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FROM THE NATION STATE TO THE MARKET:
THE EVOLUTION OF EU PRIVATE LAW

Hans-Wolfgang Micklitz & Dennis Patterson

EUROPEAN UNIVERSITY INSTITUTE, FLORENCE
DEPARTMENT OF LAW

“EUROPEAN REGULATORY PRIVATE LAW” PROJECT
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The Evolution of EU Private Law*

HANS-WOLFGANG MICKLITZ & DENNIS PATTERSON

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European Regulatory Private Law: The Transformation of European Private Law from Autonomy to Functionalism in Competition and Regulation (ERPL)

A 60 month European Research Council grant has been awarded to Prof. Hans-Wolfgang Micklitz for the project “European Regulatory Private Law: the Transformation of European Private Law from Autonomy to Functionalism in Competition and Regulation” (ERPL).

The focus of the socio-legal project lies in the search for a normative model which could shape a self-sufficient European private legal order in its interaction with national private law systems. The project aims at a new-orientation of the structures and methods of European private law based on its transformation from autonomy to functionalism in competition and regulation. It suggests the emergence of a self-sufficient European private law, composed of three different layers (1) the sectorial substance of ERPL, (2) the general principles – provisionally termed competitive contract law – and (3) common principles of civil law. It elaborates on the interaction between ERPL and national private law systems around four normative models: (1) intrusion and substitution, (2) conflict and resistance, (3) hybridisation and (4) convergence. It analyses the new order of values, enshrined in the concept of access justice (Zugangsgerechtigkeit).

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Abstract

The State exists to deliver security and welfare to citizens. One of the principal functions of the State is to enhance welfare through the production of legal regimes. Law contributes to welfare in many ways, one of which is in its contacts with markets. In this chapter, we trace the evolution of the role of law in the private sphere, with special attention to EU law. Our thesis is that the State is in a process of evolution from a Nation State to a Market State. Looking at private law confirms this evolution.

Keywords

Law; State; Market State; Markets; Private Law

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FROM THE NATION STATE TO THE MARKET: THE EVOLUTION OF EU PRIVATE LAW

Part I: The State¹

The State² exists to deliver security and welfare to its citizens. The "State" is not a static entity. In the last five hundred years, the State has evolved through five distinct forms, which are properly characterized as "constitutional orders." As the State evolves, the grounds of its legitimacy vis-a-vis the nation changes. States produce legal systems consistent with the demands of legitimacy. As the grounds for the legitimacy of the State changes, so too does its legal system.³ In this article, we argue that the evolution of the State from a Nation State to a Market State⁴ can be seen at the level of EU private law doctrine. We use European Private Law Regimes to make the case for understanding and illustrating this evolution.

Over the course of the last five hundred years, the State has evolved through a number of configurations. While the Peace of Westphalia is often identified as the point of origin for the State, we agree with those who locate the origins of the State in the mid-seventeenth century.⁵ As the State evolves over time, its constitutive features change both in themselves and in relation to one another. At all times, the most important aspect of the evolution of the State is the degree to which the State responds to the demands of the nation⁶ in the course of legitimizing itself.

The State has two faces, an inner and an outer. The outer dimension of the State is comprised of two principal features: strategy and trade. At all times, states have a strategic relationship to other states, the most basic of which are peace and war. Trade is the second dimension of the outer face of the State. Trade ideology (e.g., mercantilism or comparative advantage) follows the constitutional order of the society of states in that each form of the State is complemented by a particular trade regime.

The inner face of the State is law and welfare. With respect to welfare, the modern nation-state provides support and protection for the nation. Additionally, the State improves the lives of citizens through law. The story of the nation-state is one of the rise of law and regulation as the means for betterment of the daily lives of the citizenry.

"Statecraft" embodies the outer and the inner faces of the State. Our argument is that these two dimensions of Statecraft interact with one another over time, and that the legal regimes produced by states must be structured so as to accord with the ethos of the State.

¹ Although the text is a joint production, the prime responsibility for Part I lies with Dennis Patterson, for Part II with Hans-W. Micklitz.

² We use the word "state" in two different senses. When we write "State," we are referring to the conceptual political entity that has evolved in the Western world over roughly the last five hundred years. See J.S. McClelland, *A History of Western Political Thought* 280 (Routledge, 1996) at 280 (dating the birth of the modern state at 1500). The State is manifested in many territorially and politically distinct "states," like Italy or the Republic of Latvia. When refer to these individual states, refer to them as a "state." For discussion of the various phases of the State's development, and their relation to a variety of constitutional orders, see Philip Bobbitt, *The Shield of Achilles: War, Peace and the Course of History* (Knopf, New York, 2002), at 69-347.

³ These ideas are elaborated in more detail in Dennis Patterson and Ari Afilalo, *The New Global Trading Order* (CUP: 2008).

⁴ The legitimacy of the market-State is grounded in its ability to provide economic opportunity for the citizenry. This is its purpose and its ethos.

⁵ See Bobbitt (2002) and Martin Van Creveld, *The Rise and Decline of the State*, p. vii (University Press, Cambridge, 1999).

⁶ The "nation" is an ethnographic construct or concept.

Our theory posits that the inner constitutional dimension of the State, law, is directly linked to the outer face of the State, that the inner constitution of the State varies from one epochal manifestation to the next, and that the interaction between the inner and outer faces of the State ultimately brings about transformative patterns that, over time, usher in the next era of Statecraft.

The inner face of the State is law and “welfare.” We understand welfare capaciously as both subventions by the State as well as the production of legal regimes designed to improve the lives of citizens. The latter is what we term “regulatory welfare”. Regulatory welfare refers to the regulation of the economic and social aspects of the State. Health, labor, environmental regulations, resource conservation, worker safety, competition laws, consumer and investor protection, are examples of regulatory welfare. We call the subvention part of welfare “entitlements welfare.” It encompasses the various regimes adopted by European states to ensure minimum standards of living for their subjects. These include unemployment benefits, retirement, health insurance, minimum income guarantees, housing aid, aid to families with children, education, and other welfare tools adopted by European states to ensure that their nation will not fall below a minimal safety net level.

“Statecraft” embodies the outer and the inner faces of the State. Our theory posits that the inner constitutional dimension of the State, law, is directly linked to the outer face of the State; that the inner constitution of the State varies from one epochal manifestation to the next; and that the interaction between the inner and outer faces of the State ultimately brings about transformative patterns that, over time, usher in the next era of Statecraft.⁷ Thus, the state-nation’s solidification enterprise, drawing on its subjects to consolidate the metropolis, wound up establishing a distinct “nation” that became associated with the state and its boundaries. This nation would become the foundational interlocutor of the nation-state, and the legitimating enterprise of the State would be to provide for its welfare.

In this essay, we seek to understand the European private law enterprise in light of a theory of Statecraft that views the State as undergoing successive epochal transformations. This theory holds that, in each era, a prevailing form of the State operates characterized by foundational features that define the nature of its internal law and its relations with other states. We review the historical and legal background of the European collectivity in light of our Statecraft theory, and explain how Statecraft sheds light and insight into the political, legal and institutional evolution of Europe and its crises, both past and present.

⁷ Cooper writes: “The kind of world we have depends on the kind of states that compose it: for the pre-modern world, success is empire and failure is chaos. For the modern, success entails managing the balance of power and failure means falling back into war or empire. For the postmodern state, success means openness and cooperation.” Robert Cooper, *The Breaking of Nations*, p. 76. (Atlantic Books, 2003).

Pre-Modern Era: No Possible Europe

We posit that the pre-modern era started with the French Revolution, spanned the Industrial Revolution, and ended with World War I. In this age of Statecraft, the State focused on its own consolidation. Internally, the pre-modern era involved a foundational *laissez-faire* policy coupled with the growth of a legal system designed to protect private property and contract rights. Externally, the State adhered principally to a zero-sum game intended to amass wealth. Taken together, these policies had the design and purpose of strengthening the industrial base of the developing states.

