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Judge-Made European Private Law and European Polity-Building

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I. Two Worlds Apart

When public lawyers speak about the EU, the autonomous legal order, or the constitutional legal order, they discuss to what extent the EU can be compared with a nation-state or whether it should be regarded as a *sui generis* institution. When private lawyers speak about the EU in constitutional language, they speak about the economic or social constitution, private law society or the constitutionalisation of private law. The purpose of this chapter is to bring the two strands of discourses together and to relate them to the phenomenon of judge-made European private law, here being equated with the more than 300 judgments that the Court of Justice of the European Union (CJEU) rendered between 2002 and mid-2022 in the field of Secondary European Private Law.[1] The chapter thus investigates whether the CJEU-made private law may be understood as an integral part of the process of European polity-building. Whilst there is a dominance on consumer issues, the judgments of the CJEU unfold legal effects

[1] Overviews of the judgments that have been rendered between 2002 and mid-2018 can be found in HW Micklitz, 'Rechtsprechungsübersicht zum Europäischen Verbraucherrecht: Vertrags- und Deliktsrecht' (2006) *Europäisches Wirtschafts- und Steuerrecht (EWS)* 1; HW Micklitz, 'Rechtsprechungsübersicht zum Europäischen Verbraucherrecht: Vertrags- und Deliktsrecht' (2008) *EWS* 353; B Kas and HW Micklitz, 'Rechtsprechungsübersicht zum Europäischen Vertrags- und Deliktsrecht (2008–2013) – Teil I' (2013) *EWS* 314; B Kas and HW Micklitz, 'Rechtsprechungsübersicht zum Europäischen Vertrags- und Deliktsrecht (2008–2013) – Teil II' (2013) *EWS* 353; B Kas and HW Micklitz, 'Rechtsprechungsübersicht zum Europäischen Vertrags- und Deliktsrecht (2008–2013) – Teil I' (2018) *EWS* 181; B Kas and HW Micklitz 'Rechtsprechungsübersicht zum Europäischen Vertrags- und Deliktsrecht (2014–2018) – Teil II' (2018) *EWS* 241. We have collected and added the judgments that have been rendered between mid-2018 and mid-2022. These overviews are not published. It should be noted that our collection of the case-law is limited to 'judgments' of the CJEU. It is noticeable that the Court is increasingly making use of the possibility to reply to preliminary references by 'reasoned order' in the area of Secondary European Private Law, specifically with respect to the Unfair Terms Directive 93/13/EEC ([1993] OJ L 95/29). According to Article 99 of Rules of Procedure of the Court of Justice ([2012] OJ L 265/1), the Court may reply by order when a preliminary ruling is identical to a question on which the Court has already ruled, where the reply to such a question may be clearly deduced from existing case-law or where the answer to the question referred for a preliminary ruling admits of no reasonable doubt. In view of the increasing number of decisions, we had to exclude 'orders' from our overviews for practical reasons. For an interesting view as to what the increasing use of adjudicating orders may signify, see U Šadl, D Naurin, L López Zurita, SA Brekke, 'That's an Order! The Orders of the CJEU and the Effect of Article 99 RoP on Judicial Cooperation' (2020) iCourts Working Paper Series No 219 ('The findings suggest that the Court uses adjudicating orders to disengage from 'local' problems and unilaterally terminate the conversations with resolute national courts.').

far beyond the domain in the overall field of private law. This is true for two reasons: doctrinally many of the substantive questions affect in one way or the other SMEs and therefore raise the question whether consumer law can serve as a standard also for the protection of SMEs against big businesses. Secondly, and maybe more importantly, the kind of polity the CJEU is building is not limited to consumer law but more generally to the private law 'field' in the meaning of Pierre Bourdieu as we will develop below.

The chapter unfolds in three steps: First, the elaboration of the conceptual and theoretical framework in which the idea of an EU polity needs to be embedded. This requires a deeper look into constitutional theories to justify why the link between CJEU-made private law and the European polity looks promising. This part will rely on three writings: *The Politics of Judicial Co-operation in the EU*,[2] *The Politics of Justice in European Private Law*[3] and the review article 'The European Union Project'.[4] Secondly, the stock-taking and systematisation of the CJEU case-law, which brings the debate down to earth as a counterpoint to high-flying constitutional theories. Thirdly, merging the two together - the theoretical strands and the realities of CJEU-made private law - with a view to clarify the added value of the European polity paradigm in private law.

A. Constitutional Theories and the Missing Private Law

Ever since the CJEU held that the EU is governed by an autonomous legal order, later upgraded to a constitutional order, legal scholarship is debating how to classify the EU. The discussion raises the question whether the autonomous legal order embraces private law. It must be recalled that the CJEU never used the same language with respect to private law. There is not a single case where the CJEU speaks about the 'autonomous European private law order'. In a handful of cases, the Court referred to 'general principles of civil law',[5] which however quickly disappeared in later rulings. European private law has developed in a piecemeal and unsystematic fashion through the adoption of secondary EU law regulating market activities in different sectors to serve various policy goals. Its implementation and categorisation within the national legal orders is left to the Member States. Hence, EU private law does not need to become part of the national private legal orders as defined by the Member States.[6]

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[2] HW Micklitz, *The Politics of Judicial Co-operation in the EU: Sunday Trading, Equal Treatment and Good Faith* (Cambridge, Cambridge University Press, 2005).

[3] HW Micklitz, *The Politics of Justice in European Private Law: Social Justice, Access Justice, Societal Justice* (Cambridge, Cambridge University Press, 2018).

[4] HW Micklitz, 'The European Union Project, Review Article on J Dickson and P Eleftheriadis (eds), The Philosophical Foundations of European Union Law' (2013) 32 *Yearbook of European Law* 538.

[5] Case C-277/05 *Société thermale d'Eugénie-les-Bains v Ministère de l'Économie, des Finances et de l'Industrie* [2007] ECR I-6415; Case C-412/06 *Annelore Hamilton v Volksbank Filder eG* [2008] ECR I-2383; Case C-489/07 *Pia Messner v Firma Stefan Krüger* [2009] ECR I-7315; Case C-215/08 *E Friz GmbH v Carsten von der Heyden* [2010] ECR I-2947; Case C-174/12 *Alfred Hirmann v Immofinanz AG* EU:C:2013:856.

[6] For a recent account of the debate on the relationship between EU law and national private law, see OO Cherednychenko, 'Islands and the Ocean: Three Models of the Relationship between EU Market Regulation and National Private Law' (2021) *The Modern Law Review* 1294.

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The last years have forcefully demonstrated the never-ending academic interest in the correct classification of the European Union as a statutory or quasi-statutory body. In his review article of Pavlos Eleftheriadis' book *A Union of Peoples*,[7] Massimo Fichera provides for an insightful account of the different strands in constitutional theory and legal philosophy to get to grips with the particularities of the European Union. He distinguishes between the hierarchical and the heterarchical paradigm. Those who focus on the hierarchical paradigm must decide whether the national or the EU legal order is on top of the hierarchy. They are either state centred or in one way or the other federalist. Those who subscribe to a heterarchical paradigm reject both monism and dualism and submit that the particularities of the EU cannot be caught in hierarchical categories.

Whatever the language used - the EU as a constitution, a supranational state, or a polity - and whatever legal concept of the state and legal philosophy serves as the reference point - with Kelsen and Hart as key actors -, it is striking that the role and function of private law in the understanding of the constitutional character of the EU is more or less absent, even if genuine private law categories are used, as Eleftheriadis does.[8] Maybe the gap is due to the fact that the whole idea of a Common Market and later on the Internal Market is implicitly based on the existence of private law that enables private parties to realise the four freedoms. The big theories focus on the EU as a constitution, on constitutionalism and on polity-building, notwithstanding that private law theory is discussing since the 1920s the idea of an 'economic constitution' and a 'private law society', an idea that had strong impact on the conceptualisation of the EU in the political and theoretical discourse. Kaarlo Tuori is one of the few constitutional theorists who has taken up this strand in the 'many constitutions', where the economic constitution, not yet the social constitution, forms a building block of his conceptualisation of the EU.[9]

However, what is true for the constitutional discourse is equally true for the private law discourse. There is not much connection between the grand constitutional theories on the one hand and the attempts of private lawyers to get to grips with private law beyond the nation state. The only connection between the two seems to be the 'economic constitution', where the problem of the EU legal order as a hierarchical order reappears. When it comes to the heterarchical strand, private law theory is not so much focusing on European private law, but on transnational private law of which the European legal order is explicitly or implicitly forming an integral part. Rodotà showed how codifications of private law played an essential role in the constitution of a collective identity in the development of the nation state and pictured its role 'in the transition from a Europe of the market to a Europe of the rights'.[10] Seen

[7] M Fichera, 'Solidarity, Heterarchy, and Political Morality' (2020) 2 *Jus Cogens* 301.
[8] He refers to tort law and corrective justice as key elements of his conceptualisation of the EU as progressive internationalism, see P Eleftheriadis, *A Union of Peoples: Europe as a Community of Principle* (Oxford, Oxford University Press, 2020), ch 8 and 9.
[9] K Tuori, *European Constitutionalism* (Cambridge, Cambridge University Press, 2015).
[10] S Rodotà, 'The Civil Code within the European "Constitutional Process"' in MW Hesselink (ed), *The Politics of a European Civil Code* (The Hague, Kluwer Law International, 2006) 115, 121.

this way the failure of the building of a European constitution and a European Civil Code[11] rendered the making of a homogenous European collective identity even more difficult.

