

THE GENERAL PRINCIPLES OF CIVIL LAW: THEIR  
NATURE, ROLES AND LEGITIMACY

Martijn W. Hesselink

Amsterdam Law School Legal Studies Research Paper No. 2011-35  
Centre for the Study of European Contract Law Working Paper No. 2011-14



# CENTRE FOR THE STUDY OF EUROPEAN CONTRACT LAW

Centre for the Study of European Contract Law  
Working Paper Series  
No. 2011-14

## **The General Principles of Civil Law: their Nature, Roles and Legitimacy**

Martijn W. Hesselink

[m.w.hesselink@uva.nl](mailto:m.w.hesselink@uva.nl)

Centre for the Study of European Contract Law  
Universiteit van Amsterdam  
P.O. Box 1030  
1000 BA Amsterdam  
The Netherlands

# The general principles of civil law: their nature, roles and legitimacy

Martijn W. Hesselink

## Introduction

In a number of recent judgements the Court of Justice of the European Union (CJEU) referred to 'the general principles of civil law', 'allgemeine Grundsätze des Zivilrechts' or 'principes généraux du droit civil'. These cases raise a number of questions concerning the nature, role and legitimacy of such principles. Do these principles belong to national law or to EU law? In either case, what can be their role and effects? So far, the Court has referred to them merely in the context of the interpretation of directives. But could they also play other roles, e.g. in gap filling or even in setting aside national law or secondary EU law, notably directives and regulations? In the latter case, could such principles yield direct horizontal effects in the sense that they become the source of rights and obligations between private parties? And how do they relate to the familiar general principles of EU law, such as the equality principle, which have constitutional status?

Depending on the answers to these questions, the general principles of civil law could represent an instance of more or less strong involvement of EU law in private law relationships, the theme of the present conference.<sup>1</sup> I understand this theme as referring not only to direct horizontal effect of EU law in the narrow sense of creating, modifying or extinguishing rights and obligations of private parties,<sup>2</sup> but also to direct effect in the broader sense that individuals can invoke and rely on them in (horizontal) cases against other private parties (i.e. not only through (vertical) claims against the state),<sup>3</sup> and indeed to indirect horizontal effects such as, in particular, the interpretation of national law in conformity with EU law (harmonious interpretation).

---

<sup>1</sup> This paper was written for the conference 'The Involvement of EU Law in Private Law Relationships', hosted by the Institute of European and Comparative Law on 28<sup>th</sup> -29<sup>th</sup> September 2011 at St Anne's College, Oxford.

<sup>2</sup> A.S. Hartkamp, 'The General Principles of EU Law and Private Law', 75 *RechtsZ* (2011), 241-259, 249 and A.S. Hartkamp, 'The Effect of the EC Treaty in Private Law: On Direct and Indirect Horizontal Effect of Primary Community Law', 18 *ERPL* (2010), 527-548, proposes to reserve the term for this narrow category. The narrow definition fits well with the private law perspective on the sources of right and obligations of private parties.

<sup>3</sup> This broader definition of direct effect is closer to its original international law meaning where the effect is perceived from the perspective of the enforcement of obligations arising under the Treaties. It does not fit well, however, with direct effect of secondary EU law (and of unwritten primary EU law). For a discussion of various definitions of direct effects see e.g. P. Craig & G. De Búrca, *EU Law: Text, Cases and Materials*, 5<sup>th</sup> ed. (Oxford: OUP, 2011), 181ff.

The Court's discovery of general principles of civil law in recent cases has worried some authors, such as Weatherill, who wrote that he was 'anxious that these rulings seem uncritically ready to absorb search for general principles of civil law as proper task of the EU and, specifically, of its Court.'<sup>4</sup> Others, however, have welcomed this new source of European private law and have encouraged the Court to further pursue this path. Hartkamp, for example, wrote recently that '[i]n the light of the expansion of the private law component of EU law it is likely and desirable that the ECJ will undertake to increase the number of useful rules and principles of civil law.'<sup>5</sup>

Clearly, the desirability of more general principles of civil law very much depends on what they actually are and on what roles they are likely to play. But not only that. A crucial factor is also how they come about. This raises the questions where the Court found these principles, what methods it will use in the future for discovering new ones and to what extent the Court will inform us about its discovery procedure.

It may very well be that the reference by the Court to general principles of civil law in these recent cases was purely accidental and was not meant to introduce a new concept or category in any technical sense. However, even if that were the case it would still worth exploring whether the Court should actually start formulating such general principles of European private law, in addition to the general (or fundamental) principles of EU law, and what the nature and roles of such principles should be.

This paper is organised in the following way. It starts with a brief presentation of the recent cases in which the Court actually referred explicitly to the general principles of civil law. It then proceeds, in a second section, by enquiring into the nature of the concept, discussing in particular what its elements of 'general', 'principles' and 'civil law' might refer to. A third section then continues the analysis by addressing the different functions and effects that general principles of civil law might have. The fourth section discusses how these principles of civil law, and future new ones, could become legitimate private law norms. At the end of the paper some conclusions will be drawn.

## The principles

Before we can address any questions concerning the nature, roles and legitimacy of general principles of civil law we need to examine in some detail the cases where the Court of Justice of the European Union recently discovered them. The four clearest instances were *Société thermale d'Eugénie-Les-Bains* (2007), *Hamilton* (2008), *Messner* (2009), and *E. Friz* (2010). I will now introduce these cases briefly, in their order of appearance.

---

<sup>4</sup> S. Weatherill, 'The "principles of civil law" as a basis for interpreting the legislative *acquis*', 6 *ERCL* (2010), 74-85, 84.

<sup>5</sup> Hartkamp 2011, *op. cit.* note 2, 258.

## Société thermale d'Eugénie-Les-Bains

*Société thermale d'Eugénie-Les-Bains* (2007)<sup>6</sup> was a case relating to the interpretation of a tax law directive.<sup>7</sup> The reference for preliminary ruling was made by the French *Conseil d'État* in the course of proceedings between Société thermale and the Ministry of the Economy, Finance and Industry concerning the application of value added tax (VAT) to deposits collected by Société thermale on the reservation of hotel rooms and retained by it following the cancellation of some of those reservations. The case turned on the nature of deposits in the hotel sector. In that context the question arose whether the payment of a deposit by the client can be regarded as (part of) the consideration for the service provided by the hotelier. The Court of Justice held that this was not the case because the obligations for the client to pay and for the hotelier to provide the accommodation arise directly from the contract, not from the payment of the deposit. The Court justified its decision relying on the notion of general principles of civil law, in the following consideration:<sup>8</sup>

In accordance with *the general principles of civil law*, each contracting party is bound to honour the terms of its contract and to perform its obligations thereunder. The obligation to fulfil the contract does not therefore arise from the conclusion, specifically for that purpose, of another agreement. Nor does the obligation of full contractual performance depend on the possibility that otherwise compensation or a penalty for delay may be due, or on the lodging of security or a deposit: that obligation arises from the contract itself.

The issue had arisen in a French dispute and both the French *Code de la consommation* and the *Code Civil* contain relevant provisions concerning deposits which were cited in the proceeding.<sup>9</sup> However, the Court's task was to interpret an EEC directive, not French law. Nevertheless, the resolution of the tax law question whether VAT was due could clearly benefit from received classifications and definitions in the area of private law. And the Court would probably simply have referred to the European Civil Code had there been one. However, in the absence of written European rules of general private law the Court resorted to unwritten principles. Thus, in this case the general principles of civil law function as unwritten background principles for the interpretation of written secondary EU law. In this case the Court merely postulated the existence of the principle without clarifying where it had found it. On the other hand, however, the principle of the binding force of contract is not a very controversial one in Europe.<sup>10</sup>

---

<sup>6</sup> Case C-277/05, *Société thermale d'Eugénie-les-Bains v Ministère de l'Économie, des Finances et de l'Industrie* [2007] ECR I-06415.

<sup>7</sup> Articles 2(1) and 6(1) of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1; 'the Sixth Directive').

<sup>8</sup> Para 24 (emphasis added).

<sup>9</sup> See Art. L 114-1 Code de la consommation and Art. 1590 Code civil.

<sup>10</sup> In Para 25 the Court phrases the same principle as: 'the principle that contracts must be performed'.

## Hamilton

In *Hamilton* (2008), the Court had to decide on a reference for a preliminary ruling from the *Oberlandesgericht* of Stuttgart (Germany), relating to the interpretation of the doorstep selling directive.<sup>11</sup> The question was whether the national legislature is entitled to provide, as the German legislator had done, that the right of cancellation laid down in Article 5(1) of that directive may be exercised no later than one month from the time at which the contracting parties have performed in full their obligations under a contract for long-term credit, also where the consumer has been given defective notice concerning the exercise of that right. The Court answered the question in the affirmative. In its reasoning it referred to the general principles of civil law. The Court said:<sup>12</sup>

Similarly, the provision which governs the exercise of the right of cancellation – namely, Article 5(1) of the doorstep selling directive – provides, inter alia, that “[t]he consumer shall have the right to renounce the effects of his undertaking”. The use in that provision of the term “undertaking” indicates, as Volksbank argued at the hearing before the Court, that the right of cancellation may be exercised as long as the consumer is not bound, at the time that the right is exercised, by any undertaking under the cancelled contract.<sup>13</sup> That logic flows from one of *the general principles of civil law*, namely 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.<sup>14</sup>

Again, the reference to the general principles of civil law occurs in the context of the interpretation of a directive, this time in the area of consumer law. And here also, like in *Société thermale d'Eugénie-Les-Bains*, the Court could not adduce national (in this case: German) general contract law in order to make a point concerning the interpretation of EU law. Therefore, with a view to an autonomous interpretation of the directive it had to refer to more general or European background rules or principles of contract law. In the absence of a written general European contract law it resorted to unwritten law. However, like in *Société thermale d'Eugénie-Les-Bains*, the Court did not speak of principles ‘of EU law’, thus suggesting that these

---

<sup>11</sup> Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises (OJ 1985 L 372, p. 31; ‘the doorstep selling directive’).

<sup>12</sup> Case C-412/06, *Annelore Hamilton v Volksbank Filder eG* [2008] ECR I-02383, Para 24 (emphasis added).

<sup>13</sup> This is obviously a mistranslation. Compare the same sentence in French, the working language of the Court): ‘En effet, l’utilisation, à cette disposition, du terme «engagement» indique, ainsi que l’a fait valoir Volksbank lors de l’audience devant la Cour, que le droit de révocation peut être exercé à moins qu’il n’existe pour le consommateur, au moment de l’exercice dudit droit, aucun engagement découlant du contrat dénoncé.’ (emphasis added)

<sup>14</sup> The term termination is also somewhat misleading here as it suggest (active) termination by one party of the contract (e.g. for non-performance) whereas what is meant here is (also) the mere coming to an end (or: the end) of a contract. Compare, again, the French version: ‘Cette logique relève d’un des principes généraux du droit civil, à savoir que l’exécution complète d’un contrat résulte, en règle générale, de la réalisation des prestations mutuelles des parties à ce contrat et de *la fin* de celui-ci.’ (emphasis added)

principles might actually belong to (as opposed to: derive from) the laws of the Member States.

Again, there is no attempt at providing any empirical basis (in comparative law) or rational basis (in natural law) for the acknowledgment of a general principle. However, in this case the Court's reasoning from principle (as opposed to the outcome) is not necessarily convincing. On the one hand, in many countries rights and duties can continue to exist even after a contract has come to an end, e.g. in the case of non-competition clauses (which may constitute a 'post-contractual relationship'). On the other hand – and more to the point here –, the mere fact that a contract has been completely performed, and the contractual relationship has come to an end, does not necessarily imply that the contract giving rise to these obligations can no longer be affected. The best example is the avoidance of a contract, e.g. for mistake or fraud, which may very well be retroactive. Similarly, it is entirely conceivable that a withdrawal right could also be exercised, retroactively, even after the contract has come to an end because all obligations that the contract had given rise to have already been performed. Therefore, there exists, in most Member States, no general principle to the effect that a party cannot withdraw from a contract (by terminating, avoiding or cancelling it) once all obligations under the contract law have been performed. Most Member States do contain a general principle of discharge by performance, the principle that the Court seems to be hinting at, but that principle does not suffice to justify the Court's decision.

In his opinion in this case, Advocate-General Maduro had also referred to a general principle.<sup>15</sup> His opinion differs from the Court's ruling in a number of relevant respects. First, he speaks explicitly of a 'principle common to the laws of the Member States'. Secondly, he provides some *prima facie* evidence for its existence by referring to the Lando principles, the Gandolfi code and the Acquis principles.<sup>16</sup> Thirdly, the principle that he quotes does actually exist in most if not all Member States, i.e. the principle of 'the placing of a time-limit on the exercise of a right, most often referred to as "limitation"'. And, finally, he points out that this principle 'might well ultimately appear at Community level in the context of the creation of a common frame of reference for European contract law'.<sup>17</sup>

This is, of course, not the place to discuss the merits of the Court's decision.<sup>18</sup> The point here is rather that the mere postulation of a general principle, without

---

<sup>15</sup> See Opinion of Advocate General Poiares Maduro delivered on 21 November 2007, ECR [2008] I-02383, Para 24.

<sup>16</sup> O. Lando, E. Clive, A. Prüm & R. Zimmermann (eds.), *Principles of European Contract Law Part III* (The Hague: Kluwer Law International, 2003), G. Gandolfi (ed.) *Le code européen des contrats* (Milan: Giuffrè, 2004), and *Principles of existing EC Contract Law (Acquis Principles)*, Contract 1, Part 1, Pre-contractual Obligations, Conclusion of Contract, Unfair Terms, Volume I (Munich: Sellier, 2007) respectively.

<sup>17</sup> *Loc. cit.* note 15, Para. 24.

<sup>18</sup> The Consumer Rights Directive will follow AG Maduro's approach, introducing in its Art 10 Para 1 a one year cut-off period running from the end of the initial withdrawal period. See European

providing any (even prima facie) evidence, comparative or other, makes it difficult to assess the merits of the Court's reasoning and makes it hard to predict what new principles we may expect in the future.

### Messner

The ruling in *Messner* (2009), a decision on a reference for a preliminary ruling from the *Amtsgericht* Lahr in Germany, concerned the interpretation of the distance selling directive.<sup>19</sup> Pia Messner had bought a second-hand laptop computer via the Internet from Firma Stefan Krüger. After a few months the display became defective. Upon Krüger's refusal to repair the defect free of charge, Ms Messner exercised her right of withdrawal which she still had because she had never received a notice from the seller concerning the existence of that right. Ms Messner sought reimbursement of the price, but Krüger counterclaimed compensation for the use made of the computer by Ms Messner amounting to a sum (based on the average market rental price) somewhat higher than the purchase price. Such a claim for compensation could be successful, in principle, under German law. However, having doubts whether German law as it stood was compatible with the distance selling directive, in particular Article 6 thereof, the Court in the main proceedings referred a question to the Court of Justice for preliminary ruling. In its response, the Court held as follows:<sup>20</sup>

Regard being had to all of the foregoing, the answer to the question referred is that the provisions of the second sentence of Article 6(1) and Article 6(2) of Directive 97/7 must be interpreted as precluding a provision of national law which provides in general that, in the case of withdrawal by a consumer within the withdrawal period, a seller may claim compensation for the value of the use of the consumer goods acquired under a distance contract. However, those provisions do not prevent the consumer from being required to pay compensation for the use of the goods in the case where he has made use of those goods in a manner incompatible with *the principles of civil law*, such as those of good faith or unjust enrichment, on condition that the purpose of that directive and, in particular, the efficiency and effectiveness of the right of withdrawal are not adversely affected, this being a matter for the national court to determine.

Note that the Court refers to 'the principles of civil law', not the *general* principles of civil law. Note also that in this case it is less clear than in *Société thermale d'Eugénie-Les-Bains* and *Hamilton* that the Court actually means European principles or principles common to the laws of the Member States. It is possible that the Court here merely intends to refer to the principles of civil law of the Member State at hand. Indeed, in this case the Court seems to be trying to find the right balance between, on the one hand, the requirements of the European directive and, on the

---

Parliament legislative resolution of 23 June 2011 on the proposal for a directive of the European Parliament and of the Council on consumer rights (COM(2008)0614 – C6-0349/2008 – 2008/0196(COD)).

<sup>19</sup> Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts (OJ 1997 L 144, p. 19).

