³²⁰.

While the CFR along with national law, and the ECHR and other international human rights treaties, facilitate the interpretation of EU law as a mix of these different sources¹³²¹, the CFR might come to constitute a “one-stop shop” for reference to fundamental rights. This is essentially a matter of constitutionalisation, particularly of private law; while the CJEU has until now referred to constitutional traditions common to the Member States, the ECHR and both before and since it has become binding, the CFR itself, it remains unclear whether there will be a shift in scope in respect of this approach to constitutionalisation. Evidently, to the extent that this involves the generation of information, the scope for comparative analysis is pertinent. That is to say, in the alternative to engaging in a comparative analysis, for the purposes of identifying common or general principles, or “best solutions”, the CJEU might rather engage with the CFR as a written source of law, recognising that (most of) the Member States have assented to and will be bound by the CFR. The CFR amounts to the “creative distillation” of rights, civil, political, economic and social, deriving from various sources, including national, Union and international law¹³²². Such an approach would arguably negate the need for in-depth comparative research; instead, generality or commonality could be identified *prima facie*, namely international treaties, the ECHR and the ECtHR jurisprudence.

The primary recognition and evolution of rights within a national context necessarily engages the notion of (cultural) relativism¹³²³; the danger of which was highlighted in the processes of drafting international human rights treaties¹³²⁴. Yet to the extent that human and fundamental rights are advanced as universal in their nature, the focus underpinning their analysis should not necessarily be on the national culture or tradition¹³²⁵, suggesting the scope for a shift in

¹³²⁰ *McB* (n.1274), Judgement, para.53.

¹³²¹ H. Collins, 'The Impact of Human Rights Law on Contract Law in Europe' *University of Cambridge Faculty of Law Research Paper No. 13/2011*, p.15.

¹³²² Craig and de Búrca, *EU Law* (n.212), p.395.

¹³²³ It is worth noting, which cannot be expanded upon here, the difficulties – like those encountered in relation to culture - with the notions of cultural and moral relativism and the confusion surrounding the two.

¹³²⁴ On the United Nations Commission on Human Rights preparation of the Convention on Human Rights in respect of which the “Western” dominance was noted: Executive Board, American Anthropological Association, ‘Statement on Human Rights’ (1947) 49 *American Anthropologist* 539.

¹³²⁵ It is worth noting that there has been some political science research undertaken in respect of whether certain traditions are more or less likely to bind themselves to international human rights conventions; see B. Simmons, ‘Why Commit? Explaining State Acceptance of International Human Rights Obligations’; Paper prepared for meeting of the Conference on Delegation to International Organizations, May 3-4, Brigham Young University, Provo, Utah (< http://www.wcfia.harvard.edu/sites/default/files/752__SimmonsWhyCommit.pdf>; Last

the determination of what is compared, i.e. the unit of comparative analysis; that is to say, it should not be limited to the national legal order, culture or tradition but might extend beyond the national order.

The multiple sources of rights protection, and the potential scope for conflict arising between fundamental rights and national norms but also, as is the focus herein, between rights and fundamental freedoms, attribute to these cases an additional dimension of complexity. These conflicts give rise to preliminary references where national judges seek guidance; the reference procedure engenders scope for interaction between the national, EU and international systems of protection, and in particular, between the national courts and the CJEU. However, these conflicts and the interaction arising therefrom, also open up the potential for engagement with different methodologies and furthermore, potential avenues of communication, in respect of which, the recognition of generality and commonality, the identification of “best solutions”, and thereafter, transfers and dialogue become possible.

ii. Conflicts Between Fundamental Rights and Freedoms: Rights-Based and Integration-Orientated Understandings of the Balancing Exercise

Schmidberger, *Omega*, *Viking* and *Laval* highlight the breadth of conflicts that might arise from legal disputes arising from private law relationships in (cross-)national contexts, which cannot be merely characterised as legal but are shaped by significant political, cultural and socio-economic factors. The relevance of these dimensions are reflected in the identifiable scope for conflict between the Treaty freedoms as “fundamental [Union] provisions”¹³²⁶ and fundamental rights in private law relationships, and more broadly, particularly in the *Viking* and *Laval* cases, the scope for “conflict” between national legal cultures and traditions, in respect of the putative (and arguably, crude) West/East (former Communist) divide.

Accessed: 22.04.2013), who argues that there cultural (including legal tradition), political (including states of transition) and regional (including what neighbouring states do) that will shape commitment to human rights agreements; and O. Hathaway, 'Why Do Countries Commit to Human Rights Treaties?' (2007) 51 *J.Con.Res.* 588 who rather argues that the scope for domestic enforcement of the treaty, and its consequences, will largely determine whether the national system will commit.

¹³²⁶ C-49/89 *Corsica Ferries* [1989] ECR I-4441, Judgement, para.8.

Omega follows a line of case law in which the CJEU has been required to engage in the balancing of fundamental freedoms and fundamental rights, including *Schmidberger*¹³²⁷, a preliminary reference and *Commission v France*¹³²⁸, an infringement proceeding. *Schmidberger* concerned an environmental protest, organised by the “Transitforum Austria Tirol” at the Brenner Pass, a motorway in Austria against levels of pollution in the Alps; it had been authorised by the Austrian government and which disrupted traffic and blocked the motorway between Germany and Italy for thirty hours. Consequently, Schmidberger’s international transport company, based in Germany, was precluded from transporting goods between Germany and Italy; he subsequently sought damages from the Austrian government, arguing that its authorisation of the protest had failed to ensure the free movement of goods. The CJEU accepted that the protest created a blockage, which precluded the transfer of goods between Germany and Italy via Austria and as such, constituted an infringement of the free movement. *Schmidberger* is often compared with the decision in *Commission v France*¹³²⁹, an action brought by the Commission in which the French government was accused of failing to take satisfactory preventative action to ensure the free movement of goods (in particular, the import of Spanish produce) in light of the prolonged and destructive protests of French farmers. The CJEU held that France had, in failing to act, breached its obligations under Art.4(3) TEU (requiring loyalty; then Art.10 EC) and violated freedom of movement under Art.34 TEU. In *Schmidberger*, notwithstanding its recognition of Austria’s obligation per *Commission v France*, the CJEU considered that the infringement of free movement enshrined in the Treaties had to be balanced with the fundamental rights (including that of freedom of expression and freedom of assembly), as enshrined in Art.10 and Art.11 of the ECHR. The Court adopted the notion of balancing or “weighing” in light of whether the Austrian government had acted in a proportionate and reasonable manner, “having regard to all the circumstances of the case in order to determine whether a fair balance was struck between those interests¹³³⁰ and held that this balance could be reflected in the recognition of a restriction of, the economic freedom enshrined in the Treaties, justified by the fundamental freedoms at stake; the CJEU therefore found there to be no violation of Art.34 TEU.

¹³²⁷ *Schmidberger* (n.1265).

¹³²⁸ C-265/95 *Commission v France* [1997] ECR I-6959.

¹³²⁹ *Commission v France* (n.1328).

¹³³⁰ *Schmidberger* (n.1265), Judgement, para.81.

*Omega*¹³³¹ concerned a prohibition, issued by the police of the city of Bonn¹³³², on *Omega*'s providing access to a particular game in which participants stimulated the shooting of others; the “commercial exploitation” of shooting arose as a public policy issue and was reflected in public protest. The supply of the game materials by a British company established the EU dimension; *Omega* argued against the restriction in the absence of a “sufficiently concrete and precise basis in national law” on the basis that it constituted a breach of legitimate expectations in the absence of a public policy justification¹³³³ and restricted its freedom to provide services and the free movement of goods¹³³⁴. *Omega* appealed through three courts before reaching the *Bundesverwaltungsgericht*; while considering that the commercial activity affronted human dignity as a “cardinal principle of the Constitution”¹³³⁵ per the *Grundgesetz*¹³³⁶, it recognised the scope for a conflict between adherence to national constitutional law and free movement and thus referred the case¹³³⁷ to the CJEU and subsequently rendered the final decision¹³³⁸. *Omega* provides a key example of the scope for conflict and the putative incompatibility arising from an attempt to fully comply with both national and Union law. The reference is rather unique: the German court engaged with previous CJEU jurisprudence in formulating its understanding of the issues, which brings to the fore an interesting rationale underpinning the decision to refer, including the CJEU's consideration of the need for commonality, that is, whether “the restriction [of fundamental freedoms by rights] must be based on a legal conception that is common to all Member States”¹³³⁹. With regard to the relationship between national and EU systems of rights protection, distinct national concepts will not prevail over EU law; this has long been the approach followed by the CJEU and is applicable as the “default” position, supported by the need to ensure the uniform and effective application of EU law, its structure and coherence¹³⁴⁰. Thus, mere engagement with national constitutional principles will not necessarily justify a restriction on freedoms; the key question referred concerned whether the

¹³³¹ C-36/02 *Omega* [2004] ECR I-9609.

¹³³² On para.14(1) of the *Ordnungsbehördengesetz* (the law of the police authority) on the basis of public policy (*Öffentliche Ordnung*) concerns, namely, the principle of human dignity enshrined in Art.1, *Grundgesetz*.

¹³³³ *Omega* (n.1331), Opinion of AG Stix-Hackl, para.40.

¹³³⁴ The AG and the Court operate on the restriction of freedom to provide services: *Omega* (n.1331), Judgement, para.27.

¹³³⁵ *Omega* (n.1331), Opinion of AG Stix-Hackl, para.18.

¹³³⁶ *BVerwG, Beschluss vom 24.10.2001 - 6 C 3/01, OVG 5 A 4916/98* (including the cases heard before *VG Köln Beschluss vom 03.09.1998 - Az., VG 20 K 8466/95* and *OVG Münster Beschluss vom 27.09.2000 - Az.: OVG 5 A 4916/98*).

¹³³⁷ *BVerwG, Beschluss vom 24.10.2001, 6 C 3.01*.

¹³³⁸ *BVerwG, Beschluss vom 13.12.2006 - 6 C 17.06*.

¹³³⁹ *Omega* (n.1331), Judgement, para.23.

¹³⁴⁰ *Internationale Handelsgesellschaft* (n.1256), Judgement, para.3.

legitimacy of national restrictions of freedoms, per public policy derogations, depends on the existence of a common basis identifiable in all Member States.

The German court referring *Omega* questioned whether a common conception underpinning a restriction is required, taking into consideration previous CJEU jurisprudence, including *Schindler* in which the Court recognised that the basis upon which different Member States restrict certain activities will be shaped by diverse considerations such that “it is not possible to disregard the moral, religious or cultural aspects of lotteries, like other types of gambling”¹³⁴¹. Thus, the diversities in the Member States with regard to the level of protection of fundamental rights have been recognised as significant¹³⁴². Thus, while limits are established at the EU level, the assessment is based on “national value judgements”, it seems these may but need not necessarily be shared between the national cultures and traditions: “[m]ethodologically speaking... There is no question here of any general opinion in the Member States”¹³⁴³.

The Court in *Omega* ultimately rejected any need for commonality, either in respect of the common conception underlying the “system of protection” or the proportionality test¹³⁴⁴. Both the AG and the Court specifically highlighted that there is no need for a common conception underpinning a restriction to freedoms¹³⁴⁵ (notwithstanding, the Court considered it might be a possibility, that is to say, it was deemed “not indispensable”). While the Court, following the AG, recognised that respect for human dignity should constitute a principle of EU law, based upon the national and international legal cultures and traditions, it did not undertake a comprehensive comparative evaluation of the relevant norms. The Court rather followed previous CJEU jurisprudence and looked to national and international law, attributing “special significance” to the ECHR¹³⁴⁶ as “inspiration”. At the time of *Omega*, the Union had not yet acceded to the Convention and the CFR was not yet binding; yet it was recognised that Union and Member State acts must comply with the relevant rights, the Union

¹³⁴¹ C-275/92 *Schindler* [1994] ECR I-1039, Judgement, para.60.

¹³⁴² *Omega* (n.1331), Opinion of AG Stix-Hackl, para.3.

¹³⁴³ *Omega* (n.1331), Opinion of AG Stix-Hackl, para.105.

¹³⁴⁴ *Omega* (n.1331), Judgement, paras.37-38.

¹³⁴⁵ *Omega* (n.1331), Opinion of AG Stix-Hackl, para.71.

¹³⁴⁶ C-305/05 *Ordre des barreaux francophones et germanophones and Others* [2007] ECR I-5305, Judgement, para.29.

having been founded on such respect¹³⁴⁷. The rationale underlying the reference to the international treaties lies in the treaties deemed to form part of the “constitutional traditions common” to the Member States as a result of their collaboration in their drafting and development, and their role as signatories, i.e. having consented thereto¹³⁴⁸; on this basis, the content of the ECHR can also be understood to be “common”. This might be explained in two ways, discussed in more detail below¹³⁴⁹.

The AG considered nevertheless it necessary to conceptualise human dignity as a general principle, having the status of primary law¹³⁵⁰. Reference was made to a number of – predominantly German - scholars, and “a variety of religious, philosophical and ideological reasoning...[a]ll in all, human dignity has its roots deep in the origins of a conception of mankind in European culture”¹³⁵¹. Considering the “generality” of the principle, the AG cited the 1948 Declaration of Human Rights, the UN Covenants on Civil and Political Rights, and Economic, Social and Cultural Rights, and the case law of the ECtHR, in which human dignity is recognised to exist as “the very essence of the Convention”¹³⁵². At the national level - again with predominant reference to German scholarship – human dignity was recognised as having divergent conceptions, definitions and interpretations, and not necessarily as an “independent, justiciable rule of law”, in particular to the extent that it constitutes a broad “generic concept”, which is more often rather engaged by its component parts¹³⁵³.

The Court, following the AG, considered that the order, while restricting free movement, could be justified¹³⁵⁴. The Court actually engaged in the “balancing” of the freedoms and rights, in respect of the public policy derogation, and did not leave this to the national courts. Its recognition of the need to reconcile rights and freedoms¹³⁵⁵ suggests that there is no

¹³⁴⁷ *Omega* (n.1331), Opinion of AG Stix-Hackl, para.55, citing Art.51, CFR even though it was not binding at the time.

¹³⁴⁸ *Omega* (n.1331), Judgement, para.34.

¹³⁴⁹ See the discussion of international law as a source of comparative analysis in Chapter 8.

¹³⁵⁰ *Omega* (n.1331), Opinion of AG Stix-Hackl, para.93.

¹³⁵¹ *Omega* (n.1331), Opinion of AG Stix-Hackl, fn.46-48; 51-53, para.78.

¹³⁵² *Omega* (n.1331), Opinion of AG Stix-Hackl, para.83, citing *Pretty v UK* (2002) 35 EHRR 1.

¹³⁵³ *Omega* (n.1331), Opinion of AG Stix-Hackl, fn.55-56, para.85-86.

¹³⁵⁴ *Omega* (n.1331), Judgement, para.41.

¹³⁵⁵ *Omega* (n.1331), Opinion of AG Stix-Hackl, para.50.

hierarchy between these norms, as both sets constitute primary law¹³⁵⁶. Indeed, the Court engaged with the conclusion derived initially by the referring court – that the prohibition “corresponds to the level of protection of human dignity which the national constitution seeks to guarantee”; by banning only one type of game – where the problem is clear, in the stimulated killing of people – the measure is also deemed to be proportional¹³⁵⁷. The link between the *Omega* (and also the previous *Schmidberger*) cases and those of *Viking* and *Laval* (as discussed below) derives from the engagement of fundamental rights as a limitation of free movement in the former, and with free movement rules as a limitation on the (social) fundamental rights in the former. Clear processes of cross-referencing in the CJEU and particularly, in the latter cases to the approaches adopted in the former, can be identified, especially with regard to the balancing of freedoms and rights and the application of the proportionality test.

*Viking*¹³⁵⁸ and *Laval*¹³⁵⁹ (often incorrectly bundled together, with the relevant divergences highlighted herein) are perhaps two of the most evaluated decisions of the CJEU in recent years. Following the judgements, *Viking* was settled out of court in 2008¹³⁶⁰, when the ferry line decided to reflag not from Finland to Estonia but to Sweden, while the *Swedish Arbetsdomstolen* rendered the final decision in *Laval*. The analysis of the jurisprudence focuses primarily on the conflicts identified above, particularly those between rights and freedoms. Both cases also concerned the application of EU law to collective action, its effect against unions and the “protection” of the competences reserved to the national social systems. In both cases, the CJEU¹³⁶¹ rejected the argument that national social policy – encompassing labour law and in particular, the right to take collective action – fell outwith EU law; furthermore, the CJEU found EU law (Art.49 and 56 TFEU) to have horizontal direct effect against unions¹³⁶². Thus, like the state liability cases, *Viking* and *Laval* are cases in

¹³⁵⁶ *Omega* (n.1331), Opinion of AG Stix-Hackl, paras.48-49 and 52 citing *Schmidberger* (n.1265), Judgement, paras.77-79; in particular, the approach is interesting to the extent that the Court undertakes a comparison of justifications of the limitations of fundamental rights considered by the CJEU and those by the ECtHR.

¹³⁵⁷ *Omega* (n.1331), Judgement, para.39.

¹³⁵⁸ *Viking* (n. 355).

¹³⁵⁹ *Laval* (n.355).

¹³⁶⁰ <<http://www.itfglobal.org/press-area/index.cfm/pressdetail/1831%22>>; Last Accessed: 17.04.2013.

¹³⁶¹ *Viking* (n. 355), Judgement, paras.39-41; C-341/05 *Laval* [2007] ECR I-11767, Judgement, para.88.

¹³⁶² The Opinion of AG Maduro deserves greater consideration. It engages a number of other considerations, while the Court in both cases followed AG Mengozzi in *Laval*, building on and extending the notion of “vertical direct effect” from *Walrave* and *Koch*; *Viking* (n. 355), Judgement, paras.58-61; *Laval* (n.355), paras.97-98. Consider also, C-171/11 *Fra.Bo*, nyr in respect of the horizontal direct effect of free movement of goods.

which EU law establishes the ultimate remedy, that is to say, neither national system would have been able to provide for such an outcome.

Viking concerned the right of the International Transport Workers' Federation and the Finnish Seamens' Union (FSU) to engage in collective action, which purported to deter the reflagging of Viking's ferry from Finland to Estonia and prevent Viking from negotiating pay and conditions with associations other than the FSU. Viking had the explicit intention of lowering costs¹³⁶³ while FSU's concern related to the potential impact of reflagging on pay and employment conditions. At first instance, Viking obtained an injunction to preclude the union's foreseeable breach of the freedoms of establishment and movement under Art.49 (freedom of establishment) and 56 (freedom to provide services) TFEU (then Art.43 and 49 EC); this was lifted on appeal¹³⁶⁴. The English Court of Appeal referred to the CJEU and the case was settled in 2008 following the CJEU judgement¹³⁶⁵. Three questions were referred: the first concerning whether EU social policy dictates that collective action falls outwith the scope of EU law, per *Albany* (in which the CJEU held that a collective agreement fell outwith the scope of competition law rules)¹³⁶⁶; the second, concerning the horizontal direct effect of free movement and the third, concerning the justification of restrictions to free movement on the basis of fundamental rights.

The Court followed the AG (although not explicitly) and accepted that union activities fell within the scope of EU law, rejecting both the analogy with *Albany*¹³⁶⁷, and the argument that the fundamental nature of the right to strike brings it outwith Art.49 (ex Art.43 EC)¹³⁶⁸. The Court recognised that Art.49 TFEU has horizontal direct effect, essentially allowing for an analogy with its findings in its case law against free movement in relation to other private bodies¹³⁶⁹. Notwithstanding, the AG noted that free movement provisions cannot replace national law; national rules can operate to regulate these relationships providing there is compatibility with EU law and that a remedy exists in national law. If this is not the case, the

¹³⁶³ *ITWF v Viking Line et al* [2005] EWCA Civ 1299, para.24 *et seq.* per Waller LJ.

¹³⁶⁴ *Viking Line et al v ITWF* (Unreported) Commercial Court, Queen's Bench Division, Commercial Court, 2004 Folio 684, per Mrs Justice Gloster.

¹³⁶⁵ <<http://www.itfglobal.org/press-area/index.cfm/pressdetail/1831%22>>; Last Accessed: 17.04.2013.

¹³⁶⁶ C-67/96 *Albany* [1999] ECR I-5751.

¹³⁶⁷ *Viking* (n. 355), Opinion of AG Maduro, paras.26-28; Judgement, paras.48-55.

¹³⁶⁸ *Viking* (n. 355), Judgement, paras.38 *et seq.*

¹³⁶⁹ *Viking* (n. 355), Judgement, paras.33 *et seq.* (applicable not only to public authorities, unions not considered as such, para.60). With reference to *Schmidberger* (n.1265), Judgement, paras.57 and 62 and *Commission v France* (n.1328), Judgement, para.30.

Treaty can be engaged directly¹³⁷⁰. The AG recognised the scope for diverse approaches in the national cultures and traditions and highlighted that the courts enjoy a “margin of discretion”¹³⁷¹ aiming, on the one hand, for the preservation of “national law grounded in the values of the national legal system” and on the other, the effectiveness of Union law¹³⁷².

The Court determined that the ITWF and FSU action constituted a restriction on freedom of establishment, the fundamental nature of which was highlighted, with relative ease¹³⁷³ considering the impact of the action in rendering Viking’s exercise of freedom of establishment “less attractive or even pointless”¹³⁷⁴. This left the predominant discussion to the scope for the justification of such restrictions in respect of the FSU’s organisation of collective action, and the ITWF’s call for “solidarity” strikes, in line with its policy against flags of convenience. The Court considered that the right to strike, if proportional and having “a legitimate aim compatible with the Treaty...justified by overriding reasons of public interest” could constitute a justifiable restriction to free movement¹³⁷⁵. ITWF as well as the German, Irish and Finnish governments argued that the objective of protecting workers constituted a legitimate interest, overriding in the public interest¹³⁷⁶. The Court accepted this, following *Schmidberger*, and noted that the Union is of both an economic and social character¹³⁷⁷ (characterised as a “social contract”¹³⁷⁸ by Maduro), the dimensions of which must be balanced. Having engaged with national, European and international law, including

¹³⁷⁰ *Viking* (n. 355), Opinion of AG Maduro, paras.50-53.

¹³⁷¹ It should be noted that the term “margin of discretion” is used in respect of the CJEU, and “margin of appreciation” with regard to the ECtHR.

¹³⁷² *Viking* (n. 355), Opinion of AG Maduro, para.54.

¹³⁷³ *Viking* (n. 355), Judgement, paras.68-70.

¹³⁷⁴ *Viking* (n. 355), Judgement, para.72.

¹³⁷⁵ *Viking* (n. 355), Judgement, para.75.

¹³⁷⁶ It is worth noting that the AG distinguishes collective action in the interest of jobs and conditions of current crew, and collective action to prevent an undertaking from providing services following relocation, and that to improve terms of workers throughout the Union. The first must be considered in respect of whether it constitutes a breach of non-discrimination, and whether it is proportional (for the national court); the second will constitute a restriction on establishment, to be justified, and the third “in principle...constitutes a reasonable method of counter-balancing the actions of undertakings who seek to lower their labour costs by exercising their rights to freedom of movement”, which can be abused and so has to be limited; Opinion of AG Maduro, paras.65-70. The Court similarly highlights the distinction in the action, and the solidarity action called for by ITWF, against “flags of convenience” in respect of protection of terms and conditions of employment (from the “case file”, the Court notes that ITWF would have called for such action, regardless of whether the employment conditions are at stake: *Viking* (n. 355), Judgement, paras.88-89); the determination is for the national court, and might depend on the “social model” in the national system and the extent to which the national court is willing to go in order to establish such an assertion, as the Court itself seems to reject establishing a broad socially-orientated approach at the European in this context.

¹³⁷⁷ *Viking* (n. 355), Judgement, paras.76-78.

¹³⁷⁸ *Viking* (n. 355), Opinion of AG Maduro, paras.59-60.

the ECHR, the Union and COE Charters¹³⁷⁹, the ILO conventions¹³⁸⁰ and the CFR, the Court recognised the right to strike as a fundamental (yet not absolute) one, and as a general principle of Union law¹³⁸¹. Following *Schmidberger* and *Omega*, both the AG and Court rejected the notion that this status necessitated that the right be deemed to fall outwith the scope of EU law but rather considered that the protection of fundamental rights constitutes a legitimate interest, which, if proportionate, could justify a restriction on economic freedoms¹³⁸².

The Court made explicit reference to the “division of labour” between the courts: it provided guidance to the domestic courts, in respect of both the determination of worker protection and the proportionality assessment¹³⁸³; notwithstanding, the final assessment is for the latter on the facts before it¹³⁸⁴. The action must have the objective of protecting workers; that is to say, jobs or conditions of employment must be “jeopardised or under serious threat”¹³⁸⁵. Thereafter, to satisfy the proportionality requirement, the measure cannot go beyond what is necessary, which depends on whether alternative action is available or has been pursued¹³⁸⁶. In identifying “common ground” underpinning this determination of “appropriateness”, the Court engaged the justifications advanced in the ECtHR in respect of trade union objectives¹³⁸⁷, explicitly cross-referencing between ECHR and Union law.

The facts of *Laval* are well known but merit brief consideration. *Laval*, a Latvian construction firm had brought an action calling for a declaration of illegality, interim relief and compensation before the Swedish labour court (the court of final appeal in relation to collective agreements), in respect of collective action, engaged following *Laval*’s posting of Latvian workers to Sweden and the subsequent failure of negotiations for a collective agreement. The collective action constituted the obstruction of a construction site - in respect of which *Laval* had a contract with Swedish town government - the effect of which was to basically preclude the operation of the site; *Laval*’s contract was subsequently terminated.

¹³⁷⁹ The Charter of the Fundamental Social Rights of Workers (09.12.1989) and the European Social Charter (18.10.1961).

¹³⁸⁰ Convention No.87 concerning Freedom of Association and Protection of the Right to Organise (09.07.1948)

¹³⁸¹ *Viking* (n. 355), Judgement, paras.43-44.

¹³⁸² *Viking* (n. 355), Opinion of AG Maduro, para.24; Judgement, paras.46-47.

¹³⁸³ *Viking* (n. 355), Judgement, para.85.

¹³⁸⁴ *Viking* (n. 355), Judgement, paras.79-80.

¹³⁸⁵ *Viking* (n. 355), Judgement, paras.81 and 83.

¹³⁸⁶ *Viking* (n. 355), Judgement, paras.84-87.

¹³⁸⁷ *Viking* (n. 355), Judgement, para.68, citing *Syndicat national de la police belge v Belgium*, 27.10.1975, A.19 and *Wilson, National Union of Journalists and Others v United Kingdom* of 02.07.2002, 2002-V, para.44.

The Posted Workers Directive made provisions for unions¹³⁸⁸ however Swedish law had not transposed the relevant measures in the directive for the purposes of regulating the conditions and wages of posted workers¹³⁸⁹. Rather Swedish law had continued to provide that unions could not take collective action purporting to elude an existing collective agreement; per the *lex britannia*, adopted prior to its 1995 accession to the EU, this prohibition was not applicable in relation to collective action against a foreign enterprise posting workers. Rather, it had provided that unions should have been, for the purposes of negating scope for social dumping, able to exercise their autonomy to enter collective agreements with employers established in other Member States¹³⁹⁰; this would have also allowed unions to take collective action (an established constitutional right¹³⁹¹) against employers who did not so agree¹³⁹². Essentially, the *lex britannia* provided that the Swedish unions were not required – in respect of their collective action – to respect the collective agreements between Laval and Latvian unions. Laval brought an action for interim relief – an injunction precluding the action – and compensation; in November 2004, the *Arbetsdomstolen* - the Swedish labour court, rendering the preliminary reference¹³⁹³ and final decision¹³⁹⁴ - refused to satisfy Laval’s initial claim. Rather, it wanted to know if primary and secondary Union law (namely, Arts.18 (non-discrimination) and 56 (freedom to provide services) TFEU, then Art.12 and 49 EC and Directive 96/71) precluded unions from engaging collective action in order to force an enterprise established outwith Sweden but posting workers therein, to accept and apply a Swedish collective agreement. The questions referred concerned the compatibility of the collective action with the free movement and non-discrimination principles in primary law, and furthermore with the directive, where the action has the aim of forcing a foreign service

¹³⁸⁸ Directive 96/71/EC, O.J. 1997, L 18/1 concerning the posting of workers in the framework of the provision of services.

¹³⁸⁹ Art.3 Directive 96/71, with the Swedish adopting neither of the two means set out in the directive, that is, state regulation on minimum wages, or the universal application of collective agreements.

¹³⁹⁰ The ‘Britannia’ Judgement of the *Arbetsdomstolen*, 1989, No.120, in which the court held that the provision of para.42 of the Law on Workers’ Participation 1976, *om medbestämmande i arbetslivet ou medbestämmandelagen*, (which prohibited collective action which had the purpose of repealing or amendment a collective agreement entered into by other parties), also applied in in respect of foreign parties. The *lex britannia* of 1991 inserted provisions into the 1976 law, essentially excluding collective agreements between unions outside of Sweden from this limitation on collective actions, thus creating a difference between Swedish and foreign collective agreements.

¹³⁹¹ Workers’ freedom of association and right to strike is established in Chp.2 of the Swedish Basic Law, *Regeringsformen*, and the Employment (Co-Determination in the Workplace) Act 1976, *Medbestämmandelagen* (MBL).

¹³⁹² J. Malmberg, ‘The Collective Agreement as an Instrument for Regulation of Wages and Employment Conditions’ (2002) 43 *Scan.Stud.Law.* 190, pp.207-210, on “Outside Employers” in the Nordic countries, in general.

¹³⁹³ Case No. A 268/04, *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet et al*, Judgement No.49/05, 29.04.2005.

¹³⁹⁴ Case No. A 268/04, *Laval*, Judgement No.89/09, 02.12.2009.

provider to sign a collective agreement and where the host system's transposition of the directive did not make provision in respect of the terms and conditions of employment in a collective agreement. Furthermore, the court asked whether Swedish law, including the MBL and the *lex britannia*, in respect of its application to the collective action of Swedish unions against foreign enterprises posting workers, should be precluded by the principles of freedom of movement and non-discrimination and the directive itself.

The Court began by reformulating the first question referred, concerning whether primary (namely Arts. 18 and 56 TFEU) and secondary EU law precludes union action which purports to force a provider of services established in another Member State to enter into negotiations for a collective agreement on pay, and terms and conditions, where some of those issues are dealt with in Directive 96/71, and others are not. By virtue of PIL rules, workers are protected under the legal system of the Member State in which they work; to counter the difficulties that a firm operating across the EU might face, the directive provides an exception from this general rule in respect of "posted workers".

The collective action was initiated following Laval's refusal to provide the wage requested by the union (even though Sweden adopted neither of the two provisions in Art.3¹³⁹⁵ for the purposes of regulating the wages of posted workers) and to sign the collective agreement, (some of the provisions of which provided for better conditions than those provided in the directive, while others extended beyond). With regard to the scope for the Member States to determine terms and conditions, including wages, the Court held that the directive does not provide for full harmonisation and thus initially recognised the broad scope and means by which the national systems might have transposed the "non-harmonising" directive, thus accepting putative divergences between the national traditions, particularly in respect of the social and industrial regimes established therein. The determination of the content of the rules has been deemed to be for the national legislature, providing that EU law is respected¹³⁹⁶. Yet the Court highlighted that Art.3 only establishes minimum rates of pay "lay[ing] down a nucleus of mandatory rules"¹³⁹⁷ but that certain terms of the collective agreement went beyond this minimum standard; while Art.3(7) could not have precluded this,

¹³⁹⁵ It is worth noting that in 2012, the Commission published a proposal for a new Posted Workers Directive COM(2012) 131 and a proposal for a Regulation on the exercise of the right to take collective action COM(2012) 130.

¹³⁹⁶ *Laval* (n.355), Judgement, para.68.

¹³⁹⁷ *Laval* (n.355), Judgement, paras.59-60.

the Court holds that this provision cannot be employed to force the enterprise via collective action to agree to more favourable terms¹³⁹⁸. Thus, Member States which do not establish wages per Art.3 cannot require foreign enterprises to negotiate and agree to rates demanded by the unions¹³⁹⁹.

The AG examined the labour cultures and traditions of the national orders, and in particular, the Swedish labour model¹⁴⁰⁰; consequently, he considered that the autonomy-based approach of the Swedish legislature could not in itself reflect inadequate transposition¹⁴⁰¹. From the AG's Opinion, it is clear that a new/old Member State conflict is identifiable in the submissions as to Sweden's correct implementation of the directive. Thus, the Scandinavian systems, as well as Austria, France and Iceland supported Sweden's assertion of correct implementation; the German, Spanish and Irish governments, as well as the Commission, "follow the same general line of reasoning" but considered that the terms and conditions in the collective agreement must either have fallen within Art.3(1) or have been caught by the public policy derogation; on the other hand, Laval, as well as the Estonian, Latvian, Lithuanian, Polish and Czech governments argued that the directive was implemented incorrectly¹⁴⁰².

With regard to the compatibility of the collective action and Union law, and in respect of the scope for collective action under Swedish law, the Court distinguished between that action which purported to force Laval to negotiate on posted workers' wages and that which purported to force the negotiation of a collective agreement, the terms of which would have transcended the minimum protection of the directive (by virtue of being more favourable or dealing with issues not included therein); the Court rather considered there to be incomplete implementation of the "nucleus" of the directive, to the extent that the Swedish law on the basis of which the union could have taken action, purported to force the enterprise to sign a collective agreement including "more favourable terms and conditions...as regards the matters referred to in Art.3(1)", or on issues not included in the directive¹⁴⁰³.

¹³⁹⁸ *Laval* (n.355), Judgement, paras.78-80.

¹³⁹⁹ *Laval* (n.355), Judgement, para.70.

¹⁴⁰⁰ In respect of which, he makes reference to legal scholarship.

¹⁴⁰¹ *Laval* (n.355), Opinion of AG Mengozzi, paras.180-182.

¹⁴⁰² *Laval* (n.355), Opinion of AG Mengozzi, paras.166-169.

¹⁴⁰³ *Laval* (n.355), Judgement, para.99.

Both the AG and the Court rejected the argument, based on the social policy of the Union, per Art.153 TFEU (then Art.137 EC), that the right to take collective action fell outwith free movement provisions. With reference to national and international law instruments, including the ECHR¹⁴⁰⁴, ILO Conventions, Art.6(4), European Social Charter and the Charter on the Fundamental Social Rights of Workers (which, as a political declaration, is not binding) and the CFR (which at the time was not binding), the Court recognised the right to strike as a fundamental one, and as a principle of Union law¹⁴⁰⁵. Arriving at this view, the AG who recognised the scope for divergences between the national traditions, was “not of the view that they must be examined exhaustively”¹⁴⁰⁶; rather, building on *Schmidberger* and *Omega*, it was considered that the right had to be recognised as a “legitimate interest”, which, providing it satisfied the principle of proportionality, could have justified restrictions to the fundamental freedoms¹⁴⁰⁷. The AG and Court recognised the restriction of Art.56 TFEU (of horizontal effect) caused by the union’s collective action¹⁴⁰⁸ and held that a restriction on freedom of establishment could be justified only if it pursued a legitimate interest “involving a real advantage that made a significant contribution to the social protection”, if it was compatible with the Treaty, in the “overriding public interest” and proportional¹⁴⁰⁹.

The public policy (including health and safety) dimensions of *Laval* were clear from the “balancing” undertaken by the Court. The Court accepted that the public interest advanced - the protection of workers – might normally justify the restriction engendered by the collective action (and even the blockage of the site), considering, in particular, the social and economic character of the Union¹⁴¹⁰. Notwithstanding, the Court rejected this objective as a justification in light of the facts of the case, where the action had the purpose of forcing the employer to enter an agreement the terms of which go beyond the nucleus of mandatory

¹⁴⁰⁴ *Laval* (n.355), Opinion of AG Mengozzi, para.68, citing C-540/03 *Parliament v Council (Family Reunification)* [2006] ECR I-5769, Judgement, para.38.

¹⁴⁰⁵ *Laval* (n.355), Judgement, paras.90-92.

¹⁴⁰⁶ *Laval* (n.355), Opinion of AG Mengozzi, paras.77-78. It is worth noting that the AG only looks to those systems in which these rights and freedoms are protected in constitutional traditions and where there is explicit reference; thus, while there is no explicit constitutional right in England, the AG does not make reference to the exceptions provided therein. Mengozzi rejects the need for “exhaustive review” of national rules because of the existence of the CFR, which essentially brings together the rights found in the different Member States. This affirms the consideration made above, in respect of the legitimacy attributed to an international or European instrument by the Court, on the basis of the consensus of the Member States.

¹⁴⁰⁷ *Laval* (n.355), Opinion of AG Mengozzi, paras.81-83; Judgement, paras.94, 101 and 108.

¹⁴⁰⁸ *Laval* (n.355), Opinion of AG Mengozzi, para.161, and para.240; Judgement, paras.97-99.

¹⁴⁰⁹ The AG makes reference to ECHR case law which he considers should also be taken into consideration by the national courts, providing the preliminary reference with character of a kind of mechanism for dialogue between the national courts and ECtHR, *Laval* (n.355) Opinion of AG Mengozzi, paras.303-304.

¹⁴¹⁰ *Laval* (n.355), Judgement, paras.102-105.

protection, and further, in respect of pay, where the action purported to force the employer to enter into a national “context characterised by a lack of provisions of any kind” and with which it is impossible or excessively difficult for the employer to comply¹⁴¹¹.

The domestic court’s second question concerned Swedish law; the MBL and *lex britannia*, precluded union action which purported to set aside a collective agreement to which a service provider was already party but limited this prohibition to terms and conditions to which Swedish law directly applied (i.e. the *lex britannia* exception), such that a foreign enterprise, posting workers, and which had entered into an agreement in another state, would not have been able to rely on the prohibition. The Court found that the Swedish legislation – including the *lex britannia*, which operated for the purposes of facilitating the exercise and enforcement of the right to collective action – restricted free movement, per Art.52 and 56 TFEU¹⁴¹². Further, the Court held that as the *lex britannia* failed to take notice of collective agreements already in existence in the state in which the economic undertaking (i.e. Laval) was established, it gave rise to discrimination, by drawing a distinction between Swedish and non-Swedish agreements¹⁴¹³. The Court further rejected the scope for the application of the “public policy, public security or public health” justification per Art.36 and 52 TFEU in order to justify the restriction with free movement. Arts.52 and 56 TFEU (then 49 and 50 EC) were deemed to preclude such a condition.

Thus, national law, as well as EU and international law played a key role in the determination of the need for a balance between economic freedoms and social rights; in such balancing exercises, there should not simply be a preference of one over the other, but it must be recognised that the Union has both economic and social purposes¹⁴¹⁴. Balancing is deemed necessary for the purposes of avoiding a conflict between the exercise of the right and other rights or freedoms; there can be no adherence to hierarchy¹⁴¹⁵. With respect to the character of the approaches and reasoning of the AG and Court, it seems that a distinction can be identified between the approaches to balancing reflecting, one the one hand, a social-

¹⁴¹¹ *Laval* (n.355), Judgement, paras.108-111.

¹⁴¹² *Laval* (n.355), Judgement, para.120.

¹⁴¹³ *Laval* (n.355), Judgement, paras.110 and 118, ex Art.46 and 49 EC.

¹⁴¹⁴ *Laval* (n.355), Judgement, para.79.

¹⁴¹⁵ Including, per CJEU precedent, the principle of non-discrimination: *Laval* (n.355), Opinion of AG Mengozzi, paras.84-86; 88-89.

protection orientated approach and on the other, a “liberal” market-orientated approach¹⁴¹⁶. Thus, while the Court – following *Schmidberger* and *Omega* – engages a “balancing” approach between the freedoms and rights, as opposed to falling in favour of one over the other, it nevertheless appears that the approach is a “classic market access” one¹⁴¹⁷. These considerations are returned to below, in light of the operation of the “division of labour” in the national courts.

II. The Management of Conflict in a Multi-Level Space: Identifying Synergies in the CJEU and National Courts

This section firstly follows up on the *Fransson* and *Melloni* cases and their shaping of the character of the multi-level system of rights protection; thereafter, it aims to reiterate the different types of conflicts arising in the European sphere and further explore the effects of key CJEU decisions at the national, Union and international levels. Thereafter, it analyses the role of the national courts in balancing fundamental rights and freedoms, on the basis of the guidance provided by the CJEU and looks to identify the CJEU’s recognition of the different values, and considerations relevant to this balancing exercise. The framework that the CJEU advances for the purposes of managing such conflicts – namely, the balancing of rights and freedoms – is examined and the guidance it provides to the national courts explored. Thereafter, the legal, socio-economic, and political implications in the national cultures and traditions are explored, and the scope for cross-referencing and spillovers – of a cross-border and cross-sectoral nature - will be identified. By engaging developments at the Union level, and beyond, the possible contribution to a European, or transnational, culture is explored. Thereafter, the analysis shifts to the scope for impact in the national contexts, and beyond the state. Reactions can be identified from various sources, from the courts and legislatures and also from academic scholarship, newspaper reports¹⁴¹⁸, and from private and public organisations and civil society bodies. These reactions establish that the putative influence of these judgements extend beyond the legal to the political, social and cultural dimensions of European integration.

¹⁴¹⁶ Compare Bakardjieva-Engelbrekt, ‘Institutional Theories, EU Law and the Role of Courts for Developing a European Social Model’ in Neergaard *et al*, *The Role of Courts in Developing a European Social Model* (n.61), p.336, who is “less inclined to see in the decision of the court a denial of fundamental union rights...and even less so, a triumph of unfettered market freedoms over social policy concerns”.

¹⁴¹⁷ C. Barnard, ‘Viking and Laval: An Introduction’ (2007-2008) 10 *Cam.YB.Eur.Leg.Stud.* 463, p.486.

¹⁴¹⁸ There are a number cited in Barnard’s article, identifying a shift from a “pro-social model” reaction, following the AG Opinions to a “social-model undermined” reaction, following the judgement; Barnard, ‘Viking and Laval’ (n.1417), p.487, fn.141.

The cases of *Fransson* and *Melloni* have been outlined above. The interpretations rendered of Arts.51 and 53 CFR shape its scope, application and interaction with national and international regimes; essentially, the cases concern the primacy of Union law, where primacy is understood to preclude the application of national constitutional law over Union law in a case of conflict¹⁴¹⁹. While the CJEU seems to affirm the multi-level nature of fundamental rights protection, its interpretations also exemplify the notion of floors and ceilings of rights protection. As noted above, both the ECHR, per Art.53, and the CFR, per Art.53, seem to establish themselves as “floors”, i.e. as providing minimum levels of protection, which would allow the Member States to set their own standards, providing they do not fall below this “floor”. While the national courts in practice might raise the incompatibility of Union measures and the ECHR, it should not arise in theory. Furthermore, while the Court in *Melloni* remarks that in so far as the Union had not yet acceded to the Convention, it “does not constitute...a legal instrument” and as such, Union law should not be understood as governing interrelations or potential conflicts arising between national law and the ECHR¹⁴²⁰, both the CJEU and the ECtHR “cross-reference” and exercise a degree of mutual respect¹⁴²¹; the Court in *Melloni* also confirms that it aims to ensure conformity and will therefore examine ECHR jurisprudence¹⁴²².

In *Fransson*, as noted above, the CJEU attributes a wide scope to the CFR via its interpretation of Art.51 and in the case before it, considered the relevant connection could be drawn with Union law. While the CJEU provided that “national authorities and courts remain free to apply national standards...provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of Union law are not thereby compromised”¹⁴²³, which would seem to advance the CFR as a “floor” of protection, it also essentially, together with *Melloni*, establishes a burden on those who claim for a higher standard of protection – of national or international origin – to establish that the principles of primacy, supremacy and effectiveness would not be undermined. As a result,

¹⁴¹⁹ This would be the approach followed in *Hauer* (n.701) whereby the CJEU would not look to the level of protection of any particular national tradition.

¹⁴²⁰ *Fransson* (n.1287), Judgement, para.44.

¹⁴²¹ Not to mention the other problems with the *Bosphorus* judgement, the ECtHR held that “the protection of fundamental rights by Community law [is] ... “equivalent” ... to that of the Convention system”; *Bosphorus Airways v Ireland*, no.45036/98, 30.06.2005, para.165.

¹⁴²² *Melloni* (n.1287), Judgement, para.50.

¹⁴²³ *Fransson* (n.1287), Judgement, para.29.

the CFR might come to be understood as a default maximum level of protection. In *Melloni*, the Court specifically rejected that the Spanish court could rely on Art.53 to engage a higher (national) degree of protection, considering that such an interpretation thereof “cannot be accepted” as it would “allow a Member State to disapply EU legal rules which are fully in compliance with the Charter where they infringe the fundamental rights guaranteed by that State’s constitution”¹⁴²⁴. Essentially, this decision establishes Union standards of protection as the “ceiling” where national and Union competences in this area overlap.

Both cases have given rise to criticism from academic and judicial perspectives. In particular, the *BverfG*¹⁴²⁵ has challenged the CJEU’s finding, in *Fransson*, of a connection with Union law, as well as the consequent extension of its own jurisdiction¹⁴²⁶. It has rejected the notion that the facts of the case fell within the CFR’s scope, considering that any effect on Union law would have been indirect; against the background of the “cooperative relationship” it considers to exist between the courts, it has indicated that it will engage a narrow understanding of the CJEU’s interpretation of Art.51. Following *Melloni*, the Spanish Constitutional Court, shifting from previous approaches, has interpreted its own constitutional norms so as to ensure that it falls in line with the supremacy of Union law¹⁴²⁷. The foundations of the Spanish decision are diverse. On the one hand, it engaged ECtHR jurisprudence, in which it had been considered that no violation of Art.6 ECHR could occur if the right to be physically present at a trial had been waived by the relevant party¹⁴²⁸; this jurisprudence was referenced by the court notwithstanding that it had not been followed in a previous case¹⁴²⁹, suggesting that the decision could not be deemed to be based on the ECHR jurisprudence itself. On the other hand, it considered that the CJEU’s response and its own final decision had to be rendered in line with the SSC Declaration 1/2004 on the Lisbon Treaty, which sets out the relationship between the Spanish courts and the CJEU¹⁴³⁰. Yet the Spanish court did not explicitly state that its shift in approach directly resulted from the

¹⁴²⁴ *Melloni* (n.1287), Judgement, paras.57-58.

¹⁴²⁵ Judgement of 24.04.2013, 1 BvR 1215/07.

¹⁴²⁶ Indeed, in the case itself a number of Member States as well as the Commission, had made interventions arguing that the Swedish authorities could not be deemed to be “implementing Union law”; moreover, the AG found no such connection.

¹⁴²⁷ *Sentencia del Tribunal Constitucional, Auto de 26/2014 de 13.02.2014, recurso 6922-2008* <<http://boe.es/boe/dias/2014/03/11/pdfs/BOE-A-2014-2650.pdf>>; Last Accessed: 25.03.2014).

¹⁴²⁸ *Sejdovic v Italy* (2004) ECtHR, 10.11.2004, App.No.6581/00, paras.82 *et seq.*

¹⁴²⁹ *Sala Segunda. Auto de 177/2006, de 5.06.2006* (BOE núm. 161, de 7.07.2006) and *Sala Primera. Auto de 199/2009 de 28.09.2009* (BOE núm. 254, de 21.10.2009).

¹⁴³⁰ It essentially provides that powers can be transferred providing there remains respect for some characteristics of the Spanish constitution, including, sovereignty, fundamental values, and constitutional structures.

CJEU's decision. Indeed, two different approaches are identifiable in the decision; on the one hand, in the majority opinion, Art.24, Spanish Constitution is reinterpreted, and on the other, in the concurring opinions¹⁴³¹, an interpretation is advanced, engaging Art.93, Constitution and thus utilising EU law as a references in respect of the interpretation of fundamental rights harmonised at the Union level¹⁴³². Ultimately, against the background of the CJEU's interpretation, the Spanish court rejected Mr Melloni's argument on the basis of his constitutional claim, a decision that nevertheless seems to be limited to those cases in which there has been an indirect violation of the Spanish Constitution.

The CJEU's approach seems to clearly aim at advancing a harmonised level of fundamental rights protection across the Union space, by virtue of its interpretation of Arts.51 and 53, provisions inserted into the CFR by the Member States for the very purpose of limiting the scope of the Union regime. While the focus on uniformity might undermine the scope for reference to and the acknowledgement of divergent national and international levels of fundamental protection, the affirmation of the multi-level nature of rights protection in the European space also allows for developments at these different levels to be engaged as re-interpretations are rendered by the CJEU¹⁴³³. Furthermore, within this multi-level space, Art.4(2) TEU - engaged by the CJEU in *Sayn-Wittgenstein*¹⁴³⁴ - provides for explicit reference to national "constitutional" identities and the relevant legal norms therein; it underpins a pluralist perspective of development, facilitated by reference to the commonality and diversity of national approaches via comparative analysis, and the scope for judicial dialogue. Art.4(2) allows for the identification of common and divergent standards of fundamental rights protection across the Union space, as well as evolutionary developments in such regimes; the existence of relevant changes and their manifestations across the Member States and at the international level might be identifiable over time and space via the CJEU's engagement with comparative analysis¹⁴³⁵.

¹⁴³¹ Of Justices Asua, Roca and Ollero in STC 26/2014 (n.1427).

¹⁴³² The descent of *Melloni* provides that Art.93 Constitution does not make EU law part of the constitutional canon. See judgments *Pleno. Auto de 28/1991 de 14.02.1991* (BOE núm. 64 de 15.03.1991) and *Sala Segunda Auto de 41/2002 de 25.02.2002* (BOE núm. 80 de 3.04.2002).

¹⁴³³ F. Fabbrini, *Fundamental Rights in Europe* (OUP, Oxford; 2014), pp.41-42.

¹⁴³⁴ Previously in *Omega*, the CJEU had engaged national values, legitimising a public policy restriction to free movement based on human dignity interpreted by the German court, recognising that such "local values", which the CJEU acknowledged give rise to public policy considerations which diverge across the Member States, could be engaged.

¹⁴³⁵ Of the "evaluative comparison" engaged by the AG in *Akzo* (n.691), Opinion of AG Kokott, para.94.

Not only have *Melloni* and *Fransson* confirmed the supremacy of Union law, and particularly, its level of rights protection, over national constitutional law and international law where there is an overlap in competence but furthermore, the CJEU has essentially opened the scope for the extension of its jurisdiction and its establishment at the apex of this multi-level construct as the institution responsible for resolving future conflicts in respect of the interaction of national, Union and international protection. The following section aims to uncover the nature of conflicts arising, in light of the analysis of the cases above, and the role of the CJEU and the national courts in the management of these conflicts.

i. The Jurisdiction and Role of the National Court as a Conflict-Resolution Institution

The cases illustrate the breadth of conflicts that might arise in the context of the multi-level protection of fundamental rights. The conflicts are not merely of a broad nature, that is, between fundamental rights and national norms, or between fundamental rights and freedoms but are rather multi-dimensional and increasingly nuanced. One dimension of the conflict in *Omega* concerned the promotion of public policy considerations, underpinning which is respect for the fundamental principle of human dignity, on the one hand, and the resulting interference with free movement, on the other. *Viking* and *Laval* concerned the effect of the collective industrial action on freedom of establishment and the free movement of workers; both cases also engaged an additional East/West, "social dumping" dimension. Across the cases, there also existed a broader conflict (of a kind), namely, the determination of those competences attributed to the Union, and those remaining with the Member States (per Art.153 and provision (5) TFEU, ex Art.137 EC)¹⁴³⁶. These conflicts might also be characterised as "freedom versus solidarity", or "social versus liberal" conflicts, underpinning both of which is a broad range of ideological considerations.

Generally, and very broadly, the constitutionalisation of private law has been conceived as setting autonomy, reflected in the freedom of private parties, against solidarity, reflected in the protection of fundamental rights. The cases discussed can arguably be conceived as such but the characterisation is more complex; the former concerned not only the freedom of *Omega* to make the game available but of the British supplier to provide the materials for

¹⁴³⁶ N. Reich, 'Free Movement v Social Rights in an Enlarged Union – the Laval and Viking Cases Before the ECJ' (2008) 9 *GLJ* 125, p.127.

such a purpose, and further, the choice of the individual to engage with the activity, i.e. to play the game; herein, the autonomy underpinned the free movement. With regard to *Viking* and *Laval*, the social autonomy of the labour unions, on the one hand, and of the national social models, on the other¹⁴³⁷ (which most likely differ between national traditions) underpins the exercise of the fundamental right. Yet the autonomy – freedom of movement and of establishment - of the enterprises was similarly significant, as was the solidarity that underpinned the collective action. In both cases, the private parties, attributing to the conflict its horizontal character, were not private individuals but economic enterprises and social associations¹⁴³⁸; the cases illustrate that the CJEU will connect Union law and private law relationships between legitimate state interests, the principle of non-discrimination and the fundamental rights of individuals.

In *Schmidberger* it was considered that “fundamental rights is a legitimate interest which, in principle, justifies a restriction on a fundamental freedom guaranteed by the EC Treaty, such as the free movement of goods”¹⁴³⁹. The Court recognised in *Laval* that free movement can be limited; with regard to previous jurisprudence¹⁴⁴⁰, the distinction can be made in terms of where the “power” is held. In *Defrenne*, power rested in the hands of the employer, and in *Viking* and *Laval*, in the hands of the unions; it is this power, to force the employer to negotiate and conclude an agreement which constitutes the restriction¹⁴⁴¹. The determination of legitimate interferences, which restrict free movement, has been recognised as a balancing exercise, in line with the principle of proportionality. The balancing task is to be undertaken at the national level “at the stage of application...of the legislation implementing the directive...between the rights and interests involved”¹⁴⁴².

¹⁴³⁷ Reich, ‘Free Movement v Social Rights in an Enlarged Union’ (n.1436), p.132.

¹⁴³⁸ *Angonese*, concerning a national collective (employment relationship, essentially a private agreement providing for the organisation of workers) agreement requiring satisfaction of a linguistic test, confirms the vertical and horizontal direct effect of free movement: *Angonese* (n.1230), Judgement, para.34.

¹⁴³⁹ *Schmidberger* (n.1265), Judgement, paras.74-75.

¹⁴⁴⁰ Including *Defrenne*, in which the CJEU attributed horizontal direct effect to Art.157 TFEU (then Art.119 EC) in respect of equal pay (including labour agreements), C-43/75 *Defrenne v Sabena* [1976] ECR 455, Judgement, para.39.

¹⁴⁴¹ *Viking* (n. 355), Judgement, paras.72-73 and *Laval* (n.355), Judgement, paras.99-100. This can also be very clearly identified from AG Maduro, *Viking* (n. 355), Opinion of AG Maduro, para.70.

¹⁴⁴² *NS* (n.1249), Opinion of AG Trstenjak, para.85.