One of the authors of the present chapter has tried to catch the heterarchical European private legal order by focusing on four constitutive parameters: self-sufficiency, convergence, hybridisation and conflict.[12] This conceptualisation of European private law comes close to an understanding of a legal order based on moral practical reasoning. The claim is that EU private law is yielding access justice and societal justice as unique values that hold the European private legal order together.[13] It is a heterarchical order of bits and pieces though since there is no central authority that holds all the power together. The key position remains empty.[14] Our analysis of the CJEU-made private law and its impact on polity-building complements the overall picture.

B. Constitutionalisation of Private Law

For more than three decades private law theorists are discussing the constitutionalisation of private law, first at the national level, later at the European level. A clarification is needed for two reasons, first because of a possible link between the constitutionalisation of private law and the legal constitutional discourse on the EU, and secondly because the CJEU-made private law enjoys constitutional standing, at least if one subscribes to a hierarchical understanding of the EU, most outspokenly in the federal vision of the EU.

Constitutionalisation of private law is a dazzling term. First, constitutionalisation may mean materialisation of private law through fundamental and human rights. This is by far the dominating discourse in particular with respect to the idea that constitutionalisation should remedy justice deficits in private law, be it national or European. The CJEU's more recent move towards the recognition of the horizonal direct effect of fundamental rights in the EU Charter has even enhanced these expectations.[15] Secondly, constitutionalisation of private law is enshrined in the idea of a private law society (*Privatrechtsgesellschaft*), as presented in Franz Böhm's social theory of an economic constitution for a nation-state.[16] In the EU, the idea of an economic constitution triggered a debate on the constitutional standing of the four freedoms and competition. This is the second form of constitutionalisation of private law. Thirdly, constitutionalisation refers to the self-constitutionalisation of private law beyond the nation-state. This strand of the debate leads to transnational legal theories and suffers from differentiation between transnational private law and European transnational private law (with

[11] HW Micklitz, 'Failure or Ideological Preconceptions—Thoughts on Two Grand Projects: The European Constitution and the European Civil Code' (2010) EUI LAW Working Paper 2010/04.
[12] See the ERC-project on 'European Regulatory Private Law', www.cordis.europa.eu/project/id/269722/it.
[13] Micklitz, *The Politics of Justice in European Private Law*.
[14] Micklitz, 'The European Union Project' 551.
[15] Joined Cases C-569/16 and C-570/16 *Stadt Wuppertal v Maria Elisabeth Bauer and Volker Willmeroth v Martina Broßonn* EU:C:2018:871.
[16] F Böhm, 'Privatrechtsgesellschaft und Marktwirtschaft' (1966) 17 *ORDO: Jahrbuch für die Ordnung von Wirtschaft und Gesellschaft* 75.

or without 'private').[17] There are few attempts to disconnect European private law from the broad strand of transnational legal theories in order to look for eventual particularities.[18]

Quite often constitutionalisation is narrowed down to the analysis of CJEU judgments that refer explicitly or implicitly to human and fundamental rights. In the field of private law this kind of references are the exception to the rule, and it does not appear that the CJEU is ready to make extensive use of fundamental and human rights in private law decisions. The impact of the 'economic constitution' in the meaning of Böhm and Mestmäcker on private law is strong, but often neglected. The CJEU has endlessly interfered through the four freedoms into private legal relations and thereby transformed private legal concepts, such as the legal subject, contract, tort, and remedies.[19]

But there is a loose end in the debate about the constitutionalisation of private law, one that matters in our examination of the CJEU-made private law in Secondary European Private Law. As early as 1978 the ECJ held in *Simmenthal*[20] that not only primary EU law but also secondary EU law enjoys supremacy. In *Marshal*[21] the CJEU granted secondary EU law vertical direct effect. The struggle over the potential horizontal direct effect of EU directives is ongoing. Although the CJEU comes ever closer, it has rejected the horizontal direct effect of directives until today. The transfer of constitutional language to private law has triggered questions and resistance from the 1990s on. The key question was and is what it means for the national private legal orders if secondary EU law enjoys supremacy over private law. There is a huge strand of debate. It suffices to refer to G Teubner and Ch Joerges, who have amply shown how the hierarchical interference in the national legal systems leads to 'irritation' or to 'diagonal conflicts'.[22]

We will not engage into this discourse by staying away from the constitutional rhetoric and rather connecting the analysis to more recent strands in the search of the European soul, to which the CJEU-made private law can more easily be connected. There are three candidates - the role and function of private law in the building of a European society, the understanding of European private law as epistemic community (or communities) and the link of European private law to a European polity. For clarification purposes, the first two will be sketched out roughly before moving to the European polity, which seems to be the most promising and innovative avenue.

C. European Society, Epistemic Community, and Private Law

[17] See A Beckers, HW Micklitz, R Vallejo Garretón, P Letto-Vanamo (eds), *The Foundations of the European Transnational Private Law* (Oxford, Hart Publishing, forthcoming 2023).
[18] An example is L Niglia (ed), *Pluralism and European Private Law* (Oxford, Hart Publishing, 2013).
[19] HW Micklitz and C Sieburgh, *Primary EU Law and Private Law Concepts* (Cambridge, Intersentia, 2017).
[20] Case C-106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* [1978] ECR 629.
[21] Case C-152/84 *MH Marshall v Southampton and South-West Hampshire Area Health Authority* [1986] ECR 723.
[22] G Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergences' (1998) 61 *The Modern Law Review* 11; C Joerges, 'The Impact of European Integration on Private Law: Reductionist Perceptions, True Conflicts and a New Constitutional Perspective' (1997) 3 *European Law Journal* 378.

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Putting private law into the limelight of the search for the European soul brings the idea of a 'private law society' back to the fore, which is enshrined in the idea of an economic constitution. Private law society - *Privatrechtsgesellschaft* - does not make much sense without explaining the background of Sinzheimer, Böhm, Mestmäcker and Schweitzer, the proponents (H Dagan and M Heller's liberal theory of contract)[23] and the critique (M Hesselink, Justifying Contract in Europe)[24] or the much deeper conflict between Mestmäcker defending an economic constitution based on private autonomy and competition law and Wiethölter's attempt to democratise the economy through law.[25] For our purpose it might suffice to recall that the debate around the private law society and the economic (democratic) constitution is still a rather unique account for developing a legal concept of society, an issue which is usually left to political science and sociology. Lawyers and even legal theory tend to refer to 'society' without trying to clarify what is meant. The essence of the concept is that private parties are the prime holders of the responsibility for the societal order. What matters in our context is the strong interaction between the 'law' (here private law) and the 'society', which is very much conceived of in the national context.

When translated to the level of the EU, two strands are standing out which embrace the (European) private law society: On the one hand, there is the understanding of competition and competition law as a constitutive part of a democracy,[26] which offers an innovative perspective on the interaction between private law and competition law in the European economic constitution. On the other hand, there are attempts to look into how the CJEU contributes to the building of a European society through law.[27] This debate has attracted the interests of political scientists and sociologists.[28] Vauchez goes as far as saying with regard to the EU: 'in the European Union, even more than anywhere else, there is no possible distinction between the 'law' and the 'society'. There are no areas of Europe's politics, economics, bureaucracy or civil society that have not been produced or co-produced to some extent by lawyers'.[29] Whilst these are promising avenues to combine law and society, the question remains if 'law' and 'society' may integrate the 'political' and constitute a European polity.

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[23] H Dagan and M Heller, *The Choice Theory of Contracts* (Cambridge, Cambridge University Press, 2017); see also H Dagan, *A Liberal Theory of Property* (Cambridge, Cambridge University Press, 2021).

[24] MW Hesselink, *Justifying Contract in Europe. Political Philosophies of European Contract Law* (Oxford, Oxford University Press, 2021).

[25] See the contributions in G Grégoire and X Miny (eds), *The Idea of Economic Constitution in Europe* (Leiden, Brill, 2022), specifically therein HW Micklitz, 'Discussion: Society, Private Law and Economic Constitution in the EU' 380.

[26] E Deutscher, 'Of masters, slaves, behemoths and bees: the rise and fall of the link between competition, competition law and democracy' (PhD thesis, European University Institute 2020).

[27] G Comandé, 'The Fifth European Union Freedom: Aggregating Citizenship … around Private Law' in HW Micklitz (ed), *Constitutionalization of European Private Law* (Oxford, Oxford University Press, 2014); K Carr, 'Regulating the periphery – shaking the core European identity building through the lens of contract law' (2015) EUI Working Paper LAW 2015/40.

[28] R Münch, 'Constructing a European Society by Jurisdiction' (2008) 14 *European Law Journal* 519; A Vauchez, *Brokering Europe. Euro-Lawyers and the Making of a Transnational Polity* (Cambridge, Cambridge University Press, 2015), 4.

[29] Vauchez, *Brokering Europe* 4.

Before we move on to the 'polity', we have to clarify the relationship between society and epistemic community(ies) – an idea or a concept which is not originating from EU law but from transnational law.[30] Seen through the lenses of transnational legal theories, the EU becomes just a variant of transnational law. Those who engage into the debate, focus on private regulation and private ordering, on private actors who establish rules typically for particular business purposes or economic sectors.[31] It might therefore be more appropriate to speak of epistemic communities in the plural. We are wondering what the idea of epistemic communities can add in clarifying the meaning and importance of judge-made EU private law. There is a crucial difference between the European and the transnational legal order. European epistemic communities - provided they exist - look different from transnational epistemic communities. Beyond the nation state and beyond Europe, transnational law is by and large to be equated with private regulation in institution building and in shaping private transactions. The EU is typically promoting regulation or co-regulation via secondary EU law. Moreover, and contrary to the global level, the CJEU has adjudicative power to interpret the law.