<sup>20</sup> Case C-489/07 *Pia Messner v Firma Stefan Krüger* [2009] ECR I-07315, Para 26 (emphasis added).



other hand, the fundamental private law principles prevailing in the Member State that has to transpose the directive, in this case Germany. Having said that, this particular Member State is of course not unique in this respect. On the contrary, most Member States contain general principles of good faith and unjust enrichment. Still, these principles are not general European principles given the fact that some Member States (notably the United Kingdom, for English law) do not recognise a general principle of good faith whereas other Member States, although containing a general principle of unjustified enrichment, do not generally require - on account of that latter principle (or another) - compensation for use after unwinding contracts that have already (partially or entirely) been performed.<sup>21</sup>

### E. Friz

Finally, in *E. Friz* (2010) a consumer, who had invested a large sum (DEM 384 044) in a real property fund established in the form of a partnership contract that had been concluded during an unsolicited doorstep-selling visit at his home, had cancelled his participation in the partnership after having been a member for more than a decade. According to (judge-made) German law as it stood, in these circumstances, the cancellation would not have a retro-active effect (effect *ex tunc*), in the sense that the consumer would get back his entire investment leaving any existing losses for the remaining partners (who presumably included other consumers as well): the consumer could only claim the value of his interest at the date of his retirement from membership and could therefore get back less than the value of his capital contribution or might even have to participate in the losses of that fund (effect *ex nunc*). In a reference for a preliminary ruling the German *Bundesgerichtshof* asked the Court of Justice whether this rule was compatible with Art 5(2) of the Doorstep selling directive. The Court answered in the affirmative. In its motivation the Court referred to the general principles of civil law. The Court said:<sup>22</sup>

As the *Bundesgerichtshof* observed in its decision for reference, that rule is intended to ensure, in accordance with *the general principles of civil law*, a satisfactory balance and a fair division of the risks among the various interested parties.

Specifically, first, such a rule offers the consumer cancelling his membership of a closed-end real property fund established in the form of a partnership the opportunity to recover his holding, while taking on a proportion of the risks inherent to any capital investment of the type at issue in the main proceedings. Secondly, it also enables the other partners or third party creditors, in circumstances such as those of the main proceedings, not to have to bear the financial consequences of the cancellation of that membership, which moreover occurred following the signature of a contract to which they were not party.

---

<sup>21</sup> See H. Schulte-Nölke, C. Twigg-Flesner & M. Ebers (eds.), *Consumer Law Compendium; The Consumer Acquis and its transposition in the Member States* (Munich: Sellier, 2008), 560-561.

<sup>22</sup> Case C-215/08, *E. Friz GmbH v Carsten von der Heyden* [2010] ECR I-00000, Para 48-49 (emphasis added).

This time, the Court is discussing a national rule (with a view to its compatibility with a directive) and argues that the rule is intended to ensure a fair division of risks among the parties, 'in accordance with the general principles of civil law'. It seems that the Court here has national principles in mind, although the phrase does not exclude a more general (or even universal) notion of general principles of civil law. After all, the Court could have referred specifically to 'the German principles of civil law' or to 'the general principles of German civil law'. In any case, any rules existing in other Member State which are similar or based on the same or similar principles of civil law will also be held by the Court to be compatible with the directive. That brings some resemblance of this decision with the *Messner* ruling.

From the Court's judgment we do not get to know what exactly these principles were. The Court refers to an observation by the BGH in its decision for reference,<sup>23</sup> but that observation is not quoted in the Court's own decision. The principles that the BGH had referred to in its decision actually were the 'Grundsätze der fehlerhaften Gesellschaft' (principles of defective partnership), in particular the 'Grundsätze über den fehlerhaften Gesellschaftsbeitritt' (principles of defective accession to a partnership).<sup>24</sup> In her Opinion in this case, advocate general Trstenjak referred to these principles saying that 'It is therefore clear from the principles of that case-law [i.e. national case law - MWH] in relation to a "defective partnership" (*fehlerhafte Gesellschaft*) that exercise of the right of renunciation does not have the effect of restoring the *status quo ante*.'<sup>25</sup> It is very well possible that the Court borrowed its 'principles' formula from its Advocate General. And it is clear that in her opinion the term 'principles' refers to the principles of (unwritten) German law as established in the case-law of the BGH.

Interestingly, in this case the Court goes into the substance of the balancing of interests. It seems to accept the kind of interests that German private law takes into account and also the way in which and the extent to which they are taken into account, even though this leads to a lesser degree than complete protection of the consumer. In other words, the Court accepts (as it had already done in *Schulte*) that effective protection is not the same as maximum protection.<sup>26</sup> And once the Court does not require the maximisation of consumer protection it will inevitably have to address the other private interests at stake and the private law principles that protect these. Thus, the court is forced into private law reasoning and, one way or another, it will develop European private law principles. It is true that the Court will not set the specific private law rules: that will be left to the Member State law makers (legislators and courts) but it does engage in a debate about the underlying principles and, in this case, approves the application of the principles that had been

---

<sup>23</sup> The reference itself, as published, does not refer to principles. See Reference for a preliminary ruling from the Bundesgerichtshof (Germany) lodged on 22 May 2008 *OJ C 209*, 15.8.2008, p. 23.

<sup>24</sup> *Betriebsberater* 2007, @.

<sup>25</sup> Opinion of Advocate General Trstenjak delivered on 8 September 2009, ECR [2010] I-00000, Para 18.

<sup>26</sup> Case C-350/03, *Elisabeth Schulte and Wolfgang Schulte v Deutsche Bausparkasse Badenia AG*, ECR [2005] I-09215.

developed by the German supreme civil court. Since the Court of Justice will follow the same reasoning concerning any other Member State having similar private law principles, the Court is effectively developing, in dialogue with the Member State courts, European private law principles. This raises the question whether these principles should be categorised as European in the strict sense of being part of EU law (and if so, which part) or merely in the broader sense of belonging, as background principles, to the developing multi-level system of private law in Europe or to a common European private law space. This brings us to the nature of the general principles of civil law.

## Their nature

What does the Court mean when it refers to the general principles of civil law? In this section, I will consider each of the composing elements of the expression separately, i.e. 'general', 'principles' and 'civil law'. Before addressing those four main elements, it is worth pointing out that the Court refers to '*the* (general) principles of civil law'. The use of the determinate article (in all language versions) seems to convey the message that these principles already existed before the Court referred to them. This matches with the idea that the Court discovers such principles rather than inventing them.<sup>27</sup> On the other hand, we should probably not exaggerate the importance of the precise wording of the Court's rulings.

## General

In what sense are these principles general? With regard to the subjects or the persons they apply to, or the places where they apply, or a combination of these? I will discuss, in turn, the substantive, personal and territorial scope of the general principles of civil law.

## Substantive scope

One possibility is that these principles are general as opposed to specifically relating to certain sectors of civil law, e.g. certain types of contracts. This general/specific distinction would be similar to the familiar distinctions between general and specific private law, and between general and specific contract law.

The harmonisation in the area of private law by the European legislator has been referred to (usually critically) by scholars as being pointillist or piecemeal.<sup>28</sup> The European Commission, approaching the issue from a market-building perspective, speaks of a 'sector-specific' approach.<sup>29</sup> In its 2003 Action Plan on European contract law, for example, the Commission discusses 'the existing approach of sectoral harmonisation of contract law'<sup>30</sup> which it contrasts with possible 'non-

---

<sup>27</sup> Cf. e.g. K. Lenaerts & J.A. Gutiérrez-Fons, 'The Constitutional Allocation of Powers and General Principles of EU Law' 47 *CMLR* (2010), 1629-1669, 1635.

<sup>28</sup> See e.g. W-H. Roth, 'Transposing "Pointillist" EC Guidelines into Systematic Codes - Problems and Consequences', 10 *ERPL* (2002), 761-776, at 764.

<sup>29</sup> *A More Coherent European Contract Law, an Action Plan*, Brussels, 12.2.2003, COM(2003) 68, no. 55.

<sup>30</sup> *Ibidem*, no. 5.

sector-specific solutions, such as an optional instrument'.<sup>31</sup> The idea is also akin to an expression contained in scope provision of the Consumer Rights Directive in its latest, amended version: 'this Directive shall not affect national general contract law'.<sup>32</sup>

Most of the principles that the Court has referred to so far indeed seem to be general in this sense: the binding force of contract (*Société thermale*), discharge by performance (*Hamilton*), good faith and unjustified enrichment (*Messner*) are principles of general contract law or (even broader) of the general law of obligations. Their scope of application is not limited to contracts for the supply of hotel services (*Société thermale*), or contracts concluded in a doorstep selling situation (*Hamilton*) or via the Internet (*Messner*). However, the substantive scope of the *ex nunc* effect of a withdrawal from a partnership (*E. Friz*) is not general in this respect; it seems to be specific to partnership contracts, or even only to partnerships establishing a closed-end real property fund.<sup>33</sup>

At first sight, the idea of principles of civil law with a broad general scope seems to lead to of massive increase in the scope of EU private law, and a correlative decrease in the space left for the national private law maker. In other words, the discovery of these principles seem to raise justified worries for competence creep. If there is no legal basis for a written European civil code,<sup>34</sup> then surely the Court should not introduce an unwritten one – as principles – through the backdoor. However, this is not necessarily the case at all. With regard to the general principles of EU law, for example, the Court has made clear that they apply only to cases that fall within the scope of European Union law.<sup>35</sup> So, even though the principle of non-discrimination on grounds of age, as adopted in *Mangold* and *Kücükdeveci*, has direct horizontal effect (in the broad sense indicated above), it does not apply (i.e. has no effect at all) outside the scope of European Union law.<sup>36</sup> There is every reason for the Court to

---

<sup>31</sup> *Ibidem*, no. 89.

<sup>32</sup> Art 3 (Scope), Para 5 of the Consumer rights directive in its latest version (European Parliament legislative resolution of 23 June 2011, *loc. cit.* note 18). See also recital 14 (*ibidem*).

<sup>33</sup> Of course, the notion of *ex tunc* effect is general and also the principle (accepted in many countries) that the termination of a contract (as opposed to its annulment) is not-retroactive. However, the question was precisely to what categories (and its related principles) the right of withdrawal should be assimilated.

<sup>34</sup> See e.g. W. van Gerven, 'Coherence of Community and national laws; Is there a legal basis for a European Civil Code?', *ERPL* 1997, pp. 465-469. Contrast J. Basedow, 'Un droit commun des contrats pour le marché commun', *RIDC* 1998, 7.

<sup>35</sup> The same principle applies to the fundamental rights. According to Art 6 (1) TEU the provisions of the Charter do not extend in any way the competences of the Union as defined in the Treaties, and pursuant to Para 2 the accession by the EU to the ECHR will not affect the Union's competences as defined in the Treaties.

<sup>36</sup> Case C-555/07, *Seda Küçükdeveci v Swedex GmbH & Co. KG* [2010] ECR I-00000, Para 23. See earlier (less explicitly) Case C 144/04, *Werner Mangold v Rüdiger Helm* [2005] ECR I 09981, Para 75. However, the 'scope of the Treaties' which is relevant in this regard is not always easy to determine. See (critical) M. Dougan, 'In Defence of *Mangold*?' in: A. Arnulf, C. Barnard, M. Dougan & E. Spaventa (eds.) *A Constitutional Order of States? Essays in EU Law in Honour of Alan Dashwood* (Oxford: Hart Publishing, 2011), 219-243.

adopt the same policy in relation to the general principles of civil law. Indeed, nothing in the cases where the Court has referred to the general principles of civil law, so far, suggests that the Court is extending the scope of EU private law.

Therefore, the general principles of civil law are principles that can apply to many (or even all) existing areas of EU law, but do not create new areas of EU private law. To the extent that these principles are national (or similar to national ones),<sup>37</sup> of course, the scope of these national principles (where they exist) may extend, on the national level, as national principles, beyond the areas of private law that are affected by EU private law.

### Personal scope

Another possibility, however, is that the principles are meant to be general in the sense that they apply to all types of parties, not merely consumers. Strictly speaking, this interpretation would be a bit strained because usually business-to-consumer (B2C) law is referred to as 'consumer law', business to business (B2B) law as 'commercial law', and only the private law applicable to all types of relationships - i.e. B2C, B2B and C2C - is usually called 'civil law'. Thus, in combination with 'civil law' the element of 'general' would be redundant (or the other way around).

Having said that, it seems likely that the Court means to refer to principles that do apply not merely to one type of party. An important characteristic of the main category of private law rules with a limited personal scope, i.e. the rules applicable only in relationships between business and consumers, is that they aim at the categorical protection of the latter group. However, even though EU consumer law must aim at a 'high level of consumer protection',<sup>38</sup> it does not follow from this requirement or from the principle of *effet utile* that consumer protection must be absolute, not even that it must be maximised. Other interests and objectives may play a role as well. And such other relevant interests (usually private but sometimes also public) traditionally have been expressed, and balanced, in the general rules and principles of private law.

This seems to be exactly what happened in *Hamilton, Messner*, and *E. Friz*.<sup>39</sup> In all three cases, the Court of Justice was evaluating the effectiveness of consumer protection that the Member State (in all three cases Germany) was achieving through its transposition of a consumer protection directive. In all three cases, the interest of consumer protection had been balanced by the Member State against other interests, in particular certain interests of other parties to transactions with consumers. And the Court was limiting its evaluation not simply to the level of consumer protection that was achieved. It also (marginally) evaluated the kind of interest that were allowed to enter the balancing exercise, and thus – to put it more straightforwardly – the kind of interests of other parties that could justify the

---

<sup>37</sup> On this possibility, see further below.

<sup>38</sup> See Articles 114 (3) TFEU and Article 169 (1) TFEU.

<sup>39</sup> *Société thermale d'Eugénie-Les-Bains* is different in this respect.

limitation of consumer protection. It did so, not on the level of concrete rules, nor by directly balancing the relevant interests, but by reviewing the private law principles that the Member State had applied.

### Territorial scope

A third possibility is that these principles are meant to be general (also) in the sense of general for the whole European Union, as opposed to merely (and specifically) national. That idea reminds, of course, of the general principles of EU law (formerly: of Community law), such as, for example, the equality principle, the reliance principle and the principle of effectiveness (*effet utile*).<sup>40</sup> These principles are a well-known and important source of primary EU law, which can also be invoked in disputes between private parties, e.g. concerning contractual relationships, as became clear in the landmark decisions *Mangold* and *Kücükdeveci*.<sup>41</sup> Even though these general principles of EU law often originate in the laws of the Member States, which is reflected in the recurrent expression 'principles common to the laws (or: the constitutional traditions) of the Member States', they have become (also) European Union principles, and are applicable as such, i.e. as (primary) EU law.<sup>42</sup>

On the other hand, it is not certain that the Court means to refer to 'the general principles of civil law' in the analogical sense of general principles of European Union private law. The Court does not mention the EU in its expression, it speaks of 'general principles of civil law', not 'general principles of EU civil law'. Thus, the Court may also regard these principles as being entirely national principles (but, of course, possibly existing in more than one Member State). In all four cases that we saw, the principle that the Court referred to as one of 'the (general) principles of civil law' was recognised as a principle in the Member State where the case was situated. It may very well be that in *Hamilton*, *Messner*, and *E. Friz* the Court was not saying more than that a limitation of consumer protection on the basis of these principles, *where they exist in the national legal system*, is compatible with the directives.<sup>43</sup> On the other hand, in *Société thermale d'Eugénie-Les-Bains* the Court was clearly looking for an autonomous European principle, similar to the autonomous interpretation of private law concepts in the Brussels I and Rome I Regulations:<sup>44</sup> the actual existence of the same principle in the national law of the referring court does not seem to have been a precondition.

---

<sup>40</sup> See T. Tridimas, *The General Principles of EU Law*, 2<sup>nd</sup> ed. (Oxford: OUP, 2006).

<sup>41</sup> *Loc. cit.* note 36.

<sup>42</sup> A second category of general principles of EU law are those which are inherent in the legal order of the EU as it can be derived from the aims and structure of the founding Treaties. See e.g. Tridimas, *op. cit.* note 40, 4; Opinion of Advocate General Trstenjak delivered on 30 June 2009, Case C-101/08, *Audiolux SA e.a. v Groupe Bruxelles Lambert SA (GBL) and Others and Bertelsmann AG and Others*, ECR [2009] Page I-09823, 69.

<sup>43</sup> There is a parallel here with the *Courage* case, where the Court relied on the unclean hands principle as 'a principle which is recognised in most of the legal systems of the Member States' to conclude that EU law does not preclude a national rule based on that same principle. See further below.

<sup>44</sup> Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters *OJ* 2001, L 12, 1-23; Regulation (EC)

Another possibility is that the Court deliberately refrains from locating the general principles of civil categorically (i.e. *en bloc*) and exclusively at the European or the national level. Maybe the Court envisages a more flexible and chameleonic nature for these principles.

Indeed, it seems to be one of the main advantages of the normative category of principles, that, in comparison to rules, they are more flexible.<sup>45</sup> Thus, in particular, they could become the ideal tool for further developing the emerging multi-level system of private law in Europe,<sup>46</sup> or a common European private law space.<sup>47</sup> They could contribute to bringing more coherence and convergence to European private law. And for that purpose it is not necessary for them to have a very clearly defined scope of territorial application. Whether they are merely general principles recognized in the laws of the Member States or, in addition, also principles of EU law, is of limited importance especially in their role as principles providing the background against which directives are interpreted (i.e. in practice the main role so far).