A national dimension can also be identified in the conflicts in *Viking* and *Laval*, that is, a very crude East/West distinction, in the context of enlargement¹⁴⁴³. Before considering the nature of the conflict and the CJEU's reasoning, an interrelated consideration, reflected throughout this thesis in the constitution of the CJEU and the bifurcated analysis of the case law¹⁴⁴⁴, and concerning the construction of the chamber hearing each of the cases, can be explored. In *Laval*, the judgement was rendered by the Grand Chamber, including four judges from the recently acceded Member States, namely Makarczyk (Poland), Kūris (Lithuania), and Levits (Latvia). The *juge rapporteur* in the case – Uno Lõhmus – is Estonian, having been an academic, a judge of the ECtHR and Chief Justice of the Supreme Court of Estonia, prior to taking his seat at the CJEU in 2004¹⁴⁴⁵. Similarly, in *Viking*, the Grand Chamber included the same four judges of the recently acceded states, with a Luxembourgish *juge rapporteur*. The conflicts concerned the protection of free movement (predominantly in respect of workers and enterprises – employers - in the “new” Member States) and the protection of union rights (predominantly in respect of the social systems in the “Western” Member States, and trade unions’ concerns about the inundation of cheap “Eastern” labour, and the consequent undermining of labour conditions). Within the Nordic tradition in general, the social welfare system has been inherently tied to the nation state, its structure and the relationship established between the state, the labour market participants and the unions¹⁴⁴⁶. A number of restrictions on the free movement of workers and freedom of establishment in the new Member States putatively arise, none of which applied to enterprises established in the acceding Member States or in “old” Member States, which might seek to re-establish therein to take advantage of the cheap labour available. This East/West distinction highlights divergent perspectives on the need to balance the exercise and protection of economic freedoms (on the part and to the advantage of the new Member States) and the protection of fundamental rights (on the part of the Western Member States, and in particular, their national social welfare systems). It is important to note that even within the “Western” States, welfare systems diverge. The UK was however the exception in supporting the position adopted by Estonia and Latvia in its submissions. Pollicino identifies a distinction in the approach to conflict between fundamental rights and freedoms due to enlargement, from justification with

¹⁴⁴³ In *Viking*, the English courts founded jurisdiction because the defendant (Viking Line having sought an injunction) ITWF, has its offices – principle place of business, per Art.60 - in London Brussels I, per Regulation 44/2001, Art.2.

¹⁴⁴⁴ See Chapter 4.

¹⁴⁴⁵ <http://curia.europa.eu/jcms/jcms/Jo2_7026/>; Last Accessed: 23.04.2013.

¹⁴⁴⁶ Bakardjieva-Engelbrekt, ‘Institutional Theories, EU Law and the Role of Courts for Developing a European Social Model’ in Neergaard *et al*, *The Role of Courts in Developing a European Social Model* (n.61), p.332.

reference to a “majoritarian activist approach”, prior to *Omega*, (which Pollicino engages as a kind of benchmark case splitting the pre- and post-accession environments), “to a post-accession reference to the required protection, at least in the most sensitive cases, of the fundamental rights peculiar even to a single Member State’s Constitutional identity”¹⁴⁴⁷. He argues that the “new” CEE Member States make a “strong, identity-based demand of recognition”¹⁴⁴⁸, which, across the national cultures and traditions, might be tied to the CJEU’s willingness to recognise the significance of national constitutional values (reflected – as asserted above - in the public policy considerations underpinning the invocation of rights, and also freedoms) invoked in the national court’s balancing exercise.

The fundamental rights argument is invoked in different ways in each of the cases. From *Schmidberger* and *Omega*, for example, it is clear that the private individual defends the private interest and the public authority protects “national” values: “the private X may have a public authority under EU law. This is potentially disturbing for the social policy of the state but also for the structural features of the national system of private law”¹⁴⁴⁹. Furthermore, from *Viking* and *Laval* (as well as *Albany*¹⁴⁵⁰ – concerning the exemption of social actors, with “social policy” interests, from competition law rules) it seems that, where the conflict arises between economic freedoms and fundamental rights, both dimensions invoke policy considerations, potentially rendering different repercussions depending on the area of law. Firstly, this will be relevant in the determination of whether the conflict engages Union law; for example, while in *Albany* the “social policy” aims arising from the collective agreements resulted in the determination that such agreements fell outwith EU law, in *Viking* and *Laval* the CJEU rejected the argument analogising *Albany*, and rather held that union action fell within the scope of EU law.

The invocation of fundamental rights as a justification to restriction of freedoms falls to the discretion of national courts, in line with EU law and on the basis of “public policy, public

¹⁴⁴⁷ Pollicino, ‘The New Relationship Between National and the European Courts After the Enlargement of Europe’ (n.223), p.92. Although see M. Avbely, ‘European Court of Justice and the Question of Value Choices: Fundamental Human Rights as an Exception to the Freedom of Movement of Goods’ *Jean Monnet Working Paper No. 6/2004*, who considers that in fact there is a shift from the national as the majority, to the national as the minority and the favour of the “European demos”.

¹⁴⁴⁸ Pollicino, ‘The New Relationship Between National and the European Courts After the Enlargement of Europe’ (n.223), p.92.

¹⁴⁴⁹ Azoulay, ‘The Case of Fundamental Rights: A State of Ambivalence’ in Micklitz and de Witte, *The European Court of Justice and the Autonomy of the Member States* (n.1239), p.215.

¹⁴⁵⁰ *Albany* (n.1366), Judgement, para.60.

security or health” (per Art.36 and 52 TFEU, then Art.30 and 46 EC). Public policy, shaping the relevant circumstances of the justification of the derogation, potentially engages a “margin of discretion” in respect of national interests, where public policy might diverge “from one country to another and from one period to another”¹⁴⁵¹, and between its national and European conception. The public policy consideration is restricted by the CJEU’s recognition (without detailing substantive content) of the need for a “genuine and sufficiently serious threat to the requirements of public policy affecting one of the fundamental interests of society”¹⁴⁵². The determination of a sufficiently serious threat is nevertheless for the national court, in line with the principles of appropriateness and proportionality. EU “law does not impose upon the Member States a uniform scale of values”; the assessment may therefore differ depending on the specific issue and as such the national courts exercise discretion, “in particular in areas that are especially sensitive ideologically or associated with particular risks”¹⁴⁵³.

By bringing together the interference with the fundamental freedoms, which underpin the economic Union, and the fundamental rights, and asserting that these must be “reconciled”¹⁴⁵⁴, in line with the governing principles of the Union (particularly, proportionality), the CJEU arguably undermines the “very autonomy of Member States’ labour and social constitutions”¹⁴⁵⁵; Joerges and Rödl thus characterise the relevant conflicts as examples of “asymmetrical (diagonal) interlinking”¹⁴⁵⁶ (the “interlinking” established by the CJEU). This requires consideration of the interaction between the orders, which arises – particularly in respect of the national courts and the CJEU via the preliminary reference procedure.

Reference has been made above to the crucial role of constitutional courts in protecting fundamental rights as an explanation for the initial silence of the Treaties. That is to say,

¹⁴⁵¹ *Omega* (n.1331), Opinion of AG Stix-Hackl, para.97 (citing C-41/74 *Van Duyn* [1974] ECR 1337, Judgement, paras.18-19 and C-54/99 *Église de scientologie* [2000] ECR I-1335, Judgement, para.17); Judgement, paras.31-32.

¹⁴⁵² C-30/77 *Bouchereau* [1977] ECR I-1999, Judgement, paras.33-35; Judgement, para.30, citing C-54/99 *Église de Scientologie* [2000] ECR I-1335, Judgement, para.17, in which it is clear that this understanding of public policy is relatively well established, with a case from 1975 being cited: C-36/75 *Rutili* [1975] ECR I-1219.

¹⁴⁵³ *Omega* (n.1331), Opinion of AG Stix-Hackl, paras.101-102.

¹⁴⁵⁴ *Viking* (n. 355), Judgement, para.45, citing the approach in *Omega*.

¹⁴⁵⁵ C. Joerges and F. Rödl, ‘On the ‘Social Deficit’ of the European Integration Project and its Perpetuation through the ECJ Judgements in Viking and Laval’ *Recon Online Working Paper 2008/06*, p.11.

¹⁴⁵⁶ Joerges and Rödl, ‘On the ‘Social Deficit’ (n.1455), p.11.

certain national courts¹⁴⁵⁷ argued that fundamental rights protection is most appropriately assured within the domestic courts¹⁴⁵⁸. It is therefore for national courts, in line with national law, to assess the facts and to make the determination as to the satisfaction of the conditions of proportionality¹⁴⁵⁹. The proportionality test is key to the balancing exercise, and it is the latter which shapes the impact on national law; as Collins notes, “ultimately, the impact of human rights law on private law will turn on how competing rights will be reconciled. At the core of every private law dispute exists a contest between rights of individuals”¹⁴⁶⁰.

It has been noted that the identification of a connecting factor between national and EU law, the protection of fundamental rights being dependent on another secondary EU law rule¹⁴⁶¹, is often controversial. Azoulai has considered that where Union law is invoked (e.g. in the transposition and interpretation of directives¹⁴⁶²), the CJEU has taken the foundation of fundamental rights protection from the national level and transferred it to the EU level, building on the notions of commonality and generality identified from the constitutional traditions of the Member States¹⁴⁶³. This “expansion” of both the CJEU’s jurisdiction and role has given rise to a number of issues of legality and legitimacy, which underpin the integrity (if any exists) of fundamental rights protection.

It must be recognised that the EU is not the appropriate level for balancing; rather, a kind of division of labour exists¹⁴⁶⁴, which might be said to reflect the empowerment of referring courts: where the “power” in respect of the protection of fundamental rights was transplanted from the national courts to the EU level (that is, to the CJEU), it is then given back to the

¹⁴⁵⁷ For example, the ECHR is a guide to interpretation in German law, without having the same rank as the German Basic Law, as is the jurisprudence of the ECtHR; *BVerfGE* 128, 326 and *BVerfGE* 111, 307. The wide interpretation of Art.51(1) CFR has been criticised by the German *Bundesverfassungsgericht*, *BVerfGE*, 1 BvR 1215/07.

¹⁴⁵⁸ The jurisdiction of the CJEU on the basis that the case falls within Union law remains controversial; for example, in the *Mangold* case, the connecting factor is not very clear.

¹⁴⁵⁹ The application of this proportionality test might be more difficult in some systems than in others. This is true in certain courts, and in respect of certain areas of law (including, for example, labour law in the English and Scottish courts), in respect of which there has been a solid attempt to avoid politicisation. Furthermore, the “absence of knowledge” of the principle of proportionality – finds its origins in the civilian, particularly, the German tradition is potentially problematic (M. Reimann and J. Zekoll, *Introduction to German Law* (Kluwer, The Hague; 2005), p.76 – the notion of “*Grundsatz der Verhältnismässigkeit*”).

¹⁴⁶⁰ H. Collins 'The Impact of Human Rights Law on Contract Law in Europe' *University of Cambridge Faculty of Law Research Paper No. 13/2011*, p.15.

¹⁴⁶¹ C-117/01 *KB* [2004] ECR I-0541.

¹⁴⁶² C-275/06 *Promusicae* [2008] ECR I-271.

¹⁴⁶³ *Internationale Handelsgesellschaft* (n.1256).

¹⁴⁶⁴ *Lindqvist* (n.309).

national courts¹⁴⁶⁵. Azoulai engages this division of labour as a reflection of the protection of national identity (and by extension, the collective of citizens) in light of the constitutional identity of the Member States, has been attributed to the Member States. However, per *Laval*, he notes that the protection of this identity only engages in respect of state identity and not that of social organisations: thus “what the CJEU had previously granted to Member States, it then refused to grant to trade unions”¹⁴⁶⁶.

While the balancing of rights and freedoms is for the national courts, the CJEU as recognised that it “must provide all the criteria of interpretation required” for a determination as to the compatibility of national law with Union law to be made¹⁴⁶⁷. The consequence of such reasoning is that the impact on the Member States should be characterised as formal as opposed to substantive; that is to say, the CJEU might provide guidance to the national courts, but not as to the substantive outcome of the relevant case¹⁴⁶⁸. While the CJEU might want to make clear to national courts (and the Member States more generally) what is acceptable and what is not in terms of broad public policy considerations policy in this balancing exercise, its policy dictates that, even if the final conclusion is obvious and can be easily identified by “reading between the lines”, the determination will nevertheless be left to the national court.

Balancing provides for the constitutionalisation of private across and between the national, European and international cultures and traditions¹⁴⁶⁹; where the task falls to the national courts, this constitutionalisation essentially occurs within these diverse cultures and traditions. The CJEU has recognised that national values, whether moral, religious or cultural, are relevant for the purposes of justifying reliance on the margin of appreciation in the national systems¹⁴⁷⁰. The balancing task of the national court might concern the balancing of values of

¹⁴⁶⁵ Azoulai, ‘The Case of Fundamental Rights: A State of Ambivalence’ in Micklitz and de Witte, *The European Court of Justice and the Autonomy of the Member States* (n.1239), p.217.

¹⁴⁶⁶ Azoulai, ‘The Case of Fundamental Rights: A State of Ambivalence’ in Micklitz and de Witte, *The European Court of Justice and the Autonomy of the Member States* (n.1239), p.217.

¹⁴⁶⁷ C-349/07 *Sopropé* [2008] ECR I-10369, Judgement, paras.34-35 citing C-260/89 *ERT* [1991] ECR I-2925, para.42, and C-159/90 *Society for the Protection of Unborn Children Ireland* [1991] ECR I-4685, Judgement, para.31. The case concerned national procedures of the application of the (then) Community Customs Code, and in particular the principle of the right of the defence.

¹⁴⁶⁸ O. Cherednychenko, ‘EU Fundamental Rights, EC Fundamental Freedoms and Private Law’ (2006) 14 *ERPL* 24, p.60.

¹⁴⁶⁹ See V. Kosta, ‘International Market Legislation and the Private Law of the Member States: The Impact of Fundamental Rights’ in ‘The Impact of the Internal Market on Private Law of Member Countries’ *EUI Working Paper 2009/22*, p.29.

¹⁴⁷⁰ *Schmidberger* (n.1265), Judgement, para.82 and C-244/06 *Dynamic Medien* [2008] ECR I-0505, Judgement, para.44 (in the former, the wide margin of discretion is recognised and any restrictions must be subject to the

the Member States and those of the Union, or the balancing of Union (and international) values. The task falls to the domestic court to bring “fundamental national values into accordance with EU provisions taking account of the specific features of the national state”¹⁴⁷¹. The deference to the national systems as to their domestic values might also be extended to notions of national identity, the connections between which have been explored in Parts I and II; this is recognised in *Sayn-Wittgenstein*, in which the Court, engaged in the assessment of a restriction of free movement of persons on public policy grounds, highlighted that the Union must “respect the national identities of its Member States” per Art.4(2) TEU¹⁴⁷². The reception of national identities within the broader integration process arises on the one hand, from the need to respect national constitutional identity; to the extent that fundamental rights protection broadly falls within the constitutional jurisdiction of the Member States’ courts, the fundamental rights cases before the CJEU establish a passageway through which national identities become ever-increasingly significant at the Union level¹⁴⁷³. AG Maduro has asserted that “*De même que le droit communautaire prend en compte l’identité constitutionnelle des États membres, de même le droit constitutionnel national doit s’adapter aux exigences de l’ordre juridique communautaire*”¹⁴⁷⁴, suggesting that these identities undergo a process of change from the national to the Union level.

On the one hand, the CJEU clearly recognises the significance and scope of value-based choices in the Member States and attempts to ensure these national values are balanced with the economic values of the Union, “reassuring” the Member States, especially the new ones, that their interests will not be wholly disregarded in favour of those of the Union; on the other hand, the Court obviously continues to promote an integrationist approach. Tridimas describes *Omega* as an “integration model based on value diversity”¹⁴⁷⁵; that is to say, the CJEU renders a judgement which furthers the integration process but by virtue of which it

proportionality test; in the latter, given “inter alia, moral or cultural” views, the states’ margin of discretion must be understood as “definite”).

¹⁴⁷¹ Azoulay, ‘The Case of Fundamental Rights: A State of Ambivalence’ in Micklitz and de Witte, *The European Court of Justice and the Autonomy of the Member States* (n.1239), p.216; Azoulay makes reference to C-353/06 *Grunkin-Paul* [2008] ECR I-07639.

¹⁴⁷² C-208/09 *Sayn-Wittgenstein* [2010] ECR I-13693, Judgement, para.92, in respect of the law on the abolition of the nobility, which has constitutional status, is deemed to be reflective of national identity, implements the principle of equal treatment and the removal by the Austrian state of the “nobility” part of a name (where that name had previously been registered in another Member State).

¹⁴⁷³ D. Ritleng, “Le droit au respect de l’identité constitutionnelle nationale” in J-D. Mouton et J-C. Barbato (eds.), *Vers la reconnaissance de droits fondamentaux aux États membres de l’Union européenne?* (Bruylant, Bruxelles; 2010), pp.22-47.

¹⁴⁷⁴ C-213/07 *Michaniki* [2008] ECR I-9999, Opinion of AG Maduro, para.33.

¹⁴⁷⁵ T. Tridimas, *The General Principles of EU Law* (OUP, Oxford; 2nd edn., 2006), p.341.

also seems to attempt to balance the predominantly economic values of the Union with diverse national and international values, without deriving or constructing an unambiguous common understanding to be shared across the Union.

The Court has considered that it is not “indispensable” that the protection offered is shared or common in all national systems but recognises that both the level of protection afforded in the national system and the national values “inter alia, moral or cultural” underpinning the protection, may diverge; as such, a margin of discretion must be recognised and maintained¹⁴⁷⁶. The line of fundamental rights jurisprudence arguably reflects a plural understanding of the existence of various constitutional ideals in the Union context, including those not necessarily restricted to the market.

Following the inclusion in the Lisbon Treaty, of Art.4(2) TEU, a provision requiring that the Union “respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government” (and the deletion, from the Draft Constitution of the provision explicitly enshrining the principle of primacy), Kumm has asserted that the shifting conception of the supremacy principle dictates that the CJEU must render interpretations of EU law which guide the national court, and facilitate the balancing of constitutional, identity-shaping values with the economic ones of the Union¹⁴⁷⁷. This understanding, which arguably reflects a more “compromised” understanding of supremacy, has been tied to the consequences of enlargement, as explored above¹⁴⁷⁸. Yet while the CJEU – particularly, AG Mengozzi in *Laval*¹⁴⁷⁹ – seems to reject the notion of a hierarchy or ranking of primary Union law norms, it is clear that, in most cases, fundamental rights are engaged by the CJEU in a particular way as a justification for Treaty derogations, which undermines this equal ranking “plurality of values”. On this basis, Davies characterises the CJEU’s invocation of rights as “defensive”¹⁴⁸⁰.

¹⁴⁷⁶ C-244/06 *Dynamic Medien* [2008] ECR I-0505, Judgement, para.48.

¹⁴⁷⁷ M. Kumm, ‘The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe Before and After the Constitutional Treaty’ (2005) *ELJ* 262, pp.298 and 303, respectively.

¹⁴⁷⁸ Pollicino, ‘The New Relationship Between National and the European Courts After the Enlargement of Europe’ (n.223), p.97-98.

¹⁴⁷⁹ *Laval* (n.355), Opinion of AG Mengozzi, para.84.

¹⁴⁸⁰ A.C.L. Davies, ‘One Step Forward, Two Steps Back? The Viking and Laval Cases in the ECJ’ (2008) 37 *In.L.J.* 126, p.139.

In *Viking*, the Court asserted, via its interpretation of the Treaties, that the Union should be characterised not only in terms of the internal market but also in terms of social protection (ex Art.2 and 3 EC), illustrating the need to balance the economic and social “purposes” of the Union¹⁴⁸¹. Even where it seems that the right “triumphs” over the freedom (as in *Schmidberger* and *Omega*), the economic freedom is validated as the primary norm, from which derogations – interpreted narrowly – must be justified. This justification is not to be found in the right itself but with what AG Trstenjak describes as “written or unwritten grounds of justification” (which seemingly, would include considerations of public policy, illustrating the “public interest”, as noted above); the AG further asserts that “the approach adopted in *Viking Line* and *Laval*...sits uncomfortably alongside the principle of equal ranking for fundamental rights and fundamental freedoms”¹⁴⁸², the balancing test advocated in *Schmidberger* and the “equal ranking” being “central” therein¹⁴⁸³. Trstenjak highlights the significance of the proportionality test – of appropriateness, necessity and reasonableness¹⁴⁸⁴ - as a means of concretising the notion that not only must the restriction of a fundamental freedom by a fundamental right be proportional but the restriction of a fundamental right by a fundamental freedom must similarly be proportional; only on this basis can the rights and freedoms be understood to be equal. The CJEU’s approach can be contrasted with that of the ECtHR, where the burden of proof is reversed. On the basis of the European Social Charter and Art.11 ECHR, - the freedom of assembly and association – the ECtHR has recognised and developed the right to take collective action¹⁴⁸⁵. Both the AG and the Court in *Viking* and *Laval* engage with the ECHR and its jurisprudence, and additionally, in certain cases, the ESC and the CFR, the process of balancing in both courts differs; arguably this comparison reflects the way in which the economic dimension dominates the CJEU’s decision making, despite its seeming openness to a plurality of Union values.

Viking and *Laval*, as well as *Schmidberger* and *Omega*, are often bundled together, failing to account for the key distinctions between the cases; one such distinction – in particular, with regard to the relationship between the national and EU order, and more specifically, the courts

¹⁴⁸¹ *Viking* (n.355), Judgement, paras.78-79.

¹⁴⁸² C-271/08 *Commission v. Germany* [2010] ECR I-7091, Opinion of AG Trstenjak, para.183.

¹⁴⁸³ C-271/08 *Commission v. Germany* [2010] ECR I-7091, Opinion of AG Trstenjak, para.195.

¹⁴⁸⁴ Also per the proportionality assessment in Art.51(2) CFR; see also, C-346/06 *Rüffert* [2008] ECR I-1989, highlighted by Trstenjak, in which the Court seems to recognise the notion that

¹⁴⁸⁵ More recently than *Viking* and *Laval*, *Demir and Baykara v Turkey*, A.No.34503/97, 12.12.2008 (and therein, on the recognition and development of the right to strike, paras.140-146) and *Enerji Tapi-Tol Sen v Turkey*, A.No.68959/01, 21.04.2009.

– concerns the finality of the CJEU judgements. A scale of “conclusiveness” can be constructed in respect of the CJEU judgement and the discretion left to the national courts. In *Laval*, the Court held that Swedish law – the *lex britannia* - was incompatible with EU law; it rendered a comprehensive determination that the Swedish union could not attempt to force the Latvian enterprise by means of collective action to enter into a collective agreement, nor could it rely on the exception established in the *lex britannia*, which would require it to make a distinction between Swedish and foreign bodies. The scope for the effect is clear in relation to *Laval*, at least in respect of the Swedish system, and less clear in *Viking*, given the absence of a final decision. In *Omega*, the Court rendered a relatively concrete answer: while the determination of the relevant national rights was for the national court, the Court indicated that it would provide guidance as to the balancing of the rights and freedoms¹⁴⁸⁶. Notwithstanding, the Court was clearly unwilling to engage to too great an extent with what would occur at the national level; thus, there was no consideration of the issues relevant to the particular private relationship, including the contract, between Omega and the British company, Pulsar. Nor was the possibility of remedies considered at the EU level in *Laval*¹⁴⁸⁷; the CJEU left the final decision to the national court. These degrees of conclusiveness reflect, from the perspective of the national court, the level of discretion exercisable in its final decision.

ii. The Balancing Exercise as a Means of Addressing Diversity

Policy considerations and choices necessarily diverge across the national, Union and international levels; when these form part of judicial reasoning – in particular, by virtue of engagement of fundamental rights argumentation, as Mak has asserted¹⁴⁸⁸ – it is necessary to consider if these divergences are accounted for, and if so, on what basis. Public policy seems to be engaged not only to establish an equilibrium at the EU and national levels but for the very purposes of allowing for consideration of the distinct nature of the systems of protection – and in particular, the various dimensions and constitutional sensitivities, predominantly the social, cultural and often political – in the multi-level space of protection. Yet, as Azoulai notes, the invocation of public policy considerations concern not only rights but also

¹⁴⁸⁶ *Omega* (n.1331), Judgement, para.34. The (relatively limited- extent of the “guidance” provided contributes to the lack of concreteness.

¹⁴⁸⁷ See J. Malmberg, ‘Trade Union Liability for ‘EU-Unlawful’ Collective Action’ (2012) 2 *Eur.Lab.Law.J.* 5.

¹⁴⁸⁸ Mak, *Fundamental Rights in European Contract Law* (n.1232).

freedoms; that is, while they might operate to limit fundamental rights; the effect on any understanding of national identity is not clear¹⁴⁸⁹. This applies more specifically to the “national regimes of protection” and the divergent factors engaged in the determination of the balance.

In light of the diversities existing, the CJEU therefore recognises a margin of appreciation on the part of the national courts but has long considered the need to ensure the objectives of Union fundamental rights protection are satisfied¹⁴⁹⁰. In *Productores de Música de España*¹⁴⁹¹, concerning a conflict of rights arising from competition, intellectual property and consumer data protection issues, in the context of secondary Union law¹⁴⁹², between two private parties, the national court raised the application of the CFR. The CJEU established that the balancing of rights is for the national courts but recognised that a discretion exists; when implementing and interpreting the directives “a “fair balance [should] be struck” between conflicting rights, which must also be compatible with fundamental rights and principles recognised at the EU level¹⁴⁹³. This not only seems to reinforce the existence of a margin of appreciation but also similarly confirms that the CJEU is reluctant to construct a benchmark, which should be applied in a uniform manner by national courts in the balancing of fundamental freedoms and rights.

Social, labour and welfare systems diverge across the EU; these divergences transcend the crude East/West distinction highlighted above. Strike action, and the right to strike in particular, is of cultural, political, economic and legal significance across Europe, related to periods of social and civil resistance¹⁴⁹⁴. Within Western Europe, certain states do not

¹⁴⁸⁹ Azoulai, ‘The Case of Fundamental Rights: A State of Ambivalence’ in Micklitz and de Witte, *The European Court of Justice and the Autonomy of the Member States* (n.1239), p.215 citing Joined Cases C-305/85 and C-142/86 *UK v Commission* [1988] ECR I-5813.

¹⁴⁹⁰ That is to say, to avoid the situation in which different national standards undermine the effectiveness of Union law; see recently, C-206/13 *Siragusa*, nyr, Judgement, paras.31 *et seq.*

¹⁴⁹¹ C-275/06 *Productores de Música de España* [2008] ECR I- 271.

¹⁴⁹² Including Directive 2000/31/EC, OJ L 178/1, 17.07.2000; Directive 2001/29/EC, OJ L 167/10, 22.06.2001 and Directive 2004/48/EC, OJ L 195/16, 02.06.2004.

¹⁴⁹³ C-275/06 *Productores de Música de España* [2008] ECR I- 271, Judgement, para.68.

¹⁴⁹⁴ It became increasingly significant during the Industrial Revolution as large bodies of labour emerged. Striking has also been attributed varying degrees of significance throughout the 20th century, with various objectives. For example, the first non-communist controlled union, *Solidarność* (Solidarity) emerged from the strikes at the Gdańsk shipyard in Poland of 1980; the union – which had the objective of promoting workers’ rights and protection, as well as significant political changes – contributed to the end of communist rule in Poland; A. Smolar, “Self-limiting Revolution”: Poland 1970-89’ in A. Roberts and T. Garton Ash (eds.), *Civil Resistance and Power Politics: The Experience of Non-violent Action from Gandhi to the Present* (OUP, Oxford; 2009), pp.127-43.

recognise a right to strike (including the UK and Ireland), while in others, the right to strike is established and protected by a breadth of mechanisms, which includes direct constitutional provision (for example, in the Preamble of the French Constitution or Art.59 of the Polish Constitution), indirect constitutional provision (as in the German constitution, via the right to freedom of association in Art.9, GG), case law and collective agreements¹⁴⁹⁵. There is no “right to strike” in the UK¹⁴⁹⁶; the cases have had little effect in this respect, and it is unlikely that they will¹⁴⁹⁷. In the UK, the impact of *Viking* and *Laval*, as well as *Omega*, might be felt in relation to the fundamental rights dimension, and particularly, with regard to policy¹⁴⁹⁸.

The Nordic social model – dubbed “the holy grail [...] reconciling flexibility with security”¹⁴⁹⁹ – which has previously been promoted by the European Commission, has thus been forced to undergo significant changes following *Laval*. These changes concern not only the character of the system but the law itself. For example, as noted, the *lex britannia* was not amended on Sweden’s joining the EU; apparently, there had been no attempt – neither by the Swedish government nor by the relevant social actors - to render this law compatible with primary EU law¹⁵⁰⁰. Following the CJEU’s finding of incompatibility in the *Laval* judgement, the final decision in the *Laval* case concerned the liability of unions for unlawful

¹⁴⁹⁵ Rather, reference can be made to the comparative study of the Institute for Employment Rights, ‘The Right to Strike: A Comparative Perspective’ (IER, Liverpool; 2008) (<<http://www.ier.org.uk/system/files/The+Right+to+Strike+A+Comparative+Perspective.pdf>>; Last Accessed: 27.03.2013).

¹⁴⁹⁶ Striking is unlawful and constitutes an economic tort. To avoid liability, the union must be able to engage immunity by virtue of statute; this broadly reflects the CJEU understanding – a finding of a restriction (unlawfulness), which must subsequently be justified. This might seem normal in the common law system, where the focus lies not on rights but on remedies, where available; yet at the European level, and within the other traditions, the negation of the “rights-based” approach, which would be accepted elsewhere, is significant. Regardless, within the UK context, the union must engage in a subjective determination of the legality of the strike based on whether it is undertaken “in contemplation or furtherance of a trade dispute”, established in s.244(1) Trade Union Labour Regulations (Consolidation) Act 1992. In the UK, the political, social and cultural influence can be identified in respect of the miners’ strikes in the 1980s, after which - under Thatcher’s Conservative government – the scope for striking was reduced considerably, and the power of trade unions repressed. Per Art.1(2), CFR, the UK has opted out of Title IV of the CFR (which includes Art.28 and the right to collective action). Contrast, Barnard, ‘Viking and Laval’ (n.1417), p.489, who considers that the task might be much more considerable for the English and Scottish courts.

¹⁴⁹⁷ A.C.L. Davies, ‘One Step Forward, Two Steps Back? The Viking and Laval Cases in the ECJ’ (2008) 37 *In.L.J.* 126, pp.137-138.

¹⁴⁹⁸ For example, with regard to the notion of the right to strike as a fundamental right, the Trades Union Congress – a federation of fifty-three unions in the UK – initially welcomed the decision (<http://www.tuc.org.uk/workplace/tuc-14088-f0.cfm>; Last Accessed: 24.04.2014) but has subsequently challenged the *Viking*, *Laval*, and *Rüffert* jurisprudence, and the balance between the social and the internal market, <http://www.tuc.org.uk/international/tuc-21938-f0.cfm>; Last Accessed: 24.04.2014).

¹⁴⁹⁹ Barnard, ‘Viking and Laval’ (n.1417), p.488.

¹⁵⁰⁰ Many thanks to Professor Jonas Malmberg for this observation.

collective action¹⁵⁰¹. *Laval*, in bankruptcy, was awarded damages, payable by the union, on the basis of Art.56 TFEU (ex Art.49 EC), in respect of the free movement of services, the Swedish court having found that the article included a right to damages arising from a dispute between private parties. The case reflects an example of the influence of EU law on national law, in particular on remedies¹⁵⁰², which is less evident in the other cases. Like the rights and remedies impact in the state liability example, *Laval* highlights the need for a new remedy in the Swedish tradition; in other systems, it might not be required that a new remedy is developed but amendment of an existing remedy might be sufficient. Reich calls this hybridisation, to the extent that the remedy derives from an action which finds its basis in national law, which is “upgraded” by EU law¹⁵⁰³. The system - which has been inherently tied to the nation state, its structure and the relationship established between the state, the labour market participants and the unions¹⁵⁰⁴ - relies on the interaction of different institutions, namely (rather weak) employment protection legislation, a developed and established labour policy and strong, independent unions. The effects of the *Laval* reference have been felt in the Nordic tradition broadly, and not only in Sweden, to the extent that the “flexicurity” of the model has been undermined¹⁵⁰⁵. Furthermore, the ETUC – the European Trade Union Confederation – also anticipated in 2007, “negative implications for other countries’ systems”¹⁵⁰⁶, which illustrates that the potential impact of these cases will be felt not only in the state of the referring court but be of a cross-border character.

The putative impact of the fundamental rights cases has been felt beyond the legal sphere, strictly understood. Micklitz asserts that *Laval* reflects a particular notion of justice, namely, access justice (*Zugangsgerechtigkeit*), which he ties to the emergence of the “market state”, encompassing the emergence of new values, freedom and fairness of market access, and the constitutionalisation of private law¹⁵⁰⁷. For Patterson *et al*, this notion of the market state,

¹⁵⁰¹ It is worth noting that the union applied for a hearing before the Supreme Court, on an extraordinary basis (claiming there had been a substantive defect, there being no normal appeal), and arguing *inter alia* that the damages issue should have been referred to the CJEU. The Supreme Court rejected the application – App.No.2181/10, 06.07.2010 (as cited in U. Bernitz and N. Reich, ‘Case Note’ (2011) 48 *CMLR* 603, fn7).

¹⁵⁰² More recently, the issue of liability in cases of labour law has come before the CJEU; C-282/10 *Maribel Dominguez* nyr.

¹⁵⁰³ N. Reich, ‘Hybridisation of Remedies’ (2007) 44 *CMLR* 705.

¹⁵⁰⁴ Bakardjieva-Engelbrekt, ‘Institutional Theories, EU Law and the Role of Courts for Developing a European Social Model’ in Neergaard *et al*, *The Role of Courts in Developing a European Social Model* (n.61), p.332.

¹⁵⁰⁵ ETUC Response, ‘Disappointment of the ETUC’ (<<http://etuc.org/a/4401>>; Last Accessed: 23.04.2013).

¹⁵⁰⁶ ETUC Response, ‘Disappointment of the ETUC’ (n.1505).

¹⁵⁰⁷ Micklitz, ‘The Visible Hand of European Regulatory Private Law’ (n.326), p.39. See also, H-W. Micklitz, ‘Introduction’ in H-W. Micklitz (ed.) *The Many Concepts of Social Justice in Private Law* (Edward Elgar, Cheltenham; 2011), pp.3-60, and pp.37-43, especially.

inherently tied to the promotion of integration through free movement – the free movement of workers and services having been reinforced in *Viking* and *Laval* – and the facilitation of competition, reflects one particular understanding of European culture¹⁵⁰⁸. Both Micklitz and Patterson argue that the judgements in *Viking* and *Laval* rather disconnect the exercise of rights and freedoms (and thus the possibility to engage in transnational relationships on the basis of these rights and freedoms), from the nation state; thus, the individual – that is the worker - similarly becomes less connected to his national (collective) group¹⁵⁰⁹ (and perhaps, as explored above, his national identity). This brings to the fore the question of whether the individual, and thus, (at least one of) the group(s) to which he belongs, can be understood to exist beyond the state. Without considering in detail the “demise of national social welfare state” that might derive from *Viking* and *Laval*, the question arises as to whether the unions might similarly “transnationalise” themselves¹⁵¹⁰, establishing, beyond the state, a kind of cross-boundary and cross-cultural approach to social welfare, on the basis of which unions can engage regardless of their national origin. This “transnationalisation” seems to follow Micklitz’s understanding that the judgements aimed to open up the markets for labourers (and thus, to cheap labour but nevertheless, facilitating the functioning of the market, and thus integration)¹⁵¹¹. The argument made by Micklitz and Patterson can be linked to the notion of the “social market economy”; whether this sufficiently engages consideration of both economic and social issues in practice - as opposed to merely projecting the “holistic” perception of an economic and social Union - is not clear. The consequences would seem to depend on the significance attached to the guidance offered by the CJEU; the scope for the development of these issues at the CJEU level, i.e. future references, and the impact in the national systems and beyond the state, which broadly – beyond that discussed below – remains to be seen.

¹⁵⁰⁸ Patterson *et al*, ‘Statecraft, the Market State and the Development of European Legal Culture’ (n.171), p.8.

¹⁵⁰⁹ Micklitz, ‘Three Questions’ (n.355), p.7, with reference to AG Maduro’s Opinion in *Viking* at paras.70-72, and Micklitz’s understanding of Maduro’s recognition of the need for cross-border cooperation between unions. Micklitz also engages with Durkheim’s “cult of the individual”, noting the shift from mechanical solidarity (collective with the state) to organic (emerging forms of solidarity). To take this a little further, post-Division of Labour, Durkheim began to move away from this mechanical/organic distinction. Initially, he had considered that the construction of the individual in respect of organic solidarity inferred that the “cult of the individual” bound one not to society but to oneself; (Durkheim, *The Division of Labor in Society* (n.66), p.122); thereafter, he seems to suggest the continuing significance of society in respect of the cult of the individual, the focus not being on the “isolated individual” but the generalised one (É. Durkheim, ‘Individualism and the Intellectuals’ in R.N. Bellah (ed.), *Émile Durkheim: On Morality and Society* [1898] (U.Chicago Press, Chicago; 1973), pp.43-57, pp.48-49) (C. Shilling, ‘Embodiment, Emotions and the Foundations of Social Order: Durkheim’s Enduring Contribution’ in J.C. Alexander and P. Smith (eds.), *The Cambridge Companion to Durkheim* (CUP, Cambridge; 2005), pp.211-238, pp.226-228).

¹⁵¹⁰ Barnard, ‘Viking and Laval’ (n.1417), p.492.

¹⁵¹¹ Micklitz, ‘Three Questions’ (n.355), p.6.

Furthermore, the impact of the cases can be identified in respect of the institutional dimension of European dialogue, and namely, in the relationship between the national, Union and international orders, the courts and the legislatures. This is clear from the abandonment of the proposal for a regulation on striking¹⁵¹², the process and eventual renunciation of which highlights the lack of consensus across the Member States, at the Union and international levels, and arguably also the weak position of the European political institutions. Thus, *Laval* – with regard to the 1996 Directive – illustrates that the conflicts arising are also inherently political; the directive was drafted for the purposes of resolving issues relating to posted workers’ rights and restrictive conditions imposed by host states but did not fully resolve the problem, leaving the issue instead to the CJEU and consequently, as noted, creating a basis for dialogue between the national courts and the CJEU, via the preliminary reference procedure. In addition, this dialogue can also be said to have an international law dimension; the ILO has been engaged with the consequences of *Laval*. It has considered that the law adopted in Sweden¹⁵¹³, following the CJEU’s judgement in *Laval* and the Swedish government’s review¹⁵¹⁴, violates “fundamental trade union rights”, and in particular, the Freedom of Association and Protection of the Right to Organise Convention No. 87 and the Right to Organise and Collective Bargaining Convention No. 98¹⁵¹⁵, (to which, it should be noted, the Court made reference in *Laval*¹⁵¹⁶).

The case study highlights the scope for conflicts – the divergent characterisations of which have been uncovered above – arising as a result of the interaction of the fundamental freedoms and the exercise or undertaking of certain acts or omissions on the basis of fundamental rights, which reflects one dimension of the constitutionalisation of private law. The notion of the multi-level regime of fundamental rights protection is engaged, which is highlighted in the relationship between the national courts and the CJEU arising via the preliminary reference procedure, and the channels of communication and dialogue that derive

¹⁵¹² Monti II, abandoned in September 2012 (<<http://www.euractiv.com/socialeurope/ec-drops-regulation-right-strike-news-514793>>; Last Accessed: 16.04.2013).

¹⁵¹³ The so-called *lex laval*, 2009/10:48, *Svensk Författningssamling* (Swedish Official Journal) 2010:228, in force since 15.04.2010.

¹⁵¹⁴ ‘Action in Response to the Laval Judgment. Summary’ (Swedish Government Official Reports, Stockholm; 2008); <www.government.se/content/1/c6/11/77/22/fa71ed8c.pdf>; Last Accessed: 02.05.2013).

¹⁵¹⁵ ILO Committee of Experts, ‘2013 General Report on the Application of Conventions and Recommendations’, pp.176-180 (<http://www.ilo.org/ilc/ILCSessions/102/reports/reports-submitted/WCMS_205472/lang--en/index.htm>; Last Accessed: 16.04.2013).

¹⁵¹⁶ *Laval* (n.355), Judgement, paras.89-90.

therefrom. At one level, reference can be made to the CJEU's recognition of fundamental rights as general principles of Union law, bringing to the fore its reference to generality and commonality, discussed in more detail below; it also becomes clear that the CJEU does not necessarily engage comparison for the purposes of finding similarity, or commonality, above all other considerations. At another level, the balancing of the rights and freedoms – a task which the CJEU has attributed to the national courts – highlights the breadth of divergences between the national traditions and establishes the margin of appreciation as a (methodological) tool which permits the national courts to engage with these political, cultural and socio-economic considerations, in the name of public policy and the public interest. The cases bring to the fore the significance attached to national and transnational interests, to standards of protection of fundamental rights and further introduce a pertinent political dimension to the balancing of fundamental rights and freedoms, in respect of the balancing of market interests with individual and group interests. This line of analysis contributes to the idea that the effects of CJEU case law, and indeed national case law – the balancing being undertaken therein - diverge between the national traditions (and beyond the state), both in respect of the impact on certain political, cultural and socio-economic dimensions of the system, and that on national private law.

Case Examples. Concluding Remarks

Brief conclusions have been drawn at the end of each case example. Herein, more general conclusions will be drawn, which forms the basis of the analysis that follows in Part IV. The hypothesis advanced at the beginning of the thesis – that is, as to the putative relevance of comparative analysis in the Europeanisation of private law via the courts – is a precursory one. An attempt has been made to develop it through an examination of relevant cases arising by virtue of the preliminary reference system; against this background, the interaction of national, Union, European and international legal orders can be identified, via the intertwinement of national and European courts and the engagement at different levels of norms arising from different regimes of regulation. Moreover, as a result of this interaction and its nature, whether hierarchical or non-hierarchical, different mechanisms of Europeanisation can be uncovered¹⁵¹⁷.

¹⁵¹⁷ M. Kumm, 'Internationale Handelsgesellschaft, Nold and the New Human Rights Paradigm' in M.P. Maduro and L. Azoulay, (eds.) *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart, Oxford; 2010), pp.106-118, p.114.

The case examples have illustrated two key aspects of legal development pertinent to the Europeanisation of private law: firstly, they have allowed for the identification of the scope for the shifting conceptualisations of private law, pertinent to the nature of the Europeanisation of law and its multi-level structure within the pluralist European space, explored above. The coherent, technical, and politically-neutral conceptualisations of private law and their connections to the nation states have been explored in Chapter 1. In Chapter 2, the functional foundations of private law at the Union level, that is, in facilitating the functioning of the internal market, have been set out. This dominant underlying rationale has been used to uncover and explain the nature of the Union legislature's initial approach to Europeanisation, namely, its focus on codification, and subsequently, on the promotion of the uniformity of private law across the Member States by virtue of its harmonisation efforts; in light of the limits of legislation, the shift in focus of legal development from the legislature to the courts has been explored in Chapters 3 and 4. Moreover, these cases, including but not exclusively those concerning fundamental rights, have illustrated that private law is neither wholly politically nor normatively neutral but might also have social and political objectives. Secondly, the cases have illustrated the divergent manifestations of the sources of comparative analysis; they have further provided insights as to the context in which comparison is undertaken and as to the rationales underpinning its engagement, namely why comparative analysis might be beneficial to the normative development of the Europeanisation of private law, as explored in a preliminary manner in the Introduction and Chapter 3.

Each of the cases also brings to the fore the multi-level characterisation of private law, and in particular the interaction of national, European and international regimes of regulation. Against this background, they also highlight the scope for conflict arising therein, and the divergent nature of such conflicts, the existence of which permeates the rationale of the domestic court to refer to the CJEU. The exploration of the nature of these conflicts has confirmed that private law cannot be understood as coherent, technical or politically or ideologically neutral at the Union level; consequently, it can no longer be understood as such within the national context, in light of the impact of Union legislation and CJEU

interpretations in the national systems¹⁵¹⁸. Reference has been made to the notion that the changing nature of private law is reflected in its constitutionalisation, materialisation¹⁵¹⁹ and regulation, phenomena that are identifiable in each of the case examples.

For example, reference can be made to the increasingly regulatory character of private law in light of its role in consumer protection. In the context of the regulation of contract terms, explored herein, the preliminary rulings rendered on the basis of the CJEU's interpretative jurisdiction, have not only emphasised this regulatory role but they also have a constitutional consequence as a result of their attributing to the national courts a role the assessment, *ex officio*, of contract terms. This "empowering" of national courts is also potentially identifiable in the state liability case law (in respect of lower national courts being able to "skip" the supreme courts and refer to the CJEU) and the fundamental rights jurisprudence (in respect of which the national courts have engaged a role in balancing freedoms and rights). As is also clear, this "empowerment" thesis is ambiguous as the national courts have been restricted in other ways (for example, in respect of the shift from a power to an obligation of *ex officio* review in the unfair contract terms case example). The (arguably, as noted above, "hidden") constitutionalisation of private law is identifiable not only, as might be most expected, in the fundamental rights example but also in the UCTD jurisprudence, particularly in respect of the balancing of party autonomy and *ex officio* regulation and the engagement of effectiveness, enshrined now in Art.47(1) CFR and Art.19(1) TEU. Micklitz and Reich have suggested that against this background, the CJEU also advances the notion of consumer empowerment, in light of the financial crisis, in line with a "social empowerment...developing hand in hand with the consumers and citizens what has been called a 'European civil society'"¹⁵²⁰. These processes of constitutionalisation, also identifiable in the fundamental rights cases, and particularly, in the balancing of fundamental rights and freedoms, similarly reflect private law's political dimensions, in respect of which it becomes clear that private law, as it is subject increasingly to constitutionalisation, cannot be understood to be politically neutral. Each of the case examples also bring to the fore the significance of the social, political and economic contexts – and thus of tradition and culture –

¹⁵¹⁸ Furthermore, as Caruso has asserted: "integrationist pressures compel national legal actors to make explicit the social and economic choices underlying private law rules"; Caruso, 'The Missing View of the Cathedral' (n.243) (abstract).

¹⁵¹⁹ Materialisation is understood to reflect the drafting of norms for a particular purpose.

¹⁵²⁰ Micklitz and Reich, 'The Court and Sleeping Beauty' (n.1036), p.806, citing Comandé, 'The Fifth European Union Freedom' in Micklitz, *The Constitutionalization of Private Law* (n.1217).

in which the preliminary references arise, in which Europeanisation occurs and more specifically, in which the CJEU has developed, with the national courts, consumer protection.

Furthermore, the case examples illustrate that while elements of comparative analysis are identifiable in the CJEU, there exists no rigid theoretical or methodological framework for its engagement; indeed, the evidence of comparative analysis is often far from explicit, which is to say, one has to engage the critical assessment of comparison in Chapter 3 to understand its dimensions and to identify it, even where its use might not be perspicuous. This is true across each of the case examples. The analysis has therefore aimed to concretise the discourse above, appertaining to the relevance of comparative analysis and the nature of comparison engaged by the CJEU in light of the criticism advanced against mainstream comparative law in Chapter 3 and the interaction of the national and European courts, beyond the state, in Chapter 4; that is to say, against the background of the critique of the dominant unit of comparative analysis and the context in which the comparison is undertaken, as well as the dynamic and shifting character of private law development. For example, comparison in its complex form might help to explain the development of “regulatory space, the confines of which are no longer congruent with jurisdictional borders”, where the nature of these areas of law also pose problems for comparative analysis as it is traditionally understood, that is, having a focus on the national legal order¹⁵²¹. Furthermore, the cases establish the foundations for the analysis of the implications of comparative analysis in respect of the furtherance of European integration via the national and European courts, as these institutions are engaged in the interpretation and application of the legislative *acquis* and judicially developed principles of law. The next chapter engages the manifestations of comparative analysis, which have been derived from these case examples amongst others, to construct two classifications: one, which aims to illustrate the relevant sources of comparative analysis employed by the AG and the Court, and a second, which aims to uncover the diverse rationales underpinning the engagement with comparison.

¹⁵²¹ Zumbansen, 'Transnational Comparative Theory and Practice' (n.301), p.5.

PART FOUR: THE EVALUATION OF THE CJEU AS A “COMPARATIVE LABORATORY”¹⁵²²

This part builds on the analysis of the case studies on state liability, consumer protection and fundamental rights, which illustrate two dimensions of legal development. On the one hand, they confirm the shifting conceptualisations of private law, the scope for which was outlined in the introduction and Part I, as well as the emergence of private law within a multi-level structure in the context of European integration; this is deemed to further concretise the rationale for the engagement with complex comparative analysis outlined in Chapter 3. Moreover, the cases illustrate that diverse manifestations of comparison are identifiable in the CJEU’s jurisprudence, notwithstanding the absence of a rigid adherence to a theoretical or methodological framework.

Chapter 8 has the purpose of extrapolating from the case analyses the building blocks of two classifications, both of which establish the epistemological foundations of the use of comparative analysis and provide the basis for advancing, in Chapter 9, the relevance of comparison to the CJEU’s “meta-mechanisms” of Europeanisation. The first chapter of this part therefore attempts to “map” the different sources of law that the CJEU engages in its comparative analysis; at a fundamental level, this attempt at mapping is descriptive and thus has no “pure” scientific aim. Notwithstanding, against this background, the breadth of approaches to comparative analysis, identifiable across the case examples and shaped by these different sources, is explored.

Thereafter, in light of this initial analysis, the rationales, aims and objectives of comparison - the why and for what purpose comparison is engaged – are then set out; reference is made to the identification of commonality, the recognition of an absence of commonality, the identification of an autonomous interpretation, the identification of a “best solution” and the scope for dialogue to which comparison gives rise. The first chapter provides the basis for the examination in the second chapter of the “meta-mechanisms” engaged in the Europeanisation of private law – including the identification of principles of Union law, the recognition of

¹⁵²² Hilf ‘The Role of Comparative Law in the Jurisprudence of the Court of Justice of the European Communities’ in De Mestral *et al*, *The Limitation of Human Rights in Comparative Constitutional Law* (n.3), p.550.

“best solutions” and the scope for transfer and dialogue – and the CJEU’s use of comparative analysis in their development and utilisation.

Chapter 8. Uncovering the Foundations of a Classification of Comparative Analysis in the CJEU

This chapter attempts to uncover, in a more categorical fashion, the CJEU's engagement of comparative analysis, with reference to its jurisprudence including but not limited to the case examples evaluated above. The first section categorises the manifestations of the sources of comparison in the Opinions of the AG and the judgements of the Court while the second builds on these identifying factors, categorising the diverse rationales, aims and objectives underpinning the CJEU's engagement with comparison. The case examples attest to and concretise the need for the recognition of the scope for shifting understandings of private law, and its Europeanisation in the context of integration. On this basis, they substantiate the foundations of the engagement of comparative analysis as part of the framework of national and European legal development.

Indeed, the case examples illustrate the existence of manifestations of comparison in the CJEU's reasoning; the approach of the CJEU nevertheless appears to lack strict theoretical rigour and a consistent methodological framework. Comparison is often invoked in the rendering of opinions and judgements in national, regional and international courts, although it is infrequently explicit¹⁵²³. The lack of express engagement with comparison suggests that judges simply do not think of themselves as comparatists: “[w]e are already comparatists...We just don't think of ourselves that way”¹⁵²⁴. This is not necessarily to suggest that the approach is a “shallow” one; indeed, it seems that – albeit, perhaps not explicitly – the AG and the Court know something of the dimensions of complex comparison advanced in Chapter 3. That is to say, in the context of the Europeanisation of private law via the preliminary reference procedure, the CJEU engages a breadth of legal sources of comparative analysis (in terms of what is being compared) and similarly recognises a breadth of rationales underpinning its use, allowing for the construction of diverse hypotheses as to the purposes served by comparative analysis.

¹⁵²³ C.N. Kakouris, ‘L’utilisation de la méthode comparative par la Cour de Justice des Communautés européennes’, in U. Drobnig & S. van Erp (eds.) *Comparative Law and the Courts* (Kluwer, The Hague; 1999), pp.97–111; M. Kiikeri, *Comparative Legal Reasoning and European Law* (Kluwer Academic, The Hague; 2001); K. Lenaerts, ‘Interlocking Legal Orders in the European Union and Comparative Law’ (2003) 52 *ICLQ* 873. See most, recently, Bobek, *Comparative Reasoning in European Supreme Courts* (n.601).

¹⁵²⁴ Justice Shirley Abrahamson, Chief Justice of the Wisconsin Supreme Court in S.S. Abrahamson and M.J. Fischer, ‘All the World’s a Courtroom: Judging in the New Millennium’ (1997) 26 *Hofstra.L.Rev.* 276, p.285, cited in Slaughter, *A New World Order* (n.803), p.76.

The analysis of the case examples further corroborates the suggestion advanced in Part II as to the significance of the sociological, cultural perspective, and in particular, of the composition and construction of the CJEU, with regard to the analysis of its interpretative jurisdiction and the evaluation of its inter-institutional relationships, predominantly with the national courts but also with international courts (including the ECtHR), scholars, civil society bodies and increasingly, as its role in private law and the regulation of private relationships, evolves, private individuals. That is to say, much of the scope for comparison arises from the diversity inherent in the European judiciary itself and the bifurcated analyses of the AG and the Court. The scope for its engagement with comparative methodologies was recognised at the birth of the CJEU's remit by the French AG, Maurice Lagrange¹⁵²⁵. As suggested, the judges and AGs must necessarily be understood to be at once bound and distinct from their diverse national legal cultures and traditions¹⁵²⁶. Thus, it has been asserted that “[c]omparison seems to be inevitable in the view of the different legal backgrounds of the judges sitting in the court”¹⁵²⁷. The perspective adopted in this thesis – namely, the promotion of the plurality of backgrounds, in contrast to the uncritical acceptance of the need for a single and distinct European culture or identity – finds supports in the notion that:

[t]he comparative method is underlying in all cases due to each judge's different legal training, knowledge, approach and reasoning which reflects the legal system of his country. The deliberations are enriched by the diversity of the contributions made by the judges. The Court's deliberations constitute a living comparative law in action¹⁵²⁸.

Moreover, and on a related note, the CJEU is obliged to ensure that the ruling it renders in the case before it is one which is acceptable and capable of being applied across the European space, that is, in all national jurisdictions and beyond the culture and tradition of the referring court, a consideration which gives rise to the scope for spillovers of a cross-order and cross-

¹⁵²⁵ M. Lagrange, 'Une réalité européenne – La Cour de Justice de la CECA' (1955) 28 *Cah.Chrét.Fonct.Publique* 16, p.21. Translated in Cohen and Vauchez, 'The Social Construction of Law – The European Court of Justice and its Legal Revolution Revisited' (n.664).

¹⁵²⁶ Slaughter has asserted that “judges see each other not only as servants and representatives of a particular polity, but also as fellow professionals in an endeavour that transcends national borders”; A-M. Slaughter, 'A Global Community of Courts' (2003) 44 *Harv.Int.L.J.* 191, p.193. This is also true of the researchers in the Research and Documentation Centre at the CJEU, which allows for comparative research to be done by the various national lawyers engaged in the drafting of Opinions and Judgements.