The state-nation⁸ legitimated itself by bringing unity out of diversity. It arose from the unification into one entity of largely unrelated territories, such as dukedoms, feudal territories, and princely states. The state-nation founded a single entity within discrete boundaries. Economically, it saw the rise of capital investment in the industrial base. Its ethos was to increase the power of the emerging sovereign. The internal legal system of the state-nation enabled its essential purpose. The state-nation adopted an economic legal structure designed to protect contractual and private property, rather than to extend entitlements to its subjects. Legal codes such as the Napoleonic Code were drafted.⁹ They protected the expectations of capital holders, and they did so by ensuring that in the common cycles of “boom-and-bust” policies that later in history came to be known as “Keynesian” did not interfere with the free evolution of the market.

Another way to conceptualize this era of Statecraft is to think of it as a “minimal welfare” constitutional era. A regime of entitlements welfare was inconsistent with the protection of capital. Industrialization and the concentration of capital required a freer market than a sophisticated system of welfare entitlements would permit. The same result obtained for regulatory welfare. Here, as well, the state-nation did not legitimize itself by providing protection to its nation. It had not even yet generated the concept of a nation. Instead, it drew on its subjects to amass resources and strengthen itself and, in the process, created the unified State resting on the nation that characterized the 20th century. In that context, regulatory systems like labor or consumer protection, environmental or resource conservation (generally, any of the 20th century administrative laws that we are familiar with) were not part of the internal legal fabric of the states. They would have burdened and hampered the solidification of the emerging industrial concerns at a time when the State derived its legitimacy from the protection of this very process.

Externally, the state-nation followed trade and strategic foundational policies that furthered a similar purpose: the consolidation of the state-nation. The state-nations of Europe colonized foreign territories and drew upon their resources to bolster their own commercial and industrial base.¹⁰ These foreign territories were viewed as resources with respect to which they were in competition with their neighbors. The colonial map of Africa bears witness to these struggles. It was comprised of states that carved through traditional tribal boundary lines, lumping together ethnic groups that historically had never been part of the same polity, reflecting territorial struggles and compromises among England,

⁸ The state-nation is the constitutional manifestation of a state characterized by a mobilization of a nation (a national, ethnocultural group) to benefit the State. This form of the State, exemplified by Napoleonic France, dominated Europe and America in the nineteenth century and ultimately gave rise to the modern nation-state with the advent of World War I. For a general description, see Bobbitt (2002) 144-204.

⁹ Alexander I. Grab, *Napoleon and the Transformation of Europe*, pp.50-51 (Palgrave Macmillan, 2003). Peter A.J. van den Berg, *The politics of European codification: a history of the unification of law in France, Prussia, the Austrian Monarchy and the Netherlands*, pp. 4-5, 206 (Europe Law Pub., 2007).

¹⁰ Francois Crouzet, *A History of European Economy, 1000-2000*, pp. 50-54, 165 (The University press of Virginia, 2001).

France, Belgium, Germany, Italy and other European colonial powers.¹¹ The European state-nations also followed a predominantly mercantilist policy, seeking to sell as much as possible and buy as little as possible from their trading interlocutors.¹²

In this environment, there was no foundation for a European Union. Each entity comprising the whole dedicated itself to consolidating its own base. The very ethos of the state-nation was antithetical to unity. States could not engage in an economic and strategic zero-sum game to strengthening themselves while at the same time seeking collaboration. Whether in the colonial battle field or in the realm of economic competition, the nature of Statecraft called for mustering the available resources to build a unified state.

The state-nation needed to build its industrial and commercial base. The state-nation process achieved that goal and, in the course of its enterprise, also created a nation associated with its physical boundaries. The Schuman Declaration may be read to perceptively understand that the European enterprise was not a matter of destiny. It described the failures of the nations of Europe, after World War I, to begin creating a unified whole. It did not argue, as Fukuyama or Ricardo did, that history had ended because we had reached a timeless and ultimate state of democratic rule or of economic organization. Instead, it acknowledged that the tragedy of Europe lay in its failure to recognize that, after World War I, a “united Europe was not created and we had war”.¹³ It recognized that in the post-World War I era, Europeans adopted a Treaty which reflected the state-nation era values of competition, zero-sum game, lack of cooperation, and domination. The result was a foundational rupture between the architecture of a basic treaty defining the relations among European states and the Statecraft of the age.

World War II was a catalyst to the adoption of the treaties and programs that shaped the world in the second half of the 20th century. Those treaties, as we explain below, are consistent with a nation-state, modern age of Statecraft. The GATT was signed at Bretton Woods and ushered in the trade liberalization enterprise, rejecting mercantilism and protectionism.¹⁴ It “embedded liberalism” in that each state participant enjoys, at least in theory, the sovereign right to establish and operate a welfare system of its choice, and at the same time removed barriers to trade and create a more efficient trading system. France could stay France and maintain programs ranging from universal education to the supply of subsidized *metro* tickets to large families, all the while participating in a liberalized system of trade that generated more global resources to share. The Marshall Plan ensured that the European trading partners had sufficient economic strength to be meaningful commercial interlocutors for the United States. The new modern order relied on balance of powers, alongside liberalized trade and integration among sovereign equals, and the Marshall Plan fostered European powers so as to bring about greater balance.

Europe, because of its unique suffering during World War II, engaged in a deeply integrationist enterprise that went well beyond what any other free trade area would aspire to accomplish. Nevertheless, its roots can be traced to a modern enterprise, albeit amplified by historical circumstances.

¹¹ Thomas Pakenham, *The Scramble for Africa*, p.21 (Avon Books, New York, 1991). H.L.Wesseling, *Imperialism and Colonialism, Essays on the History of European Expansion*, pp.12-20 (Greenwood Press, 1997). On colonization of Africa see also Vincent B Khapoya, *The African Experience: An Introduction*, (Prentice Hall, 2009).

¹² Peter Mathias and Sidney Polland, *The Cambridge Economic History of Europe*, Volume VIII, p. 103 (Cambridge University Press, 1989).

¹³ The Schuman Declaration (Paris, 9 May 1950), http://europa.eu/abc/symbols/9-may/decl_en.htm

¹⁴ After the initiation of Bretton Woods, international trade proliferated six-fold from 1948-1973. See <http://econ2.econ.iastate.edu/classes/econ355/choi/bre.htm>

Europe: The Early Years

By the end of World War I, after the adoption of the Treaty of Versailles, the European states had graduated to the early stages of the nation-state era. During that era, the State would marshal its power to provide for the welfare of its nation. At that time, the seeds that had been sown for the establishment of a European collectivity based on free trade and common political institutions had yielded a collectivity of states ready to engage in the European endeavor.¹⁵ The European Union was ready to proceed as a project of integration of discrete nations into a whole that would be inextricably bound but would at the same time respect national sovereignty.¹⁶

The historical basis of Europe is succinctly expressed in the Schuman Declaration: “A united Europe was not achieved, and we had war”. By binding France and Germany to a union and partnership for coal and steel, the resources of war, the community of Europe would make war not only “unthinkable but materially impossible.” Europe would not be achieved overnight. It would focus on concrete achievements and, in leaps and bounds, become a polity that could in time fairly be labeled as the “United States of Europe.” In the meantime, foundational treaties were designed to shelter the sovereign right of the Member State to engage in regulatory and entitlements welfare.