However, this view clearly depends on one's general conception of European (private) law and its system(s). There are at least three different ways of looking at European private law: a nationalist, a dualist (or pluralist), and a Europeanist way.<sup>48</sup> In the nationalist perception, the Europeanisation of private law is a process that affects and modifies the national systems of private law of each Member State. In this perception, although most of private law is of domestic origin, today an increasing part is of European extraction. The focus is on how to integrate these 'foreign' elements into the original national system without upsetting it too much. In a dualist view, in contrast, on the territory of each Member State there are two systems: a national and a European one. Both these systems are complementary and interrelated but nevertheless distinct. In other words, each Member State has its own national system of private law, in addition to which they together share a common system of European Union private law. In this perception, the focus is, quite naturally, on tracing the exact borderline between the two systems. (A variant

---

No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ 2008, L 177, 6–16.

<sup>45</sup> See further below.

<sup>46</sup> In the same sense A. Metzger, *Extra legem, intra ius: Allgemeine Rechtsgrundsätze im Europäischen Privatrecht* (Tübingen: Mohr Siebeck, 2009). See also J. Basedow, 'The Court of Justice and Private Law: Vacillations, General Principles and the Architecture of the European Judiciary' 18 *ERPL* (2010) 443-474.

<sup>47</sup> Compare Lenaerts & Gutiérrez-Fons, *op. cit.* note 27, 1631, with regard to the general principles of EU law: 'common constitutional space'.

<sup>48</sup> This paragraph draws on M.W. Hesselink 'The Common Frame of Reference as a source of European private law', 83 *Tulane Law Review* 4 (2009), 919-971, 932-936. For a similar distinction, see Julie Dickson, 'Directives in EU Legal Systems: Whose Norms Are They Anyway?', 17 *ELJ* (2011), pp. 190–212, 192, whose a) '27 plus 1' model (or the 'distinct but interacting legal systems' model), b) 'part of member states' legal systems' model, and c) 'one big legal system' model, are roughly similar to what I call, respectively, the a) dualist, b) nationalist, and c) Europeanist perspectives.

is a pluralist view where e.g. international treaties may add additional systems.) In a Europeanist perception, finally, all private law in the European Union forms one single, gradually integrating system. The focus is on the interplay between the different levels of governance and on how the progressive coherence of the whole multi-level system and the gradual convergence of its components can be achieved. On this latter view, an increasing part of European private law is regulated at the EU level, while a considerable part is still regulated at the national level (and a minor part on the global level – think e.g. of the CISG) of one and the same system. These are three different ways of looking at the same phenomenon, i.e. of private law in Europe, neither of which can be said at the outset to be more true (positively) or more right (normatively). It is impossible to discuss the issue in a neutral fashion. Rather, the relative attractiveness of these models depends on one's more general views on the nature, future, and finality of the European Union.<sup>49</sup> Indeed, the issue of how many legal systems there are in Europe is closely related (if not identical) to the vexed question of *Kompetenz-Kompetenz*.<sup>50</sup> In those circumstances, it can only contribute to the clarity of the debate if its participants make their position explicit. This essay is inspired by a moderate Europeanist vision.<sup>51</sup>

A nationalist reading of the cases we saw above would probably lead to the conclusion that the Court is only referring to general principles of national civil law.<sup>52</sup> These principles apply, as national, in the Member States. So, on this view there are no general principles of European Union private law. Indeed, this view matches with the fact that the Court itself does not speak of EU principles. If these principles are merely principles of the Member State at hand, that the Court merely mentions as possibly existing, then they will only apply to the extent that the Member State law actually contains such a principle (or a rule based on it). For example, a seller from a legal system (like English law) that does not contain a good faith principle could not claim compensation for use on this ground (but maybe she could do so on the basis of unjustified enrichment, the other justifying principle accepted by the Court in *Messner*).

From the dualist perspective the question where these principles are located is crucial. If they are principles of national law they cannot be at the same time also principles of EU law and vice versa. Therefore, if the Court was referring to general principles of EU civil law then these principles are *different* from any principles existing at the national level going under the same name. In other words, there will be the various national principles of good faith in each of the Member States (as the case may be) plus one European one with its own autonomous meaning. And each of these principles, the existing national ones and the European one, has its own field of application. The dualist model already leads to great practical difficulties when

---

<sup>49</sup> See U. Haltern, 'On Finality', in: A. von Bogdandy & J. Bast (eds.), *Principles of European Constitutional Law*, 2<sup>nd</sup> ed. (Oxford: Hart Publishing, 2010), ch. 6.

<sup>50</sup> See J.H.H. Weiler, *The Constitution of Europe; "Do the New Clothes Have an Emperor?" and Other Essays on European Integration* (Cambridge: Cambridge University Press, 1999), ch. 9.

<sup>51</sup> See further Hesselink, *op. cit.* note 48.

<sup>52</sup> Except maybe in *Société thermale d'Eugénie-Les-Bains*.



limited only to legislation and other concrete written rules. However, when it comes to general principles, which are unwritten, generally abstract, and whose own borderlines are vague, then the exercise of drawing the borderline between national and EU law becomes even more challenging (and hence attractive to doctrinally oriented scholars).

The situation is much easier from the Europeanist point of view (indeed too easy, from the perspective of nationalists and dualists, who will denounce the lack of analytical rigour and legal certainty). If one regards all private law in the European Union as one single, gradually integrating system and strives for the progressive coherence of the whole multi-level system and the gradual convergence of its components, then the idea of general principles does not look like a problem but rather like a welcome solution. From the Europeanist perspective there is no great need to draw formal distinctions between national and European principles. Rather, the focus will be on the substantive convergence of the various versions, Member State and Union, of the *same* principle. And for this purpose the flexible and malleable nature of principles is an advantage. Borderlines are helpful for who wishes to separate but an obstacle for who wishes to unite. The general principles of civil law, as a network of pan-European principles of civil law related, sometimes loosely sometimes more closely, to similar principles at the national (and indeed the global) level could become ideal building blocks or cement (or even foundations) for a developing multi-level system of European (private) law. From this perspective, the language used by the Court of Justice in *Société thermale d'Eugénie-Les-Bains*, *Hamilton*, *Messner*, and *E. Friz* has nothing puzzling or worrying,<sup>53</sup> nor does the role that the Court attributed to these principles in these cases.

## Principles

What does the Court mean when it refers to 'principles'? Is its aim to distinguish these from rules? Does the Court mean to take a stance in a famous debate in legal theory? Or is the aim more strategic: to avoid an impression of encroaching upon the task of the legislator?

## Principles and rules

There are many different theories concerning the nature of general principles of law. And principles play a central role in some prominent theories of law, notably in Dworkin's idea of 'law as integrity'.<sup>54</sup> Dworkin draws a sharp distinction between principles and rules. According to Dworkin, rules have an all-or-nothing character whereas principles are characterised by a dimension of weight.<sup>55</sup> Principles play an

---

<sup>53</sup> In *Société thermale d'Eugénie-Les-Bains*, *Hamilton*, and *E. Friz* the Court refers to 'the general principles of civil law'. However, in *Messner* the Court uses the expression 'the principles of civil law' without the adjective 'general'. From the Europeanist perspective, nothing important turns on this difference in language.

<sup>54</sup> For a full statement of that idea, see R. Dworkin, *Law's Empire* (Cambridge, Massachusetts, Harvard University Press, 1986).

<sup>55</sup> See R. Dworkin, *Taking Rights Seriously* (Cambridge, Massachusetts, Harvard University Press, 1977), ch. 2.

important role in finding the existing right answer to any question of law: when the existing materials do not seem to yield a distinct answer ('hard cases'), courts must try to find a principle that does provide a solution to the case and fits with the relevant legal materials and with the prevailing political morality.<sup>56</sup> In contrast, legal positivists reject the existence of principles: where the law runs out, courts have discretion. However, 'inclusive positivists', like Coleman and probably Hart, accept the existence of principles to the extent that acknowledged sources of law refer to them.<sup>57</sup> For the nature and attributes of principles this seems to imply that whatever a statute or a legal precedent (or anything else that the rule of recognition acknowledges as a source of law) refers to as being a principle, will count, for that reason alone, as a principle, quite apart from its further characteristics.

It does not seem likely that the Court of Justice of the European Union intended to take a stance in this debate: its use of the concept seems to be compatible with both an essentialist and a mere appellationist conception of principles. This does not exclude, of course, the possibility to analyse the Court's rulings in terms of one or more of these theories, and decide in those terms whether these purported principles *really* are principles, quite apart from what the Court says.<sup>58</sup> This may be important, in particular, when it comes to the legitimacy of what the Court is doing: are these principles an exercise in legitimate law making, and what are its limits? That will be the subject of the fourth section of this paper.

On a more descriptive note, for now, the Court seems to use the concept in a very basic, literal sense of starting points, i.e. starting points for reasoning – in this case legal reasoning. What the Court seems to be doing, in particular, is to allow certain types of grounds for limiting consumer rights. As said, European consumer protection law cannot be about the blunt and absolute *maximisation* of consumer protection. In the cases that we have seen here, the Court tells national courts what reasons are acceptable for limiting consumer protection. In *Messner*, for example, the Court is concerned with 'the efficiency and effectiveness of the right of withdrawal'.<sup>59</sup> The directive leaves the determination of the legal consequences, in part, to the Member States. However, this is subject to the principle of effectiveness (a general principle of EU law). The question is then to figure out what is necessary to permit a consumer to make effective use of his right of withdrawal. The Court does not tell in any detail what specific limitations are permitted. It limits itself to evaluating in general terms the reasoning of national law, by acknowledging certain

---

<sup>56</sup> See further below.

<sup>57</sup> See J. Coleman, *The Practice of principle; In defence of a pragmatist approach to legal theory* (Oxford: OUP, 2001) and H.L.A. Hart, *The Concept of Law*, 2<sup>nd</sup> ed., (Oxford: Clarendon Press, 1994), 'Postscript'.

<sup>58</sup> For a sophisticated analysis in such terms, see Ch. Mak, 'Hedgehogs in Luxembourg? A Dworkinian Reading of the CJEU's Case Law on Principles of Private Law and a Reply of the Fox', Amsterdam Law School Legal Studies Research Paper No. 2011-24, Centre for the Study of European Contract Law Working Paper No. 2011-10 (forthcoming ERPL - available at SSRN: <http://ssrn.com/abstract=1920649>).

<sup>59</sup> Paras. 24-29.

principles that can come into play, thus giving guidelines without determining exactly what role these principles should play. The Court says: 'It is in the light of those principles (both the general principles of civil law and the principle of effective protection, it seems - MWH) that the national court must resolve the actual case before it, taking due account of all the elements of that case'.<sup>60</sup> Thus, the general principles also allow the Court to respect the principle of subsidiarity by not going more than necessary into the details of national law. In other words, whereas a dualist view (see above) would require a sharp dividing line between national and EU law, it is precisely the vagueness of principles, that are located somewhere between national and European law, that here allows the Court to interfere no more than necessary with national law. That the Court regards the general principles of civil law as starting points for legal reasoning or as guidelines for dispute resolution is also illustrated by the way in which the Court referred to them in *Hamilton*: 'That logic flows from one of the general principles of civil law', the Court said there.<sup>61</sup> The idea of a logic that flows from principles, in other words of principled reasoning and rational discourse, fits well with the idea of developing a system of private law in Europe that is as coherent as possible across the different levels of law making.

### Judges and legislators

Rules are adopted by legislators, while principles are discovered by judges. Therefore, although most of the principles that the Court has formulated so far (binding force of contract, discharge by performance, good faith and unjust enrichment) have the typical characteristics of generality and abstractness that is usually associated with general principles of law, it is not excluded that the Court used the concept of 'general principles of civil law' also for another reason. Given the fact that the idea of a European Civil Code is controversial, not in the last place because of doubts as to whether there would be a legal basis for it, it would be rather bold for the Court to do what the European legislator is not allowed to do, i.e. to adopt unwritten legal rules that would normally belong in a civil code. Therefore, the Court may have thought it to be more prudent to refer to principles rather than to rules. Such strategic reasons would be very similar to the ones that also made the drafters of the Unidroit principles and the Lando principles opt for the terminology of principles, i.e. their lack of legislative power. I will come back to the separation of powers dimension below when discussing legitimacy.

### Civil law

What exactly does the Court mean when it refers to 'the general principles of *civil* law?' Civil as opposed to what? In EU legal language 'civil law' is a familiar term, just like the related terms of 'civil liability', 'civil action', 'civil proceedings', and 'civil-law remedies'. For example, in the words of the Court, the *Courage* case concerned 'certain consequences in civil law' of a breach of art 101 TFEU.<sup>62</sup> Civil law is often

---

<sup>60</sup> Para 28.

<sup>61</sup> Para 42.

<sup>62</sup> Case C-453/99 *Courage Ltd v Crehan* [2001] ECR I-6297, Para 35.

contrasted with administrative, criminal or tax law,<sup>63</sup> just like a ‘civil court’ is often contrasted with criminal and administrative courts. See in this respect also the Brussels I regulation which is on ‘civil and commercial matters’; the Court has developed a rich case law on the (autonomous) interpretation of the concept of ‘civil matters’ in this context.<sup>64</sup> In the TFEU, in the title concerning the area of freedom, security and justice there is a chapter 3 (consisting of one provision: Art. 81), on ‘judicial cooperation in civil matters’.

Traditionally, ‘civil law’ is usually contrasted with ‘commercial law’. However, the use of the term ‘civil law’ in European law often rather seems to include ‘commercial law’, sometimes even explicitly. The same seems to be true for the way in which the Court intends its general principles of civil law. There is nothing in the four cases where the Court refers to (general) principles of civil law that excludes commercial cases from their scope of application. Thus, it seems, the Court could just as easily resort to these principles in a case concerning the interpretation of the late payment directive, whose scope is limited to ‘commercial transactions’.<sup>65</sup>

In practice, therefore, ‘civil law’ seems to mean ‘private law’. That latter term, in contrast, is much less frequently used by the European authorities.<sup>66</sup> This may explain why the Court refers to civil law. However, nothing fundamental would change (except an increase in precision and clarity), it seems, if the Court changed its terminology and started to refer to ‘the general principles of private law’. Indeed, if the principles are understood as principles belonging to the multi-level system of European private law or to a common European private law space then the most appropriate name would be ‘general principles of European private law’.<sup>67</sup>

## Their roles

What roles do the general principles of civil law play in the cases that we saw? And what further roles might they have?

---

<sup>63</sup> See e.g. Case C-195/02, *Commission of the European Communities v Kingdom of Spain*, ECR [2004], I-0785, 40: ‘legal consequences of a civil, criminal and administrative nature.’

<sup>64</sup> Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters *OJ* 2001, L 12/1-23.

<sup>65</sup> Directive 2011/7/EU of 16 February 2011 on combating late payment in commercial transactions (recast). See art. 1 (Subject matter and scope). For a definition, see Art. 2: “‘commercial transactions’ means transactions between undertakings or between undertakings and public authorities which lead to the delivery of goods or the provision of services for remuneration’.

<sup>66</sup> Sometimes, reference is made to a legal person, contract of employment etc. ‘governed by private law’ or to ‘a private-law association’. And in a recent case concerning the Rome Convention (now Rome I regulation), the CJEU held that ‘[t]he function of the Convention is to raise the level of legal certainty by fortifying confidence in the stability of legal relationships and the protection of rights acquired over the whole field of private law.’ (Case C-133/08, *Intercontainer Interfrigo SC (ICF) v Balkenende Oosthuizen BV and MIC Operations BV* ECR [2009] I-09687, Para. 23– emphasis added) The TFEU sometimes refers to ‘private law’. See e.g. *Art 54 TFEU* and *Art 272 TFEU*.

<sup>67</sup> In the same sense, Basedow *op. cit.*, note 46, 462.

## Interpretation, gap filling and correction

For the general principles of EU law it is familiar to distinguish three functions, i.e. interpretation (*secundum legem*), gap filling (*praeter legem*), and correction (*contra legem*).<sup>68</sup> Interestingly, these three functions coincide with the three traditional functions of good faith, a prominent source of unwritten judge-made private law in the civil law tradition. This is not surprising because these three functions simply coincide with the three roles that courts will inevitably have to play when applying abstract rules (i.e. statutes and codes) to concrete cases.<sup>69</sup> Indeed, these were already regarded as the three functions of praetorian (i.e. 'judge-made') law by Papinian,<sup>70</sup> from whom Wieacker borrowed them in order to describe the functions of § 242 BGB, the general good faith clause in the German civil code.<sup>71</sup>

Do the general principles of civil law fulfil the same three interpretative, gap-filling and corrective functions? The four cases where the Court has explicitly referred to general principles of civil law are all instances of the interpretation of EC directives against the background of these principles. Indeed, background rules of general private law seem indispensable, in particular, for the interpretation of EC directives that aim at sector specific consumer protection. As Beale put it, 'a great deal of general contract law that is not explicitly referred to in the *acquis* is nonetheless essential background to it'.<sup>72</sup>

Arguably, *Messner* could also be regarded as a case of gap filling (the distinction between interpretation and gap-filling being notoriously vague). However, none of them were an instance of correction (or: review). Nor has there been, so far, any attempt by referring national courts to introduce this idea with the Court.<sup>73</sup> This is in contrast with the 'general principles of EU law'. There, the Court made it clear that these principles can set aside provisions of national law in disputes between private parties.<sup>74</sup> Moreover, in *Audiolux* the central question whether there was a general principle of EU law concerning shareholder equality, was discussed because,

---

<sup>68</sup> See e.g. Tridimas, *op. cit.* note 40, p. 27ff, Metzger *op. cit.* note 46, Hartkamp 2011, *op. cit.* note 2, 256, and for the interpretative and gap-filling functions, A-G Trstenjak, Opinion in *Audiolux op. cit.* note 42, 68.