¹⁵²⁷ Smits, 'European Private Law and the Comparative Method' in Twigg-Flesner, *The Cambridge Companion to European Union Private Law* (n.549), p.39.

¹⁵²⁸ C.N. Kakouris, 'Use of the Comparative Method by the Court of Justice of the European Communities' (1994) 6 *Pace.Int.L.Rev.* 267, p.277 (footnote removed).

sectoral nature¹⁵²⁹. Fundamentally, the interpretation rendered must also comply with Union and international law, including, fundamental rights. These considerations further reflect the multi-level nature of the emerging body of European private law; the nature of the conflicts arising in the context of its Europeanisation have been outlined above, and are identified concretely in each of the case examples, the exploration of which further reflects the different mechanisms that have been identified, developed and advanced by the CJEU in order to deal with such conflicts. These include the recognition of either similarity and divergence, the promotion of a balancing exercise and the identification of a division of labour between the CJEU and the national courts, as well as the “meta-mechanisms” underpinning the emergence of European private law within an increasingly globalised context, namely, the recognition of legal principles, transfer and dialogue. As to the first consideration, for the purposes of the analysis that follows, reference is made to the CJEU’s engagement of comparative analysis for the identification of commonality, on the one hand, and the identification of diversity (or recognition of a lack of commonality, herein conceived of as generality), on the other. The roots of such a distinction will therefore be uncovered in the following paragraphs¹⁵³⁰; accordingly, at the outset, it is fundamental to note that herein the terms are not used interchangeably.

Building on the analysis in Chapter 3, and the outline of the procedure in Chapter 4¹⁵³¹, it is submitted that at the outset of the hearing, the AG and the Court must each identify the need for the comparative analysis in light of the legal issue arising in the case. At this stage, it is necessary that the AG and the Court (normally, the *juge rapporteur*, at the initial stage) draw hypotheses as to the result for which they are searching, that is, the hypotheses as to what they might hope to obtain from the comparative analysis; this will depend on the breadth of

¹⁵²⁹ For the purposes of this thesis, it is considered that spillover effects within the national order might be broader than simply the application of a judgement in the national court (either within or beyond the court making the initial preliminary reference). Reference will be made to spillovers where relevant herein but for an overview of the understanding adopted, see A. Johnston, ‘Spillovers’ from EU Law into National Law: (Un)intended Consequences for Private Law Relationships’ in D. Leczykiewicz and S. Weatherill (eds.), *The Involvement of EU Law in Private Law Relationships* (Hart, Oxford; 2013), pp.357-394.

¹⁵³⁰ It is important to note that the notions of convergence and commonality are not used interchangeably yet, it is further recognised that there might be some overlap between the notions of commonality and generality, as well as commonality and convergence (on the different meanings of which, see R. Brownsword, ‘Convergence: What, Why, and Why Not?’ in H-W. Micklitz and Y. Svetiev (eds.), ‘A Self-sufficient European Private Law?’ *EUI WP 2012/31*, pp.77-82, pp.77-78). While there is no strict adherence to a formalist conception of commonality, it is recognised that commonality and convergence might be used to attribute the same meaning, where a formalist understanding is adopted; however, it is recognised that convergence might exist where there is a lack of commonality as to the applicable norms, i.e. where the norms possibly diverge but the outcome of their application might converge.

¹⁵³¹ See Chapter 4.

rationales explored in the second section of this chapter. Essentially, Gerber frames the question as follows: “where are we going and how do we get there?”¹⁵³². Thereafter, having identified the reasons for the engagement of comparative analysis, it is necessary to choose what is being compared and how it should be compared, that is, the relevant sources of comparative analysis, and its perspective and context.

These determinations must be made in light of the relevant “data” or information on the basis of which the comparative analysis can be undertaken. The parties to the action, encouraged by the AG or the Court, might well provide this data. Thus it might be said that it is rather the approach adopted by the parties to the action that largely gives rise to and shapes the scope for the engagement with comparative analysis as a dimension of the reasoning of the AG and the Court. The basis and rationale underpinning the proposal of the relevance of comparative analysis by the submitting parties and interveners will diverge, depending on their understanding of the case and its categorisation by the CJEU. That is to say, well-prepared and well-informed lawyers might, where relevant, make reference to norms including but not limited to national norms (which might, it is submitted, be susceptible to a form of “methodological nationalism” reflecting rules deriving from their “home” legal systems), international law norms, norms from other areas of Union law, and furthermore, privately-made and non-state norms, as relevant to interpretation. One of the parties - in particular, the Commission - might seek to have a principle, rule or concept recognised as common and with this intention, introduce the scope for a comparative analysis in its submissions for the purpose of facilitating the recognition of commonality between national cultures and traditions, across regimes of Union law, international or transnational law¹⁵³³. Furthermore, both the General Court and the CJEU can ask the Commission as a party to the case, or as an *amicus curiae*-type party¹⁵³⁴, to submit under Art.45 of the Rules of Procedure of the CJEU; this might encompass a comparative law report¹⁵³⁵. The national governments might wish to draw attention to the specificities of their own legal cultures and traditions¹⁵³⁶. The right of

¹⁵³² D.J. Gerber, ‘Toward a Language of Comparative Law?’ (1998) 46 *AJCL* 719, p.719.

¹⁵³³ For example, C-108/81 *Amylum v Council* [1982] ECR I-03107.

¹⁵³⁴ G. de Búrca, ‘After the EU Charter of Fundamental Rights? The Court of Justice as a Human Rights Adjudicator?’ (2013) 2 *Maas.J.Eur.Comp.Law* 168.

¹⁵³⁵ For example C-155/78 *M v Commission* [1980] ECR I-1797.

¹⁵³⁶ Thus, the House of Lords recognised the scope for national governments to highlight specific features of national traditions, allowing the CJEU to illustrate “substantial deference to the difference in national systems”; House of Lords, EU Select Committee, ‘The Impact of the Treaty on the European Institutions’ 10th Report of Session 2007-2008 (The Stationery Office, London; 2008), para.6.87 citing Professor Guild’s Evidence to the House of Lords, QE130.

intervention of the Member States allows national governments to highlight specific features of their orders; it affords scope for “substantial deference to the difference in national systems” on the part of the CJEU¹⁵³⁷. Both the General Court and the CJEU might similarly request that the Member States submit their observations in the case before it¹⁵³⁸. Essentially, even where it appears that the AG or the Court has raised the comparative dimension of the analysis, it might rather have been engaged on the basis of the submissions of one of the parties; it is impossible to concretely determine if and how the submissions inspire the AG or the Court, as they generally remain unpublished. Indeed, this is true of many internal documents.

Furthermore, as noted in Chapter 4, the *juge rapporteur* might request in the *rapport préalable* that the *DRD* provide a *note de recherche* which can be used by the judges, the AG and their *référéndaires*. The *note de recherche* usually comprises an outline of the relevant national provisions and case law on the key legal questions of the case as identified in the *rapport*; it is often of a strictly positivist nature. Where relevant, it might also include reference to the rules and case law of other, non-state orders and of international conventions and agreements. Most of these documents tend to remain internal due to a number of considerations, and particularly, the burden of translation. It is also worth noting that the *DRD* endeavours to make available a breadth of information, both to the CJEU itself and to external institutions. It publishes a *bulletin reflet* three times per year, which is available in French on the CJEU website¹⁵³⁹, and which has been published in English by the *Association des Conseils d'État et des juridictions administratives suprêmes de l'Union européenne* since 2010¹⁵⁴⁰. Its availability in two languages necessarily renders it more accessible to a wider body of actors¹⁵⁴¹. The content of the *bulletin* is relatively consistent; some editions have a specific focus (for example, the first of 2013 focuses on the CFR) while others are general making reference to recent national jurisprudence and legislation relevant to the interests of the Union. It also includes information on pertinent international conventions, the case law of

¹⁵³⁷ House of Lords, EU Select Committee, ‘The Impact of the Treaty on the European Institutions’ 10th Report of Session 2007-2008 (The Stationery Office, London; 2008), para.6.87 citing Professor Guild’s Evidence to the House of Lords, QE130. The same was also recognised in the evidence of former AG Sir Francis Jacobs.

¹⁵³⁸ For example, in the ‘Moped Trailers’ infringement action, C-270/02 *Commission v Italy* [2004] ECR I-1559.

¹⁵³⁹ *Bulletin reflet* (<http://curia.europa.eu/jcms/jcms/Jo2_9951/jurisprudence-nationale-et-internationalehttp://intranet/jcms574/jcms/Jo2_9951/jurisprudence-nationale-et-internationale>; Last Accessed: 26.09.2013).

¹⁵⁴⁰ The association also publishes supranational (including from the ECtHR, Benelux and EFTA courts) and national jurisprudence (including that of the Member States and Canada), concerning Union law.

¹⁵⁴¹ *Bulletin reflet* in English (<http://www.juradmin.eu/en/reflets/reflets_en.html>; Last Accessed: 26.09.2013); Jurisprudence (<http://www.juradmin.eu/en/jurisprudence/jurisprudence_en.lasso>; Last Accessed: 26.07.2013).

international courts and tribunals, including but not limited to the ECtHR, and guidance on the *pratique des organisations internationales*. These resources form key parts of the processes undertaken in the cabinets of the judges and AGs and necessarily shape the approaches to methodology and reasoning adopted by dictating the availability and ease of access to materials.

The stages of the comparative analysis are deemed to be twofold, shaped by the hypotheses advanced and encompassing the description and explanation of what is identified, which might amount to, for example, similarities and differences. The explanatory dimension provides for, as noted above in Chapter 3, the nature of the similarities and the nature of the absence of similarity, the determination of those considerations on which the similarities are based, the considerations on which lack of similarity are based, and ultimately, what these similarities and differences reveal in light of the hypotheses initially developed. To return to the determination by the AG and the Court of the hypotheses as to the result for which they are searching, it might be that the initial hypothesis reflects one of commonality, divergence, autonomous interpretation or a “best solution” (acknowledging the scope for overlap). If, for example, the search for commonality is taken as a starting point, it is necessary to respond to the question: “commonality of what?”. *Prima facie*, the AG and the Court might search for commonality in respect of the text of the relevant norms; however, in light of the significance of the contextualist and culturalist approach as discussed in Chapter 3, this will not necessarily lead to a finding of true commonality. Commonality identified solely on the basis of text is likely to be superficial or coincidental; as such, their identification thus undermines the scope for plurality (whether as empirical fact or as perspective). Rather commonality also needs to be identified in respect of the context of the norm’s development and application, reflected in its judicial interpretation. It has been recognised that a contextualist and culturalist approach to complex comparison is likely to be considerable and time-consuming, where the norms relevant to interpretation derive from national sources, from the Union level, considering, for example, the process of the directive’s implementation within each Member State, or from international or transnational law. Against this background, the AG and the Court can draw preliminary and evaluative conclusions from the comparative analysis, and its application in the case before it. To follow the example hypothesis outlined above, if the case and circumstances call for the identification of a principle of Union law, it might be characterised as a common one if commonality can be identified. If commonality cannot be

found, the AG and the Court must then revisit their initial hypothesis and draw a second one, again in line with the aims and objectives of the Union.

The first section of this chapter sets out the manifestations of the legal sources of comparative analysis while the second presents the manifestations of the aims and objectives underpinning comparison. As noted above, it is recognised that it is trite to proclaim that there is a single comparative methodology; indeed, they are multiple and diverge depending on the legal sources engaged and the aims and objectives of the comparative analysis undertaken by the CJEU.

I. The Manifestations of Comparative Analysis in the Opinions of the AG and Judgements of the Court

This section categorises the different sources of comparative analysis, identifiable from the analysis of CJEU jurisprudence in Part III. This attempt at taxonomical clarification affords scope for the (re)consideration of the identification of what is being compared (and fundamentally, the notion that it should not be limited to that arising within the state), and the way in which it is compared, reflecting the epistemological foundations of the scope for complex comparative analysis outlined in Chapter 3. For the purposes of the comprehension of the analysis that follows, it is necessary to briefly set out the CJEU's engagement of principles of Union law.

The CJEU has engaged a number of judicially-developed norms, and particularly, principles of Union law, the latter – some of which will be outlined below – have been conceptualised by Tridimas as unwritten judicial norms, that is, a source of law deriving from judicial precedent, or as a distinct source of law in their own right¹⁵⁴². However, there has been little explication of the methodology (or methodologies) engaged either by the Court or the AG in extracting such normativity; this chapter aims to uncover the sources and rationales underpinning this recognition with reference to the comparative analysis undertaken by the AG and the Court. On the one hand, the CJEU appears to understand identification and recognition of principles simply as a matter of interpretation, which might be engaged at the Union level, where there is no other explicit provision therein. This was one of the rationales

¹⁵⁴² Tridimas, *The General Principles of EC Law* (n.1475), p.2.

underpinning both the state liability¹⁵⁴³ and fundamental rights cases¹⁵⁴⁴. As will be set out in the first section of this chapter, in such an exercise, the CJEU is not limited to national legal sources but can engage and evaluate the relevance of European, international and non-state law. In respect of the CJEU's identification of principles in particular, a distinction between common and general principles is advanced. This distinction is further explored in Chapter 9, as is the notion that principles of both characterisations might also be advanced as “best solutions”, there being scope for overlap between the categorisations¹⁵⁴⁵. To the extent that it permeates the analysis that follows, it is worth briefly outlining the way in which such principles might be derived from comparative analysis.

It is submitted that principles might be identified by virtue of comparative analysis – within a particular area of law - either on the basis: 1) that they are understood as pre-existing within the national, European or international legal order on the basis of specific legal norms; or 2) they are extracted, via induction, from national, European or international sources of law in the absence of an existing principle. The principle is then established at the Union level, it being necessary – as Tridimas has advanced – that a “minimum ascertainable legally-binding content”¹⁵⁴⁶ can be identified. Comparative analysis therefore essentially allows for the identification of the norms – including their scope and content – existing in the pertinent orders and the identification of commonality or a lack thereof; it can therefore be used to draw the distinction between common principles and general principles. With regard to commonality, comparative analysis would allow for the identification of the lowest or highest common denominator shared across the Member States; it is recognised that while this reflects a fairly formalistic understanding, such an analysis should include not only reference to the text of the norm¹⁵⁴⁷ but also its context, thereby engaging the scope for commonality in interpretation, with regard to the particular area of law in which the norm is applicable¹⁵⁴⁸. For example, freedom of contract might be identified as one concept in respect of which the

¹⁵⁴³ *Brasserie* (n.186), Judgement, para.24 *et seq.*

¹⁵⁴⁴ *Stauder* (n.682), *Internationale Handelsgesellschaft* (n.1256) and *Nold* (n.791), Judgement, para.13.

¹⁵⁴⁵ Tridimas, *The General Principles of EC Law* (n.1475), pp.20-21. At the level of the CJEU, see Case 14/60 *Hoogovens v High Authority* [1962] ECR 253, Opinion of AG Lagrange, paras.283-284.

¹⁵⁴⁶ Tridimas, *The General Principles of EC Law* (n.1475), p.26.

¹⁵⁴⁷ With regard to the text, issues of language and translation also come to the fore.

¹⁵⁴⁸ Such commonality might be identifiable, for example, in relation to the application of effective judicial protection in a given set of facts, i.e. in a given case; it is recognised that even within national legal systems, its understanding might differ, depending on the context.

text (notwithstanding problematics of translation) is common but the interpretation is not¹⁵⁴⁹. It is worth noting that, in contrast to the distinction between commonality and generality advanced herein, Tridimas rejects the notion that the CJEU searches for that which is entirely shared¹⁵⁵⁰ and instead engages the identification of “wide acceptance”: “[i]n the absence of guidance by Community written law, it must be widely accepted in one way or another by the Member States”¹⁵⁵¹. Yet it is not clear how “wide” such acceptance must be for Tridimas. Rather herein, it is submitted that the basis upon which commonality is identified will depend on the sources of law engaged by the CJEU, which will be considered in greater detail below.

On the other hand, principles might be recognised as general where they lack commonality (as identified by virtue of the comparative analysis). In the absence of commonality, the approach is, at first glance, more complex. It is recognised that generality has different meanings. For example, while Tridimas defines a general principle as a “general proposition of law of some importance from which concrete rules derive”¹⁵⁵², it is the characterisation of general which dictates that it “operates at a level of abstraction that distinguishes it from a specific rule” and which requires that it also holds a degree of importance¹⁵⁵³; moreover, he recognises that generality might have other meanings, engaging those principles which “underlie the legal systems as a whole” or “refer[ring] to the degree of recognition or acceptance”¹⁵⁵⁴. For the purposes of this analysis, generality is engaged as reflecting this latter consideration. While the attribution of the characterisation of generality is understood to engage the maintenance of diversity, it must also be borne in mind that the “language of ‘generalisation’ is disturbingly dismissive of diversity, when it is presented...without any comparative reflection”¹⁵⁵⁵.

¹⁵⁴⁹ See for example, the recognition of freedom of contract in *Caja de Ahorros* (n.268), Opinion of AG Trstenjak, fn.9 and 12; recognising freedom of contract as common and “unanimous”, but nevertheless recognising that its application might diverge; she therefore made indirect reference to the significance of comparative analysis without actually undertaking a comprehensive study, engaging predominantly German but also French and Spanish scholarship on the legal theory of freedom of contract.

¹⁵⁵⁰ It is worth noting that Tridimas rejects the notion that the CJEU looks for commonality, arguing that its interpretation is not a “mechanical process”: Tridimas, *The General Principles of EC Law* (n.1475), pp.20-21.

¹⁵⁵¹ Tridimas, *The General Principles of EC Law* (n.1475), p.26.

¹⁵⁵² Tridimas, *The General Principles of EC Law* (n.1475), p.1.

¹⁵⁵³ Tridimas, *The General Principles of EC Law* (n.1475), p.1.

¹⁵⁵⁴ Tridimas, *The General Principles of EC Law* (n.1475), p.1.

¹⁵⁵⁵ S. Whittaker, ‘The ‘Principles of Civil Law’ as a Basis for Interpreting the Legislative *acquis*’ (2010) 6 *ERCL* 74, p.79.

The recognition and characterisation of principles as general might therefore require a subjective determination on the part of the AG or the Court, which is to say that evaluative comparative analysis – discussed below – might allow for examination of Member States’ norms over time and space¹⁵⁵⁶, indicating that no such commonality is (yet) identifiable¹⁵⁵⁷ or that a norm might exist in only a minority of states but might still be engaged at the Union level¹⁵⁵⁸. The general principle is therefore not recognised on the basis that it is common or shared but rather by virtue of a comparative analysis which highlights its existence (or putative existence)¹⁵⁵⁹ in light of a teleological interpretation, its consistency with and facilitation of the aims and objectives of the Union¹⁵⁶⁰ and an evaluation of legal development over time¹⁵⁶¹. For example, while the principle of state liability might have been identifiable at the outset, if not in all, then in a majority of Member States¹⁵⁶², the extension of liability to the acts and omissions of the courts seems to follow this approach, whereby there did not initially exist support across the national systems for such liability¹⁵⁶³. In these latter cases,

¹⁵⁵⁶ For example, in respect of whether the protection of communications between lawyers, established as a fundamental right in Union law on the basis of commonality on the Member States, the CFR and the ECHR, should extend to communications between a management body and an in-house lawyer: *Akzo* (n.691), Opinion of AG Kokott, para.94 and *Dominguez* (n.1502), Opinion of AG Trstenjak, para.94.

¹⁵⁵⁷ Consider the recognition of abuse of right. Generally, it can be identified as a doctrine discernible across the continental legal traditions, which is codified in a number of systems and which forms an unwritten principle, developed through case law, in others (For example, in the French legal tradition, the prohibition against abuse of rights derives from the case law, subsequently recognised in Art.1382 and 1134(3) *Code civil*, in relation to tort and contract, respectively; BGB, Art.226, often combined with Art.242 and the general principle of good faith. Also, consider the approaches in the Spanish and Dutch systems: Art.7(2), *Código civil*; Art.3:13, Dutch Civil Code) and almost outright rejection in the English system (*Mayor of Bradford v Pickles* [1895] AC (HL) 587, p.594 per Lord Halsbury).

¹⁵⁵⁸ Consider AG Legrand’s explicit comparison of the national laws on misuse of powers, in *ASSIDER*, even though the principle existed in only one national system: C-3/54 *ASSIDER* [1955] ECR 63.

¹⁵⁵⁹ For example, *Akzo* (n.691), Opinion of AG Kokott, para.94 and *Dominguez* (n.1502), Opinion of AG Trstenjak, para.94, and Maduro, ‘Interpreting European Law’ (n.397), p.7.

¹⁵⁶⁰ For example, with regard to the obligation of the national courts to engage ex officio with contract term regulation, an approach which was not recognised in most Member States, and indeed, precluded in some, see the UCTD cases, discussed above, and especially, *Pénzügyi Lízing* (n.1033), Judgement, para.51: “In order to safeguard the effectiveness of the consumer protection intended by the European Union legislature, the national court must thus, in all cases and whatever the rules of its domestic law, determine whether or not the contested term was individually negotiated”.

¹⁵⁶¹ This can be identified in respect of the notion of abuse of law; initially, the CJEU rejected it as a principle of Union law (C-373/97 *Diamandis v Elliniko Domsio* [2000] ECR I-1705); thereafter, developing a European conception of abuse of rights, with its own conditions for application (C-110/99 *Emsland-Stärke GmbH v Hauptzollat Hamburg-Jonas* [2000] ECR I-1569, Judgement, paras.51-53, in which the Court derived the “abuse test”), and finally recognising a principle in C-321/05 *Hans Markus Kofoed* [2007] ECR I-5795, Judgement, paras.37-38.

¹⁵⁶² With the diversity reflected particularly in the conditions for liability; see Chapter 5, for a more in-depth analysis.

¹⁵⁶³ As discussed above, in relation to the state liability case example, reference was made to comparative analysis, looking to national and international norms for an understanding of the “state”, that would allow for such an extension; similarly, AG Léger engaged ECtHR case law, against the background of his comparative analysis of the lack of commonality amongst the Member States: *Köbler* (n.184), Opinion of AG Léger, paras.79-80.

the recognition of the existence of liability could not have been common, but might rather have been better recognised as a finding of generality. Comparative analysis of this nature must be undertaken in the context of the relevant area of law, to the extent that the broad teleological objectives might differ, and which suggests that these aims must be attributed divergent degrees of significance. This is another fundamental point at which an approach based on complex comparative analysis comes to the fore, potentially giving rise to, as Semmelmann notes, a clash between area-specific objectives and the broad overarching objective of (predominantly) economic (but also, it is submitted herein, legal, political, social and cultural) integration¹⁵⁶⁴.

i. Reference to the *travaux préparatoires* of EU Legislation and Cross-Referencing Within and Between Union Law

The reference to the *travaux préparatoires* falls broadly within the CJEU's historical interpretative approach; that is to say, it allows for the determination of the intention of the Union legislature to afford a contemporary interpretation of the provision, where its text is unclear or obscure¹⁵⁶⁵. The *travaux préparatoires* cover a broad body of documents, including the Reports of the Commission, of the Council and of the Parliament, and more specifically, White and Green Papers, Communications, Commission Proposals, Explanatory Papers, Parliamentary Resolutions, Parliamentary Debates, and various Declarations and Opinions of the Union institutions.

Often such documents include explicit comparative analyses, either of national norms pertinent to the putative piece of legislation, or existing Union law. This is clear from, amongst others, the Green Paper on the CSD¹⁵⁶⁶. As such, the *travaux préparatoires* allow for indirect, vertical or horizontal comparison, facilitating comparative analysis of national or international norms and cross-referencing of European law; this can be characterised as

¹⁵⁶⁴ C. Semmelmann, 'Legal Principles in EU Law as an Expression of a European Legal Culture Between Unity and Diversity' *MEPLI Working Paper 2012/12*, p.17.

¹⁵⁶⁵ C-292/00 *Davidoff* [2003] ECR I-389, Opinion of AG Jacobs, para.34. Such reference to the *travaux préparatoires* is also provided in VCLT, Art.32; however, it is worth noting that the CJEU rarely applies the VCLT to primary law, and has never applied it to secondary law (there is one General Court – then CFI – case in which the Court held that the rules of interpretation of secondary Union law were almost identical to those of the VCLT: T-45/06 *Reliance Industries* [2008] ECR II-2399, paras.101-012).

¹⁵⁶⁶ Within the initial Green Paper, there is a clear comparative analysis of the divergent approaches to consumer sales and guarantees in the systems of the twelve Member States, in particular to the remedies available, and time limits imposed: Section C.2. 'The Diversity of the Legal Rules' and Annex I, European Commission, 'Green Paper on Guarantees for Consumer Goods and After-Sales' (1993) COM (93) 509.

indirect, to the extent that while reference might not be made to the norms themselves but to the preparatory documents within the Opinion or judgement, the influence of comparative analysis is nevertheless felt. The *travaux préparatoires* also illustrate the way in which the original draft of a proposal for EU legislation has been amended through the legislative process¹⁵⁶⁷, and consequently, provide for reference to the evolution of national and EU norms as well as national and EU policy, the main groups of stakeholders being national and Union representatives. As the legislative process is necessarily one of change and compromise, encompassing a number of amendments, instigated by different participants¹⁵⁶⁸, the benefit of the *travaux préparatoires* is also their downfall; its engagement might give rise to confusion.

Indeed, the Court has held that it will only refer to the *travaux préparatoires* where they might also be found in the promulgated version of the relevant legislation itself¹⁵⁶⁹. The CJEU seems to be aware of the potential difficulties that might arise from an unrestrained approach to the identification of normative sources; thus, on the basis of legitimacy concerns, it will generally refrain from making reference to sources of law not ratified by the Member States¹⁵⁷⁰. As a general rule, the AGs and the Court have not made reference to the *travaux préparatoires* in cases concerning the interpretation of primary Union law¹⁵⁷¹. Notwithstanding, it seems that more recently the AG and Court have adopted an increased willingness to engage a more broad reference to the *travaux préparatoires*. This is clear from a recent case in which, holding an action to be inadmissible on the basis of a narrow interpretation of individual standing per Art.263 TFEU, the Court's interpretation of the notion of "regulatory act" in Art.263(4) TFEU was made with reference to the *travaux préparatoires*, not of the TFEU itself but of the Constitution for Europe, Art.III-365(4) of which comprised a provision identical to that of Art.263(4)¹⁵⁷². The AGs and the Court will

¹⁵⁶⁷ While they might reflect the divergences in legislative drafting, depending on the nature of the legislation and illustrate the manner in which the proposals have developed, they do not explicate the rationale underpinning the final adopted draft.

¹⁵⁶⁸ On this basis, the *travaux préparatoires* should, in any case, only be understood as an aid to interpretation; if they add to confusion or lead to a result that is contrary to the provision's natural understanding, the CJEU will not follow the interpretative guidance.

¹⁵⁶⁹ C-292/89 *Antonissen* [1991] ECR I-745, Judgement, paras.17-18.

¹⁵⁷⁰ As is clear from Joined Cases C-21-24/72 *Int'l Fruit Co. NV v. Productschap voor Groenten en Fruit* [1972] ECR 1219, and the approach adopted with reference to the GATT.

¹⁵⁷¹ L. Senden, *Soft Law in European Community Law* (Hart, Oxford; 2004), pp.374-380.

¹⁵⁷² C-583/11 P *Inuit*, nyr, Judgement, para.59.

engage the *travaux préparatoires* in the interpretation of secondary Union law¹⁵⁷³; this reference reflects not only the significance of cooperation and compromise in Union norm formation and interpretation but also recognition of the breadth of diversity across the Union¹⁵⁷⁴. In particular, reference is made to relevant Green Papers, often as a means of explicating the aims and objectives of the Union legislature, especially where these might converge or diverge with trends in the Member States¹⁵⁷⁵. Furthermore, the AG and Court increasingly make reference to the Explanations of the CFR, as part of the *travaux préparatoires*¹⁵⁷⁶ and to which reference should be made per Art.6(1) TFEU and Art.52(7) CFR. The difficulties of access and verification that might previously have dissuaded the AG or Court from referencing such resources are now less obvious, given that the *travaux préparatoires* are being published more widely, and fundamentally, are available online¹⁵⁷⁷. This might also explain why one can identify references to the *travaux préparatoires* of Union law in national case law, even where no preliminary reference is made (for example, in the English cases on the UCTD, discussed above).

The reference to the *travaux préparatoires* also brings to light the scope for cross-referencing between areas of Union law, which can be deemed to constitute a method of comparison. Cross-references can be identified in the Court or AG's engagement of relevant CJEU jurisprudence or Union legislation, either explicitly or by analogy (it is necessary to consider that reasoning by analogy extends to references beyond those of a comparative nature¹⁵⁷⁸). Reference might be made to "hard" European legislation, to judicially-developed norms, and increasingly, to non-binding, "soft" Union law (including guidelines, declarations and

¹⁵⁷³ Including C-68/94 *Commission v France* [1998] ECR I-1375, Judgement, para.167; *Quelle* (n.241), Judgement, para.33 (with reference to the meaning of "free of charge" in Directive 1999/44/EC) (followed in C-65/09 *Weber/Putz* [1998] ECR I-5257, Judgement, para.46); C-22/11 *Finnair* nyr, Opinion of AG Bot, paras.33 and 55.

¹⁵⁷⁴ F. Jacobs, 'How to Interpret Legislation Which is Equally As Authentic in Twenty Languages', *Seminar on Quality of Legislation*; Brussels, 20.10.2003.

¹⁵⁷⁵ See for example, *Banco Español* (n.1016), Opinion of AG Trstenjak, fn.15.

¹⁵⁷⁶ *Inuit* (n.1572), Opinion of AG Kokott, para.109, where the Explanations are deemed to be "guidance for the interpretation of the Charter and to which the European Union Courts and the courts of the Member States must have due regard"; Judgement, para.97. Consider the lack of clarity as to their significance added in *Åkerberg Fransson* (n.1287), Opinion of AG Cruz Villalon, para.25, who refers to the Explanations, "for all that they are worth"; Judgement, para.20.

¹⁵⁷⁷ <http://ec.europa.eu/prelex>, on which Commission documents can be found; <http://register.consilium.europa.eu>, on which Council documents can be found and <http://www.europarl.europa.eu/plenary/en/home.html> for Parliament documents.

¹⁵⁷⁸ L. Weinrib, *Legal Reason: The Use of Analogy in Legal Argument* (CUP, Cambridge; 2005); see also, the discussion in the categorisations that follow.

opinions)¹⁵⁷⁹ and might involve cross-referencing between regimes at the Union level. Such an approach is clearly identifiable in the state liability case example, in which both the AG and the Court cross-reference between the judicially-developed regimes of Union and state liability. Furthermore, the engagement with this type of comparison might arise in respect of the evaluation of similar concepts existing in different directives. This is identifiable in *Leitner*, for example, in which the AG compared the notions of damage in Directive 85/374 and Directive 90/314¹⁵⁸⁰, and also in respect of the evolution of the national and European concepts of consumer¹⁵⁸¹. The rationales underpinning the determination of the source to which reference is made might diverge; predominantly, the Court and AG seems to engage in this kind of comparative analysis for the purpose of creating greater consistency and thus coherence between different areas of Union law, whether legislatively or judicially developed.

ii. Reference to, and Analysis of National Legal Norms, National Case Law, and Aspects of National Cultures and Traditions

In those cases in which the issue underpinning the reference concerns the interpretation of EU law and its application in the national context, and particularly, the determination of the compatibility of national and EU law, the relevant national norms will normally be set out at the outset of the AG's Opinion and the Court's judgement. Generally, this amounts to the mere "copy and paste" of the pertinent, applicable provisions of national legislation and does not encompass reference to other types of norms. However, there is a relevant comparative dimension: notwithstanding that a similar issue of compatibility might putatively arise in other national jurisdictions, and that the judgement – and particularly, the interpretation of Union law rendered, and potentially any finding of compatibility or incompatibility - will be applicable across the Union and not only in the Member State of the referring court, reference is normally made only to the norms prevailing in the jurisdiction of the referring court. An approach which does more than make mere reference to national rules but which encompasses the identification, examination and evaluation of relevant national norms, is not undertaken in every case; rather, the depth of the analysis seemingly depends on the nature of the dispute

¹⁵⁷⁹ For example, in *Dominguez* (n.1502), Opinion of AG Trstenjak, paras.102-109, with reference to provisions of Union law, of public international law and of Member State law, respectively (including reference to soft law, for example, Community Charter of the Fundamental Social Rights of Workers). Notwithstanding, the CJEU has shown reluctance to base its recognition of a principle of Union law on non-binding soft law (C-101/08 *Audiolux* [2009] ECR I-09823, Judgement, paras.33-34).

¹⁵⁸⁰ *Leitner* (n.728), Opinion of AG Tizzano, paras.34 and 35.

¹⁵⁸¹ Mak, 'Harmonisation through 'Directive-Related' and 'Cross-Directive' Interpretation' (n.313).

arising. A distinction can be drawn between those cases in which reference is made to the norms prevailing in the jurisdiction of the referring court and those in which there is scope for the relevance of norms applicable in other jurisdictions¹⁵⁸².

Moreover, the Treaty structure might explicitly provide for comparative analysis to be adopted by the CJEU. This is the case per Art.340 TFEU in respect of the non-contractual liability of the Union, a foundation that the CJEU has subsequently engaged, transferred and adopted in its development of the liability of the Member States¹⁵⁸³. While AG Tesauro notes that “the substantive preconditions for liability are more or less the same everywhere”¹⁵⁸⁴, the conditions of liability (particularly concerning the availability of compensation, and especially for pure economic loss) and the variables delineating liability, necessarily engage the diversity of national tort rules. Indeed, AG Tesauro compared (although perhaps in a limited fashion, looking only to identify similarities) national rules, for the purposes of “enabling a common definition to be found of the conditions in question”¹⁵⁸⁵. The state liability example reflects one set of cases in which the CJEU found there to exist a general principle of Union law, notwithstanding the identification – on the basis of its comparative analysis of the pertinent national norms – of an absence of commonality between the Member States as to the existence of liability; this was particularly true in respect of the availability of a remedy for compensation. The existence of diversity is therefore recognised but has not undermined the scope for the identification of generality; indeed, as noted above, this finding is perhaps better characterised as one of generality as opposed to commonality. This suggests that the CJEU did not simply engage comparative analysis for the purposes of identifying similarity or repressing difference. However the AG and Court also looked to draw a comparison with other areas of Union law, namely the non-contractual liability of the Union (and further, international law), for the purposes of ensuring the coherence of the broader regime¹⁵⁸⁶; the approach is teleological, looking to the evolution of Union culture

¹⁵⁸² Consider for example, the comparative reference – via legal scholarship and citation of national legislative provisions – in respect of the scope for collective action for unfair terms across the national legal traditions in the Opinion of AG Trstenjak and the lack of any comparative analysis – but rather, mere reference to the the impact on Hungarian national law - in the judgement of the Court in *Invitel*: cf. *Invitel* (n.1016), Opinion of AG Trstenjak, fn.10-11.

¹⁵⁸³ *Brasserie* (n.186), Judgement, para.27.

¹⁵⁸⁴ *Brasserie* (n.186), Opinion of AG Tesauro, para.53.

¹⁵⁸⁵ *Brasserie* (n.186), Opinion of AG Tesauro, para.54.

¹⁵⁸⁶ Essentially AG Tesauro argues “...I consider that there is no reason for applying different criteria – naturally in like situations – depending on whether the infringement of Community law in question is attributable to a State or Community institution”; *Brasserie* (n.186), Opinion of AG Tesauro, para.67.

underpinning legal development¹⁵⁸⁷. Indeed, since *Brasserie*, the conditions on which the obligation to make reparation in respect of state and Union liability is founded, have become almost identical¹⁵⁸⁸, reflecting the consequences of clear processes of cross-referencing between both regimes. The same notion of coherence underpins the understanding that the CJEU's jurisprudence on state liability was "fully transferable" in respect of the development of the liability of the national courts¹⁵⁸⁹.

Returning to the explicit bases of comparison identifiable in the Treaty structure, Art.6(2) TEU provides for explicit reference to "[f]undamental rights...as they result from the constitutional traditions common to the Member States..."; however, this provision does not provide for the content of rights, or how they should be identified or extrapolated. In this area, the CJEU has therefore recognised the inspiration and guidance provided by national law, as well as international law. Indeed, in *Internationale Handelsgesellschaft*, the Court highlighted that the constitutional traditions (as well as international human rights treaties) could function as an "inspiration" to the protection afforded to fundamental rights, albeit, as noted above, in line with the aims and objectives of Union law¹⁵⁹⁰. Thus, one can identify references which include but are not limited to national legal rules but extend, as noted above, to international law, and most significantly, the ECHR; moreover, against this background, there exists broader consideration of the value considerations that permeate fundamental rights protection (and its invocation) at the national and Union levels.

The fundamental rights example further illustrates that the CJEU does not merely engage in comparison for the purposes of identifying similarity or difference or for the purpose of identifying commonality at the expense (i.e. repression) of the divergences existing between legal regimes, whether national, European or international. Yet this has not always been clear. On the one hand, the CJEU has long recognised fundamental rights as principles of Union law, finding their bases in a "philosophical, political and legal substratum" deemed to be "common" and shared between the Member States, from which "an unwritten Community law emerges"¹⁵⁹¹. Moreover AG Roemer when rendering the Opinion in *Stauder*, accepted

¹⁵⁸⁷ *Francovich* (n.219), Judgement, paras.30 and 35, respectively.

¹⁵⁸⁸ Tridimas, 'Liability for Breaches of Community Law' (n.920).

¹⁵⁸⁹ *Köbler* (n.184), Opinion of AG Léger, para.36.

¹⁵⁹⁰ *Internationale Handelsgesellschaft* (n.1256), Judgement, para.4 and Opinion 2/94 (n.1246), para.33, both of which are cited in Chapter 7.

¹⁵⁹¹ *Internationale Handelsgesellschaft* (n.1256), Opinion of AG Dutheillet de Lamothe, paras.1146-1147.

the assertion advanced by “many writers” (of the time) that “general qualitative concepts of national constitutional law...which form an unwritten constituent part of Community law” must be identified by “a comparative valuation of laws”¹⁵⁹², in the course of the identification and recognition of principles of Union law. It is not clear if AG Roemer understood this as a reflection of the need for commonality and unanimity of national norms, as a prerequisite to the recognition of such principles.

It now seems to be clear that commonality is not deemed to be a prerequisite for recognition of a principle of Union law. The AG and Court recognised a principle of human dignity per Art.6(2) TEU, deemed to be shared between the Member States reflecting the notion that “[a]ll in all, human dignity has its roots deep in the origins of a conception of mankind in European culture”¹⁵⁹³. Notwithstanding, no express comparative analysis of national norms and traditions was undertaken; this, it is asserted, would have actually revealed a lack of commonality. Instead, reference was made to a number of – predominantly German - scholars, and “a variety of religious, philosophical and ideological reasoning...”. Having recognised such a broad principle, so conceived as to find some understanding across the Member States, the Court in *Omega* then ultimately rejected a requirement of commonality, both in respect of that which underlies the “system of protection” and the development and application of the proportionality test¹⁵⁹⁴, with regard to which the AG and the Court specifically asserted that there was no need for a common conception underpinning a restriction to freedoms¹⁵⁹⁵. While, on the one hand, *Omega* seems to reflect an approach of the CJEU based on a pluralist, multi-level perspective of fundamental rights protection and the balancing of fundamental freedoms and fundamental rights, in light of the aims and objectives of Union law underpinning the European endeavour, its approach and comparative analysis is inconsistent.

Moreover, the existence of divergences, identified via comparative analysis, is also particularly relevant in respect of the CJEU’s utilisation of the margin of discretion. One can identify the scope for comparison – not in respect of the undertaking of analysis at the level of the CJEU itself but in the recognition that diversities exist between the Member States – not

¹⁵⁹² *Stauder* (n.682), Opinion of AG Roemer, p.428; Judgement, p.422.

¹⁵⁹³ *Omega* (n.1331), Opinion of AG Stix-Hackl, fn.46-48; 51-53, para.78.

¹⁵⁹⁴ *Omega* (n.1331), Judgement, paras.37-38.

¹⁵⁹⁵ *Omega* (n.1331), Opinion of AG Stix-Hackl, para.71.

only with regard to the determination of the “status” of fundamental rights but also with regard to their substantive role, in respect of the “balancing” exercise set out by the CJEU and to be applied by the national courts. These dimensions are necessarily intertwined, yet it is the latter which is predominantly explored in the case example above. While the balancing of fundamental rights and freedoms is undertaken at the national level, the CJEU might provide guidance to the national judge, reflecting the notion of division of labour. Indeed, the CJEU recognises that the Member States may exercise a “margin of discretion” in this task, and particularly in respect of its proportionality dimension, identified in *Schmidberger et al*¹⁵⁹⁶. This is attributed particular relevance in respect of the public policy foundations of the invocation of fundamental rights, and dictates that the national particularities of protection, that is, national values, could be taken into consideration. When it comes to considering the way in which reference to legal sources might shape the CJEU’s comparative analysis, reference must be made to the CJEU’s utilisation of the margin of appreciation or discretion as a mechanism of taking into consideration national specificities via comparative analysis. Initially developed within the ECtHR, it has been introduced in light of the fundamental rights jurisprudence as a possible means of regulating divergences in their across the European space, and comes to the fore particularly in respect of sources of international law. The breadth of the margin of appreciation will depend on the nature of the relevant norm and the extent to which the CJEU identifies the existence of commonality or diversity across the Member States; at a fundamental level, comparison is necessary to identify such characterisations. In this respect, reference is made to more than national – and strictly legal – norms but also to those component parts that constitute national culture and tradition, including the values that contribute to the development of national identities, and furthermore, the evolution of the nation state. Indeed, in *Sayn-Wittgenstein*, the Court referred to Art.4(2) TEU and the need to “respect the national identities of its Member States, which include the status of the State as a Republic”¹⁵⁹⁷; this essentially brings to the fore the notion that the protection of the identities of the Member States should be relevant to the balancing process where fundamental rights give rise to a conflict with economic freedoms.

¹⁵⁹⁶ For a comparison between the margin of discretion of the CJEU and the margin of appreciation of the ECtHR, and the development of a European understanding of deference, see J. Gerards, ‘Pluralism, Deference and the Margin of Appreciation Doctrine’ (2011) 17 *ELJ* 80.

¹⁵⁹⁷ *Sayn-Wittgenstein* (n.1472), Judgement, para.92.

While the ECtHR seems to identify the shifting margin of appreciation depending on the extent of the commonality or divergence across the Convention States¹⁵⁹⁸, as identified by comparative analysis – such that, where the degree of commonality is higher, the margin of appreciation will be narrower; where there is little degree of commonality, the margin of appreciation will be broader - the CJEU rather looks to commonality in determining the margin of discretion, seemingly in light of its need to promote uniformity for the purposes of facilitating the internal market. As such, while Augenstein recognises an attempt on the part of the ECtHR to bring national diversities into Convention law, he considers that the CJEU’s approach is “antagonistic to accommodating national diversity”¹⁵⁹⁹. Where diverse standards of protection are identifiable, the CJEU will not recognise this diversity as part of Union law where, if there is European consensus as to the level of protection to be afforded, it is deemed to undermine the uniform interpretation of fundamental rights across the EU space¹⁶⁰⁰, a result, he considers, of the significance of the internal market in shaping interpretation, and the consequent focus on the need for uniformity for its functioning. Thus, in respect of the recognition of principles of Union law, the CJEU has left little scope for engaging diversities at the Union level, either by refusing to recognise a Union principle, as was the case in *Hoechst*¹⁶⁰¹, or recognising one so broad so that it finds some basis across the Union space, as in *Omega*. As considered above, the CJEU is still bound to respect national diversities per the Treaties and the Charter, and in the absence of commonality, seems to justify exceptions to free movement on the basis of national policy considerations and standards of rights protection, per *Schmidberger*; notwithstanding, as noted in Chapter 7, the focus arguably remains internal market-orientated - as is also clear from *Viking* and *Laval* – as opposed to

¹⁵⁹⁸ Which might, it should be noted, be invoked as a means of delineating progressive policy at the European level. This can be identified most explicitly in the jurisprudence of the ECtHR, in the case of *Schalk and Kopf* (*Schalk and Kopf v. Austria* (2010) ECtHR, 24.06.2010, App.No.30141/04). Art.44 of the Austrian Civil Code defined marriage as between two persons of the opposite sex with reference to Art.9 CFR and Art.12 ECHR, neither of which explicitly refers to the need for “opposite sex”. The ECtHR considered that per Art.12 ECHR and Art.9 CFR, it should no longer be necessary for persons to be of the “opposite sex” to exercise the right to marry (at para.61). However, recognising the divergences existing between the national systems and consequently, the difficulty in identifying a common European approach, the ECtHR deferred to the margin of appreciation and as such, held that the ECHR does not oblige contracting states to legislate for or recognise same-sex marriages.

¹⁵⁹⁹ D. Augenstein, ‘Disagreement – Commonality – Autonomy: Fundamental Rights in the Internal Market’, p.16 (<http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2338630>; Last Accessed: 13.04.2014).

¹⁶⁰⁰ *Melloni* (n.1287).

¹⁶⁰¹ As Augenstein noted (D. Augenstein, ‘Disagreement – Commonality – Autonomy: Fundamental Rights in the Internal Market’, p.19), with regard to the initial refusal to recognise Art.8 ECHR protection in respect of business premises, wherein the Court provided, “because there are not inconsiderable divergences between the legal systems of the Member States in regard to the nature and degree of protection afforded”; *Hoechst* (n.1265), Judgement, para.17. Subsequently, after the ECtHR identified commonality, the CJEU recognised the extension of protection in *C-94/00 Roquettes Frères* [2002] ECR I-9011.

reflecting the recognition of diversity. Weatherill derives the following conclusion: “the more sensitive and the more remote from commercial considerations the matters advanced in the context of justification of trade barriers are, the more generous the Court is to the available scope for justification and also to the breadth of the margin of appreciation enjoyed by the regulator”¹⁶⁰².

Thus, it is clear that the CJEU’s use of the margin of discretion differs from that of the ECtHR. On the one hand, the margin of discretion could provide scope for the CJEU’s recognition of the plurality, multi-level nature of fundamental rights protection¹⁶⁰³; furthermore, using comparative analysis for the purpose of identifying the particularities of a certain national system and employing the margin of discretion as a mechanism for recognising diversity at the Union level, would allow the CJEU to attribute force to its judgement by convincing national courts of the acceptability of its interpretation¹⁶⁰⁴. It is clear that the protection of fundamental rights cannot be guaranteed only within the national systems but “must be ensured within the framework of the structure and objectives of the Community”¹⁶⁰⁵. Following *Omega*, and the subsequent line of cases arising, the CJEU illustrates that it will aim to respect national identity in the protection of fundamental rights – essentially, evidenced in the application of national rights protection by the domestic courts – “provided that the level of protection provided for by the Charter, as interpreted by the [CJEU], and the primacy, unity and effectiveness of EU law are not thereby compromised”¹⁶⁰⁶. As noted, a distinction can seemingly be identified in respect of the approaches to balancing, between a social-protection orientated approach and a “liberal” market-orientated approach¹⁶⁰⁷; from these lines of reasoning, it is further evident that the economic dimension dominates the CJEU’s decision making, despite its apparent openness to and acceptance of a plurality of values permeating the national and Union levels. Against this

¹⁶⁰² S. Weatherill, ‘From Economic Rights to Fundamental Rights’ in S. de Vries, U. Bernitz and S. Weatherill (eds.), *The Protection of Fundamental Rights in the EU After Lisbon* (Hart, Oxford; 2013), pp.11-36, p.24.

¹⁶⁰³ M. Delmas-Marty, ‘Ordering Pluralism’ *EUI MWP WP 2009/06*, p.7.

¹⁶⁰⁴ As considered above, in relation to the discussion of the “empowerment” thesis, it should be noted that the significance to be attached to such force has been challenged by Alter, who questions whether it can really be understood as the reason why national courts accept the decisions of the CJEU; see Alter, ‘Explaining National Court Acceptance of European Court Jurisprudence’ in Slaughter *et al*, *The European Court and National Courts* (n.805), pp.227-252.

¹⁶⁰⁵ *Internationale Handelsgesellschaft* (n.1256), Judgement, para.4.

¹⁶⁰⁶ *Melloni* (n.1287), Judgement, paras.60-61.

¹⁶⁰⁷ Compare Bakardjieva-Engelbrekt, ‘Institutional Theories, EU Law and the Role of Courts for Developing a European Social Model’ in Neergaard *et al*, *The Role of Courts in Developing a European Social Model* (n.61), p.336, who discusses considers the scope for the CJEU to deny fundamental rights, and promote freedoms at all costs above social policy considerations.

background, it is clear that the margin of discretion is to be employed by the CJEU to promote the maintenance of divergences only where these divergences do not undermine the effectiveness of Union law¹⁶⁰⁸.

For the purposes of comprehensiveness, it is worth noting that there is less evidence of the engagement of a comprehensive comparative analysis of national norms or traditions in the Opinions of the AGs or the judgement of the Courts in the UCTD case examples. Rather, these case examples illustrate the scope for comparison, which, it seems, has not been engaged in each case heard before the CJEU. The significance of the multi-level nature of consumer protection is reflected in the "division of labour" between the national courts and the CJEU, and the scope for comparative analysis arises in respect of the following dimensions permeating the jurisprudence: the rationales underpinning the *ex officio* regulation, and its evolution from a power to an obligation on the part of the national court; the consequent shift in the understanding of the role of the national judge (and the character of this role, in respect of the notion of judicial passivity *versus* judicial activity); the reflection of the constitutionalisation of private law and particularly, the significance of the national and European public policy dimensions arising¹⁶⁰⁹; and the resistance to the Europeanisation of procedure, conceived as a putative intrusion into national procedural autonomy. In light of the number of cases referred from the courts in recent years, the UCTD jurisprudence gives rise to the scope for comparative analysis to be relevant not only for the purposes of identifying commonality or diversity but also to determine whether its existence and breadth might be relevant for the courts of other Member States. It does not seem as if the CJEU has consistently given explicit consideration to such spillover effects; this will be discussed in more detail in relation to the scope for dialogue.

From the case examples, it seems that one might uncover a distinction which indicates the existence of comparative analysis, even if it cannot be explicitly identified in the text of the case itself. This distinction might be identified, on the one hand, between those cases

¹⁶⁰⁸ *Melloni* (n.1287), Judgement, paras.60-61.

¹⁶⁰⁹ The way in which public policy is engaged in different areas of law and in different national systems might diverge; for example, it plays a particularly significant role in private international law and the determination and application of applicable law: Public policy has been described in the sense that "the courts do not close their doors, unless help would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal" (*Loucks v. Standard Oil Co. of New York* 224 N.Y. 99, at 111, 120 N.E. 198 at 202 (1918)). In the context of, in particular, the fundamental rights cases above, the notion of public policy is employed at the national level as a basis for the limitation of fundamental rights, understood as fundamental values (which is a concept within which fundamental rights might also fall).

involving a substantive analysis of national norms and on the other, those in which there is no explicit reference to the rules of the specific Member States but rather to the way in which the AG or Court considers legal traditions or legal culture in “classifying” (very broadly understood) legal systems. For example, in *Leitner* AG Tizzano referenced those systems that had extended the scope for compensation to include non-material damage and “the other groups of the Member States”¹⁶¹⁰; among the former are included the legal systems of Germany (as referred to by the Austrian *Landesgericht* in its preliminary reference)¹⁶¹¹, Belgium, Spain and the Netherlands¹⁶¹², and among the latter, the English, French and Italian systems. Furthermore, AG Tizzano also made reference to the “open” approach followed in some of the US jurisdictions¹⁶¹³. Another example of such categorisation arises in the UCTD jurisprudence, where implicit reference is made to the notion of a substance or procedure-based culture or tradition in light of the CJEU’s forging of a pathway into national procedural autonomy, the close link between national procedural autonomy and legal tradition¹⁶¹⁴ enduring in the absence of the Europeanisation of the former.

The above analysis aims to illustrate that the reference to national norms gives rise to a vertical, direct or indirect comparative analysis, engaging national legal norms, and in some cases, the component parts of national legal culture and tradition, for the purposes of identifying commonality and diversity across the European space. However, the analysis similarly confirms the absence of a methodological framework of comparison and the lack of theoretical rigour in the CJEU’s approach; for example, there is less evidence of comparative analysis in the UCTD case law, notwithstanding the line of cases arising from particular courts, and the consequent scope for analysis of (at least) those traditions, while the fundamental rights jurisprudence illustrates that the dominance of the internal market focus

¹⁶¹⁰ *Leitner* (n.728), Opinion of AG Tizzano, paras.40-42.

¹⁶¹¹ Para.651(f), BGB, developed subsequently by case law, as noted above.

¹⁶¹² Art.19(4) and (5), *Loi de 16.02.1994*; Art.11(2), *Ley 21/96*, 06.07.1995; Art.7:510, *Burgerlijk Wetboek*, respectively (cited at fn.20-22).

¹⁶¹³ With reference, respectively, in fn.23-25 to *Jarvis v Swan Tours* [1973] QB 233; *Jackson v Horizon Holidays* [1975] 1 WLR 1468 (it is worth noting that while there has been evolution from the understanding that no recover can be made under contract in respect of mental distress – see *Addis v Gramophone Co Ltd* [1909] AC 488 - non-material loss does not provide an actionable claim in itself; it is a consideration in the determination of damages broadly (*Ichard v Frangoulis* [1997] 1 WLR 556) – yet the issue has not come before a court higher than the Court of Appeal for a number of years); to various French jurisprudence and a number of Italian cases.

¹⁶¹⁴ Adinolfi, ‘The “Procedural Autonomy” of Member States and the Constraints Stemming from the ECJ’s Case Law’ in de Witte and Micklitz, *The European Court of Justice and the Autonomy of the Member States* (n.1166), p.286.

shapes the CJEU's use of comparative analysis for the purposes of recognising and acknowledging diversity across the Union space.

iii. Reference to, and Analysis of International Norms and the Decisions of Courts and Tribunals Other than Those of the Member States¹⁶¹⁵

In respect of the CJEU's engagement with national and international law norms, a parallel might be drawn in respect of, on the one hand, the CJEU's declaration of the autonomy of the Union order¹⁶¹⁶, and on the other, its unwillingness to sever the connection to its twin origins of national and international law. As de Witte has noted, the understanding of the EU as an autonomous, self-referential and closed system¹⁶¹⁷ depends broadly on the acceptance of such an understanding by the national courts¹⁶¹⁸; this engages the relevance of comparison, for the purposes of identifying the reactions in the national orders, and beyond.

On the one hand, the CJEU and other Union institutions are bound by international agreements into which the Union has entered¹⁶¹⁹, necessitating their engagement with international law. The VCLT – especially Arts.31 and 33 – is relevant to the interpretation of the Union's international agreements; these rules facilitate a contextual and purpose-orientated interpretation, beyond the textual construction of the provision. The influence of international agreements should not be considered on their own as they will also affect the CJEU's interpretation of primary or secondary Union law by virtue of which obligations deriving from international law are incorporated into the Union, and consequently, the national legal orders. The manifestations of this effect might encompass reference to customary international law, by which the powers exercised by the Union are deemed to be limited, or principles of customary international law enshrined in international treaties to which the Union is not a party¹⁶²⁰. Notwithstanding, while the primacy principle dictates that

¹⁶¹⁵ Certainly it should be noted that the references made herein do not reflect all of the references made to, for example, fundamental rights courts and tribunals, and international tribunals, in respect of, for example, issues of international trade law, international environmental law, international investment law, and so on.