D. European Polity

M Fichera has identified 'security' and 'fundamental rights' as meta rationales of European constitutionalism.[32] This seems a high benchmark which private law could only reach if connected to fundamental rights. If this is true, we are back to zero - back to constitutionalised private law. For the time being it might suffice to start from a more general understanding of what a polity is and link such an understanding to European private law. It remains for the third part of this paper to bring back the analysis of the CJEU-made private law to the broader picture of European constitutionalism. The European polity is being understood as an identifiable political entity with a collective identity, tied together through institutionalised social relations. Whilst such a definition might come close to common sense in the field, there are many loose ends in the idea of a European polity that reaches beyond public (constitutional) law. Three of the definitional elements are not necessarily connected to the perspective of the role of private law in polity-building, the notions of 'institution', 'political' and 'collective identity',[33] although private law adds additional difficulties to the idea of a European polity. The difficulty is the implicit or explicit yardstick against which the EU is measured. The parameters for defining the polity are taken from the nation state context and from nation state based constitutional theory. Shifting the level playing field brings quite a number of difficulties to

[30] J Klabbers, 'Setting the Scene' in J Klabbers, A Peters, and G Ulfstein, *The Constitutionalization of International Law* (Oxford, Oxford University Press, 2009), 1.

[31] L Bernstein, 'Opting out of the Legal System: Extralegal Contractual Relations in the Diamond Industry' (1992) 21 *Journal of Legal Studies* 115; G Shaffer, 'Theorizing Transnational Legal Ordering' (2016) 12 *Annual Review of Law and Social Science* 231.

[32] M Fichera, *The Foundations of the EU as a Polity* (Cheltenham, Edward Elgar, 2018).

[33] Regarding the 'political' and 'institutions', see Stefano Bartolini, who is trying to get to grips with the many different understandings of the 'political' and of 'institutions', S Bartolini, *The Political* (London, Rowman & Littlefield International, 2018). In the EU context identity is much more discussed as an argument to defend national identity against EU intrusion.

the fore which differ with regard to what is at stake – the institution, the political or the collective identity.

Could the EU be regarded as an entity which institutionalises social relations? The answer seems to be in the affirmative, although this chapter does not discuss whether the EU could be regarded as a supranational democratic entity. Judge-made private law points to the particular role and function of secondary EU law and the role and function private law plays within the European legal order. The *institutional* element does not pose insurmountable obstacles as what holds true for primary EU law is by and large true for secondary EU law, perhaps with the particularity of majority voting. *Simmenthal* was decided prior to the Single European Act of 1986 which introduced majority voting and thus facilitated secondary law-making. Although unanimity was no longer required, the CJEU continued to submit all directives adopted after 1986 to the doctrine of the supremacy of EU law, recognised the vertical direct effect of secondary EU law, whilst still rejecting the horizontal direct effect - setting aside the doctrine of consistent interpretation. The limping institutionalisation of private law relations through the CJEU necessarily affects social relations. The institutional design leaves structurally more space for the Member States' courts in the preliminary reference procedure. The idea of a 'polity' seems to benefit from the opening as the interaction is less hierarchical than in primary EU law.

But where is the *political* dimension in CJEU-made private law? It is easy to set up a long list of CJEU judgments that bear a strong political dimension, beginning with *van Gend en Loos*[34] and *Costa v Enel*,[35] which laid the foundations for the autonomy of the European legal order, which was qualified in *Les Verts* as a constitutional order.[36] There are many landmark decisions in private law that have a long-lasting effect on the understanding of rights, freedoms and remedies. It suffices to look into the casebooks on EU law in general and on private law in particular. However, there is no pendant to *van Gend en Loos* or *Costa v Enel* claiming the existence of 'a genuine and autonomous European private law order'. There is no big bang in private law and there is equally no inquiry similar to the one of A Vauchez on the polity-building character of *van Gend en Loos*.[37] Most of the private law judgments remain rather technical, even if technicality may hide politics.[38] Judgments in private law that reached the limelight of public attention and triggered political discussions in the democratic fora are the exception to the rule. In *Commission v France*[39] the CJEU held that the product liability directive aims at full harmonisation and restricts the competence of the Member States. The judgment triggered a resolution of the European Council with a forceful political critique on the assumption of full harmonisation, however, without any long-lasting effect.[40] The vast

[34] Case C-26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* [1963] ECR 3.
[35] Case C-6/64 *Flaminio Costa v ENEL* [1964] ECR 1141.
[36] Case C-294/83 *Parti écologiste "Les Verts" v European Parliament* [1986] ECR 1339.
[37] Vauchez, *Brokering Europe* 116-150.
[38] D Kennedy, 'The Hermeneutic of Suspicion in Contemporary American Legal Thought' (2014) 25 *Law and Critique* 91.
[39] Case C-52/00 *Commission v France* [2002] ECR I-3827.
[40] Council Resolution of 19 December 2002 on amendment of the liability for defective products Directive [2003] OJ C 26/2.

majority of European private law litigation does not hit that benchmark. One may, however, in line with Bourdieu conceive of the private law litigation as a 'field'.[41] This would require a kind of research which does not only look into the judgments, but into the key role of the 'Euro-lawyers' within and outside the legal field under investigation independent of their particular role and function in the litigation.[42]

However, there is another way to introduce the political into European private law before the CJEU. One may understand the design of the preliminary reference procedure as a political mechanism, through the way it is constructed. The CJEU is not deciding a concrete conflict but provides guidance about the interpretation of EU law with *erga omnes* effect. This mechanism is opening a space for political action, at least in certain types of litigation, where the addressee of the CJEU's judgment is not necessarily the national referring court but the national legislature(s), the national society(ies) or the EU institutions. In such conflicts the parties could be understood as 'mandataire' of the collective interests, ie of all those who are directly affected by the decision. Whether such a case reaches the European polity depends on the weight of the collective interest. A promising candidate for passing this threshold is public interest litigation. Here the claimant is instrumentalising the preliminary reference procedure to bring high level policy issues to the court.[43] On that basis, it looks as if the idea of a European political entity held together through social institutions allows for integrating private law or at least particular forms of private litigation, such as mass conflicts and public interest litigation.

However, what about the *collective* identity - is European private law part of a/the European collective entity or can it be or maybe better, can it turn into something like a European polity? The founding fathers of the Treaty of Rome did not consider the role and function of private law in European integration. They relied on what F Wieacker termed the 'common heritage' of private law in Europe - individualism, legalism, intellectualism.[44] The ambitious project of a European Civil Code did not reach beyond an academic draft. The attempt of the European Commission to develop at least a Common European Sales Law so forcefully promoted by the European Parliament failed due to the resistance of six Member States. All what the European Union managed to achieve in the last three decades is a European private law of bit and pieces, composed of the horizontal consumer law, labour law and non-discrimination law and the vertical law of the regulated market, complemented by a dense network of private international law on the place of jurisdiction, the applicable law and the recognition and enforcement of foreign judgments. A European private law of bits and pieces does not exclude the existence of a collective identity, although the identity might exist only in

[41] P Bourdieu, 'La Force du droit. Élément pour une sociologie du Champ Juridique' (1986) *Actes de la recherches des sciences sociales* 3.

[42] The PhD thesis of B Kas could be understood as an attempt to apply the field theory in practice, see ''Hybrid' collective remedies in the EU social legal order' (PhD thesis, European University Institute, 2017).

[43] With a critical eye on the consequences for the legal profession, see HW Micklitz and Th Roethe, 'Public Interest Litigation, Legal Professionalism and the ECJ – Deciding a Case or Managing Politics?' in D Leczykiewicz and others (eds), *Liber Amicorum Stephen Weatherill* (forthcoming).

[44] F Wieacker, 'Foundations of European Legal Culture', translated and annotated by Edgar Bodenheimer (1990) 38 *The American Journal of Comparative Law* 1.

the fields where EU law is dense enough and it might be a divided identity, divided in between the national and the European.

Let us now investigate the CJEU-made private law and how the body of case-law can be connected to the grand theories of European constitutionalism, here with particular emphasis on the European polity.

II. The Body of CJEU Judgments

Our account of the CJEU's case-law in European private law shows that the Court has rendered around 300 judgments in approximately 20 years.[45] The cases were selected through the 'advanced search' online form of the CJEU's website.[46] Our results are based on a double search: On the one hand, we conducted a narrow search by using the form 'references to case-law or legislation' and by filling in the relevant secondary law instruments in the area of EU consumer law. On the other hand, we conducted a broader search by using the form 'text' to search all rulings containing the keyword 'consumer'. Among them, we selected the judgments that are relevant for private legal relationships between consumers and traders. In our overviews, we categorised the decisions according to the various fields of private law which have been Europeanised through secondary EU law since 1984: contract law (unfair terms, direct and distant selling, consumer sales, services), travel law (passenger rights, package travel, information on air fares), consumer credit, finance and insurance, product liability, consumer issues in European private international law (PIL) and alternative dispute resolution. Unfair commercial practices have been covered only as far as there is a strong connection to contract law.