<sup>69</sup> See M.W. Hesselink, 'The concept of good faith', in: A.S. Hartkamp, M.W. Hesselink, E.H. Hondius, C. Mak & C.E. du Perron (eds.), *Towards a European civil code*, 4<sup>th</sup> ed. (Alphen aan den Rijn: Kluwer Law International 2011), 619-649.

<sup>70</sup> D. 1, 1, 7: 'Ius praetorium est, quod praetores introduxerunt adiuvandi vel supplendi vel corrigendi iuris civilis gratia propter utilitatem publicam (...)'.  
<sup>71</sup> F. Wieacker, 'Zur Rechtstheoretischen Präzisierung des § 242', in: *Recht und Staat in Geschichte und Gegenwart; Eine Sammlung von Vorträgen und Schriften aus dem Gebiet der gesamten Staatswissenschaft*, 193/194 (Tübingen: Mohr, 1956), 22

<sup>72</sup> H. Beale, 'The European Commission's Common Frame of Reference Project: a progress report', 2 *ERCL* (2006) 303-314, 312.

<sup>73</sup> Indeed, in none of the cases that we saw did the reference for preliminary ruling refer to the general principles of civil law. In contrast, in Case C-101/08 *Audiolux and Others* [2009] ECR I-0000, it was the referring national Court who explicitly asked the question whether the references to the equality of shareholders in a number of EC directives were manifestations of a general principle of Community law.

<sup>74</sup> See *Mangold and Küçükdeveci*, *loc. cit.* note 36.

if such a principle did exist, the plaintiffs claimed, it would have been directly horizontally effective and would have set aside the otherwise applicable national Luxembourg law.<sup>75</sup> However, Hartkamp is right in pointing out that there is nothing, in principle, in the nature of general principles of civil law that excludes that they could also play such a corrective role.<sup>76</sup>

## Direct effect?

### As unwritten secondary law

Could the general principles of civil law have direct effects on relationships between individuals in the (narrow) sense that they would create, modify or annul rights and obligations between them, similar e.g. to art 101 TEU (ex 81 EC) that directly declares void certain agreements that distort competition within the internal market?<sup>77</sup> Keeping in mind the three possible functions of these principles the question then becomes whether acts of private parties, such as contracts (provided of course that they are within the scope of EU law), must be interpreted, supplemented (gap-filling) and reviewed (corrected) in the light of the general principles of civil law.

For the general principles of EU law – in particular the principle of non-discrimination – , Hartkamp has argued that they could produce direct horizontal effects for the reason that ‘here as elsewhere there is no good reason to distinguish between written and unwritten primary law’.<sup>78</sup> This reasoning seems to imply that primary EU law and direct horizontal effect are two sides of the same coin. However, the doctrine of direct effect, be it horizontal or vertical, is not limited to primary law. All binding EU law, including secondary legislation, can have direct effect, as long as the relevant provision is sufficiently clear, precise, and unconditional.<sup>79</sup> For example, the regulation on air passengers’ rights produces direct horizontal effects, such as a right to compensation, between passengers and airline companies.<sup>80</sup> Nevertheless, Hartkamp is right that in relation to direct horizontal effects there is no good reason to distinguish between written and unwritten EU law. Supremacy and, as the case may be, direct effect of EU law should not depend on whether the relevant EU law is written or unwritten. This leads to the conclusion that whether or not the general principles of civil law, as a category, have the primary law status possessed by the

---

<sup>75</sup> *Loc. cit.* note 73, Para 63.

<sup>76</sup> Hartkamp, *op. cit.* note 2, 256. Whether that would be legitimate is a different question, which will be discussed in the next section.

<sup>77</sup> As said, this direct horizontal effect in a narrow sense can be distinguished from direct effect in the broader sense of being directly applicable in disputes between private parties. In other words, the review of contract law is not the same as the review of a contract.

<sup>78</sup> Hartkamp, *op. cit.* note 2, 250.

<sup>79</sup> Cf. Craig/De Búrca, *op. cit.* note 3, 180.

<sup>80</sup> See art. 5, Regulation No 261/2004 of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights. Cf. *Sturgeon*, Joined cases C-402/07 and C-432/07, *Christopher Sturgeon, Gabriel Sturgeon and Alana Sturgeon v Condor Flugdienst GmbH* (C-402/07) and *Stefan Böck and Cornelia Lepuschitz v Air France SA* (C-432/07), ECR [2009] I-10923, Para 45.



general principles of EU law is not decisive for the question whether they could produce direct horizontal effects. Rather, what seems more relevant is the requirement for direct effect that the legal provision be sufficiently clear, precise, and unconditional. Principles may often be too general to pass this test.

Nevertheless, the recent *NCC Construction Danmark* case, which will be discussed in more detail below, seems to suggest that only principles of primary EU law can have direct effect. This brings us to the question whether the general principles of civil law are (also) (sometimes) principles of primary law.

### As unwritten primary EU law

In a number of cases (notably *Viking* and *Laval*) the Court of Justice has accepted direct horizontal effect of market freedoms.<sup>81</sup> Hartkamp points out an important problem with the direct horizontal effect of market freedoms.<sup>82</sup> If a party can invoke her market freedom directly in a private law dispute, e.g. concerning a contract, then the other party, as the law stands now, can only invoke essentially public interests to counter that right.<sup>83</sup> Merely private (and typically merely economic) interests can not be raised to defeat the direct effect of the other party's freedom. Effectively, that could mean a limitation of the private autonomy of individuals, for the sake of market building.

In the past, justified worries have been expressed that EU private law is too much dominated by the internal market and that the effect of the market freedoms might be the 'constitutionalisation' of party autonomy and freedom of contract.<sup>84</sup> Here, however, the opposite seems to happen: freedom of contract and party autonomy are defeated by the market freedoms. Whereas traditionally private law disputes have been a matter of balancing the interests of the private parties,<sup>85</sup> incrementally on a case to case basis by courts and on a more abstract level in codifications, the direct horizontal effect allows only for the balancing of exclusively public interests. Hartkamp argues that the exception system should be extended for direct horizontal effect cases.<sup>86</sup>

---

<sup>81</sup> Case C-438/05, *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti*, ECR [2007], I-10779; Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet and Others* [2007] ECR I-11767

<sup>82</sup> Hartkamp 2010, *op. cit.* note 2.

<sup>83</sup> In *Bosman*, the Court did not seem to see any difficulty: 'There is nothing to preclude individuals from relying on justifications on grounds of public policy, public security or public health. Neither the scope nor the content of those grounds of justification is in any way affected by the public or private nature of the rules in question.' (Case C-415/93 *Bosman* [1995] ECR I-4921, Para 86).

<sup>84</sup> Study Group on Social Justice in European Private Law, 'Social Justice in European Contract Law: a Manifesto', 16 *European Law Journal* (2004), 653-674.

<sup>85</sup> However, in more recent approaches, especially in law & economics, private law should explicitly (and, according to some, even exclusively) serve public goals such as the maximisation of social welfare.

<sup>86</sup> Hartkamp 2011, *op. cit.* note 2, 548. In the same sense H. Schepel, 'Who's Afraid of the Total Market? On the horizontal application of the free movement provisions in EU Law' (Cambridge: CUP, forthcoming), 611-639, 628.

Maybe the general principles of civil law could provide a solution here. Could not the general principles of civil law contribute to developing a specific justification regime for the horizontal effect of market freedoms? They would bring in the private law interests. And they would do so in a way that does not necessarily have to worry those that fear the constitutionalisation of freedom of contract because in this way private autonomy *and its limits* would enter the equation.<sup>87</sup> In this way all relevant private interests, readily balanced (or still to be balanced, but as principles), could come directly into play. For example, the Court has already referred to both the principle of binding force of contract and its traditional counter principle of good faith.<sup>88</sup>

The result would be, of course, that the general principles of civil (or some of them) would gain the constitutional status of primary law. This could be conceived in two different ways. Either, as a matter of interpretation of the market freedoms, the general principles of civil law (or some of them) would become part of the justification regime for horizontal effect of the market freedoms. Or these principles (or some of them) would independently, as it were, counter-balance these freedoms. In the latter interpretation, it seems, this would be a case of direct horizontal effect of the principles themselves. In the former, they would be absorbed, as it were, by the Treaty provisions on the market freedoms, in a way very similar to private law principles applicable in the context of the private law remedies in competition cases based by the Court on art. 101 TFEU.<sup>89</sup>

The question arises, however, whether it is all worth the effort. If direct horizontal effect is going to be limited, first, to the freedom of establishment and the freedom to provide services (free movement of goods is so far excluded),<sup>90</sup> and then by general principles of civil law, thus creating a differentiation between the justification regimes in vertical and horizontal cases, and if the horizontal effect is going to be limited anyway to cases where the acts of private parties (contracts etc.) have the ability to obstruct free movement (which is rarely the case, because of competition), this may yield very little economic benefit, while coming at a price of greater complexity and legal uncertainty.<sup>91</sup> Therefore (and also for more traditional reasons, such as the division of labour with competition law), several observers

---

<sup>87</sup> That risk would exist if freedom of contract was simply elevated to the constitutional status of a general principle of EU law, as was recently proposed by M. Safjan & P. Miłośzewicz, 'Horizontal effect of the general principles of EU law in the sphere of private law', 18 *ERPL* (2010), 475-486, 484.

<sup>88</sup> Compare art 1134 French Civil Code, Paras 1 and 3 respectively. Cf. C. Jamin, 'Une brève histoire politique des interprétations de l'article 1134 du code civil', 178 *Dalloz* (2002), 901-907

<sup>89</sup> See *Courage*, *loc. cit.* note 62.

<sup>90</sup> See, however, Opinion of Advocate General Poireres Maduro delivered on 23 May 2007, Case C-438/05, ECR [2007], I-10779.

<sup>91</sup> In this sense, H. Schepel *loc. cit.* note 86, 630. In his contribution, G. Davies, 'Freedom of Movement, Horizontal Effect, and freedom of Contract' (conference paper), argues that the law of free movement is almost certainly welfare reducing (at best, there is a deferred welfare gain) and should rather be understood as a project in transformative social engineering, essentially political, seeking to nudge Europeans into changing their domestic preferences for more European ones.



have argued for a retreat from direct horizontal effect of the market freedoms.<sup>92</sup> If, however, the Court persists (or even extends) horizontal effect, then a principled approach, informed by general principles of private law, is to be preferred over a mere balancing of public and private interests. And from the perspective of coherence there seems to be good reason at least to coordinate these principles with private law principles developed, accepted or acknowledged in other areas of EU law such as competition law (*Courage, Manfredi*).

### The hierarchy of norms

To the extent that the general principles of civil are (also) part of EU law the question arises where they are located in the hierarchy of norms, (also) on the level of primary ('constitutional') EU law or merely on the level of secondary EU law, or both (or neither)?

### Their relationship to the general principles of EU law

The general principles of EU law have played a prominent role in the shaping EU law.<sup>93</sup> These principles, which include important examples such as equality, proportionality, and effectiveness, enjoy 'constitutional' status in the sense that they are unwritten primary law, on the same hierarchical level as the founding Treaties. These principles may also be relevant for private law disputes, as was well illustrated by the *Mangold* case. What is the relationship, if any, between the general principles of EU law and the general principles of civil law? Is there some (potential) overlap between the two categories? Can certain general principles of civil law be recognised as general principles of EU law?

In *Audiolux* the Court said:<sup>94</sup>

The general principles of Community law have constitutional status while the principle proposed by *Audiolux* is characterised by a degree of detail requiring legislation to be drafted and enacted at Community level by a measure of secondary Community law. Therefore, the principle proposed by *Audiolux* cannot be regarded as an independent general principle of Community law.

This reasoning suggests that there is some link between the degree of detail and constitutional status. The more detailed the principle the less likely it is to be a constitutional principle. That makes sense: choices concerning details and exceptions belong to the realm of the ordinary legislator.<sup>95</sup> However, this reasoning,

---

<sup>92</sup> For Hartkamp 2010, *op. cit.* note 2, this would be the preferred option.

<sup>93</sup> Different names were used in the past, including 'fundamental principles' etc., but since the entrance into force of the Lisbon Treaty the Court has usually referred to them as 'general principles of EU law'. See e.g. Case C-279/09, *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland*, ECR [2010] Page 00000, concerning the principle of effective judicial protection.

<sup>94</sup> See explicitly *Audiolux*, *loc. cit.* note 73, Para 63.

<sup>95</sup> See *ibidem*, Para 62: 'A principle such as that proposed by *Audiolux* presupposes legislative choices, based on a weighing of the interests at issue and the fixing in advance of precise and detailed rules'.

on its own, would not defeat the candidacy for acquiring constitutional status of, for example, the principles of binding force, good faith and unjustified enrichment since these are very general and broad principles.

What seems to have been decisive, rather, was the fact that *Audiolux* was trying to achieve some direct effect of the principle. What *Audiolux* needed was a principle that had direct horizontal effect between the private parties and enjoyed supremacy over the otherwise applicable Luxemburg law, which contained no such principle and only rules of company law favouring its adversary. Indeed, it is far from clear that the Court in a different case concerning, for example, the interpretation of a company law directive could not have accepted the same principle that it rejected as a general principle of EU law, in the shape of a general principle of civil law. Because in the latter type of cases, as we have seen, the way the principle works is not absolute. The Court is not implying in *Messner et cetera* (nor in *Courage*) that these principles are absolute, without exception. On the contrary. Therefore, what the Court actually seems to be saying in *Audiolux* is that the principle that *Audiolux* proposed is not sufficiently clear, precise, and unconditional to have direct horizontal effect.

At first sight it seems self-evident that the principles of the binding force of contract, good faith, and unjust enrichment, even though they are among the most fundamental and general principles of private law are nevertheless not constitutional principles. Indeed, they cannot be found in any of the constitutions of the Member States of the Union. The reason is simply that these principles, as Hartkamp puts it, 'are not sufficiently important for them to be counted as general principles of EU law'.<sup>96</sup> Central as, for example, the principle of good faith may be to private law, there is an obvious (and categorical) difference between this principle and, say, the general principle of equal treatment.

Still, it is not entirely self-evident what exactly constitutional means in the context of the European Union. It has become customary to refer to the primary EU law of the founding treaties as its constitutional framework, i.e. today essentially the TEU, the TFEU and the Charter.<sup>97</sup> In addition, the CJEU has acknowledged, by analogy, unwritten primary law with similar constitutional status.<sup>98</sup> However, as to the substance, it is far from self-evident that certain rules and doctrines belong to the constitutional framework of primary law. Not only does the European constitution look rather economic. Also, it does not even generally guarantee economic freedoms and competition but focuses more specifically on cross-border trade, which seems odd for constitutional liberties. What is true for written law is even more strongly so for unwritten law. In the absence of any previous recognition by the Court it is not self-evident at all what could become one day recognised as a principle of primary

---

<sup>96</sup> Hartkamp 2011, *op. cit.* note 2, 257.

<sup>97</sup> See art. 1, Para 2: the TFEU and the TEU 'constitute the Treaties on which the Union is founded'.

<sup>98</sup> Cf. F. Jacobs, foreword to Tridimas *op. cit.* note 40, ix, 'Thus the general principles rank alongside the Treaties as primary sources of Community law, prevailing over conflicting legislation.'

EU law. Some guidance could be found maybe in the aims and values of the EU as expressed in the Treaties and the Charter of fundamental right of the EU.<sup>99</sup> But any further or deeper basis is lacking.

