The character of European private law

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The Character of European Private Law

Inaugural address, delivered by

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Understanding Society

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The Character of European Private Law

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The Character of European Private Law

Esteemed Rector Magnificus,
dear colleagues, students, family, and friends,

What do we talk about when we talk about private law? Let me give an example to illustrate this question. I take a case from the UK, but the problem is easily translatable to the Netherlands. Looking at legal cases outside our own borders, moreover, already gives a bit of a taster of what we will be talking about when we talk about *European* private law.

One of the most prominent UK cases of recent years was the so-called Bank Charges case.[1] The Office of Fair Trading (OFT), at that time responsible for the supervision of banks' compliance with consumer regulation, sought to challenge the costs that banks charged to their customers for making use of overdraft facilities. The system of overdraft charges in the UK is used as a form of cross-subsidy by banks, with the income generated by these charges being used to cover the costs of other customers who never (or rarely) incur such charges. The question in private law, as identified by the UK Supreme Court, however is narrow—it focuses not on the system, but on whether bank charges should be considered unfair in the contractual relationship between the bank and the customer. In the words of Lord Walker:[2]

> *Some would regard the United Kingdom system as being, in some sense at least,obviously unfair, though Mr Sumption QC (for the banks) vigorously disputed Lord Mance's suggestion that his clients were engaged in a sort of "reverse Robin Hood exercise". That is an imponderable question which depends partly on whether one's perception of the average customer who incurs unauthorised overdraft charges is that he is spendthrift and improvident, or that she is disadvantaged and finding it hard to make ends meet. But it is not the question for the Court. The question for the Court is much more limited, and more technical. It is whether as a matter of law the fairness of bank charges levied on personal current account customers in respect of unauthorised overdrafts ... can be challenged ... as excessive in relation to the services supplied to the customers.*

[1] *Office of Fair Trading v Abbey National plc* [2008] EWHC 875 (Comm); [2009] EWCA Civ 116; [2009] 2 WLR 1286; [2009] UKSC 6; [2009] 3 WLR 1215 (the Bank Charges case) discussed by Simon Whittaker (2011) 74 *Modern Law Review* 106.

[2] Bank Charges case, Lord Walker, paras 2-3.

Weighing the arguments from both sides, the UK Supreme Court, overturning the decision of the Court of Appeal, held that the fairness of the charges could not be challenged under existing legislation. Terms concerning the price, which the Court deemed these charges to be, cannot be subjected to an unfairness assessment.[3] The banks won.

[3] The charges were deemed to fall within the exception in regulation 6(2)(b) of the Unfair Terms in Consumer Contracts Regulations 1999, as relating to 'the adequacy of the price or remuneration, as against the goods or services supplied in exchange.' They could therefore not be subject to a test of (un)fairness under the Regulations.

1

The Character of European Private Law: Private and Public

This example is characteristic of what most lawyers would understand when we say 'private law',[4] and more specifically contract law. It concerns the relationships between individuals or businesses or more generally, between private actors rather than public actors.[5] The case illustrates which obligations those actors may have against one another under the contracts they concluded between them —for example an obligation to pay a charge when making use of an overdraft facility—and the courts' discussion of whether these obligations are enforceable under the existing rules of private law. Questions about 'fairness' are also very typical of private law relationships.

At the same time, however, the case veers away from what we would traditionally think of as 'private law matters' by having the court discuss possible restrictions on what private parties can agree between them. Legislation, or regulation, or statutory law—all synonyms for rules laid down by public institutions—in many cases interferes with private parties' freedom of contract with an eye to achieving certain policy aims. Such a policy aim can be the protection of consumers in contract law, for example against unfair contract terms, because consumers are usually not in a position to bargain with regard to the terms of the contract. Not only do many businesses make use of standard terms and conditions—and does anyone ever try to re-negotiate them with a trader, let alone succeed?—they also are in a much stronger position because they can simply tell the consumer 'if you don't like my offer, too bad. You can take it or leave it.'

The pursuit of policy goals through law, sometimes labelled as 'instrumentalism',[6] can provoke negative responses from lawyers who believe that private law should be concerned only with facilitating private law relationships, eg by making contractual promises enforceable so that parties can go to court if the

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[4] Ralf Michaels and Nils Jansen identify seven characteristics; see 'Private Law Beyond the State? Europeanization, Privatization, Globalization' (2006) 54 *American Journal of Comparative Law* 843, 847 ff.

[5] Although some blurring can occur between categories, eg where a public entity enters into a private transaction.

[6] Although it gives rise to new questions in European private law, instrumentalism is not new in law and some of its darker sides have been subject to discussion in other contexts; see eg on US law Brian Tamanaha, *The Perils of Pervasive Legal Instrumentalism* (Wolf Legal Publishing, Oisterwijk 2008), arguing that 'in situations of sharp disagreement over the social good, if law is perceived as an instrument, individuals and groups within society will endeavor to seize the law, and fill in, interpret, and apply the law, to serve their own ends.'

other party does not perform their part of the agreement. Yet, policy goals are part and parcel of European private law. Legislation in this field, as I will discuss in more detail, is based on specific policy goals that the EU legislator seeks to pursue, such as the integration of the internal market but also social goals. Hans Micklitz analysis of what he calls 'European regulatory private law', which represents a shift from autonomy to regulation in private law,[7] is one way of describing that traditional distinctions between private and public in this field have become blurred.

Rather than avoiding the influence of instrumentalism on private law, the argument that I wish to posit is that we should actively seek to engage with it: how do policy goals shape private law in Europe? What does that mean for the substantive rules of private law, for example in how contract law balances the rights and obligations of businesses and consumers? And seeing that rules are developed at ever more different levels of regulation—in national law, but also in EU law, transnational law and in self-regulation by businesses—how can we ensure that private parties are not subjected to four (or perhaps even more) conflicting sets of rules at the same time?

These questions, on a broader level, require us to re-think how we look at private law in a context of multilevel regulation. The puzzle in front of us is: if we accept that European private law is characterized by instrumentalism—give or take the objections that one may have against it, but accepting that this is factually what is happening—but also by the pursuit of different policy goals at different levels of regulation, how can we deal with the complexity that arises from it? Complexity here relates to the co-existence of rules at different levels of regulation that can operate in parallel but that can also, depending on the context in which they operate, clash with one another.

To explore this puzzle, I will focus on the law relating to consumer contracts in Europe, which is the main area in which the European legislator has actively introduced legislation to facilitate contracting in the EU,[8] but also to pursue

[7] Hans-W Micklitz, 'The Visible Hand of European Regulatory Private Law – The Transformation of European Private Law from Autonomy to Functionalism in Competition and Regulation' (2009) 28 *Yearbook of European Law* 3.