¹⁶¹⁶ *Van Gend en Loos* (n.219), Judgement, para.3.

¹⁶¹⁷ As in R. Barents, *The Autonomy of Community Law* (Kluwer, The Hague; 2004), p.259.

¹⁶¹⁸ B. de Witte, 'Direct Effect, Primacy and the Nature of the Legal Order' in P.P. Craig and G. de Búrca (eds.), *The Evolution of EU Law* (OUP, Oxford; 2nd edn., 2011), pp.323-362, pp.361-362.

¹⁶¹⁹ Per Art.216 TFEU, in respect of which, these agreements are binding; confirmed, *inter alia*, in C-61/94 *Commission v Germany* [1996] ECR I-3989, Judgement, para.52.

¹⁶²⁰ C-162/96 *Racke* [1998] ECR I-3655, Judgement, para.45, and with respect to the VCLT, at paras.45-46. See also, *Leitner* (n.728), Opinion of AG Tizzano, para.39, with reference to the scope (and limits) of compensation

international agreements prevail over Union law, they will not undermine the Union's constitutional foundations¹⁶²¹. Thus, these references, reflecting the influence of international law are not automatic but rather engage a process of analysis and reflection on the part of the CJEU in respect of the putative interaction between the international, Union and national legal orders¹⁶²². On the other hand, the AG and/or Court might engage with the existence or substantive meaning of a particular concept of international law. This might be done for the purposes of promoting the consistency and coherence of the international and Union regimes¹⁶²³; this is clear with reference, for example, to the CISG in cases involving sales within the European context¹⁶²⁴. The rationale underpinning such an interpretative approach falls within broader Union concerns – and can be identified in all of the case examples above – reflecting fundamental principles of the Union order, including, for example, the need to ensure effective judicial protection (per Art.19 TFEU and Art.47 CFR, and Arts.6 and 13 ECHR).

Moreover, reference to international norms might provide a basis upon which the CJEU can facilitate the transfer of a concept from the international to the Union regime. This is identifiable particularly with regard to the understanding of the state, wherein both AGs in *Brasserie* and *Köbler* engaged in the systematic interpretation of the concept in international law, creating – in the absence of a Union understanding – a connection between the two regimes to the extent that liability could be understood as inherent in the Treaties¹⁶²⁵; express reference has been made to international law, legal scholarship¹⁶²⁶, legal doctrine¹⁶²⁷ and case law¹⁶²⁸, including that of the ECtHR, in respect of the development of the liability of national courts¹⁶²⁹. Another example concerns the evolution of the concept of human dignity as it arose in the *Omega* case. The Court, following the AG, recognised that respect for human

in various international conventions (to which the Member States can make reference in limiting compensation, per Art.5(2), Directive 90/314) and to which reference is made in recital 18, Directive 90/314.

¹⁶²¹ *Kadi* (n.147), Judgement, para.285: “the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles”.

¹⁶²² Opinion 1/09 on Art.218(11) TFEU [2011] ECR I-1137, para.84.

¹⁶²³ *Commission v Germany* (n.1619), Judgement, para.5.

¹⁶²⁴ *Quelle* (n.241), Opinion of AG Trstenjak, fn.28, in respect of the interpretation of Art.3(2) Directive 1999/44 and Art.46(2) CISG, in the need for the consumer to choose – between repair and replacement – the remedy which is possible and proportionate; C-65/09 *Weber/Putz* [2011] ECR I-5257, Opinion of AG Mazak, para.57, in respect of the differing conditions shaping the seller's liability for more indirect consequences of his non or defective performance (in national law and the CISG).

¹⁶²⁵ *Brasserie* (n.186), Opinion of AG Tesouro, paras.38 *et seq*; *Köbler* (n.184), Judgement, para.32.

¹⁶²⁶ *Köbler* (n.184), Opinion of AG Léger, para.45.

Köbler (n.184), Opinion of AG Léger, paras.42-44.

¹⁶²⁸ *Köbler* (n.184), Opinion of AG Léger, fns.46-47.

¹⁶²⁹ *Köbler* (n.184), Judgement, para.49, citing ECHR, *Dulaurans v. France* of 21.03.2000, (2001) 33 EHRR 45.

dignity could constitute a principle of Union law deriving from the understanding of the concept in the national legal cultures and traditions (and the protection afforded therein). Notwithstanding, neither the AG nor the Court engaged in a comprehensive comparative evaluation of the national norms and as such, comparative analysis could not have been used to identify commonality between the national systems; thus, on the one hand, while the CJEU did not appear to consider commonality between the national orders as a prerequisite for its engagement at the Union level, it nevertheless seemed that the principle recognised was so broad as to find some common or shared basis across the Union. Furthermore, the CJEU had identified another source of commonality, recognising that provisions of international treaties could be understood as “common” to the national cultures and traditions as a result of the Member States’ collaboration in their drafting and development, and their role as signatories, that is, having given their consent thereto¹⁶³⁰. Thus, in *Omega* the comparative analysis was rather engaged in respect of the understanding of human dignity in the relevant international treaties, including the 1948 Declaration of Human Rights, the UN Covenants on Civil and Political Rights, and Economic, Social and Cultural Rights, and the case law of the ECtHR (in respect of which human dignity is recognised to exist as “the very essence of the Convention”) for the purposes of the recognition of the concept at the Union level¹⁶³¹. This can be explained in two ways. Comparative analysis that engages international law as a source of comparison allows for norms to be identified as enshrined in international law, for example, in treaties or conventions. On the one hand, a formalist approach would dictate that it is the enshrinement of norms therein which provides that they might be engaged at the Union level, for example, in the CJEU’s recognition of principles, whether deemed to be common or general. Comparative analysis also allows for the identification of norms in the national regimes, which reflects the engagement and consent of the Member States. On the other hand, a voluntarist approach would dictate that it is this consent to the norm that dictates it can be engaged at the Union level. This derives not from the fact that it is enshrined in the treaty or convention as such, but because it is identifiable by the judge in domestic law, its existence therein reflecting the “consent” of the state¹⁶³².

In the cases outlined above, a vertical comparative analysis can be identified: in the absence of commonality between the Member States (either identified by virtue of a comprehensive

¹⁶³⁰ *Ordre des barreaux francophones et germanophones* (n.1346), Judgement, para.29.

¹⁶³¹ *Omega* (n.1331), Opinion of AG Stix-Hackl, para.82 *et seq*, citing *Pretty v UK* (2002) 35 EHRR 1.

¹⁶³² J. Ellis, ‘General Principles and Comparative Law’ (2011) 22 *EJIL* 949, pp.953-954.

comparative evaluation of national norms, or in its absence, as in *Oceano*), the CJEU then looks to the international level; what is identified there is deemed to be shared by the Member States, and is subsequently considered to be transferrable to the Union level. In this case, the comparative analysis can be understood to be vertical but of an indirect nature; that is to say, it is of international law, the norms of which constitute a proxy and allow for indirect reference to national law. However, the nature of the comparative analysis is important. It must be thorough and rigorous, in order to avoid the relevant norm being identified as a fiction (indeed, thorough comparative analysis itself can alert us to the fiction); furthermore, this gives rise to problematics of cherry-picking, whereby the existence of a norm in one or more orders is taken for granted across the Union space, ultimately calling into question the legitimacy of the interpretation rendered by the CJEU.

Moreover, the CJEU has long highlighted the significance of the jurisprudence of the ECtHR¹⁶³³ in its judgements, even prior to the EU having acceded to the Convention system, attributing “special significance” to the ECHR¹⁶³⁴ as “inspiration”, providing “guidelines” engendered by international law¹⁶³⁵. Prior to the EU's accession to the ECHR, the ECtHR had no jurisdiction in respect of the assessment of the compatibility of Union acts with the Convention; this jurisdiction fell solely to the CJEU. It should be noted that the CJEU's decision might largely follow the substance of the decisions of the ECtHR, notwithstanding that it might not explicitly engage its jurisprudence¹⁶³⁶. There nevertheless exists scope for conflicting judgements, to the extent that the Strasbourg Court exercises jurisdiction over the States (also when acting as Member States) in respect of the compliance with the ECHR¹⁶³⁷. There are key examples of the scope for possible conflicts: *Bosphorus* is of course, one¹⁶³⁸; *Kadi*¹⁶³⁹ is also of prime relevance. Many relevant cases have concerned Art.6 ECHR and the scope for a fair trial in proceedings arising before the national courts and referred to the CJEU. It seems that the relationship to which the scope for conflict gives rise between the ECtHR and CJEU results in one of a kind of dialogue, with each citing the jurisprudence of the other court and precluding the potential for a real clash between the

¹⁶³³ C-540/03 *Parliament v Council (Family Reunification)* [2006] ECR I-5769, Judgement, paras.54-56.

¹⁶³⁴ *Omega* (n.1331), Judgement, para.34.

¹⁶³⁵ *Schmidberger* (n.1265), Judgement, para.71 and the cases cited therein.

¹⁶³⁶ C-283/11 *Sky Österreich* nyr.

¹⁶³⁷ See S. Douglas-Scott, 'A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights Acquis' (2006) 43 *CMLR* 629.

¹⁶³⁸ *Bosphorus v Ireland* (2005) ECtHR, 30.06.2005, App.No.45036/98; See also, *Matthews v. United Kingdom* (1999) ECtHR, 18.02.1999, App.No.24833/94.

¹⁶³⁹ *Kadi* (n.147).

regimes¹⁶⁴⁰. In the case of *Vermeulen*, heard before the ECtHR, it was argued that the role of the *procureur du Roi*, the lack of opportunity to reply to his statements, and the role of the advocate general in national (Belgian) proceedings, infringed Art.6(1) ECHR and the right to adversarial proceedings. The ECtHR upheld this argument, finding a violation of Art.6(1)¹⁶⁴¹. Subsequently, an attempt was made before the CJEU – in the case of *Emesa Sugar* - to draw an analogy with *Vermeulen*, in respect of the lack of opportunity to reply to the AG before the CJEU. The CJEU rejected the argument that the lack of opportunity to reply violated Art.6(1), on the basis of the "organic and functional" relationship existing between the two judicial institutions, namely the AG and the Court¹⁶⁴². The issue again came before the Strasbourg Court, at which instance it rejected the argument - citing CJEU case law - that the lack of opportunity for a applicant to review the submissions of the *Commissaire du Gouvernement* before their submission violated Art.6(1); the ECtHR found that there existed other satisfactory measures to ensure the protection of the right¹⁶⁴³. The continuing interaction between the two regimes and the dialogue that both seem to attempt to foster, can be further identified in a more recent case¹⁶⁴⁴, in which the ECtHR, having taken consideration of the proceedings as a whole, held that the refusal of the Belgian *Cour de Cassation* and the *Conseil d'État* to refer questions to the CJEU, did not amount to a violation of Art.6(1) ECHR. This dialogue results from a cross-citation of jurisprudence and cross-referencing of reasoning and findings.

The CJEU has similarly made reference to the CFR and did so, even before it became binding in the Union regime¹⁶⁴⁵; the CFR must now be understood as primary law, per Art.6(1) TEU. It is a matter for consideration whether the drafting of a “Bill of Rights”, that is, the essential codification of fundamental rights in the CFR, will affect the methodology, and thus the scope for comparison, adopted by the CJEU when rendering a judgement on a case involving the rights found in the CFR. Essentially the question arises as to whether the CJEU will continue to refer to and interpret CFR rights and principles with reference to sources of the national traditions, the ECHR and other relevant international norms, or instead if rights and principles

¹⁶⁴⁰ Reference might also be made to COE, ‘Factsheet on Case-Law Concerning the EU, August 2013’ (<http://www.echr.coe.int/Documents/FS_European_Union_ENG.pdf>; Last Accessed: 29.09.2013).

¹⁶⁴¹ *Vermeulen v. Belgium* (1996) ECtHR, 20.02.1996, App.No.19075/91.

¹⁶⁴² C-17/98 *Emesa Sugar v. Aruba* [2000] ECR I-665, Order, para.16.

¹⁶⁴³ *Kess v France* (2001) ECtHR, 07.06.2001, App.No.39594/98.

¹⁶⁴⁴ *Ullens de Schooten and Rezabek v. Belgium* (2011) ECtHR, 20.11.2011, App.Nos.3989/07-38353/07.

¹⁶⁴⁵ C-540/03 *Parliament v Council (Family Reunification)* [2006] ECR I-5769, Judgement, para.38.

will be understood only in respect of their primary law status attributed via the CFR¹⁶⁴⁶. This question relates to the nature and status of the fundamental right, and whether a distinction might be drawn between those identified from the national constitutional traditions and those of the CFR; this then brings to light whether such a status might affect the nature of comparison. In a recent case, the referring German court asked if "fundamental rights which continue to apply as general principles of Union law under Article 6(3) EU stand autonomously and independently alongside the new fundamental rights" of the CFR, per Art.6(1) CFR; the Court did not render an answer as no connection could be drawn per Art.51 CFR¹⁶⁴⁷.

In respect of the nature of comparison, one might assume that a comparative analysis of the laws and traditions of the Member States, and of international law, becomes superfluous for the purposes of the identification and recognition of fundamental rights as general or common principles of Union law. This assertion seems to find support in an argument made by Rosas, writing extra-judicially, who suggests that reference to the CFR - in the context of a discussion of fundamental rights at the national level - removes the need for reference to be made to national laws, or national constitutional traditions¹⁶⁴⁸. On the other hand, Lenaerts, also writing extra-judicially, has considered that as the scope of the CFR goes beyond, for example, Union principles as currently recognised, it might facilitate their future identification¹⁶⁴⁹. As discussed above, there is a lack of clarity in respect of the nature of the relationship between fundamental rights recognised as principles by the CJEU, and those found in the CFR, which should be clarified by the CJEU.

Yet recalling the framework of interaction between the CJEU, the CFR, the ECtHR and the Convention outlined in Chapter 7, the CFR itself provides for continued reference to national legal norms, cultures and traditions (a provision inserted as part of a broader effort to achieve political compromise in the drafting and negotiation process) per Art.52 CFR. The scope for the interaction of the various regimes of fundamental rights protection therefore continues, beyond the focus on the national systems, extending to the ECtHR, and to other regional and

¹⁶⁴⁶ Editorial, 'The Scope of Application of General Principles of Union Law: An Ever Expanding Union?' (2010) 47 *CMLR* 1589, p.1595.

¹⁶⁴⁷ C-40/11 *Iida*, nyr.

¹⁶⁴⁸ A. Rosas, 'When is the EU Charter of Fundamental Rights Applicable at the National Level?' (2012) 19 *Jurisprudence* 1269, p.1272.

¹⁶⁴⁹ K. Lenaerts, 'Exploring the Limits of the EU Charter of Fundamental Rights' (2012) 8 *ECLR* 375, pp.385-386.

supranational (human rights) bodies and organisations (including those of the UN). This is particularly relevant where matters arise in respect of which there exists putative scope for a conflict based on legal norms, and/or values. The ECHR and the ESC also provide for reference to national and Union law, which might be particularly relevant in respect of those rights which are potentially politically, socially and culturally controversial. This includes, for example, Art.12 ECHR on the right to marry and Art.22 ESC on the right to take part in the “determination and improvement of the working conditions and working environment”; reference is made to the exercise and protection of such rights "in accordance with national legislation and practice". It is not clear what approach would be adopted by the CJEU if it were required to interpret one of these potentially controversial provisions, particularly where there exists little consensus, both as to national or European norms and in respect of national or European policy, where there has been no clarification, either by the Union legislature or by the ECtHR. Both provisions rather seem to provide for the engagement of an approach based on "comparative evaluation", even though it is in these types of cases that reference to national law and policy, or that beyond the state, might be of significant relevance.

The multi-level character of fundamental rights protection - of national constitutional laws, Union law, the ECHR¹⁶⁵⁰ and international law – has been set out in Chapter 7. The Court in *Melloni*, dealing with the interaction of national and Union standards of fundamental rights protection in relation to criminal justice, has confirmed this characterisation and provided that “it is true that Article 53 of the Charter confirms that, where an EU legal act calls for national implementing measures, national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not thereby compromised”¹⁶⁵¹. However, the CJEU rejected the notion that Art.53 necessarily gives the Member State the option to go beyond what is provided for in EU law, to the extent that, where the Union legislature has harmonised exhaustively the relevant applicable norms, such an interpretation would undermine the effectiveness of Union law and go against the principle of its primacy¹⁶⁵². The CJEU thus provides that the Member States

¹⁶⁵⁰ Consider *Rottman* (n.1319), Judgement, para.55 which recognises a double layer of scrutiny of proportionality assessment.

¹⁶⁵¹ *Melloni* (n.1287), Judgement, para.60.

¹⁶⁵² See the decision of the Spanish to amend its own national provision – in respect of the protection afforded by the Spanish Constitution, the right to a fair trial, per Art.24(2) thereof, on which Mr Melloni attempted to rely - to fall into line with EU law, in STC 26/2014.

can only transcend the regulatory standard established at the Union level where the relevant norms have not been so harmonised. This would allow the legislature or the court within the Member State to choose itself the means of fundamental rights protection (where there exists a choice) in line with its own national constitutional tradition, and might further facilitate the respect of national identities per Art.4(2) TEU¹⁶⁵³. Art.53 therefore potentially reinforces the notion of a multi-level system of fundamental rights protection; it is likely to give rise to future issues of contention. While certain national courts – for example, the *Tribunal Constitucional de España* - has endorsed this formulation¹⁶⁵⁴, it has similarly been recognised that it is complex, and gives rise to concerns relating to the clarity of the law (and particularly the threat to the uniformity of EU law) and the scope for justice to be done. The problem of complexity is recognised as a real one: "it can become a daunting task for a national administrator or judge to assess which margin, if any, a norm of Union law may leave for applying rights other than those of the Charter, and then to identify the various applicable fundamental rights and their meaning pursuant to the case law of the Strasbourg, Luxembourg and the national constitutional court"¹⁶⁵⁵. The difficulty with this multi-level formation of rights protection arises in respect of the feasibility of the co-existence, cooperation and coordination between the different regimes; while it is submitted that comparative analysis could facilitate these interactions, by virtue of the identification of commonalities and diversities, as noted above, the approach of the CJEU remains inconsistent, as its identification of the margin of discretion focuses on the need for commonality and thus, uniformity to the exclusion of diversity, in light of the facilitation of the internal market.

The complex comparison advanced herein would allow for the identification of the relevant sources of comparison – of a national, European and international nature – and facilitate the scope for the management of diversities and commonalities, particularly where these might shift, in light of a determination of the dynamic aims and objectives of Union law. This analysis highlights two dimensions of the engagement with comparison. It further illustrates and solidifies the need for a reflection on the relevant conceptualisation of comparison. The reference to international legal sources and case law allows for vertical and horizontal, direct and indirect comparison, and the identification of commonality and diversity, notwithstanding

¹⁶⁵³ L. Besselink, 'National and Constitutional Identity Before and After Lisbon' (2010) 6 *Utrecht Law Review* 36, p.42.

¹⁶⁵⁴ *Tribunal Supremo, Auto de* 13.12.2004 (DTC 1/204).

¹⁶⁵⁵ C. Ladenburger, 'EU Institution Report on the Scope of the Protection of Fundamental Rights Post-Lisbon', FIDE 2012, p.25; (<http://www.fide2012.eu/index.php?doc_id=88>; Last Accessed: 29.09.2013).

that the reference to the latter is less explicit, given the predominant focus on the facilitation of the internal market. On the other hand - particularly with regard to fundamental rights but similarly in respect of the other case examples – there is evidence of the notion that the multi-level character of a regime of regulation gives rise to complexity which must be dealt with via coordination and cooperation, and which can be facilitated by the dialogue to which the comparative methodology potentially gives rise. This is further explored in Chapter 9.

iv. Reference to “Non-State” Norms and Academic Writing

The CJEU often makes reference to “non-state” norms and academic writing, understood as a broad spectrum including but not limited to – the following are of particular relevance to the Europeanisation of private law – the PECL and the DCFR; as noted above, reference might be made to bodies of norms, which are not of binding force at the relevant time of their engagement in the reasoning of the AG or the Court (including, prior to the Lisbon Treaty, the ECHR and CFR, discussed above).

The Common Frame of Reference, from which the DCFR derives, can be taken as an example¹⁶⁵⁶ of the CJEU’s engagement with academically-developed norms. It has been characterised in legal scholarship as a “source of inspiration”¹⁶⁵⁷ and as a potential source of law¹⁶⁵⁸, an understanding advanced by the AGs (but less significantly, by the Court). These bodies of norms have been constructed on the basis of (predominantly positivist) comparative scholarship, funded by the Commission (the DCFR formed part of the broader CFR of the Commission). To recall, the DCFR derives from the analysis of principles, rules and concepts common to the Member States, in the exploration of which the drafters identified the common norm, or, in the absence of commonality¹⁶⁵⁹, their “best solution”. The engagement can therefore be understood to reflect an indirect comparison on the part of the AG and the Court. This reference to academic writing and scholarship might reveal the “inspiration” underlying the Opinion or Judgement rendered. That is to say, it might be the case that there is a

¹⁶⁵⁶ From which the DCFR derived, not to be confused with the Charter of Fundamental Rights.

¹⁶⁵⁷ Hesselink, ‘A Toolbox for European Judges’ (n.707), p.11, making reference in support of such a proposition to Basedow, ‘The Court of Justice and Private Law’ (n.808), and against, to H-W. Micklitz, ‘Failure of Ideological Perceptions – Thoughts on Two Grand Projects: The European Constitution and the European Civil Code’ *EUI WP 2010/04*, p.20.

¹⁶⁵⁸ *Hamilton* (n.552), Opinion of AG Maduro, para.24; C-489/07 *Pia Messner* [2009] ECR I-07315, Opinion of AG Trstenjak, para.94.

¹⁶⁵⁹ It is not suggested that the identification of the “best solution” necessarily constitutes an alternative; this is not clear.

predominance of a certain type of scholarship, of scholarship from a particular jurisdiction, of a particular language or with a particular political “tilt”. Again, it is in the AG’s Opinion as opposed to the Court’s judgement that reference to substantive legal scholarship can be identified. For example, in the UCTD case law, AG Trstenjak engages German, French and Spanish scholarship on the legal theory underpinning the evolution of freedom of contract; with regard to the justification underpinning interference with such autonomy, the literature cited by the AG is predominantly German¹⁶⁶⁰. Notwithstanding the absence of a comprehensive comparative analysis (the undertaking of which would not have allowed for the identification of a unanimous finding between the Member States, Union law, international law and private regulation on the matter), the AG engages particular legal scholarship, supporting the reference to previous CJEU jurisprudence for the purposes of highlighting the status of freedom of contract as a “unanimous” principle of Union law¹⁶⁶¹.

It has long been recognised that private parties play a significant role, and often have a considerable interest, in legal (as well as political, social and policy-orientated development) European integration. Private regulatory regimes, of different constitutions and structures, and with differing aims, have often contributed to integration, either consciously or incidentally; often this resonates from the harmonisation of norms (which similarly, may or may not explicitly have the purpose of facilitating integration)¹⁶⁶². As the interests of these private parties and private regimes interest might conflict with the objectives of the Union, the CJEU has long assessed the compatibility of the norms of private regulatory regimes with Union law, particularly with reference to their validity in terms of competition¹⁶⁶³, free movement and fundamental rights¹⁶⁶⁴. However, the CJEU rarely seems to engage such norms in a comparative analysis; one example can be identified in respect of the protection of lawyers’ secrecy and the exception to the obligation to report¹⁶⁶⁵, with reference to

¹⁶⁶⁰ *Caja de Ahorros* (n.268), Opinion of AG Trstenjak, fn.9 and 12.

¹⁶⁶¹ Namely, C-499/04 *Werhof* [2006] ECR I-2397, Judgement, para.23.

¹⁶⁶² F. Cafaggi and A. Janczuk, ‘Private Regulation and Legal Integration: The European Example’ (2010) 12 *Business and Politics*, Art.6, pp.19 *et seq.*

¹⁶⁶³ C-309/99 *Wouters* [2002] ECR I-1577, Judgement, paras.73 *et seq.*

¹⁶⁶⁴ Mattli and Slaughter, ‘Revisiting the European Court of Justice’ (n.90). See *Walrave* (n.1226), holding that private organisations and regimes, and not only public regimes are bound by the prohibition on discrimination, and *Bosman* (n.1227), in which the prohibition of discrimination, similarly on nationality grounds (restrictions in participation in competition based on nationality), was similarly deemed to apply to private (sporting) organisations.

¹⁶⁶⁵ *Ordre des barreaux francophones et germanophones* (n.1346), Opinion of AG Maduro, paras.37-38.

“professional secrecy” as identifiable both in national norms and the Code of Conduct for European Lawyers adopted by the CCBE¹⁶⁶⁶.

The CJEU’s engagement with non-state norms and academic writing provides scope for vertical comparison, predominantly of an indirect nature, and horizontal comparison. The analysis underpinning this categorisation illustrates that the instances of comparison might be more clearly identifiable in the Opinions of the AG than in the judgements of the Court¹⁶⁶⁷; as above, this observation does not engage a determination as to the normative trend, that is, whether the AGs might be more willing than the Court to adopt approaches transcending orthodox (comparative) reasoning but might rather be explained in the context of the procedure internal to the CJEU. The AG issues a single, individual Opinion, in the preparation of which he must act with “complete impartiality and independence”¹⁶⁶⁸; notwithstanding this duty, his Opinion might potentially constitute a reflection of personal opinion. Consequently, the AG’s “complete impartiality and independence” might be limited by the absence of other participants in the drafting of the Opinion¹⁶⁶⁹; this means that the AG has greater scope to shape his methodology and reasoning processes in light of his individual legal background, which would include the assumptions and prejudices deriving from his or her education, training and work in a particular legal culture or tradition¹⁶⁷⁰.

In contrast, the collegial nature of the Court’s procedure dictates that while the *juge rapporteur* prepares and disseminates the *rapport préalable* to the chamber (including the AG) before which the case is heard, the deliberation between the judges, on the basis of which the final, single judgement - with no dissenting opinion - is drafted, is undertaken in secret¹⁶⁷¹; “[c]ompromise is the name of the game”¹⁶⁷². These considerations further suggest that the AG might be more aware, or appreciative of the potential effect of the particular

¹⁶⁶⁶ Council of the Bars and Law Societies of the European Union.

¹⁶⁶⁷ B. Markesinis and J. Fedtke, ‘The Judge as Comparatist’ (2003) 78 *Tul.L.Rev.* 11, pp.83-84. In fact, the first AG, Legrange made an explicit comparison of the national laws on misuse of powers, in *ASSIDER* (n.1558).

¹⁶⁶⁸ Art.252 TFEU.

¹⁶⁶⁹ Of course, as noted at the beginning of this chapter and in Chapter 4, the AG employs the assistance of the *DRD* of the CJEU.

¹⁶⁷⁰ See the interview material collected in I. Solanke, ‘Diversity and Independence in the European Court of Justice’ (2008-2009) 15 *Col.J.Eur.L.* 89, pp.98-99.

¹⁶⁷¹ The Statute of the CJEU provides that AGs and judges should act “impartially and conscientiously and...preserve the secrecy of the deliberations of the Court” per Art.2; Art.35 further provides that deliberations should remain secret, Protocol (No.3) on the Statute of the Court of Justice of the European Union, annexed to the Treaties, OJ L 228, 23.8.2012.

¹⁶⁷² K. Schiemann, ‘Should We Come Together? Reflections on Different Styles of Judicial Reasoning’ (2006) 9 *Zeitschrift für Europarechtliche Studien* 1, p.7.

judgement, and the nature of the judicial methodology and reasoning underpinning, in the Member States' legal systems. The determination of the effect of the AG's opinion on the judgement of the Court, and more broadly, its relevance to the implementation of the judgement in the national orders is, as a general rule, difficult to gauge; while the Court might make explicit reference, either in following or dissenting from the AG, the national judge is less likely to do so¹⁶⁷³.

For the purposes of drawing this section of the chapter to a close, the following paragraph will highlight the way in which the engagement of different sources of analysis appears to shape the nature of the CJEU's comparison. The *travaux préparatoires* might give rise to indirect, vertical comparison between national and international norms, as well as horizontal comparison with Union or international norms; furthermore, the scope for their reference also gives rise to cross-referencing between areas of Union law. The reference to national norms continues to constitute the predominant engagement with comparative analysis within the CJEU; notwithstanding, explicit reference to national traditions and cultures is less frequent. Both give rise to a type of vertical comparison, which has been used not only for the purposes of identifying commonality or uniformity in interpretation but also for the acknowledgement of diversity across the Union space. In the fundamental rights case law, the scope for the margin of appreciation to be engaged as a mechanism of respect for diversity comes to the fore; as noted above, within the CJEU it seems that the margin of discretion is not identified on the basis of commonality or diversity but rather on the significance of the need for commonality (and thus uniformity) in the particular case for the purposes of facilitating the operation of the internal market. The reference to international legal sources allows for vertical and horizontal, direct and indirect comparison. Concepts, their meaning and their interpretation might be engaged directly from the international level, consequent to a direct and vertical comparative analysis. On the other hand, the analysis might be vertical and indirect, where the existence and interpretation of a norm at the international level is deemed to reflect commonality between the Member States.

¹⁶⁷³ Tridimas, for example, has attempted to illustrate, through empirical research, that the nature of the process of deliberation and the reporting procedure of the Court renders it difficult to identify any definitive influence that the AG might have on the Court's decision: T. Tridimas, 'The Role of the AG in the Development of Community Law: Some Reflections' (1997) 34 *CMLR* 1349, pp.1362-1365.

Horizontal comparative analysis arises between the ECtHR and the CJEU, reflecting the scope not only for conflict and a lack of compliance between the two regimes but also the potential for dialogue and cooperation; furthermore, it has also been noted that the CJEU might identify commonality, which it had initially dismissed, on account of the ECtHR's recognition thereof¹⁶⁷⁴. Finally, the engagement with non-state norms and academic scholarship illustrates the scope for vertical comparison of an indirect nature, which allows for reference to the national norms, legal traditions and cultures, for example via the DCFR, which has been constructed on the basis of a comparative analysis of national norms. It also illustrates the scope for horizontal comparison at the Union level; in particular, in respect of the sales part of the DCFR, which will soon form part of Union law in the Regulation on a CESL. Finally, there is also scope for the AG and the Court to obtain a solid understanding of the theoretical and historical development, as well as the interpretation and practical application, of certain norms within the national contexts, by virtue of its reference to legal scholarship.

II. The Rationales Underpinning Comparative Analysis in the Opinions of the AG and Judgements of the Court

The following section purports to clarify the different rationales underpinning the CJEU's engagement – that is to say, in the Opinion of the AG and judgement of the Court, whether explicit or implicit – of comparative analysis, for the purposes of the evaluation that follows in Chapter 9. Each categorisation below aims to set out, with reference to case examples, what the CJEU might hope to achieve by engaging in comparison; this focuses on the engagement of the particular rationale, its normative dimension and its theoretical underpinnings.

i. The Identification of Commonality

The foundations and nature of Union legislative activity has been set out in Part I. As noted, the facilitation of the internal market provides the legitimacy basis, per Art.114 TFEU, for the

¹⁶⁷⁴ The CJEU initially rejected the scope for the extension of Art.8 ECHR protection on account of the extent of divergence between the Member States in *Hoechst* (n.1265), Judgement, para.17. Subsequently, after the ECtHR identified commonality in *Niemitz v Germany* (1992) ECtHR, 16.12.1992, App.No.13710/88, the CJEU recognised the extension of protection in *C-94/00 Roquettes Frères* [2002] ECR I-9011.

majority of legislation – of the *acquis* and PIL norms – underpinning the legislative Europeanisation of private law. Essentially, this legitimacy basis, against the background of the internal market, operates to dictate that there should be little scope for the national courts to render diverse rulings such that the resolution of disputes should be the same regardless of the *lex forum*. Thus where the national judge identifies an incompatibility between national and Union law, reference should be made to the CJEU, which must per Art.19 TEU, “ensure that in the interpretation and application of the Treaties the law is observed”.

The desire to find commonality, as noted above, is inherently linked to uniformity. In the introduction to this chapter, a distinction has been advanced between the identification of principles of Union law which are common and those which lack commonality but might rather be characterised as general. In particular, the lack of coherence that arises from the structure of Europeanisation dictates that the identification of commonality and generality is especially relevant to the CJEU’s recognition of common or common principles of law. Commonality has therefore been linked to the promotion of coherence and the avoidance of the fragmentation of law in the pluralist, multi-level context of Union law (and private law, in particular), the complexities of which have been outlined above. Comparative analysis might therefore be employed for the purposes of identifying and promoting commonality, and thus, ensuring the unity and coherence of Union law.

Furthermore, the CJEU’s engagement of comparative analysis for the purposes of identifying commonality, might also be used to fill gaps with reference to that which is common between national, Union, international or indeed, transnational law. This “gap-filling” rationale is discussed in more detail below; as it is inherently linked to the identification of commonality, it is explored briefly here. This problematic might arise where the contested issue is one that is entirely or relatively original at the EU level; thus where a gap is identified in the rules established by the European legislature, the CJEU might seek to fill this lacuna “in the absence of any Community case law”¹⁶⁷⁵. As discussed, legislation as promulgated either follows a minimum, maximum or targeted harmonisation approach; its often incomplete nature attributes to the CJEU a role in ensuring its effective interpretation and implementation. This requires that the CJEU adopt a significant role in law making, filling gaps where necessary to ensure the coherence of the relevant norm, the relevant piece of

¹⁶⁷⁵ C-334/00 *Tacconi* [2002] ECR I-07357, Opinion of AG Geelhoed, para.4.

legislation in itself and the legal order as a whole. Moreover, the CJEU might recognise the existence of gaps as deliberate, providing a basis for its intervention; consequently, it might not characterise its intervention as activist but rather understand its role to be necessary to ensure coherence and ultimately, justice. The relevance of comparison arises to the extent that it is “obliged to solve the problem by reference to the rules acknowledged by the legislation, the learned writing and the case-law of the Member Countries”¹⁶⁷⁶.

Notwithstanding, the scope for the CJEU to adopt a role in systemising private law has been called into question; Schmid notes that there are too few decisions before the CJEU to allow it to adopt such a jurisdiction in the same way that the national courts might be able to engage in such a task¹⁶⁷⁷. Not only are there too few cases but the nature of the preliminary reference procedure also dictates that the CJEU does not render a decision on the final outcome of the case. This is recognised in practice in the division of labour between the courts, which gives strength to the notion that for every right (identifiable at the Union level or in national, international or private regimes), there must exist a remedy (which, given the nature of the EU, must be established at the national level): *ubi jus, ibi remedium*.

The CJEU might engage comparison where there exists a gap in the pool of applicable Union norms and the need for commonality, which might ultimately lead to an attribution of a uniform interpretation of the relevant norm. One example of can be identified in the fundamental rights case study, in respect of which the Treaties were initially silent. From *Nold*, it became clear that this legislative silence would be filled judicially¹⁶⁷⁸; the CJEU referred to the common constitutional traditions of the Member States, international law, and subsequently, not-yet-binding Union law, to fill relevant gaps in order to ensure the effective protection of rights. Moreover, the principles of access to justice and effective judicial protection have been identified, via comparative analysis, in the constitutional traditions of the Member States and established as common, overarching fundamental rights at the Union level (per Art.19 TEU and Art.47 CFR) and in international law¹⁶⁷⁹. The Treaties now make

¹⁶⁷⁶ Joined Cases 7/56, 3/57-7/57 *Algera* [1957] ECR 81, Judgement, p.54.

¹⁶⁷⁷ Schmid, ‘The ECJ as a Constitutional and a Private Law Court’ (n.318), p.14.

¹⁶⁷⁸ *Nold* (n.791).

¹⁶⁷⁹ The United Nations Basic Principles and Guidelines relating to the Right to a Remedy and Reparation place emphasis on the State’s duty to provide victims with equal and effective access to justice. It is a fundamental human right established in Art.8 of the Universal Declaration of Human Rights that “[e]veryone has the right to an effective remedy...”. The International Covenant on Civil and Political Rights (Art.14(1), in respect of which, in the European context, the ECHR provides for almost identical wording), the International Convention on the

specific reference to “commonality” with regard to the engagement with fundamental rights at the Union level¹⁶⁸⁰.

Notwithstanding, the relationship between commonality and generality – and the relevance of comparative analysis to their identification – is complex. This is clear from the state liability jurisprudence. At the beginning of the 1990s, while the Treaty structure made reference to “commonality” with regard to the liability of the Union¹⁶⁸¹, it was not evident that state liability could be identified as a principle across all of the Member States; indeed, many national governments maintained the principle of immunity of state institutions¹⁶⁸². At the time, an absence of commonality was identifiable via the comparative analysis of the AG’s Opinion and the judgement, both in respect of the conditions of liability and the availability of a remedy; as these determinations – and particularly the latter – were for the national court and shaped by national private law concepts, commonality was not deemed to be necessary. Notwithstanding, the scope for a finding of common applicable norms for the purpose of promoting their uniform interpretation in the CJEU was advanced¹⁶⁸³. The CJEU held that the liability of the state to make reparation for damage was to be established, provided, per *Francovich*, that certain conditions of liability could be satisfied¹⁶⁸⁴. Subsequently in *Brasserie* – the conditions of liability having been left open in *Francovich* – the AG considered that it was the existence of commonality that engendered the Community characterisation of those conditions: “conditions must be common and thus Community conditions”¹⁶⁸⁵. This seems to suggest that while commonality between the national, Union and international systems was not deemed to be a prerequisite to the recognition of state liability as a principle of Union law, it was nevertheless attributed significance for the purposes of facilitating consistency and coherence across Union regimes (particularly in respect of Union and state liability), and across the national orders, where the regulation was put into practice.

Elimination of All Forms of Racial Discrimination (Art.6), the Convention on the Elimination of Discrimination Against Women (Art.2(c)) and the Convention on the Rights of the Child (Art.12(2)) all include a provision on effective protection and remedies.

¹⁶⁸⁰ With regard to fundamental rights, the “constitutional traditions common to the Member States, shall constitute general principles of the Union’s law” per Art.6(3) TEU.

¹⁶⁸¹ With regard to the non-contractual liability of the Union, damage should be made good “in accordance with the general principles common to the laws of the Member States” per Art.340 TFEU.

¹⁶⁸² *Francovich* (n.219), Opinion of AG Mischo, para.47.

¹⁶⁸³ For example, as to commonality of conditions underpinning a claim; *Brasserie* (n.186), Opinion of AG Tesauro, para.54. Cf. *Omega* (n.1331), Judgement, paras.37-38.

¹⁶⁸⁴ *Francovich* (n.219), Judgement, paras.35-37; 38-46.

¹⁶⁸⁵ *Brasserie* (n.186), Opinion of AG Tesauro, para.11.

ii. The Identification of Diversity or a Lack of Commonality

The distinction advanced above between commonality and generality, wherein generality reflects an absence of commonality, is further developed below in respect of the identification and recognition of the principles of Union law; it should be reiterated at the outset. The following paragraphs aim to clarify that while the CJEU might aim to facilitate, via negative and positive integration, the convergence of norms via harmonisation and ultimately, the uniform application of Union norms in national courts, neither the AG nor the Court appears to feel bound to derive an outcome that necessarily engenders or facilitates commonality. While as noted above, comparative analysis might involve a search for commonality, it might also lead the CJEU to accept the diversity existing across the Union space. This might result in the recognition not of a common principle but of a general principle or other “best solution”, there existing overlap between these categories of norms. That is to say, and as will be discussed further in Chapter 9, while the CJEU seems to recognise principles that are characterised as “common”, it will also recognise principles which cannot be characterised as common because of the very absence of commonality. Commonality and the absence of commonality become evident via comparative analysis in the context of the processes of such analysis, as outlined hypothetically in Chapter 3. This distinction purports to avoid confusion to the extent that the CJEU has tended to characterise all principles – whether they are indeed, found to be common or not – as “general principles”, with intermittent reference to notions of commonality.

It therefore seems that the CJEU holds a wide discretion in characterising the norms relevant to the rendering of its interpretation; this is particularly true in respect of its identification of commonality, divergence, or something in-between: “...[the CJEU] is not obliged to take the minimum which the national solutions have in common, or their arithmetic mean or the solution produced by a majority of the legal systems as the basis of its decision...”¹⁶⁸⁶. Furthermore, while it has been recognised in the context of state liability jurisprudence that the Union nature of norms might be based on the existence of commonality, the AG in *AM&S*, has highlighted that “[u]nanimity, as to a subject which is relevant to a Community

¹⁶⁸⁶ C-155/79 *AM&S Europe v Commission* [1982] ECR 1575, Opinion of AG Slynn, p.1649, citing former CJEU Judge Kutscher (citing H. Kutscher, ‘Methods of Interpretation as Seen by a Judge at the Court of Justice’ (Judicial and Academic Conference – CJEU, Luxembourg; 1976), p. 29).

law problem, may well be a strong indication of the existence of a rule of Community law. Total unanimity of expression and application is not, however, necessary”¹⁶⁸⁷.

On the one hand, while the CJEU seems to recognise that commonality is not absolutely necessary for the recognition of a norm at the Union level, on the other hand, it might refuse to adopt a particular interpretation of a norm against the background of clear divergences existing between the Member States; it is its engagement with comparative analysis that allows for the divergences to be identified. For example, in the context of the state liability jurisprudence, the Court - having undertaken a comparative evaluation of national and Union norms – considered that it could not recognise at the Union level the non-contractual liability of public authorities to make reparation for damage resulting from their lawful act or omission, where there existed a lack of commonality as to the existence of such liability at the Union level and between the national orders¹⁶⁸⁸.

Furthermore, the existence of divergence might play a part in the CJEU’s balancing of fundamental rights and freedoms, where these divergences are identified on the basis of its comparative analysis of national norms and traditions, as well, potentially, of international law. As noted above, there is a lack of clarity – and thus, a proliferation of complexity – underpinning the CJEU’s approach. In respect of the balancing of fundamental rights and economic freedoms, the CJEU has understood fundamental rights as a putatively justifiable restriction to freedoms¹⁶⁸⁹ to the extent that any derogation is made in line with fundamental rights and principles of Union law¹⁶⁹⁰. Indeed, the Court in *Omega* recognised a principle of human dignity in light of the diverse national constitutional traditions; this principle was conceived so broadly as to find some foundation across the Member States. Thereafter it rejected the need for commonality, both in respect of the commonality underpinning the “system of protection” and the human dignity dimension of the proportionality test¹⁶⁹¹.

¹⁶⁸⁷ *AM&S* (n.1686), Opinion of AG Slynn, p.1650.

¹⁶⁸⁸ C-120/06 P *FIAMM* [2008] ECR I-6513, Judgement, paras.170-175.

¹⁶⁸⁹ *Omega* (n.1331), Opinion of AG Stix-Hackl, para.71.

¹⁶⁹⁰ *ERT* (n.1280), Judgement, para.43.

¹⁶⁹¹ *Omega* (n.1331), Judgement, paras.37-38.

Another example illustrating the CJEU's use of comparative analysis – in respect of the recognition of an absence of commonality¹⁶⁹² - arises in the recent case of *Akzo*; this case also advances the notion that commonality itself is not a static idea. *Akzo* was an appeal from the General Court, in which the question as to whether the protection of communications between lawyers, established as a fundamental right in Union law on the basis of commonality on the Member States¹⁶⁹³ (as well as the norms of the CFR and ECHR¹⁶⁹⁴) should extend to communications between the management body of an undertaking and an in-house lawyer arose. *Akzo*'s second and alternative claim asserted that the General Court had failed to engage developments in the “legal landscape” which required it to reconsider *AM&S*. AG Kokott examined these changes and confirmed, following the General Court, the parties' acceptance that no commonality existed across the Member States in respect of the extension of legal privilege to in-house lawyers¹⁶⁹⁵. The AG engaged the relevance of comparative analysis in respect of the recognition of principles of Union law, and particularly, the significance of principles deriving from the common constitutional traditions and legal principles common to the states¹⁶⁹⁶. However, she discarded any definitive requirement of commonality across the Union as a prerequisite to the recognition of a general principle. Instead, on the basis of an “evaluative comparison of the legal systems”, the AG considered that relevant national norms must be examined in light of the broader objectives of the Union;

¹⁶⁹² Another example of a case in which comparative analysis is used, and which leads to the identification of a lack of commonality – explicitly recognised by the CJEU – is *BED*. The case concerned the provision of legal aid to legal persons as a reflection of effective judicial protection, which the AG examined as a principle of Union law found in Arts.6 and 13 ECHR and Art.47 CFR. In particular, he assessed – with reference to “international practice”, the ECHR and ECtHR jurisprudence, EU law and the “practices of the Member States” (C-279/09 *BED* [2010] ECR I-3849, Opinion of AG Mengozzi, paras.60-80) – the “scope of the right to legal aid for legal persons” per Art.47(3) CFR which provides that legal aid should be made to everyone, and “those who lack sufficient resources”. The AG did not find, with reference to this “body of evidence” a basis to establish that the Member States must provide legal aid to legal persons on the same conditions as natural persons. The scope of protection is essentially a matter of interrelation of the sources. The AG notes that Art.53(2) CFR would allow him to go beyond what is provided for in the ECHR and ECtHR jurisprudence, allowing for a broad interpretation of Art.47(3) CFR, “which would have to be construed as requiring Member States to make legal aid available to legal persons” (C-279/09 *BED* [2010] ECR I-3849, Opinion of AG Mengozzi, para.98). Rather, the comparative analysis of the national norms, as well as that of international law, allowed the AG to determine that there could be no “commonality” per the CFR preamble. As such, he found there to be no general principle – “as EU law currently stands” – which establishes that Member States must grant legal aid to legal persons on the same basis as natural persons. The Court, not quite to the contrary, found that the principle of effective judicial protection, per Art. 47 CFR, “must be interpreted as meaning that it is not impossible for legal persons to rely on that principle” (C-279/09 *BED* [2010] ECR I-3849, Judgement, para.59), the determination being one for the national court but nevertheless recognised “the absence of a truly common principle” (para.44).

¹⁶⁹³ *Akzo* (n.691), Opinion of AG Kokott, para.47 citing *AM&S* (n.1686).

¹⁶⁹⁴ Art.7 and 47(1) CFR; Art.8(1), 6(1) and (3)(c) ECHR.

¹⁶⁹⁵ *Akzo* (n.691), Opinion of AG Kokott, paras.89-90; T- *Akzo* paras.170 and 177.

¹⁶⁹⁶ *Akzo* (n.691), Opinion of AG Kokott, para.90.

that is to say, “not only of the aims and tasks of the European Union but also of the special nature of European integration and of EU law”¹⁶⁹⁷.

Moreover AG Kokott considered that a principle might be recognised as general even where it exists “only in a minority” of national systems. The absence of commonality would not therefore preclude the recognition of generality where – on the basis of AG Maduro’s Opinion in *FIAMM* – the principle is of particular significance¹⁶⁹⁸, or where – a consideration explicated by AG Kokott which allows for the evaluation of the dynamic, evolving nature of Union law – “it constitutes a growing trend”¹⁶⁹⁹. The AG explicated this reasoning with regard to the controversial recognition in *Mangold* of the principle of non-discrimination on the basis of age as a general principle of Union law, identified not on the basis of commonality across the Member States but on the basis that the principle “was consistent with a specific task incumbent on the European Union in combating discrimination”¹⁷⁰⁰. In the *Akzo* case itself, it was the absence of commonality, not in itself but together with other considerations that led to the determination on the part of both the AG and the Court that a principle of Union law could not be identified. Thus, the AG found there to be “no comparable circumstances” underpinning the aims of Union law which would support such a finding in respect of the extension of legal privilege.

The Court came to the same conclusion as AG Kokott, and while it did not itself engage in explicit comparison, referred to the “comparative examination” undertaken in the General Court¹⁷⁰¹ and found, on the basis of the lack of “uniformity” in the national systems that “no predominant trend towards protection...may be discerned in the legal systems of the 27 Member States” and that the approach in one Member State – the Netherlands – could not be indicative of a “developing trend”¹⁷⁰². It is worth noting that the Court does not make reference to the idea advanced by the AG that a principle might be identified even if only recognised in a minority of national systems. Notwithstanding, its previous case law – for

¹⁶⁹⁷ *Akzo* (n.691), Opinion of AG Kokott, para.94.

¹⁶⁹⁸ As was the case in *Mangold*, where the general principle was recognised not on the basis of the commonality of all the Member States but on the basis that it “was consistent with a specific task incumbent on the European Union in combating discrimination”: C-144/04 *Mangold* [2005] ECR I-9981, Judgement, para.75; *Akzo* (n.691), Opinion of AG Kokott, para.96.

¹⁶⁹⁹ *Akzo* (n.691), Opinion of AG Kokott, para.95, citing *FIAMM* (n.1688), Opinion of AG Maduro, para.55-56.

¹⁷⁰⁰ C-144/04 *Mangold* [2005] ECR I-9981, Judgement, para.75; *Akzo* (n.691), Opinion of AG Kokott, para.96.

¹⁷⁰¹ T-125/03 *Akzo* [2007] ECR II-3523, paras.153 and 171, with reference to the comparative analysis undertaken by one of the observers, the European Company Lawyers Associations.

¹⁷⁰² *Akzo* (n.691), Judgement, paras.73-75.

example, that on state liability, discussed above – suggests that the Court would not necessarily dismiss such a suggestion. That is to say, it seems that the CJEU might recognise a principle as a general one even if the majority of the Member States adopt a different approach; this would most likely be the case where, engaging a comparative analysis, which as Maduro notes, forms part of a teleological approach, reflects an outcome in line with the needs of the Union¹⁷⁰³. On the basis of the distinction advanced in Chapter 9, this principle could be correctly characterised as a general but not as a common principle, there being no need for commonality in respect of the former.

The *Akzo* case further evidences the relevance of the comparative analysis which engages an assessment not only of legal rules but also of societal developments, reflecting considerable divergences across the Union. It seems to follow from the much earlier *Reed* case, the Court recognised that “any interpretation of a legal term on the basis of social developments must take into account the situation in the whole Community, not merely in one Member State”¹⁷⁰⁴, particularly where the interpretation is a potentially controversial one¹⁷⁰⁵. Such an approach might be particularly relevant where the matter before the CJEU is one which is potentially politically, socially or culturally controversial. This is especially evident in the *Grant* case, in which the issue of the compatibility of an employer’s decision with the principle of equal treatment as regards remuneration per Art.157 TFEU arose; the Court adopted a comparative analysis, noting that between the Member States there was a divergence in the treatment of cohabitation as an equivalent of marriage. In light of this divergence, the Court considered that “in the present state of the law within the Community, stable relationships between two persons of the same sex” could not be regarded as equivalent to marriage, or a stable relationship between persons of the opposite sex¹⁷⁰⁶, leaving the political determination to the legislature¹⁷⁰⁷.

¹⁷⁰³ *FIAMM* (n.1688), Opinion of AG Maduro, para.55: “In other words, the Court has the task of drawing on the legal traditions of the Member States in order to find an answer to similar legal questions arising under Community law that both respects those traditions and is appropriate to the context of the Community legal order. From that point of view, even a solution adopted by a minority may be preferred if it best meets the requirements of the Community system”. It is submitted that the pluralist perspective – which as noted above, allows for the recognition of the scope for diversity, and the understanding that the legal sources which form part of the comparative analysis are indeed conceived as foreign – facilitates the identification of principles from the bottom up; the EU teleology guides the identification of the sources and the identification of principles at the Union level, against the background of the need for uniform interpretation of Union norms and their co-existence with the national norms within the national traditions.

¹⁷⁰⁴ C-59/85 *Reed* [1986] ECR I-1283, Judgement, para.13.

¹⁷⁰⁵ The case concerned the interpretation of the notion of “companion”, and rights of residence.

¹⁷⁰⁶ C-249/96 *Grant* [1998] ECR I-0621, Judgement, para.35.

¹⁷⁰⁷ *Grant* (n.1706), Judgement, para.36.

This example, the *Akzo* case and the *FIAMM* case concerning the liability of public authorities for lawful acts, illustrate that comparative analysis might be engaged to identify diversity, either because the AG or Court searches for it or because they search for commonality, and find diversity instead. It seems evident that the case law across sectors lacks consistency and as *Akzo* illustrates, even within the same case the approaches of the AG and the Court might not necessarily coincide with regard to the contribution of comparative analysis; for example, while it considered the notion of “developing trend”, the Court, unlike the AG, did not comment on or delve more deeply into the scope for a principle to be identified even if it exists only in a minority of national systems. While the engagement of comparative analysis is necessary to identify either the existence of commonality, or the lack thereof, it seems that it is not the comparison as such, but rather its engagement together with the teleological approach that is relevant to the determination of whether a principle of Union law is identified and how it is characterised.

iii. The Identification of an Autonomous Interpretation of Union Norms

Against the background of the scope for the CJEU’s engagement of comparative analysis for the purposes of identifying that which is common across the relevant national, European, international and transnational orders, the scope for the use of comparison for the purposes of rendering autonomous interpretations of Union law also comes to the fore. The principle, recognised by the CJEU in 1964 in the *Hoekstra* case¹⁷⁰⁸, dictates that there is one correct interpretation of terms employed in EU legislation; these should be derived independently from national or international interpretations, except where reference is made expressly or impliedly to such sources in the text of the norm itself¹⁷⁰⁹. Much of the CJEU’s early private law jurisprudence arose from private international law and in particular the Brussels Convention¹⁷¹⁰, in respect of which the CJEU highlighted the need for autonomous interpretation of the Convention in order to ensure the uniform and effective application of

¹⁷⁰⁸ *Hoekstra* (n.354).

¹⁷⁰⁹ C-49/71 *Hagen OHG* [1964] ECR 23, Judgement, para.6: “terms used in Community law must be uniformly interpreted and implemented throughout the Community except when an express or implied reference is made to national law”.

¹⁷¹⁰ C-9/87 *Arcado SPRL v Haviland SA* [1988] ECR 1539, Judgement, para.1555; U. Magnus and P. Mankowskie, *Brussels I Regulation* (Sellier, München; 2007), pp.31-32.

Union law in the national courts¹⁷¹¹. Autonomous interpretation is therefore understood as one judicially-developed mechanism¹⁷¹² facilitating the resolution or management of the putative scope for conflicts of interpretation¹⁷¹³ and conflicts of norms arising before the national courts.

Two issues arise. On the one hand, at first glance it might be suggested that the significance of autonomous interpretation might seem to preclude comparative analysis¹⁷¹⁴. The difficulty is that reference to comparison would seem to undermine the notion that the interpretation of the norm derives purely from its European origins¹⁷¹⁵. On the other hand, autonomous interpretations must be capable of being applied in the national courts. It is submitted that the engagement of comparative analysis allows for the identification of the origins of the autonomous European interpretation and thus potentially attributes it with legitimacy, to the extent that such an interpretation has been recognised or is deemed to be acceptable – in perhaps a different form – in (some) of the national orders.