European exceptionalism joined Statecraft to create a highly integrated Europe. The European Treaties went well beyond the free trade treaties (e.g., the GATT) that were adopted after World War II. They included a commitment to a single, tariff-free market and the removal of non-tariff barriers to trade. The GATT, on the other hand, contemplated a gradual reduction of the applicable tariffs through a “binding system” that capped the tariff each state could apply in any product category, and a most-favored-nation system that (save for regional commitments) required that the lowest tariff extended by the GATT members to any trading partner be extended to all. The European Community, as successor to the European Coal and Steel Community, also established common institutions mirroring those of the ECSC that the GATT and other integration systems did not come close to achieving. As explained in greater depth below, Europe attempted to replicate the institutional structure of modern liberal democracies by instituting legislative bodies, an executive-like agency, and a constitutional court. The Treaties also gave individuals a right of access to national courts to enforce rights granted under European law.¹⁷

While the European Treaties were bolder and more ambitious than any international treaty in force at the time, this overall design still provided a substantial level of protection of the Member States’ ability to legislate both regulatory and entitlements welfare. Each Member State could, to a certain extent, remain a “black box” in which it enjoyed freedom to determine how best to support the welfare of its nations, free from interference by European law.¹⁸

The initial challenges of Europe involved the familiar questions attendant to the integration of discrete nation-states into a single market. When borders are open to trade, although formally regulatory welfare remains unaffected, the disparate regulatory levels travel along with the goods.

European judicial and political institutions reacted to this challenge of integration with a significantly greater pro-trade oriented approach than other integration projects that did not feature the European

¹⁵ Anthony Sutcliffe, *An Economic and Social History of Western Europe Since 1945*, at 106 (Longman, New York 1996).

¹⁶ Damian Chalmers, Gareth Davies and Giorgio Monti, *European Union Law. Cases and materials.*, pp.7-9 (Cambridge University Press, 2010); Neill Nugent, *The Government and Politics of the European Union*, pp. 9-16 (Duke University Press 5th ed., 2003).

¹⁷ See Case 14/83 Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen [1984] ECR 1891.

¹⁸ For quite some time the constitutional courts of the Member states contested the European Court of Justice’s position on fundamental rights issues. Thus, in 1970 the German and Italian constitutional courts stated they would not apply provisions of EU Law that failed to respect the fundamental rights and values set out in their national constitutions. See in this respect *Internationale Handelsgesellschaft*, [1974] 2 C.M.L.R. 540 and *Frontini v. Ministero delle Finanze* [1974] CMLR 386.

commitment to creation of a new legal order.¹⁹ In its early decisions, the European Court of Justice made certain that any measure that actually or potentially, directly or indirectly, hindered trade, would be subject to its judicial scrutiny.²⁰ In all cases, barriers to trade arose out of the disparity among national regulations.

The unbridled integrationist purpose of the European Court of Justice thrust it in the midst of a European review of national measures. At the same time, the Court found that European law would have direct effect as long as it was clear and unconditional.²¹ It implied a supremacy clause in the Treaties.²² It also found an implicit “Bill of Rights” in the common traditions of the Member States, thereby assuaging the national judicial fears that an all-powerful European law would trump national constitutional human rights provisions. As Professor Weiler observed in his seminal article “The Transformation of Europe”²³, the political institutions of the Member States (in particular, France) did not expect that the Treaties would be interpreted in such an aggressive integrationist manner

As we explain below, every modern trade-liberalizing system ultimately erodes sovereignty and sows the seeds of its own demise. Modern Statecraft is based on sovereignty and the notion that liberalizing trade can be done without infringing sovereignty. While each trade system will, by definition, seek to balance these conflicting values (often choosing sovereignty-protection), over time, the diffuseness and interloped nature of liberalized integrated markets erodes the black box nature of the participating states. This destroys the conditions that made modern trade interaction desirable, and necessitates a new system.

Owing to its unique history, Europe witnessed this phenomenon very early (at the height of the modern era), hence the significance and political sensitivity of the Luxembourg crisis.²⁴ The Member States rejected the combination of aggressive economic constitutional jurisprudence, passage to less-than-unanimity voting, and closure of selective exit through hardening of law because they could not fathom a situation where other States would outvote them and dictate welfare policy. The sensitivity to welfare and sovereignty, however, was no accident: it was a unique product of the modern age. As we explain later, the Member States had no issue abandoning the Luxembourg compromise whereby each State could veto European legislation that it disliked later in the 20th century, because by then they had graduated to a post-modern market-state age. The protective reflex that led to the Luxembourg accords, thereby saving the European enterprise, stemmed from fundamental nation-state constitutional principles: preservation of regulatory welfare, sovereign right to legislate in that area free of international and supranational interference, and sovereign limitation on the import of foreign standards into the domestic market.²⁵

The closure of selective exit was unpalatable because it would have established a foundational system more characteristic of the market-state, where sovereignty is subordinate to international measures to solidify and protect markets. The European plan to install such a system was scheduled to take effect

¹⁹ See Michelle P. Egan, *Constructing a European Market*, ch.4 (Oxford University Press, 2001).

²⁰ See Case 41/74 *Van Duyn v. Home Office* [1974] ECR 1337.

²¹ See Case 26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administratio*, [1963] ECR 1.

²² See *Flaminio Costa v ENEL* [1964] ECR 585 (6/64); C-106/77, *Simmenthal II* [1978] ECR 629; C-106/89 *Marleasing* [1991] ECR I-7321.

²³ Joseph H.H. Weiler, The Transformation of Europe, *The Yale Law Journal*, Vol. 100, No. 8, Symposium: International Law. (June, 1991).

²⁴ N. Piers Ludlow, De-commissioning the empty chair crisis: The community institutions and the crisis of 1965-6, pp. 79-96, in Wallace, Helen and Winand, Pascaline and Palayret, Jean-Marie, (eds.) *Visions, votes and vetoes :The empty chair crisis and the Luxembourg compromise forty years on* (Peter Lang, Brussels, Belgium 2006).

²⁵ See Weiler, *The Transformation of Europe*, above, at p. 2457.

in the thick of the modern nation-state era. This was inconsistent with the legitimacy demands on the State, and with its need to provide welfare unimpeded by international regulatory schemes.

Democracy Deficit

Statecraft also explains the institutional challenges that arose in the formative years of Europe, and how those challenges were met. In the modern nation-state age, the global collectivity of states agreed to open up borders to trade, all the while preserving in theory each individual state's ability to establish the welfare system of its choice.²⁶ France could remain France and extend half-price metro tickets to families with many children, England could continue to adhere to cradle-to-grave programs, Japan could engage in indicative planning, and the United States could tax and spend.

Europe had to adopt a political decision-making structure for crafting laws that would harmonize the single market and that, in light of the decisions of the European Court on constitutional issues, would be binding throughout the Member States. This was another manifestation of European exceptionalism. One of its initial foundational challenges, then, was how to design those institutions.

Europe quickly fell into the trap of trying to resolve this issue by replicating the political institutions of the nation-state attempting, in effect, to create a European "super-nation-state," one that would protect the welfare of the European collectivity. Europe adapted the institutions with which the Member States were familiar. Where it acted through its institutions for the whole, Europe would replicate the European modern liberal democratic state.

This is what led to what came to be known as the "European democracy deficit". The democracy deficit debate often took the form of a critique of Europe's failure to adopt institutions that better replicated those of modern liberal democracies.

Europe also sought to replicate the modern constitutional protections of minority rights. After it announced its supremacy jurisprudence, the European Court assuaged the fears of national judiciaries and other interlocutors by implying a Bill of Rights in the European treaties, which included none.²⁷ The fundamental rights guaranteed by this jurisprudence would be inspired by the common values of the Member States.

However, as more insightful observers commented, this nation-state reflex to determine welfare by majority or other democratically-endorsed voting quorum missed the core question of integration in the modern nation-state era: how to craft rules for the whole all the while respecting national sovereignty. Whether an alliance of national members of Parliament voted down another set of Member State representatives directly elected by the people, or whether this happened through a vote of the executives delegated to the Council, the integrated area would overrule national choices that were the essence of Statecraft in action in the modern age. No matter how much representative democracy was infused in the system, the malaise caused by the democracy deficit would not dissipate.²⁸

²⁶ See John Gerard Ruggie, *International Regimes, Transactions, and Change: embedded liberalism in the postwar economic order*, pp. 385-388. International Organization, Vol. 36, No. 2, International Regimes (Spring, 1982).