[8] See also Marco Loos, 'The Influence of European Consumer Law on General Contract Law and the Need for Spontaneous Harmonisation' (inaugural address University of Amsterdam, 2006).

policy goals—in particular the pursuit of a high level of consumer protection and the integration of the EU internal market. Some of this discussion may be of broader application in other areas of private law, such as tort law, and I will therefore on occasion use the broader term 'private law' even if the argument focuses primarily on contract.

The problem will be approached in three stages. The first part of this lecture will explore which policies the European legislator has sought to pursue in contract law, and for which reasons. The second part looks at what these choices have meant for the balancing of private law interests between businesses and consumers in EU law. In that sense, it not only examines the character of European private law, but also its *characters*—for whom are private laws written? This part will show that the 'Europeanness' of private law at the EU level prompts a different balancing of interests between private parties—eg between businesses and consumers—than in national private laws, with the added complication that the balancing can also differ from one area of EU law to another. The third part focuses on how this multiplicity of rules across different levels or regulation, and different sources of law can be coordinated.

2
The Changing Character of Private Law: Local to European

Why does the European legislator create new rules for consumer contract law? Roy Goode—emeritus professor at Oxford and an early mentor on my academic path—used an illustrative example in his inaugural lecture at Utrecht University in 2003, discussing the argument that harmonization of laws is needed because 'consumers avoid buying in another state just because of the fact that they do not know the law'.[9] This argument, focusing on consumer confidence, has often been used by the European Commission to justify harmonizing legislation. Yet, Goode replies:

> This conjures up a vision of a woman from, say, Ruritania, who visits Rome and there, in the Via Condotti, sees a fabulous dress, a dress to die for. She is about to buy it but then caution prevails: I must not buy this dress because I am not familiar with Italian law. Clearly a very sophisticated consumer, and one who by inference *is* familiar with Ruritanian law.

The argument that consumers refrain from cross-border purchases because they are unfamiliar with the law of the other state, indeed, seems weak. That does not mean, however, that there are no other reasons for wanting to improve the regulation of private law transactions in Europe.

a. Economic and social arguments for regulation

Scholars in European private law have sought to establish whether theoretical justifications exist that can support legislative action at the EU level. Mostly these types of argument focus on market regulation, but economic arguments have been supplemented with broader arguments relating to social justice.

Economic arguments relating to cross-border contracting in Europe focus on transaction costs.[10] Additional costs can arise for businesses in cross-border contracts, for example because they will have to obtain legal advice about foreign law. To tackle this problem, legislative reforms aim at simplifying the regulatory framework for cross-border transactions, which should increase legal certainty and in effect also decrease transaction costs.

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[9] Roy Goode, 'Contract and Commercial Law: The Logic and Limits of Harmonisation', vol 7.4 *Electronic Journal of Comparative Law* (November 2003); available at: http://www.ejcl.org/74/art74-1.html.

[10] See eg Fernando Gomez, 'The Harmonization of Contract Law through European Rules: A Law and Economics Perspective', InDret 2/2008; available at SSRN: http://ssrn.com/abstract=1371515.

The 'certainty' argument is perhaps most commonly raised in commercial settings, where contracting parties aim to make a profit, and utilitarian arguments carry more weight than concerns about the substance of the applicable rules. To cite a famous English case:

> in all mercantile transactions the great object should be certainty. And therefore it is of more consequence that a rule should be certain than whether the rule is established one way or the other: because speculators in trade then know which ground to go upon.[11]

Consumers and smaller businesses can too benefit from greater legal certainty. An argument that is often heard in the European private law debate is that small and medium-sized enterprises (SMEs) may be deterred from entering foreign markets because they do not have the resources to obtain adequate legal advice and therefore run the risk eg of being confronted with stricter rules of consumer protection.[12] For them harmonization of private laws or other strategies to facilitate the legal aspects of cross-border trade seem particularly useful. The economic argument also applies to consumers. By decreasing transaction costs and creating a basis for cross-border trade for businesses market gains will be established that will also benefit consumers.[13] Another economic argument in favour of mandatory rules of consumer protection established at EU level is that such rules may decrease externalities.[14]

The project of facilitating private law transactions in Europe also has a social face. The aim of lawmaking projects in EU law should not only be to pursue the integration of the internal market but also, as legal scholars have pointed out, to achieve social justice.[15] What kind of justice should be aimed for is a matter of

[11] cf *Vallejo v. Wheeler* (1774) 1 Cowp 143, Lord Mansfield at 153.
[12] Gerhard Wagner, 'The Economics of Harmonization: The Case of Contract Law' (2002) 39 *Common Market Law Review* 995, 1017-18.
[13] *ibid*. Also, 'Green Paper from the Commission on policy options for progress towards a European Contract Law for consumers and businesses', COM(2010) def (1 July 2010) 9.
[14] Filomena Chirico, 'The Function of European Contract Law: An Economic Analysis', in Pierre Larouche and Filomena Chirico (eds), *Economic Analysis of the DCFR. The work of the Economic Impact Group within the CoPECL network of excellence* (Sellier, Munich 2010) 9, 24-25.
[15] Study Group on Social Justice in European Private Law, 'Social Justice in European Contract Law: A Manifesto' (2004) 10 *European Law Journal* 653; Hans-W Micklitz (ed), *The Many Concepts of Social Justice in European Private Law* (Edward Elgar, Cheltenham 2011).

debate. Hans Micklitz has argued that the European legal order, because of its market orientation, has embraced a different type of justice than the redistributive justice found in national consumer laws. The aim of European legislation is to give enough rights to consumers to enable them to take part in the internal market and reap the benefits of it. The notion of justice associated with that philosophy can be called *Zugangsgerechtigkeit* or 'access justice'.[16] As a counterweight to the market integration ideology in EU consumer law policies, the idea of access justice can ensure that those for whom mandatory rules are written—such as consumers—actually have access to the market so that they can benefit from these rules.