One could imagine, for example, that constitutional status would be granted to those principles that are truly fundamental for human flourishing and progress, i.e. those principles that most contribute to giving individuals real opportunities to live full and creative lives and to be and to do what they want to be. This approach, the capabilities approach to human progress, is much more inclusive than conventional economic indicators like gross domestic product.<sup>100</sup> From such a perspective, it is self-evident that the discrimination of minority shareholders should not be the first candidate to become a constitutional principle. Similarly, the general principles of civil law that we have seen so far, although fundamental to the law of obligations, clearly are not fundamental to society. Their bearing on human flourishing is much weaker, and more indirect, than e.g. the principle of non-discrimination on grounds of age. On the other hand, however, it is not obvious either that the invalidity of cartels that affect cross-border trade between Member States (art. 101 TFEU) or the freedom to move goods from one EU country to another (art 28 TFEU) are more fundamental to human flourishing than the principles that contracts are binding, that unjustified enrichments must be reversed or that no one is bound to a contractual relationship after having fulfilled all their obligations or indeed, the principle according to which all contract contracts have to be performed in accordance with 'a standard of conduct characterised by honesty, loyalty and consideration for the interests of the other party'.<sup>101</sup>

### Principles of secondary EU law?

In several areas, EU law refers to general principles that clearly have no constitutional status. Think, for example, of the 'general principles concerning the health and safety of workers',<sup>102</sup> and 'the general principles of food law'.<sup>103</sup> A very interesting case in this respect is *NCC Construction Danmark* which concerned the interpretation of 'the Sixth Directive'<sup>104</sup> and the scope of the principle of fiscal

---

<sup>99</sup> See Art. 2 TEU.

<sup>100</sup> For a powerful recent statement of this approach see M.C. Nussbaum, *Creating Capabilities; The Human Development Approach* (Cambridge, Massachusetts: Belknap Press, 2011).

<sup>101</sup> The duty of good faith and fair dealing as defined in art. 2(10) Feasibility Study.

<sup>102</sup> See Art. 1, Para 2, Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work: '[This directive] contains general principles concerning the prevention of occupational risks, the protection of safety and health, the elimination of risk and accident factors, the informing, consultation, balanced participation in accordance with national laws and/or practices and training of workers and their representatives'. Cf. Joined cases C-397/01 to C-403/01, *Bernhard Pfeiffer et al. v Deutsches Rotes Kreuz, Kreisverband Waldshut eV*. ECR [2004] I-08835, Para 4.

<sup>103</sup> Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety (OJ 2002 L 31, p. 1).

<sup>104</sup> The same tax law directive that was central in *Société thermale d'Eugénie-Les-Bains*.

neutrality with regard to turnover taxes.<sup>105</sup> It is worth citing the ruling of the Court in this case *in extenso*:<sup>106</sup>

First of all, it should be noted that the principle of fiscal neutrality resulting from the provisions of Article 17(2) of the Sixth Directive implies that a taxable person may deduct all the VAT levied on goods and services acquired for the exercise of his taxable activities.

In that regard, it is necessary to add that, according to settled case-law, the principle of fiscal neutrality, and, in particular, the right to deduct, as an integral part of the VAT scheme, is a fundamental principle underlying the common system of VAT established by the relevant Community legislation.

That principle of fiscal neutrality was intended by the Community legislature to reflect, in matters relating to VAT, the general principle of equal treatment.

However, while that latter principle, like the other general principles of Community law, has constitutional status, the principle of fiscal neutrality requires legislation to be drafted and enacted, which requires a measure of secondary Community law (see, by analogy, with regard to the protection of minority shareholders, *Audiolux*).

The principle of fiscal neutrality may, consequently, be the subject, in such a legislative measure, of detailed rules, such as those, implemented in Danish law, resulting from the application of Article 19(1) in conjunction with Article 28(3)(b) of the Sixth Directive, and point 16 of Annex F to that directive, according to which a taxable person carrying out both taxable activities and exempt activities of selling real estate cannot deduct fully the VAT on its general costs.

It is also appropriate to point out that the general principle of equal treatment, of which the principle of fiscal neutrality is a particular expression at the level of secondary Community law and in the specific area of taxation, requires similar situations not to be treated differently unless differentiation is objectively justified. It requires, in particular, that different types of economic operators in comparable situations be treated in the same way in order to avoid any distortion of competition within the internal market, in accordance with the provisions of Article 3(1)(g) EC.

This decision is of interest in the present context for a number of reasons. First, because the principle of fiscal neutrality, although being ‘a fundamental principle’, is nevertheless not a constitutional principle. This confirms the idea the fundamental character is not decisive for the classification as a constitutional principle. By analogy, for example the principles of the binding force of contract and of good faith, although arguably principles fundamental to private law, are not necessarily also constitutional principles. Secondly, because here the fundamental principle underlies the common system of VAT established by Community legislation and is intended by the legislator, top down as it were. This is in contrast with the more

---

<sup>105</sup> Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1) (‘the Sixth Directive’).

<sup>106</sup> Case C-174/08, *NCC Construction Danmark A/S v Skatteministeriet*, ECR [2009] I-10567, Paras 39-46 (references omitted).

bottom-up nature of the general principles of civil law.<sup>107</sup> Thirdly, the Court rejects the constitutional status for this principle for reasons similar to the ones mentioned in *Audiolux* (a judgment from two weeks earlier, by the same chamber (but with a different rapporteur), that the Court explicitly refers to by way of analogy), i.e. that the principle of fiscal neutrality requires legislation to be drafted and enacted, which requires a measure of secondary Community law.<sup>108</sup> Fourthly, and most relevant here, the principle of fiscal neutrality is a particular expression at the level of secondary Community law and in the specific area of taxation of the general principle of equal treatment. This means that there are principles located at the level of secondary EU law, not only at the level of primary EU law. By analogy, the general principles of civil law that we have seen so far could also be located on the secondary level of EU law.

In *NCC Construction Danmark*, like in *Audiolux*, the aim of the plaintiff was for the principle to get around the otherwise applicable national law (either as gap-filling or as correction) and this may have been an important reason for the Court to deny it the constitutional status of a general principle of EU law. If this is true, then the implicit conclusion is that the Court, like Hartkamp (see above), thinks that only general principles of primary law can have such effects. That would mean that general principles of secondary EU law have more limited effects than general principles of primary EU law. For example, it could be that they have no corrective (review) function and/or no direct horizontal effect. However, as we saw above, the corrective function and direct effect are not necessarily limited to primary EU law. Therefore, it remains to be seen what choices the Court will make in this regard.

In any case, the conclusion seems to be justified that the general principles of civil law can (also) be regarded as principles at the level of secondary EU law, as unwritten secondary EU law that is, with at least an interpretative function.

### **Sovereignty and subsidiarity**

What effect does the discovery by the Court of Justice of general principles of civil law have on the autonomy of national private law makers? Are the general principles of civil law a threat to Member State sovereignty in the area of private law?

### **A reminder on scope**

It is important to point out, as a reminder, that whatever effect the principles will have, they will have these only within the scope of EU law. The general principles of civil law cannot become a source – direct or indirect - of rights or obligations outside the scope of EU law.

---

<sup>107</sup> See further below.

<sup>108</sup> Incidentally, would not the same analogy (in the opposite direction) suggest that the a principle of equal treatment of shareholders could be recognised as a general principle of secondary EU (company) law?

This means, in the first place, that the principles cannot operate beyond the competences of the EU legislator. Pursuant to the principle of conferral, the Union can act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein; competences not conferred upon the Union in the Treaties remain with the Member States (art 5(2) TEU).<sup>109</sup> Since the discovery and application by the Court of general principles of civil law is an act of the Union, just as much as legislation, this means that these also can never operate beyond the areas in which the EU has competence. In other words, if the EU has no competence to enact a European Civil Code that replaces national law, then also the Court of Justice has no competence to enact an unwritten ECC in the form of principles.

Moreover, this also means that, in the cases of shared competence (which include the areas most relevant for private law such as the internal market and consumer protection), the principles can only apply to subjects in relation to which the European legislator has actually made use of its competence by enacting EU law. Specifically in relation to gap filling this means that the Court can use the principles for filling gaps in existing EC directives but not gaps existing between different directives. So, paraphrasing Michaels' metaphor, no new islands in the ocean nor any land reclamation in between existing islands.<sup>110</sup>

#### Member-State-friendly interpretation of EU law

A second important point is that in none of the cases that we have seen so far the outcome goes against national principles of private law. In each case the Court refers to general principles of civil that are recognised (also) in the Member State at hand. *Société thermale d'Eugénie-Les-Bains* goes against the autonomy of the national tax law legislator. However, this happens on the basis of principles of private that exist also in France (i.e. the principle of the binding force of contract). Thus, it does not go against the national private law making autonomy. In *Hamilton*, one can even say, the general principles of civil law came to the aid of the national private law legislator. The general principles (in this case, discharge by performance) provided the basis for a limitation to consumer protection that merely national principles could not so easily have justified. Very similarly, in *Messner* the Court allowed a limitation to consumer protection on the basis of general principles (in this case good faith and unjust enrichment). The same applies also in *E. Friz*: the national legislator is allowed to limit consumer protection on the basis of general principles of civil law (in this case the principle of the mere *ex nunc* effect of withdrawal from a partnership) that are (implicitly) approved by the Court of Justice. If anything is limited or tempered, especially in the latter three cases, by the general principles of civil law it is the maximisation of EU consumer protection. Not the Member States should be worried but BEUC and other consumer groups.

---

<sup>109</sup> Moreover, the use of Union competences is governed by the principles of subsidiarity and proportionality (Art 5 Para 1 TEU).

<sup>110</sup> R. Michaels, 'Of Islands and the Ocean: The Two Rationalities of European Private Law', in R. Brownsword, H.-W. Micklitz, L. Niglia, S. Weatherill (eds.), *The Foundations of European Private Law* (Oxford: Hart Publishing, 2011).

In a case note on *Hamilton* and *Messner*, Weatherill recently wrote:<sup>111</sup>

Even if one is prepared to engage in the quest for ‘systematisation’ of the EU’s legislative *acquis*, the consequence of success in such a quest is unavoidably that limits are placed on national autonomy in the areas touched – incrementally, as a ‘patchwork’ – by the EU. A more coherent system at EU level may lead to a less coherent system at national level. Such a starkly destructive outcome is not inevitable, but this is where the Court’s use of general principles of civil law may lead, and it is one reason why it is troubling.

Even though this observation is generally true – there is an obvious tension between coherence ambitions of the national level and coherence efforts on the European level<sup>112</sup> - in the particular cases under discussion here (and in Weatherill’s case note) the net effect of the Court’s use of general principles so far seems to be the opposite. For, what could have happened if the Court had not resorted to the general principles? In *Hamilton*, *Messner* and *E Friz* the Court might very well have decided that the principles of civil law at hand, this time in the guise of *national* principle, had to be set aside with a view to achieving effective consumer protection. Thus, the counterfactual probably would be more intrusive for national law and more upsetting for the national system.

The case would be very different if the general principles of civil law at the EU level were used by the Court *against* general principles of civil law existing at the national level. But so far, in all four cases where the court explicitly refers to the (general) principles of civil law these principles work in support of (twin-sister) principles existing at the national level.

Actually, the reasoning in these cases is quite similar to the one adopted by the Court in *Courage*. The difference being, of course, that competition is an area of exclusive competence for the EU (see now art 3 TFEU) whereas consumer protection and internal market are areas of shared competence between the Union and the Member States (Art 4 TFEU). In *Courage*, in a bold move of judicial activism, the Court laid the foundations, to be further developed subsequently in *Manfredi*,<sup>113</sup> for a regime of private enforcement of competition law. After having established, first, that a party to a contract liable to distort competition can obtain relief from the other contracting party, and that Article 85 EC (now 101 TFEU) precludes a rule of national law under which a party to a contract liable to restrict or distort competition is barred from claiming damages for loss caused by performance of that

---

<sup>111</sup> S. Weatherill, ‘The “principles of civil law” as basis for interpreting the legislative *acquis*’, 6 *ERCL* (2010) 74-85, 80.

<sup>112</sup> See, in more detail, M.W. Hesselink, ‘The Ideal of Codification and the Dynamics of Europeanisation: The Dutch Experience’ 12 *European Law Journal* (2006) 279–305.

<sup>113</sup> Joined cases C-295/04 to C-298/04, *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA* (C-295/04), *Antonio Cannito v Fondiaria Sai SpA* (C-296/04) and *Nicolò Tricarico* (C-297/04) and *Pasqualina Murgolo* (C-298/04) v *Assitalia SpA*, ECR [2006] I-06619.



contract on the sole ground that the claimant is a party to that contract, the Court then allowed a more limited exception to liability by ruling that Community law does not preclude a rule of national law barring a party to a contract liable to distort competition from relying on his own unlawful actions to obtain damages where it is established that the latter party bears significant responsibility for the distortion of competition. The Court reached this conclusion after having referred to 'a principle which is recognised in most of the legal systems of the Member States'. The Court said:<sup>114</sup>

Similarly, provided that the principles of equivalence and effectiveness are respected (...), Community law does not preclude national law from denying a party who is found to bear significant responsibility for the distortion of competition the right to obtain damages from the other contracting party. Under a principle which is recognised in most of the legal systems of the Member States and which the Court has applied in the past (...), a litigant should not profit from his own unlawful conduct, where this is proven.

The Court is not imposing on 'unclean hands' or 'nemo auditur' principle, as a European general principle of civil law, on the Member States – even though it could have done so given the fact that competition law is an area of exclusive Union competence -, so Member States that do not have such a principle are not forced to introduce it. Nor is the Court simply leaving the matter to national law. It does something more subtle: it accepts that a Member State that has such a principle, limit the right to damages (and the private enforcement) on the basis of such a national principle, provided that the principles of equivalence and effectiveness (which are two general principles of EU law) are respected. And the reason for accepting this particular exception lies in the fact that it is based on a principle which is recognised in most of the legal systems of the Member States (and which the Court has applied in the past).

So, what is actually happening, so far, is the mirror image of the EU-friendly-interpretation of the national constitution, that the *Bundesverfassungsgericht* says is required by the German Constitution.<sup>115</sup> Here, the Court interprets EU law (in this case directives) in such a way that it is congruent with certain general principles of civil law existing (also) in a Member State.

### Chameleonic principles

In *Courage* the Court laid the foundations for the private enforcement of EU competition law, and thus for a new branch of EU private law. Since EU competition law is primary EU law the private enforcement regime is also located on the level of primary EU law. The regime itself was not formulated by the Court in terms of principles, rather as an interpretation of Art. 101 TFEU. However, as we saw, in

---

<sup>114</sup> *Courage*, *loc. cit.* note 62, Para 31.

<sup>115</sup> Derived from Article 23 Para 1 and the Preamble of the Basic Law. See *BVerfGE* 123, 267 (*Lissabon*), 225. See also *BVerfG*, 2 BvR 2661/06 of 6.7.2010, 58 (*Honeywell*) and *BVerfG*, 2 BvR 987/10 of 7.9.2011 (Greek bail-out), 109.



*Courage* the Court held that '[u]nder a principle which is recognised in most of the legal systems of the Member States and which the Court has applied in the past', a litigant should not profit from his own unlawful conduct.<sup>116</sup> This consideration led the Court to the conclusion that Community law does not preclude a rule of national law barring a party to a contract restricting competition from relying on his own unlawful actions to obtain damages in certain cases. It is a separate question to what extent this principle thus becomes (partly) (also) of European law – the answer seems to be in the affirmative since the Court says that it has applied the principle in the past – what else than EU law can the Court apply? -, but to the extent that it is European law it must be of primary law. It must be a (potential/possible) limitation to the private enforcement regime that follows from Art. 101 TFEU on the same level as the general rule of liability following from that article, because otherwise the principle holding the exception would be overruled by the general rule (without the exception). Similarly, as we saw above, if the Court is going to pursue its course of the horizontal effect of market freedoms then inevitably the Court will be developing another branch of European private law. This branch, by definition, will also be located on the level of primary EU law.

It remains to be seen to what extent the Court will choose to co-ordinate these two new branches of European private law with each other and with other areas of European private law,<sup>117</sup> and whether the Court will do so in terms of general principles of civil law or not.<sup>118</sup> If it does, then inevitable the same principle (in terms of substance) will operate at different levels of EU law, primary and secondary, chameleonicly changing its status from constitutional to secondary.

In addition, as we saw, the principles may also operate at different levels of governance, national and EU, and maybe even at both levels at the same time. In particular, the general principles of civil law tend to work in support of the same principles (or their twin-sisters) existing at the national level.

This chameleonic and multifunctional nature of the general principles of civil law would fit very well with the idea of European private law as one dynamic, gradually converging multi-system of European private law (or a European private law order) and of Europe as one single private law space, but is much more problematic from other perspectives. This brings us to the legitimacy of the general principles of civil law.

---

<sup>116</sup> *Courage, loc. cit.* note 62, Para 31 (references omitted).

<sup>117</sup> Think, for example, of the non-contractual liability of the EU. See Article 340, Para 2 TFEU, pursuant to which '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' (emphasis added).

<sup>118</sup> On horizontal coherence, see below.

## Their legitimacy

What, if anything, makes general principles of civil law a legitimate source of private law in Europe? Or, to put it more explicitly in the terms of the present conference, can the general principles of civil law be a legitimate form of involvement of EU law in private law relationships? This question has a general and a more specific aspect: First, are general principles of civil law a legitimate source of (unwritten) law? Secondly, what makes a particular principle legitimate? How should the Court of Justice (and only she?) go about 'discovering'<sup>119</sup> or 'acknowledging the existence of'<sup>120</sup> new (general) principles of civil law?