²⁷ Joseph H.H. Weiler, Eurocracy and Distrust: Some Questions Concerning the Role of the European Court of Justice in the Protection of Fundamental Human Rights within the Legal Order of the European Communities, p. 1105. Washington Law Review, Vol. 61, Issue 3 (July, 1986).

²⁸ See *id.*, at pp. 2466-2474.

From Luxembourg to Maastricht: Accession to the Age of the Market State

The Luxembourg crisis both saved and tempered the integration enterprise of Europe. Bargaining “in the shadow of the veto”²⁹ sheltered sovereignty but slowed the adoption of European integration measures. By the 1980s and 1990s, however, Europe picked up speed and moved rapidly ahead with the harmonization or approximation of its laws on a larger scale. Complementing the more perfect unification of its single market, Europe then proceeded to adopt a single currency, European citizenship, an agreement for the removal of border controls among Member States belonging to the Schengen zone, and other institutional and political breakthroughs that pushed Europe significantly along the integration road.

We posit that, while other factors surely contributed to it, the acceleration of the integration of Europe was made possible by the accession to the age of the market-state. Nation-states are bound to evolve into market-states over time. Their inner ethos, welfare for the nation, corresponds to their outer face: integration through trade while preserving sovereignty. Trade in goods and services inevitably leads to capital flows and interloping ownership of global assets. This is true especially in an integrated area like Europe, where the movement of capital and people is ensured and encouraged to a much greater extent than in other trade regulatory schemes. The integrated area will then tend to become more diffuse and use its “black box aggregation character.” Industries and other commercial sectors will tend to be dissociated from the nation. Regulatory welfare will be disrupted by the growing import of goods manufactured under other regulatory conditions. In time, jobs and production will be increasingly outsourced.

In this environment, the State loses control over regulatory and entitlements welfare. Traditional tools such as exchange rates become regulated by the market to a much greater extent than by the State. States gradually lose their ability to incur national debt because foreign debt holders gradually displace nationals. The free flow of goods carries with it disparate regulation. With the aging of a population that boomed after World War II with renewed birth rate and immigration, budgets for entitlements welfare come under excessive strain. In turn, the nature of sovereignty changes as the ethos of the State shifts away from providing top-down regulatory and entitlements welfare to fostering and preserving market conditions where economic opportunity can be maximized.

This is the legitimating ethos of the market-state. Instead of providing top-down welfare, the post-modern Market State unleashes its power to ground the market and maximize the enablement of economic opportunity for its citizens. This may translate into legislation that is similar to that which obtained in the nation-state. Securities disclosure or bank capitalization laws, for example, protect consumer welfare while fostering market stability. Even entitlements such as aid to education may belong to both ages, although vouchers and other market-based solutions may be more appropriate to the market-state era. In the changed post-modern globalized terrain, market failures in one segment of the market can travel rapidly to threaten and infect other segments across borders. The collectivity of states must dedicate itself to create conditions that stabilize and solidify the enlarged market. The process is not unlike that of the state-nation; even if it infringes on what would have been viewed as unassailable welfare sovereign rights in the middle of the 20th century, it is necessary to maintain the architecture of the 21st. This is the pattern that Europe followed.

We place the emergence of the market-state toward the end of the 20th century, when global economies started to integrate to such an extent that black box Statecraft eroded enough to give way to a more diffuse, interloped set of market-states whose ethos focused on the preservation of the market and the maximization of opportunity, rather than top-down welfare entitlements. Europe’s expansion into market-state regulatory territory coincided with this timetable. In effect, “[i]n the late 1980s the Single European Act was passed to facilitate the creation of a single market by streamlining the method by which harmonization laws were made. These laws were designed to complete the single

²⁹ See Weiler, *The Transformation of Europe*, above, at p. 2450.

market by the end of 1992.³⁰ Prior to 1993, over 300 measures were passed into law”.³¹ Thereafter, hundreds more measures were adopted, thereby bringing the regulatory welfare landscape of Europe into substantial conformity. This was the birth of what we later call European Regulatory Private law.

The Treaty of Maastricht built upon the SEA by completing the single market and establishing the European Monetary Union in three successive stages. The Treaty requires the Member States to “ensure coordination of their economic policies” (a significant move to which we will come back later in this essay), and to “provide for multilateral surveillance of this coordination.” In addition, the States “are subject to financial and budgetary discipline”. Monetary unification was an extremely significant step in the evolution of Europe, which was also consistent with accession to the market-state. The objective of monetary policy is to create a single currency and to ensure this currency's stability by maintaining price stability, economic policy coordination, and respect for the market economy.³²

The convergence of economic policy that came with monetary unification goes to the heart of welfare entitlements. Although Europe did not adopt a common fiscal policy, it did not infringe on the welfare system of Member States in that it left them free to craft social security and health, education, retirement and other mainstays of welfare as they saw fit. But entry to the Euro zone demanded that participating Member States adhere to specified macroeconomic goals.³³ These European requirements made sense in a market-state age where protecting market opportunity becomes the ethos of the State and an animating principle of the relationship among states.

³⁰ Article 13 of the Single European Act (“SEA”), which entered into force in 1987 amended, inter alia, article 8a of the Treaty Establishing the European Economic Community (“EEC Treaty”) so that it read: “The Community shall adopt measures with the aim of progressively establishing the internal market over a period expiring on 31 December 1992. The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty.” The SEA is available at: http://ec.europa.eu/economy_finance/emu_history/documents/treaties/singleeuropeanact.pdf

³¹ More at: http://www.lavellecoleman.ie/cuuploads/editor/file/England%20and%20Wales%20pdfs/UsingEuropeanLaw2/5_%20Harmonisations%20of%20Laws.pdf

³² See: http://europa.eu/legislation_summaries/economic_and_monetary_affairs/institutional_and_economic_framework/treaties_maastricht_en.htm. See also article 105 of the Treaty on European Union (TEU) added by the Maastricht Treaty. The consolidated version of the TEU is available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2006:321E:0001:0331:EN:PDF>

³³ These criteria, established by the Maastricht Treaty and referred to as the “Maastricht Criteria”, were enshrined in articles 104 and 121(1) of the TEU, as well as in Protocol (No 20) on the Excessive Deficit Procedure, and Protocol (No 21) on the Convergence Criteria referred to in Article 121 of the Treaty on European Union. Such criteria may be summarized as follows: “1)inflation of no more than 1.5 percentage points above the average rate of the three EU member states with the lowest inflation over the previous year. 2) A national budget deficit at or below 3 percent of gross domestic product (GDP) 3) National public debt not exceeding 60 percent of gross domestic product. A country with a higher level of debt can still adopt the euro provided its debt level is falling steadily. 4) Long-term interest rates should be no more than two percentage points above the rate in the three EU countries with the lowest inflation over the previous year. 5) The national currency is required to enter the ERM 2 exchange rate mechanism two years prior to entry [to the Euro zone]” http://glossary.reuters.com/index.php/Maastricht_Criteria

Lisbon – the Market State Takes Shape

Lisbon is an eminently early market-state era treaty. While it continues the European tendency to replicate the structure of the nation-state at the integrated area level, it does not hesitate to give the European polity powers that nation-state Statecraft could never have tolerated be transferred from the nation. Lisbon gives Europe an important foreign policy unified voice. It consolidates it into a legal personality that will make it easier to accede to agreements and international institutions. It gives more power to the European Parliament while making qualified majority at the Council level the default. It transfers to the European Court jurisdiction over areas that are traditionally associated with the nation-state's competence in the previous Statecraft age. It further Europeanizes human rights by strengthening the legal status of the Charter of Fundamental Rights. It increases the coordination between national and European institutions, strengthens the concept of subsidiarity, and moves Europe theoretically further down the role of a quasi-Federal entity. But it did not properly lay the ground for the development of a European Civil Code, as we will demonstrate.