In pursuit of these economic and social goals, the EU has looked to the law as a tool for supporting the integration of the internal market.

b. Legal responses

Legal responses of the EU legislator have mostly taken two forms. On the one hand, the integration of the internal market has been pursued through the free movement provisions of the EU Treaty.[17] These give power to the Court of Justice to find national legislation inconsistent with the free movement of goods—or services or persons or capital—if the national rules constitute an unjustified barrier to trade in the internal market. This type of harmonization, where integration of the market is pursued by removing barriers in national laws, is called 'negative harmonization'. Second, the EU has sought to support the integration of the internal market by introducing new legislation—this is called 'positive harmonization'.[18]

The legal basis for harmonization is, in both cases, the removal of obstacles to trade in the internal market.[19] In addition, the Treaty prescribes that harmonizing legislation should pursue a 'high level of consumer protection',[20] whereas in free movement cases a justification for national measures that restrict trade

[16] Hans-W Micklitz, 'Social Justice and Access Justice in Private Law', EUI Working Papers LAW 2011/02, 21-23.
[17] Case law has most often been based on the free movement of goods provisions; Artt 34-36 of the Treaty on the Functioning of the European Union (TFEU).
[18] Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases and Materials* (5th edn OUP, Oxford 2011) 601.
[19] In case of positive harmonization, the EU's competence to legislate in the area of European private law is based on Art 114 TFEU.
[20] Artt 114(3) and 169(2) TFEU.

may be that they are necessary for 'the defence of the consumer'.[21] The pursuit of a high level of consumer protection in EU policies is now recognized as a fundamental right in the EU Charter of Fundamental Rights.[22] The legal basis for EU action, either through the free movement provisions or through positive harmonization, has a double aim: the integration of the internal market and the pursuit of a high level of consumer protection. These aims coincide with the economic and social goals discussed in the previous section.

Now, can we in fact find 'obstacles to trade' in the European market, or a likelihood of them arising, that justify the involvement of EU law in business-to-consumer contracts? That is a question of measuring if, and in what type of cases, transaction costs deter businesses from offering their products in other Member States. Empirical studies indicate that traders who enter into distance contracts or consider doing so, in particular when this means offering their products to consumers in different countries, encounter significant hindrances. Over 40 per cent of traders indicate that factors that deter them from entering into cross-border sales are the potentially higher costs of the risk of fraud and non-payment, as well as the additional costs of compliance with different consumer protection rules or contract laws (including legal advice).[23]

The case for the EU legislator to facilitate cross-border private law transactions in the European internal market therefore seems to have merit. Both businesses and consumers can reap the economic benefits of an integrated internal market. From a social justice perspective the EU can stimulate the inclusion of weaker market participants in society. We therefore have a plot to the story of European private law. But in what way does EU legislative action in private law—either through harmonisation or through free movement regulation—affect the substance of national private laws? With that question, we move from the character of European private law to its characters.

[21] ECJ 20 February 1979, Case 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)* [1979] ECR 649, ECLI:EU:C:1979:42.
[22] Art 38 of the EU Charter of Fundamental Rights – on which another Professor Mak may have more to say.
[23] 'Retailers' attitudes towards cross-border trade and consumer protection', Flash Eurobarometer 359 (June 2013), 26-27, noting that 41% of traders list these two factors as obstacles.

3
Characters in European Private Law

The question 'who is private law concerned with?' determines, in many cases, in what way private law operates in society. Generalized standards like the 'reasonable man'[24] are used in many national private law systems to function as benchmarks for assessing in which circumstances a private actor may be held liable for his actions, or to assess which expectations he may have had in contract if he has relied on statements in advertising. Judges tend to be quite colourful in their descriptions of what is essentially a fictional character that helps them define the expectations that a reasonable person may have, reflecting also that the concept is applied always in a particular time and place. From the 'man on the Clapham omnibus' in late 19th-century London,[25] references in English law have broadened to 'any reasonable member of the public', the 'man on the jury',[26] the 'man in the street',[27] and the 'man on the Underground'.[28] In a European context we encounter the 'man on the Brussels tram' or the 'man on the Venetian gondola',[29] and in Australia the 'hypothetical person on a hypothetical Bondi tram'.[30] Even if the terminology is traditionally focused on men, these various benchmarks apply equally to women.[31]

Standards such as these are used in private law to provide a reference point, often for judges but also for lawmakers, for the balancing of interests between parties. What may the 'reasonable man' expect from a contract, given the information that the other party has provided?[32] And in consumer law, when does advertising for an 'average consumer' cross the line from endorsing a product to misleading the consumer? The answer to such questions in individual cases

[24] cf *Blyth v Birmingham Waterworks Company* (1856) 11 Ex Ch 781.
[25] The phrase is attributed to Bowen LJ in *McQuire v Western Morning News* [1903] 2 KB 100 (CA), Collins MR at 109. See for a later use of the term Greer LJ in *Hall v Brooklands Auto-Racing Club* [1933] 1 KB 205 (CA).
[26] *McQuire v Western Morning News* [1903] 2 KB 100 (CA) 109.
[27] *Hall v Brooklands Auto-Racing Club* [1933] 1 KB 205 (CA) 224.
[28] *White v Chief Constable of South Yorkshire Police* [1999] 2 AC 455, 495.
[29] *Nursaw v Dansk Jersey Eksport* [2009] ILPr 263 (QB).
[30] *Papatonakis v Australian Telecommunications Commission* (1985) 156 CLR 7, 36.
[31] To increase gender-neutrality in private law terminology, France recently removed the term 'bon père de famille' from its legislation, replacing it with 'reasonable person' terminology. On this amendment, Jan Smits, 'Adieu *bon père de famille*' (2014) *Weekblad voor Privaatrecht, Notariaat en Registratie (WPNR)*, no 7012, 303.
[32] cf Hans Nieuwenhuis, 'Paternalisme, fraternalisme, egoïsme: een kleine catechismus van het contractenrecht' (valedictory lecture University of Leiden, 2009); available at: https://openaccess.leidenuniv.nl/bitstream/handle/1887/19705/afscheidsrede%20Nieuwenhuis.pdf?sequence=1.

requires the legal standard to be substantiated, either through a normative assessment by the court—which is probably the most common in private law cases, leaving the judge to determine what is 'reasonable' in the circumstances of the case—or an empirical assessment based on opinion polls or surveys. The primary test will normally be a normative one, with empirical evidence only providing part of the factors that a judge will have to take into account in his or her decision. In comparison to other areas of law, surveys are more often used in trade mark cases, eg to establish distinctiveness or confusion, but their use is not ubiquitous amongst courts in the EU Member States. Germany has traditionally been more favourable to opinion polls or surveys than the United Kingdom.[33]

Since the normative question is relatively open-ended and sensitive to the context in which questions arise, the assessment of reasonable expectations in contractual situations—coming back to our case study of business-to-consumer contracting in Europe—can lead to varied outcomes between Member States' courts. To cite a common distinction in European contract law, notions of reasonableness are more likely to supplement contractual provisions in continental European systems than in England.[34] Different outcomes can also occur internally in a legal system, eg between courts within a Member State[35] or between different areas of EU law.