Herein, it is not suggested that an autonomous interpretation of a Union norm will always be identified in the absence of a consideration of the interpretation rendered in, for example, the national orders. It is clear from the reasoning of AG Tizzano in *Leitner* that autonomous interpretation does not preclude the scope for comparative analysis; comparison is rather understood as an inherent interpretative approach¹⁷¹⁶. The problematic arising before the

¹⁷¹¹ *CILFIT* (n.694), Judgement, para.7; *C-125/92 Mulox IBC Ltd v Hendrick Geels* [1993] ECR I-4075, Judgement, para.10.

¹⁷¹² Including the principles of primacy, supremacy and direct effect, and increasingly, the recognition of general or common principles of law.

¹⁷¹³ *Leitner* (n.728) in respect of the concept of damages in Directive 90/314.

¹⁷¹⁴ R. Michaels, 'Comparative Law' in J. Basedow *et al* (eds.), *Max Planck Encyclopedia of European Private Law* (OUP, Oxford; 2012), pp.297-301. Michaels suggests that the comparative analysis would be precluded where that analysis bears reference only to a single source of comparison, for example, the interpretation of a norm in a single Member State.

¹⁷¹⁵ Notwithstanding, the scope for the CJEU to maintain such an approach in respect of the pCESL is ambiguous, Consideration 29 of which provides that interpretation is to be undertaken without recourse to "any other law". This would appear to provide for a higher degree of autonomy than that which exists in respect of the uniform application of *acquis* norms in the national courts, in line with its obligation of harmonious interpretation (J.M. Smits, 'The CESL – Beyond Party Choice' *Maastricht European Private Law Institute Working Paper 2012/11*, pp.10-12.), and, as Micklitz and Reich have noted, will likely result in a greater number of preliminary references to the CJEU where an issue of interpretation of the CESL arises before national courts (H-W. Micklitz and N. Reich, 'Commission Proposal for a 'Regulation on a Common European Sales Law (CESL)' – Too Broad or Not Broad Enough', *EUI WP 2012/4*, p.24).

¹⁷¹⁶ Kakouris, 'Use of the Comparative Method by the Court of Justice of the European Communities' (n.1528), p.269, understanding comparison as a "method of interpretation". See also, generally, P. Pescatore, 'Le recours, dans la jurisprudence de la Cour de justice des Communautés européennes, à des normes déduites de la comparaison des droits des états membres' (1980) 32 *Revue internationale de droit comparé* 337.

national court concerned the fact that while the wording of Art.5 of the Package Travel Directive¹⁷¹⁷ left “damage” undefined, compensation for non-material damage – the only basis for redress – was not available under Austrian law. The AG interpreted the concept firstly in a textual and literal manner, looking to the wording of the provision¹⁷¹⁸, and subsequently with reference not only to the laws of the Member States, which retained their own private law mechanisms for limiting liability¹⁷¹⁹ and international law but also by cross-referencing Union rules¹⁷²⁰. It is also clear that the AG’s analysis is teleological, looking - against the background of the broader need for coherence between European regimes – to the purpose of the directive, the scope for divergent understandings of damage depending on the aim and objective of the relevant Union law. This approach adheres to Maduro’s assertion that comparative analysis should be understood as “one more instrument” of the CJEU’s teleological approach¹⁷²¹. Furthermore, AG Tizzano recognised comparative analysis as a “reference point” for evolution or development and asserted that “the most interesting developments are those provided by the legislation and case-law of the Member States”¹⁷²². It seems that he understood the ambiguity in the drafting to be a deliberate undertaking on the part of the Union legislature, allowing the CJEU to adopt a role in developing the law over time¹⁷²³. While the AG’s use of comparative analysis does not highlight commonality across the Member States and international law but rather divergence, it is the teleological understanding of the directive, together with the comparative analysis, which leads the AG to identify the autonomous interpretation most appropriate to Union legal development.

This case also responds to a second consideration; that is to say, while autonomous interpretation aims to promote uniformity, it does not seem to preclude the existence of diversity across the Union space at the stage of implementation. While the interpretation of the CJEU must be adopted as autonomous in light of the aims and objectives of Union law¹⁷²⁴, it is recognised that autonomous interpretation need not necessarily lead to commonality but can be compatible with the existence of divergent interpretations across the

¹⁷¹⁷ Directive 90/314/EEC on Package Travel OJ L158, 23.06.1990.

¹⁷¹⁸ *Leitner* (n.728), Opinion of AG Tizzano, para.25-32.

¹⁷¹⁹ Indirectly, via the Commission’s Report.

¹⁷²⁰ *Leitner* (n.728), Opinion of AG Tizzano, with reference to autonomous interpretation at para.25, to the national laws at para.40, to Union law and Directive 85/374 at paras.34-38 and international law at para.39.

¹⁷²¹ Maduro, ‘Interpreting European Law’ (n.397), p.7.

¹⁷²² *Leitner* (n.728), Opinion of AG Tizzano, para.40.

¹⁷²³ *Leitner* (n.728), Opinion of AG Tizzano, paras.34 and 35.

¹⁷²⁴ L. Pech, *The Rule of Law as a Constitutional Principle of the European Union* NYU *Jean Monnet WP 2009-04*, p.6.

Member States, and indeed, beyond the state. The division of labour outlined above is reflected in the understanding that while the national court has the task of implementing and applying the norm¹⁷²⁵, the task of autonomous interpretation is one for the CJEU to “ensure supremacy but at the same time paying due consideration to the existence of different legal traditions in Member States”¹⁷²⁶; this latter consideration is identifiable in AG Jacob’s Opinion in *Schmidberger*¹⁷²⁷. Notwithstanding, while it seems that the CJEU will recognise such diversity to be significant, it is not clear the extent to which it will be protected in light of the scope for an autonomous interpretation which is common and which is deemed necessary to ensure supremacy, that is, via the promotion of uniformity¹⁷²⁸.

Furthermore, the scope for autonomous interpretation gives rise to the question of whether national courts can and will cross-reference the interpretations of the courts of other Member States. The relevance of this question is clear in respect of the interpretation of options for compulsory service payments (compensation or indemnity) to commercial agents per the Commercial Agents Directive 86/653/EEC. The regime for options has its basis in the French and German orders; when it came to be interpreted within the English courts, one judge – Lord Hoffman – made reference to the notion that the English court could engage French law “for guidance or confirmation”¹⁷²⁹. Arguably, strict adherence to autonomous interpretation would call such an approach into question, to the extent that the rule - which is novel to the English court – derives from the European level, notwithstanding its foundations in the continental orders. On the one hand, this would suggest – as Twigg-Flesner has asserted – that the national courts are not necessarily bound to follow the interpretation of the national court “of origin”, which recognises the scope for divergent interpretations across the European space¹⁷³⁰. On the other hand, the CJEU has held that the national courts have a discretion in determining the option to be made to the agent, which suggests neither that there

¹⁷²⁵ *Freiburger Kommunalbauten* (n.265), Judgement, para.22, in respect of the interpretation and application of the unfairness test in respect of the UCTD.

¹⁷²⁶ Cafaggi, ‘The Making of European Private Law’ in Cafaggi and Muir Watt, *The Making of European Private Law* (n.59), p.328.

¹⁷²⁷ *Schmidberger* (n.1265), Opinion of AG Jacobs, para.97 *et seq.*

¹⁷²⁸ Consider for example, the interpretation of the term “workers” in *C-53/81 Levin* [1982] ECR 1035, Judgement, para.11 and the particular reference to the notion reference to national meanings as opposed to a Community meaning would “frustrate” the rules on free movement.

¹⁷²⁹ Ultimately, the House of Lords (as it then was) refused to follow the French method of calculating severance payments because such a calculation was based on a French market for selling commercial agencies which does not exist in England; *Lonsdale v Howard and Hallam Ltd* [2007] UKHL 32 (per Lord Hoffman at para.18).

¹⁷³⁰ C. Twigg-Flesner, *The Europeanization of Contract Law: Current Controversies in Law* (Routledge, London; 2nd edn., 2008), p.137.

is anything to prohibit such cross-referencing nor that the Member States obliged to engage it to avoid divergent interpretations¹⁷³¹.

It is submitted that an autonomous interpretation need not always reflect commonality between the Member States; consequently, it need not exclude diversity. The autonomous interpretation rendered might not exist in one single Member State; even if the interpretation can be identified in certain legal orders, there is nothing to suggest that it must be identified as common to be engaged at the Union level. Regulation within a multi-level structure should not preclude the existence of divergent norms or their interpretations.

iv. The Identification of the “Best Solution”

At the establishment of the CJEU, Lagrange, writing extra-judicially, noted that the CJEU’s adoption of comparative analysis could be “very useful; for even if the Court is sovereign and must assert for itself what is the ‘law of the Treaty’, it is easy to conceive that the source of this law can only be drawn from the legal ‘common roots’ of the six States – which first required the knowledge of each of the national laws...[o]ne easily digs out, when going to the bottom of the problems; these ‘general principles of the law’, that, in reality, albeit by different developments of thought, end up offering the same solution to identical problems”¹⁷³². Lagrange clearly considered that even if the Union itself should be understood as “autonomous and self-sufficient”, such that it might govern “*aux lieu et place*” of the national legal orders¹⁷³³, national law must retain its significance. This is fundamental to the understanding of legal development advanced herein. Yet it is also an approach reflecting the functional conceptualisation of comparison outlined above¹⁷³⁴; it is also seemingly limited to positivist sources of law – the “legal ‘common roots’” of the national legal orders – and the identification of similarity or commonality for the purposes of identifying solutions to functional problems arising in different national systems. Notwithstanding, bringing to light the notion of solutions, it has the potential to reflect the compatibility of the understanding of the Union order as an autonomous one with the continuing existence of divergences. On the

¹⁷³¹ C-465/04 *Honeyvem v Mariella* [2006] ECR I-2879, Judgement, para.36.

¹⁷³² M. Lagrange, ‘Une réalité européenne – La Cour de Justice de la CECA’ (1955) 28 *Cah.Chrét.Fonct.Publique* 16, p.21. Translated in Cohen and Vauchez, ‘The Social Construction of Law – The European Court of Justice and its Legal Revolution Revisited’ (n.664).

¹⁷³³ M. Lagrange, ‘L’ordre juridique de la CECA vu à travers la jurisprudence de sa Cour de Justice’ (1958) 84 *Rev.Droit.Public.Sci.Polit.Fr.L’étranger* 841, p.843.

¹⁷³⁴ See Chapter 3.

one hand, the focus remains on commonality; Konrad Schiemann – the former British judge at the CJEU – proclaimed, “I have the feeling that there is a genuine attempt to arrive at the best common solution that the brains of the [CJEU] can reach”¹⁷³⁵.

It is important to note that neither writer explains how a “best solution” should be identified; both seem to focus on commonality. Lagrange rather seems to suggest that one solution would necessarily, and apparently implicitly, arise as the common one, which could thereafter be engaged as the “best”. The characterisation of that which is common as “best” on the basis of mere empirical analysis is questionable; it brings to the fore an absence of clarity as to the approach to be adopted in the absence of commonality and gives rise to the question of whether the notion of best solution constitutes an alternative to commonality. The notion of “best solution” has been introduced above, and the methodology for its identification is considered in greater detail below¹⁷³⁶. For the moment, it is submitted that the determination of that which is best necessarily engages a normative evaluation and determination; it removes the methodology and reasoning – namely, that of comparison - from the apolitical sphere. This assertion derives from the critique of the methodology underpinning the DCFR. As noted above, the Commission requested that the drafters identify the “best solutions, taking into account national contract laws (both case law and established practice), the EC *acquis* and relevant international instruments”¹⁷³⁷; however, the drafters – as academics, and not political actors (strictly understood) – seemed to aim to identify the “best solution” while simultaneously avoiding any normative determination. As such, it is suggested that the DCFR rather provides “a source of inspiration for the legislature”¹⁷³⁸ as opposed to a tome of “best solutions”.

Indeed, the CJEU has recognised the scope for the identification of the “best solution” in light of the existence of diversity. In *AM&S*, a case concerning legal privilege, both the AG and the Court recognised the absence of commonality between the national systems; understanding the need for an analysis of “the spirit, orientation and general tendency of the

¹⁷³⁵ K. Schiemann, ‘From Common Law Judge to European Judge’ (2005) 13 *Zeitschrift für Europäisches Privatrecht* 741, p.747.

¹⁷³⁶ See Chapters 4 and 9.

¹⁷³⁷ Commission, ‘Communication on European Contract Law and the Revision of the *Acquis*’ (n.274), p.11.

¹⁷³⁸ C. von Bar *et al* (eds.), *Principles, Definition and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR, Outline Edition)* (Sellier, München; 2009), p.7.

national laws” and that “the aim of Community law is to find the best solution”¹⁷³⁹, it explicitly accepted the submission of the CCBE as to the existence of privilege¹⁷⁴⁰. More recently, *Werhahn v Council* called into question the continuing relevance, post-enlargement, of pre-enlargement case law, where a subsequent, post-enlargement, comparative analysis would have identified an absence of commonality between the national systems, which had existed previously. The AG’s reasoning followed Zweigert’s “*wertende Rechtsvergleichung*” approach, wherein, “what might be highly relevant is to ascertain which legal system emerges as the most carefully considered”¹⁷⁴¹. That is to say, the reasoning was not simply based on the commonality that may (or rather may not) have been identifiable from a previous or contemporary comparative analysis but instead made reference to an evolutionary approach and any “tendency to further development”. The notion of “most carefully considered” dictates that what is identified might - but need not be - based solely on commonality but rather reflect the identification of the most appropriate rule with regard to the particular case at hand.

v. Comparison as a Basis for Dialogue

The thesis takes the potential existence of conflict as a starting point in light of the commonality and diversity permeating the European space; the nature of these conflicts has been outlined in Part I. It is considered that the scope for such conflict will necessarily continue to emerge as Union enlargement proceeds and as other transnational regimes emerge and evolve. The preliminary reference procedure itself has emerged as a mechanism by which conflict can be resolved or at least managed. It is therefore engaged as a space of communication between the national courts and the CJEU; this has been discussed above¹⁷⁴². Thus, as a space of communication, it necessarily also has the potential to facilitate dialogue to the extent that it brings to the fore the relationship between the national courts and the CJEU.

Dialogue can be received in the latter because of its structure and composition, namely of lawyers, researchers, AGs and judges from divergent legal cultures, traditions and experiences

¹⁷³⁹ *AM&S* (n.1686), Judgement, pp.1599-1600; Opinion of AG Slynn, pp.1648-1650.

¹⁷⁴⁰ The Council of Bars and Law Societies of Europe.

¹⁷⁴¹ The idea was introduced to EU law by Zweigert, Zweigert, ‘Der Einfluß des Europäischen Gemeinschaftsrechts auf die Rechtsordnungen der Mitgliedstaaten’ (n.1272).

¹⁷⁴² See Chapter 3.

who are obliged to work together¹⁷⁴³. Van Gerven thus characterises the relationship existing between legal orders – particularly of national and Union law – as one of “dialectical interaction between national laws and Community law”¹⁷⁴⁴. Indeed, the preliminary reference system has been cemented as a hermeneutic procedure underpinning the EU legal order; the CJEU, like the national court, constitutes an interpretative community. These interpretative communities exist within particular cultures, such that the acts of communication are also understood as cultural acts; that is to say, from a linguistic perspective, law is understood as “acts of communication in a kind of social language...[elaborated upon by]...interpretive communities”¹⁷⁴⁵. It is submitted that the engagement of comparison as a “second-order” device has the potential to amplify this characteristic and in particular, facilitate the scope for transfer and dialogue, discussed further in Chapter 9.

From a normative perspective, comparison is engaged at the outset as a dimension of methodology that provides a means of dealing with and managing conflict, particularly as it emerges in the context of the Europeanisation of private law within a pluralist, multi-level space. That is to say, by generating knowledge and facilitating connections, comparison should promote communication, and foster the emergence of the values and characteristics underpinning and arising from dialogue, including coordination, cooperation and conciliation. By promoting these types of values, comparison can work not only to identify but also to justify the existence of divergences, to the extent that these values engender a perspective which undermines the notion of incompatibility between the understanding of the Union regime as an autonomous legal order and the existence of difference across the “other” Member States. On this basis, comparative analysis might also have a legitimising effect, generating confidence on the part of the institutional actors of the state but more broadly, in respect of the citizens of the Union, to the extent that it allows for recognition of the peculiarities of the national traditions and cultures and the determination of what will be deemed acceptable therein. The scope for reconciliation that potentially arises from dialogue, and the significance of comparison therein, can further be identified in the CJEU’s attribution of the task of balancing to the national courts (predominantly in respect of the balancing of

¹⁷⁴³ Markesinis and Fedtke, ‘The Judge as Comparatist’ (n.1667), p.84.

¹⁷⁴⁴ van Gerven, ‘Bringing (Private) Laws Closer to Each Other at the European Level’ in Cafaggi, *The Institutional Framework of European Private Law* (n.228), pp.37-77, pp.49 and 77.

¹⁷⁴⁵ Marini, ‘Taking Comparative Law Lightly’ (n.445), p.8 citing S. Fish, *Is There a Text in This Class?* (HUP, Cambridge; 1980), pp.147-174 and R.M. Dworkin, ‘Law as Interpretation’ (1982) 60 *Tex.L.Rev.* 373.

fundamental rights and economic freedoms in fundamental rights cases but also in respect of the balancing of the market-integration and consumer protection orientations of the Union in consumer contract cases).

Chapter 8. Concluding Remarks

Chapter 8 has aimed to offer an empirical reflection on the sources of analysis referenced by the CJEU, and the rationales underpinning its engagement with comparative analysis, by constructing two classifications based on the analysis of the three case examples above. As concluded from Part III, the analysis of the case examples therein illustrates the changing nature of private law, the shifting dynamics of Europeanisation and integration, and the recognition on the part of the CJEU of the significance of the contexts in which Europeanisation and integration occur. Thereafter, employing the analysis of the case examples as the empirical foundations, the chapter has aimed to construct two classifications, firstly, of the manifestations of comparison – that is, that which is compared – and thereafter, of the rationales underpinning the engagement of comparative analysis. These do not aim to be evaluative as such but are rather explicative; nevertheless, they illustrate that the CJEU's engagement with comparison lacks a rigorous theoretical and methodological basis, and very often, explicit recognition and acknowledgement.

Indeed, the first exercise in classification has illustrated that the engagement of both the AG and Court with comparison seems to transcend the mainstream approaches critiqued in the first section of Chapter 3, at least in respect of the different sources of comparative analysis to which reference is made. This is true in at least one key respect: while the CJEU often engages components of comparative analysis that arise within the nation state, its analysis is by no means so limited; that is to say, the AG and Court also engage, *inter alia*, norms of international institutions, jurisprudence of international courts, privately-made norms and norms developed within legal scholarship. The second classification has, for the purposes of explication, illustrated the diverse bases and rationales underpinning the engagement of comparison, building on the normative dimensions and theoretical foundations explored in Chapter 3. As noted therein, there exists a lack of clarity as to the potential, putative purposes and aims of comparison, an apparent consequence of the fact that much of the analysis has

predominantly focused on the use of comparison for harmonisation and unification purposes, against the background of the facilitation of the internal market¹⁷⁴⁶.

This evaluation has further aimed to highlight that the CJEU is not bound by the orthodox aims of comparison, that is, the rationale of identifying commonality or similarity for the purposes of facilitating the construction of a body of common Union norms deemed to be applicable across the Member States in a uniform manner. Notwithstanding this finding does not necessarily suggest that comparative analysis is not used as a tool of the harmonisation project, i.e. to identify similarities and differences for the promotion of the former and suppression of the latter. Yet in light of the nature of the Europeanisation and the character of the European space – that is, its multi-level, plural form, - it is advanced within the scope of this thesis that the existence of divergence across the Member States must be compatible with harmonisation (as is clear, for example, from the minimum harmonisation approach of the Union legislature). Ultimately, these two classifications aim to clarify that the CJEU does not seem to limit itself to a default position whereby comparison is engaged merely as a “harmonising handmaiden”¹⁷⁴⁷.

This chapter has therefore advanced two classifications: one reflecting the manifestations of the sources of comparative analysis, and a second reflecting the rationales underpinning the use of comparison in the case law of the CJEU. Both illustrate the “first order” engagement of comparison by the AG and the Court. This analysis is intended to provide the foundations for the exploration and identification of the use of comparative analysis in a “second order” respect, which sheds light on the notion of “comparing how others compare”¹⁷⁴⁸ and which allows for the engagement of the discourses on legal development at different levels in a multi-level construct, in light of the CJEU’s development of its meta-mechanisms of Europeanisation. Comparative analysis firstly facilitates the identification of these mechanisms and their use by the AG and the Court; furthermore, it is advanced that a more detailed evaluation might facilitate the understanding of the way in which these mechanisms contribute to Europeanisation and integration in a pluralist, multi-level order via the Luxembourg Court’s interpretative jurisdiction. The first section of the following chapter

¹⁷⁴⁶ For one understanding of the role of the CJEU in unification, see W. van Gerven, 'ECJ Case Law as a Means of Unification of Private Law' (1996-97) 20 *Fordham.Intl.L.J.* 680.

¹⁷⁴⁷ Menski, *Comparative Law in a Global Context* (n.483), p.46.

¹⁷⁴⁸ D. Nelken, 'Comparing Criminal Justice' in M. Maguire *et al* (eds.), *The Oxford Handbook of Criminology* (OUP, Oxford; 5th edn., 2012), pp.138-157, pp.142-143.

builds on the analysis pertinent to that undertaken herein concerning the identification and recognition of principles of Union law, and the second aims to uncover the interaction of these principles with other mechanisms, including the recognition of “best solutions” and the scope for transfer and dialogue.

Chapter 9. Advancing the Europeanisation of Private Law via Comparative Analysis: Uncovering the Meta-Mechanisms of the CJEU

This chapter explores the meta-mechanisms engaged by the CJEU in its Europeanisation of private law; it aims to cultivate the evaluation of the CJEU's use of comparative analysis in a "second order" perspective, firstly in respect of the recognition of principles of Union law, and thereafter with regard to other mechanisms of Europeanisation, including the recognition of "best solutions" and the scope that arises for transfer and dialogue. Elaborating upon the categorisation of the manifestations of comparison and the rationales underpinning its engagement in Chapter 8, the first section explores the following "stories" of comparison: 1) the use of comparative analysis for the purposes of identifying, recognising (and frequently, constituting) common principles; 2) the use of comparative analysis for the purposes of identifying, recognising (and frequently, constituting) general principles; and 3) the use of comparative analysis for the purposes of identifying "best solutions" (which might include practices rules, principles and values). Thereafter, this chapter aims to integrate this analysis with the development of other meta-mechanisms engaged by the CJEU in its Europeanisation of private law; the focus falls initially on the legal transfers discourse introduced in Chapter 3 and thereafter, on the engagement and evolution of judicial dialogue, as tools of Europeanisation and integration.

I. Exploring the Comparative Analysis Underpinning the CJEU's Recognition of Principles of Union Law

At the beginning of Chapter 8, a distinction between commonality and generality has been advanced. Reference has also been made to Tridimas' definition of a general principle, and his recognition of the different conceptualisations thereof¹⁷⁴⁹; it has been noted that for the purposes of this analysis, generality is engaged as reflecting the "degree of recognition or acceptance" of norms across the relevant legal orders. This understanding is maintained for the purposes of uncovering the comparative analysis underpinning the recognition of a common principle on the one hand, and of a general principle on the other. Thereafter, the focus shifts to the engagement of comparative analysis for the purposes of advancing the other meta-mechanisms of European private law development, including best solutions,

¹⁷⁴⁹ Tridimas defines a general principle as a "general proposition of law of some importance from which concrete rules derive"; Tridimas, *The General Principles of EC Law* (n.1475), p.1.

transfer and dialogue. It is recognised that there exists a degree of overlap between the recognition of common principles, of general principles, of best solutions and the scope for the recognition of transfers of a vertical and horizontal nature.

This section begins by advancing a working definition of the notion of principle. This definition is engaged as a working one as it is considered that the body of principles emerging at the Union level is constantly expanding in line with the contemporaneous expansion of the CJEU's jurisdiction in private law matters; furthermore, it is considered that principles are attributed, and adopt, an increasingly significant role in legal development following Pescatore's recognition that principles of law constitute a "fertile source" of EU law, reflecting "a universal phenomenon of legal 'civilization'"¹⁷⁵⁰. Consequently, the definition advanced is one that aims to reflect the normative perspective of the thesis, with reference to the evaluation of the case examples; that is to say, fundamentally, the understanding engages the emergence of the Europeanisation of private law within the pluralist, multi-level space, defined by commonality and diversity. As such, it is recognised that there is scope for its refinement and evolution.

i. Principles of Law in the National and Union Orders

Building on this introduction, it is acknowledged that principles are not fixed but rather it is their interpretation in light of a particular set of facts – that is, essentially, a case – that allows for their situation within a temporal and geographical space. As such, it is considered that the application, as well as the legitimacy basis and conceptualisation of the notion of principle have the potential to differ between national cultures and traditions¹⁷⁵¹ and also beyond the

¹⁷⁵⁰ Pescatore, *The Law of Integration* (n.67), p.75. Obviously, the term "civilized nations" has been criticised, not only in respect of the connotation of colonisation, and the Christianisation of Europe and elsewhere but also with regard to the lack of understanding as to what civilisation actually means, there rather being a presumption, for example, within the UN, that its members are all civilised nations. Certain authors have made reference to the use of the principle as providing a basis upon which a distinction can be made between those systems which have maintained their civilised nature, and those which have "moved away" – for diverse reasons – from their adherence to civilised approaches to law; see, for example, C. Bassiouni, 'A Functional Approach to "General Principles of International Law"' (1990) 11 *MJIL* 768, fn.4.

¹⁷⁵¹ Perhaps the most evident example is the rejection of an overarching principle of good faith, and the scope for the recognition of such a principle in the continental systems; House of Lords, EU Select Committee 'European Contract Law: The Draft Common Frame of Reference' (The Stationery Office, London; 2008-09), paras.31-38, and for example, in French law, the notion of *bonne foi*, has been recognised, among other contexts, in contract performance, in terms of *l'obligation de loyauté*, *l'obligation de résultat* and *l'obligation de résultat* (Cass., 08.04.1987, *Bull.*, III, n°88, p. 53, *RTD civ.* 1988, 122; Cass., 05.06.1968, *D.*, 1970, 453). In German law, §242BGB provides for *treu und glauben* generally, while §§138 and 826 provide for further expressions of good

state, as principle might be engaged in the development of Union law, international law or private regulatory regimes.

The notion of principle has received little consideration in classical positivist conceptions of law, in so far as principles are understood neither to be prescriptive nor derivations of directly enforceable commands¹⁷⁵². Thus, from a positivist perspective, it is considered that the authority of principle must necessarily be deemed to derive from the rule of recognition; any other suggestion as to the basis of authority is rebuked¹⁷⁵³. This assumes that principles, even if recognised in courts, must nevertheless be promulgated by the legislature¹⁷⁵⁴. The relevance of Hart's notion of soft or inclusive positivism follows therefrom; the recognition of principle does not necessarily constitute "an alternative to a criterion provided by a rule of recognition" but rather "a complex 'soft-positivist' form of such a criterion identifying principles by their content not by their pedigree"¹⁷⁵⁵. Dworkin draws a distinction between rules and principles, which rests on the different weights that can be attributed to different principles and the outcome to which their application gives rise; that is to say, rules require a particular outcome while principles do not express the consequences following from their invocation¹⁷⁵⁶. Thus, to the extent that they provide different lines of guidance from rules, principles engaged in "hard" cases¹⁷⁵⁷ are therefore understood to offer a higher degree of discretion to judges¹⁷⁵⁸. Unlike rules, principles – defined by their generality – are inherently uncertain, "to be sought rather in the Platonic heaven of law than in the law books"¹⁷⁵⁹. It should be noted that the Dworkinian understanding reflects a narrow conception of principle, one which focuses on individuals' rights but does not encompass that which he deems to be "policy" orientated, that is, considerations arising in or related to the broader public interest.

faith, amongst others. For a general overview in European law, see K. Riesenhuber, *System und Prinzipien des Europäischen Vertragsrechts* (W. De Gruyter Recht, Berlin; 2003), pp.398-414.

¹⁷⁵² R.M. Dworkin, *Taking Rights Seriously* (CUP, Cambridge; 1977), p.40.

¹⁷⁵³ For example, the arguments of Dworkin, explored below.

¹⁷⁵⁴ J. Raz, 'Legal Principles and the Limits of Law' (1972) 81 *Yale.L.Rev.* 823, p.848: "Legal principles, like other laws, can be enacted or repealed by legislatures... They can also become legally binding through establishment by the courts. Many legal systems recognize that both rules and principles can be made into law or lose their status as law through precedent".

¹⁷⁵⁵ Hart, *The Concept of Law* (n.151), p.263.

¹⁷⁵⁶ Dworkin, *Taking Rights Seriously* (n.1752), pp.24 *et seq.*

¹⁷⁵⁷ In particular, Dworkin engages the case of *Riggs v. Palmer* 115 N.Y. 506 (1889), in Dworkin, *Taking Rights Seriously* (n.1752), p.29.

¹⁷⁵⁸ Unlike a rule, "[a principle] states a reason that argues in one direction, but does not necessitate a particular decision", Dworkin, *Taking Rights Seriously* (n.1752), pp.24-25, providing judges act in line with public standards, R.M. Dworkin, 'Judicial Discretion' (1963) 60 *J.of.Phil.* 624, p.635.

¹⁷⁵⁹ C-411/05 *Palacios de la Villa* [2007] ECR I-8531, Opinion of AG Mazak, para.86; J. Wouters *et al.*, 'The Influence of General Principles of Law' *Leuven Centre for Global Governance Studies Working Paper 2011-70*, pp.4-5.

Dworkin asserts that “I call a ‘principle’ a standard that is to be observed, not because it will advance or secure an economic, political or social situation deemed desirable, but because it is a requirement of justice or fairness or some other dimension of morality”¹⁷⁶⁰. Thus, while he recognises that the invocation of principles might be relevant to the reasoning in which the judge is engaged in his interpretation of existing legal materials, the considerations to which this invocation gives rise must be distinguished from policy, which is understood as “a kind of standard that sets out a goal to be reached, generally an improvement in some economic, political or social feature of the community...”¹⁷⁶¹.

Other conceptualisations of principle engage their legal character, on the one hand, and their cultural, socio-economic and political character, on the other; the determinations of these characters are relevant not only in relation to the source of principles (to the extent that they may not necessarily derive from the legal dimensions of these cultures and traditions but from moral or value-based considerations relevant to the development of the legal order), but also in respect of their status and role. From this perspective, it has thus been considered that it is the values underpinning principles that allow the latter to be understood as “bridg[ing] the gap between positive legal rules and normative legal ideas”¹⁷⁶². While as noted above, the notion of principle might not be fixed in itself, principles might be engaged as a component dimension of legal development; thus, as Habermas has highlighted, reasoning based on such considerations might be circular in its nature: “argumentation based on values and principles is a tool for tying individual cases to a longer line of cases and to make explicit the underlying social theory guiding the ECJ legal decision-making process”¹⁷⁶³.

The Treaty structure of the Union does not explicitly refer to principles as a means by which the Union institutions can exercise their roles and competences; while reference is made to the existence and effects of sources of Union law, other than the Treaties, in the TFEU – including regulations, directives, decisions, recommendations and opinions – no explicit reference is made to principles of law. However, primary Union law is not entirely silent; for example, reference can be made to the principle of sincere cooperation in Art.4(3) TEU, of conferral in Art.5(1) TEU, and of subsidiarity in Art.5(3) TEU, as well as the principles found

¹⁷⁶⁰ Dworkin, *Taking Rights Seriously* (n.1752), p.22.

¹⁷⁶¹ Dworkin, *Taking Rights Seriously* (n.1752), p.22.

¹⁷⁶² Wouters *et al*, ‘The Influence of General Principles of Law’ (n.1759), p.5.

¹⁷⁶³ J. Habermas, *Between Facts and Norms – Contributions to a Discourse Theory of Law* (Blackwell, Boston; 1998), pp.194-195.

in the CFR. Perhaps as a result, the conception of principle engaged by the CJEU is ambiguous, both with regard to its recognition, status and use¹⁷⁶⁴. As noted, a distinction between commonality and generality is advanced herein, one which is based on, and similarly purports to better clarify, the comparative analysis of the CJEU. This is necessary in light of the fact that the engagement with legal principles – both common and general – fall “outside the formal sources of Community law”¹⁷⁶⁵. That assertion derives from the CJEU’s recognition of principles, predominantly from national (and international) law; moreover, principles might be derived from the Treaties. In this latter respect, the CJEU initially engages a process of induction, providing that a particular Treaty provision constitutes a principle of Union law not explicitly set out in the Treaty as such; thereafter, the CJEU engages in a process of deduction and applies that provision – understood as a principle of law – to provide an interpretation in a particular case¹⁷⁶⁶.

From the perspective of the evaluation of the jurisprudence of the Luxembourg Court in respect of its recognition of principles from “beyond the Treaties”, two dimensions of analysis are relevant and will be explored in the paragraphs below: on the one hand, the CJEU’s use of comparison and therein, its engagement with commonality and generality underpinning the recognition of a principle, and on the other, the scope for its engagement with principle as a means of engaging the broader context (outlined above) of norms strictly conceived as legal rules.

An attempt will be made to identify which, if indeed any, particular conceptualisation of principle is adopted by the CJEU, there having been little explication of a rigid understanding. This seems to be deliberate: AG Trstenjak, exploring the “concept of a general principle” has highlighted the multiple uses of principles – particularly, as an “an aid to interpretation” and a means of filling gaps - while acknowledging that “the Court also appears to have opted not to

¹⁷⁶⁴ For example, AG Safjan, writing extra-judicially, makes reference to general principles of EU law having a similar status as that attributed to fundamental rights: M. Safjan and P. Miklaszewicz, ‘Horizontal Effect of the General Principles of EU Law to Fundamental Rights’ (2010) 18 *ERPL* 475, p.480. With regard to the CFR, it is worth noting that it seemingly distinguishes between rights and principles, per Art.52(2), it not necessarily being clear what the effects of such a distinction might be in practice (C. Hilson, ‘Rights and Principles in EU Law: A Distinction without Foundation?’ (2008) 15 *Maas.J.Eur.Comp.L* 193; Craig, *The Lisbon Treaty* (n.407), pp.216-217).

¹⁷⁶⁵ F. Jacobs, ‘Preface’ in Tridimas, *The General Principles of EC Law* (n.1475), pr.1.

¹⁷⁶⁶ For example, this can be identified in respect of the Treaty provision establishing equal pay for equal work, regardless of sex, in (now) Art.157 TFEU, and identified as a principle of sex equality in C-20/71 *Sabbatini v Parliament* [1972] ECR 345.

undertake a precise classification of general principles in order to retain the flexibility"¹⁷⁶⁷. Notwithstanding the reluctance of the CJEU, a number of distinctions might be drawn in the exploration of principles. In contemporary literature, while the terms are usually engaged interchangeably, the scope for a distinction between principles of Union law and those of a private or civil nature has been advanced¹⁷⁶⁸. The former category might comprise those principles that more blatantly reflect fundamental Treaty provisions¹⁷⁶⁹, that is to say, deriving from a national or EU constitutional background¹⁷⁷⁰. The latter encompass those principles which originate in (predominantly, national) private law and include *inter alia*, the notion that “each contracting party is bound to honour the terms of its contract and to perform its obligations thereunder”¹⁷⁷¹, the idea that “full performance of a contract results, as a general rule, from discharge of the mutual obligations under the contract or from termination of that contract”¹⁷⁷², the right to be heard in competition law proceedings¹⁷⁷³, the principle of legal privilege and of confidentiality between lawyers and clients¹⁷⁷⁴ and the “clean hands” principle¹⁷⁷⁵, principles relating to effective judicial protection¹⁷⁷⁶, in addition to others, including the principle against unjust enrichment¹⁷⁷⁷, the principle of good faith¹⁷⁷⁸ and the

¹⁷⁶⁷ *Dominguez* (n.1502), Opinion of AG Trstenjak, paras.91 *et seq.*, para.93 in particular. The Opinion can be compared with the judgement of the Court in which there is almost no consideration of the idea of general principle, in the context of the fundamental rights dimension of the case (entitlement to paid annual leave as a general principle).

¹⁷⁶⁸ See K. Purnhagen, ‘Principles of European Private or Civil Law? A Reminder of the Symbiotic Relationship Between the ECJ and the ECFR in a Pluralistic European Private Law’, *Centre for the Study of European Contract Law, University van Amsterdam, Working Paper 2011/04*.

¹⁷⁶⁹ Although for example, Art.345 TFEU, establishing that EU law shall not affect property rights, has a clear private law significance. The right to property is also well-established: *Hauer* (n.701).

¹⁷⁷⁰ For example, see *AM&S* (n.1686) – concerning obligations of confidentiality arising between solicitor and client; the CJEU made explicit requests for comparative material on the rules of the legal systems of the different Member States; referenced in T. Koopmans, ‘The Birth of European Law - At the Crossroads of Legal Tradition’ (1991) 39 *AJCL* 493, pp.498-499 and T. Koopmans, ‘Comparative Law and the Courts’ (1996) 45 *ICLQ* 545.

¹⁷⁷¹ C-277/05 *Société thermal d’Eugénie-Les-Bains* [2007] ECR I-06415, Opinion of AG Maduro, para.24.

¹⁷⁷² *Hamilton* (n.552), Judgement, para.42.

¹⁷⁷³ C-17/74 *Transocean Marine Paint v Commission* [1974] ECR 1063. Consider especially, AG Warner’s comparative examination of the right to a fair hearing, Opinion of AG Warner, pp.1088-1089.

¹⁷⁷⁴ *AM&S* (n.1686), a result arguably much more influenced by the common law, which has traditionally offered greater protection than the continental systems in such contexts. The AG advocated an approach whereby “the Court has to weigh up and evaluate the particular problem and search for the best and most appropriate solution”, Opinion of AG Slynn, p.1649. The Court itself undertook a comparative analysis of the laws of the Member States, attempting to identify a common approach by employing the two distinct national methodologies for the purpose of identifying a solution that would be appropriate within the European context.

¹⁷⁷⁵ C-453/99 *Courage and Crehan* [2000] ECR I-11179.

¹⁷⁷⁶ There are a number of cases which emphasise the significance of effective judicial protection, and as a related issue, the availability of civil remedies at the national level – for consideration of the connection, see C-50/00 *Union de Pequenos Agricultores* [2002] ECR I-7289, Opinion of AG Jacobs, para.97. Consider, in particular, *Johnston* (n.950) (effective judicial protection) and C-253/00 *Munoz* [2002] ECR I-7289 (right to a civil action or remedy based on EU law but available at the national level).

¹⁷⁷⁷ C-47/07 *Masdar (UK) Ltd v Commission* [2008] ECR I-09761.

¹⁷⁷⁸ *Pia Messner* (n.1658).

principle prohibiting abuse of right¹⁷⁷⁹. Notwithstanding the scope for its recognition, it is submitted that for the purposes of this thesis, the distinction is one which gives rise to unnecessary complexity and confusion to the extent that a great deal of overlap exists between the two categories. As such, no strict distinction of this nature is advanced herein.

Rather - in line with the exploration of the “stories” summarised above - the analysis that follows advances a distinction between commonality and generality in the reasoning of the CJEU. The distinction advanced is not a simple one; these characterisations are also frequently intertwined. From the jurisprudence of the CJEU, it is difficult to identify a consistent approach to the recognition of common or general principles, or even reference to consistent wording. Rather, the notion of general principle emerges as a broad category into which the CJEU seems to “throw” all principles. Indeed, AG Trstenjak has expressly considered that “general principle” is a “thorny issue”; furthermore, she has acknowledged that while:

the terminology is inconsistent both in legal literature and in the case-law...to some extent there are differences only in the choice of words, such as where the Court of Justice and the Advocates General refer to a generally-accepted rule of law, a principle generally accepted, a basic principle of law, a fundamental principle, a principle, a rule, or a general principle of equality which is one of the fundamental principles of Community law”¹⁷⁸⁰.

In the following paragraphs, the distinction will be explored, based on the reasoning of the AG and Court in the cases evaluated in Part III; it is submitted that the ambiguity of the CJEU’s reference offers a space ripe for analysis and for the uncovering of considerations relevant to its methodology and reasoning. Moreover, this distinction might engender clarity, particularly as to the facilitation of the understanding and development of the CJEU’s reasoning and therein, its use of the comparative methodology. It is worth recalling – as illustrated by the case examples, and as categorised above – that the CJEU will engage different sources of comparative analysis; notwithstanding, much of the literature cited below is limited to references to comparative analysis which from the nation state; the normative perspective adopted within this thesis rejects such a delineated approach to legal development. Consequently, for the purposes of the evaluation that follows, the broad notion of “the sources

¹⁷⁷⁹ *Hans Markus Kofoed* (n.1561).

¹⁷⁸⁰ *Audiolux* (n.1579), Opinion of AG Trstenjak, para.67.

being analysed” or “the sources of comparison” is engaged to illustrate that the CJEU’s comparative analysis does not appear – while it lacks theoretical and methodological rigour – to be so limited.

ii. An Endeavour at Clarifying the CJEU’s Reasoning: A Distinction in the Characterisations of Commonality and Generality

While the scope for different categorisations of principles has been considered in the CJEU, the distinction advanced herein, namely between commonality and generality, has not been recognised. Thus AG Trstenjak has advocated a distinction based on principles recognised in a “narrow sense” (those which derive from the “spirit and system of the Treaties and relate to specific points of EU law”) and those which are common to the national systems; only the latter are deemed to require “critical or evaluative” comparison¹⁷⁸¹. Thus, it is submitted that where a principle or its interpretation cannot be identified across all relevant legal orders, or where “non-negligible” divergences are identified between the sources of comparison, including but not limited to those of the Member States¹⁷⁸², it might be more appropriate to characterise the principle as the “most common” amongst the Member States¹⁷⁸³; herein, it is submitted that in order to avoid the term commonality, the principle might be better identified as a “general one”. Comparison therefore not only facilitates the identification of that which is common but also in the absence of commonality, that which might be reflected in the notion of generality. It is submitted that the distinction will facilitate the uncovering and clarification of the (already ambiguous) comparative methodology of the CJEU.

As to the recognition of commonality, the comparative analysis allows the CJEU to compare the text and interpretations of the relevant norms across the Member States¹⁷⁸⁴ and beyond the state. It is clear from the case examples explored above, that while the CJEU might identify commonality (which might then be advanced – and diversities repressed – for the purposes of promoting uniformity and thus, unification), on the basis of comparative analysis. Furthermore, the CJEU’s recognition of commonality might also derive from the consolidation of the norms in a single form. Such an approach is identifiable in light of the “almost codification” of fundamental rights (and related principles) in the CFR. The CJEU

¹⁷⁸¹ *Dominguez* (n.1502), Opinion of AG Trstenjak, para.94.

¹⁷⁸² N. McCormick, *Legal Reasoning and Legal Theory* (Clarendon Press, Oxford; 1978), pp.97-99; pp.100-128.

¹⁷⁸³ Conway, ‘Levels of Generality in the Legal Reasoning of the European Court of Justice’ (n.691), p.797.

¹⁷⁸⁴ *AM&S* (n.1686).

has not explicitly characterised its reasoning in this respect but it has recognised that the CFR encompasses “those values hav[ing] in common the fact of being unanimously shared by the Member States...The Charter has undeniably placed the rights which form its subject-matter at the highest level of values common to the Member States”¹⁷⁸⁵. Furthermore, the CJEU has recognised commonality on the basis that the relevant norms have been expressed in provisions of international treaties, which form part of “constitutional traditions common” across legal orders as a result of the Member States, or the Union, having consented thereto¹⁷⁸⁶; this characteristic of commonality is then deemed to be transferable to the Union, and subsequently, to the national level¹⁷⁸⁷.

Notwithstanding the CJEU’s characterisation of norms as common, its comparative reasoning seems to be much more complex than one based on the identification of similarity; indeed it is not so limited. Moreover, even where it does pursue commonality, it might not always find it¹⁷⁸⁸. The normative rationales underpinning the identification of commonality are broad. It is potentially circular, as well as time and material-dependent; that is to say, the significance attached to the “status” of commonality ultimately depends on what the CJEU identifies as being common at a particular moment in time and in a particular case. Moreover – at least within the context of the Europeanisation of private law (but not limiting the normative sources of legal development to those which are European) – it seems that only the CJEU is in a position to identify commonality in a set of given norms.

Yet, the CJEU does not only recognise principles of Union law where commonality is identifiable; it will also recognise principles of Union law where divergences exist between the sources of comparison. It seems that the CJEU will recognise norms as principles of Union law notwithstanding that diversities in the relevant norms exist across the Member

¹⁷⁸⁵ C-353/99 *Council v Hautala* [2001] ECR I-09565, Opinion of AG Léger, paras.80-82, citing recitals four and five to the Preamble to the Charter of Fundamental Rights of the European Union, OJ 2000 C 364/01.

¹⁷⁸⁶ *Ordre des barreaux francophones et germanophones* (n.1346), Judgement, para.29.

¹⁷⁸⁷ See the expression of the voluntarist approach in relation to international law, in the ICJ judgement of *S.S. Lotus*, 1927 PCIJ Series A, No. 10, 18. Positivist and voluntarist approaches of law have been understood to be strictly intertwined; S.R. Ratner and A-M. Slaughter, ‘Appraising the Methods of International Law: A Prospectus for Readers’ (1999) 93 *AJIL* 291, p.293. Cf. Hart’s positivist conception, which is understood to provide for a way to overcome the disadvantages of the voluntarist approach, and the focus on the will of the sovereign state - Hart, *The Concept of Law* (n.151).

¹⁷⁸⁸ This seems to be the case in *Omega*, where the understanding of human dignity adopted as a principle of Union law is deemed to be so broad as to find some foundation across the Member States: *Omega* (n.1331), Judgement, paras.37-38.

States providing the principle is deemed to be of an appropriate degree of significance¹⁷⁸⁹; this requires that both the aims and objectives of the Union order, and the national diversities must be engaged and intertwined in its analysis. Where there is an explicit divergence or where there is an absence of commonality, such principles cannot, it seems, be classified as common, as there is nothing to substantiate the characterisation. Thus, it is the existence of non-negligible divergences between the Member States¹⁷⁹⁰ that provides that not all principles of Union law can be understood to be common¹⁷⁹¹. These principles should rather, it is submitted, subscribe to the characterisation of generality.

Again, comparative analysis brings to light the absence of commonality across the national orders, and where relevant, at the international level and beyond the state. On the one hand, the CJEU might hypothesise as to the existence of commonality and its analysis might dictate that no such commonality exists; alternatively, the CJEU might recognise that divergence is likely, in light of the nature of the relevant issue at state. As noted, given that the CJEU currently makes no distinction between commonality and generality, all principles are characterised as general principles; the problematic, that is, the potential confusion, thus arises from the inconsistency surrounding the utilisation of “common” in the rhetoric of the CJEU. This, it is submitted, has the potential not only to undermine the clarity of the comparative analysis adopted but also, as Weatherill has noted, the Court’s “cavalier and scantily explained approach” also undermines the diversity between the legal systems of the Member States¹⁷⁹².

The CJEU has also recognised principles of Union law following a single national legal order, whereby a norm will be recognised as putatively common where it is deemed likely to be accepted in the courts of all of the Member States; this kind of development can be found in the CJEU’s adoption of the concept of misuse of power as derived originally from French administrative law¹⁷⁹³ and the notion of proportionality from German law¹⁷⁹⁴. These

¹⁷⁸⁹ In considering principles common to the laws of the Member States, the CJEU has made it clear that there is no need for a principle to exist in all legal traditions; rather, it is satisfactory that the particular principle is found in several systems: *Hoechst* (n.1265).

¹⁷⁹⁰ MacCormick, *Legal Reasoning and Legal Theory* (n.1782), pp.97-99; pp.100-128.

¹⁷⁹¹ Conway, ‘Levels of Generality in the Legal Reasoning of the European Court of Justice’ (n.691), p.797.

¹⁷⁹² S. Weatherill, ‘The ‘Principles of Civil Law’ as a Basis for Interpreting the Legislative Acquis’ (2010) *ERCL* 74, p.79.

¹⁷⁹³ P. Pescatore, ‘Le recours, dans la jurisprudence de la Cour de justice des Communautés européennes, à des normes déduites de la comparaison des droits des états membres’ (1980) 32 *Revue internationale de droit comparé* 337, p.354.

examples provide evidence of the scope for overlap in the characterisation of principles and transfers; in particular, the notion of proportionality might rather be said to be a vertical transfer, from the national to the supranational level. It is then recognised at the Union level, and sent back to all of the national systems as a principle of Union law. Indeed, in this case, the CJEU's (putative) engagement of comparative analysis would have indicated that there was no commonality. Rather, the Court identified the principle as such, against the background of its determination that it would likely be accepted across the courts of the Member States. In this example, the commonality is a fiction and it is the comparative analysis that alerts us to this. Furthermore, as discussed above¹⁷⁹⁵, notwithstanding the existence of diversities in the text and interpretation of norms across the Member States, the CJEU will recognise a principle that is deemed to be "internationally accepted"¹⁷⁹⁶ as a principle of Union law; as a general rule, principles of international law must be distinguished from those of European law¹⁷⁹⁷, notwithstanding that as a source of international law such principles are binding on the EU¹⁷⁹⁸. Moreover, the CJEU might recognise principles of Union law from the legislative *acquis*¹⁷⁹⁹, where a principle exists at the Union level but cannot be deemed to be common in respect of other sources of comparative analysis. It must therefore be considered that generality does not always equal commonality; the problematic of the current approach of the CJEU – where no explicit distinction is made between

¹⁷⁹⁴ *Verhältnismässigkeit*, N. Emiliou, *The Principle of Proportionality in European Law: A Comparative Study* (Kluwer, London; 1996), chp.2.

¹⁷⁹⁵ See Chapter 8.

¹⁷⁹⁶ See the reference to "general principles of law recognized by civilized nations" in Art.38 of the Statute of the ICJ, 26.06.1945, 33 UNTS 993.

¹⁷⁹⁷ Perhaps the external/international distinction made by can be employed to highlight this distinction; M. Hilf, 'Power, Rules and Principles – Which Orientation for WTO/GATT Law?' (2001) *Journal of International Economic Law* 111, as cited in Wouters *et al*, 'The Influence of General Principles of Law' (n.1759), p.5.

¹⁷⁹⁸ The binding nature of international law in respect of the EU is recognised in the TEU in Arts.3(5) ("In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter"), 21(1) ("...respect for the principles of the United Nations Charter and international law") and 21(2)(b) ("consolidate and support democracy, the rule of law, human rights and the principles of international law") and by the CJEU in *Racke* (n.1620), Judgement, paras.45-46 ("Racke is invoking fundamental rules of customary international law..."). The Court considered that Racke was invoking the principle of *rebus sic stantibus*, as an exception to the principle of *pacta sunt servanda*; it has been considered this was a wrong determination, in Wouters *et al*, 'The Influence of General Principles of Law' (n.1759), p.17. Reference must also be made to the *Kadi* case, in which the CJEU, in respect of the hierarchy of general principles, provided that international agreements, binding on the EU, must be understood as binding in respect of Union acts of a secondary nature but not over Union primary law; to this extent, it must also be understood that general principles have an interpretative purpose. *Kadi* (n.147), Judgement, paras.307-308, 316-17, in which the Court highlighted the distinct character of the EU legal order. See also G. de Búrca, 'The European Court of Justice and the International Legal Order After Kadi' (2010) 51 *Harv.Int.L.J.* 1.

¹⁷⁹⁹ *Transocean Marine Paint* (n.1773), Judgement, para.15.

commonality and generality but both labels are used interchangeably – is that it engenders a lack of clarity as to the methodology of the AG and the Court, in addition to the understanding of the foundations, status and role of the relevant principle, as well as the context in which it has been recognised¹⁸⁰⁰.

Notwithstanding the CJEU’s recognition of a breadth of principles of Union law, it is clear that there neither exists a characterisation of such principles – the commonality/generality distinction having been advanced in the previous paragraphs – nor an agreed, clear or coherent methodology on the basis of which Union principles are identified and recognised¹⁸⁰¹; indeed, the “robustness” of the CJEU’s methodology has been called into question¹⁸⁰². The problematic is not confined to the European sphere; in the international law context, the methodology engaged in the recognition of principles of international law - understood to be “recognized and accepted in international doctrine and jurisprudence” - has been criticised as “a remarkably unsophisticated approach to interactions among legal systems”¹⁸⁰³. The analysis that follows aims to determine whether a more consistent methodology can be identified, one which engages with the distinction outlined above and which might cohere with the manifestations and rationales of comparison set out above.

As a general rule, principles of Union law are derived from norms; notwithstanding, they differ from those norms to the extent that they are rather abstractions as opposed to rules of specific application. This suggests that it is not the principle itself which is identifiable within a (national, Union, international or private) culture or tradition (existing within or beyond the nation state) but rather a set of rules from which a principle can be abstracted¹⁸⁰⁴, and in respect of which, an interpretation can be derived in a particular set of facts, situating the principle in time and space. On this basis, it is submitted that arguably, an approach based on

¹⁸⁰⁰ For example, this might be said to be the situation in those cases in which the AG and the Court has recognised a principle of Union law (reference might be made to the notion that full performance of a contract results from the discharge of the mutual obligation under the contract, or the termination of the contract, and the notion of good faith and unjust enrichment) and those cases in which the AG and the Court has refused to recognise a principle of Union law (reference can be made to the *Audiolux* case; *Audiolux* (n.1579)).

¹⁸⁰¹ Ellis, ‘General Principles and Comparative Law’ (n.1632), p.950; In the international law context, the methodology for recognising general principles, understood to be “recognized and accepted in international doctrine and jurisprudence” has been criticised as “a remarkably unsophisticated approach to interactions among legal systems”.

¹⁸⁰² Editorial Comments, ‘The Scope of Application of General Principles of Union Law’ (n.1312), p.1589; the main discussion in this commentary concerns what is necessary for the acts of a Member State to “fall within the scope of the Treaties” such that general principles of Union law might be invoked.

¹⁸⁰³ Ellis, ‘General Principles and Comparative Law’ (n.1632), p.950.