## To ensure that the law is observed

If it is true that the functions of general principles coincide with the three tasks that courts will inevitably have to fulfil when applying existing abstract rules to new concrete cases,<sup>121</sup> then does not simply the office of the judge in itself already justify that she resort to general principles and, thus, provide legitimacy to all the principles that she finds necessary for fulfilling her tasks? Courts have to interpret, fill gaps and occasionally correct rules. This simply follows from the nature of adjudication.

In a positivist fashion, such institutional legitimation, based on the office of the judge, could simply be based on art 19 TEU. Pursuant to the first paragraph of that article, 'The Court of Justice of the European Union ... shall ensure that in the interpretation and application of the Treaties the law is observed.' This article and its predecessor art 220 EC, is often cited as the justification for the Court's development of the general principles of EU law.<sup>122</sup> The legitimacy of the principles would then derive directly from the legitimacy of the founding Treaties. However, on the other hand these provision do not explicitly refer to general principles. There are provisions in the Treaty that refer to general principles but they have a narrow scope, notably the non-contractual liability of the EU.<sup>123</sup> Thus, the positivist argument could actually be inverted.

Moreover, and more importantly, the tasks of the CJEU could at most justify the general existence and functions of general principles, but not their content: *which* principles should the Court adopt or find and which should it reject? Anything goes? If not, how can the acknowledgment of certain principles, and not others be justified?

---

<sup>119</sup> Lenaerts & Gutiérrez-Fons, *op. cit.* note 27, 1635.

<sup>120</sup> Compare *Küçükdeveci*, *loc. cit.* note 36 (with reference *Mangold*, paragraph 75), Para 34: 'the Court has acknowledged the existence of a principle of non-discrimination on grounds of age which must be regarded as a general principle of European Union law'.

<sup>121</sup> See above.

<sup>122</sup> See e.g. Tridimas, *op. cit.* note 40, 19.

<sup>123</sup> See Art 340 TFEU, cited above, note 116.

## Coherence

After earlier signs of its inclination in the opposite direction,<sup>124</sup> the Court of Justice more recently (and sometimes even explicitly) seems to be adopting a more systematic mode of interpretation.<sup>125</sup> This may be part of a development from a instrumental (mainly market building) teleological into a more rights oriented legal order, from objectives to principles, and from interests to rights. How do the general principles of civil law fit into this picture?

## Law's integrity

In Dworkin's theory of law, principles are closely related to his right answer thesis and his idea of law's integrity: the legal system as a seamless web providing answers to all questions of law from which Hercules, 'an imaginary judge of superhuman intellectual power and patience who accepts law as integrity',<sup>126</sup> could derive the rights (and obligations) that individuals have.<sup>127</sup> That theory does not necessarily fit well with the post-national condition, multi-level governance and, in particular, the nature of EU law, based on limited and sometimes shared competences, and with legislative instruments like directives which lack direct horizontal but have to be interpreted harmoniously. In this context, it is not clear what exactly it means to take European rights seriously.<sup>128</sup> What the theory does, however, is underscore the close link between principles and coherence. If the general principles of civil law can contribute to making European private law more coherent and, and if this increased coherence does not come at too high a price, e.g. in terms of national sovereignty (an important 'if'), then surely their discovery by the European Court of Justice must be welcomed.

## Vertical coherence

As we saw, and will further discuss below, general principles of civil law, because of their flexible and informal nature which allows them to operate on more than one level of governance, could make an important contribution to the coherence and convergence of private law making on the national, European and indeed global level.

For example, sales law in CISG,<sup>129</sup> the consumer sales directive,<sup>130</sup> and in a number of Member States (but not all) is based, at least in part, on similar principles.<sup>131</sup> As

---

<sup>124</sup> Notably the *Simone Leitner* case where the Court refused to borrow the definition of 'damage' from the product liability directive for determining the meaning of the same concept in the package travel directive, in spite of the suggestion by its advocate general to do so. See Opinion of AG Tizzano in Case C-168/00, *Simone Leitner v TUI Deutschland GmbH Co. KG*, Paras 29-33.

<sup>125</sup> Explicitly in Case C-348/07, *Turgay Semen v Deutsche Tamoil GmbH*, ECR [2009], I-02341, Para 29.

<sup>126</sup> R. Dworkin, *Law's Empire* (1986) 239.

<sup>127</sup> For the latest statement, extending the idea of integrity well beyond the law into a more general theory of value, see R. Dworkin, *Justice for Hedgehogs* (Cambridge, Massachusetts: Belknap Press, 2011).

<sup>128</sup> In the same sense Mak, *op cit.* note 58.

<sup>129</sup> United Nations Convention on contracts for the international sale of goods (1980).

<sup>130</sup> Directive 1999/44/EC on consumer sales and guarantees.

legislative devices they all are very rigid. The revision of the consumer sales directive recently failed (i.e. dropped almost entirely out of the consumer rights directive). And it is also unlikely that countries like the Netherlands or Germany will soon update their re-codification (1992) or law reform (2002) which shaped their sales law after the CISG model. Also, CISG itself – because of its success - will be difficult to change, even though it is already more than three decades old and many gaps and ambiguities have been discovered. In these circumstances, underlying principles can be helpful in assuring the development of sales law and, where possible (see on this below), its convergence. All this can happen without undermining the sovereignty of the democratically elected law maker who can retain the final say. Such a multi-level dialogue in a common European private law space could help in removing unnecessary contractions. Ideally, it could even lead to a reflective equilibrium.<sup>132</sup>

### Horizontal coherence

General principles of civil law could contribute not only to the vertical coherence of the multi-level system of private law in Europe, but also to its horizontal coherence. This is probably even more urgent.

The European legislator, with its sector-specific approach, has produced, on the European level, a colourful patchwork of rather incoherent bits and pieces of private law.<sup>133</sup> That is true, not only *within* specific areas of policy, such as consumer law, where e.g. general concepts such as damage and consumer are defined differently, but also among these different areas. The initial aim of the reform of the *acquis* was to tackle this problem.<sup>134</sup> However, in the course of the Action Plan process the scope of the review became increasingly narrow. From the outset, the exercise had been limited to contract law, despite efforts from scholars to demonstrate that tort and property should be included on account of the coherence objective that was said to be at the basis of the reform,<sup>135</sup> these subject were excluded right from the beginning. Soon the review was further limited to consumer contract law.<sup>136</sup> Then the scope was reduced from eight<sup>137</sup> to only four directives,<sup>138</sup> and further to two

---

<sup>131</sup> See S. Grundmann, 'Consumer Law, Commercial Law, Private Law: How can the Sales Directive and the Sales Convention be so Similar?', *EBLR* (2003), 237-257.

<sup>132</sup> Compare J. Rawls, *A Theory of Justice*, revised edition (Belknap Press, Cambridge, Massachusetts, 1999 [1971]). In his theory the equilibrium is between one's principles and one's judgment, and limited to what Rawls calls the basic structure of society. Here the equilibrium could be between the different levels of governance.

<sup>133</sup> Cf. L.A.D. Keus, *Europees privaatrecht - Een bonte lappendeken; Preadviezen, uitgebracht voor de Vereniging voor Burgerlijk Recht en de Nederlandse Vereniging voor Europees Recht* (Lelystad: Vermande, 1993).

<sup>134</sup> See *Action Plan*, *loc. cit.* note 29.

<sup>135</sup> See Ch. von Bar & U. Drobnig (eds.), *The interaction of Contract Law and Tort and Property Law in Europe: a Comparative Study* (Munich: Sellier, 2004).

<sup>136</sup> *First Annual Progress Report on The Common Frame of Reference*, 23.09.2005, COM(2005) 456.

<sup>137</sup> *Green Paper on the Review of the Consumer Acquis*, Brussels, 08.02.2007, COM(2007) 744.

<sup>138</sup> *Proposal for a Directive of the European Parliament and of the Council on consumer rights* (Brussels, 08.10.2008 COM(2008) 614/3).

(and a tiny bit of a third one).<sup>139</sup> Thus, other large chunks of EU private law entirely remain outside the scope of this endeavour to make European private law more coherent. Think only of the private enforcement of competition law: the Commission's white paper did not even refer to the *acquis* reform that was underway.<sup>140</sup>

Private enforcement of competition law proposals were sparked, of course, by the Court's case law in *Courage* and *Manfredi*. In those cases the Court gave some very broad directives concerning the regime. In *Courage* it allowed the unclean hands defence, as we saw, and in *Manfredi* the Court addressed causation and the amount of damages (expectation damages). However, there was no sign of any attempt at articulation in terms of private law principles. Why expectation damages? Because they are contractual? But they seem to be allowed also in claims against third parties (i.e. other members of the cartel), which is already puzzling per se in the light of the general private law principle of privity of contract.

From the perspective of legitimacy therefore it seems urgent also for the Court to seriously start to address the coherence of its own rulings in the area of private law. In practical terms this means that when it invokes, or implicitly applies, private law principles, it should try to use the same general principle of private law (or 'general principles of civil law'), even when it deals with private law questions in different policy areas of the Union. In other words, the same general private law principles should apply, in principle, to consumer law, passenger's rights, commercial agency, Rome I, Brussels I, Francovich, arts 340 Para 2 TEU (non-contractual liability of the Union), private enforcement of competition law, horizontal effect of market freedoms, to mention only a few examples. And if the Court finds that it should resort to different principles for different areas, it should explain why different general principles should apply to these different subjects.

The point here is not that coherence is the most important value that should trump all law making. Nor that coherence is an unproblematic concept. The argument is rather that it is irrational for EU private law makers to strive for micro-coherence without paying any attention to the broader picture, and that different answers to the same question in different areas, *without any justification*, are arbitrary.

### Discourse and dialogue

In reality, a European court that tries to find general principles of civil law does not have to start from scratch. On the contrary, not only at the national level but increasingly also at the European level ('European private law') and indeed the global level ('private law theory') there is a sophisticated body of knowledge about fundamental questions and fundamental principles of private law. Could such expert knowledge provide legitimacy? Would a judgment by the CJEU directly, through its own critical assessment of legal scholarship, or indirectly, via documented opinions

---

<sup>139</sup> See European Parliament legislative resolution of 23 June 2011, *loc. cit.* note 18.

<sup>140</sup> White Paper on Damages Actions for Breach of the EC antitrust rules COM(2008) 165, 2.4.2008.

of its advocates general, informed by legal scholarship, become more legitimate for that reason alone?

Scholarship can be regarded as a manifestation of society's development and sophistication (division of labour). With regard to legal scholarship, Habermas has pointed out that 'the comparatively high degree of rationality connected with legal institutions distinguish these from quasi-natural institutional orders, for the former incorporate doctrinal knowledge, that is, knowledge that has been articulated and systematized, brought to a scholarly level, and interwoven with a principles morality.'<sup>141</sup> Given this high degree of rationality, Hercules could regard himself as part of an interpretative community of experts.<sup>142</sup> Therefore, it seems, the Court of Justice could benefit from borrowing the findings of legal scholars, and from engaging in a more explicit and reasoned debate with legal scholarship.

Of course, in the Member States there are different traditions concerning the relationship between judges, legislators and professors.<sup>143</sup> And the expectations of each of us will inevitably be influenced by our own national experiences. While a German scholar might expect the Court to follow, in principle, any existing consensus among legal scholars an English legal scholar will accept much more readily the Court's role as a protagonist. Similarly, for me, as a Dutchman, the best way forward seems to be through a prominent role of the advocates general who, assisted by their *Referendars* produce well documented and reasoned opinions which engage in an explicit debate with legal scholarship. The opinions of AG Trstenjak, notably in the *Audiolux* case (but also in several other cases),<sup>144</sup> are exemplary in this respect. The Court then can refer to these, and cherry pick from them, without always having to engage directly into the nuances of the academic debate.

Clearly, the debate concerning principles of law, including general principles of civil law, cannot remain limited to legal experts alone. One reason is that any position in this debate is necessarily informed by a political background understanding of the legal system as a whole and of the place of private law in it. And that political background understanding clearly is not merely a scientific matter to be sorted out among scholars and other legal experts. In the words of Habermas:<sup>145</sup>

The dispute over the correct paradigmatic understanding of the legal system, a subsystem reflected in the whole of society as one of its parts, is essentially a

---

<sup>141</sup> J. Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Cambridge: Polity Press, 1996) and 114@. In the German original, J. Habermas, *Faktizität und Geltung: Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats* (Suhrkamp: 1992), 106-107 and 146: 'ein dogmatisch durchgestaltetes, d.h. artikuliertes, auf wissenschaftliches Niveau gebrachtes und mit einer prinzipiengeleiteten Moral verschränktes Wissenssystem.'

<sup>142</sup> *Ibidem*, 275.

<sup>143</sup> R.C. Van Caeneghem, *Judges, Legislators & Professors; Chapters on European Legal History* (Cambridge: CUP, 1987).

<sup>144</sup> *Loc. cit.* note 42.

<sup>145</sup> *Op. cit.* note 141.

political dispute. In a constitutional democracy, this dispute concerns all participants, and it must not be conducted only as an esoteric discourse among experts apart from the political arena. In virtue of their prerogatives and, more generally, their professional experience and knowledge, members of the judiciary and legal experts participate in this contest of interpretations in a privileged way; but they cannot use their professional authority to impose one view of the constitution on the rest of us.

What Habermas says here concerning constitutional law applies equally, also in Habermas' own view,<sup>146</sup> to private law.<sup>147</sup> Since a legal order is legitimate to the extent that it secures, at the same time, the private and public autonomy of its citizens it is crucial, also for private law, that the addressees of private law can regard themselves at the same time as its authors.<sup>148</sup>

This does not mean, however, either for public or private law, that only direct democratic input could be the key to legitimate law making. We should not throw out the baby with the bath water. More democracy and a more inclusive deliberative politics does not mean *less* (at least not in an absolute sense) scholarly input. In our complex society expert knowledge is indispensable. What is crucial, however, is that the expert knowledge at the political centre of decision making is informed by public opinions flowing freely also from citizens at the periphery, instead of being imposed upon them from the centre of political and economic power.<sup>149</sup> Therefore, to the extent that legal scholarship provides rational reconstructions of the legal experience of us all, and not merely of a limited section of society sharing homogeneous values and interests, it can contribute to making the discovery of new general principles of civil law more legitimate.

In the cases where the Court has referred to the general principles of civil law, so far, it has done so in a rather apodictic fashion. It is not clear what the origin of these principles was. They were not referred to as principles 'recognised in most of the legal systems of the Member States' (as was the unclean hands principle in *Courage*).<sup>150</sup> Nor were they presented as a reflection of the *communis opinio* prevailing among legal experts. In one case (*Hamilton*), the advocate general had proposed a general principle, which was acknowledged in legal scholarship, but the Court decided the case on the basis of another principle, without explaining why. And in another case (*Messner*), the Court labelled as general, without giving any explanation, a principle (i.e. good faith) which has been one of the most controversial principles in the academic debate on European private law.<sup>151</sup>

---

<sup>146</sup> *Op. cit.* note 141, 477-493.

<sup>147</sup> Compare also the idea, expressed by M. Kumm, 'Who is Afraid of the Total Constitution? Constitutional Rights and Principles and the Constitutionalization of Private Law', 7 *German Law Journal* (2006), 341-369, 359, of private law as applied constitutional law.

<sup>148</sup> Habermas *op. cit.* note 141, 492-493.

<sup>149</sup> Habermas, *op. cit.* note 141, 460.

<sup>150</sup> See above.

<sup>151</sup> See below.

Legal scholarship has in common with legal principles they are not necessarily confined within national borders. They are or can easily become transnational. The role of general principles in bringing coherence and convergence in the multi-level system of private law in Europe,<sup>152</sup> can be easily matched by the emerging European legal scholarship. Thus, the general principles of civil law, informed by transnational legal scholarship, could play an important role in the vertical dialogue between law makers at the national, the EU level and the global. European private law principles and scholarship can find each other in a common European legal space.<sup>153</sup>

This also suggests that formal distinctions between different categories of principles, national and European, of primary and of secondary law, should not be exaggerated. Just like the public opinions of Member States should be open towards each other, so also arguments of principle should not be stopped by formal borders. This is not to say that there should be only pan-European principles (just like one single pan-European public opinion is not the solution).<sup>154</sup> The common law traditionally has not recognised a general principle of good faith. Although that fact should not enter some formal calculus of qualified majority voting, it does mean nevertheless that the Court should think twice before claiming it to be a general principle with a pervasive mandatory role.

Again, one should not be naive. There are risks of the 'framing' of the debate (e.g. by an exclusive focus on one single academic project, as a 'common frame of reference') and agenda setting. Therefore, we should constantly and actively strive for openness, pluralism and diversity of contribution. But it would also be irrational to dismiss out of hand any insights from legal scholarship merely because it came from experts. What is needed is a critical examination of the scholarly knowledge production. And to the extent that this knowledge is biased e.g. by conservatism or captured by special interests it can be set aside, with good reason. What we need is a critical, open and continuous exchange and flow of ideas between the Court and a legal scholarship which is as open as possible and informed, as much as possible, by the stakeholders at the periphery.