Whilst contract law through the use of open norms like 'reasonableness' or 'fairness' is tailored towards achieving individual justice in individual cases, it also aims to ensure legal certainty, as we can recall from the previous section. The two aims can be in conflict, since greater variety between outcomes makes it harder for private parties to divine what the outcome might be if a court were asked to interpret their contract. This tension between open norms and legal

[33] The UK is still reluctant to admit survey evidence, although the context matters: acquired distinctiveness might sooner be empirically measurable than consumer confusion; see Graeme Dinwoodie and Dev Gangjee, 'The Image of the Consumer in European Trade Mark Law', in: Dorota Leczykiewicz and Stephen Weatherill, *The Image of the Consumer in EU Law: Legislation, Free Movement and Competition Law* (forthcoming 2015).

[34] Martijn Hesselink, 'The Concept of Good Faith', in Arthur Hartkamp cs (eds), *Towards a European Civil Code* (4th revised and expanded edn, Kluwer Law International, The Hague 2010) 619. Note Hesselink's alternative view on good faith, 635 ff.

[35] ibid. For an excellent discussion on Dutch judicial practices in 'average consumer' cases see Jan Kabel, *Rechter en publieksopvattingen: feit, fictie of ervaring?* (inaugural address University of Amsterdam, 2006).

certainty may well be the evergreen of private law.[36]

The European dimension adds complexity to this puzzle. In business-to-consumer contracts the standard by which the reasonable or presumed expectations of consumers are measured is that of the 'average consumer'. The term is the official benchmark by which expectations are determined in free movement cases, trade mark law, and in unfair commercial practices law. It also can function as a benchmark to compare other areas of European consumer contract law, even if in regulation in that field often no specific reference is made to a particular image of the consumer.[37] Problematic is that the images of the 'average consumer' that have emerged in these two areas of European consumer contract law seem to set two completely different regulatory standards, based on very different rationales. Both relate to the policy objective to pursue the integration of the EU internal market. However, whereas the European Court in free movement cases pursues market integration by coming down on national consumer protection legislation that creates barriers to trade by adopting a high level of consumer protection in national law—a process helped by holding that consumers do not need that protection because they are well-informed and can take care of their own interests—the reasoning in harmonization projects works the other way. There, the EU seeks to pursue the integration of the internal market through legislative measures, and upholding the high standards of consumer protection adopted in that legislation confirms the place of EU law in national laws. Angus Johnston and Hannes Unberath have referred to this as the 'double headed approach' of the European Court of Justice in consumer law.[38] The Court is Janus faced.

The puzzle that arises is how these conceptions of the reasonable expectations of an average consumer can be related to the balancing of business and consumer interests in national private laws, or even in self-regulation. Do we just have to accept that standards differ, or is coordination possible?

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[36] In the Netherlands, see Herman Schoordijk, 'Zijn open normen in de wetgeving wenselijk?', *Nederlands Juristenblad*, 1992, 1569; Maurits Barendrecht, *Recht als model van rechtvaardigheid* (Kluwer, Deventer 1992). See also Timothy Endicott, *Vagueness in Law* (OUP, Oxford 2000).

[37] Apart perhaps, by inference, in the Consumer Rights Directive. Recital 34 refers almost verbatim to the specific provision made for vulnerable consumers in the UCP Directive.

[38] Hannes Unberath and Angus Johnston, 'The Double-Headed Approach of the ECJ Concerning Consumer Protection' (2007) 44 *Common Market Law Review* 1237.

Before coming to those questions, let me say a bit more about the 'double headed' consumer benchmarks that have become prominent in EU law. Who are the characters of European private law?

a. The average consumer of EU law

The average consumer of EU law is defined as someone who is 'reasonably well-informed and reasonably observant and circumspect'.[39] In other words, we are looking at consumers who read the labels before placing a product in their shopping basket in the supermarket. Diligent and careful consumers, rather than 'morons in a hurry'—a term that did have some popularity in trade mark cases in the UK and Canada.[40]

The idea of the reasonably well-informed, observant and circumspect average consumer was developed in the case law of the European Court of Justice relating to the free movement of goods. It has since been copied in European rules relating to unfair commercial practices,[41] and to retail investment services under the Markets in Financial Instruments Directive (MiFID).[42] The Court intends it to function as a normative standard or guideline, which allows a national court to assess what the presumed expectations of an average consumer should be in the circumstances of a case referred to them. The Court at the same time leaves it open for national courts to make use of empirical data as part of their assessment. Moreover, sometimes similar cases have used the criterion whether 'a

[39] ECJ 16 July 1998, Case C-210/96 *Gut Springenheide and Rudolf Tusky v Oberkreisdirektor des Kreises Steinfurt* [1998] ECR I-4657, ECLI:EU:C:1998:369, paras 30-31. An even higher level of circumspection is expected from the 'informed consumer' in relation to models in intellectual property law, as well as from the 'man skilled in the art' in patent law; cf CJEU 18 October 2012, joined cases C-101/11 P and 102/11 P *Neuman v Buena Grupo SA*, nyr, ECLI:EU:C:2012:641. See for a discussion of different consumer concepts in trade mark law Dinwoodie and Gangjee (n 33).

[40] *Morning Star Cooperative Society Ltd v Express Newspapers Ltd* [1979] FSR 113, Foster J at 117; cited by Lord Denning MR in *Newsweek Inc v Britisch Broadcasting Corporation* [1979] RPC 441 (CA). For Canada, see *CMS Industries Ltd v UAP Inc* [2002] SKQB 303. The official benchmark in Canada is now the 'ordinary hurried purchaser'; see *Mattel Inc v 3894207 Canada Inc* [2006] 1 SCR 772. Compare also *Richard v Time Inc* [2012] 1 SCR 265, in which the court defined the average consumer as someone 'who is credulous and inexperienced and takes no more than ordinary care to observe that which is staring him or her in the face upon first entering into contact with an entire advertisement.'

[41] Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market [2005] OJ L149/22, Art 5.

[42] Directive 2004/39/EC on markets in financial instruments (MiFID) [2004] OJ L145/1.

significant number of consumers' would be misled as their benchmark.[43] The CJEU has more recently indicated that it regards this quantitative assessment as a measure that may be interchangeable with the average consumer test.[44] That finding appears to fit with some approaches seen in national systems, such as in German law, where the assessment of whether consumers will be misled is often tested through empirical studies.[45] On occasion that may lead to contrasting outcomes between the EU test and the assessment in individual cases before national courts. For example, in the German *Reinheitsgebot*-case, national law prohibiting the import of beer that did not fulfil the German requirements for beverages to be qualified as 'beer' was held by the Court to constitute a barrier to the free movement of goods. Justification was found in consumer protection, notwithstanding the fact that German courts could assume the misleading character of advertising even 'if only 10 to 15 per cent of the addressed average casual (passing) consumers would be misled'.[46]

Some flexibility for Member States' courts exists because the European Court has indicated that 'social, cultural and linguistic' aspects which are particular to a Member State may be weighed in a national court's assessment.[47] The primary assessment, however, is the normative assessment based on the notion of a reasonable, rational average consumer.