Altogether, these developments are consistent with the diffuseness of an integrated area that arose out of its nation-state iteration, in the early age of the market-state evolution. They reflect attempts to shore up the collective whole by strengthening the power of its institutions and loosening the decision-making capacities, all the while addressing some of the remnants of the nation-stage age issues, such as the democracy deficit.

In this respect, Lisbon is most conspicuous for what it does not include: a coordination of budget and tax policies in the integrated single market for goods, services, capital, and persons. These aspects of integration are some of the last frontiers of the dismantlement of nation-state welfare. Welfare entitlements depend on the budget and tax choices made by the nation-state. While the Eurozone nation-states of Europe committed to a certain degree of convergence, Europe fell short of unifying or harmonizing budget and tax choices. The nation-state's reflex, whether it is expressed in French strikes to protest the proposed lowering of the retirement age or Greek debt issuance, evidently does not allow Europe to strip its members of welfare entitlements sovereignty at this early market-state age.

The situation just described is akin to the state-nation reflex of the post-World War I era that prevented the emerging nation-states from trading among themselves based on comparative advantage and the preservation of sovereignty. Architecturally, Europe had to shed its mercantilist skin in exchange for an economically collaborative one. Today, Europe must begin to shed its national welfare entitlements skin and trade it in for a market-state budget and tax policy that will inevitably cut deep into the welfare entitlements programs of the 20th century. Failure to do so will lead to existential crises akin to the trade wars of the 1920s and 1930s. The reason is this: in a diffuse and intertwined market, the welfare entitlements choices made by one national component reverberate and threaten those made by others. The Greek and Irish debt crises illustrate this claim.

Part II: European Private Law

We want to demonstrate how the European Union, being understood as a market state, affects the private legal order (Privatrechtsordnung) of the Member States and the design of the emerging European private legal order.³⁴ We argue that the national private legal orders may be equated with the pre-modern state nation and later the nation state of the 20th century, whereas the emerging European private law Europe may be equated with the EU market state. We use the distinction between the inner and the outer space as a blueprint. In the inner space of the Internal Market, the EU is building smoothly but steadily a genuine private law that must be kept distinct from nation state codifications. In the outer space the EU market state and the MS nation states are engaged in a battle over competences, which seems to challenge our hypothesis of a strong correlation between the inner and the outer space of the EU. However, it will have to be shown that the competence battles are largely of an ideologically character that do not impede the development of a European private law beyond the EU.

Our argument is based on a particular understanding of private law (meaning “economic law”) that reaches beyond nation state categories of private legal orders. Only such a broadened frame opens the way to understanding this evolution. The transformation happens over time, takes various forms and it is not homogeneous. The process begins with the Single European Act. We will use four parameters for getting to grips with the tensions between the nation state private legal orders and the market state European private law: conflict and resistance, intrusion and substitution, hybridisation and convergence.

Traditional Nation State Private Law vs. Modern European Market State Private Law

Private law is understood as economic law,³⁵ covering not only contract and tort or systematically speaking the continental codifications but also public and private regulation of the economy. The broad understanding of private law is crucial for the development of a deeper understanding of the ongoing transformation process in the EU. The traditional national private legal orders with its focus on contract and tort present the *nation-state variant of private law*. They have emerged and they are deeply rooted in the state nation and nation state building process of the 18th and 19th century in continental Europe. International private law formed the conceptual answer to decide on the applicable law in cross-border transactions.

European Union private law is different. The European Union is not a state, at least not a nation state or a state of nations. What makes the discourse on the European Constitution, with a big or a small ‘c’,³⁶ difficult is the fact that the conceptual design of the EU legal order is so deeply entrenched by nation state constitutional patterns, overlooking the potential of the ongoing transformation process, as has been shown above.³⁷ The debate (now over ten years old) over the feasibility of a European Civil Code³⁸ fits neatly into such a distorted perspective, which is just a mirror image of the constitutional

³⁴ In order to avoid the always odd reference to own contributions, we mention those who form the background to this paper once, H.-W. Micklitz, *The Visible Hand of European Private Law*, in *Yearbook of European Law* 2009, volume 28, P. Eeckhout/T. Tridimas (eds.), 2010, 3-60.

³⁵ Assmann/G. Brüggemeier/D. Hart/Ch. Joerges, *Zivilrecht als Teil des Wirtschaftsrechts*, 1980.

³⁶ N. Walker, ‘Big ‘C’ or small ‘c’’, (2006) 12 *ELJ* 12-14.

³⁷ J. Habermas, *Zur Verfassung Europas, Ein Essay*, 2011, Edition suhrkamp.

³⁸ The official start might be dated back to the Communication of the European Commission, although the European Parliament had been advocating for a European Civil Code already since the early 1990s.

debate. The 2001 document of the European Commission, enumerated mainly European international private law and consumer contract law directives. The first category is conceptually speaking no more than a European variant of long-standing attempts at the international level to agree on common standards on how the applicable law should be determined. Consumer law had raised more awareness being the gateway for the European Union to instrumentalize consumer contract law for completing the internal market, long before the discussion on a European Civil Code started. The second source of inspiration constituted the nation state private legal orders. Perhaps not thinking but discussing private law in categories of the nation state must cast a blind eye to the development of private law outside nation state formed categories. Not being a state, the European Union was never concerned with the underpinnings of national private law, with private autonomy or freedom of contract. In the completion of the Internal Market the European Union appears as a regulator, be it through the ECJ which is challenging national economic rules that hinder free trade of products, services, capital or persons or be it through the EU legislator which is adopting horizontal or vertical market related rules on private transactions, often by way of new modes of governance.³⁹ Regulatory private law, in its negative variant through the impact of the four freedoms on the private law and in its positive variant through the bulk of EU rules that have been adopted in the aftermath of the Single European Act outside Consumer and Anti-discrimination Law, serves the EU *market state* now comes clear. *This* private law is different from national private legal orders which based on private autonomy and free will, it is a private law which takes its form, its procedure and its content from being instrumentalised for building and shaping markets.⁴⁰

There is an obvious argument against such a distinction between *nation* states being equated with contract and tort law, with freedom of contract and private autonomy and *European* private law being regulatory in nature meant to design markets. Regulation in private law has been discussed already for more than hundred years. *Otto v. Gierke* is among those who criticised the distinction between formal private law of the pre-morden state and private law regulation, which contained the nucleus for what should become the welfare state in the 20th century.

Regulatory law in the late 19th century was mainly labour and social law which was kept outside the BGB. Today's regulatory private law cuts across all sectors of economic policies. In particular, it lies at the heart of service contracts on financial services, on telecommunications, on energy (electricity, gas), on (the increasingly privatised) health care services, last but not least on transport which amount for 70 % of the gross income in the EU. The driving force behind all these rules that aim mainly at opening up markets, at establishing competition, at liberalising former public services, at promoting privatisation in former areas of public services, is undoubtedly the EU, more precisely the European Commission. Private law issues tie in only in between other more 'important aspects' of the appropriate market design. This private law is regulatory law, but "regulatory" should not be equated with rules that restrict private autonomy and freedom of contract. Its instrumental character shields them from easy classification. Regulatory private law may contain both elements, establishing market freedoms, therefore increasing private autonomy, while at the same time providing for rules that set boundaries to the newly created market autonomy.⁴¹

The regulator of hundred years ago was the nation state, which used its regulatory power to shape national markets for national economies. The establishment of the European Economic Community in 1957 changed the economic, political and social environments. Nowadays it is the EU which has garnered the necessary support at all institutional levels to adopt regulatory measures. The relevant pieces of secondary Community law address economic actors, business and consumers, who are ready

³⁹ Cafaggi/Muir Watt, F. Cafaggi/H. Muir Watt (eds.), *Making European Private Law*, 2008; same authors *The Regulatory Functions of European Private Law*, 2010.