In our analysis, each case was presented after the same scheme: the facts of the case, the arguments brought forward before the CJEU and an attempt to position the case at stake into the *acquis communautaire*. Our analysis suffers from three major deficiencies: First, it does not examine the final judgment of the referring court or where necessary the reaction of the national legislature. Secondly, it does not investigate to what extent the cases have triggered a cross-border exchange, between national courts and/or between plaintiffs/defendants on similar questions. Thirdly, it does not investigate a potential triangular exchange between the CJEU, the referring national court and affected national courts in other Member States. Positively speaking, the way in which the analysis was built provides for a vertical insight into the interaction between the national court and the CJEU, between the national law and the relevant parts of harmonised private law.

Although we are not able to systematically engage with all these questions in this chapter, we will present a refined analysis of the judgments rendered by the CJEU upon preliminary references by national courts in the last twenty years. We will base our analysis on the number of judgments per legal sub-field (A), the spread between the Member States from

[45] See n 1 for details.
[46] www.curia.europa.eu/juris/recherche.jsf?language=en.

which the references emerged (B), and the type of conflicts behind the preliminary references (C).[47]

A. Number of Judgments per Field

The categorisation of the judgments along the legislative instruments of Secondary European Private Law shows that certain sub-fields are standing out. About one-third of all judgments concern unfair standard terms. Specifically, 95 judgments deal with the Unfair Terms Directive 93/13.[48] The European law on unfair standard terms thus got established similar to the Member States with a long-standing tradition of judicial control, such as among others Austria, France and Germany.[49] In the area of travel law, we have collected 67 judgments. Air passenger rights have made a fast career. Most of the judgments in this area – ie 44 – concern Regulation No 261/2004.[50] Both sub-fields – unfair terms and travel law - cover together over 50% of all judgments. They constitute self-standing areas of EU law. The same applies to European private international law, which historically lived its own life in commentaries and regular review articles. In this field, the Brussels I (Recast) Regulation is standing out.[51] We have

[47] As indicated, our research shows that the Court has rendered in the area of European private law around 300 judgments in approximately 20 years. In this renewed analysis of the empirical material, we are excluding judgments that were given in the context of infringement proceedings. As demonstrated by our overviews of the case-law (n1), their relevance as a source for CJEU judgments gradually decreased over time, while preliminary references have been constantly increasing. Our overviews reported in total about 21 judgments that resulted from infringement actions. Two further issues should be noted about the empirical material presented in sections A and B of this analysis: The (few) judgments that concern more than one legislative instrument or have joined references from the courts of several Member States have been counted multiple times. However, where judgments joined several references from courts of the same Member States, they have been counted a single time. For instance, the judgment in Case C-485/19 *LH v Profi Credit Slovakia s.r.o* EU:C:2021:313 concerned the directives on unfair terms and on consumer credit agreements, and is thus counted twice with respect to the numbers of judgments per legal field. The judgment in Joined Cases C-146/20, C-188/20, C-196/20 and C-270/20 *AD and Others v Corendon Airlines and Others* EU:C:2021:1038, which joined one reference from an Austrian court and three references from the German courts is counted as one reference from Austria and once reference from Germany with respect to the number of judgments per country.

[48] The judgments concern Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L 95/29.

[49] HW Micklitz and N Reich, 'The Court and Sleeping Beauty: The revival of the Unfair Contract Terms Directive (UCTD)' (2014) 51 *Common Market Law Review* 771.

[50] Regulation No 261/2004 on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights [2004] OJ L 46/1; seven judgments concern international air passenger rights under the Montreal Convention and one judgment under the Warsaw Convention; three rulings deal with Regulation (EC) No 1371/2007 on rail passengers' rights and obligations [2007] OJ L 315/14; one judgment concerns Regulation (EU) No 1177/2010 of the European Parliament and of the Council of 24 November 2010 concerning the rights of passengers when travelling by sea and inland waterway [2010] OJ L 334/1; five judgments concern Council Directive 90/314/EEC on package travel, package holidays and package tours [1990] OJ L 158/59; six judgments fall under Regulation (EC) No 1008/2008 on common rules for the operation of air services [2008] OJ L 293/3.

[51] Regulation No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L 12/1; Regulation (EU) No 1215/2012 of the European Parliament and

collected 24 judgments that deal with jurisdiction for disputes involving consumer rights under the Brussels I (Recast) Regulation, which are complemented by two recent rulings on the Lugano II Convention.[52] Merely three judgments deal with questions on the applicable law in consumer disputes.[53] Next to these largely self-standing areas, we can identify three fields that are gradually emerging: the area of consumer sales law covering 41 judgments;[54] the rules on consumer credit agreements that were the subject matter of 23 rulings;[55] and liability for defective products comprising 13 judgments.[56] The remaining judgments are scattered among various areas, such as insurance, services (telecoms, energy, finance), non-discriminatory access to goods and services, and alternative dispute resolution.

B. Number of Judgments per Country

Looking at the judgments concerning unfair terms, it is striking that 60% are based on preliminary references from three countries, namely Spain (26), Hungary (18) and Poland

of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ L 351/1.

[52] 15 judgments concern Regulation No 44/2001 and nine judgments are about Regulation 1215/2012. In addition to that, two recent judgments concern the Lugano II Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, signed on 30 October 2007, the conclusion of which was approved on behalf of the European Community by Council Decision 2009/430/EC of 27 November 2008 [2009] OJ L 147/1.

[53] Specifically, dealing with Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L 177/6 and Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) [2007] OJ L 199/40.

[54] Six judgments concern Council Directive 85/577/EEC to protect the consumer in respect of contracts negotiated away from business premises [1985] OJ L 372/31; five judgments are about Directive 97/7/EC on the protection of consumers in respect of distance contracts [1997] OJ L 372/31; 10 rulings concern Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees [1999] OJ L 171/12; 17 judgments involve Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council [2011] OJ L 304/64; three judgments deal with the compatibility of national consumer protection provisions with the free movement provisions, thus going strictly seen beyond the scope of Secondary EU Law.

[55] Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit [1987] OJ L 42/48; Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC [2008] OJ L 133/66.

[56] 11 judgments concern Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products [1985] OJ L 210/29; one judgment concerns interpretation of Council Directive 93/42/EEC of 14 June 1993 concerning medical devices [1993] OJ L 169/1; Case C-581/18 *RB v TÜV Rheinland LGA Products GmbH and Allianz IARD SA* EU:C:2020:453, which deals with the compatibility of a contractual clause stipulated in a contract concluded between an insurance company and a manufacturer of medical devices with Article 18 TFEU, was added.

(13).[57] References from central and middle European Member States play a crucial role. Together with Hungary (18), Poland (13), Romania (8), Slovakia (7), the Czech Republic (1) and Slovenia (1), 50% of these cases are coming from the new Member States, ie, those which joined the EU after the fall of the Berlin wall. It is astonishing to see that preliminary references from the old Member States - France (5), Austria (3), the Netherlands (3), Belgium (2), Germany (2) and Italy (2) - constitute together the basis of less than 20% of the CJEU judgments on unfair terms. The courts of Lithuania, Czech Republic, Slovenia, Greece, Croatia, and Bulgaria have each submitted one reference in the last twenty years. Cyprus, Ireland, Luxembourg, Portugal, United Kingdom, Malta, the Baltic States (except for Lithuania) and the Nordic Countries (Denmark, Finland, Sweden) are not represented at all. Thus, all in all, the courts of 17 Member States referred a case to the Luxembourg court.

The other fields show a very different spread. In the field of travel law, preliminary references of the German (19) and Austrian courts (14) - which make up about 50% of all judgments collected in that area - are dominating. They are followed by Spain (7), Belgium (5) and the Netherlands (4). Few references stem from the UK (3), Portugal (3), Finland (3), Czech Republic (3) and Ireland (2). There are only four references from Central and Eastern European countries, namely three from the Czech Republic and one from Romania. Italy, Luxembourg, Sweden, Poland, Romania, Latvia and Cyprus have referred one case each. Hence, the CJEU's judgment are based on references from the courts of 17 Member States.

The 29 judgments that deal with consumer matters in PIL are dominated by references from Austria (11) and Germany (6), which together make up almost 60% of all judgments in that area. They are followed by the Czech Republic (4) and Italy (2). Like in the area of travel law, the Czech Republic is thus standing out from the Central and Eastern European countries. Spain, Slovenia, Poland, Romania, Luxembourg and Croatia have each referred one preliminary reference. Hence, the courts of 10 Member States have participated in that area.

In the area of consumer sales law, it emerges that Germany takes the lead with 22 references, covering thus more than 50% of all judgments in that area. Germany is followed by Austria (5), Belgium (4), Spain (3), Bulgaria (2), the Netherlands (2), the United Kingdom (1), Lithuania (1) and Estonia (1). Hence, in total, the judiciaries of 9 Member States have referred questions to the CJEU.

The judgments on consumer credit agreement do not show clear tendencies. Poland has referred five cases, which is followed by four references from France and Slovakia. They are followed by Germany, Romania and the Czech Republic, each referring two cases. Italy, Austria, Belgium and Latvia have each submitted one reference. All in all, 23 judgments stemming from 10 Member States have been collected.

In the field of product liability, four references stem from Germany, three from France and two from the UK. Spain, Austria, Finland and Denmark have each submitted one reference. That means that the courts of 7 Member States have participated.

The overview demonstrates that the judge-made European private law is based on an uneven spread of references from the Member States' courts. Combining the insights from the six fields, leading in terms of preliminary references are Germany, Spain and Austria, followed

[57] In comparison to Spain and Hungary, Poland has been a latecomer - most preliminary references are of the last five years.

by Poland, Hungary and Romania. Only the Maltese courts have not made use of the preliminary reference procedure during the examined period. Overall, using A Colombi Ciacchi's classification,[58] the old and the young continental European democracies are sitting in the driver's seat. They make extensive use of the preliminary reference procedure, thereby leaving a deep footprint on the making of European private law, whereas the Nordic Insular democracies remain by and large outside.