b. The Calimero consumer in European consumer contract law

European consumer law has a second leg: the regulations and directives introduced to harmonize the contracts laws of the Member States.[48] In fact, the majority of legislative measures in contract law introduced with a view to pro-

[43] See ECJ 16 January 1992, Case C–373/90 *Nissan* [1992] ECR I–131, ECLI:EU:C:1992:17, para 15.
[44] Compare ECJ 19 September 2006, Case C–356/04 *Lidl Belgium GmbH & Co KG v Etablissementen Franz Colruyt NV* [2006] ECR I–8501, ECLI:EU:C:2006:585, paras 78 and 82; and see ECJ *Nissan* (n 43), paras 15–16, as well as the Opinion of Advocate General Tesauro in that case, para 9.
[45] See ECJ *Gut Springenheide* (n 39), para 36.
[46] Roger Mann, 'German Advertising Standards under Pressure from Europe', (1999) 21 *European Intellectual Property Review* 519. ECJ 12 March 1987, Case 178/84 *Commission v Germany* [1987] ECR 1227, ECLI:EU:C:1987:126.
[47] Directive 2005/29 concerning unfair business-to-consumer commercial practices in the internal market [2005] OJ L149/22, recital 18.
[48] For an excellent overview and commentary on this body of regulation, honouring one of the main figures in European contract law harmonization, see Louise Gullifer and Stefan Vogenauer (eds), *English and European Perspectives on Contract and Commercial Law. Essays in Honour of Hugh Beale* (Hart Publishing, Oxford 2014).

moting the integration of the internal market have focused on consumer law issues. Examples are Directive 93/13 on unfair terms in consumer contracts, Directive 99/44 on the sale of consumer goods and associated guarantees, and Directive 2011/83 on consumer rights, each of an almost horizontal application across the field of consumer contract law.[49] Besides that, a number of Directives and Regulations has been adopted to regulate specific markets, such as electricity and gas,[50] transportation,[51] financial services,[52] and (online) dispute resolution.[53]

In this regulatory field, consumer law appears to adopt a higher level of protection than in EU free movement law; an approach that befits a more naïve, rather than a rational, consumer. The rules laid down in EU consumer contract legislation not only seek to empower consumers—eg by imposing information duties on traders—but often also lay down substantive rights aimed at consumer protection, such as protection against unfair terms, remedies for non-conforming goods, or rights of withdrawal. In keeping with the principle of effectiveness in EU law, the Court of Justice of the EU has strengthened consumer protection by judging that the exercise of the unfair terms assessment should be supported by effective procedural mechanisms, in particular for the protection of weaker consumers who may have been ignorant of their rights or unable to afford legal

[49] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L95/29; Directive 99/44 on certain aspects of the sale of consumer goods and associated guarantees [1999] OJ L171/12; and Directive 2011/83/EU on consumer rights [2011] OJ L304/64.
[50] Directive 2009/72/EC concerning common rules for the internal market in electricity [2009] OJ L211/55; Directive 2009/73/EC concerning common rules for the internal market in natural gas [2009] OJ L211/94; and Directive 2012/27/EU on energy efficiency [2012] OJ L315/1.
[51] Regulation (EC) 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights [2004] OJ L46/1; Regulation (EC) 1371/2007 on rail passengers' rights and obligations [2007] OJ L315/14; Regulation (EU) 1177/2010 concerning the rights of passengers when travelling by sea or inland waterway [2010] OJ L334/1; Regulation (EU) 181/2011 concerning the rights of passengers in bus and coach transport [2011] OJ L55/1.
[52] Directive 2008/48/EC on credit agreements for consumers [2008] OJ L133/66; and Directive 2014/17/EU on credit agreements for consumers relating to residential immovable property [2014] OJ L60/34. The Mortgage Credit Directive was adopted on 4 February 2014 and should be implemented by the Member States by 21 March 2016.
[53] Directive 2013/11/EU on alternative dispute resolution for consumer disputes [2013] OJ L165/63; and Regulation (EU) 524/2013 on online dispute resolution for consumer disputes [2013] OJ L165/1.

advice.[54] Similar protection based on the notion that consumers as weaker parties are in need of protection can be seen in cases in which the right of withdrawal was extended if the trader had not informed the consumer that this right applied.[55]

A more fitting image of the average consumer for such cases would be the cartoon character Calimero—created in Italy and famous in some other European countries too—who is a small, black chicken that gets into trouble often and does not quite understand why grown-ups around him are angry at him for his clumsiness. The phrase that he utters invariably at the end of each episode is: 'They are big and I is [sic] small and it's not fair, oh no!'

Comparing unfair commercial practices and unfair terms regulation, it would therefore appear that the same 'average consumer' is expected to be more observant when reading adverts in the newspaper than when he or she agrees to (standard) contract terms. That would perhaps be justifiable if one considers that most consumers are unable to properly assess the effects of general terms and conditions before signing a contract because of cognitive limitations in processing this type of, or amount of information.[56] Lawmakers could perhaps also take into account that the majority of consumers does not, or only briefly, read the general terms before agreeing to conclude a contract. Research conducted by Florencia Marotta-Wurgler in the US reveals that when concluding online software contracts, most consumers either click on 'agree' immediately, or if they scroll down they never look at the page long enough to have actually read the information.[57] But even if different policy reasons can be considered, is the

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[54] ECJ 27 June 2000, joined cases C–240/98 to 244/98 *Océano Grupo Editorial SA v Roció Murciano Quintero* [2000] ECR I–4941, ECLI:EU:C:2000:346, para. 26.

[55] eg ECJ 3 September 2009, Case C–489/07 *Pia Messner v Firma Stefan Krüger* [2009] ECR I–7315, ECLI:EU:C:2009:502. And compare also the *Schrottimmobilien* cases: ECJ 13 December 2001, Case 481/99 *Georg Heininger and Helga Heininger v Bayerische Hypo- und Vereinsbank AG* [2001] ECR I–9945, ECLI:EU:C:2001:684; ECJ 25 October 2005, Case C–350/03 *Elisabeth Schulte and Wolfgang Schulte v Deutsche Bausparkasse Badenia AG* [2005] ECR I–9215, ECLI:EU:C:2005:637.

[56] For a critical perspective, see eg Omri Ben-Shahar and Carl E Schneider, 'The Failure of Mandated Disclosure', U of Chicago Law & Economics, Olin Working Paper No 516, U of Michigan Law & Econ, Empirical Legal Studies Center Paper No 10-008, available at SSRN: http://ssrn.com/abstract=1567284.