⁴⁰ In the German understanding private law as economic law, Privatrecht als Wirtschaftsrecht, see for Europe Ch. Schmidt, *Die Instrumentalisierung des Europäischen Privatrechts durch die Europäische Union*, 2010.

⁴¹ As prominently designed in the White Paper of the Completion of the Internal Market COM (1985) 310 final.

to invest into a market that offers more opportunities and better choices on both sides. The legislative means and regulatory tools, not to speak of the particular content of the rules, inherently bear a crossborder dimension. This might explain why the EU has to ‘invent’ new devices that fit overall policy objectives.

Four Parameters for Analysing the Transformation within the EU

The four categories are meant to capture the set of variants available in the relationship between nation state private law and market state European private law.⁴² They share a common theoretical background in legal theories of private law as economic law⁴³ and theories analysing private law beyond the state⁴⁴ and in institutional economics. We have identified four parameters which tentatively allow us to describe and analyse the interaction between nation state private law regimes and market state European private law regimes: conflict and resistance, intrusion and substitution, hybridisation and convergence. Without any attempt to explain the deeper reasons behind each category, we will use them in a rather pragmatic way to clarify the relationship between nation state private law and market state European private law.

(1) *Conflict and resistance*:⁴⁵ This is suggested as one of the possible reactions of the Member States. The perspective is that the Member States do not give way to the intruding European regulatory private law. Instead, they provoke a clash between the European regulatory private law and the national law and set limits to where the intruding law ends and where the national laws begin.

In defending the national private legal order, more precisely national civil codes, Member States defend nation states patterns. The political and academic reactions in the Member States on the feasibility of a European Civil Code provide ample evidence for such an understanding. Even the academic world is divided between the ‘believers’ and the ‘opponents’. The discourse sometimes evinces a degree of hostility.⁴⁶ With the adoption of the draft Regulation on a Common European Sales Law (CESL) the remnants of the European civil code project reaches the political agenda in the Council of Ministers, in the European and national Parliaments. Parliaments of seven Member States have raised objections against the draft Regulation mainly for lack of competence. Whilst this does not suffice to stop the initiative under the rules of the Treaty, it provides evidence of strong resistance in a considerable number of Member States against any attempt of the EU to intervene into the core of the nation states private legal orders, i.e. into sales law.

⁴² The following is no more than a snapshot of the theoretical background that guides our analysis. This is not the right place to explain the deeper reasons. For the purpose of this paper, we will simply ‘use’ and ‘apply’ what we have developed elsewhere.

⁴³ L. Raiser, *Die Zukunft des Privatrechts*, 1971.

⁴⁴ R. Michaels/N. Jansen, *Private Law Beyond the State? Europeanization, Globalization, Privatization*, (54) *American Journal of Comparative Law* 2006, p. 843.

⁴⁵ See for a deeper understanding B. Tamanaha, *Understanding Legal Pluralism, Past to Present, Local to Global*, (30) *Sydney Law Review*, 375; D. Caruso *The Missing View of the Cathedral: The Private Law Paradigm of European Legal Integration*, *ELJ* (3) 1997, 3; L. Niglia, *The non-Europeanisation of Private Law ERPL* 4 (2001) 575.

⁴⁶ E.g. F Yves Lequette, *Quelques remarques à propos du projet de code civil européen de Monsieur von Bar*, *Recueil LeDalloz* 2002, 2202-14; Bénédicte Fauvarque-Cosson, *Faut-il un code civil européen?*, *Revue Trimestrielle De Droit Civil* 2002, 463; also, *Droit européen des contrats: première réaction au plan d'action de la Commission*, *Receuil le Dalloz* 2003, 1171; Ph. Malinvaud, *Réponse-hors délai- à la Commission européenne: à propos d'un code européen des contrats*, *Receuil La Dalloz* 2002, 2542-51; Jean Heut, *Nous faut-il un ‘euro’ droit civil?* *Receuil La Dalloz* 2002, 2611-14; P. Legrand, *Antivonbar*, *Journal of Comparative Law* 1 2006, 13

(2) *Intrusion and substitution*:⁴⁷ This is suggested to be the perspective of the current EU law-making and law enforcement strategies, enshrined in the idea of a self-sufficient order composed of three major elements: (1) the horizontal and vertical sectoral rules; (2) the general principles enshrined in the horizontal and vertical sectoral rules; (3) the general principles of civil law.⁴⁸

Regulatory private law is the blueprint for understanding the transformation process. The EU is bypassing the nation states and developing its own design for a market based private legal order, an enabling legal order. The standard model for private law as a self-sufficient order is the sectorial rules on telecommunication, energy, financial services and transport. Self-sufficiency means the whole process of law-making up to law enforcement follows sector specific patterns. The Member States have given way to substitution and intrusion by adopting generations of secondary community law (1st, 2nd and 3rd between 1986-2010) rules which aim at establishing a European market for telecommunication, for energy and for transport. When the EU implements rules into national law are usually kept distinct from the codified national private legal orders. They are enshrined in national acts that leave the structure of the EU regulatory approach intact, which means leaves market access rules and private law rules intact. Some Member States have compiled consumer law in a separate code, most of them integrate the relevant rules sector by sector into their national legislation.

(3) *Hybridisation*:⁴⁹ This is suggested to be an overall normative model of a composite legal order, within which the European and the national legal orders both play their part in some sort of a merged European-national private legal order. Hybridisation means that the legal character of the respective rule is neither European nor national. It bears elements of both legal orders and is therefore supposed to be hybrid.

From an historical perspective, this is an old form of the co-existence of different legal patterns. The colonial experience provides ample evidence for hybrid legal orders. In modern times hybridisation characterises the relationship between private legal orders and constitutions. In view of the envisaged analysis, one might understand hybridisation as a means to leave space for nation state private legal orders and self-standing market state private legal order(s). Understood in this way, hybridisation can be found mainly in the so-called “constitutionalisation” of private law. The development started decades ago in the Member States, when national courts referred to constitutional rights to intervene into classical private law cases, mainly in order to enhance the importance of social rights in private law matters.⁵⁰ The ECJ, as well as the ECtHR, have begun an ever stronger form to use human rights and since 2000 fundamental rights as a means to enhance the position of the individual be it against his or her state, be it horizontally in private law relations.⁵¹ The result is a hybrid order, where nation state remedies form the ground which is then be examined against European fundamental and human rights.

⁴⁷ The link to system theory is obvious, though not sufficient, see G. Teubner, *Self-subversive Justice: Contingency or Transcendence Formula of Law*, 72 *MLR* 2009, 1.

⁴⁸ ECJ 10.4.2008 Case C-412/06 – Hamilton, at 42; AG Trstenjak, Case C-489/07 Messner, at 91 and 108, ECJ at 29; 15.10.2009 Case C-101/08 – Audiolux ECR 2009 I-nyr; J. Basedow, Mangold, Audiolux und die allgemeinen Grundsätze des europäischen Privatrechts, *Festschrift für K. Hopt* 2010, 27; St. Weatherill, The ‘principles of civil law’ as a basis for interpreting the legislative acquis, *ERCL* 2010, 74; A. Hartkamp, ‘The General Principles of EU Law and Private Law’, *RechtsZ* 2011, 241.

⁴⁹ Th. Duve, *An Early Globalization of Justice? Historical observations on mechanisms of creating normative coherence in the Age of Discovery*, paper presented at the University of Helsinki, September 2011; I.-J. Sand, *Hybrid Law – Law in a Global Society of differentiation and Change*, in: Galf-Peter Calliess; Andreas Fischer-Lescano; Dan Wielsch and Peer Zumbansen (eds.): *Soziologische Jurisprudenz: Festschrift für Gunther Teubner*, Berlin: Walter de Gruyter, pp. 871-886.