C. Types of Litigation

Studying the summaries of the cases discloses meaningful insights on the types of litigation which national courts are bringing before the CJEU. Three types can be distinguished, although there might be overlaps: first mass conflicts with a strong societal dimension, secondly conflicts with a strong national legal context and thirdly legal interpretational issues of relevance for the whole European private law.

Up to now, the CJEU had to deal twice with mass conflicts which arose in Germany and Spain, and the Central and Eastern European countries, and which have led to a whole series of references, where the CJEU was pushed to clarify its position and/or to react to developments in the Member States after its first judgment. The first is the *Heininger* saga, a 10 Billion Euro story.[59] After German reunification, German consumers in the former German Democratic Republic (GDR) were pushed to buy property on the doorstep as credit financed investments which should amortise themselves through the rents. The model did not work, and the consumer investors ended up with overpriced property where the rent did not suffice to cover the mortgage. In *Heininger*, the CJEU held that the then Directive 85/577/EEC on doorstep selling grants an eternal right to withdrawal, thereby encouraging consumer/investors to get rid of their 'junk property' (*Schrottimmobilien*).

The second event was the financial crisis in 2007/2008. In Spain consumers had bought private property often at the limits or beyond what they could afford. Both the banks and the consumers were relying on constantly rising housing prices. The crisis triggered a downward spiral. Consumers lost their jobs and could no longer pay the mortgages.[60] The CJEU's ruling in *Aziz* became a point of reference for demonstrating the Unfair Terms Directive 93/13's potential to alleviate the repercussions of the financial crisis on consumer debtors.[61] In the Central and Eastern European countries banks offered loans which were coupled to the Swiss Franc. When the crisis devaluated the national currency, consumers saw themselves confronted

[58] A Colombi Ciacchi, 'Judicial Governance in European Private Law: Three Judicial Cultures of Fundamental Rights Horizontality' (2020) 28 *European Review of Private Law* 931.

[59] Case C-481/99 *Georg Heininger and Helga Heininger v Bayerische Hypo- und Vereinsbank AG* [2001] ECR I-9945. The CJEU dealt subsequently with the conflict in Case C-350/03 *Elisabeth Schulte and Wolfgang Schulte v Deutsche Bausparkasse Badenia AG* [2005] ECR I-9215; Case C-229/04 *Crailsheimer Volksbank eG v Klaus Conrads and Others* [2005] ECR I-9273; *E Friz* (n 5).

[60] F Gómez Pomar and K Lyczkowska, 'Spanish Courts, the Court of Justice of the European Union, and Consumer Law' (2014) *Revista para el Análisis del Derecho (InDret)*.

[61] Case C-415/11 *Mohamed Aziz v Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)* EU:C:2013:164.

with a much higher debt than originally foreseen at the time of the contract conclusion.[62] Almost all references from Spain, Hungary, Slovakia, Poland, Romania, Slovenia and the Czech Republic in the field of unfair terms have their origin in the effects of the crisis on mortgage contracts and consumer loans. Preliminary references invoking the Unfair Terms Directive 93/13/EC to deal with the consequences of the crisis have not yet subsided.

A bit more hidden mass conflict is the PIP scandal. For many years, the French breast implant manufacturer PIP used substandard industrial silicone gel instead of the required medical gel. When the fraud was discovered in 2010, millions of women across the world had already received substandard and potentially dangerous breast implants.[63] *Schmitt*[64] and *TÜV Rheinland* [65] demonstrate that EU law has not yet come to help the many women who received defective breast implants.[66] A further ongoing mass conflict is the *Dieselgate* scandal, which has been uncovered in 2015 by the US Environment Protection Agency. Consumer organisations all over Europe are raising attention to the fact that not all affected European car owners have been yet compensated.[67] The Court recently strengthened the position of consumers by clarifying that purchasers of diesel vehicles equipped with software which reduces the effectiveness of the emission control system at normal temperatures are entitled to rescind their sales contracts according to Directive 1999/44. Vehicles fitted with a prohibited defeat device do not show the quality which is normal in goods of the same type and which the consumer can reasonably expect. According to the Court, such a lack of conformity cannot be classified as 'minor'.[68] One could understand these two scandals as the third and fourth mass conflicts, which – differently to the previous two – have a pronounced transnational dimension.

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[62] European Parliament, Briefing, Unfair terms in Swiss franc loans. Overview of European Court of Justice case law, EPRS (European Parliamentary Research Service), author: Rafał Mańko, PE 689.361 – March 2021.

[63] B van Leeuwen, 'PIP Breast Implants, the EU's New Approach for Goods and Market Surveillance by Notified Bodies' (2014) 5 *European Journal of Risk Regulation* 338; see also P Verbruggen and B van Leeuwen, 'The liability of notified bodies under the EU's New Approach: The implications of the PIP breast implants case' (2018) *European Law Review* 394.

[64] Case C-219/15 *Elisabeth Schmitt v TÜV Rheinland LGA Products GmbH* EU:C:2017:128.

[65] *TÜV Rheinland* (n 56); see on the ruling B van Leeuwen, 'The scope of application of the free movement provisions and the role of Article 18 TFEU: Allianz' (2021) *Common Market Law Review* 1249.

[66] The Product Liability Directive 85/374/EEC could not be invoked due to the liquidation of PIP. In *Schmitt*, the Court held that the Medical Devices Directive 93/42/EEC did not regulate the conditions under which a notified body could be held liable for its potential failure to carry out the inspections of the manufacturer with sufficient skill and care. In *Allianz*, the Court clarified that the free movement provisions do not regulate the conditions of insurers' civil liability for harm caused by defective products.

[67] BEUC Report, Five Years of Dieselgate: A Bitter Anniversary. 2015-2020: A long and bumpy road towards compensation for European consumers, available at www.beuc.eu/publications/beuc-x-2020-081_five_years_of_dieselgate_a_bitter_anniversary_report.pdf; A Biard, 'Retour sur 6 ans de Dieselgate en Europe du point de vue des consommateurs' (2021) *Droit de la consommation - Consumentenrecht (DCCR)* 3.

[68] Case C-128/20 *GSMB Invest GmbH & Co KG v Auto Krainer GesmbH* EU:C:2022:570; Case C-134/20 *IR v Volkswagen AG* EU:C:2022:571; Case C-145/20 *DS v Porsche Inter Auto GmbH & Co KG, Volkswagen AG* EU:C:2022:572. In a pending preliminary reference, the Court is asked whether Directive 2007/46/EC on the approval of motor vehicles ([2007] OJ L 263/1), read in conjunction with Regulation No 715/2007 on type approval of motor vehicles with respect to emissions ([2008] OJ L

The second category deals with consumer problems which have a very particular national background and where courts, quite often lower courts in the country, are invoking Luxembourg to remedy national deficits with the help of European private law. Examples are jurisdiction and arbitration clauses in Spanish consumer contracts,[69] price increase clauses in German energy supply contracts[70] and dispute settlement procedures in Italy.[71] In Spain there was a quite liberal policy about jurisdiction clauses, which barred consumers from pursuing their claims as they would have been obliged to travel to the business' residence. Price increase clauses in energy supply contracts have provoked strong reactions from German consumers who wanted to have their money back.[72] While similar contract terms might exist in all Member States, they enjoy a particular economic, social, and legal background in the country of origin. In Italy, access to court is easy and cheap but the average length of consumer proceedings is dissuasive. That is why dispute settlement procedures play a key role and the Italian legislator is at the forefront of promoting ADR by making access to court conditional on a prior attempt to an out-of-court settlement.

The third category is best categorised as legal technical, highly complicated doctrinal questions that engage strong reactions in the respective legal community. From the range of fields distant and direct selling, consumer sales and product liability are standing out. For instance, if there is no prescription period for the right to withdrawal does this mean, there is none?[73] How to interpret that the consumer can return the product bought online at 'no costs'?[74] Does this mean that they can use the product without compensation?[75] May consumers return a mattress purchased online even if they have removed the protective film or may the right of withdrawal be restricted for hygiene reasons?[76] Must the right of withdrawal be granted if the goods ordered are to be made to the consumer's specifications or are personalised, but have

199/1), confers on an individual purchaser of a vehicle which does not comply with the emission limits laid down by that regulation a right to compensation from the vehicle manufacturer, on the basis of tortious liability, and, if so, what method of calculating compensation must be established; see on this the opinion of 2 June 2022 of Advocate General Rantos in Case C-100/21 *QB v Mercedes-Benz Group AG, formerly Daimler AG* EU:C:2022:420.

[69] Joined Cases C-240/98 to C-244/98 *Océano Grupo Editorial SA v Roció Murciano Quintero and Others* [2000] ECR I-4941; Case C-168/05 *Elisa María Mostaza Claro v Centro Móvil Milenium SL* [2006] ECR I-10421; Case C-40/08 *Asturcom Telecomunicaciones SL v Cristina Rodríguez Nogueira* [2009] ECR I-9579.

[70] Case C-92/11 *RWE Vertrieb AG v Verbraucherzentrale Nordrhein-Westfalen eV* EU:C:2013:180; Case C-359/11 *Alexandra Schulz v Technische Werke Schussental GmbH und Co KG and Josef Egbringhoff v Stadtwerke Ahaus GmbH* EU:C:2014:2317.