[57] Yanis Bakos, Florencia Marotta-Wurgler and David R Trossen, 'Does Anyone Read the Fine Print? Consumer Attention to Standard Form Contracts' (2014) 43 *Journal of Legal Studies* 1.

divergence of consumer protection standards across different areas of EU law sustainable? The discussion has recently got a new impulse from the case law of the Court of Justice.

c. Janus faced or moving towards reconciliation?

Recent case law from the CJEU suggests that the Court is seeking to take a more consistent approach to the application of the 'average consumer' standard in different fields of European consumer law. In its 2014 judgment in *Kásler* the Court for the first time adopts the average consumer concept of the Unfair Commercial Practices Directive to give guidance on the assessment of unfair terms.[58] The Court referred to the concept in relation to the transparency requirement laid down in Art 5 of the Unfair Terms Directive—which stipulates that terms must always 'be drafted in plain, intelligible language'.[59] In relation to the contractual term at issue in the main proceedings, which concerned a mortgage loan agreement in a foreign currency, two assessments need to be made. Not only must it be assessed whether the 'reasonably well informed and reasonably observant and circumspect' consumer would be aware of the difference between the selling rate and the buying rate of exchange of foreign currency, generally observed on the securities market; it must also be determined whether the borrower would be able to assess the potentially significant economic consequences for him resulting from the use of the selling rate for calculating the repayments for which he would become liable.[60] The standard, therefore, is that of the average consumer standard in the Unfair Commercial Practices Directive, and similar to there, the court should examine whether the consumer was aware of the economic consequences of the contract clause—and assume that, if he were, he might have made a different decision with regard to entering into the loan agreement.

This judgment, interestingly, does exactly what the UK Supreme Court in the Bank Charges case refused to do: it regards the transparency of contract terms

[58] CJEU 10 April 2014, Case C-26/13 *Kásler*, nyr, ECLI:EU:C:2014:282.

[59] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L95/29, Art 5.

[60] CJEU *Kásler* (n 58) para 74. The outcome of the case is otherwise still unknown since, in accordance with established rules of EU law, it is for the national court to make this assessment, taking into account all relevant circumstances of the case; see ECJ 1 April 2004, Case C-237/02 *Freiburger Kommunalbauten* [2004] ECR I-3403, ECLI:EU:C:2004:209.

through the eyes of the 'average consumer'. The Court of Appeal in that case had held that whether charges should be regarded as part of the 'price or remuneration' should be determined by the standard of a typical consumer, noting also that this would correspond with the average consumer standard in other areas of EU law (ie unfair commercial practices regulation).[61] As we know, the Supreme Court held otherwise, namely that the charges according to an objective interpretation by the court fell within the 'price and remuneration' exception. It looks like there may now be some room for consumers to bring new cases in the wake of *Kásler*, since core terms (like the price) can be subject to the fairness test if they are not drafted in plain and intelligible language,[62] which should now be determined from the viewpoint of the average consumer. Nonetheless, the unfairness of contract terms will still have to be determined by the national court, taking account of the circumstances of the case—it is therefore not a given that bank charges will be found unfair. The outcome could moreover be different in other legal systems; the Netherlands for example adopts a very restrictive notion of 'core terms' and it is not unimaginable that the bank charges could have been challenged if a similar case came before a Dutch court.[63]

As an aside, another route that is starting to be tested, also in the wake of a judgment from the European Court of Justice, is to challenge bank charges on the ground that they are an adjustment of the price to which the consumer had not agreed. In accordance with the CJEU judgment in *Invitel*, such adjustments can be challenged as unfair terms if the bank does not give the consumer the possibility to terminate the contract.[64] This may provide relief to many consumers, although it should also be noted that many banks had already voluntarily lowered their charges after the Bank Charges case was decided.

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[61] Following the lower court in adopting Simon Whittaker's take on the question in *Chitty on Contracts*; see *Office of Fair Trading v Abbey National plc* [2009] EWCA Civ 116, para 91.

[62] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L95/29, Art 4(2).

[63] For a recent discussion, highlighting also changes following from Directive 2011/83 on consumer rights, see Marco Loos, 'Algemene voorwaarden onder de voorgestelde richtlijn consumentenrechten', *Vermogensrechtelijke Analyses*, 2009, no 2, 58, 65-66.

[64] See a recent County Court judgment in which a consumer successfully challenged overdraft charges with reference to CJEU 26 April 2012, Case C-472/10 *Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt*, nyr, with the judge however indicating that the assessment could only relate to the case at hand and not be of general application. See *Foster-Burnell v Lloyds TSB Bank plc* (Taunton County Court 23 June 2014, DDJ Stockdale), para 51-52.

It has also been suggested that the average consumer standard is creeping into the substantive test of unfairness in the Unfair Terms Directive,[65] which the CJEU appears to be giving more specific content in recent cases like *Aziz*.[66] These developments are met with some suspicion by EU consumer law experts, who fear that the extension of the rational, well-informed consumer standard to other areas might lead to a lowering of protection in those contexts.[67] Yet, a broader application of the standard can have advantages. An objective benchmark such as the average consumer can be favourable to the harmonization of private laws.[68] Further, its application to specific cases may in some Member States result in higher levels of consumer protection.[69]

Even if the case law shows the average consumer standard creeping into other areas of private law, the current state of the law is still one of complexity. This section has highlighted two main strands of EU consumer law which, driven by internal market policy, arrive at varying levels of consumer protection. Besides that we have a wide field of unharmonized national private laws, in which the balancing of fairness in business and consumer relations can take on many local colours.[70] Is this divergence of standards the status quo that we have to (learn to) live with, or is it possible to conceive of more structured approaches to lawmaking in European private law? I set out a brief research agenda.

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[65] Charlotte Pavillon, 'Wat maakt een beding oneerlijk? Het Hof wijst ons (eindelijk) de weg', *Tijdschrift voor Consumentenrecht*, 2014-4, 163, 167.

[66] CJEU 14 March 2013, Case C–415/11 *Mohamed Aziz v Caixa d´Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)*, nyr, ECLI:EU:C:2013:164. See also CJEU 16 January 2014, Case C–226/12 *Constructora Principado SA v José Ignacio Menéndez Álvarez*, nyr, ECLI:EU:C:2014:10.

[67] See Pavillon (n 65), 167; Joasia Luzak, 'Online Disclosure Rules of the Consumer Rights Directive: Protecting Passive or Active Consumers?' (2015) 4 *Journal of European Consumer and Market Law* (forthcoming); Bram Duivenvoorde, *The Consumer Benchmarks in the Unfair Commercial Practices Directive* (doctoral thesis University of Amsterdam, defended 3 July 2014) 222-224.

[68] Pavillon, ibid. Similarly, Whittaker (n 1) 114-115.