⁵⁰ O. Cherednychenko, *Fundamental Rights, Contract Law and the Protection of the Weaker Party: A Comparative Analysis of the Constitutionalisation of the Contract Law with Emphasis on Risky Financial Transactions*, doctoral dissertation – Utrecht University, 2008; Ch. Mak, *Fundamental Rights in European Contract Law. A Comparison of the Impact of Fundamental Rights on Contractual Relationships in Germany, the Netherlands, Italy and England*, Alphen aan den Rijn: Kluwer Law International, 2008.

⁵¹ N. Reich, *Horizontal Liability in EC Law – Hybridisation of Remedies for Compensation in Case of Breach of EC Rights*, *CMLR* 2007 (44) 704.

(4) *Convergence*:⁵² This is suggested to be a process of mutual approximation of the two different legal orders, of nation state based legal orders and market based legal order(s). They are not merged like in the concept of hybridisation, they still exist side by side, but they are drawing nearer to each other. Convergence is not bound to mandatory standards and default rules. It instead enshrines in particular the new modes of governance, co-regulation and self-regulation, which are enhanced by limited and limiting state powers.

The market state concept opens up space for private regulation, i.e. for private actors and private regulation.⁵³ The theoretical debate on convergence is very advanced, however; it still focuses too much on statutory law making or more precisely on EU law making via directives and regulations. The inherent assumption of all EU law making is that harmonisation of private law rules via top-down binding directives and regulations increases convergence. The counter position is most prominently documented in the *Jus Commune* series edited by W. v. Gerven. Here the idea is that the courts are the key players in paving the way for convergence via a mutual learning process. We start from the premise that convergence is easier to manage and to realise in areas where private actors dominate, e.g. standardisation of services via national and European standards bodies. Private regulation is older than the state nation (*lex mercatoria*). That is why there is a link between the old state nation patterns (and its predecessors) and new emerging market state.⁵⁴

The current state of affairs - the intermingling of nation state private legal orders and the emerging EU market state - could be summed up in the following overview which nicely demonstrates that we are observing an ongoing process of change where different patterns and different variations of the state stand side-by-side.

	Conflict and resistance Nation state	Self-sufficiency Market state	Hybridisation Nation state and market state side by-side	Convergence State nation and market state (Co-State?)
Private/economic law	Maintenance of the national private legal orders	European regulatory private law	Constitutionalisation of private law	Lex mercatoria, private regulation

⁵² W. van Gerven, *Private Law in a Federal Perspective*, in R. Brownword/H.-W. Micklitz/L. Niglia/St. Weatherill (eds.), *The Foundations of European Private Law*, Hart Publishing, 2011, 337; Legrand, *The Impossibility of Legal Transplants*, 4 *Maastricht J. Eur. & Comp. L.* 111 1997, Th. Wilhelmsson, *The Contract Law Acquis – Towards More Coherence Through Generalisation*, *Europäischer Juristentag*, 4 (1), 111-145.

⁵³ F. Cafaggi (ed.) *Reframing Self-Regulation in European Private Law*, 2006.

⁵⁴ See on this issue N. Jansen, *Legal Pluralism in Europe, National Laws, European Legislation, and Non-legislative Codification*, in L. Niglia (ed.), *Pluralism and European Private Law*, Hart publishing 2012, forthcoming.

The Interaction between the Inner and the Outer Space of Nation State Private Law and Market State European Market State Private Law

The answer to the question of the interaction between the inner and the outer space of private law might in the EU market state might be a straightforward ‘no’, as Member States will claim that private law in the outer space of the EU lies in their hands be it in the traditional or the modern variant. In traditional private law, Member States co-ordinate their private legal orders outside the EU within ‘The Hague Conference of Private International Law’,⁵⁵ or they unify contract law through international agreements such as the Vienna Convention. This clear picture becomes blurred through CESL which if adopted would compete with the Vienna Convention, just Latin American or Asean (Japan, Korea, China) models of enhanced co-operation in nation state private law. It would make the EU an international player and competitor over the search for the best legal order. The picture seems similar in sector related rules in areas such as telecommunications, financial services, transport, to some extent energy, or sports (football, Olympic Games), health and safety regulation in the area of pharmaceuticals (WHO), chemicals (FAO/UNEP), pesticides (FAO/UNEP), foodstuff (FAO/Codes Alimentarius) and consumer goods (ISO/IEC). Like in traditional nation state private law, Member States claim that any involvement at the international level, even under the integration of the EU, has to go through their hands, leaving the EU with a back stage role. The fortress Europe – the inner space of European (regulatory) private law – looks from the outside like a coherent block, the outer space of European (regulatory) private law like an integral part, if any, of an international legal order where the EU has no say. The result would then be that the space for European private law remains limited to the inner world of the EU, whereas the outer space remains dominated by the Member States in both areas, traditional and modern private law.

Competence is key. Whether or not the European Union may become involved in private law making and enforcement (!) outside the EU depends on areas of *both* nation state private law and market state European law on whether it has the competence to engage in negotiations maybe even conclusion of international agreements which bind the Member States. The EU law on external relations can be characterised as a longstanding battle over competences, with the EU constantly attempting to extend its powers via Treaty amendments and/or with the help of the European Court of Justice, whereas the Member States hesitate – to put it in cautious terms – to “delegate sovereignty” to the EU level. The competence rules of the Treaty, read together with the relevant case-law of the ECJ, tell a different story, one where there could and might be much more coherence between the inner and the outer space of European regulatory private law, one where the market state has gained ground even outside the EU borders, but where there is still room for nation state private legal orders in the traditional field of private law. In order to verify our thesis of the existing interlink we need to look into the EU powers in external relations, both in traditional nation state contract and tort law (the codifications) and the market state European regulatory private law. This requires a short excursion into competence rules, linked to the different substance of European private law (traditional and regulatory).

Within the EU, the scenario looks like this: Traditional private law matters (e.g., the harmonisation of contract and tort – the core of national private legal orders) is mainly and mostly subject to attempts of the European Union to Europeanise international private law rules via Art. 81 TFEU (jurisdiction, applicable law and transborder enforcement of judgments). The EU enjoys no competence in the core areas of private law, contract and tort. Measures to set common standards in the area of regulatory private law are based either on Art. 114 TFEU (consumer law, telecommunications, energy, financial services) or Art. 91/100 TFEU (transport). CESL represents the first attempt to use Art. 114 TFEU to regulate traditional private law matters, though in a transborder context.

⁵⁵ http://www.hcch.net/index_en.php

Outside the EU the situation is more complex. The implied power doctrine, as developed by the ECJ,⁵⁶ suggests that whenever the EU has succeeded in regulating (regulatory) private law matters *within* the EU under whatever competence rule (Art. 80, 91/100, 114 TFEU), it has also obtained the power to engage in negotiations and international agreements in *external* relations in that very same field. This power has to be shared with the Member States in so far as the measures adopted internally strive for minimum harmonisation only. In *Lugano* the ECJ⁵⁷ confirmed the implied power doctrine with regard to Art. 81 TFEU, in the core area of Member States competences and of nation state private legal orders. The Lisbon Treaty extended the powers of the EU in the area of the Common Commercial policy considerably. Art. 133 TFEU grants the EU exclusive powers not only for the regulation of goods but also for services. Setting aside the relationship between the implied power doctrine and Art. 133 we assume that this extension must be regarded as another building block in shaping the EU as a market state.

So far, only the regulation of investment services has raised the attention of the Member States with an interest in making sure in the Lisbon Treaty that the enlarged competences of the EU are not used to affect the existing bilateral investment treaties.⁵⁸ The legislative developments in the economically most important area of services where the European Union has obtained powers internally via Art. 114 TFEU and externally via the implied power doctrine and now via Art. 133 TFEU has not yet reached the political agenda, maybe because the European Commission has not yet clarified in which way and where it will use these powers. Looking into traditional private law and modern regulatory law and linking them to the powers of the European Union internally and externally, the interlink between the competences becomes clear. The divided world of traditional vs. modern private law in the inner space is mirrored in the outer space of the EU. The way is free to develop a European private law that reaches beyond the territories of the EU, thereby circumventing the role and function of nation states private legal orders.