### Principles and *acquis*

Should the general principles of civil law be derived (by the Court, assisted by scholars) primarily or even exclusively from the *acquis communautaire*? At first sight this might seem an attractive idea, especially from the perspectives of the separation of powers and the limited competences of the EU. Should not, also in Europe, the law making powers rest as much as possible with the legislator, especially now that the democratic input from the European Parliament is on the rise? And are not general principles that remain as close as possible to the *acquis*

---

<sup>152</sup> See above.

<sup>153</sup> Compare, with regard to the general principles of EU law, Lenaerts & Gutiérrez-Fons, *op. cit.* note 27.

<sup>154</sup> Habermas, *op. cit.* note 141, 373 and J. Habermas, *Europe: The Faltering Project* (Malden, Massachusetts: Polity Press, 2009), 106.



the best guarantee against competence creep and an incremental reduction of national sovereignty?

As we saw above, in another area, i.e. tax law, the Court regards the principle of fiscal neutrality as a principle of secondary EU law, 'a fundamental principle underlying the common system of VAT established by the relevant Community legislation', a principle that 'was intended by the Community legislature to reflect' the general principle of equal treatment. Thus, the principle of fiscal neutrality is a principle underlying the *acquis* (in the area of VAT law) and its content and nature are determined (at least in part) by the intention of the EU legislator. Should not then, by analogy, the general principles of civil law be principles underlying the common system of civil law established by the relevant EU legislation as intended by the EU legislator? The answer is of course 'no' because there is no general civil law *acquis*. There is no common system of civil law established by the relevant EU legislation from which legislative intent of the EU legislator concerning general principles of civil law can be derived.

From the perspective of general private law the *acquis communautaire* is a patchwork, whereas from the perspective of EU policy and legislation, there is common market law and consumer protection law, but no such thing as general private law with regard to which a legislative intent of the EU legislator could be derived. The vast majority of directives – including the latest version of the CRD - are based exclusively on art 114 TFEU and its predecessors. And clearly from the aim of the approximation of laws for the establishment and functioning of the internal market and even from the aim of a high level of consumer protection (Para 3 of Art 114 TFEU) it is not possible to derive any general principles of civil law. Even the idea of general principles of the *acquis* in the area of private law is a contradictory notion because, as said, the private law *acquis* is a patchwork. Indeed, the methodology that was adopted for developing 'Acquis Principles' has been criticised (rightly, in my view) exactly for this reason.<sup>155</sup>

Moreover, and most importantly, the Court clearly does not refer to *acquis* principles in any of the four cases that we saw. It refers to general principles of *civil* law, not to principles of consumer law and not even to general principles underlying the *acquis communautaire* in the area of private law. That would also have been completely useless: what the Court needed were general principles of private law, not *acquis* or consumer law principles. So, in this respect the general principles of civil law that the Court refers to in *Société thermale d'Eugénie-Les-Bains*, *Hamilton*, *Messner*, and *E. Friz* are quite different from the principle of fiscal neutrality. Both are principles, the former 'general' and the latter 'fundamental', both seem to be located (in part) on the level of secondary EU law, but the tax law principles essentially are *acquis* principles whereas the general principles of civil law clearly are not.

---

<sup>155</sup> See N. Jansen & R. Zimmermann, 'Restating the *Acquis Communautaire*? A Critical Examination of the Principles of the Existing EC Contract Law', 71 *MLR* (2008), 505-534.

With regard to general principles of EU law, i.e. the fundamental principles that are located on the level of primary law and thus have constitutional status, a distinction is usually made as to their origin between principles deriving from the common traditions of the Member States, on the one hand, and principles deriving from that objectives of the EU, on the other.<sup>156</sup> The former could be referred to as bottom-up (inductive) and the latter as top-down (deductive) principles.<sup>157</sup> A similar distinction could be drawn in relation to principles that are not necessarily located at the level of primary EU law. The principle of fiscal neutrality would clearly be an example of a top-down principle located at the level of secondary EU law, underlying the *acquis* in the area of VAT law and an expression of the legislative intent of the European legislator. The general principles of civil law, at least the ones that the Court has referred to so far, are examples of bottom-up (inductive) principles that are derived from the common private law traditions of Member States.

This is not to say that principles in the area of private law could only be bottom-up (inductive) principles deriving from common traditions and never top-down principles underlying a certain area of EU legislation. On the contrary, in analogy to principles ‘underlying the common system of VAT established by the relevant Community legislation’, the Court could develop principles underlying, for example, the protection of consumers against unfair terms. In *Pénzügyi Lízing* the Grand Chamber of the CJEU pointed out, with references to earlier cases (*Océano*, *Mostaza Claro* and *Asturcom*), that ‘according to settled case-law, the system of protection introduced by the Directive is based on the idea that the consumer is in a weak position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge.’<sup>158</sup> If the unfair terms directive introduced a ‘system’ and if that system is ‘based on’ a certain ‘idea’ (which can easily be assimilated to legislative intent) then it seems entirely possible, and indeed appropriate, for the Court to deduce some underlying principles. However, these would be unfair terms or (depending on its level of generality, consumer protection) principles, not general principles of civil law.

However, one should not draw too sharp a distinction between these two (ideal) types of principles. In a (non formal) comparison of the private laws of the Member States, with a view to distilling bottom-up principles of civil law the *acquis* should also play a role. Indeed, today’s national private law has been shaped to a considerable extent by the *acquis*, both actively and passively, as it were. Actively, in the sense that Member State laws were modified as a result of EU law, most clearly as a consequence of EC directives. Directives have to be transposed into national

---

<sup>156</sup> See above, note 42.

<sup>157</sup> See Lenaerts & Gutiérrez-Fons, *op. cit.* note 27, Metzger *op. cit.* note 46, and, more in general, W. van Gerven, ‘Codifying European Private Law: Top Down and Bottom Up’, in S. Grundmann and J. Stuyck (eds.), *An Academic Green Paper on European Contract Law* (The Hague: Kluwer Law International, 2002) 405-432.

<sup>158</sup> Case C-137/08, *VB Pénzügyi Lízing Zrt. v Ferenc Schneider*, ECR [2010], 00000, Para 46.

law and are binding as to the result to be achieved but they leave to the national authorities the choice of form and methods (art. 288 TFEU). There were rather divergent transposition strategies and some Member States sometimes opted for supererogatory transposition.<sup>159</sup> In Germany, for example, as a result of the *Schuldrechtsreform*, on several subjects, what originally was European consumer law became national general private law.<sup>160</sup> Such large scale reforms of national law, which are triggered by EU law, are simply unintelligible without taking into account the relevant directives. Thus, already for this reason alone the *acquis* has to be taken into account in any serious comparison of national general principles of private law. However, the *acquis* has also affected national law in the passive sense that what was already done by the European legislator did not have to be done any more by the national legislator. In other words, absent the *acquis* national private law might have looked quite different. Here the (by definition hypothetical) examples are the reverse of those of the *Schuldrechtsreform*: in some Member States what became consumer law, as a result of EC directives, could have been adopted as general private law, applicable in B2C and B2B cases, had the national legislator taken the initiative before the European legislator did. Therefore, national private law to a large extent assumes the existence of the *acquis* and to the extent that national and EU private law are complementary, national private law is unintelligible without knowing the *acquis*. Indeed, the Principles of European Contract Law have been criticised for disregarding *acquis*.<sup>161</sup> Metzger is right that this may explain, in part, why they have had little influence of ECJ's case law.<sup>162</sup> The Draft Common Frame of Reference was an improvement in this respect,<sup>163</sup> although it was rightly criticised for not sufficiently *integrating* *acquis* and common core, merely juxtaposing them.<sup>164</sup>

### Principles and common core

The fact that top-down principles, derived deductively from the *acquis* and its objectives, cannot do the job that the Court wants the general principles of civil law to do, does not in itself make bottom-up principles, that are derived in an inductive fashion from the laws of the Member States, become legitimate. The mere fact that principles are common to the legal systems of the Member States is, of course, not a sufficient reason for these principles to be legitimate. Even a principle that exists in

---

<sup>159</sup> W. van Gerven, 'A Common Law for Europe: The Future Meeting the Past?' *ERPL* (2001) 485-503, 491, uses the term 'spill-over effect'.

<sup>160</sup> See e.g. S. Grundmann, 'Germany and the Schuldrechtsmodernisierung 2002', 1 *ERCL* (2005), 129; R. Zimmermann, 'Contract Law Reform: the German Experience', in: S. Vogenauer & S. Weatherill, *The Harmonisation of European Contract Law, Implications for European Private Laws, Business and Legal Practice* (Oxford: Hart Publishing, 2006), 71-88.

<sup>161</sup> H. Beale & O. Lando (eds.), *Principles of European Contract Law, Parts I and II, Prepared by The Commission on European Contract Law* (The Hague: Kluwer Law International, 2000).

<sup>162</sup> Metzger *op. cit.* note 46.

<sup>163</sup> Ch. von Bar et al (eds.), *Principles, Definitions and Model Rules of European Private Law; Draft Common Frame of Reference (DCFR); Outline Edition* (Munich: Sellier, 2009).

<sup>164</sup> See H. Eidenmüller, F. Faust, H.C. Grigoleit, N. Jansen, G. Wagner and R. Zimmermann, 'The Common Frame of Reference for European Private Law—Policy Choices and Codification Problems', 28 *Oxford J Legal Studies* (2008), 659-708.

all Member States can be unjust or come to be regarded as no longer just, as the historical development of the law, including private law, has shown. Conversely, the absence of the recognition of a principle in all Member States (or even the majority of them) should not always bar the recognition of it by the Court, because that absence itself might be unjust.<sup>165</sup>

The main reason why the common core nature of general principles of civil law can contribute to their legitimacy is that it removes the potentially delegitimising factor of the usurpation of national law making prerogatives (and the erosion of national legal cultures). In the presence of truly general principles, there is a 'no-conflict' situation, to borrow a term from American private international law doctrine, where it becomes immaterial whether a general principle of national law applies or one of EU law since on whatever level of law making the principle is formally located (national, EU or global) it will always point in the same direction. The conflict between national and EU competence dissolves.<sup>166</sup>

The more it can be plausibly shown that a certain rule or principle belongs to the principles common to the laws of the Member States, the less the Court's resorting to such principles undermines (in a substantive sense) the autonomy of national law makers in the area of private law. And vice versa. Indeed, to take an example from the recent case law concerning the general principles of EU law, one of the reasons why the *Mangold* decision has been so controversial is that most observers were surprised by it. Not many were aware, before *Mangold*, that a principle of non-discrimination concerning age existed.

This is equally true for private law. From the perspective of legitimate European private law making it is crucial that the general principles of civil law genuinely represent the common core of private law in Europe. Moreover, especially when this is not self-evident, the common core character of the principle should also be demonstrated by the Court.

In this respect the case law of the Court of Justice, so far, leaves much to be desired. As we saw above, the Court simply postulates the principles without providing any prima facie evidence. That is especially troubling when it comes to principles that clearly are not common core such as, in particular, the principle of good faith. If anything, that principle has traditionally been regarded as a principle that keeps the legal traditions of the Member States divided, the civil law systems endorsing it, the common law systems rejecting it.<sup>167</sup> (Indeed, the good faith principle is a genuine

---

<sup>165</sup> In the same sense, with regard to the general principles of EU law, Lenaerts & Gutiérrez-Fons, *op. cit.* note 27.

<sup>166</sup> Faz@[noten hierna hernoemen]

<sup>167</sup> See e.g. Bingham LJ in *Interfoto Picture Library Ltd v. Stiletto Visual Programmes Ltd* [1989] QB 433: 'In many civil law systems, and perhaps in most legal systems outside the common law world, the law of obligations recognises and enforces an overriding principle that in making and carrying out contracts parties should act in good faith. (...) English law has, characteristically, committed itself

principle of *civil* law in this different sense of not being a principle of *common* law.) It is true that the *acquis* occasionally refers to the standard of good faith, and that to that extent it has become part of the law of all Member States, but this occurs (by definition) in a limited context, in this case notably unfair terms in consumer contracts.<sup>168</sup> On the other hand, however, the PECL, DCFR and the feasibility study for an optional instrument (FS) contain a general good faith duty,<sup>169</sup> albeit with varying intensity and roles, which has led to an lively debate.<sup>170</sup> Therefore, Weatherill is completely right that the Court had something to explain here.<sup>171</sup>

One research project, that has been going on for more than a decade, actually is called the Common Core of European Private Law. This project was inspired by the famous Cornell project.<sup>172</sup> That latter research project, in turn, aimed at establishing general principles of civilised nations in the sense of art 38 (1)(c) of the ICJ's Statute.<sup>173</sup> Although the common core project does not focus on formulating principles (its aim is rather the 'mapping' of existing similarities and differences) it nevertheless has yielded a host of comparative information in the fields of contract, tort and property law, including an entire volume on good faith in European contract law.<sup>174</sup> It should be noted, however, that comparative law does not necessarily lead only to common core findings. On the contrary, it has been shown time and again that legal systems with sometimes literally the same civil code provisions come to very different outcomes.<sup>175</sup> Even the common core project itself has led to many findings of different resolution of the same hypothetical case. For this reason, Kennedy recently referred to it as the "'Contradiction within the Core" project'.<sup>176</sup>

---

to no such overriding principle but has developed piecemeal solutions in response to demonstrated problems of unfairness.'

<sup>168</sup> Art. 3 (1) Directive 93/13/EEC of 21 April 1993 of 5 April 1993 on unfair terms in consumer contracts, OJ L 95, 29.

<sup>169</sup> See art. 1:201 PECL, art. III. – 1:103 DCFR and art. 8 Feasibility Study.

<sup>170</sup> See O. Lando, 'Is good faith an over-arching general clause in the Principles of European Contract Law?', in: M. Andenas et al. (eds.), *Liber amicorum Guido Alpa; Private law beyond the national systems* (London: British Institute of International and Comparative Law, 2007), 601-613 and H. Beale, 'General clauses and specific rules in the Principles of European Contract Law: the "Good Faith" clause', in: S. Grundmann & D. Mazeaud (eds.), *General Clauses and Standards in European Contract Law* (The Hague: Kluwer Law International, 2006), 205-218, 218.

<sup>171</sup> Weatherill, *op. cit.* note 4.

<sup>172</sup> See M. Bussani & U. Mattei, 'The Common Core Approach to European Private Law', 3 *Columbia Journal of European Law* (1997/1998) 339.

<sup>173</sup> See R.B. Schlesinger, 'Research on the General Principles of Law Recognized by Civilized Nations', 51 *American Journal of International Law* (1957) 734 and Rudolf B. Schlesinger (ed.), *Formation of contracts; A study of the common core of legal systems* (New York, 1968).

<sup>174</sup> R. Zimmermann & S. Whittaker, *Good Faith in European Contract Law* (Cambridge: CUP, 2000).

<sup>175</sup> See R. Sacco, 'Legal Formants: A Dynamic Approach to Comparative Law', 39 *American Journal of Criminal Law* (1991), 1-34 and 43-401.

<sup>176</sup> D. Kennedy, 'A Transnational Genealogy of Proportionality in Private Law', in: R. Brownsword, H.-W. Micklitz, L. Niglia, S. Weatherill (eds.), *The Foundations of European Private Law* (Oxford: Hart Publishing, 2011), 185- 220, 214.

There is something else to be learned from more than a century of experience in private law comparison, which can be of crucial importance when it comes to the legitimacy of any legal comparison conducted with a view to law making, i.e. the importance of methodological issues. For example, in functional comparison (the dominant method, for obvious reasons, when it comes to applied and pragmatic comparative studies) the way the functional question is formulated is crucial (and heavily normatively charged) because of its framing and agenda setting implications. This does not per se delegitimise the functional method. But it does require an awareness of where the normative issues occur.

### Principles and model rules

Do the general principles of civil law become more legitimate when they are based on, or developed in a dialectical relationship to, the principles that have been formulated in several academic projects? In the area of contract law, these projects include the Unidroit principles of international commercial contracts,<sup>177</sup> the Principles of European contract law,<sup>178</sup> and the *Principes contractuels communs*.<sup>179</sup>

These principles generally are as concrete as the ordinary rules of contract law, as they can be found in the civil codes of the Member States. Indeed, the first provision of the PECL explicitly says that ‘These Principles are intended to be applied as general *rules* of contract law in the European Union.’<sup>180</sup> It is not surprising, therefore, that in the follow-up projects, i.e. the Draft Common Frame of reference<sup>181</sup> and the recent Feasibility study<sup>182</sup> which were also drawn up by academics, this time at the request of (and, in the latter case, in collaboration with) the European Commission,<sup>183</sup> there was a terminological shift from principles towards (model) rules. The first version of the DCFR contained, in addition to the model rules, a long list of underlying principles which was reduced, a year later, to four.<sup>184</sup> The feasibility study only states three such general principles: freedom of

---

<sup>177</sup> UNIDROIT Principles of International Commercial Contracts Rome (Rome: Unidroit, 2010).