[69] Whittaker, for example, pleads in favour of identification of the 'price and remuneration' from the viewpoint of the typical or average consumer, rather than through an objective assessment by the (UK) courts. That could potentially bring a contract clause concerning charges outside the exception laid down in regulation 4(2) of the Unfair Terms in Consumer Contracts Regulations 1999, and therefore subject to an assessment of (un)fairness. Whittaker (n 1) 114.

[70] Compare, in Dutch, Charlotte Pavillon, *Open normen in het Europees consumentenrecht: de oneerlijkheidsnorm in vergelijkend perspectief* (Kluwer, Deventer 2011).

4
In Search of a New Narrative

John Austin is supposed to have said, upon turning from the study of the English common law to the study of Roman law as taught in German universities of the 19th century, that it felt like escaping 'from the empire of chaos and darkness, to a world that seems by comparison, the region of order and light'.[71]

From what came before, we may surmise that not many private law scholars will find 'order and light' in the current state of European private law. The increasing Europeanisation of private law puts pressure on positivist legal perspectives in which emerging problems need to be solved within the (foremost national) system of private law. That can be problematic, because rules developed at the EU level—as we have seen—are often based on very different policy considerations than in national private law systems.[72] National private laws have gradually developed over centuries and represent a system of rules and principles, but also of values and practices, within the boundaries of which lawyers are able to find solutions that fit with their conceptions of legal order, system, and justice.[73] Consumer protection—notably of a more recent nature in many private law systems, since regulation first appeared from the 1960s and 1970s onwards—comes in different forms and degrees in the EU Member States. Then, in comes the 'average consumer' from EU law and seeks to harmonize legal solutions and consumer protection standards across the board.

It seems no surprise then that national lawmakers often struggle to consistently apply rules originating in EU law and rules of private law in their own legal systems. The average consumer that we saw in the *Kásler* case is well-informed and rational, and potentially able to understand the fine print of a complex financial transaction. The *Dexia* saga in the Netherlands shows that the reality can be different—and also that courts find alternative routes in Dutch private law to

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[71] John Austin, *The Province of Jurisprudence Determined: Being the First Part of a Series of Lectures on Jurisprudence, or the Philosophy of Positive Law* (1832) (2nd edn, 1861), xciv. As cited by Stefan Vogenauer, 'An Empire of Light? II: Learning and Lawmaking in Germany Today' (2006) 26 *Oxford Journal of Legal Studies* 627, 627.

[72] The policy choices and values of different legal systems in Europe differ significantly amongst themselves, which also raises questions as to whether harmonization is desirable at all; see eg Ewan McKendrick, 'Traditional Concepts and Contemporary Values' (2002) 10 *European Review of Private Law* 95.

[73] cf Martijn Hesselink, 'How Many Systems of Private Law are there in Europe?', in Leone Niglia (ed), *Pluralism and European Private Law* (Hart Publishing, Oxford 2013) 199, 201-204.

protect consumers who were more naïve than the average consumer of EU law.[74]

Another problem—not limited to Europe—is that a growing part of consumer transactions are conducted in environments regulated by private regulation, and therefore largely outside the reach of formal private law. One can think of eBay, or its spin-off company PayPal. Each offers a global platform through which buyers and sellers can connect. Disputes can be resolved through the platform's own dispute resolution mechanisms, and according to the rules written up by the operators of the platform.[75] Even if, theoretically, a consumer could opt for litigation in a domestic court, the likelihood of that is slim, seeing that the costs at stake in consumer contracts are usually too low to justify that, plus that such a procedure would undoubtedly take much longer to complete than arbitration or other forms of alternative dispute resolution through eBay or PayPal.

The question is whether we—and by we, I address primarily legal scholarship, who may nonetheless inspire lawmakers and courts in this matter—can provide better strategies for coping with the complexities of lawmaking at different levels of regulation. In doing so, we should bear in mind the two aims of European private law's market integration and access justice policies: to ensure legal certainty and to pursue a high level of consumer protection.

The answer may lie in connecting that what makes private law strong—system—with current debates in transnational private regulation. The transnational perspective, as taken by scholars like Calliess and Zumbansen,[76] promises to connect the debates that are now taking place at two separate levels: the level of

[74] The court held that the bank or investment firm, as the expert party, is obliged to take account of the interests of the consumer and to protect him against the risks associated with his lack of insight or his own rash decision-making. More specifically, this means that banks and investment firms are obliged to warn consumers about the specific risks of a product, to investigate the financial position of the client, and if the circumstances demand it even advise the client against purchase of the product. Dutch Supreme Court (HR) 5 June 2009, *NJ* 2012, 182, annotated by Jan Vranken (*De Treek v Dexia*), ECLI:NL:HR:2009:BH2815. For a more detailed discussion and comparison with English and German law, see Vanessa Mak and Jurgen Braspenning, '*Errare humanum est*: Financial Literacy in European Consumer Credit Law' (2012) 35 *Journal of Consumer Policy* 307, 312 ff.

[75] Gralf-Peter Callies and Peer Zumbansen, *Rough Consensus and Running Code* (Hart Publishing, Oxford 2010) 165.

[76] ibid. See also Peer Zumbansen, 'Defining the Space of Transnational Law: Legal Theory, Global Governance and Legal Pluralism' (2011) Comparative Research in Law & Political Economy, Research Paper No. 21/2011; available at http://digitalcommons.osgoode.yorku.ca/clpe/59.

national, positivist private law systems, where legal academia is often—somewhat irreverently put—the handmaiden of legal practice; and the level oftransnational legal scholarship, which focuses on private law relationships 'beyond the state' or 'in a postnational constellation', and in which theoretical perspectives until now have had the upperhand.[77] (I realize that some will find the distinction an overstatement, but even if one does not accept that this is, by and large, the right view for private law today, the distinction helps to identify in which respects national, positivist conceptions of private law may have limitations).

How to connect those two worlds? I put forward three propositions that aim to instigate discussion and research on these questions.

I. Questions of multilevel regulation are best approached through a legal pluralist lens. Legal pluralism provides an analytical framework that makes it possible to discuss substantive questions in private law in a framework that encompasses all relevant norms—local or European or global, formal or informal. That is the most promising theoretical lens that can help us understand a world where business and consumer relationships are increasingly taking place in a cross-border context, and are governed by overlapping rules originating in national private laws, European or international laws, or in private regulation. In the example of eBay, we are even looking at a global marketplace that virtually operates beyond the state, through private regulation and private dispute resolution.[78] It is true that a pluralist perspective gives rise to questions of legitimacy of lawmaking, and that ways in which to 'manage' the coexistence of pluralist legal sources still need to be worked out—but why not take up the challenge?