[71] Joined Cases C-317/08 to C-320/08 *Rosalba Alassini v Telecom Italia SpA, Filomena Califano v Wind SpA, Lucia Anna Giorgia Iacono v Telecom Italia SpA and Multiservice Srl v Telecom Italia SpA* [2010] ECR I-2213; Case C-75/16 *Livio Menini and Maria Antonia Rampanelli v Banco Popolare – Società Cooperativa* EU:C:2017:457.

[72] N. Reich, '"I want my money back" – Problems, Successes and Failures in the Price Regulation of the Gas Supply Market by Civil Law Remedies in Germany' (2015) EUI Working Paper LAW 2015/05.

[73] *Heininger* (n 59).

[74] Case C-511/08 *Handelsgesellschaft Heinrich Heine GmbH v Verbraucherzentrale Nordrhein-Westfalen e.V.* [2010] ECR I-3047.

[75] *Messner* (n 5).

[76] Case C-681/17 *slewo - schlafen leben wohnen GmbH v Sascha Ledowski* EU:C:2019:255.

not yet been manufactured?[77] If replacement of defective goods is the only remedy, is the seller obliged to remove the defective goods and install the replacement goods at his own costs?[78] Is a medical device a product and does it suffice to trigger liability if the medical device incorporated in the body is only potentially defective?[79] All these references and there are many more have in common that the outcome of the case depends on the interpretation of a particular legal concept. Typically, there are legal arguments pro and con and the technicality hides the deeper economic and social implications - how far does the right to return goods purchased online without costs reach, who must bear the costs for a potential mis- or overuse during the return period, shall the producer of heart valves cover the surgery costs of a potentially defective product or are these costs left to the health insurance, if at all?

III. Assessment of the CJEU Judgments

The remarkable rise of CJEU judgments in European private law is a phenomenon that deserves deeper thinking. What exactly is happening in the field of private law, is it still private law or is it a mixed field, intermingling public and private law, European and national, and how can the interaction between the national courts and the CJEU be qualified? Are the actors involved in the cases building a kind of judge-made European polity? To give a tentative reply, we will look deeper into three aspects related to the previously introduced three categories of 'fields', 'countries' and 'types of litigation', namely the scope of the polity (A), participation in the polity (B), and the politicisation of litigation (C).

A. Scope of the Polity

Is there a correlation between the number of CJEU judgments and the existence of a polity? And what is the private law polity? Is it the ensemble of the different fields that we identified? Is it European private law or consumer law? Or may it be more convincing and realistic to start from the existence of emerging sub-polities? Our empirical study can be understood to provide evidence of a sub-polity in the field of secondary EU consumer law. A word of caution is needed though. Are we really talking about consumer law only or are we talking about consumer law as private law, a field of law which intermingles the private and the public dimension of EU law? The political dimension which is enshrined in the concept of a polity suggests a broader understanding, one that focuses on consumer law as an integral part of European private law.

Politicisation may take place independent of the number of preliminary references that have arisen in the legal field. *Heininger* stands for an extremely narrow bottleneck - the applicability of the Doorstep Selling Directive 85/577/EEC served as the door opener to question the legality of high value economic transactions. Looking back, it appears however

[77] Case C-529/19 *Möbel Kraft GmbH & Co KG v ML* EU:C:2020:846.
[78] Joined Cases C-65/09 and C-87/09 *Gebr. Weber GmbH v Jürgen Wittmer*, *Ingrid Putz v Medianess Electronics GmbH* [2011] ECR I-5257.
[79] Joined Cases C-503/13 and C-504/13 *Boston Scientific Medizintechnik GmbH v AOK Sachsen-Anhalt – Die Gesundheitskasse and Betriebskrankenkasse RWE* EU:C:2015:148.

that the *Heininger* saga is the exception to the rule. European private law is compartmentalised. There is not much coherence between the different fields, despite the efforts of the EU legislature. A good example are all the information duties that are spread over different fields, but which are not interconnected. When it comes to litigation before the CJEU it looks as if each field stands on its own. Such an understanding is underpinned by limited cross-references between the different fields.[80] The CJEU is by and large conceiving each field as a self-standing area of law, building its reasoning on prior cases. However, there are differences depending on the subject-matter of the respective instrument of secondary EU law. The Unfair Terms Directive is particularly of relevance as it covers goods and services, and as standard terms are omnipresent. This might explain the high number of judgments on the directive, although most of the references are dealing in variations with the economic consequences of the great crisis. However, even the crisis does not suffice to bring together what belongs together. Mortgages and consumer loans are dealt with under the Unfair Terms Directive, leaving a marginal role for the Consumer Credit Directive, even if the deeper origin of both instruments is similar.[81]

Despite all the variations in the different fields and the very fragmented legal discourse and legal reasoning, the polity is held together through the addressee, which is the one in whose name and to whose benefit all the secondary EU law has been adopted. Here is the link to the consumer economy, to the consumption society and to the overwhelming importance of private consumption for the internal market. The 'consumption polity' is composed of two different types of consumers: the active and the passive consumer. The prototype of the active consumer is the traveller, the mobile citizen who constantly crosses borders and moves from one place to the other.[82] The high number of cases from many different countries of origin, though with a slight preference from the old Member States, in the field of travel law demonstrates the

[80] There are some exceptions. For instance, the Court applied its case-law on the national judge's *ex officio* mandate developed under Directive 93/13 to consumer credit (Case C-429/05 *Max Rampion and Marie-Jeanne Godard v Franfinance SA and K par K SAS* [2007] ECR I-8017), distant sales (Case C-227/08 *Eva Martín Martín v EDP Editores SL* [2009] ECR I-11939) and consumer sales (Case C-32/12 *Soledad Duarte Hueros v Autociba SA and Automóviles Citroën España SA* EU:C:2013:637; Case C-497/13 *Froukje Faber v Autobedrijf Hazet Ochten BV* EU:C:2015:357). Another prominent example concerns the relationship between competition and contract law. In Case C-453/10 *Jana Pereničová and Vladislav Perenič v SOS financ spol s r o* EU:C:2012:144 (as more recently confirmed in Joined Cases C-776/19 to C-782/19 *BNP Paribas Personal Finance* EU:C:2021:470, para 76), the Court held that the finding of an unfair commercial practice under Directive 2005/29/EC ([2005] OJ L 149/22) is one element among others on which a court may base its assessment of the unfairness of the contractual terms under Directive 93/13, leading to a broader academic debate about the relationship of both instruments, see HW Micklitz and N Reich, 'AGB-Recht und UWG - (endlich) ein Ende des Kästchendenkens nach EuGH Pereničová und Invitel?' (2012) *Europäisches Wirtschafts- & Steuerrecht* 257.

[81] Recent preliminary references from Poland are asking the CJEU to take a more holistic perspective, see Joined Cases C-419/18 and C-483/18 *Profi Credit Polska SA v Bogumiła Włostowska and Others and Profi Credit Polska SA v OH* EU:C:2019:930; Case C-779/18 *Mikrokasa SA w Gdyni and Revenue Niestandaryzowany Sekurytyzacyjny Fundusz Inwestycyjny Zamknięty w Warszawie v XO* EU:C:2020:236; Joined Cases C-84/19, C-222/19 and C-252/19 *Profi Credit Polska SA and Others v QJ and Others* EU:C:2020:631; Case C-303/20 *Ultimo Portfolio Investment (Luxembourg) SA v KM* EU:C:2021:479.

[82] See the distinction in M Fichera, 'The Idea of Discursive Constituent Power' (2021) *Jus Cogens* 159, 164 ff.

relevance of this group of mobile consumers. The second major group of 'mobile' consumers are the online shoppers. Since the adoption of the Distance Selling Directive 97/7/EC the EU is strongly promoting the possibility to shop online across the borders. The mobility results from the broader perspective that EU law provides to consumers. The reality looks different and is often dominated by geo-blocking, where consumers are thrown back to the affiliation of the online seller in their country of residence.[83]

On the other end there is the passive consumer who is not moving. Most of the cases under review are dealing with all sorts of economic transactions concluded by the passive consumer 'at home'. A typical example are mortgages and consumer loans. Both serve local needs, the financing of the home and/or credit financed investments tied to the local residence.[84] One might associate the different consumer types to Sousa's distinction of 'globalized localisms' and 'localized globalism'.[85] 'Globalized localism' is the active consumer and 'localized globalism' the passive consumer. Hence, globalisation is not bound to constantly moving around the world but takes place at the most nitty-gritty consumer problem. Sousa helps to underpin the political dimension of the consumption process, whether the active or passive consumer is concerned, and therefore the 'political' in the judge-made private law polity. It remains open whether the identified European consumption polity may become part of a broader judge-made European polity that allows for the (re)politicisation of consumption in view of the growing calls for more sustainable economic models.

B. Participation in the Polity

The construction of a judge-made European polity relies on the interaction between European and national actors within the framework of the preliminary reference procedure. The protagonists of the procedure are the national courts and the CJEU. Their perspectives on the purpose of Article 267 TFEU are however easily clashing. The preliminary reference procedure is designed to allow the CJEU to provide authoritative guidance on the interpretation of EU law. The referring court is however seeking advice about how to solve a very concrete consumer case. There is thus a mismatch between the horizontal perspective of the CJEU who is speaking to all Member States and all national courts and the vertical perspective of the

[83] In February 2018 the EU adopted the Geo-Blocking Regulation 2018/302 ([2018] OJ L 60I/1) that prohibits restrictions on consumer access to e-commerce websites on the basis of their nationality or country of residence. The Commission's first evaluation report has shown that there were initial positive effects of the Regulation in improving the cross-border accessibility of traders' websites, but also that the Regulation has not yet reached its full intended effects (COM(2020) 766 final).