<sup>178</sup> *Op. cit.* note 161.

<sup>179</sup> B. Fauvarque-Cosson & D. Mazeaud (eds.) *Principes contractuels communs* (Paris: Société de Législation Comparée, 2008).

<sup>180</sup> Article 1:101 Para 1 PECL (emphasis added).

<sup>181</sup> *Op. cit.* note 163.

<sup>182</sup> Commission Expert Group on European Contract Law, *Feasibility Study for a future instrument in European Contract Law*, 3 May 2011.

<sup>183</sup> See Commission Decision of 26 April 2010 setting up the Expert Group on a Common Frame of Reference in the area of European contract law, 2010/233/EU, OJ 27.4.2010, L105/109.

<sup>184</sup> For a critical assessment of this remarkable development, which represents a marked ideological shift towards conservatism, see M.W. Hesselink, ‘If you don’t like our principles we have others. On core values and underlying principles in European private law: a critical discussion of the new “Principles” section in the draft CFR’, in: R. Brownsword, H.-W. Micklitz, L. Niglia, S. Weatherill (eds.), *The Foundations of European Private Law* (Oxford: Hart Publishing, 2011), 59-71.

contract, good faith and fair dealing and informality.<sup>185</sup> The latest version (by the Commission) substitutes informality with co-operation.<sup>186</sup>

As said earlier, it does not seem very useful to draw sharp distinctions between rules and principles. It is more a matter of degree: it seems more appropriate to reserve the term of principles for the more general and abstract norms which often underlie (in the sense that they can explain) sets of more concrete rules.<sup>187</sup> Thus, the question remains whether, with a view to legitimacy, it makes a difference whether the Court of Justice borrows concrete model rules from these academic projects or merely from the few very general and abstract principles that some of these projects have formulated. In practical terms, the Court seems to need not both. Indeed, some of the Court's advocates general tend to assimilate the model rules in the DCFR with the general principles of civil law.<sup>188</sup> On the other hand, most of the general principles of civil law that the Court has discovered so far are actually quite general: the binding force of contract, discharge by performance, good faith and unjustified enrichment.<sup>189</sup> And especially in the context of the interpretation of directives,<sup>190</sup> it is likely that the Court will often need principles of an intermediate level of abstraction. Micklitz has argued that the Court should not resort to the model rules in the DCFR for inspiration:<sup>191</sup> 'The short reference [to the general principles of civil law] - MWH] in *Hamilton* opens up a new horizon of research. What kind of principles are meant here? Certainly not the ones the DCFR is presenting since they do not contain principles but solutions.' In contrast, Basedow has argued that '[w]hat is needed for private law are principles of a lower degree of abstraction and generality' and that the CFR 'contains a large number of principles of medium abstraction which could prove to be highly useful for the interpretation and application of existing Union instruments'.<sup>192</sup>

---

<sup>185</sup> Arts 7-9.

<sup>186</sup> Renumbered as Arts 1-3. See 'Contract law, work in progress, version of 19 august 2011' (available at [http://ec.europa.eu/justice/contract/index\\_en.htm](http://ec.europa.eu/justice/contract/index_en.htm)).

<sup>187</sup> Compare Habermas, *op. cit.* note 141, 310 ('höherstufige Normen'). Contrast Dworkin, *op. cit.* note 55, ch. 2 and 3, and R. Alexy, *Theorie der Grundrechte* (Frankfurt: Suhrkamp, 1994 [1985]), 77 ('Jede Norm ist entweder eine Regel oder ein Prinzip').

<sup>188</sup> See e.g. opinion AG Maduro, *loc. cit.* note 15. In *Tacconi AG Geelhoed* referred to art 2.15 Unidroit principles when conducting autonomous interpretation of the Brussels Convention (now Brussels I Regulation). See Opinion of AG Geelhoed delivered on 31 January 2002, Case C-334/00, ECR [2002], I-07357.

<sup>189</sup> The exception is the principle of ex nunc effect of the withdrawal from an investment partnership referred to in *E. Friz*.

<sup>190</sup> See above.

<sup>191</sup> H.-W. Micklitz, 'Failure or Ideological Preconceptions—Thoughts on Two Grand Projects: The European Constitution and the European Civil Code', *EUI Working Papers*, LAW 2010/04, p. 20.

<sup>192</sup> Basedow, *loc. cit.* note 2, 464 and 469 respectively. See also K.P. Purnhagen, 'Principles of European Private or Civil Law? A Reminder of The Symbiotic Relationship Between the ECJ and the DCFR in a Pluralistic European Private Law', forthcoming *ELJ* (available at SSRN: <http://ssrn.com/abstract=1652039>), who advocates a symbiotic relationship between the ECJ and the DCFR.



From the point of view of legitimacy there does not seem to be any reason why it should be more legitimate for the Court to develop more abstract rather than more concrete general principles of civil law. What does seem to raise more important legitimacy issues, however, is the question from which projects the Court should borrow? For all their similarities and substantive continuity there are also differences between these sets of principles and model rules. To which of them should the Court resort for inspiration? Should it consistently limit itself to one text, e.g. the one that has had the financial and political support of the European Commission, granting it a de facto monopoly?<sup>193</sup> Or should it adopt a more pluralistic approach? As long as none of these texts have received any additional legitimacy, in particular democratic legitimacy through the adoption (after substantive discussions and amendments) by the Commission, Council and Parliament, as an official legislator's toolbox, there does not seem to be any good reason why the Court should focus its attention primarily (or even exclusively) on only one of these texts. On the contrary, on the one hand, it could find convincing arguments in different texts while, on the other hand, where all texts are in agreement on a certain point this may provide prima facie evidence (but not more than that – think only of the risk of path dependence) of the existence of a general principle of civil law. Only for practical reasons (the presumption of progress) it may be a good idea to start the analysis from the latest version.

### Principles and values

Many fundamental principles could also be regarded as underlying values. Does this mean that principles are legitimate simply because of their value? Such a direct legitimation of principles as values is certainly conceivable but it comes at a price. The price is the collapse of the distinction between law and politics. If we derive the legitimacy of principles, as sources of rights and obligations, directly from their societal value, then the question what rights and duties we have comes to depend directly on our common conception of the good life. This leads to a perfectionist notion of the law, which communitarians will be happy with, but which is incompatible with a liberal notion of the rule of law.

It is for this reason that Habermas emphasises the importance of the distinction between principles oriented adjudication and value oriented adjudication.<sup>194</sup> And he criticises the *Bundesverfassungsgericht*,<sup>195</sup> and Alexy who regards principles as

---

<sup>193</sup> Critical of this idea, on economic grounds, K. Riesenhuber, 'A Competitive Approach to EU Contract Law', 7 *ERCL* (2011), 115-133.

<sup>194</sup> Habermas, *op. cit.* note 141, 256

<sup>195</sup> See famously the *Lüth* ruling (*BVerfGE* 7, 198; *NJW* 1958, 257): 'Ebenso richtig ist aber, daß das Grundgesetz, das keine wertneutrale Ordnung sein will, in seinem Grundrechtsabschnitt auch eine objektive Wertordnung aufgerichtet hat und daß gerade hierin eine prinzipielle Verstärkung der Geltungskraft der Grundrechte zum Ausdruck kommt. Dieses Wertsystem das seinen Mittelpunkt in der innerhalb der sozialen Gemeinschaft sich frei entfaltenden menschlichen Persönlichkeit und ihrer Würde findet, muß als verfassungsrechtliche Grundentscheidung für alle Bereiche des Rechts gelten; Gesetzgebung, Verwaltung und Rechtsprechung empfangen von ihm Richtlinien und Impulse. So beeinflußt es selbstverständlich auch das bürgerliche Recht; keine bürgerlichrechtliche Vorschrift

optimizing prescriptions ( *Optimierungsgebote*),<sup>196</sup> for failing to respect this distinction, which leads to ‘value jurisprudence’ (*Wertejudikatur*) and the ‘tyranny of values’ (*Tyrannie der Werte*).<sup>197</sup> As legal norms, principles are, like moral rules, modelled after obligatory norms of action – and not after attractive goods.<sup>198</sup>

Therefore, the category of principles should be reserved for higher-order and more abstract norms than ordinary rules (although a rigid or categorical distinction in the Dworkinian or Alexian sense seems artificial and unhelpful) and should be distinguished conceptually from values, even though obviously there will often be important substantive overlaps (it would be very surprising if we attributed little value to our principles).

Unlike the general principles of EU law, the general principles of civil law that we have seen so far do not look very much like values. Nevertheless, the issue is relevant for private law as well. Very often, certain values are attributed to private law as their underlying values. Autonomy is often presented as the principal value underlying private law. Others argue that private law is based on both autonomy and solidarity, and that much of the development of private law in the 20<sup>th</sup> Century can be explained in terms of the tension, balancing, or compromise between these two values. Still others point to equality, be it formal or substantive. And dignity is also often mentioned to explain certain parts of private law. Finally, especially scholars in law & economics regard efficiency as the basic value underlying private law.

Article I-1:102 DCFR attributes interpretative and gap filling roles to the underlying principles. However, the underlying principles that the DCFR refers to are ‘freedom, security, justice and efficiency’, which in reality are values rather than principles.<sup>199</sup> Also the Feasibility Study provides for an interpretative and a gap filling role for ‘underlying principles’.<sup>200</sup> In contrast to the DCFR, however, the FS does not itself list or codify any underlying principles. This suggests that the FS intends the underlying principles as higher-level norms rather than as values. The FS also contains a section called ‘general principles’. However, although these principles are indeed principles, and not mere values, and could also be regarded as ‘underlying principles’ it does not seem that the principles in the sense of art. 1 FS are meant to be limited to these three. The FS rightly does not list any underlying values nor does it refer to them more generically.

---

darf in Widerspruch zu ihm stehen, jede muß in seinem Geiste ausgelegt werden.’ (references omitted, emphasis added).

<sup>196</sup> Alexy, *op. cit.* note 186, ch. 3.

<sup>197</sup> C. Schmitt, *Die Tyrannie der Werte*, 3<sup>rd</sup> ed. (Berlin: Duncker & Humblot, 1960): ‘Wer Wert sagt, will geltend machen und durchsetzen.’

<sup>198</sup> Alexy, *loc. cit.* esp. 143 ff, claims that rational argumentation (as opposed to mere subjective decision making) is also possible in relation to the balancing of values.

<sup>199</sup> See Hesselink, *loc. cit.* note 183.

<sup>200</sup> See the first two Paras of Article 1 (Interpretation and development).

## Principles and objectives

Having said that, the reality is that the European Union is, at least in part, a teleological and instrumental legal order.<sup>201</sup> It is true that the Court of Justice has held since the 1970s that respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice,<sup>202</sup> that this has been codified in the Maastricht Treaty, and that the Union also recognises the fundamental rights set out in the Charter (Art. 6 TEU).<sup>203</sup> The fact remains that the Union is also characterised – maybe still primarily - by its objectives, general ('[t]he Union's aim is to promote peace, its values and the well-being of its peoples'),<sup>204</sup> and more specific, in particular of course 'the aim of establishing or ensuring the functioning of the internal market' (art 26 TFEU) but also e.g. 'to promote the interests of consumers and to ensure a high level of consumer protection' (Art 169 Para 1 TFEU).<sup>205</sup>

The objective of a high level of consumer protection inevitably leads to teleological reasoning. As a clear example, see *Mostaza Claro* where the Court held as follows:<sup>206</sup>

[A]s the aim of the Directive is to strengthen consumer protection, it constitutes, according to Article 3(1)(t) EC, a measure which is essential to the accomplishment of the tasks entrusted to the Community and, in particular, to raising the standard of living and the quality of life in its territory.

The nature and importance of the public interest underlying the protection which the Directive confers on consumers justify, moreover, the national court being required to assess of its own motion whether a contractual term is unfair, compensating in this way for the imbalance which exists between the consumer and the seller or supplier.'

However, as we saw, the objective of a high level of consumer protection cannot solve private law disputes. It provides no answer to the question what rights consumers have.

---

<sup>201</sup> See e.g. C.U. Schmid, 'The thesis of the Instrumentalisation of Private Law by the EU in a Nutshell, in C. Joerges & T. Ralli (eds.), *European Constitutionalism without Private Law, Private Law without Democracy*, ARENA Report No 3/11, RECON Report No 14 (Oslo: Arena, 2011), 11-35.

<sup>202</sup> Case 11-70, *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, ECR [1970], 01125.

<sup>203</sup> The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights (Art. 6 Para 1 TEU). And fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, constitute general principles of the Union's law (Art 6 Para 3 TEU).

<sup>204</sup> Art 3 Para 1 TEU.

<sup>205</sup> The Charter of fundamental right of the EU also provides, in art 38, that 'Union policies shall ensure a high level of consumer protection', suggesting that a high level of consumer protection is a right (under 52(2) Charter), or (more likely, but no less problematic) a principle (under 52(5) Charter) recognised by the EU.

<sup>206</sup> Paras 37-38 (references omitted).

A similar problem we saw in the context of the horizontal effect of market freedoms. Market freedoms attach to individuals but have been given to them (instrumentally) with a view to attaining public objectives (i.e. market building). The instrumental nature of these freedoms naturally leads to a balancing of interests. This explains why Hartkamp, Basedow and others have argued for including private law interests into the balancing exercise.<sup>207</sup> However, Schepel has pointed out how difficult it is to for private interests to compete with – or rather as – public interests to be balanced against market objectives: ‘the total market is a scary thing’.<sup>208</sup>

The recent introduction of the category of general principles of civil law seems to represent a potentially important shift in the Court’s reasoning in relation to EU private law. It suggests a commitment to reasoning from principle rather than a balancing of (and choosing between) competing interests. Obviously, the difference between reasoning from principles and right, on the one hand, and choosing to promote certain values and interests, should not be reified: it does not exist ‘out there’. Nor is it a matter of black and white, rather a question of less or more. But a more principles oriented approach to European private law should certainly be welcomed.

The fact that the European legal order is, in part, purposive does not imply that for that reason any attempt at principled reasoning should be abandoned. On the contrary, any reasoned inroads into the Union’s teleology are more than welcome. Private law rules which express a general concern for individuals in a vulnerable position are desirable, indeed indispensable, if we take the private autonomy of individuals seriously. However, the aim of a high level of consumer protection is a rather blunt objective in this context, which can easily go against the substantive autonomy of individuals, including vulnerable persons. Therefore, a shift from a dogmatic attachment to the Treaty objective of a high level of consumer protection, especially when the consumer protection (and thus the citizens) becomes instrumental to the aim of a properly functioning internal market,<sup>209</sup> to a principled private law reasoning that takes the substantive autonomy (in the sense of capabilities) of individuals seriously, should be welcomed as important progress for European private law.

---

<sup>207</sup> J. Basedow, ‘Mangold, Audiolux und die allgemeine Grundsätze des europäischen Privatrechts’, in: S. Grundmann, B. Haar, H. Merkt et al. (eds.), *Unternehmen, Markt und Verantwortung; Festschrift für Klaus J. Hopt zum 70. Geburtstag* (Berlin, New York: De Gruyter, 2010), 27-46, 40, explicitly advocates that the Court resort to *Interessenjurisprudenz*.

<sup>208</sup> Schepel, *loc. cit.* note 86.

<sup>209</sup> The Explanatory Memorandum in Commission’s proposal for a consumer rights (!) directive explains, on p. 2, that ‘[t]he objective of the proposal is to contribute to the better functioning of the business- to-consumer internal market by enhancing consumer confidence in the internal market and reducing business reluctance to trade cross-border.’x

## Summary

The references made by the Court of Justice in a number of recent cases to 'the general principles of civil law' may have been accidental, but they may also represent a deliberate first step towards a new European legal category and a new approach towards European private law.

In the case law so far, the principles have played a role exclusively in the context of the interpretation of directives. However, there is nothing in the nature of these principles that precludes further roles and effects. General principles of civil law could belong both to national and to EU law, and both to secondary and primary EU law. They could obtain not only interpretative but also as gap-filling and corrective functions, and not only indirect but also direct effect. Thus, the general principles of civil law could have an impact, in a variety of different ways and with different degrees of intensity, on disputes between private parties. It should be reminded, however, that, whatever their role, they can never operate outside the scope of EU law.

Because of their flexible and chameleonic nature, the general principles of civil law could contribute to horizontal and vertical coherence of the developing system of European private law without imposing, in a top-down manner, new rules on Member States. They could even facilitate a Member-State-friendly interpretation of EU private law.

New general principles of civil law could be the outcome of a transnational dialogue between (and among) national and European lawmakers, informed by an equally transnational legal scholarship. However, it is important that such a European private law space be as open as possible, and be informed by arguments and reasons not merely from legal elites at the political and economic centre but also from ordinary citizens at the periphery.