II. Private law is grounded in doctrinal law and this should remain a core part of scholarship in this field, also in the study of European private law. This statement may seem at odds with my plea for a transnational approach to European private law, but it is not. Doctrinal techniques are after all not limited to being applied to national private law systems. We also make

[77] Michaels and Jansen (n 4); and compare the University of Amsterdam's project on 'The Architecture of Postnational Rulemaking', on which see: http://arils.uva.nl/research/research-platforms/content/the-architecture-of-postnational-rulemaking/the-architecture-of-postnational-rulemaking.html.
[78] The regulation of such global operations can also be approached through network theory; see Eric Tjong Tjin Tai, *Over de grenzen van het privaatrecht* (inaugural lecture Tilburg University, 2011).

use of doctrine when we do comparative legal research. To understand the solutions adopted in the private law of another country, we need to have an understanding of the way in which that private law system is organized and operates. Also in the study of private law emanating from the EU legislator, we search for cross-references between directives and regulations,[79] guiding principles,[80] or common standards used in different areas of European private law. The latter I have illustrated with the discussion of the images of the 'average consumer' in EU law. The standard appears at different levels of regulation, but what level of consumer protection the average consumer receives is always a question embedded in the specific context in which it operates. (Which incidentally lends support to the idea of a legal pluralist framework, as opposed to a monist framework).

III. European private law would benefit from more empirical research. In seeking to balance the interests of businesses and consumers, private law is intimately connected with economic and social policies in society. In order to do justice to the interests of private actors, it is therefore necessary to keep a constant check on whether private law is responding to problems that these actors actually encounter. That is an empirical question. I have highlighted studies that have been done in Europe, eg to determine whether law is considered an obstacle to cross-border trade for small businesses, but little empirical data is available to assess the need for regulation in broader areas of European private law. The EU itself has in recent years put its money on Regulatory Impact Assessments (RIAs), which is a step in the right direction, but the way in which these assessments are conducted could be much improved.[81]

It is time to conclude. How should we define the character of European private law?

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[79] Walter van Gerven, 'The ECJ Case-Law as a Means of Unification of Private Law', in Arthur Hartkamp cs (eds), *Towards a European Civil Code* (3rd edn Kluwer Law International, Alphen a/d Rijn 2004) 101.

[80] Norbert Reich, *General Principles of EU Civil Law* (Intersentia, Antwerp 2014); Axel Metzger, *Extra legem, intra ius: Allgemeine Rechtsgrundsätze im Europäischen Privatrecht* (Mohr Siebeck, Tübingen 2009).

[81] cf Esther van Schagen, 'The Hidden Potential of Regulatory Impact Assessments (RIAs) in the Private Law Acquis' (2014) 22 *European Review of Private Law* 69.

In this lecture I have put forward some thoughts, but I readily admit that they give rise to more questions. The instrumentalist nature of European private law blurs the lines between private and public—but that raises the question which parts of private law can actually be considered 'private'. Perhaps the answer is that only global market places like eBay still put party autonomy first, moderated by rules developed through self-regulation. As a second point, I have noted that policy choices influence the balancing of interests between businesses and consumers, with different outcomes in national laws, EU law, and also in transnational law and self-regulation. That raises the question how the complexity of different outcomes resulting from different sources of law can be coordinated.

Many questions remain to be discussed and I look forward to engaging in debates with colleagues at home or abroad. Finally, we can also turn to our students in class—for example in the Global Law programme at Tilburg Law School—to discuss these same issues. After all, as many have said before, a great teacher is someone who can learn from his or her students.

Acknowledgments

Ladies and gentlemen,

I thank the Board of the University for my appointment to this chair in Private Law. I also thank the same Board, the Board of Tilburg Law School, and my colleagues in the private law department at Tilburg Law School for their trust and support. The appointment to a core chair in the private law department confirms that the interaction between national and European private law has become an integral part of legal research and education in the Netherlands. I look forward to exploring this field, and the questions that I raised in this lecture, in our future work together here at the Law School.

My own education as a researcher began elsewhere. I left Rotterdam—the home of my alma mater, the Erasmus University—in September 2001 to pursue further studies in the United Kingdom. Two people have been of great importance to me as mentors in those early years as a researcher. Ewan McKendrick, I often quote some of your lines in the supervision of my own PhD candidates today. Thank you for your encouragement and guidance during the D.Phil. years. You also showed me that private lawyers, despite the many local differences between systems, can move between jurisdictions—in your own case from Scotland to England. Thank you.

Sir Roy Goode, for whom I worked as a research assistant in Oxford—we have met many times since then, in different places around the world, as part of the network that you created for teachers and researchers of Transnational Commercial Law. Your work continues to be an inspiration.

In the years leading up to my appointment, several others have been important to me. I thank Reinhard Zimmermann in Hamburg, for his kind hospitality at the Max Planck Institute, and Jan Smits, Jan Vranken, and Eric Tjong Tjin Tai for their support and guidance after joining the Tilburg Law School. Special mention must go to Herman Schoordijk, whose views on judicial decision-making and 'resultaatvoetbal' always lead to interesting discussions, and to renewed reflection on the way that private law works.

I thank my colleagues in the private law department for developing a new spirit for private law research in Tilburg, now under the new name *Tilburg Institute for Private Law*. I look forward to the challenge of being its first Director, and thank

you for your trust and support. In the department, I also thank the PhD candidates, those that have done research under my supervision and those that are currently writing their theses. Yael, Zihan, Jurgen, Anne and Daniëlle—it is immensely rewarding to be a part of your projects. Thank you for creating such a lively and inspiring research environment.

In the Law School, I thank Pierre Larouche, with whom I have worked together to establish the Global Law bachelor programme. It has been a pleasure working with you, and to now see our first students graduate this year. To the students: congratulations, and may you have every success in your future, no doubt global, careers.

To my family and friends:

Thank you for always being here, wherever this world takes me. It means a lot to have such a strong home base to come back to.

When I chose a title for this lecture, I thought of my father, who listed Bordewijk's novel *Karakter* amongst his favourite books. What stands out for me from the book's story is the determination of the main character, a young man called Katadreuffe, to learn the law and to become a lawyer—in which he succeeds eventually. That part of the book is similar to my father's story, who only became a lawyer later in life. His love of the law has been an inspiration for my own choice to embark on a legal career. I miss him.

To my mother—if anyone knows their consumer rights, it is you. Thank you for always being supportive.

My four siblings—Joost, Constant, Elaine and Chantal. As people in Brabant would say, it is very 'gezellig' to come from such a large family. Thank you for being here today. To my sisters, the other professors in the family, thank you for sharing the academic path with me.

Finally, Simon—thank you for making every day more beautiful than the one before. To quote the words of a fellow Canadian: 'Seeing you, I want no other life.'

Ik heb gezegd.

Colofon

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