[84] While the fundamental rights flavour of the litigation in *Aziz* (n 61) might have contributed to the political attention the case raised, the CJEU did not really elaborate on the right to housing in the long stream of follow-on judgments. See I Domurath and C Mak, 'Private Law and Housing Justice in Europe' (2020) *Modern Law Review* 1188; P Kenna, H Simón-Moreno, 'Towards a common standard of protection of the right to housing in Europe through the charter of fundamental rights' (2019) *European Law Journal* 608-622; F Della Negra, 'The uncertain development of the case law on consumer protection in mortgage enforcement proceedings: Sánchez Morcillo and Kušionová' (2015) *Common Market Law Review* 1009.

[85] B de Sousa Santos, 'Globalizations' (2006) *Theory, Culture and Society* 393.

referring court who is addressing the CJEU, but not necessarily the courts of the other Member States.[86]

This inherent mismatch in the institutional design of the preliminary reference procedure may hamper the process of EU polity-building via case-law. On the one hand, the more the CJEU is sticking to the horizontal perspective, the less useful the interpretation might be for the national referring court. In a worst-case scenario, the national court might be embarrassed by a 'useless' answer, deterring it from using the preliminary reference procedure in the future. On the other hand, the more the CJEU is not only interpreting the law but providing guidance on how the interpretation must be applied by the referring court to the facts of the case, the more the CJEU is engaging into a closed dialogue with the referring court, with the danger of losing sight of the potential needs of all the other national courts, respectively the national private legal orders. Although the Advocate Generals may act as 'catalysts' between the national courts and the CJEU, it has been suggested that they rarely meet the challenge of 'translating' between the different styles of communication.[87] A more (open and consistent) engagement with the comparative law method could help the transposition of the preliminary reference into a horizontal European perspective.[88]

The preliminary reference procedure builds on a single institutional safeguard to open the litigation to other Member States, namely the opportunity of the governments to intervene before the CJEU based on Article 23(2) of the Statute of the Court of Justice.[89] There is no empirical study which has analysed - quantitatively and qualitatively - the input provided by the Member States on the CJEU's case-law in European private law. References to the interventions by the governments in the opinions of the Advocate-Generals or the Court's judgments are neither complete nor systematic. Until 1994 one could retrieve summaries of the Member States' observations from the Judge-Rapporteurs' reports published in the European Court Reports.[90] Today, it is necessary to directly request access to the written observations from the Member States to reconstruct a complete account of the arguments brought forward by the national governments.[91] A report by the Swedish Institute for European Policy Studies on the governments' interventions during the years 1997-2008 shows that the Member States have taken the opportunity to intervene to considerably varying degrees.[92] The same applies to the area of European private law, where most Member States do not regularly present written

[86] Micklitz, *The Politics of Judicial Co-operation in the EU* 446 ff.
[87] ibid 427, 448.
[88] On the use of comparative law by the CJEU, see K Lenaerts and K Gutman, 'The Comparative Law Method and the Court of Justice of the European Union. Interlocking Legal Orders Revisited' in M Andenas and D Fairgrieve (eds), *Courts and Comparative Law* (Oxford, Oxford University Press, 2015), 141, specifically pp 145-150 on the role of the Advocate General in this respect.
[89] [2016] OJ C 202/210.
[90] On the documentation of the Member States' observations, see P Cramér, O Larsson, A Moberg and D Naurin, *See You in Luxembourg? EU Governments' Observations Under the Preliminary Reference Procedure* (Swedish Institute for European Policy Studies, 2016), 16-19.
[91] The CJEU recently undertook efforts to facilitate the public's access to its judicial activity. However, for the moment, only hearings from the Grand Chamber are broadcasted to the public for a six-month pilot period, see 'Broadcast by streaming of hearings and the handing down of judgments and opinions of the Court of Justice', Court of Justice of the European Union, Press release No 63/22, Luxembourg, 22 April 2022.
[92] Cramér, Larsson, Moberg and Naurin, *See You in Luxembourg?* 6 ff.

observations or participate in the oral procedure, whereas the European Commission acts as 'repeat-player', who is always providing input on what it believes to be the appropriate interpretation of EU law.[93] The differences in activity by the Member States may depend partly on the resources that the governments are ready to invest in the monitoring of and acting in EU judicial procedures, but also on how the handling of preliminary references is organised within government ministries and to what extent the conflict can be translated into the respective national environment.[94]

A fully fledged picture that covers the practice of all surrounding institutional dimensions would imply a considerable investment into the empirics of judicial co-operation in European private law. Our overviews of the case-law do not come close to what would be needed in a perfect world. Still, the analysis throws doubts on whether the metaphor of national silos comes closer to reality than the ambitious language of the European polity. The Spanish courts and the courts in the new Member States have left a deep footprint on the development of the control of unfair terms under Directive 93/13/EC. The CJEU has not only given ever concreter advice on the interpretation of individual standard terms but has also shifted the focus from substantive to procedural control.[95] However, what are the Spanish cases telling the rest of the Member States about their law on unfair terms? The analysis of the Member States' observations, the observations of the European Commission and those of the parties would certainly help to clarify the role of the Euro-lawyers and to allow for some preliminary and tentative conclusions. However, a full picture would require that all Member States have provided input, which never happened in the private law cases here at issue.[96] On the other hand, it seems premature to conclude that silence - ie no participation in the preliminary

[93] On the difference between 'repeat players' and 'one shotters', see M Galanter, 'Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change' (1974) *Law and Society* 95. According to Galanter, repeat players have the resources to engage in long-term litigation, which allows them to impact legal change. While studies have indeed suggested that the Court adheres to the Commission's position in most cases, different explanations have been put forward for this, see the overview by MP Granger, 'From the Margins of the European Legal Field: The Governments' Agents and their Influence on the Development of European Union Law' in A Vauchez and B de Witte (eds), *Lawyering Europe. European Law as a Transnational Social Field* (Oxford, Hart Publishing, 2013) 55, at 59.

[94] Cramér, Larsson, Moberg and Naurin (n 90) 39-40. On the organisational aspect, see specifically Granger, 'From the Margins of the European Legal Field' 60-63, 66-68.

[95] On the CJEU's case-law on procedural matters, focusing on the preliminary references emerging from Spain, see A van Duin, *Effective Judicial Protection in Consumer Litigation* (Cambridge, Intersentia, 2022). See also her contribution to this book, suggesting that the Dutch civil courts could learn from litigation in Spain, 'Justice in Times of Crisis: The Signalling Function of Article 47 EUCFR in Consumer Debt Collection Cases'.

[96] In the field of unfair terms, the highest number of participation, namely six governments, was reached in *Pannon* (Case C-243/08 *Pannon GSM Zrt v Erzsébet Sustikné Győrfi* [2009] ECR I-4713). It is striking that in many cases on the Unfair Terms Directive merely the government of the referring national court has been submitting observations. This applies also to the prominent *Aziz* case (n 61). Looking across the different fields, we found the highest number of participation by the Member States, namely 10 governments, in *Blödel-Pawlik* (Case C-134/11 *Jürgen Blödel-Pawlik v HanseMerkur Reiseversicherung AG* EU:C:2012:98). *Sturgeon* (Joined Cases C-402/07 and C-432/07 *Christopher Sturgeon and Others v Condor Flugdienst GmbH and Stefan Böck and Cornelia Lepuschitz v Air France SA* [2009] ECR I-10923) and *Pammer Alpenhof* (Joined Cases C-585/08 and C-144/09 *Peter Pammer v Reederei Karl Schlüter GmbH & Co KG and Hotel Alpenhof GesmbH v Oliver Heller* [2010] ECR I-12527) follow with seven governments having submitted observations.

reference procedure - means that the absent Member States and their judiciaries are not surveying and monitoring the cases before the CJEU. For instance, it could be assumed that the Nordic countries are very closely following the CJEU, due to their long-standing commitment to consumer protection.[97]

In the absence of interactions within the institutional framework of the preliminary reference procedure, 'transnational social networks' may be able to give the normative design of the procedure factual shape. Examples are the seminars of the European Academy of Law in Trier (Germany),[98] the European Law Institute in Vienna (Austria)[99] and the Centre of Judicial Co-operation in Florence (Italy),[100] which bring lawyers from all Member States (and beyond) together independent of their legal professions. In addition, there are networks between constitutional, administrative, and civil/commercial law judges created by the judiciaries themselves[101] and increasing (pre-litigation) cooperation between governments' legal agents has been observed.[102] The role and operations of such 'networks' - not to speak of more informal/interpersonal contacts - remain however largely opaque and unexplored. The claimed existence of a European polity must rely on the normative design of the preliminary reference procedure, independent of whether such exchanges take place. The tendency to self-governance in judicial networks might however lead to a closure which impedes polity-building.

C. Politicisation of Litigation

The degree of politicisation of judge-made European private law differs per case and depends on the type of litigation behind it. We distinguished three types in our study of the case-law: mass conflicts with a strong societal dimension, conflicts with a specific national legal context and disputes on legal interpretational issues. Each type can be associated with a different actor, if not a different mindset. The potential of litigation to contribute to EU polity-building is pronounced where creative or innovative legal professionals translate mass conflicts into legal questions that are brought to the attention of the CJEU. In such cases the political dimension of the preliminary reference becomes and is much more apparent than in situations where legal doctrine takes the lead. Mass conflicts are however the rarest type of litigation in European private law and a full investigation would require an analysis not only of the case-law but of all the Euro-lawyers involved in and around the cases.