¹⁸⁰⁴ Ellis, ‘General Principles and Comparative Law’ (n.1632).

the mere identification of similarities and differences is not sufficient to identify the relevant content, and putative status of the principle. Generally, the identification of commonality from sources of comparison is done via an inductive process. Where such an approach is adopted – regardless of the sources, it seems – it becomes clear, as Semmelmann has highlighted, that the task of the CJEU is one that is often tenuous and “time-consuming”¹⁸⁰⁵, to the extent that, as noted above, the comparative analysis must be thorough and should reflect the complex comparison outlined above, extending beyond the text to the interpretation and context of the relevant norms. To combat this complexity, different approaches have been advanced. To the extent that the problematic of seemingly “representative” legal families has been challenged in the introduction and Part I (as a means of generating representation without such comprehensive comparative analysis), it brings to the fore the problematic posed by the question of resources, which is one that might potentially be solved by virtue of better communication on the part of judges, the establishment of databases of case law, and the explication of relevant development in scholarship accessible to judges. Furthermore, where commonality is recognised as deriving from an international treaty or a codification of norms, it has been suggested that the need for comprehensive comparative analysis is potentially undermined¹⁸⁰⁶. This is neither to suggest that the need for comparative analysis disappears entirely, nor that the interpretation will necessarily be identical across the Member States simply because the norm has been expressed in a common text within a treaty or a codified document. Rather, it is to suggest that *prima facie*, the need for comparative analysis might fade¹⁸⁰⁷, where the norm is enshrined in a common text, at the European or international level, where it did not previously exist; in this case, prior to its codification, reference would have been made to the relevant national, international or non-state orders to identify even the content of a potential norm. Notwithstanding, the need for comprehensive comparative analysis remains¹⁸⁰⁸ as such an approach might only be relevant in a limited number of cases; furthermore, it has the potential to stifle legal development, rendering it static.

¹⁸⁰⁵ Semmelmann, ‘Legal Principles in EU Law’ (n.1564), p.14, fn.65.

¹⁸⁰⁶ See the discussion of the interpretation of fundamental rights in light of the CFR in Chapter 7.

¹⁸⁰⁷ This assertion seems to find support in an argument made by Rosas, writing extra-judicially, which seems to suggest that reference to the CFR - in the context of a discussion of fundamental rights at the national level - removes the need for reference to be made to national laws, or national constitutional traditions: Rosas, ‘When is the EU Charter of Fundamental Rights Applicable at the National Level?’ (n.1648), p.1272.

¹⁸⁰⁸ See the discussion in Chapter 8.

In respect of the identification of principles of Union law in the absence of commonality, the CJEU has made clear that there is no need for its existence across all cultures and traditions¹⁸⁰⁹ to be recognised at the Union level; rather, it is satisfactory that the particular principle is found in several systems¹⁸¹⁰ or a “sufficiently large number of domestic legal systems”¹⁸¹¹. For Conway, the significance of an analysis of the CJEU jurisprudence relating to the engagement of generality derives from the potential to better understand the “levels of generality or abstraction” engaged by the CJEU to determine the extent of its discretion in relation to the interpretation of EU law. Of two alternatives, one which engages coherence as a guiding principle¹⁸¹² and another which looks to the most relevant legal culture or tradition¹⁸¹³, Conway argues that the approach focusing on the latter is most appropriate because it constitutes the “least subjective” alternative¹⁸¹⁴. In respect of commonality, he identifies two alternative methods: one, which involves deriving a solution to a specific legal problem from the principles common to the laws of the Member States and another, which involves looking to the principles of public international law. The extent of the discretion exercised by the CJEU has the potential to shape the understanding of its legitimacy, of relevance given the specifically constitutional nature of the CJEU’s interpretation or primary and secondary law, particularly as it is neither a democratically-elected body nor are its decisions easily reversed¹⁸¹⁵. The understanding of the way in which the level of abstraction affects the utilisation of general principles and their relevance to the development of the legal order in which they are engaged, are diverse. On the one hand, it has been considered that if general principles reach such a high level of abstraction, they are rendered of little use to a

¹⁸⁰⁹ *Hoechst* (n.1265). However, this approach is not as clear as it might appear. In *Mangold*, the CJEU recognised the principle of non-discrimination on the basis of age as a general principle. The principle has been criticised to the extent that it is not a principle, which finds unequivocal support in all Member States.

¹⁸¹⁰ *Hoechst* (n.1265). A distinction can be made with the situation in international law, where the ICJ has asserted that a (relatively high) standard of “representativeness” is required for the recognition of a general principle, that is, as existing in most, if not all, national legal systems; see *Prosecutor v Kupreskic* (Appeal Judgement) ICTY-IT-95-16-A (03.10.2001), p.75.

¹⁸¹¹ Ellis, ‘General Principles and Comparative Law’ (n.1632), p.953.

¹⁸¹² Per L.T. Tribe and M.C. Dorf, ‘Levels of Generality in the Definition of Rights’ (1990) 57 *Univ.Chic.Law.Rev.* 1057 (and also, as Conway notes, finding support in Dworkin’s desire for fit, and an integrity-based interpretation of a constitution – R.M. Dworkin, *Law’s Empire* (HUP, Cambridge; 1986), pp.228-258.).

¹⁸¹³ Conway, ‘Levels of Generality in the Legal Reasoning of the European Court of Justice’ (n.691), pp.791-792. The notion of looking to the “most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified” follows from *Michael H v Gerald D* 491 US 110 (1989), fn.6 of the majority opinion of Judge Scalia. The reference to the “most specific” dictates that this approach should guide the interpretation even if it only to be identified in one national legal system; in the alternative, Conway makes reference to the approach most common to the laws of the Member States.

¹⁸¹⁴ Conway, ‘Levels of Generality in the Legal Reasoning of the European Court of Justice’ (n.691), p.805.

¹⁸¹⁵ Conway, ‘Levels of Generality in the Legal Reasoning of the European Court of Justice’ (n.691), p.789.

court¹⁸¹⁶; on the other hand, the advantage of general principles is identified in their abstract character, to the extent that their lack of precision allows for their evolution and renders them dynamic and flexible¹⁸¹⁷ and capable, via their identification, recognition and content, of being applied in different ways in the divergent legal cultures and traditions of the Member States¹⁸¹⁸ and also beyond the national context. An analogy can be drawn with the way in which Tribe and Dorf have considered the notion of generality in terms of the protection of rights: "...at what level of generality should the Court describe the right previously protected and the right currently claimed? The more abstractly one states the already-protected right, the more likely it becomes that the claimed right will fall within its protection"¹⁸¹⁹. Indeed, AG Trstenjak has highlighted that principles "differ from specific rules of law in that they claim a certain degree of general validity and are not restricted to a certain area of law"¹⁸²⁰, suggesting the scope for their facilitating cross-sectoral (as well as cross-border) impact. In this respect, the notion of generality might be extended beyond the reflection of the content and status of the principle itself to evaluate a necessarily related consideration, that is, the nature of the CJEU's reasoning in respect of the degree of its judicial discretion.

The CJEU's approach to legal reasoning in its recognition of Union principles is therefore necessarily reflective of the rationales underpinning the engagement of comparative analysis not only for the purposes of identifying relevant norms and recognising principles, but also for the purposes of uncovering the use to which such principles might be put¹⁸²¹. The analysis above illustrates that the CJEU does not merely look to identify similarities or differences, either for the purposes of highlighting the existence of the former or suppressing the latter. Rather the CJEU's identification and recognition of principles of Union law seems to illustrate its jurisdiction "in its more creative and expansive part"¹⁸²² in interpreting EU law¹⁸²³ and in filling gaps¹⁸²⁴, the latter consideration being of particular significance in

¹⁸¹⁶ P. Weil, 'Le droit international en quête de son identité. Cours général de droit international public' (1992) 237 *RCADI* 146, pp.146-147.

¹⁸¹⁷ R. Kolb, 'Principles as Sources of International Law' (2006) *NILR* LIII, p.9.

¹⁸¹⁸ Conway, 'Levels of Generality in the Legal Reasoning of the European Court of Justice' (n.691), p.793.

¹⁸¹⁹ Tribe and Dorf, 'Levels of Generality' (n.1812), p.1060.

¹⁸²⁰ *Audiolux* (n.1579), Opinion of AG Trstenjak, para.87, citing Tridimas, *The General Principles of EC Law* (n.1475), p.1 and his distinction between a rule and general principle.

¹⁸²¹ O. de Frouville, 'Les tribunaux pénaux internationaux et les principes de droit: Quelques commentaires' in M. Delmas-Marty *et al* (eds.), *Les sources du droit international pénal: L'expérience des tribunaux internationaux et le statut de la Cour pénale internationale* (UMR de droit comparé de Paris, Paris; 2004), pp.389-393, p.392.

¹⁸²² Hesselink, 'A Toolbox for European Judges' (n.707), p.9.

¹⁸²³ K. Lenaerts and J.A. Gutiérrez-Fons, 'The Constitutional Allocation of Powers and General Principles of EU Law' (2010) 47 *CMLR* 1629, pp.1631 *et seq.* Lenaerts and Gutiérrez-Fons make reference to four functions of

respect of facilitating the better understanding of the interrelationship of national, European and international legal orders¹⁸²⁵.

The CJEU's recognition of principles might be understood to be part and parcel of the engagement of its obligations under Art.19 TFEU in ensuring that the law is observed in its interpretation and application of European legal provisions, and in promoting greater coherence and certainty, ensuring "consistency between its policies and activities" per Art.7 TEU. The identification and recognition of Union principles in itself might provide for the cultivation of the Europeanisation of private law in an ordered and systematic manner by the CJEU¹⁸²⁶. Notwithstanding, the jurisdiction and role of the CJEU and the scope for its evolution must be considered in light of the Union legislature and its approach to harmonisation; that is to say, the CJEU must ensure it acts within its competence¹⁸²⁷. Yet even where the CJEU might not be able to go beyond the recognition of either a general or a common principle – that is to say, in terms of clarifying their specific application or the relationship with other norms - as Bradgate *et al* consider, there is scope – via the notions of transfer, communication and dialogue – for the recognition of a general or a common principle to be "fleshed out" by more specific rules¹⁸²⁸ established at the transnational, international, European or national level.

Indeed, one key rationale, which cuts across both the reasoning underpinning the recognition of the principle and the purpose of the principle itself, is the existence of a gap at either the national or European level. Inherently related to gap-filling is the facilitation of coherence and systemisation which, given the scope for fragmentation arising from the interaction of the national and European orders and consequent to the "piecemeal" nature of Union legislative activity, is particularly prevalent to the Europeanisation of private law. Gap filling suggests

general principles, namely, gap-filling, as an interpretative aid, as a basis for judicial review, and in the allocation of powers between the EU and Member States; in their analysis, they focus on the latter.

¹⁸²⁴ Lenaerts and Gutiérrez-Fons, 'The Constitutional Allocation of Powers and General Principles of EU Law' (n.1823), pp.1631 *et seq.*; see also, *Palacios de la Villa* (n.1759), Opinion of AG Mazak, para.85: "added flesh to the bones of Community law".

¹⁸²⁵ Tridimas, *The General Principles of EC Law* (n.1475), pp.31 *et seq.*

¹⁸²⁶ Mak, 'Harmonisation through 'Directive-Related' and 'Cross-Directive' Interpretation' (n.313), p.4.

¹⁸²⁷ Consider the criticism of the *Mangold* decision and the identification of a general principle of non-discrimination, particularly in respect of the notion that the CJEU overlooked the non-horizontal effect of directives, referring instead to what it deemed to be a general principle.

¹⁸²⁸ R. Bradgate, C. Twigg-Flesner and A. Norhausen, 'Review of the Eight Consumer Acquis Minimum Harmonisation Directives and Their Implementation in the UK and Analysis of the Scope for Simplification' (2005, URN 05/1952) (<<http://www.berr.gov.uk/files/file27200.pdf>>; Last Accessed: 22.02.2012), p.203.

that principles of Union law are identified and recognised where the issue at hand can be governed neither expressly nor by deduction from existing national or primary or secondary Union law. Lenaerts and Gutiérrez-Fons therefore consider that the rationale of gap filling allows for the identification of principles by virtue the CJEU’s exercise of its adjudicatory function via the preliminary reference procedure in light of the EU’s *sui generis* character; in respect of the latter, it is the distinct nature of the Union legal order that constitutes the specific legitimacy basis for the gap-filling role¹⁸²⁹. The recognition of principles is deemed to be legitimate to the extent that these principles lend coherence to what would otherwise be an incoherent (and thus, potentially implausible as fully autonomous) legal order¹⁸³⁰. They assert however that only those principles which have “grounding” consequences, “intrinsically linked to the nature, objectives and functioning of the Union” can be “found” by the CJEU, either in the Union itself (in the Treaty structure, namely, Arts.6(3) and 19 TEU and Art.340 TFEU) or in international treaties or the cultures and traditions of the Member States¹⁸³¹. In respect of the recognition of principles via the preliminary reference procedure, reference has been made to the notion that the engagement of a teleological and functional¹⁸³² comparative analysis also forms part of the CJEU’s methodology; that is to say, the principle recognised must fit with the aims and objectives of the Union and it is through this analysis that its purpose and function – that is, its essence – can be identified¹⁸³³. The notion of essence invokes the delineation of the principle, which might amount to its stripping back to its strictly legal content. From the legal-cultural perspective advanced for the purposes of the thesis, not only might the notion of the essence of the norm be challenged as attributing too little consideration to its non-legal dimensions but it is from the social, and more broadly, cultural, perspective that functionalism, and functional comparison, has received its fiercest critique. Thus, Frankenberg has challenged functionalism on the basis that it “negates the

¹⁸²⁹ Indeed, a problematic with generality arises from the fact that it might rather be understood to undermine legitimacy and the operation of the rule of law, where generality operates within no fixed bounds in the absence of a fixed or coherent judicial methodology, which gives rise to its potential to violate principles of legal certainty and objectivity; Conway, ‘Levels of Generality in the Legal Reasoning of the European Court of Justice’ (n.691), p.788. Furthermore, the gap-filling function renders general principles with a “subsidiary” character in international law; H. Lauterpacht, *Private Law Sources and Analogies of International Law* (Green, London; 1927), p.85.

¹⁸³⁰ Lenaerts and Gutiérrez-Fons, ‘The Constitutional Allocation of Powers and General Principles of EU Law’ (n.1823), p.1632, citing *Van Gend en Loos* (n.219), as to the *sui generis* character of the Union legal system.

¹⁸³¹ Lenaerts and Gutiérrez-Fons, ‘The Constitutional Allocation of Powers and General Principles of EU Law’ (n.1823), p.1632.

¹⁸³² Zweigert and Kötz, *Introduction to Comparative Law* (n.23), p.34 – “of functionality...that the legal system of every society faces essentially the same problems and solves these problems by quite different means though very often with similar results”. It must be briefly noted that teleology and functionalism cannot be understood to be limited by each other.

¹⁸³³ Ellis, ‘General Principles and Comparative Law’ (n.1632), p.960.

interaction between legal institutions and provisions by stripping them from their systemic context and integrating them in an artificially universal typology of ‘solutions’. In this way, ‘function’ is reified...”¹⁸³⁴. Yet, the understanding of principle need not be confined in this way; indeed, even the functional approach might facilitate an approach which attributes significance to the cultural, political and socio-economic dimensions of the relevant norms. Indeed, within the CJEU, Trstenjak has recognised that principles are linked to culture, and “embody fundamental legal concepts and values inherent in a legal order”¹⁸³⁵. This understanding can also be identified in the fundamental rights case law explored in Chapter 7, and particularly in *Stauder*¹⁸³⁶.

As the analysis above illustrates, the CJEU might exercise a wide discretion in following (or disregarding) the identification of commonality or generality at the Union level. While this discretion reflects the foundations for a distinction in the characterisation of principles, it further suggests that the CJEU might rather adopt a different yet interrelated approach. This might be one based on the identification of “best solutions”, which has been introduced above as a rationale underpinning the engagement of comparative analysis in the Europeanisation of private law¹⁸³⁷. The legitimacy bases of each diverge; both the generality and commonality¹⁸³⁸ approaches are seemingly legitimised from the principles’ abstraction from norms identifiable in the national orders, at the Union or the international levels, in light of a finding or absence of commonality. It has been suggested that the identification of the “best solution” also arises from its “frequency”¹⁸³⁹; however, there is little to suggest that commonality renders one particular solution “best”. As noted above, there has been little consideration in comparative law scholarship – and particularly in functional theories – of the basis upon which a solution is deemed to be best¹⁸⁴⁰. Indeed, the need for a metric is recognised in law and economics scholarship, particularly to the extent that, in the absence of

¹⁸³⁴ Frankenberg, ‘Critical Comparison’ (n.490), p.440.

¹⁸³⁵ *Audiolux* (n.1579), Opinion of AG Trstenjak, para.87, citing Tridimas, *The General Principles of EC Law* (n.1475), p.1 and his distinction between a rule and general principle.

¹⁸³⁶ *Stauder* (n.682), *Nold* (n.791), Judgement, para.13, *Internationale Handelsgesellschaft* (n.1256), Judgement, paras.1146-7.

¹⁸³⁷ See Chapters 3 and 8.

¹⁸³⁸ Verhoeven asserts that “the Union must respect fundamental principles *because* they are ‘common to the Member States’ and *as they are defined by* what is common in them”. A. Verhoeven, *The European Union in Search of a Democratic and Constitutional Theory* (Kluwer, The Hague; 2002), p.322.

¹⁸³⁹ For example, consider Saleilles, who asserted that the “droit idéal relatif” could be identified from that which appears in most systems: Saleilles, ‘Conception et objet de la science du droit comparé’ (n.446).

¹⁸⁴⁰ See the discussion in Chapter 3. See also, Michaels, ‘The Functional Method’ in Reimann and Zimmermann, *Oxford Handbook of Comparative Law* (n.449), p.374: “comparative material gives no guidelines, even commonality has no independent normative force”.

a metric, legal actors might essentially engage in “herd behaviour”, following the approach of a legal system notwithstanding that this approach might not be appropriate¹⁸⁴¹.

While Zweigert assumed that the identification of “best solutions” was a task that falls within the scope of the comparatist’s general task¹⁸⁴² - and as such, offered no guidance as to its determination - his understanding does not reflect a neutral character of the determination. In the context of the CJEU’s interpretative jurisdiction, it has long been recognised that the determination must reflect a normative one; that is to say, in the absence of distinct criteria, it has been suggested that the approach rather depends on the purpose for which the comparative analysis is adopted. AG Lagrange has considered that it is the teleology of the Union which guides the AG and the Court: “those solutions which, having regard to the objects of the Treaty, appear to it to be the best or, if one may use the expression, the most progressive” should be identified¹⁸⁴³. Similarly, Maduro asserts that neither the AG nor the Court will look to identify the “best solution” “in abstract” but rather that the determination must be made in a particular case, via comparative analysis, in light of the aims and objectives of the Union¹⁸⁴⁴.

It is submitted that the engagement of the complex understanding of comparison best facilitates the identification of the relevant factors that shape the determination as to the “best solution”. As complex comparison requires that the perspective of the analysis is identified, it should also allow for the identification, determination and clarification of the legal, cultural, political and socio-economic contexts in which the AG and the Court seek to identify “best solutions”, a determination which might be limited or absent in orthodox conceptualisations of comparison. This context also encompasses the identification of the aims of the researcher (i.e. the AG or the Court) and his audience (predominantly, the national courts but increasingly, international courts, civil society bodies¹⁸⁴⁵ and private individuals) and the

¹⁸⁴¹ F. Gomez, ‘Some Law and Economics of Harmonizing European Private Law’ in A.S. Hartkamp *et al* (eds.), *Towards a European Civil Code* (Kluwer, The Hague; 4th edn., 2011), pp.401-426, pp.405-406.

¹⁸⁴² Zweigert and Kötz have argued that “the comparatist uses just the same criteria as any other lawyer who has to decide which of two possible solutions is more suitable and just”: Zweigert and Kötz, *Introduction to Comparative Law* (n.23), p.47.

¹⁸⁴³ *Hoogovens* (n.1545), Opinion of AG Lagrange, paras.283-284.

¹⁸⁴⁴ Maduro, ‘Interpreting European Law’ (n.397), p.7: “As a consequence, a comparative law methodology that would amount to a simple arithmetic exercise will also ignore the value of constitutional pluralism. It will also ignore that such comparative exercise takes place not as an academic exercise but in the context of questions arising within the EU legal order and should be mindful of the specificities of this legal order”.

¹⁸⁴⁵ The limited *locus standi* for interested parties other than states dictates that those parties must show a direct interest (per Art.40 and Art.23-23a of the Statute of the Court of Justice of the European Union) to advance its

limits of such objectives. This dictates that the “best solution” must be identified with regard to the particular issue arising before the CJEU and suggests that its legitimacy basis lies largely in the subjective assessment and determination of the judge, legislature or academic¹⁸⁴⁶. Moreover, this understanding necessarily dictates that the evaluation will be a political one, the precise evaluative criteria of which will shift, depending on the specific nature of the case; as such, like principles, best solutions are not fixed but situated via interpretation in light of a given set of facts.

Thus, as noted, the identification of the “best solution” or that which is “most carefully considered” must be undertaken in light of the analysis of “the spirit, orientation and general tendency of the national laws”¹⁸⁴⁷ but also in light of the structure, aims and objectives of the Union¹⁸⁴⁸. These aims and objectives can be identified by the CJEU by virtue of its teleological approach, however this in itself is not enough; these determinations also need to be aligned with the nature of the national orders. Comparative analysis uncover the diverse societal and institutional framework of law-making across the Union, including the values and policy preferences existing within the Member States, and furthermore, the scope for the adaptability of the CJEU’s judgement therein, in light of its potential political, cultural, and socio-economic impact; this arguably renders the solution identified more likely to be deemed acceptable by the national courts. This approach engages evaluative comparison, which dictates neither the need for a finding of unanimity nor for a majority finding; rather the determination of the legal system emerges as the most carefully considered over time, and furthermore, what might be the “best solution” in light of developing trends. That is to say, this approach facilitates the uncovering of the scope for impact in the referring legal order and across legal orders (both national and beyond the state), and the understanding of legal change as political, cultural and social as well as legal and economic; moreover, it would not only go beyond mere description but also transcend the limits of methodological nationalism, set out in Chapter 2.

views – albeit new grounds cannot be raised - before the CJEU. The observations of such parties will normally only be transferred to the CJEU in paper form where those parties made observations before the national court; this rather exceptional possibility can be identified in the *NS* case (C-411/10 *NS* [2011] ECR I-13905).

¹⁸⁴⁶ R. Schulze, ‘European Private Law: Political Foundations and Current Challenges’ in R. Brownsword *et al* (eds.), *The Foundations of European Private Law* (Hart, Oxford; 2011), pp.293-307, pp.303-304.

¹⁸⁴⁷ *AM&S* (n.1686), Judgement, pp.1599-1600.

¹⁸⁴⁸ *Werhahn* (n.1262), Opinion of AG Roemer, 1259-1260.

This section has firstly evaluated the reasoning underpinning the CJEU's recognition of principles of Union law and has advanced a distinction of characterisation between those which are common and those which are general, based on the CJEU's engagement of comparative analysis. On this basis, an attempt has been made to clarify the ambiguous methodological approach of the CJEU, building on the foundations of the classifications of sources of comparative analysis and rationales of comparison, elaborated above. The following section aims to augment this analysis, and specifically engages the scope for a link to be drawn between the identification and recognition of principles of Union law, the determination of "best solutions" and the scope for transfers, and the relevance of dialogue therein.

II. The Integration of Comparative Analysis into the CJEU's Other Meta-Mechanisms of Europeanisation

This section engages with the notion that principles in themselves might also be functional; such an assertion is not necessarily new; the relevance of the critique advanced against functionalism has been outlined in Chapter 3¹⁸⁴⁹. In particular, principles, and the values underpinning, have been engaged as promoting a "continuous flux of ideas and exchange of opinion between the ECJ and its national counterparts"¹⁸⁵⁰ and facilitating judicial dialogue in general¹⁸⁵¹. In light of the significance of function, it must also be recognised that a "court's choice of interpretive methodology will affect more than the outcome of the particular case before it. It will also likely affect the broader constitutional culture of the interpreting court's jurisdiction"¹⁸⁵². Clearly, while there exists a degree of interrelation between comparative analysis, the identification of generality or commonality or "best solutions" and the scope for transfer, a "chicken and egg" situation also arises; that is to say, it is not clear which comes first. On the one hand, commonality and generality can be understood as the products of processes of transfer. Indeed, Slaughter notes that "[i]ncreasing cross-fertilization of ideas and precedents among constitutional judges around the world is gradually giving rise to

¹⁸⁴⁹ Frankenberg, 'Critical Comparison' (n.490), p.440.

¹⁸⁵⁰ Lenaerts and Gutiérrez-Fons, 'The Constitutional Allocation of Powers and General Principles of EU Law' (n.1823), p.1630.

¹⁸⁵¹ Rosas, 'The European Court of Justice in Context' (n.890), p.15.

¹⁸⁵² S. Choudhry, 'Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation' (1999) 74 *Indiana Law Journal* 819, p.841.

increasingly visible international consensus on various issues”¹⁸⁵³. Yet the CJEU’s recognition of principles of Union law via comparison also has the potential to foster lines of communication and dialogue, upon which the basis for transfer can be established and developed. However, it should be noted that there exists scope for transfer beyond commonality and generality; fundamentally, it is recognised that transfer does not necessarily result in commonality. This is clear from Teubner’s discussion of legal irritants, discussed below and can be evidenced in respect of, for example, the different interpretations rendered of the concept of good faith¹⁸⁵⁴ across the Union space, notwithstanding the recognition of commonality, albeit only in terms of the text of the relevant norms¹⁸⁵⁵. The context of transfer, whether horizontal or a vertical¹⁸⁵⁶, must therefore be considered to be fundamental. Analogy has been defined as “reasoning by example” whereby the comparatists looks to identify a similar problem to the one faced by the relevant court, and who then, having identified the potential analogy with the relevant solution, must establish the scope for its transfer¹⁸⁵⁷.

¹⁸⁵³ Slaughter, *A New World Order* (n.803), p.78.

¹⁸⁵⁴ There already exists a vast amount of literature on the development of a doctrine of good faith within the European context; see, amongst others: K. Riesenhuber, *System und Prinzipien des Europäischen Vertragsrechts* (W. De Gruyter Recht, Berlin; 2003), pp.398-414; R. Zimmermann and S. Whittaker, *Good Faith in European Contract Law* (CUP, Cambridge; 2000); T. Wilhelmsson and C. Twigg-Flesner, ‘Pre-Contractual Information Duties in the *acquis communautaire*’ (2006) 2 *ERCL* 441; O. Lando, ‘Is Good Faith an Over-arching General Clause in the Principles of European Contract Law?’ (2007) 15 *ERPL* 841.

¹⁸⁵⁵ Thus, this relates not only to the recognition or reluctance to recognise good faith as an overarching principle of law but the way in which it has been interpreted. To engage the trite distinction, the English courts, historically, have largely rejected an overarching principle of good faith (House of Lords, EU Select Committee ‘European Contract Law: The Draft Common Frame of Reference’ (The Stationery Office, London; 2008-09), paras.31-38; *Interfoto Picture Library v. Stiletto* [1989] 1 QB 433 at 439 per Bingham LJ: “English law has, characteristically, committed itself to no such overriding principle but has developed piecemeal solutions in response to demonstrated problems of unfairness”) but have more recently begun to recognise the scope for a move towards the recognition of the duty, if not overarching, with regard, most recently, to the scope for an implied duty, depending very much on the context of the dispute (*Yam Seng Pte Ltd v International Trade Corporation Ltd* [2013] EWHC 111 (QB) and *Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd (t/a Medirest)* [2013] EWCA Civ 200, and H. Beale, *Chitty on Contracts* (Sweet & Maxwell, London; 30th edn., 2008), pp.31 *et seq.*, for an overview of developments). On the other hand, one might refer to the recognition of such an overarching principle in continental and mixed legal systems, and the difference of interpretation; see, for example, H.L. MacQueen, ‘Good Faith’ in H.L. MacQueen and R. Zimmermann (eds.), *European Contract Law: Scots and South African Perspectives* (Edinburgh University Press, Edinburgh; 2006), pp.43-73, especially pp.47- 68; in French law, the notion of *bonne foi*, has been recognised, among other contexts, in contract performance, in terms of *l’obligation de loyauté*, *l’obligation de résultat* and *l’obligation de moyen* (Cass., 8.4.1987, *Bull.*, III, n°88, p. 53, *RTD civ.* 1988, 122; Cass., 5.6.1968, *D.*, 1970, 453). In German law, §242BGB provides for *treu und glauben* generally, while §§138 and 826 provide for further expressions of good faith, amongst others.

¹⁸⁵⁶ Lauterpacht, *Private Law Sources and Analogies of International Law* (n.1829), p.85.

¹⁸⁵⁷ Weinrib, *Legal Reason* (n.1578), p.4.

i. The Use of Legal Transfers as an Instrument of the Europeanisation of Private Law

The notion of the transfer (of legal doctrines, principles and concepts) has long been considered significant to dynamic legal development and the scope for changes, particularly in light of the Europeanisation of private law; indeed, it has been suggested that “[t]he tendency to borrow and even copy has been most significant in times of general transition in the legal system”¹⁸⁵⁸. This is an empirical claim which can be verified by analysing the occurrence of transfers at various points of transition, within and beyond the boundaries of national orders¹⁸⁵⁹.

The transfers discourse, outlined in Chapter 3, has been largely shaped by Watson¹⁸⁶⁰ and Legrand¹⁸⁶¹ and has been augmented by the contribution of Teubner and the integration of the systems theory analysis, which is engaged as a means of bridging the discussion between the understanding of transfers and dialogue between the courts and other institutions. At the outset, it is worth noting that terminology is important; “legal transplant”, “legal borrowing”, “legal migration”¹⁸⁶² and “legal transfer” are used interchangeably yet none seem entirely appropriate. Bell distinguishes transplantation and cross-fertilisation¹⁸⁶³; “transplantation” is used to signify movement *to* one or more legal systems, and transplantation, the direct “transposition of a doctrine from one legal system to another”. “Borrowing” reflects movement *from* one or more legal systems and “migration”, the wandering or drifting *between* systems, which may not necessarily be purposeful. Herein, transfer is used as an overarching term; the difficulties in employing such a broad term are recognised. It is

¹⁸⁵⁸ D. Barak-Erez, ‘The Institutional Aspects of Comparative Law’ (2009) 15 *Col.J.Eur.Law.* 478, p.480 (footnotes omitted).

¹⁸⁵⁹ To the author’s knowledge, no such study has been undertaken. The term “transition” is an important one. On the one hand, it could be said that many legal traditions are in a constant state of transition, while on the other, certain periods of change are of particular significance, for example, periods of colonialisation or the disintegration of the Soviet Union, which threw the legal systems of many of what are now understood as Central and Eastern European states into disarray. See specifically in relation to codification in light of an existing European code, Zimmermann, ‘Codification’ (n.166) and more recently, C. Jessel-Holst *et al* (eds.), *Private Law in Eastern Europe – Autonomous Developments or Legal Transplants?* (Mohr Siebeck, Tübingen; 2010).

¹⁸⁶⁰ See Watson, *Legal Transplants* (n.575); A. Watson, ‘Legal Transplants and European Private Law’ (2000) 4 *EJCL* (<<http://www.ejcl.org/ejcl/44/44-2.html>>; Last Accessed: 12.12.2011).

¹⁸⁶¹ See Legrand, ‘The Impossibility of Legal Transplants’ (n.465); P. Legrand, ‘On the Singularity of Law’ (2006) 47 *Harv.Int.L.J.* 517.

¹⁸⁶² N. Walker, ‘The Migration of Constitutional Ideas and the Migration of the Constitutional Idea: The Case of EU’ *EUI WP 2005/04*.

¹⁸⁶³ J. Bell, ‘Mechanisms for Cross-Fertilisation of Administrative Law in Europe’ in J. Beatson and T. Tridimas (eds.), *New Directions in European Public Law* (Hart, Oxford; 1998), pp.147-168.

employed in the same way as Wittgenstein questions the retention, after a period of time – that is, when the original situation has developed – of the “ladder that was so helpful to reaching the top”¹⁸⁶⁴; in this case, the term transfer is the ladder, critical to the very point of analysis. Thus, it is engaged, not to elude the nuances of the discourse but to facilitate analysis without becoming bogged down in terminological and conceptual difficulties.

At the outset, it is worth noting that with regard to the nature of transfers, reference can be made to those of a vertical, and those of a horizontal character. Notwithstanding their acceptability as such – which will be discussed in more detail below - both, it seems can be identified at and between different levels, that is, at the national, European and international levels. Vertical transfers are understood as those occurring between the national and supranational levels (whether EU, international or transnational law) and *vice versa*. Transfers occurring from the supranational to the national levels might be the most common; such transfers are identifiable with regard to the imposition of human rights obligations directly on a Member State via an international treaty, or Union legislation, for example, the ECHR and CFR, respectively. However, it is also recognised that transfers might occur from the national level to the supranational level, where a norm (a rule, principle or practice) is identified within one or more national legal orders and adopted, in line with Union aims and objectives, at the Union level. Horizontal transfers might occur between institutions operating at one level within a multi-level context of regulation. In respect of the Europeanisation of private law, horizontal transfers, understood broadly as cross-references, might be identifiable at the European level; notwithstanding, it is difficult to identify a “pure” horizontal transfer between the Member States¹⁸⁶⁵, that is, one which does not find its origins in a vertical transfer from the supranational to the national level, reflected, for example, in the

¹⁸⁶⁴ L. Wittgenstein, *Tractatus Logico-Philosophicus* (Harcourt, London; 1921), s.6.54.

¹⁸⁶⁵ The scope for horizontal transfer – rather, reflecting the scope for judicial borrowing - which does not find its basis in vertical transfer can be identified in the House of Lords case of *Fairchild v Glenhaven Funeral Services Ltd & others* [2002] UKHL 22 concerning the attribution of liability in respect of wrong suffered by an individual, where it was not possible to identify which party (all in breach of duty) had caused which harm. Lord Bingham, who made reference to “the wider jurisprudence” at para.24 *et seq.*, engaged in a comparative analysis, identifying the absence of a solution (or rather, the unsatisfactory nature of the existing rule in light of doing justice), and the way in which other solutions has been tried and tested in other contexts. Recognising the social and cultural development across Europe, against the background of harmonisation efforts (citing W. van Gerven *et al*, *Cases, Materials and Text on National, Supranational and International Tort Law* (Kluwer, The Hague; 2000) and C. von Bar, *The Common European Law of Torts* (OUP, Oxford; 2000)) Lord Bingham considered that while legal development could not rest on a “head count” of applicable norms in itself, it should be based on the need to do justice, “...if consideration of international sources suggests that a different and more acceptable decision would be given in most other jurisdictions, whatever their legal tradition, that must prompt an anxious review [of the English rule]...In a shrinking world... there must be some virtue in uniformity of outcome whatever the diversity of approach in reaching that outcome”, para.32 per Lord Bingham.

imposition of a regime by virtue of a Union directive¹⁸⁶⁶. The existence and nature of transfers are perhaps most clear with reference to examples; the following examples are extracted from the case studies above to determine the relevance of comparative analysis underpinning the CJEU's engagement with transfer, and whether these manifestations differ in their nature across areas of law. As has been the case throughout the thesis, the focus remains on the judiciary.

A transfer of a vertical nature, from the supranational to the national level, can be identified in the state liability case law. The CJEU recognised state liability as a principle of EU law, and furthermore, explicated the remedies available against the institution deemed to be liable, including compensation, restitution¹⁸⁶⁷ and interim relief¹⁸⁶⁸. As noted in Chapter 5, this dimension of the case law was particularly significant as the CJEU acknowledged, in light of a comparative analysis of the rules applicable in the national orders, that the national courts might have to recognise new remedies which did not previously exist or were unavailable therein¹⁸⁶⁹ (as a result, making inroads into their procedural autonomy). Another vertical transfer, from the international to the national level, is identifiable in respect of the notion of “unity of the state”, where reference is made to reference is made to international law, including legal scholarship¹⁸⁷⁰, legal doctrine¹⁸⁷¹ and case law¹⁸⁷², and the approach therein subsequently adopted in the Union context, in light of the aims and objectives thereof. Furthermore, a horizontal transfer can also be identified in the state liability case law with regard to the explication of the conditions of liability; this is identifiable in the horizontal cross-referencing between areas of Union law. Both the AG¹⁸⁷³ and the Court¹⁸⁷⁴ in *Brasserie*

¹⁸⁶⁶ An example of the scope for a horizontal transfer, which has its origins in a vertical transfer, can be identified in respect of the Commercial Agents Directive 86/653/EEC. The “regime” of options for commercial agents is understood to derive from the French and German systems; ultimately, the regime exists in the English system by virtue of the directive. Notwithstanding, the English court – or rather, one English judge – have recognised the scope for cross-referencing of interpretations, between the national systems, which could lead to a horizontal transfer, even if only of a judicial interpretation, *Lonsdale v Howard and Hallam Ltd* [2007] UKHL 32, per Lord Hoffman at para.18.

¹⁸⁶⁷ *C-33/76 Rewe-Zentral* [1976] ECR 1989.

¹⁸⁶⁸ *The Queen v. Secretary of State for Transport, ex parte: Factortame* (n.902).

¹⁸⁶⁹ *Brasserie* (n.186), Opinion of AG Tesouro, para.14. In *Brasserie*, this was true in both the German and English orders.

¹⁸⁷⁰ *Köbler* (n.184), Opinion of AG Léger, para.45.

¹⁸⁷¹ *Köbler* (n.184), Opinion of AG Léger, paras.42-44.

¹⁸⁷² *Köbler* (n.184), Opinion of AG Léger, fns.46-47.

¹⁸⁷³ *Brasserie* (n.186), Opinion of AG Tesouro, paras.61 *et seq*, with reference to “the general principles common to the laws of the Member States” an considering, “the absence of a uniform set of rules in this field, a useful frame of reference for common rules on State liability”; para.61.

¹⁸⁷⁴ *Brasserie* (n.186), Judgement, para.42 – “the conditions under which the State may incur liability for damage caused to individuals by a breach of Community law cannot, in the absence of particular justification, differ from

compared CJEU jurisprudence concerning the non-contractual liability of the Union¹⁸⁷⁵ with the norms applicable in the Member States in respect of the liability of public authorities, against the background of which AG Tesouro¹⁸⁷⁶ asserted that the criteria for determining the obligation to make reparation should diverge depending on the state or EU character of the institution in breach; in fact, he stated such divergence was “not acceptable”¹⁸⁷⁷. Indeed, he explicitly used the word “lend” in respect of the reference to the conditions of general civil liability and the liability of public authorities¹⁸⁷⁸, against the background of the coherence between the regimes; consequently, AG Léger has spoken of “an alignment between the two systems” in *Köbler*¹⁸⁷⁹.

In respect of the basis provided by the UCTD for the amendment of national consumer contract legislation, transfers of a vertical nature are identifiable. Most evidently, in both the UK¹⁸⁸⁰ and Germany¹⁸⁸¹ *inter alia*, the UCTD provided the basis for the amendment of national legislation. Moreover, the consumer contract case law gives rise to a transfer which is not of a substantive nature and does not affect a particular norm but is which broadly impacts the role of the national judge. The shift, from the recognition of a power of the national judge, to the imposition of an obligation on his part to examine contract terms *ex officio*, attributes to the judge an activist role, one which is known in certain Member States and unknown in others. In *Pannon*, the Court delineated the obligation to assess, with reference to the need for the national courts to possess the facts “necessary” to make an assessment as to unfairness¹⁸⁸², adhering – without consideration of the applicable national norms, either in Hungary or elsewhere – to the default of “passivity”. However, in *Pénzügyi Lízing*, the Court - in contrast to the AG, who deferred to national procedural law¹⁸⁸³ - and

those governing the liability of the Community in like circumstances”. Van Gerven also makes a broad claim for engagement with the non-contractual liability of the Union case law, van Gerven, ‘Of Rights, Remedies and Procedures’ (n.901), p.511.

¹⁸⁷⁵ In particular, Joined Cases 83, 94/76-4, 15 and 40/77 *Bayerische HNL v Council* [1978] ECR 1209, at *Brasserie* (n.186), Judgement, paras.28–43.

¹⁸⁷⁶ *Brasserie* (n.186), Opinion of AG Tesouro, paras.61 *et seq*, with reference to “the general principles common to the laws of the Member States” an considering, “the absence of a uniform set of rules in this field, a useful frame of reference for common rules on State liability”; para.61.

¹⁸⁷⁷ *Brasserie* (n.186), Opinion of AG Tesouro, para.66.

¹⁸⁷⁸ *Brasserie* (n.186), Opinion of AG Tesouro, para.7.

¹⁸⁷⁹ *Köbler* (n.184), Opinion of AG Léger, para.127.

¹⁸⁸⁰ Unfair Terms in Consumer Contracts Regulations 1994 SI 1994/3159, amended by the Unfair Terms in Consumer Contracts Regulations 1999 SI 1999/2083.

¹⁸⁸¹ Arts.305-310 BGB; R. Zimmermann, *The New German Law of Obligations: Historical and Comparative Perspectives* (OUP, Oxford, 2005), p.182.

¹⁸⁸² *Pannon* (n.1020).

¹⁸⁸³ *Pénzügyi Lízing* (n.1033), Opinion of AG Trstenjak, paras.113-115.

without clarifying the obligation of the national court, held that in order to ensure the effectiveness of the consumer protection, it must have a role in investigating the “legal and factual elements necessary”¹⁸⁸⁴. As noted, these considerations are largely policy orientated; while the Court undertook no explicit comparison of the cultures or traditions of the national orders but rather engaged a broad consumer protection rationale, the AG highlighted the significance of party autonomy, her understanding of which was informed by the civilian tradition in general¹⁸⁸⁵ and German law, in particular. The jurisprudence also gives rise to scope for horizontal development between directives. Yet it seems that the CJEU will not necessarily engage in such cross-referencing; this is clear from, *inter alia*, the *Oceano* case and the absence of comparison between Art.6 UCTD, and nullity in (now) Art.101 TFEU in competition cases, which has led to criticism of the absence of a conceptual underpinning in the CJEU’s reasoning¹⁸⁸⁶. More recently, comparative cross-referencing is identifiable in respect of the extension of the *ex officio* regulation beyond the UCTD to other directives, including the Doorstep Selling Directive¹⁸⁸⁷ and the Consumer Credit Directive¹⁸⁸⁸. While this might not amount to a “transplant”, strictly understood, it certainly falls within the broad understanding of transfer adopted herein¹⁸⁸⁹. What is clear is that the lack of consistency in the CJEU’s approach will surely only become more apparent as the reach of legislative intervention settles on targeted maximum harmonisation.

The scope for horizontal transfer in relation to fundamental rights protection exists on the basis of the cross-referencing engaged by the CJEU and the ECtHR¹⁸⁹⁰; these processes of reference have long been recognised and have been outlined in the case example in Chapter

¹⁸⁸⁴ *Pénzügyi Lízing* (n.1033), Judgement, para.51.

¹⁸⁸⁵ The notion that it is for the parties to the dispute to “take the initiative” can be found both in French and German law.

¹⁸⁸⁶ Collins, *The European Civil Code* (n.271), pp.60-61 and Mak, ‘Harmonisation through ‘Directive-Related’ and ‘Cross-Directive’ Interpretation’ (n.313), p.13.

¹⁸⁸⁷ Directive 85/577/EEC; *Martin Martin* (n.1021).

¹⁸⁸⁸ Directive 2008/48/EC; *Volksbank Romania* (n.1022) (from Romania) and *C Rampion* (n.1022) (then Directive 87/102/EEC) (from France).

¹⁸⁸⁹ Such an approach is also identifiable in the CJEU’s explication of the concept of consumer, discussed in Chapter 2, and in the analysis of “damage” in *Leitner* (n.728), at the Opinion of AG Tizzano, paras.34-35. As the relevant directive left damage undefined, he engaged in a comparison of European legislation and Union case law, reference to international conventions and the legislation and case law of the Member States. The *Landesgericht* had made a comparison between the state of the law in Austria and in Germany in its reference, and highlighted its understanding of the directive’s purpose of removing divergences between national systems to provide a uniform level of protection. The AG, adopting a systematic interpretation at para.26, and aiming to facilitate coherence across the regime, cross-referenced the case law of the general court on non-material damage (at para.38) and that of the CJEU, attempting to identify an autonomous interpretation.

¹⁸⁹⁰ Especially, in respect of those norms of a “constitutional nature”, underpinning fundamental rights development in the EU context: Frowein, ‘Fundamental Human Rights as a Vehicle of Legal Integration in Europe’ in *Weiler et al, Integration through Law* (n.1266).

⁷¹⁸⁹¹. The CJEU recognises the significance of the ECHR and the ECtHR adopts an “integrated approach” whereby Convention rights are considered and interpreted with some reference to social and economic rights¹⁸⁹²; the CJEU’s engagement in a comparison of its case law with that of the ECtHR, also reflects clearly the way in which the economic dimension nevertheless dominates the CJEU’s decision making, despite its seeming openness to a plurality of Union values. This can be identified in respect of the right to collective action at issue in *Viking* and *Laval*. Perhaps the most evident example of a vertical transfer arises in respect of fundamental rights protection and the principle of proportionality¹⁸⁹³; as suggested above, while it has arisen from a particular national system, and has subsequently been transferred into another, it arguably cannot be deemed to be horizontal¹⁸⁹⁴. The principle – *Verhältnismässigkeit*, an unwritten principle of German constitutional law - arose initially when the German court in *Internationale Handelsgesellschaft* considered that Union law would undermine national principles – including that of proportionality – protected by the constitution. The CJEU, distinguishing the national and Union regimes, made reference to the notion that the “protection of such rights [national fundamental rights] whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community”¹⁸⁹⁵. Essentially, the CJEU aimed to highlight that the principles underpinning Union law and Union fundamental rights protection were derived from the national systems; in these cases, comparative analysis – illuminating the societal and institutional framework of law-making, the values and policy existing in the Member States, and the scope for the adaptability of the CJEU’s judgement, in

¹⁸⁹¹ For example, *inter alia*, in *Schmidberger* (n.1265), Judgement, paras.77-79 where the Court undertakes a comparison of justifications of the limitations of fundamental rights considered by the CJEU and those by the ECtHR. Furthermore, in *Laval*, in identifying “common ground” underpinning this determination of “appropriateness” of the proportionality of Union action, the Court engaged the justifications advanced in the ECtHR in respect of union objectives, *Viking* (n. 355), Judgement, para.68, citing *Syndicat national de la police belge v Belgium*, 27.10.1975, A.19 and *Wilson, National Union of Journalists and Others v United Kingdom* of 02.07.2002, 2002-V, para.44.

¹⁸⁹² Consider the speech of the ex-President of the ECtHR, Jean-Paul Costa, who in 2008 highlighted the increasing inference of socio-economic rights by the Court, and in particular via the European Social CFR, 1961 and the CFR, citing in particular, *Budina v. Russia*, A.45603/05, ECHR, 18.06.2009 (in the end, the Court held there was no evidence that pension/social benefits were so low as to give rise to a situation incompatible with Art.3, ECHR (prohibition of inhuman and degrading treatment); Speech of Jean-Paul Costa, *La Déclaration universelle des droits de l’homme (1948) ; Les droits économiques, sociaux et culturels en question, Strasbourg*, 16.10.2008 (<http://www.echr.coe.int/NR/rdonlyres/42BD71A1-099A-4B88-B907-185CFF3B3968/0/2008_Strasbourg_colloque_déclaration_universelle_16_10.pdf>; Last Accessed: 24.04.2013).

¹⁸⁹³ *Internationale Handelsgesellschaft* (n.1256); E. Ellis (ed.), *The Principle of Proportionality in the Laws of Europe* (Hart, Oxford; 1999).

¹⁸⁹⁴ Notwithstanding the impact in national systems including, *inter alia*, the English law of reasonableness: G. de Búrca, ‘Proportionality and Wednesbury Unreasonableness: The Influence of European Legal Concepts on UK Law’ (1997) *European Public Law* 561.

¹⁸⁹⁵ *Internationale Handelsgesellschaft* (n.1256), Judgement, para.1135.

light of its potential political, cultural, and socio-economic impact – was used as a means of inspiring the CJEU in respect of the content to be attributed to these principles, and the “balancing” undertaken. The national courts – especially, the German¹⁸⁹⁶ - were initially reluctant to engage this approach, then gradually accepted¹⁸⁹⁷. In its examination of the legality of the Union norms – namely, export licenses – the Court, neither making explicit reference to German law nor to the potential impact in the other Member States, essentially engaged and applied the proportionality test as it existed in German law.

These examples of vertical and horizontal transfers indicate that the CJEU engages comparative analysis in its identification of norms and practices that might be deemed ripe for transfer, and furthermore that the sources of comparative analysis are not limited to national norms and rules but extend beyond that which is national. Furthermore, it is clear from the UCTD, amongst others, that even where there is scope for the CJEU’s decision to impact the national order, and in this case, its procedural culture, the CJEU does not necessarily engage the significance of the potential impact either in the referring state or across the Member States. Notwithstanding that this appreciation could be gained by virtue of a complex comparative analysis, the CJEU does not seem to be engaged in such an explicit evaluation in a systematic or coherent manner¹⁸⁹⁸. This problematic reflects - especially in light of the diversities existing across the European space – a broader concern with the scope for transfers (that is, the lack of consideration of context), which has come to the fore in the Watson/Legrand discourse.

Neither the Legrandian nor the Watsonian thesis seems to be wholly satisfactory in respect of the relationship that both conceive between law and authority and law and culture. In particular, there has been little consideration of the idea that European (private) law borrows from national law or international law¹⁸⁹⁹; the focus of most analyses has been on transfers between national legal orders¹⁹⁰⁰. This necessitates – as proposed in Chapter 3 in relation to

¹⁸⁹⁶ *Internationale Handelsgesellschaft* [1972] CMLR 177.

¹⁸⁹⁷ *Wünsche Handelsgesellschaft* [1987] 3 CMLR 225.

¹⁸⁹⁸ For example, while the CJEU appears to engage comparative analysis – at least in terms of the referring system – in the early fundamental rights cases, there is an absence in the UCTD jurisprudence.

¹⁸⁹⁹ See in relation to international law, J.B. Weiner, ‘Responding to the Global Warming Problem: Something Borrowed for Something Blue: Legal Transplants and the Evolution of Global Environmental Law’ (2001) 27 *Ecology L.R.* 1295, p.1297.

¹⁹⁰⁰ See the Watson pieces, and Barak-Erez, ‘The Institutional Aspects of Comparative Law’ (n.1858), focusing on the involvement of state actors: transplantation through constitution-making, through legislation, through judicial decision-making, and through the executive.

the complex understanding of comparison – that the approach to comparative analysis takes account not only of that which exists within the state but also that which transcends a limited state-based study. While Legrand’s theory provides greater scope for consideration of non-state norms, his analysis nevertheless remains broadly limited to law within the state. In order to subscribe to his view, it is necessary to assume that it is the notion of national legal culture or tradition that continues to dominate our understanding of law. Not only is it questionable that this dominance continues to exist but furthermore, the notion that attachment (or belonging) to culture or tradition (and that which derives therefrom, including identity) is single, is rejected; rather, it is advanced as being multiple and dynamic. While, as noted above, (legal) culture and tradition are inherently connected to the nation state, to the extent that their development has been mutual and reciprocal – whether this might have developed through the legal profession and a body of legal elites, as in some systems, or whether, as is the case in others, there exists a legal culture constituting a mix of political, social and economic sources¹⁹⁰¹ - as a process or perspective, it need not be maintained in such a limited form. Not only are culture and tradition multiple but the trend towards the analysis of the emergence of a global legal culture, reflecting values shared by global citizens¹⁹⁰², is pertinent as is the scope for emerging cultures of specific sectoral areas of law, which might already be understood as cutting across national boundaries (including, for example, fundamental rights and consumer protection). In light of the discussion of the reconceptualisation of private law and the understanding of legal development within the context of integration, it must be recognised that legal transfer is not a phenomenon which is limited to that which occurs within or arises from the context of the state. Indeed, various actors – public and private in nature – are likely to be engaged in the relevant processes¹⁹⁰³.

The consequences of complex comparative analysis to the transfers discourse are two-fold. On the one hand, it undermines the argument that norms are authoritative only within the single sovereign state from which they arise; rather, where legal orders are not recognised as closed but as interdependent, this argument maintains little weight to the extent that it is not

¹⁹⁰¹ Gillespie, ‘Towards a Discourse Analysis of Legal Transfers into Developing East Asia’ (n.568), p.676.

¹⁹⁰² There has been discussion of the development of a European legal culture for a number of years, driven primarily by Zimmermann; R. Zimmermann, ‘Civil Code or Civil Law – Towards a New European Private Law’ (1994) 20 *Syracuse.J.Int.&Comp.L.* 217.

¹⁹⁰³ See, for example, Slaughter, *A New World Order* (n.803), pp.239-240; and in particular, legal transplants through contract: L. Win, ‘Legal Transplants Through Private Contracting: Codes of Vendor Conduct in Global Supply Chains as an Example’ (2009) 57 *AJCL* 711. Consider also Friedman, who has asserted that those engaged in cross-border business are the “carriers of transnational law”: L.M. Friedman, ‘Border: On the Emerging Sociology of Transnational Law’ (1994) 32 *Stan.J.Int.L.* 65, p.75.

necessarily the sovereign that expressly mandates legal changes¹⁹⁰⁴. Furthermore, where the determination of what is to be compared and the comparative analysis is undertaken in a context in which adequate significance is attributed to the cultural and societal context, both in terms of the identification of that to be transferred and the transfer itself – which, it is submitted, can be facilitated by the focus on dialogue, explored below – the law and society argument against transfer, resulting from the rigid focus on entire or whole cultures, traditions, societies and therein, identities, also loses force; in reality, these phenomena are increasingly fragmented. This consideration brings the discourse to a point at which it is necessary to consider the pertinence of the systems theory perspective, and the epistemological dimension that it adds to, or rather requires of, the transfers analysis¹⁹⁰⁵.

Teubner insists that in order to better understand transfers as phenomena in legal development, a conceptually more sophisticated approach than that offered by Watson and Legrand is required. This, he asserts can be identified from the systems theoretical perspective. Systems theory, as developed by Luhmann, provides that various sub-systems, each with their own self-referential system of communication, exist within a fragmented society¹⁹⁰⁶. Law is understood as an autopoietic, self-referential system of communication, which similar to any other sub-system, is “operationally closed” yet “cognitively open to external knowledge...they self-referentially decide how this information is understood and integrated into the recipient system”¹⁹⁰⁷. That is to say, from the systems theory perspective, law is autonomous and communicatively limited¹⁹⁰⁸, that is, separate from its social environment; there need not (but can, should the legal system choose to let the information in) be any communication or link or movement in terms of influence between systems. Teubner’s analytical exploration of transfers finds commonalities with the positions of both Watson and Legrand. On the one hand, in common with Watson’s support of autonomy, systems theory rejects the “mirror theories” of law¹⁹⁰⁹; law does not necessarily mirror society, rather what is external is brought within law by means of particular processes which

¹⁹⁰⁴ In contrast to Watson, *Roman Law and Comparative Law* (n.581), p.97.

¹⁹⁰⁵ G. Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences' (1998) 61 *MLR* 12.

¹⁹⁰⁶ See generally, Luhmann, *A Sociological Theory of Law* (n.299).

¹⁹⁰⁷ Gillespie, 'Towards a Discourse Analysis of Legal Transfers into Developing East Asia' (n.568), p.680.

¹⁹⁰⁸ For Freidman, the influences of society on law, whether these influences can be characterised as internal to the national legal system or external, must be limited; thus, while there is influence and while he argues that the legal system cannot be deemed to be closed, the reflexivity to which this gives rise is necessarily limited: L. Freidman, 'The Place of Culture in the Sociology of Law' in M. Freedman (ed.), *Law and Sociology: Current Legal Issues, Vol.8* (OUP, Oxford; 2006), pp.185-189.

¹⁹⁰⁹ Ewald, 'Comparative Jurisprudence (II)' (n.572), p.500.

occur when particular sets of requirements are satisfied. In common with Legrand's understanding, while recognising law's interconnections with culture, systems theory rejects the totality of society. Further, as Teubner accepts that there is empirical evidence of legal transfers, it is deemed that legal systems are not entirely closed; relative autonomy opens up the scope for linking law and society, and more specifically, law and the culture of the society¹⁹¹⁰. Systems theory recognises the scope for influence of outside systems on the legal system; via "structural coupling", the influence exercised is indirect. Thus, the illegal and legal distinction made in autopoiesis theory could be shaped by sociological discourse; "[w]hat Watson sees as the autonomous law-making of legal elites, adherents of autopoiesis theory see as the working out of law's independent destiny as a highly specialized, functionally distinctive communication system"¹⁹¹¹. Thus, where certain requirements are met – that is, where there is communication between actors (including, it is submitted, legal professionals, judges, academics and non-state actors, encompassing, for example, civil society organisations, consumer groups and so on) in the exporting and importing of norms, through a legal/non-legal code of communication and where there is a repetition of this communication – legal transfers may take place.

For Teubner, there is no need to determine that a transfer "fits" in order to establish that it has occurred, as law and society theories might dictate; rather, the parties engaged in the communication act so as to establish a comprehension and appreciation of what is transferred. This might be positive or negative; for Teubner, the effect of legal transfers is irritation, not only in respect of the transferred rule, concept or principle itself but also on the broader "receiving" system¹⁹¹². As such, systems theory rejects the simplicity inherent in Watson's assertion that transfers are "socially easy". An analysis of legal transfers requires not only consideration of the manner in which transfers are made, that is, whether they are intentional, the purpose for which they are made and whether they should be employed in order to bring about certain results, but also consideration of the legal, cultural, social and economic drivers and ramifications of the change to which they give rise. Thus, Teubner highlights the difficult and unpredictable consequences of transfer, "unleashing an evolutionary dynamic in which the external rule's meaning will be reconstructed and the internal context will undergo

¹⁹¹⁰ G. Teubner, *Law As An Autopoietic System* (Blackwell, Oxford; 1993).

¹⁹¹¹ Cotterrell, 'Comparatists and Sociology' in Legrand and Munday, *Comparative Legal Studies* (n.579), p.145.

¹⁹¹² Teubner, 'Legal Irritants' (n.1905), p.12.

fundamental change”; transfers are characterised as “irritants” because of the changes in structural coupling and in the specific social setting, to which they give rise¹⁹¹³.

Teubner’s analysis establishes that the ties of law and society are not comprehensive but selective: from loose coupling (where legal norm production is only occasionally related to other social process; in this context, transfers may be possible) to a tight interwovenness (where formal organisations bind law to one or more sets of discourse; here, transfers are difficult due to the influence of other social processes). Certain areas of private law may be loosely coupled with, for example, politics but closely connected with economics or society; loose and close coupling explain why there is resistance to transplants in some contexts, and less resistance in others. Thus, the “totality of society” does not dominate but the fragmentation of society permeates. Autopoietic theory is based on the notion of a global, and not a national, legal culture. There is, as noted in the introduction, a need to avoid the reification of legal cultures and tradition¹⁹¹⁴. In this context, national legal culture is understood to have lost its significance; consequently, the focus should rather fall on the identification and analysis of the cultures of supranational or subsystems. Thus, in autopoietic theory, law is understood to relate not to broad notions of culture but to “fractured (and frequently transplanted) social elements”; reference should be made to culture (and the meaning of culture) in these fractured communities instead of only to culture in orthodox national cultures. As is the case in respect of the determination of the unit of comparative analysis above, this is not to suggest that national cultures are irrelevant but rather, that they cannot be considered alone.

The systems theory perspective highlights that the “concepts, structure and core matters, which are familiar from national laws, cannot simply be transposed into supranational law”¹⁹¹⁵; that is to say, there must be an additional process, or an additional space of analysis. This might also be applied to Union law. The nature of the EU and the emergence of private law as autonomous legal orders dictate that norms cannot simply be “lifted” either from the national, international or transnational order, and transferred to the Union level. This understanding dictates that the development of European private law must take into

¹⁹¹³ Teubner, ‘Legal Irritants’ (n.1905), p.12.

¹⁹¹⁴ Nelken, ‘Beyond the Metaphor of Legal Transplants?’ in Priban and Nelken, *Law’s New Boundaries* (n.566), p.286.

¹⁹¹⁵ Schulze, ‘Contours of European Private Law’ in Schulze and Schulte-Nölke, *European Private Law: Current Status and Perspectives* (n. 538), p.6.

consideration the nature (political, economic, social and cultural) and the aims and objectives of the Union and integration, with the diversity existing across the European space. In the international law context, reference has long been made to the potential to derive principles of law from comparative examination of national legal systems¹⁹¹⁶ (and potentially, one could assume, other sources of comparative analysis) and to the scope for their transfer to the international level for various purposes, including that of gap-filling, where those gaps arise in the formation, interpretation and application of international norms¹⁹¹⁷. It has been recognised that there can be no “import”, “lock, stock and barrel”¹⁹¹⁸ of what is identified at the national level to a level above; nor is the inverse possible. The “additional” process, which is seemingly required has been characterised as one “*d’abstraction-généralisation*”¹⁹¹⁹. Against the background of the analysis in Chapter 8, the question arises as to whether there is a process through which that recognised as common or general is “purged of its municipal taint”¹⁹²⁰ in its transfer from the source of comparative analysis to the European level; indeed, as noted in the paragraph above, it is likely that a similar kind of process – even if not explicit and not necessarily visible – also occurs. This is recognised by Zweigert and Kötz who make reference to the notion that “each of the solutions must be freed from the context of its own system”¹⁹²¹.

ii. Building on Transfer: The Shift to Communication and Dialogue in the Europeanisation of Private Law

Without placing the breadth of relevant considerations to the side, an attempt is made in this section to identify what this additional process might be; herein, particular consideration is attributed to the significance of communication and dialogue and the relevance of comparative analysis therein. Dialogue is multi-faceted, with varied objectives, which may

¹⁹¹⁶ “Law” for the purposes of general principles of law, is understood broadly “to embrace all branches of law, including municipal law, public law, constitutional law and administrative law, private law, commercial law, substantive and procedural law etc.”; *South West Africa, Second Phase, Judgement, ICJ Reports 1966*, pp.294-295 per Judge Tanaka.

¹⁹¹⁷ In addition to Art.38, reference can also be made to Art.7(2) CISG, which provides that “questions concerning matters governed by this convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law”, leading arguably to a hierarchy of general principles.

¹⁹¹⁸ *International Status of South West Africa* (Advisory Opinion) [1950] ICJ Rep.128, Separate Opinion of Lord McNair, p.148.

¹⁹¹⁹ Weil, ‘Le droit international en quête de son identité’ (n.1816), p.146.

¹⁹²⁰ Ellis, ‘General Principles and Comparative Law’ (n.1632), p.959.

¹⁹²¹ Zweigert and Kötz, *Introduction to Comparative Law* (n.23), p.44.

diverge depending on the perspective adopted¹⁹²². While it occurs predominantly between courts, it is not so limited; that is to say, it is inter-institutional and potentially arises between courts and legislatures¹⁹²³ as well as other institutions, including academia¹⁹²⁴. Notwithstanding, given the analysis above and the scope for the preliminary reference procedure to be understood as an analytical space from which dialogue potentially arises, the focus falls on dialogue between courts with reference to “inter-institutional” dialogue and the relevance of comparative analysis therein.

Broadly, comparative reasoning has been considered to constitute dialogue in itself¹⁹²⁵. However, this consideration can be developed. Comparative analysis and dialogue are deemed to be complementary, to the extent that dialogue can be understood to constitute a mechanism of comparative analysis, while comparison might play a role in dialogue between courts. Dialogue in itself lacks a single substantive aim; it might be considered that it promotes communication, as a vehicle of cross-referencing and fertilisation, or a means of exchange¹⁹²⁶ of ideas and knowledge, or as deliberation with the aim of promoting a specific outcome through collective agreement¹⁹²⁷. Normatively, dialogue might aim to reduce or eliminate the scope for conflicts of authority, which necessarily arise in a multi-level space where competences are divided and shared, and where diversities exist. In general, this has been recognised in a macro-level analysis; each order must “find within itself the instruments for cooperation with the others”¹⁹²⁸ in an environment which, given the scope for regime interaction, is characterised by its increasingly fragmented nature¹⁹²⁹. The objectives of

¹⁹²² Torres-Perez sets out six prerequisites for dialogue which will be considered herein but not reproduced. The notion of dialogue as a source of legitimacy derives from the work of Habermas and his discourse theory; Torres Pérez engages the requirements of rationale discourse for the purposes of explicating her requirements for dialogue, each of which, she considers, can be satisfied in the EU context: different understandings of the meaning of the law, scope for mutual understanding, an absence of total sovereignty of one court over another, an understanding of the courts constituting “part of a common enterprise”, opportunity for participation and “dialogue over time”. See further, A. Torres Perez, *Conflicts of Rights in the European Union* (OUP, Oxford; 2009), pp.118-134.

¹⁹²³ For example, with regard to the protection of human rights in the UK: A. Kavanagh, *Constitutional Review Under the UK HRA* (CUP, Cambridge; 2009), pp.209 *et seq.*

¹⁹²⁴ Consider the DCFR expert group, at the Union and national levels and the law commissions at the national levels.

¹⁹²⁵ A-M. Slaughter, ‘A Typology of Transjudicial Communication’ (1994) 29 *U.Rich.L.Rev.* 99.

¹⁹²⁶ Torres Perez, *Conflicts of Rights* (n.1922), pp.112-113.

¹⁹²⁷ L.B. Tremblay, ‘The Legitimacy of Judicial Review: The Limits of Dialogue Between Courts and Legislatures’ (2005) *International Journal of Constitutional Law* 617. He identifies the framework for such a dialogue – a lack of hierarchy, a process of “rational persuasion” and a common desire to achieve a result.

¹⁹²⁸ S. Cassese, *When Legal Orders Collide: The Role of Courts* (Global Law Press, Editorial Derecho Global, Seville; 2010), p.15.

¹⁹²⁹ A. Fischer-Lescano and G. Teubner, ‘Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law’ (2004) 25 *Mich.J.Int.Law.* 999.

dialogue are therefore not merely methodological but also normative and can only be sought by virtue of the information gained by comparative analysis. In the alternative to conflict and hierarchy, greater coherence and coordination may arise from dialogue, promoting cooperation, reciprocity, recognition and respect¹⁹³⁰; in hand with comparative analysis, this might attach greater legitimacy to the jurisdiction and role of the CJEU, a consideration explored in more detail below.

Slaughter amongst others asks, in respect of the transfer discourse, what is “new” or original with the idea of borrowing and sharing between legal orders, given that there exists evidence of the occurrence of such activity over a number of decades¹⁹³¹. The same question might be posed of dialogue. The former Judge of the Canadian Supreme Court, L’Heureux-Dubé, has asserted that it is “the process of international influences has changed from reception to dialogue”; that is to say, “[j]udges no longer simply receive the cases of other jurisdictions and then apply them or modify them for their own jurisdiction”¹⁹³². It is submitted that a shift in focus from mere reception to the advocacy of dialogue, coincides with the systems theory analysis of transfer, and permits that the actors of the legal order (and beyond) participate in determining the manner in which the rule, institution or structure is imported and engaged therein. Slaughter notes that communication is a function of globalisation, suggesting that “[t]hey [judges and observers] point to a number of distinctive features: the identity of the participants, the interactive dimension of the process, the motives for transnational borrowings, and the self-conscious construction of a global judicial community”¹⁹³³. In other words, there is a need not only for the identification of what can be transferred and of the transfer itself, but also for dialogue – which has the potential to be transnational as well as local and regional – which allows for consideration of the way in which that transfer might be, and subsequently has been, received in the relevant court. This shift to dialogue can perhaps also be reflected in what Kennedy describes as the “dissemination of the discursive practices of actors who are producing law”, which arguably leads to the “transnational genealogy of legal thought”¹⁹³⁴. It further finds support in the significance of communication – albeit of a different nature – that permeates the systems theory perspective; society is

¹⁹³⁰ Rosas, ‘The European Court of Justice in Context’ (n.890).

¹⁹³¹ Slaughter, *A New World Order* (n.803), p.71.

¹⁹³² C. L’Heureux-Dubé, ‘The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court’ (1998) 34 *Tul.L.J.* 15, p.17.

¹⁹³³ Slaughter, *A New World Order* (n.803), p.71.

¹⁹³⁴ D. Kennedy, ‘A Transnational Genealogy of Proportionality in Private Law’ in R. Brownsword *et al* (eds.), *The Foundations of European Private Law* (Hart, Oxford; 2011), pp.185-220, p.188-189.

understood to be composed of functionally differentiated sets of communication and states are understood to be products of development, historically and politically embedded, and capable of being conceived in different ways at different times and in different spaces¹⁹³⁵.

The “judicial globalisation” which results from but also facilitates “global constitutional jurisprudence” - the consideration of which, as noted, has largely focused on constitutional law issues¹⁹³⁶ - arguably provides the foundations for the emergence of a “global legal system”¹⁹³⁷. While the notion of a global legal order tends to give rise to an assumption of a hierarchical legal system at the top of which sits a “world court”, adjudicating cases arising between national states and pronouncing rules applicable within national and regional courts¹⁹³⁸, this notion of globalised network need not necessarily give rise to a hierarchical construct. Slaughter, in asking “how best to structure the relations between a supranational entity and its domestic counterpart”¹⁹³⁹ engages the notion of “community of courts” in which the judges acknowledge each other as participants in a community which transcends national borders¹⁹⁴⁰, and where “judges see each other not only as servants and representatives of a particular polity, but also as fellow professionals in an endeavour that transcends national borders”¹⁹⁴¹. Indeed, considering the methodology engaged by the CJEU, its increasing jurisdiction and role must be considered; its impact is not merely limited to the Member States, individually, or collectively or to the Union itself but extends to the globalised sphere of legal development. The notion of community further brings to the fore the significance of the considerations raised in Parts I and II, concerning culture, tradition and identity within and beyond the state. Slaughter further characterises these relationships as forming part of an international “network”¹⁹⁴². The idea of network seems apt to characterise the diversity and character of the linkages emerging; that is to say, the lines of communication are vertical, horizontal¹⁹⁴³ and even cross-cutting, and engage not only courts but also other legal actors. This is also reflected at the Union level; Kilpatrick considers that it is these diversities which

¹⁹³⁵ Luhmann, *A Sociological Theory of Law* (n.299).

¹⁹³⁶ Slaughter, ‘A Typology of Transjudicial Communication’ (n.1925).

¹⁹³⁷ Slaughter, *A New World Order* (n.803), pp.-65-103.

¹⁹³⁸ Slaughter, *A New World Order* (n.803), p.67.

¹⁹³⁹ Slaughter, *A New World Order* (n.803), p.147.

¹⁹⁴⁰ Slaughter, *A New World Order* (n.803), p.68.

¹⁹⁴¹ Slaughter, ‘A Global Community of Courts’ (n.1526), p.193.

¹⁹⁴² The notion of network has been engaged in different disciplines - from political and social sciences to economics, to law - and used in different ways. It has been applied in different contexts, to accommodate the changing nature of the nation state, to describe the EU and in the context of the emergence of a global legal order.

¹⁹⁴³ Slaughter, *A New World Order* (n.803), p.69.

further dialogue: “[i]nstead of a European community of courts and law, it is the need to mediate differences between European communities of courts and law which produces the possibility for dialogue”¹⁹⁴⁴. There can be no presumption of divergence or similarity; these must be identified by virtue of comparative analysis.

There are a number of fundamental considerations that shape the context, scope for dialogue, and furthermore, its consequences. It is therefore necessary to consider the extent to which dialogue might be facilitated, to identify the incentives underlying the engagement with dialogue and the consequences of such interaction in respect of the Europeanisation of private law. The attitude of legal actors towards communication and dialogue with their counterparts in other cultures and traditions is also vital, and thus, the significance of culture and identity are again brought to the fore; as Slaughter has noted, this might concern the way in which the legal actors understand themselves to be part of a community or network. These attitudes might diverge, from willingness to reluctance, and shift, depending on whether such dialogue is horizontal, vertical or diagonal. The broad attitudes of judges in the highest courts are often the most widely articulated. Normally, these opinions relate to the citation of foreign precedent, the mere reference to which should, of course, be distinguished from complex comparative analysis of the nature advanced in Chapter 3; notwithstanding, both expressions of reluctance and willingness reflect broadly the attitudes of the judges and are therefore relevant to the scope for their engagement with comparison.

For example, the Chief Justice of the Norwegian Supreme Court, Chief Justice Smith, has argued for an approach of open communication: “...it is the duty of national courts – and especially of the highest court in a small country – to introduce new legal ideas from the outside world into national judicial decisions”¹⁹⁴⁵. In the UK, a breath of opinion has been expressed as to the use of foreign law; its concrete engagement seems to be dependent on the nature of the case before the court. Consider for example, Lord Browne-Wilkinson, who makes reference to the notion that English judges will “accord persuasive authority to the constitutional values of other democratic nations when dealing with ambiguous statutory or common law provisions that impact upon civil liberties issues”¹⁹⁴⁶. The most palpable

¹⁹⁴⁴ C. Kilpatrick, ‘Community or Communities of Courts in European Integration? Sex Equality Dialogues Between UK Courts and the ECJ’ (1998) 4 *ELJ* 121, p.129.

¹⁹⁴⁵ C. Smith, ‘The Supreme Court in Present-Day Society’ in S. Tschudi-Madsen (ed.), *The Supreme Court of Norway* (H. Aschehoug and Co., Oslo; 1998), p.135 cited in Slaughter, *A New World Order* (n.803), p.70.

¹⁹⁴⁶ Cited in Slaughter, *A New World Order* (n.803), p.71.

assertion of reluctance derives not from Europe but from the section of the bench of the Supreme Court of the US led by Justice Scalia, an approach that has been called into question by the more liberal front led by Justice Breyer. Both have engaged in public discourse about the use of foreign law in US courts, a discourse which is reflected in majority and dissenting opinions; it should be noted however that the debate does not concern the use of comparative law in specific cases as such, but rather the understanding of the nature of the task with which judges are engaged¹⁹⁴⁷. This relates more to the approach adopted by the judge, and of course, legal actors in general and again highlights the significance of the perspective adopted, a determination which is relevant to the interpretative methodology employed; that is to say, a comparative analysis of the complex nature outlined herein, facilitates the engagement with pluralism, and recognition of the diversity of cultures and traditions shaping norm-formation, interpretation and enforcement, as well as the rules, principles and values underpinning. It thus provides greater scope for dialogue; the recognition and acceptance of a plurality of sources, allows for the emergence of a plurality of solutions to diverse legal problems to be envisaged, giving rise to the potential for mutual learning, between and across legal traditions and cultures¹⁹⁴⁸.

Attempts to uncover and map dialogue in the EU space have largely been confined to the sphere of constitutional law¹⁹⁴⁹; private law has received little consideration. For the purposes of this thesis, the preliminary reference system has been engaged as an “analytical space” in which the methodological discourse can be resurrected, especially in respect of the use of comparative analysis as a tool of integration and of the Europeanisation of private law by the CJEU¹⁹⁵⁰, recognised therein as an “instrument of cooperation”¹⁹⁵¹, “based on a dialogue between one court and another”¹⁹⁵². These understandings, and the scope for dialogue, which arguably derives from the duty of judicial cooperation in Art.81 TFEU, are reflected in the consumer contract case examples. In the context of the preliminary references analysed above, the cases can be tracked along different courses, establishing a direct vertical

¹⁹⁴⁷ The transcript of this debate, held at the American University Washington College of Law in January 2005, and subject to much discussion, can be read here; <http://domino.american.edu/AU/media/mediarel.nsf/1D265343BDC2189785256B810071F238/1F2F7DC4757FD01E85256F890068E6E0?OpenDocument> (Last Accessed: 17.08.2013).

¹⁹⁴⁸ Slaughter, *A New World Order* (n.803), pp.68-69.

¹⁹⁴⁹ For the initial consideration of judicial dialogue as a mechanism for legal integration, see generally, A-M. Slaughter, A. Stone Sweet and J.H.H. Weiler (eds.), *The European Court and National Courts—Doctrine and Jurisprudence* (OUP, Oxford; 1998).

¹⁹⁵⁰ See Chapters 3 and 4.

¹⁹⁵¹ *Pénzügyi Lízing* (n.1033), Judgement, para.37.

¹⁹⁵² *Pénzügyi Lízing* (n.1033), Opinion of AG Trstenjak, para.29.

dialogue between the national courts and CJEU, and necessarily cutting across vertical and horizontal interactions at the national and European levels. These different types of dialogue can be better explicated with reference to examples. Vertical dialogue thus arises through the request and provision of an authoritative interpretation of EU law, that is, in the ascent, and descent of the reference to the CJEU¹⁹⁵³. Horizontal dialogue is identifiable at both the supranational and national levels, reflected in the former, for example, in cross-referencing between different areas of Union law – i.e. between the Union legislature and the CJEU¹⁹⁵⁴ – and similarly between Union law and the ECtHR¹⁹⁵⁵; this interaction is constitutional and reciprocal. Similarly to transfers, “pure” horizontal dialogue between national courts is difficult to identify but might rather arise following vertical dialogue.

In respect of vertical dialogue, one might question whether the AG or the Court or both, are aware of similar references arising from different orders, reflecting distinct national cultures and traditions¹⁹⁵⁶. To a certain extent, the preliminary reference procedure renders dialogue fictional. That is to say, once the national court requests the ruling, the case does not return to the domestic jurisdiction until the CJEU has rendered its interpretation, reducing the scope for the identification of dialogue, at least in its orthodox conceptualisation. With regard to the scope for horizontal dialogue thereafter, one must question whether the AG and the Court are aware of the potential for spillover effects between orders; that is to say, on receipt of the CJEU’s interpretation, whether dialogue might arise between the courts of the other Member States, following the *erga omnes* effects thereof¹⁹⁵⁷. While the AG and the Court seem to recognise the scope for such dialogue and the potential spillover effects of *erga omnes*

¹⁹⁵³ This can be identified in the Solange line of cases between the CJEU and the *BverfG*.

¹⁹⁵⁴ Per the cross-referencing between the non-contractual liability of the Union and the non-contractual liability of the state, in *Franovich* and *Brasserie*, and between state liability for the acts and omissions of the legislature, and acts and omissions of the courts, and the concept of damage in *Leitner*.

¹⁹⁵⁵ Consider, for example, the CJEU’s comparison of justifications of the limitations of fundamental rights considered by the CJEU and those by the ECtHR in *Schmidberger*, and its engagement of the justifications advanced in the ECtHR in respect of trade union objectives, in identifying “common ground” underpinning the determination of “appropriateness” of the proportionality of Union action, in *Laval*.

¹⁹⁵⁶ Given the line of preliminary references that have recently been requested, this question could be considered in light of the UCTD case law, not only with reference to vertical dialogue but the scope for cross-cultural dialogue.

¹⁹⁵⁷ Similarly, this could be considered in light of the consumer contract law, and in particular, the consideration of the binding effects of injunctions at the national and Union levels, discussed above. It should be noted that the decision in *Invitel* (n.1016), in which the CJEU held that Art.6(1) and 7(1) of the UCTD, should a declaration of invalidity can be made and have effect in respect of all consumers who entered into the contract, including those not party to the specific proceedings, led to changes in the Romanian legislation; Law 193/2000, per.Art.12(3) and 13, was amended in August 2012, providing national courts with the power to provide for the invalidity of a contract term with regard to all consumers who concluded that contract with the seller or supplier, including those not party to the case before the court itself.

interpretations, it is not clear whether this acknowledgement factors explicitly in their reasoning; the same also seems to be true at the national level. The UCTD case law provides a useful example. Spillovers arise in general in relation to the *ex officio* assessment of contract terms, and in particular from, for example, the scope for collective action. In respect of the former, the Commission has acknowledged that the nature and effect of collective action diverge across the Member States¹⁹⁵⁸ and the Parliament has recognised the need for a horizontal framework for collective redress¹⁹⁵⁹. While the AG examines scholarship on the different measures and divergent mechanisms in the national systems¹⁹⁶⁰, the CJEU does not undertake an explicit comparative analysis neither of the national rules nor of their provision of an appropriate and effective remedy per Arts.6 and 7 UCTD; rather, it recognises the need for the unfair term to “become ineffective *ipso jure*”¹⁹⁶¹ and understands the *erga omnes* impact of the injunction as one way¹⁹⁶² to ensure this effective means¹⁹⁶³. The added value of comparative analysis in this context would arise not only in respect of the facilitation of the scope for dialogue in what already constitutes a line of case law on the UCTD, but further, in respect of the scope for generating a degree of clarity as to the consequences of the non-binding nature of a term, for the purpose of identifying the potential scope for conflict and moreover, the foundations and effect of collective actions¹⁹⁶⁴. The *ex officio* assessment of contract terms as to their unfairness also gives rise to the scope for spillover effects in respect of the increasingly regulatory function of the national courts. The judgements generate scope for inconsistencies, in respect of the role of the national courts adopted in *ex officio* regulation, not only as a result of the CJEU’s lack of consideration of the diversities (interpretations of norms and contexts) existing across the Union but also consequent to the lack of guidance offered to the national courts by the CJEU¹⁹⁶⁵. Comparative analysis would

¹⁹⁵⁸ European Commission, ‘Green Paper: Access of Consumers to Justice and the Settlement of Consumer Disputes in the Single Market’ COM(1993) 576, 16.11.1993, p. 64.

¹⁹⁵⁹ European Parliament, ‘Towards a Coherent European Approach to Collective Redress’ 2011/2089, 02.02.2012.

¹⁹⁶⁰ *Invitel* (n.1016), Opinion of AG Trstenjak, fn.10-11.

¹⁹⁶¹ *Invitel* (n.1016), Judgement, paras.35–36; see also F. Cafaggi and S. Law, ‘Effect of Collective Proceedings’ in E. Terry et al (eds.), *Landmark Cases of EU Consumer Protection: Liber Amicorum Jules Stuyck* (Intersentia, Antwerp; 2013), pp.653-677, pp.646-647.

¹⁹⁶² One means amongst others, an understanding supported by Directive 2009/22/EC on Injunctions for the Protection of Consumers’ Interests, Art.3 and Art.7(2) UCTD.

¹⁹⁶³ The AG and Court rather considered the matter was for the national legal traditions, within the limits of EU law, including fundamental rights: *Invitel* (n.1016), Opinion of AG Trstenjak, paras.53–54; Judgement, paras.42 *et seq.*

¹⁹⁶⁴ Recognising of course that the UCTD does not have the purpose of standardising collective actions nor of harmonising the consequences of the non-binding nature of terms found to be unfair.

¹⁹⁶⁵ The following references are adopted from Cafaggi and Law, ‘Effect of Collective Proceedings’ in Terry et al, *Landmark Cases of EU Consumer Protection* (n.1961), pp.656-657. For example, in the English system, the

allow for the identification, not only of the (substantive and procedural) norms applicable in the national orders but also of the commonality and diversity existing in respect of the traditions and cultures (particularly of the judiciary); this would allow for the CJEU, as well as the national courts, to envisage potential spillover effects and thus implement the judgement so as to facilitate the effectiveness of Union law, where at the moment, these divergences may give rise to diverse scope and approaches to *ex officio* regulation in line with the domestic procedural regimes¹⁹⁶⁶.

It is submitted that engagement with dialogue as a mechanism of comparative analysis might therefore operate to democratise judicial law-making, where comparison is placed not only in the context of discursive judicial reasoning, but can reflect at the same time discursive reasoning¹⁹⁶⁷. The CJEU has recognised that the reference to comparison via dialogue can be inherently tied to legitimacy, and further to justice, stating that where no solution can be found in Union law, “unless the Court is to deny justice it is therefore obliged to solve the problem by reference to the rules acknowledged by the legislation, the learned writing and the case-law of the member countries”¹⁹⁶⁸. For example, the CJEU often recognises principles of Union law, the recognition of which is subsequently sanctioned by the Union legislature and the Member States; notwithstanding, this might not always be the case¹⁹⁶⁹. The CJEU might

national court’s power to raise issues *ex officio* is very limited (the English Rules of Civil Procedure 1999 introduced a degree of “judicial management”, from broad “passivity; generally, however, the changes in rules of civil procedure are not thought to have significantly shifted the role of the court: *Circuit Systems Ltd. v Zuken-Redac (UK) Ltd* [2001] EWCA Civ 482; broadly, public policy considerations arise only in the case of *prima facie* illegal contracts: *Holman v Johnson* (1775) 1 Cowper 341 per Lord Mansfield at 343). In the French system, the notion of *ordre public* dominates; the distinction between *ordre public de protection*, for the protection of specific interests, i.e. those of consumers, and *ordre public de direction*, for the protection of the general public interest, has long defined the boundaries between the parties and judges, to the extent that it is the latter which is understood to provide a basis for courts to raise issues *ex officio* (*Rampion* (n.1022), Opinion of AG Mengozzi, para.79). Traditionally, the power was limited to the second set of cases but the impact of consumer protection has broadened the scope of judicial power (See C. Aubert de Vincelles, ‘Élargissement de l’office du juge en matière de clauses abusives’ (2011) *Revue des contrats* 504, p.509). Germany appears to afford judges wider discretion in balancing between judges and parties, on the basis of a broad view of public interest (German Code of Civil Procedure, *Zivilprozessordnung (ZPO)*); in general, via the principles of *Dispositionsgrundsatz*, (of party disposition) and *Verhandlungsgrundsatz*, (of party presentation) dictates that issues of fact and evidence are to be brought by the parties; however, it has been recognised that the judge may have a greater role to play: H. Kötz, ‘Civil Justice Systems in Europe and the United States’ (2003) 13 *Duke.J.Int.Comp.Law* 61, in order to provide substantive justice, and in line with para.139, *ZPO*).

¹⁹⁶⁶ The operation of which must nevertheless occur within the confines of Union law, and particularly, fundamental rights.

¹⁹⁶⁷ H. Muir Watt, ‘La fonction subversive du droit comparé’ (2003) 52 *Revue internationale du droit comparé* 503.

¹⁹⁶⁸ *Algera* (n.1676), Judgement, p.55.

¹⁹⁶⁹ Consider the controversy surrounding *Mangold*, where the general principle and its effect was recognised by the CJEU not on the basis of the commonality of all the Member States but on the basis that it “was consistent

use comparative analysis to legitimise its recognition of principles at a preliminary stage, where these principles might be subsequently but have not yet been legitimised by the Union legislature or the Member States. This is identifiable, for example, in the cases reflecting, in the context of the legislative silence of the Treaties, the foundations of judicial fundamental rights protection, following which the Union legislature took steps to enshrine such protection in primary law¹⁹⁷⁰.

Furthermore, the significance attached to this legitimacy dimension might also reflect the transparency (or lack thereof) in the diverse legal reasoning processes existing across legal orders. Moreover, the judgements rendered by the Court, and less so, the Opinions of the AG, have been characterised as “stale” and formalistic; such an approach might well undermine the legitimacy of the reasoning, methodology and indeed, the final interpretation rendered. On the one hand, while this lack of clarity might dissuade judges in the national courts from engaging in dialogue (and in comparison), they might be more encouraged to enter into dialogue with the CJEU and to attribute greater consideration to its reasoning, where it is more transparent; that is to say, the legitimacy of the CJEU’s judicial reasoning might be increased, at least before the national courts, as its transparency is similarly augmented¹⁹⁷¹. Furthermore, the national courts would also be encouraged to engage with the CJEU, particularly, if it can identify, on the part of the Luxembourg Court, acknowledgment of national commonalities and diversities. Thus, for Torres Perez, dialogue facilitates legitimacy, which derives not only from the existence of uniform interpretation but similarly from the scope for the maintenance of diverse interpretations rendered in Member States, where the former ensures the effectiveness of Union law and the latter promotes democracy. The promotion of dialogue, she argues, rather undermines any strict adherence to a hierarchical relationship between Union and national law and purports to ensure that the notions of diversity and uniformity are not concretised as rigid dichotomies¹⁹⁷². By referring to the constitutional rights of the Member States, and engaging comparative reasoning, dialogue is deemed to promote legitimacy. It is on this basis that a plea for a more explicit, more methodologically rigorous engagement with comparison and in particular, its

with a specific task incumbent on the European Union in combating discrimination”: C-144/04 *Mangold* [2005] ECR I-9981, Judgement, para.75; *Akzo* (n.691), Opinion of AG Kokott, para.96

¹⁹⁷⁰ The area in which, according to Tridimas, developments in the recognition of principles of Union law have been most significant: Tridimas, *The General Principles of EC Law* (n.1475), p.8.

¹⁹⁷¹ Semmelmann, ‘Legal Principles in EU Law’ (n.1564), p.18. See also, Torres Perez, *Conflicts of Rights* (n.1922), pp.177-178.

¹⁹⁷² Torres Perez, *Conflicts of Rights* (n.1922), p.92.

mechanisms, is made. Thus, it is often proclaimed that while the judges of the CJEU engage with “the law of the other” in the preparation, hearing and drafting of the judgement, it is simply the case that these references are not explicitly cited in the final ruling¹⁹⁷³; yet, as is clear, this is not to assert that this analysis has had no influence on the reasoning or deliberation processes.

The significance of a comprehensive engagement with comparative analysis on dialogue is identifiable from a reconsideration of the *Viking* and *Laval* cases. As noted above, the facts of the cases themselves and the commentary to which they have given rise highlight the significance of the legitimacy of the approach to governance advanced herein. For Schmid, multi-level governance dictates that the legitimacy of governance is “highest” where European intervention (understood broadly as the recognition of the status of a particular norm, or the attribution of a certain interpretation to it by the CJEU) “compensate[s] ‘nation state failures’”; however, such interventions should not affect “democratically-rooted legitimate national institutions, social state institutions, in particular, which the EC/EU is not realistically able to establish at the European level...but should instead focus on their stabilisation and compatibilisation with European basic values...integrating all affected interests”¹⁹⁷⁴. In order to ensure this, Schmid makes reference to the need for the CJEU “to enter into a more constructive dialogue with national courts”¹⁹⁷⁵ not only for the purposes of uncovering the different social, economic, political and legal traditions but also to identify the “different factual consequences of decisions in the various Member States”¹⁹⁷⁶. This provides one example of the way in which comparative analysis not only facilitates dialogue but whereby dialogue might also facilitate comparative analysis. Such a process firstly requires the identification of nation states failures, a determination which must be made against the background of Union aims and objectives. Only once these failures have been identified, can Union intervention be legitimised; notwithstanding, the intervention must take into account the relevant interests within the national orders. These interests must be identified by virtue

¹⁹⁷³ Kakouris, ‘Use of the Comparative Method by the Court of Justice of the European Communities’ (n.1528), p.277.

¹⁹⁷⁴ C. Schmid, ‘From Effet Utile to Effet Neolibéral; A Critique of the New Methodological Expansionism of the European Court of Justice’ in R. Nickel (ed.), *Conflict of Laws and Laws of Conflict in Europe and Beyond: Patterns of Supranational and Transnational Juridification* (Intersentia, Antwerp; 2010), pp.295-314, p.313.

¹⁹⁷⁵ Schmid, ‘From Effet Utile to Effet Neolibéral; A Critique of the New Methodological Expansionism of the European Court of Justice’ in Nickel, *Conflict of Laws and Laws of Conflict in Europe and Beyond*, (n.1974), p.313.

¹⁹⁷⁶ Schmid, ‘From Effet Utile to Effet Neolibéral; A Critique of the New Methodological Expansionism of the European Court of Justice’ in Nickel, *Conflict of Laws and Laws of Conflict in Europe and Beyond*, (n.1974), p.314.

of evaluative comparative analysis, which allows for consideration of the developing nature of the national traditions as well as the aims and objectives of the Union; this comparison also allows for the scope for their scope for convergence and divergence across the Union space to be understood. On this basis, the CJEU can hypothesise as to how the intervention might operate in the relevant national contexts, for the purposes of determining its potential effectiveness; this forms the beginning of a dialogue, which can be continued if there is a need for an amendment of the intervention¹⁹⁷⁷.

This example also illustrates that the CJEU might be criticised for failing to attribute satisfactory consideration to how its decisions will be engaged in the national context. Yet this consideration – and especially, the scope for dialogue – is also one shaped by the national court. National judges are obliged to ensure that they interpret national private law in conformity with European law, by virtue of national mechanisms of interpretation¹⁹⁷⁸; the national court’s interpretation of national law “as far as possible, in the light of the wording and purpose of the directive” is intended to reduce the scope for conflict between European and domestic law¹⁹⁷⁹. This obligation is inherent to the scope for judicial dialogue, particularly as it might be understood as legitimising the request for a preliminary ruling, and the interpretation rendered; thus where the national court is unsure of the appropriate interpretation, it is – as noted above¹⁹⁸⁰ - obliged to make a reference to the CJEU under Article 267 TFEU. This duty becomes particularly pertinent where the European norm applies across the entire national order, in which case, the interpretation in line with European law cannot lead to a *contra legem* interpretation of national law¹⁹⁸¹. As noted above, there is a lack of clarity as to whether all national courts actually consider themselves to be obliged to make a reference in such a context.

Moreover, there necessarily exists a political dimension to comparison and dialogue, which is becoming increasingly important; it has been envisaged that cooperation and communication will benefit developing democracies (for example, as they existed in Central and Eastern

¹⁹⁷⁷ This reflects Torres Perez’s idea of “dialogue over time”.

¹⁹⁷⁸ Joined Cases C-397-401/01 *Pfeiffer* [2004] ECR I-8835, Judgement, para.116.

¹⁹⁷⁹ *Marleasing* (n.393), Judgement, para.8, developing *Von Colson* (n.778), Judgement, para.28.

¹⁹⁸⁰ See Chapter 4.

¹⁹⁸¹ C-212/04 *Adeneler* [2006] ECR I-6057, Judgement, para.110.

European states following the disintegration of the Soviet Union¹⁹⁸²) as well as “established” legal orders. Orders of the former nature come together – that is, they must necessarily interact – in the EU context; in particular, the increasing and expanding EU and the contemporaneous development of the jurisdiction of the CJEU post-Lisbon, particularly in relation to private law, dictates that there is an increasing body of national, Union, international and transnational sources of norms to which the AG and Court can refer. It must be borne in mind that in spite of the “invaluable services” of comparison, the difficulty of the task necessarily increases, particularly in the context of enlargement; thus, it has previously been questioned “whether this approach [comparative analysis] can be upheld after the enlargement of the Communities”¹⁹⁸³.

The analysis of the normative underpinnings of communication and dialogue are largely shaped by the concept of law engaged and the attitude of the legal actor as to the context in which legal development occurs. The scope for dialogue might also play on the attitudes of the institutions, and particularly of the courts, in respect of their self-perception of their own legitimacy and power, in relation to that of other actors. Furthermore, it might shape their determination to exercise self-restraint or not, the exercise of which might reflect the significance of balancing that power¹⁹⁸⁴. Tensions between national and European institutions – for example, where national courts become wary of the power of the European courts – might render the courts “much more aware of each other and more wary about treading too much on each other’s toes”¹⁹⁸⁵. In this context, it is clear that the institutions have the potential to become aware of putative conflict¹⁹⁸⁶; comparative analysis allows for this knowledge to be disseminated and facilitates the values underpinning communication between the courts to either to ensure conflict does not arise or that it does not become problematic. Thus, Slaughter suggests there is evidence that the national courts engage with the CJEU “as a co-equal rather than a superior court”¹⁹⁸⁷.

¹⁹⁸² Z. Kühn, ‘Worlds Apart, Western and Central European Judicial Culture at the Onset of the European Enlargement’ (2004) 52 *AJCL* 531, p.549.

¹⁹⁸³ Pescatore, *The Law of Integration* (n.67), p.76, fn.14.

¹⁹⁸⁴ Tontti undertakes a critique of dialectical accounts; he asserts that interpretation is about power and conflict and authority: J. Tontti, *Right and Prejudice – Prolegomena to a Hermeneutical Philosophy of Law* (Ashgate, Aldershot; 2004), pp.125 *et seq.*

¹⁹⁸⁵ Slaughter, *A New World Order* (n.803), p.147.

¹⁹⁸⁶ The hermeneutic understanding of dialogue dictates that interpretation must necessarily engage with notions of conflict.

¹⁹⁸⁷ Noting that this is particularly true of the attitude adopted by the German *Bundesverfassungsgericht*. For example, *Brunner v The European Union Treaty*, in which the constitutionality of the Treaty of Maastricht was

Chapter 9. Concluding Remarks

The classifications advanced in Chapter 8 were developed for explanatory purposes in their own right but have also provided the foundations for the analysis of the evolution of the meta-mechanisms of Europeanisation and integration that has been undertaken in Chapter 9. With reference to these categorisations, three stories of comparison have been uncovered, concerning firstly, the use of comparative analysis in the identification of either common or general principles of Union law, and the recognition of “best solutions”, and thereafter, the uncovering of the “second order” engagement with comparison, in respect of the evolution of the transfer and dialogue discourses.

The first section of the chapter has aimed to examine the way in which the CJEU identifies and recognises common and general principles of Union law. Fundamentally, it has become clear that the AG and the Court engage with comparative analysis in the reasoning processes from which principles are derived; moreover, the sources of comparison engaged are not only national norms but include norms of international law, Union law, private regimes and scholarship. Furthermore, it has been advanced that a distinction should be drawn in respect of the characterisation of principles, between the recognition of common principles on the one hand and general principles on the other; given that both the AG and the Court seem to “throw” all principles into the same basket of “general principles”, these terms are currently used interchangeably. It has been submitted that this distinction not only facilitates the identification of the nature of the comparative methodology engaged within the CJEU but further illustrates the use of comparison for the purposes of either identifying commonality between sources of comparative analysis, identifying difference, or perhaps, for the purposes of accepting an absence of commonality; fundamentally, this evaluation has confirmed that the CJEU does not merely use comparative analysis to identify similarities and repress differences but also to acknowledge divergence, to fill gaps, to generate coherence and to trigger dialogue, that is, more broadly as a mechanism of Europeanisation¹⁹⁸⁸. This analysis has therefore corroborated the conclusion advanced above in Chapter 8.

challenged, and in which the BvG called for a “cooperative relationship” between the national courts and the CJEU; *Maastricht Treaty Decision*, BvG 2. Senat 12 Oct. 1993, reported in [1994] 1 *CMLR* 57.

¹⁹⁸⁸ Principles are engaged as mechanisms of Europeanisation, for example, most predominantly, in filling gaps, where there might be more of a reluctance, per Lenaerts, to use general, as opposed to common, principles for such a purpose; Lenaerts and Guitiérrez-Fons have suggested that where there is an absence of commonality

Moreover, the distinction between commonality and generality and the acknowledgement that the CJEU exercises a wide discretion in respect of its identification thereof, has allowed for the analysis of the CJEU's engagement of comparison, for the identification of "best solutions", a concept also introduced in Chapter 3. It has been acknowledged that comparative analysis, as it is currently conceived, does not provide a basis upon which a determination as to that which is "best" can be made. It has been submitted that a solution cannot be identified as "best" on the basis of an empirical comparative analysis. Rather, the determination must be conceived as a normative one, shaped by the subjective assessment of the AG or judge; this determination is necessarily made against the background of the teleological approach of the CJEU, in line with the aims and objectives of the Union. It is further accepted that the developed understanding of complex comparison advanced in Chapter 3 - a complex theoretical and methodological approach based on socio-legal comparison has been advanced, acknowledging the socio-economic, political and cultural, as well as legal, dimensions of Europeanisation and integration, and which thus allows for the engagement of the dynamic nature of private law development - does not in itself provide a metric by which such solutions can be identified and ranked. However, it does advance a perspective of legal development, and thus of comparative analysis, which will likely facilitate the identification of this aforementioned normative determination, by clarifying the context in which, and the purposes for which, the comparative analysis is undertaken.

Finally, the focus of this chapter has shifted to the comparative analysis underpinning the other meta-mechanisms of the CJEU's reasoning, primarily, in respect of legal transfers and thereafter, with regard to the increasing significance of dialogue and communication, for the purposes of explaining interactions in a pluralist, multi-level context. The transfer discourse - introduced in Chapter 3 - has been reconsidered in light of systems theory, which illustrates that rules, principles, practices, values and so on cannot simply be transposed; rather, the analysis gives rise to the notion that there must be "something else" that facilitates transfer. This has led to the consideration of the scope for a potential shift from the mere reception of transfer to the engagement of communication and dialogue as a means, not only of promoting the scope for transfer, but more broadly, for promoting the understanding of the interrelations between legal orders and the relevant participants thereof. Dialogue has therefore been

between the Member States, the CJEU will not adopt a norm as a general principle of Union law: Lenaerts and Gutiérrez-Fons, 'The Constitutional Allocation of Powers and General Principles of EU Law' (n.1823), p.1633.

advanced as a mechanism of Europeanisation facilitated by comparative analysis, but also as a mechanism of comparison in itself, which occurs not only (although perhaps predominantly) between courts but potentially also between a broad range of institutions, which are legal, political, social and cultural in their nature; dialogue becomes increasingly significant as the scope for interaction between legal orders emerges in a progressively globalised and – within the European context - enlarged space. Moreover, it has been submitted that the perspective adopted of comparison shapes the understanding and attitude of legal (and other) actors to dialogue; in particular, the assertion that private law is understood to develop in a pluralist, multi-level space arguably promotes the scope for dialogue, in respect of the emergence of the values underpinning, including coordination and cooperation. On this basis, it has been considered that dialogue – as a dimension of comparison – might lend legitimacy to judicial law-making, and more specifically, the jurisdiction and role of the Luxembourg Court in Europeanisation and integration, beyond its interpretative role; it is submitted that comparative analysis might be engaged in a “second order” perspective – that is to say, beyond interpretation – for the purposes of the evolution of these meta-mechanisms of Europeanisation and integration.

CONCLUDING PART: THE CJEU AND ITS USE OF COMPARATIVE ANALYSIS AS TOOLS OF THE EUROPEANISATION OF PRIVATE LAW AND INTEGRATION

The thesis has aimed to identify the relevance of comparative analysis to the CJEU's Europeanisation of private law; where comparison has been engaged by the AG and/or the Court, the thesis has further purported to identify the nature of comparative analysis employed and its "added value", both as an interpretative tool and as a "second-order" device, that is, as a means of advancing the meta-mechanisms of European legal development. The foundations of the thesis derive from the preliminary analysis in Parts I and II; thereafter, three case examples have been explored, providing the basis for the evaluation of the CJEU as a "comparative laboratory" in Part IV. This concluding part firstly restates the fundamental dimensions of the thesis and thereafter reiterates the key findings of the analysis undertaken herein, drawing conclusions as to the understanding of the evolving jurisdiction and role of the CJEU, and the relevance of comparative analysis, as tools of Europeanisation and integration.

I. An Overview of the Analysis Undertaken

At the outset of this final part, the structure of the thesis, and its specific dimensions, should be briefly reiterated. The engagement of both theoretical and case-based analyses for the purposes of facilitating this investigation explains its structure. In light of the preliminary evaluation, which establishes the embeddedness of private law in the nation states, comparative analysis has been advanced at an initial stage as a potential theoretical, methodological and normative tool of European legal development; notwithstanding, the appropriateness of comparative analysis, as it is currently conceived, has not been taken as a given. On the basis of an initial critical assessment of comparison – undertaken in Chapter 3 – it is considered that it is lacking in its prevailing conceptualisation as a tool for the Europeanisation of private law and European integration. In light of this critical evaluation, a reconceptualised understanding of complex comparison has been advanced, one which is aligned to the socio-legal context and conceptualisation of these dynamic European endeavours; against the background of the limits of legislative activities, the focus of the analysis throughout has fallen on judicial development, especially legal via the national and European courts. The case-based analysis that has followed has attempted to concretise the

discourse - as to whether, and if so, how, comparative analysis forms part of the methodological framework of Europeanisation - via the analysis of three case examples examined against the background of a socio-legal assessment of the evolving constitution and jurisdiction of the CJEU. The preliminary conclusions drawn therefrom have allowed for a second round of analysis, wherein the CJEU has been evaluated as a “comparative laboratory”.

At the outset, the nature of the processes of integration and Europeanisation has been uncovered, and the interrelation of the two endeavours has been set out; this foundational analysis, which explicates the legal, political, cultural and socio-economic dynamics thereof, has allowed for both endeavours to be located in the dynamic and evolving context that constitutes the European space. The thesis began by outlining the relevant international relations theories of European integration, which has allowed for the articulation of its interrelation with the Europeanisation of national private law. The emphasis on the nation state foundations of private law, including PIL, has illustrated the synergies in the development of (national) private law, the emergence of the nation state, and the evolution of national culture and tradition (and therein, identity); against this background, it is clear that these relationships have been and continue to be reciprocal. Consequently, the European space has been emphasised as one of commonality and diversity, a determination which is deemed to shape the Europeanisation of private law, and which has necessarily permeated the investigation undertaken herein.

The analysis of the foundations and processes of European legislative development and of the role of the Union legislature has therefore aimed to highlight two interrelated lines of discourse. It has brought to the fore the interdependence of the national and Union orders, particularly, in light of the legislature’s focus on the harmonisation of national private law norms via the Union *acquis* and PIL rules and the obligations of the Member States arising therefrom; this legal development finds its legitimacy basis in the facilitation of the internal market. Notwithstanding this focus on economic integration, this analysis has also brought into consideration the more recent assertion that the existence of a single and distinct European culture (and therein, identity) constitutes a prerequisite to the Europeanisation of private law, to the extent that the component parts of culture and tradition are relevant to the Europeanisation of private law just as they have been relevant to the emergence and

consolidation of national private laws. It has been acknowledged that the characterisation of the commonality and diversity of the European space extends beyond culture and tradition to the applicable substantive norms, and that the scope for fragmentation and conflict¹⁹⁸⁹ to which it gives rise, is reflected in the desire of the Union legislature to promote coherence via legislative harmonisation, the CJEU's autonomous interpretation of Union norms and ultimately, the uniform application thereof in the courts of the Member States.

It is in this context that the nature of private law, as it continues to evolve within the nation states and as it emerges from processes of Europeanisation, has been explored in Chapter 2. The dynamic character of private law is deemed to derive from two interrelated considerations. The analysis in Chapter 1 has illustrated that private law has been inherently tied to the development of the nation state, and therein, to national culture and tradition; in this context, private law has long been considered as technical and apolitical. It was initially similarly conceived in respect of its role in European integration, that is to say, in its facilitation of the functioning of the internal market. Yet it has been submitted that private law must be understood as a dynamic construct; its evolution must therefore be considered to be intertwined with that of the Union legal order, the specific dimensions of which have been illustrated by the case examples in Part III. For the purposes of this recap, it is sufficient to consider this to mean that the role of private law in both the Union and national contexts extends beyond the facilitation of the internal market and the regulation of strictly private relationships; as a consequence of its constitutionalisation and materialisation, it has been engaged in an increasingly regulatory function¹⁹⁹⁰. Furthermore, it is necessary that the appreciation of this dynamic conceptualisation of private law be made in light of the understanding that the role of the state is also shifting in the national, European and (emerging) global law contexts. This perspective dictates that the dangers of methodological nationalism are acknowledged; it must be considered that the nation state no longer, if it ever did, constitutes nor reflects the sole analytical focus point of legal evolution, which is to say that the analysis of private law development must avoid becoming stagnated, in terms of being conceived in light of its rigid ties to the state. Rather, it has been submitted that the conceptualisation of private law engaged must be sufficiently flexible and dynamic so as to account for the evolutions in the context of Europeanisation and integration, understood as

¹⁹⁸⁹ The different types of conflict are set out in Chapter 1.

¹⁹⁹⁰ See Chapter 2.

“transformative process[es]”¹⁹⁹¹. This assertion also underpins the comparative complex analysis advanced.

Building on the interdependencies of the national and Union orders, it has been submitted that the European construct should be conceived as a multi-level space of legal development characterised on the one hand, by the multiplicity of sources of norms and dispute resolution bodies existing at divergent levels – from the national to the transnational – of normativity, and on the other, by the engagement of the pluralist perspective and the recognition of the scope for interlegality to which this gives rise¹⁹⁹². Indeed, as it emerges at the European level, private law also continues to exist and develop within the Member States; European private law must be applicable within the national context and existing national private law is therefore necessarily relevant to European legal development. Furthermore, as integration occurs in a globalised context – opening the European up to the transnational – account must also be taken of private law development at the international level and in private law making. The explication of this perspective in Part II has therefore aimed to reinforce the understanding that European private law specifically, as well as Union law in general, must be understood to emerge within a pluralist, multi-level structure, in which – as noted above – there exists a diversity of sources of private law and a multiplicity of dispute resolution bodies with jurisdiction to interpret and apply the relevant norms to resolve the conflicts putatively arising therefrom¹⁹⁹³.

It is from this perspective, in light of the dynamic and shifting character of the Europeanisation of private law, that the need for a developed understanding of the methodological discourse – or lack thereof – has come to the fore¹⁹⁹⁴; it was neither intended nor anticipated that this analysis would or could provided the entire framework. The “resurrection” of one dimension of the methodological discourse in European legal development rather aims to permit an understanding of Europeanisation which better explicates the nature of its development, against the background of the recognition of the

¹⁹⁹¹ Miller, *The Emergence of EU Contract Law* (n.259), p.3.

¹⁹⁹² de Sousa Santos, *Towards a New Legal Common Sense* (n.422) and B. de Sousa Santos, ‘Law: A Map of Misreading: Towards a Postmodern Conception of Law’ (1987) 14 *J.Law&Soc.* 279, esp.280-281.

¹⁹⁹³ Albeit, as to the latter, predominantly in respect of the national courts and the CJEU.

¹⁹⁹⁴ The framework is lacking; as Miller considers, “[m]ulti-level Europe demands a framework for contract law which can capture the plurality of normative sites and the heterarchical relationships that exist between them”: Miller, *The Emergence of EU Contract Law* (n.259), p.154.

interdependence of the national and European legal orders¹⁹⁹⁵ within an increasingly globalised legal, cultural, political and socio-economic context. The significance of the multi-level structure of private law has been outlined in Chapter 2; it is relevant to the actors engaged in legal development and the composition of law-making institutions (the focus herein being on judicial development), the nature of their law-making role, and the consequences thereof including the impact of the decisions of national courts to refer and of the CJEU's preliminary ruling, both within the referring system and beyond. Furthermore, it is this consideration that underpins the rejection herein of the need for a single and distinct European culture and identity as a prerequisite of legal development. Rather, as private law is understood to emerge within a multi-level space, it is asserted that the plurality of cultures and traditions should be accepted as a fundamental dimension of this construct and not as a hurdle to its development¹⁹⁹⁶. Predominantly, within a multi-level system, there is, as Hesselink recognises, no *Grundnorm* providing for how regulation, or more broadly, legal development, should occur¹⁹⁹⁷; the existence of different regulatory regimes at diverse levels, within which there is a plurality of legal sources and actors, dictates, it is submitted, that it is necessary to identify a methodology of legal development, which allows for the engagement of commonalities and the maintenance of diversities.