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[97] T Wilhelmsson, 'The Emergence of Nordic Consumer Law and a Nordic Consumer Law Community and Its Impact on Nordic Legal Unity' in HW Micklitz (ed), *The Making of Consumer Law and Policy in Europe* (Oxford, Hart Publishing, 2021) 171.
[98] www.era.int.
[99] www.europeanlawinstitute.eu.
[100] https://cjc.eui.eu.
[101] For an overview of the most well-known networks, see M de Visser and M Claes, 'Courts United? On European Judicial Networks' in A Vauchez and B de Witte (eds), *Lawyering Europe. European Law as a Transnational Social Field* (Oxford, Hart Publishing, 2013) 75, 78-84; on judicial self-governance, see David Kosař, 'Beyond Judicial Councils: Forms, Rationales and Impact of Judicial Self-Governance in Europe' (2018) *German Law Journal* 1567.
[102] Granger (n 93) 69-70.

In mass conflicts - such as *Heininger* (doorstep selling of credit financed property), *Aziz* (mortgage enforcement proceedings) or *Schmitt* (PIP scandal) - there is a social problem that raises the question whether and to what extent litigation can contribute to find societally acceptable solutions. This is the prominent field of public interest litigation. It requires innovative legal professionals - be it a practicing lawyer who is defending the case or a judge who is delegating the dispute to the CJEU - who are confronted with a real-world problem, with people who suffer from a very concrete problem or with a broader societal and or political issue that has not yet found an acceptable legal answer.[103] The challenge for the legal professional is to find the best legal fit for the collective/societal problem at stake. It is striking that all the mentioned mass disputes concerned individual consumer litigants. Overall, consumer associations - at least formally - have not played a significant role in the case-law on European private law. Clearly different from mass conflicts are the two other types of litigation, namely those with a strong national background and those raising legal technical doctrinal questions. Many - if not most - of the technical legal issues have been discussed in legal doctrine prior to the dispute at issue. Legal scholarship had invested into the meaning of the technical terms prior to the litigation before the CJEU - such as the right to return goods purchased online without costs, the remedies under the consumer sales directive or the notion of defect in the product liability directive - long before the case went to court and reached the CJEU. The lawyer in charge of the case or the judge involved could rely on legal doctrinal considerations. However, that does not necessarily facilitate a process of reflection and interaction on the economic and social implications that are standing behind the technicality in the broader environment.

When it comes to private parties, the preliminary reference procedure puts the decision on who may participate in the procedure before the CJEU into the hands of the national legal orders. Private parties can submit an intervention only if they were already a party to the main national proceedings. Thus, to be able to reach the CJEU, the national requirements on legal standing play a crucial role. However, in European private law, contrary to environmental issues, legal standing never posed obstacles to test out the reach of EU law. It does not matter who the parties to the conflicts are, whether these are individual individuals, individuals as mandataire for a good cause or non-governmental organisations, typically consumer associations, defending the collective interests for consumers.[104] What looks clear in theory might however pose problems in practice. For instance, the procedural move in the law on unfair standard terms has brought the CJEU much closer to drawing a line between individual

[103] See for instance the account of José Mª Fernández Seijo - the national judge who submitted the preliminary reference in the *Aziz* case – in this book, 'Lights and Shadows of the Aziz case'. A further example, although from the area of EU environmental law, is the lawyer that devised the legal strategy in the *Janecek* case (Case C-237/07 *Dieter Janecek v Freistaat Bayern* [2008] ECR I-6221), see B Kas, 'Transforming the European 'Legal Field' by strategic litigation' in L de Almeida, M Cantero Gamito, M Djurovic and KP Purnhagen (eds), *The Transformation of Economic Law: Essays in Honour of Hans-W. Micklitz* (Oxford, Hart Publishing, 2019).

[104] Such a finding should not be conflated with the much more debated issue on collective legal redress, on whether for instance all European consumers who suffered from *Dieselgate* could address the CJEU and seek compensation directly through a European wide solution. The new Directive 2020/1828 on Representative Actions ([2020] OJ L 409/1) introduces minimum standards at the national level but provides for rudimentary rules on a European wide collective action only.

consumers and collective entities, let alone the linkage between the two. Several references, mainly from the Central and Eastern European countries pay witness to the difficulties that result from intermingling individual and collective interests.[105] Another example is *Asociación de Consumidores Independientes de Castilla y León* where the CJEU drew a sharp line between the position of consumer organisations and of individual consumers vis-à-vis traders. The Court clarified that the Unfair Terms Directive does not preclude national procedural rules under which actions for an injunction brought by consumer protection associations must be brought before the courts where the defendant is established.[106] A similar example is the famous *Schrems* case,[107] where the litigant collected 25 000 complaints for Facebook's infringement of privacy and data protection rights. The CJEU held that Mr Schrems may bring an individual action in Austria against Facebook Ireland, but that he cannot benefit from the consumer forum as the assignee of other consumers' claims for the purposes of a collective action.[108]

Taking a more distant perspective and looking at the role of the various actors in shaping EU law more generally, there is a striking difference between the preliminary references from the old Member States and the new Member States, including Spain. In the former, the use and usefulness of EU law was discovered mainly through national legislation that imposed barriers to trade. This applies to Germany with *Cassis de Dijon*,[109] Italy with *Zoni*,[110] the UK with *Sunday trading*[111] and France with *Keck*.[112] These cases were driven by business interests. In the latter, on the other hand, European private law was instrumentalised to fight down hardship for which national private law lacked the tools. Thus, somewhat overstated, one might argue that in the old Member States the market freedoms were used to strike down trade barriers, whereas in Spain and the Central and Eastern European Countries EU consumer law served to increase the level of social protection in the domestic legal orders. There are certainly inconsistences. Greek and Portuguese consumers were equally affected by the great crisis. But there were no references from their respective courts. Instead, citizens addressed the European Court of Human Rights to contest measures implemented by their governments in response to the economic crisis.[113] The same applies to five financial companies, which - as a last resort to counter the CJEU's protective outlook - tried to challenge Hungarian legislation implementing the CJEU's case-law on the Unfair Terms Directive 93/13 for violating their right to a fair trial (Article 6 ECHR).[114]

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[105] C Leone, 'The missing stone in the Cathedral: Of unfair terms in employment contracts and coexisting rationalities in European contract law' (PhD thesis, University of Amsterdam, 2020).
[106] Case C-413/12 *Asociación de Consumidores Independientes de Castilla y León v Anuntis Segundamano España SL* EU:C:2013:800.
[107] Case C-498/16 *Maximilian Schrems v Facebook Ireland Limited* EU:C:2018:37.
[108] ibid.
[109] Case C-120/78 *Rewe v Bundesmonopolverwaltung für Branntwein* [1979] ECR 649.
[110] Case C-90/86 *Criminal proceedings against Zoni* [1988] ECR 4285.
[111] Case C-145/88 *Torfaen Borough Council v B & Q plc* [1989] ECR 3851.
[112] Case C-267/91 *Criminal proceedings against Bernard Keck and Daniel Mithouard* [1993] ECR I-6097.
[113] C Kilpatrick and B De Witte (eds), 'Social Rights in Times of Crisis in the Eurozone: The Role of Fundamental Rights' Challenges' (2014) EUI Working Papers LAW 2014/05.
[114] *Merkantil Car Zrt v Hungary and four other applications* App no 22853/15 (ECtHR, 20 December 2018).

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IV. On the Way to a European Polity?

Bringing the 300 judgments of the CJEU into perspective raises lots of definitional issues - about the European Constitution, the role of private law in the European Constitution, the understanding of what private law means in the European regulatory context, the conceptualisation of the European society, the European epistemic community(ies) and the European polity and all this has to be analysed with a view to the particular role of the CJEU in the preliminary reference procedure. Based on our research the authors tend to subscribe to the idea that EU law in general and EU private law in particular is apt to build and develop over time a European polity or perhaps more realistically European polities around different legal fields. Such a finding, however, rests on several ambitious assumptions - a holistic perspective on the interaction between the CJEU, the national courts, the national governments, the Euro-lawyers involved in and around the litigation and the key role of the law as the 'glue' (Vauchez) which holds the law, the society and the polity together.

The overall process towards building a private law polity is certainly facilitated through the imperfect or incomplete constitutive elements of European private law - the claim of supremacy of Secondary EU law over national private law coupled to the vertical - not the horizontal - direct effect of Secondary EU law. The CJEU is thereby opening space for interaction in a heterarchical image of private law, where Euro-lawyers in different roles and functions can interfere in the search for solutions which take the CJEU's interpretation into account, without suffocating national adaptations.[115] The particular regulatory character of EU private law, its ambiguous nature in between public and private is an additional asset as it broadens the potential scope of Euro-lawyers, who may be public or private, EU focused or concentrating on the national context. The problem in European polity-building, however, results from the limited preparedness of the Euro-lawyers in the Member States and their national judiciaries to make constructive use of the space the CJEU is opening. There is a certain tendency that many of the 300 cases are perceived as 'national problems' referred to the CJEU in order to find a solution to a 'national' problem and not as a genuinely Europeanised issue, which might have an impact on all national orders in the Member States. Insofar it might be safer, more realistic and conceptually wise to speak of a European polity in the making, at least with regard to private law matters.

[115] G Tagiuri, 'How EU law politicises markets and creates spaces for progressive coding' (2022) *European Law Open* 390.