The analysis undertaken has fallen not on the European legislature but rather as the Europeanisation of private law is understood as “a stipulative not a legislative definition”¹⁹⁹⁸, it has been acknowledged that account must be taken of the multiplicity of legal (and other) institutions engaged in law-making (broadly understood as interpretation, application and enforcement). This necessarily engages the CJEU and national courts as well as private individuals, civil society bodies and legal scholars, in the interpretation and application of the legislative *acquis*. It is on this basis that the focus of the analysis has shifted to the CJEU and its relationship with the national courts; the role and jurisdiction of the CJEU has been set out in Chapter 4, and the pertinent socio-legal dimensions thereof, including its constitution and structure, are highlighted, providing the foundations for its conceptualisation as a space for comparison. The preliminary reference procedure has been conceived as an epistemological

¹⁹⁹⁵ The legal orders are understood to be interdependent, where interdependency does not necessarily necessitate unification: Delmas-Marty, 'Comparative Law and International Law' (n.4).

¹⁹⁹⁶ See Chapter 2.

¹⁹⁹⁷ Hesselink, 'A European Legal Method?' (n.147), p.43.

¹⁹⁹⁸ Cafaggi, 'The Making of European Private Law' in Cafaggi and Muir Watt, *The Making of European Private Law* (n.59), p.289.

lens through which European private law development can be evaluated and consolidated¹⁹⁹⁹, one from which the interactions between the national, Union, international and (increasingly transnational) orders within a multi-level space can be explored. Against the background of the socio-legal assessment of its composition and structure (highlighting in particular, the diversity of the backgrounds – national, educational, professional - of the AGs and judges) and in respect of its jurisdiction – per the preliminary reference procedure, in particular – it has been submitted that the CJEU has the potential to be understood as a “comparative laboratory”.

Prior to this analysis, it has been advanced that comparative analysis might potentially reflect one methodological dimension of the framework of the Europeanisation of private law, in respect of which its dynamic nature can be understood and its evolution facilitated from the pluralist perspective in light of which the interdependence of legal orders is acknowledged (and putatively managed) within an increasingly globalised, multi-level context. While it is generally assumed that private law and comparative law share an intimate connection, one which derives from the role played by the state, in respect of which there are, as discussed above, historical and cultural interdependencies, the appropriateness of comparative analysis in its current conceptualisation has not been taken for granted. This is clear from the understanding, outlined in Chapters 1 and 2, of private law scholarship developing alongside comparative law at a time when private law was intended, and thus largely understood, as apolitical within the territorial confines of the state; comparative law was consequently conceived – in its doctrinal and functional understandings - as apolitical. While it is recognised that there is a need to move away from these characterisations, they nevertheless continue to permeate the prevailing theoretical and methodological conceptualisations of comparative analysis. In practice however, by virtue of its jurisprudence – and in particular, its development as a “driver of integration” beyond the removal of technical barriers to trade – the CJEU has itself, by implication, acknowledged that neither private law nor comparative law remains technical or apolitical²⁰⁰⁰. Comparative analysis is therefore advanced not only

¹⁹⁹⁹ Zimmermann, ‘Europeanization of Private Law’ in Reimann and Zimmermann, *The Oxford Handbook of Comparative Law* (n.62), p.545

²⁰⁰⁰ Broadly, these shifts can be identified across private law development: Study Group, ‘Social Justice in European Contract Law’ (n.341). This might be identified for example, in the shifting understanding of the consumer, and the rationale underpinning the *ex officio* regulation of contract terms, explored in Chapter 6, namely the need for the protection of the consumer as a weaker group (of course, it is recognised this is not the only rationale). Furthermore, reference can be made to the multi-level nature of fundamental rights protection, in Chapter 7, and confirmed in *Melloni – Melloni*, (n.1287), Judgement, para.60 – in respect of the scope, in

as an interpretative tool of legal development but also as a mechanism of identifying, within a multi-level context, shared and diverse values underpinning the evolution of private law, which contributes to the development of the CJEU's meta-mechanisms of Europeanisation.

A critical evaluation of “mainstream” comparative analysis has therefore been undertaken in Chapter 3. It has been submitted, on the basis of this preliminary critique, that, as it is currently conceived, comparative analysis is lacking – theoretically and methodologically, for the reasons set out immediately below – as a tool of Europeanisation. It has neither been suggested that the orthodox conceptualisations of comparison have not been subject to critique nor that they have failed to evolve from an apolitical, technical understanding. Indeed, this evolution has been recognised in Chapter 3; comparative legal scholarship has been subject to considerable development, in general and also in respect of the evolution of those particular approaches potentially pertinent to the emergence of European law²⁰⁰¹. Notwithstanding, the critical evaluation in Chapters 3 and 4 has illustrated that comparison retains fundamental problematics, which undermine the potential for its engagement as a tool of the CJEU and as a tool of Europeanisation and integration. As the limitations of these understandings of comparison have been considered in detail in Chapter 3, they will be outlined only briefly.

The problematics are theoretical and methodological and relate to the identification and determination of what is being compared by the CJEU:

- a. The understanding of the unit of comparative analysis is predominantly territorially defined; that is to say, it largely limits the comparative analysis to legal rules arising from the national legal order. It has been submitted that it would undermine the entire discussion to make reference to a multi-level order but simultaneously neglect sources of comparison arising from other – possibly “postnational” – normative orders in favour of a strict adherence to a positivistic, state-based understanding of what is compared.

particular, for the national authorities and courts to apply their own standards of protection; in this example, as the *Tribunal Constitucional de España* has explicated (*Tribunal Supremo, Auto de 13.12.2004 (DTC 1/204)*), the difficulty lies in the co-existence, cooperation and coordination of the different regimes. It has been submitted above that the engagement by the CJEU of the complex understanding of comparison, would facilitate the understanding – at least at the outset, which can evolve with “evaluative comparison” – of the scope for these interactions and the potential for conflict.

²⁰⁰¹ See Chapter 3.

- b. This narrow conceptualisation leads to a limited understanding of the significance of legal culture and tradition; that is to say, the comparative analysis is limited to the extent that even where culture and tradition are engaged in the analysis (relatively rare in itself), the understanding of culture or tradition generally reflects the broad adherence to the national system and is therefore often conceived as static, lacking the dynamism required to deal with the Europeanisation of private law and integration²⁰⁰².

The problematics also concern the manner in which comparison is undertaken by the CJEU (considerations which necessarily relate to the determination of what is being compared):

- c. There exists a lack of consensus as to the purposes for which comparison is engaged. The breadth of potential uses of comparative analysis has been outlined in Chapter 3 and explored in more detail in Chapter 8 (including comparison as an aggregation of knowledge, as a means of identifying similarity/difference, commonality/lack of commonality, as a means of identifying principles of Union law – whether characterised as common or general – as a means of identifying “best solutions” and as a driver of dialogue).
- d. There further exists a lack of understanding and appreciation of the context in which comparison is undertaken, that is, the absence of a law-in-context approach to the analysis; consequently, there is little scope to consider the emergence and operation of private law within a pluralist, multi-level space and as such, a lack of understanding of the way in which the orders existing therein interact.

On the basis of the analysis undertaken in Chapter 3, an understanding of complex comparison has been advanced, which is to say that the thesis does not go so far as to propose a model of comparative analysis. The key dimensions of this understanding are reflected in the following considerations: it is necessary to adopt an approach which attributes adequate significance to and takes account of the socio-economic, political and cultural, as well as legal, dimensions of Europeanisation and integration, and which thus allows for the

²⁰⁰² For example, the development of the CJEU’s perspective can be identified in relation to its interpretation of consumer: initially, the “weak consumer” derived from the historical, socio-economically and culturally embedded understanding of protection within the nation state; thereafter, the understanding of the consumer as “average”, “circumspect” and “rational” emerged, understood as a participant in the processes of Europeanisation and integration. A deeper analysis – with case examples - has been undertaken in Chapter 2.

engagement of the dynamic nature of private law development, the shifting understanding of which has been confirmed by virtue of the case law. This thesis has therefore aimed to build on the understanding of comparative analysis as “the study of transnational law as a process of normative *engagement* through which distinct legal systems increasingly encounter the law and legal culture of other systems”²⁰⁰³. It has had the intention to free comparative analysis from its methodological nationalism, and its boundedness to the nation state so as to facilitate its engagement in a multi-level, pluralist context like that of the Europeanisation of private law; comparative analysis might then be engaged not only as a tool of interpretation but also as underpinning the meta-mechanisms of transfer and dialogue explored in Chapter 9.

Against the background of the conclusions drawn from the preliminary part of the analysis, the case-based exploration of the judicial development of Europeanisation has been engaged, in respect of which it has been possible not only to evaluate the relevance of mainstream comparative analysis and the scope for the engagement of the complex understanding of comparison in a concrete setting but also to draw conclusions in light of the particularities of the subject matter of the thesis. This has aimed to facilitate an in-depth evaluation of CJEU jurisprudence arising via the preliminary reference procedure in three areas pertinent to private law development, namely, state liability, consumer contract and fundamental rights²⁰⁰⁴. This evaluation has been undertaken in light of the socio-legal dimensions of enquiry developed in Chapter 4, that is, the constitution of the CJEU and the bifurcated analyses underpinning the Opinions of the AG and the judgements of the Court. Three preliminary determinations are identifiable from the analysis, and have been outlined in more detail in Part III: 1) the case examples illustrate the shifting nature of private law and the need for a dynamic, flexible conceptualisation thereof; 2) the case examples further illustrate that while there exists evidence of comparative analysis in the CJEU’s efforts at the Europeanisation of private law, there does not exist a rigorous methodological framework underpinning; and 3) the case examples confirm, as anticipated in Chapter 3, that while the CJEU does seem to “know” of the ideas of complex comparative analysis advanced in

²⁰⁰³ R.A. Miller and P. Zumbansen, ‘Introduction’ in R.A. Miller and P. Zumbansen (eds.), *Comparative Law as Transnational Law: A Decade of the German Law Journal* (OUP, Oxford; 2012), pp.1-13.

²⁰⁰⁴ It should be noted that the legal issues arising from the cases examined in Part III derive from divergent areas of law which cannot necessarily be strictly categorised; that is to say, while the Union does not have express competence in respect of private law, it is clear that private law disputes arise increasingly in areas of law extending beyond those with which private law might conventionally be associated (including, at the national and the Union levels, conflicts directly related to the regulation of private relationships and/or the facilitation of the internal market). Reference can also be made to the “justification” of the choice of case examples; see the beginning of Part III.

Chapter 3 – its constitution and construction, as advanced, providing a space for comparative analysis via the preliminary reference procedure – the current conceptualisation of comparison about which it is knowledgeable, is lacking as it does not find in itself a developed framework. As a result, the comparative analysis, rather circularly, remains limited. An example can be engaged for clarification purposes. Reference has been made above to AG Trstenjak’s recognition of freedom of contract as a principle characterised in the Opinion as one unanimous to the Member States²⁰⁰⁵. Trstenjak engaged in a direct – although not explicit – comparative analysis, with reference to the theory of freedom of contract in different Member States, including that of Germany, France and Spain; notwithstanding that her analysis evidently extends beyond a consideration of the text of the norms in each order, and the identification of commonalities or differences therein to the theoretical and historical context and underpinnings of the rule, it is evidently confined by a tilt in favour of the German approach, seemingly reflecting the (educational) background of the AG. While, in light of the socio-legal analysis of the constitution of the CJEU - which, it has been submitted gives rise to the scope for complex comparative analysis - it has been recognised that such “tilts” are potentially unavoidable, one cannot help but consider whether its scope – identifiable across the case examples²⁰⁰⁶ – is due to the absence of a framework of comparative analysis.

The case examples have subsequently been employed as the foundations of the evaluation of the CJEU as a “comparative laboratory” in Chapters 8 and 9. Chapter 8 has encompassed an outline of the different sources of comparative analysis and an exploration of the putative rationales underpinning the AG and Court’s engagement with comparison. These outlines are explicative and have been further employed in Chapter 9 in the evaluation of the use of comparative analysis in the CJEU’s interpretative jurisdiction, and in its development of the meta-mechanisms of Europeanisation, namely, the identification of principles of Union law (in respect of which, it is submitted that for clarification purposes a distinction should be drawn between common and general principles) and “best solutions”, the development of transfer and the facilitation of judicial dialogue.

²⁰⁰⁵ *Caja de Ahorros* (n.268), Opinion of AG Trstenjak, fn.9 and 12.

²⁰⁰⁶ For example, in respect of AG Léger’s reference to French scholarship in particular, reflecting his own tradition, in respect of the “already implied” recognition of state liability for the acts and omissions of the judiciary: *Köbler* (n.184), Opinion of AG Léger, para.51 and 52.

II. Conclusions as to the Evolution of the Jurisdiction and Role of the CJEU and the Engagement of Comparative Analysis Therein, as Tools of Europeanisation and Integration

Against the background of this brief overview, the following paragraphs aim to draw conclusions as to the contribution that this thesis – that is, the analysis of the CJEU’s engagement with comparison, and the evaluation of the relevance of a developed understanding of complex comparative analysis - might afford to the Europeanisation of private law and European integration. The conclusions have two dimensions, both of which (there existing a degree of overlap) illustrate that comparative analysis in itself and its engagement in the CJEU potentially constitute tools of the Europeanisation of private law and more broadly, of integration: 1) facilitating a better understanding of the theoretical and methodological dimensions of comparison in general; and 2) advancing the understanding of the role of the CJEU, via its engagement with comparative analysis in the Europeanisation of private law and integration. These conclusions should therefore be read in light of the scope for the engagement of the developed understanding of complex comparison advanced in Chapter 3²⁰⁰⁷, and outlined in the following paragraphs. These conclusions are advanced in light of the understanding that the CJEU does indeed engage comparison, and moreover – particularly on the basis that this engagement transcends a descriptive focus on the identification of similarity and difference for the purposes of promoting the former and repressing the latter, that is, for unification purposes – that it is knowledgeable about the breadth and potential of comparative analysis. It has been recognised that the CJEU’s engagement of comparative analysis lacks a methodological and theoretical framework, either as it is employed in its mainstream or complex conceptualisation. Notwithstanding, as asserted in Chapter 3, comparative analysis as it is currently conceived is, in itself, lacking; indeed, one might therefore assert that the approach adopted in the CJEU is lacking because of an absence of a satisfactory or convincing approach advanced in legal scholarship.

Broadly, comparison is conceived as a means of generating knowledge, which together with its dissemination, promotes academic research and legal scholarship and thus facilitates the

²⁰⁰⁷ It is necessary to adopt an approach which attributes adequate significance to and takes account of the socio-economic, political and cultural, as well as legal, dimensions of Europeanisation and integration, and which thus allows for the engagement of the dynamic nature of private law development.

better understanding of law²⁰⁰⁸. The breadth of uses of comparison is evident from existing scholarship; notwithstanding, these are often overlooked in the context of private law as a result of the predominant focus on the use of comparison for harmonisation, and ultimately, unification purposes against the background of the facilitation of the internal market. This approach has almost been institutionalised in the Union legislature²⁰⁰⁹. Moreover, it is reflected in the CJEU's use of comparison in its interpretative role, particularly where it might aim to identify similarity or difference, predominantly for the purposes of the promotion of the former and repression of the latter in respect of rendering an interpretation of a norm putatively applicable across the Member States in a uniform manner²⁰¹⁰. This thesis rather aims to consider a complex comparative analysis as a means of engaging the difference that permeates the European space, outlined in the introduction and Part I. While it does not go so far as to suggest that comparison can achieve the "total understanding of the law"²⁰¹¹, it is submitted, from the epistemological perspective adopted – namely, the preliminary reference procedure – that it has the potential to permeate all areas of normativity. Against this background, it is advanced that from the pluralist perspective, comparative analysis and the values of coordination, cooperation and compromise inherent therein²⁰¹², can also facilitate the better comprehension of the interdependence of legal orders in a multi-level context, substantiating the ties between comparison and the Europeanisation of private law in the context of European integration.

As Union law is understood as a construct of transnational law, it has been recognised that the approach to comparative analysis must allow for the engagement with the nature and demands of legal development in the context of Union integration "beyond the nation state"²⁰¹³. It is evident from the outline of the manifestations of legal sources advanced in Chapter 8 that

²⁰⁰⁸ Patrick Glenn, 'Aims of Comparative Law' Smits, *Elgar Encyclopedia of Comparative Law* (n.441), p.59; although it has been argued that the generation of knowledge is not sufficient in itself to justify comparative law as a discipline

²⁰⁰⁹ See Chapters 1 and 2, particularly in respect of the Commission's understanding of the use of comparison in the development of the DCFR.

²⁰¹⁰ Indeed, it must be noted that one of the most fundamental contributions of comparative law has been to establish, in respect of the promotion of uniformity, that "certain differences among legal systems are merely apparent", comparison having the role of "measuring the extent of difference", Sacco, 'Legal Formants (Instalment I of II)' (n.475), pp.3 and 7, respectively, and 'Il circolo di Trento; Second Thesis' (Universita degli studi di Trento, Trento; 1987).

²⁰¹¹ E. Örücü, *The Enigma of Comparative Law: Variations on a Theme for the Twenty-First Century* (Martinus Nijhoff, Leiden; 2004), p.11.

²⁰¹² Including cooperation and cooperation as opposed to hierarchy, and plurality as opposed to commonality or uniformity.

²⁰¹³ R. Michaels and N. Jansen, 'Private Law and the State: Comparative Perceptions and Historical Observations' (2007) 71 *RabelsZ* 345 and Michaels and Jansen, 'Private Law Beyond the State?' (n.157).

while the CJEU predominantly engages in a comparative analysis founded on national legal norms, its reasoning is not so rigidly limited. Rather, it engages a breadth of references including the following (the examples are identifiable from the case examples but should not be understood as an exhaustive overview²⁰¹⁴):

Identification of...	Manifestations of Comparison					
	National Legal Rules	National Tradition or Culture	<i>travaux préparatoires</i>	Union Law	International Law	Non-State Law and Legal Scholarship
Commonality, Gap-Filling and Overcoming Fragmentation	<i>Francovich</i> <i>Brasserie Köbler</i>	<i>Internationale Handelsgesellschaft</i> <i>Nold</i>	<i>Fransson</i>	<i>Factortame</i> <i>Leitner</i>	<i>Ordre des barreaux francophones</i> <i>Brasserie Köbler</i>	<i>Stauder</i>
Lack of Commonality/Absence of Need for Commonality	<i>Francovich</i> <i>Brasserie Köbler</i> <i>FIAMM</i> <i>Azko</i>	<i>Omega</i> <i>Brasserie Köbler</i> <i>Akzo</i>			<i>Omega</i>	<i>Caja de Ahorros Putz/Weber</i> <i>Stauder</i>
“Best Solution”	<i>AM&S Werhahn v Council</i>		<i>Inuit</i>		<i>Leitner</i>	
Basis for Cooperation/Dialogue/Inspiration	<i>Factortame</i> <i>Quelle</i>			<i>Factortame</i>		<i>Hamilton</i>

Table 1

At a fundamental level, the thesis illustrates that comparative law is not “ending”,²⁰¹⁵. The case examples illustrate that the CJEU does engage comparative analysis. In respect of the sources of comparative analysis, the evaluation of the case examples seems to allow for the conclusion that while these sources might predominantly reflect national legal norms²⁰¹⁶, the CJEU’s comparative analysis is not so limited. While the CJEU’s reference to culture and tradition (whether national or transnational) is narrow and rarely explicit, the potential sources of analysis include national legal norms and national case law as well as aspects of national culture and tradition and might also extend beyond the strictly national components of law. As is evident from the analysis of the case examples, these sources encompass the *travaux*

²⁰¹⁴ This also explains why not all boxes are filled.

²⁰¹⁵ In contrast to M. Siems, ‘The End of Comparative Law’ (2007) 2 *JCL* 133.

²⁰¹⁶ Strictly understood as norms deriving from the national legislature or courts, not including, for example, norms of international or European law.

préparatoires of EU legislation²⁰¹⁷, Union norms (reflected in cross-referencing between areas of Union law)²⁰¹⁸, decisions of the courts and tribunals other than those of the Member States²⁰¹⁹, international law norms²⁰²⁰, “non-state” norms²⁰²¹ and legal scholarship²⁰²². Fundamentally, it seems that this provides support for the assertion made in Chapter 3, namely the rejection of the “totality” of any single source of comparative analysis. Rather it has been submitted that the conceptualisation of what is compared must be an open one, which while rendering it more complex (to the extent that such openness gives rise to a lack of certainty), also provides the foundations for the engagement of the developed understanding of the rationales underpinning as well as the context in which comparison is undertaken.

Indeed, the evaluation of the current understanding of comparison in Chapter 3 and the developed conceptualisation advanced therein, have further illustrated – evident from the case examples – that comparative analysis can be dynamic and flexible and consequently, that it can evolve, in its theoretical and methodological dimensions, to deal with the evolution of substantive law, including private law²⁰²³. Indeed, the analysis has reiterated – as evidenced

²⁰¹⁷ Which allows for, as noted in Chapter 8, indirect comparative analysis, arising in cases such as *Quelle* (n.241), Judgement, para.33, with reference to the meaning of “free of charge” in Directive 1999/44/EC, or to the Explanations of the CFR, as part of the *travaux préparatoires*, as in *Inuit* (n.1572), Opinion of AG Kokott, para.109, where the Explanations are deemed to be “guidance for the interpretation of the Charter and to which the European Union Courts and the courts of the Member States must have due regard”, in respect of the scope for the extension of direct legal remedies against European legislative acts for the purposes of ensuring the protection of the right to an effective remedy.

²⁰¹⁸ See for example, the cross-referencing between the judicially-developed regimes of Union and state liability, in *Brasserie* (n.186), Opinion of AG Tesauo, para.7 and 66, with express use of the word “lend” by the AG, and the subsequent recognition of “an alignment between the two systems” in *Köbler; Köbler* (n.184), Opinion of AG Léger, para.127.

²⁰¹⁹ *Köbler* (n.184), Judgement, para.49, citing ECHR, *Dulaurans v. France* of 21.03.2000, (2001) 33 EHRR 45, with regard to Art.41 ECHR which allows a court (including a supreme court) to order a state which has infringed a fundamental right to compensate the damage arising from that breach.

²⁰²⁰ In respect of the evolution of the content of the concept of legal dignity, consider the reference to the 1948 Declaration of Human Rights, the UN Covenants on Civil and Political Rights, and Economic, Social and Cultural Rights, and the case law of the ECtHR, *Omega* (n.1331), Opinion of AG Stix-Hackl, para.82 *et seq.*, citing *Pretty v UK* (2002) 35 EHRR 1.

²⁰²¹ For example, in respect of the protection of lawyers’ secrecy and the exception to their obligation to report²⁰²¹, with reference to “professional secrecy” as identifiable both in national norms and the Code of Conduct for European Lawyers adopted by the CCBE (*Ordre des barreaux francophones et germanophones* (n.1346), Opinion of AG Maduro, paras.37-38).

²⁰²² The most significant example is the DCFR, advanced as a “source of inspiration” and even further, as a potential “source of law” for the CJEU: *Pia Messner* (n.1658), Opinion of AG Trstenjak, para.94; *Hamilton* (n.552), Opinion of AG Maduro, para.24, in respect of the understanding of good faith and the idea that “full performance of a contract results, as a general rule, from discharge of the mutual obligations under the contract or from termination of that contract”, respectively.

²⁰²³ That is to say, for example, greater use of comparative analysis could have been used in respect of the evolution of the *ex officio* regulation of unfair contract terms, particularly in respect of the role of the national

in the examination of the breadth of approaches in Chapter 3 - that it can take different forms, depending on the sources engaged, and can serve different aims, both where it is engaged by the CJEU in its interpretation of Union law, and as a second-order device, facilitating the meta-mechanisms of Europeanisation.

	Case Study					
	State Liability		Consumer Contract		Fundamental Rights	
Nature of Comparative Analysis	Source of Comparison	Case Example	Source of Comparison	Case Example	Source of Comparison	Case Example
Vertical Comparison	National norms Cultures and traditions International law	<i>Francovich</i> <i>Brasserie</i>	National norms and traditions	<i>Invitel</i> <i>Asturcom</i>	International law Privately-made norms	<i>Omega</i> <i>Ordre des barreaux franco-phones et germano-phone</i>
Horizontal Comparison	CJEU case law	<i>Francovich</i>	EU directives and CJEU case law	<i>Concept of the consumer</i>	Soft law (EU) International law (ECHR)	<i>Dominguez</i> <i>Viking</i>
Direct or Express Comparison	National norms CJEU case law	<i>Francovich</i> <i>Köbler</i>	National traditions	<i>Pannon Rampion</i>	International law (ECHR) National traditions	<i>Schmidberger</i> <i>Omega</i> <i>Grant</i>
Indirect Comparison and Cross-referencing	CJEU case law	<i>Brasserie Köbler</i>	<i>Travaux préparatoires</i> DCFR Scholarship	<i>Banco Español de Ahorros Pénzügyi Lizing</i> <i>Caja de Ahorros</i>	<i>Travaux préparatoires</i> National law via international law	<i>Inuit</i> <i>Grant</i>

Table 2

Notwithstanding that the CJEU neither limits itself to engaging national legal norms as a source of comparative analysis nor to a focus on identifying commonality for the purposes of facilitating unification via harmonisation, it is nevertheless clear that the CJEU’s comparative analysis, if at all engaged, does not always amount to the complex approach advanced in Chapter 3 and set out in the paragraphs above and below. In order to clarify this assertion,

judge; as noted above, there has been little consideration of the nature of the judge in his task of identifying the facts necessary to make the assessment, from *Pannon* to *Pénzügyi Lizing*.

reference will be made to case examples indicating where the CJEU seems to engage the complex approach and where it is lacking.

The complex understanding of comparison explicitly brings to the fore the relevance of a socio-legal approach to comparative analysis, one which allows for account not only of legal norms (of a national, international or non-state nature) but also culture and tradition, with regard both to the determination of what is being compared and also in respect of the identification of the context in which the analysis is undertaken. As to the former, it has been submitted that the relevant dimensions of (legal) culture and tradition, either as these exist within the national orders, or at the regional or international level, should engage the cultural, socio-economic and political commonalities and divergences that shape the context of integration. As to the latter, it is evident that the deliberation as to the pertinent historical context, the political and economic commonalities and divergences, the cultural and social similarities and differences, and value judgements must be (explicitly) undertaken. The acknowledgement of the significance of context arises in two ways. As to the first, one must now surmise that comparison must be done “in context”, reflecting a shift from the predominant, positivist understanding of (private) law as technical and apolitical; that is to say, it is necessary to transcend the examination of that which is provided for in the rulebooks and identify and evaluate the contexts - both legal and non-legal – in which these rules develop²⁰²⁴ and are applied in practice. The “context” of the case itself is also significant. On the one hand, reference must be made to its position in the line of pre-existing jurisprudence (at the national and CJEU levels) and on the other, to the broader socio-economic, cultural and political context of the area of law in which it arises; both must be engaged in light of the pluralist, multi-level space in which European private law emerges.

Furthermore, the analysis of the CJEU’s use of comparison confirms that there is indeed value in studying the composition and structure of the CJEU, a determination that might further shape the perspective from which the comparative analysis itself is undertaken²⁰²⁵. The scope for the influence of the constitution and structure of the CJEU in legal development allows for

²⁰²⁴ Van Hoecke, ‘Deep Level Comparative Law’ in Van Hoecke, *Epistemology and Methodology of Comparative Law* (n.7), p.167.

²⁰²⁵ This can be identified in particular in those cases in which it is clear that – predominantly – the AG engages sources of comparative analysis reflecting his or her own national or education legal tradition and culture. Reference can be made to *Caja de Ahorros* (n.268), Opinion of AG Trstenjak, fn.9 and 12, with reference to predominantly German legal scholarship and *Köbler* (n.184), Opinion of AG Léger, para.51 and 52, with reference to predominantly French legal scholarship.

the positioning of the “self” in comparative analysis. The Court or the AG can identify his own position, in relation to what is being compared; this might *prima facie* appear to be a theoretical determination but it is understood to be relevant to the judge and AG as they are necessarily conceived as nationally-trained legal actors who must nevertheless identify themselves as European, with responsibility, for example, for rendering autonomous interpretations of Union law. The CJEU should intrinsically provide a putative space in which comparative analysis, which identifies and engages assumptions and presuppositions, can be undertaken thereby overcoming the difficulty of “insurmountability of context”²⁰²⁶. In this sense, the engagement of an approach to complex comparative analysis should ensure that both the AG and the Court avoid “cherry-picking” in respect of the determination of what is compared, i.e. the unit of comparative analysis and the context or perspective adopted for the comparative analysis²⁰²⁷, in light of the rationales underpinning its engagement of comparison. The notion that comparative reasoning simply has the purpose of confirming a decision made on another basis comes to the fore in the absence of a theoretical or methodological framework of comparison, with the result that comparative analysis is engaged merely for “show” supporting the scope for cherry-picking on the part of the CJEU.

The perspective from which comparison is undertaken shapes the significance attributed to the various rationales underpinning the CJEU’s engagement with comparative analysis, reflecting its reasoning and determination of relevant interpretative approaches (which, as is clear from the evaluation above, are not predominantly limited to but often encompass a teleological dimension²⁰²⁸). The nature of its task – in line with its Art.19 TEU obligation to ensure that “in the interpretation and application of the Treaties the law is observed”, it must provide an interpretation of Union law which allows the national court to render a decision – dictates that the CJEU is not bound by any such conceptualisation of comparison. Rather, both the AG and Court seem to engage with a breadth of interpretative approaches, which are often interrelated and appear to be indistinct and overlapping. The CJEU might purposively

²⁰²⁶ Peters and Schwenke, ‘Comparative Law Beyond Post-Modernism’ (n.480), p.811.

²⁰²⁷ Cases in which “cherry-picking” was not avoided, can be identified where, for example, the AG, makes predominant reference to his or her own legal background, whether “natural” or “educational”; reference can be made to AG Trstenjak’s recognition of freedom of contract as a principle she characterises as unanimous to the Member States and her predominant engagement of German norms and scholarship: *Caja de Ahorros* (n.268), Opinion of AG Trstenjak, fn.9 and 12.

²⁰²⁸ *Akzo* (n.691), Opinion of AG Kokott, para.95, citing *FIAMM* (n.1688), Opinion of AG Maduro, para.55-56; by using comparative analysis to identify responses to legal issues, which respect national legal traditions on the one hand, but which also fall in line with Union aims and objectives, via a teleological approach to the understanding of the scope, not only for the development of Union law but also the development, via consideration of the “trends” of national norms.

seek to identify difference, or indeed, difference might be identifiable from the lack of commonality. For this purpose, it is submitted that the “positioning” of the AG or the judge is similarly important. That is to say, it is the “positioning of the self” that allows for engagement with the “other” and which facilitates the CJEU’s engagement with comparison beyond the mere identification of similarity as empirical fact for the unification purposes (it being recognised that harmonisation affords scope for divergence).

That is to say, the adoption of an approach to comparative analysis which engages a breadth of legal sources allows for evaluation of the “other” from which the comparatist derives knowledge of “new” substantive information; this information might be used to construct a developed perspective, which affects not only the way in which the “other” is understood but also the way in which the comparatist understands his own legal system, the culture from which he originates and the background assumptions that he carries²⁰²⁹. Comparative analysis therefore has the potential to facilitate the “opening up” of legal systems (in the sense that it makes the actors in the legal order more aware of what is happening in “other” orders, cultures and traditions, the conceptualisation of which is broadly understood and not limited to the confines of the state). Thus, it has a “subversive role” by forcing engagement with critique of the “home” legal order, whether this is national, European or international, in order to identify unsatisfactory aspects therein²⁰³⁰; it compels the reconsideration of this order from the perspective of an outsider and is thus said to “liberate[...] one from the narrow confines of the individual systems”²⁰³¹.

The need for the determination of this context is of inherent relation to the perspective adopted by the CJEU, in respect of its interpretative role broadly. To the extent that comparison allows for a study not only of the rules of the different national orders and the cultures and traditions from which they derive²⁰³² but also for the examination and evaluation

²⁰²⁹ Frankenberg, ‘Critical Comparison’ (n.490).

²⁰³⁰ See for example, G.P. Fletcher, *Comparative Law as a Subversive Discipline* (1998) 46 *AJCL* 683.

²⁰³¹ W.J. Kamba, ‘Comparative Law: A Theoretical Framework’ (1974) 23 *ICLQ* 485, p.492.

²⁰³² Indeed, it is recognised that the contextual approach to European legal integration – and the notion of unpinning the historical development, and interaction of norms with political, socio-economic and cultural institutions and practices - in itself is not novel but formed part of the “integration through law” project of Cappelletti *et al*; in light of the shifting aims of integration, and particularly, the shifting understanding of convergence, from its understanding as a descriptive and normative desire of integration, to be achieved, alongside the elimination of differences, via the development of uniform legal rules in the integration through law project (Cappelletti, Secombe and Weiler, *Integration Through Law* (n.101), pr.vi)), it is rather the engagement of the contextual approach to the Europeanisation of law as a perspective, in light of the

of relevant international and privately-made norms and scholarship that necessarily shapes the way in which these are understood within the European and national courts, it is asserted that comparative analysis constitutes one conceivable means of reconciling the conflicts arising from the efforts at integration (as socio-economic, cultural and social, beyond a mere focus on its legal and economic dimensions) and the Europeanisation of private law (the nature of these conflicts have been outlined in theory in Chapter 1 and are identifiable from the analysis of the case examples²⁰³³). This complex perspective can be identified in the characterisation of comparative analysis as “evaluative”, in light of which the aims and tasks of the Union legal order are intertwined with the acknowledgement of the scope for development in the national, international and transnational orders, against the background of their relevant cultures and traditions; indeed, such evaluative comparison can be identified in recent jurisprudence of the CJEU²⁰³⁴.

In this task, it is clear that the CJEU cannot engage only with the European law dimension of the case²⁰³⁵ - to the extent that this gives rise to what Schmid describes as conceptual conflicts arising from the “one-sided teleology of European instruments”²⁰³⁶, reflected in the integrationist interest underlying private law²⁰³⁷ - but must respond to all national courts by rendering an interpretation applicable across the Member States in any equivalent case, reflecting “the right balance between the interests of Community law and the acceptability of their ruling to the national legal orders”²⁰³⁸. Both the CJEU and the national courts must be able to accept and apply this interpretation; to this extent, the CJEU operates from a position whereby it acknowledges that the national courts will have to implement EU law as a “middle

Europeanisation of private law, and against the background of an understanding of the pluralist, multi-level construct in which private law emerges, which is advanced herein.

²⁰³³ M. Darmon, ‘La Prise en compte des droits fondamentaux par la Cour de justice des Communautés européennes’ (1995) *Revue de science criminelle et de droit pénal comparé* 29.

²⁰³⁴ For example, *Akzo* (n.691), Opinion of AG Kokott, para.94.

²⁰³⁵ Schmid, ‘The ECJ as a Constitutional and a Private Law Court’ (n.318), p.17. Schmid asserts that if the CJEU is to take on a role which allows it to engage in “system-building”, it would be necessary that it engages not only in the interpretation of European law but also takes into account the national law surroundings relevant to the case.

²⁰³⁶ Schmid, ‘The ECJ as a Constitutional and a Private Law Court’ (n.318), p.11. Comparing the concepts which are dominant in European and national private law, Schmid makes reference to freedom, equality and justice (communitative not distributive) in the national dimension (such that the key interest in private law adjudication is the balancing of interests between parties).

²⁰³⁷ Schmid, ‘The ECJ as a Constitutional and a Private Law Court’ (n.318), pp.11-12. Schmid challenges the notion that this supposedly “collective interest” provides an appropriate basis for the balancing of the interests of private parties

²⁰³⁸ Lenaerts, ‘Interlocking Legal Orders’ (n.1523), p.883.

line”²⁰³⁹ and as such it might attempt to identify, as the most palatable, a “mixed” solution which satisfies the national courts²⁰⁴⁰. While the CJEU rarely makes explicit reference to such a rationale underpinning its engagement with comparison, or to the impact in the national system, it does seem to recognise the potential consequences of a particular judgement on the orders, cultures and traditions of the Member States. Notwithstanding this is rarely explicit. However, there seems to be some evidence not only in respect of the interpretations rendered by the CJEU but also in respect of its recognition and explication of either common or general principles, and the scope for transfer and dialogue²⁰⁴¹, an approach which arguably “reflects the Court’s concern in respecting cultural differences”²⁰⁴². However, the reference to the impact within and across cultures and traditions is often lacking, which undermines the scope for the engagement of comparative analysis to potentially legitimise the interpretation rendered and to be applied in the national court. This is clear from the *Viking* and *Laval* cases²⁰⁴³.

In this context, comparison has been characterised as “an exercise in ‘psycho-diplomacy’...in the interests of ‘acceptability’ of Community law in the domestic legal orders”, ensuring on the one hand, the satisfactory interpretation, application and thus effectiveness of EU law and on the other, respect for the “richness” of the national, international and transnational cultures and traditions²⁰⁴⁴. Thus, comparative analysis can be engaged as a means by which the cultural perspective of legal development can be brought to the fore, allowing for the uncovering of the relevant dimensions of the national and transnational cultures and traditions, as well as the scope for an understanding of a (not necessarily single or common) European culture which embraces plurality²⁰⁴⁵.

However, comparative analysis might indeed be engaged to identify both (or indeed, either) commonality and a lack of commonality as political, socio-economic and cultural constructs

²⁰³⁹ Hilf ‘The Role of Comparative Law in the Jurisprudence of the Court of Justice of the European Communities’ in De Mestral *et al*, *The Limitation of Human Rights in Comparative Constitutional Law* (n.3), pp.563-564.

²⁰⁴⁰ Reid, ‘The Idea of Mixed Legal Systems’ (n.571), p.38, fn.148: the idea of “civil and common law lite: law made more palatable by the act of mixture”.

²⁰⁴¹ See, for example, C-21/76 *Bier v Mines de Potasse d’Alsace* 1976 ECR 1735, Judgement, para.23.

²⁰⁴² Kakouris, ‘Use of the Comparative Method by the Court of Justice of the European Communities’ (n.1528), p.276.

²⁰⁴³ See Chapter 7 and the discussion of the legitimacy of EU intervention in Chapter 9.

²⁰⁴⁴ K. Lenaerts, ‘Interlocking Legal Orders or the European Union of E Pluribus Unum’ in G. Canivet *et al* (eds.), *Comparative Law Before the Courts* (BIICL, London; 2004), pp.99-134, pp.133-134, for all quotes.

²⁰⁴⁵ See Chapters 2 and 3.

of the national and Union orders, beyond the identification of the commonality or diversity of legal rules²⁰⁴⁶. Furthermore, the significance of the perspective adopted is also clear where the CJEU looks to identify similarity or divergence and thus engages comparative analysis for a functional purpose. For example, comparison might be engaged in a gap-filling role, to facilitate coherence and avoid fragmentation; furthermore, it might be engaged as a means of supporting the autonomous interpretation of a Union norm²⁰⁴⁷. In both manifestations, the engagement of comparative analysis can legitimise the expanding jurisdiction and role of the CJEU, the legitimisation being reflected, for example, in the scope to do justice via comparative analysis in the absence of a Union norm²⁰⁴⁸.

Not only does comparative analysis have the potential to facilitate this kind of critique but it might also allow for the identification of that which is best. As noted above, the functional engagement of comparison is also identifiable in the CJEU's recognition of principles of Union law and of "best solutions". Three "stories" have been outlined, in respect of which a distinction between common and general principles has been advanced: 1) the use of comparative analysis for the purposes of identifying, recognising (and frequently, constituting) common principles; 2) the use of comparative analysis for the purposes of identifying, recognising (and frequently, constituting) general principles; and 3) the use of comparative analysis for the purposes of identifying the "best solution" (which might include rules, principles, values and practices)²⁰⁴⁹. In particular, a distinction has been advanced as to the recognition of principles as common and the recognition of principles as general. This distinction would not only have the purpose of clarifying the reasoning of the CJEU in general²⁰⁵⁰ but would also clarify the nature of the comparative reasoning adopted, that is to say, the use of comparative analysis for the purposes of the identification of commonality between legal sources on the one hand, and the acknowledgement of divergence, i.e.

²⁰⁴⁶ Evidence of this approach can be identified in respect of the jurisprudence on the conceptualisation of marriage, whereby the CJEU has held that given the absence of commonality (otherwise frames as the existence of diversity), a same-sex relationship cannot be interpreted as marriage. For example, *Grant* (n.1706), Judgement, para.35.

²⁰⁴⁷ For example, these considerations overlap in the CJEU's understanding of the notion of damage in the *Leitner* case, particularly in respect of AG Tizzano's analysis: *Leitner* (n.728), Opinion of AG Tizzano, paras.34-35.

²⁰⁴⁸ See for example, *Algera* (n.1676), Judgement, p.54.

²⁰⁴⁹ The methodologies and metrics have been outlined in Chapter 8 and 9, above.

²⁰⁵⁰ For example, AG Trstenjak has recognised the potential for a categorisation of different principles however, it is not one based on the way in which comparison shapes the identification of the principles: *Dominguez* (n.1502), Opinion of AG Trstenjak, para.94.

generality, on the other²⁰⁵¹. However, as is clear from the analysis in Chapter 3, the comparative methodology does not in itself provide the criteria for the identification of the “best solution”²⁰⁵². It is submitted that the determination of that which is best is neither empirical – that is, it cannot be identified on the basis of commonality or generality alone – nor based on economic efficiency to the exclusion of political considerations²⁰⁵³ but rather encompasses a set of normative determinations, identifiable via comparative analysis, in light of the commonalities and diversities of the national, international and transnational traditions and cultures (albeit the latter two being limited²⁰⁵⁴) – and not merely the rules therein – against the background of the aims and objectives of the Union²⁰⁵⁵.

Furthermore, it is submitted that the complex understanding of comparative analysis shapes those mechanisms that delineate the interaction between the diverse legal orders, and particularly those of transfer and dialogue, which are deemed to provide a means of dealing with the increasing interdependence that arises from the deconstruction of hierarchical, closed (predominantly, national) systems in the European (and increasingly, transnational) space. In the context of the Europeanisation of private law and the interpretative role of the CJEU, these interdependences arise as a result of and are reflected in the preliminary reference procedure. That is to say, it is submitted that the values – predominantly of coordination and cooperation - underpinning comparison are relevant to the understanding of the scope for transfer and the promotion of dialogue, which necessarily promotes the interaction between, and the interdependence of the diverse legal orders existing within the multi-level European space. Comparison, especially in its complex conceptualisation, facilitates the explication of the means by which different norms (broadly understood) are identified but also shared and potentially adopted within and between different legal orders. Such transfers are identifiable within the context of the Europeanisation of private law, for example, in respect of the development of state liability, from the national to the Union order²⁰⁵⁶ and from the

²⁰⁵¹ Notwithstanding the scope for the distinction, it is clear that the CJEU continues to use the terms interchangeably. For example, principles found in several systems - *Hoechst* (n.1265); principles identified in international law - *Racke* (n.1620), Judgement, paras.45-46.

²⁰⁵² See Chapters 3, 8 and 9.

²⁰⁵³ Per the discussion of the approaches of the World Bank and legal origins methodologies in Chapter 3.

²⁰⁵⁴ For example, *Akzo* (n.691), Opinion of AG Kokott.

²⁰⁵⁵ This paragraph aims only to clarify; see the discussion at the end of the first section of Chapter 9. The fact that it might not provide a complete metric is acknowledged as one key failing of the approach proposed.

²⁰⁵⁶ Consider the recognition of the principles of proportionality (*Internationale Handelsgesellschaft* (n.1256)) and legitimate expectations (Joined Cases C-205-215/82 *Deutsche Milchkontor* [1983] ECR I-02633).

international to the Union, and thereafter, to the national orders²⁰⁵⁷. It is further recognised that in light of the difficulties underpinning transfer and their acceptance in context (in particular, in respect of the systems theory analysis), there might be scope for a greater role for dialogue in these processes. That is to say, scope for a shift from reception of transfer to dialogue; it is submitted that this approach reflects the prevailing trends in the Europeanisation of private law²⁰⁵⁸. To the extent that it has been asserted that it is the “linkage between legal systems previously conceived as completely different that has created the transnational European law”²⁰⁵⁹, its development is arguably facilitated by effective “dialectical interaction between national laws and Community law”²⁰⁶⁰ via the transmigration of legal ideas and knowledge. The acknowledgment of these interactions and of the multi-level nature of the Union, and the need for interaction between the courts is identifiable in the “division of labour” between courts in the fundamental rights cases, which arguably also allows for the development of the national, European and increasingly transnational, identities²⁰⁶¹. Thus, for example, while the balancing of fundamental rights and freedoms²⁰⁶² is for the national court in the light of national, regional and international diversities, the CJEU should provide criteria of interpretation for the national judge, building on the emergence of and necessitating a discursive relationship between both²⁰⁶³. Comparative analysis in itself constitutes a mechanism of dialogue, providing the foundational knowledge of commonalities and diversities across the Union space; moreover, dialogue also facilitates comparative analysis. However, as is clear from the cases, the scope for this “opening” up and for the consideration of difference and thus, of “otherness”, is limited because the

²⁰⁵⁷ See for example, *Racke* (n.1620), Judgement, paras.45-46 and *Ordre des barreaux francophones et germanophones* (n.1346), Opinion of AG Maduro, paras.37-38, in respect of the “professional secrecy” norms in the Code of Conduct for European Lawyers.

²⁰⁵⁸ These understandings, it is submitted, require reconsiderations about the understanding of law within the CJEU; it requires an understanding of law, not just as rules, but as encompassing cultures and traditions, within and beyond the state, and of law as dynamic, engaging the scope for the development of trends and ideas; Consider Ewald and his “comparative law as jurisprudence”, and further, C. Valcke, ‘Comparative Law as Comparative Jurisprudence: The Comparability of Legal Systems’ (2004) 52 *AJCL* 713, p.731.

²⁰⁵⁹ D. von Daniels, *The Concept of Law from a Transnational Perspective* (Ashgate, Farnham; 2010), p.61.

²⁰⁶⁰ van Gerven, ‘Bringing (Private) Laws Closer to Each Other at the European Level’ in Cafaggi, *The Institutional Framework of European Private Law* (n.228), pp.37-77, p.49.

²⁰⁶¹ For example, in the “guidance” of the CJEU in the national courts’ balancing of fundamental rights and economic freedoms, respect should be maintained for the identities of the Member States - *Sayn-Wittgenstein* (n.1472), Judgement, para.92.

²⁰⁶² *NS* (n.1249), Opinion of AG Trstenjak, para.85.

²⁰⁶³ C-349/07 *Sopropé* [2008] ECR I-10369, Judgement, paras.34-35.

comparative analysis continues to focus on norms, while the reference to tradition and culture – whether national or transnational – remains limited²⁰⁶⁴.

This kind of interaction between the legal orders appertains to the Europeanisation of private law and integration as “part of an ongoing process”²⁰⁶⁵, or rather processes, suggesting that the component dimensions of these processes are dynamic and changeable. From this perspective, the CJEU and national courts can promote the emergence of a network, fostering a discursive rapport between the European and national orders, within a broader globalised context²⁰⁶⁶. While the CJEU has afforded little express consideration to this shift to dialogue, it does recognise the preliminary reference procedure as a space of communication, potentially giving rise to cooperative relationships between legal orders and the actors therein²⁰⁶⁷. Comparative analysis is therefore ultimately engaged as it facilitates a shift in perspective from the autonomy of the national and Union legal orders, to interdependence, even if this interaction is predominantly understood as interdependence between the national and European orders in the European context, it has the potential to stretch beyond the national and European space. This autonomy relates not only to the relationship between legal orders but also to relations within orders, allowing for the socio-economic, cultural and political dimensions of integration to be absorbed in the CJEU’s development of private law.

The aim of this thesis has been to explore the relevance of the comparative methodology – particularly as it has been engaged by the CJEU in its interpretative jurisdiction and role – in the Europeanisation of private law. It has advanced the critique of the theoretical and methodological dimensions of comparison and the plea for the reconceptualisation of the perspective adopted, particularly as the scope for its engagement arises *vis-à-vis* the CJEU's interpretative role and also in a “second order” respect, with regard to the development of the CJEU’s meta-mechanisms of Europeanisation. It has therefore aimed to facilitate the resurrection of the methodological discourse and explore the implications of this evaluation in respect of the evolution of the Europeanisation of private law, as it occurs in the context of

²⁰⁶⁴ This, it is submitted, is clear in respect of the UCTD cases and the Court’s lack of comparative analysis and engagement with dialogue, particularly in respect of the clarification of the *ex officio* regulation of contract terms, notwithstanding the arguably “already existing” framework for dialogue existing as a result of the preliminary references from diverse national traditions.

²⁰⁶⁵ van Gerven, ‘Bringing (Private) Laws Closer to Each Other at the European Level’ in Cafaggi, *The Institutional Framework of European Private Law* (n.228), pp.37-77, p.49.

²⁰⁶⁶ Perju, ‘Reason and Authority in the ECJ’ (n.666), pp.338-344.

²⁰⁶⁷ *Pénzügyi Lízing* (n.1033), Judgement, para.37 and in the national court, *Maastricht Treaty Decision*, BvG 2. Senat 12 Oct. 1993, reported in [1994] 1 *CMLR* 57.

European integration via the judiciary. That is to say, it has purported to illustrate that the explication and reconceptualisation of the methodological and theoretical dimensions of comparative analysis allows for the evolution of the Europeanisation of private law driven by judicial activity, and the understanding of integration in its entirety, namely as socio-economic, cultural and social, beyond a mere focus on its legal and economic dimensions; this abstracted dimension is placed in a concrete context of potential conflict arising at different levels of Union regulation (national, European and even transnational) via the case studies²⁰⁶⁸. This final chapter has intended to focus on the theoretical and methodological conclusions that can be drawn from the theoretical and case-based analysis that constitutes the core of the thesis. Two fundamental deductions are identifiable. The thesis has attempted to advance the assertion that a developed understanding of complex comparative analysis (while not going so far as to promote a model or a framework of methodology) can be engaged: 1) to facilitate the better understanding of comparative analysis as a tool to enhance the Europeanisation of private law and European legal integration in context; and 2) to facilitate, via an evaluation of its engagement with comparison, the better understanding of the jurisdiction and role of the CJEU as it arises especially from the preliminary reference procedure in the Europeanisation of private law and integration. The breadth of conclusions that can be drawn are diverse and overlapping and concern the context in which Europeanisation and integration occur, the conceptualisation of private law engaged at the outset in light of its emergence in a pluralist, multi-level order and the understanding of the comparative methodology, both with regard to the identification of what is compared by the CJEU and the context in which comparison is undertaken.

²⁰⁶⁸ Joerges, 'The Impact of European Integration' (n.654).

FINAL CONCLUSIONS

This thesis has sought to determine whether, and if so, in what form, comparative analysis forms part of the methodological framework of the Europeanisation of private law. In light of the preliminary evaluation, which uncovered the nature of Europeanisation and integration and highlighted the significance of the legal, political, cultural and socio-economic contexts in which these processes occur, it was submitted that European private law must be understood to emerge within a pluralist, multi-level space. On this basis, the need for a shift in the perspective of European legal development was advanced. In light of the exploration of the foundations of the Union legislature's task and the reach of its competences, the limits of the legislative development of European law – in particular, the focus on harmonisation via legislation, and ultimately unification, given the recognition of the unlikely scope for the codification of private law – have been recognised at the outset. In light of the preliminary conclusions, the focus of the analysis has fallen on the CJEU's interpretative role as it arises predominantly via the preliminary reference procedure. Against this background, the thesis has argued that comparative analysis might provide one means by which this alternative perspective – one which acknowledges the dynamic nature of private law, its emergence within a multi-level construct, and the pluralism shaping the European space - might be developed via the courts.

However, the appropriateness of comparative analysis has not been taken as a given; by virtue of the subsequent evaluation and critique of the comparative methodology as it is currently conceived, the thesis has considered the need for the resurrection of the comparative discourse. It has engaged and advanced a developed understanding of complex comparison, one which facilitates the evolution of the Europeanisation of private law and the appreciation of integration in its entirety, namely as socio-economic, cultural and social, beyond a mere focus on its legal and economic dimensions. That is to say, this complex comparative analysis advocates the engagement of sources of comparative study, which transcend those arising from the nation state, and the undertaking of comparison from a perspective which allows for a “law in context” evaluation. The thesis has focused on the relevance of comparative analysis to European private law development as the processes of Europeanisation and integration occur via the CJEU, and necessarily, the national courts. This evaluation has therefore been undertaken via an analysis of three case examples arising

before the Luxembourg Court by virtue of the preliminary reference procedure and against the background of a socio-legal assessment of the constitution and jurisdiction of the CJEU (in light of which the CJEU has been engaged as a potential space for comparison). This abstract proposal of complex comparison has therefore subsequently been placed in a concrete context of jurisprudence-based analysis (that is, one of potential conflict arising at different levels of Union regulation, namely national, European and even transnational)²⁰⁶⁹.

The case-based analyses have provided the foundations for the evaluation of the CJEU as a “comparative laboratory”. Fundamentally, they have confirmed the preliminary conclusions that have shaped the foundations of this study, that is, the emergence of private law within a multi-level construct of regulation and the significance of the pluralism as a defining characteristic of the European space. Furthermore, the case examples have provided evidence of the engagement of comparative analysis within the CJEU; indeed, such reasoning is identifiable, albeit often not explicitly, in the judgements of the Court and the Opinions of the AGs. Moreover, it becomes clear that the reference to comparative analysis is not necessarily limited to those understandings critically assessed as “orthodox” in Chapter 3; while it might not be evident that the CJEU has the potential to fully and unequivocally subscribe to the developed notion of complex comparison advanced in Chapter 3, it does not seem to have been so limited. Against this background, it has been possible to construct two outlines elucidating the CJEU’s use of comparative analysis, in respect of its engagement of: 1) the relevant sources of comparative analysis; and 2) the rationales underpinning its reference to comparison. These classificatory exercises have also provided the basis for the evaluation of the CJEU’s use of comparative analysis as a tool of interpretation and for a “second order” purpose. That is to say, the second round of evaluation has allowed for the analysis of comparison in the CJEU’s development of its meta-mechanisms – namely, principles of Union law, “best solutions”, transfer and dialogue – of the Europeanisation of private law. The final chapter has not only aimed to provide an outline of the thesis and to reiterate the fundamental dimensions of the investigation but to further illustrate the contribution that this thesis has made to Europeanisation and legal integration, by advancing the understanding of comparative analysis, and its use by the CJEU, as tools thereof.

²⁰⁶⁹ Joerges, ‘The Impact of European Integration’ (n.654).

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