⁵⁶ ECJ, Case 22/70 *Commission v. Council (AETR/ERTA)* (1971) ECR 263 at 19; generally M. Cremona, *External Relations and External Competence of the European Union: The Emergence of an Integrated Policy*, in P. Craig/G. de Burca (eds), *The Evolution of EU Law*, Chapter 9, OUP 2nd Edition 2011, p. 217, at 219 ff.

⁵⁷ ECJ 7.2.2006, *Opinion 1/2003 (Lugano II)*.

⁵⁸ See the strong statement of the GCC in the Lisbon judgment at 370 et seq.;

http://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208en.html

Fields of private law in the Member States	EU Internal powers	EU External powers	Fields of private law at the international level
Code Civil Code Civil, Codice Civile, Bürgerliches Gesetzbuch Contract and tort (common law)	Art. 114 Mainly consumer law directives, product liability, few commercial law, but now CESL	Implied power Minimum harmonisation (shared powers) Full harmonisation (exclusive power)	Vienna Convention on Sales Law
International private law a) jurisdiction b) applicable law c) mutual recognition	Art. 81 a) Reg. 44/2001 b) Reg. 864/2007; 593/2008 c) Reg. 44/2001	Implied power <i>Lugano</i> 1/2006 (exclusive power)	The Hague Convention
Regulatory private law Energy, financial services, telecommunications, transport	Art. 114 Art. 114 (now Art. 00 Art. 114 Art. 91/100	Competences a) Implied power doctrine Art. 114 b) Art. 133 services (exclusive powers)	Multilateral and bilateral sector-related international agreements

Four Parameters for Analysing the Transformation outside the EU

The transfer of the four parameters of conflict and resistance, substitution and intrusion, hybridisation and convergence from the inner to the outer world of the EU paves the way for a deeper understanding of conditions under which the EU is acting or may be acting as a market state and where it leaves space for traditional nation state patterns of behaviour. Our tentative hypothesis is that the EU takes a strong stand as a market state, whenever it is truly economically important whereas it gives way to nation states behaviour in more ideological charged fields.

Conflict and resistance: the counterpart to the established nation state private legal orders is the ‘The Hague Convention on International Private Law’. The conventions adopted in that frame do not affect the substance of the nation state private legal orders. The general idea behind this is that the international rules shall balance out conflicts between different jurisdictions, the old Savigny ideal. The opinion of the ECJ in *Lugano* tilts the balance between the Member States and the EU. Granting exclusive competence to the EU must be understood as a big ‘blow’ to the finely tuned web of intertwined competences in the area of international private law. In a way it is the logical consequence of the harmonisation of European international private law rules in the Brussels and the two Rome Regulations, although the latter two have been adopted after the *Lugano* opinion.⁵⁹ Following this line of argument, the EU would become the sole actor in weaving the web that ties the nation state private legal orders together. However, the European Commission is not making use of that new power. In the first occasion offered to benefit from its exclusive power in the field of international private law, it behaved as if the EU and the Member States enjoy joint power.⁶⁰ One might argue that there is a difference between an established concept of joint power and a voluntary practice which leaves the last word and the last decision always in the hands of the European Commission. One might also argue that the European Commission intends to mitigate the heavy impact of the *Lugano* opinion, thereby avoiding new competence battles. What matters much more is, however, that the European Commission is so generous because international private law issues do not rank high on its policy agenda. The practical and economic importance is limited. Member States may defend their turfs; international private law does not really affect the task of the EU market state in the international economy. The EU is focusing on the regulation of services which currently are driving the economy.

Substitution and intrusion: In the area of telecommunications, energy and financial services, health and safety regulation, the European Commission keeps a rather low profile, although we know little about the role and function the European Commission is actually playing. Until now, it has not referred to the implied power doctrine in these three sectors in order to claim competence in international agreements. Air transport, however, is the exception to the rule. The European Commission used the infringement procedure to claim and in the end to gain exclusive competence in that domain.⁶¹ The visible result is the so-called Open Sky Agreements (OSA) concluded by the European Union, not only but mainly with the United States of America. One may wonder whether and to what extent the OSA can and might serve as a blueprint for action in the field of telecommunication, energy and financial services. Setting energy apart, the European Commission is already playing a key role in the external regulation of telecommunication, financial services as well as health and safety. This is so quite independent of the question whether the European Commission is being granted exclusive or shared competence, of whether the European Commission has no formal

⁵⁹ The ECJ decided on the 7.2.2006, Rome II was adopted on the 11.7.2007, Rome I on the 17.6.2008.

⁶⁰ OJ L 2009 L 200, 13.2009, 25 Regulation 662/2009 establishing a procedure for the negotiation and conclusion of agreements between Member States and third countries on particular matters concerning the law applicable to contractual and non-contractual obligations; see J.-J. Kuipers, The Exclusive Competence of the Community under Art. 81 TFEU: Lugano re-opened, in M. Cremona/M.J. Monar/S. Poli (eds). *The External Dimension of the Area of Freedom, Security and Justice*, P. Lang, 2011, p. 287.

⁶¹ See A. Heritier/Y. Karagiannis (2011) The New institutions of Transatlantic Aviation, *Global Policy*, 2, 2, 152-62

competence at all, or has obtained only an observer status. There is much research to be done in order to get a clear picture of the role and function of the EU in these market sectors. In all these areas the European Commission is involved in international (soft-law) making outside formal conventions. It is working as a catalyst all too often between the United States (nearly always supported by the UK) and the other Member States of the EU. We would call this a typical market state behaviour. The European Commission is enabling the opening of markets, to the benefit of the companies in Europe, sometimes against the resistance or the reluctance of their host countries.

Hybridisation: Constitutionalisation of private law in the external dimension of the EU is associated with the increasing role human rights/fundamental rights are playing. There is little knowledge available on the degree to which human rights are used to influence the external dimension of European private law issues, be it traditional nation state private law (international private law) or European regulatory private law. So far this question has never been systematically investigated. Case law of the ECJ does not (yet) provide for much guidance.⁶² One striking though rather old example is the so-called export of hazardous products from the EU to non-EU member States. At the culmination point of the debate in the 1980s the promoters of a home state responsibility for export outside national territories invoked human rights to justify and to legitimate the extraterritorial responsibility of nation state be it as part of the national constitution be it as imposed via an international human right to safety.⁶³ Outside and beyond health and safety issues we do not have much evidence on the possible role and function of human rights in the external dimension of European (regulatory) private law. This might change once the EU has officially joined the European Convention of Human Rights. Hybridisation would lead to a composite order of European private law rules in external relations combined with the Convention of Human Rights. In the past the European Union played a rather active role in promoting human rights in external relations. Again this is in line with the transformation process within the EU.⁶⁴

Convergence: following the scenario at the inner EU level, one may start from the premise that the European Commission is playing and might play an ever-increasing role in the new modes of international governance that is so predominant in the regulation of services. In the aftermath of the 1985 'New Approach to Technical Standards and Regulation', the European Commission established a European standards body in the field of telecommunication, it developed and fine-tuned the comitology procedure, and invented the Lamfalussy procedure. These new forms of governance are particularly open to internationalisation processes. The EU is then well placed to connect the *inner* EU world to the *outer* international world. The very open and less legalised mechanisms leave substantial leeway for input from outside the EU which could easily be organised by the European Commission. The new modes of governance have attracted great attention in particular within the EU. In the last couple of years, the transnational dimension of this new modes of governance have raised concern, theoretically under different headings such as 'private law beyond the state', global administrative law,⁶⁵ transnational law,⁶⁶ *lex mercatoria*⁶⁷ or transnational private regulation.⁶⁸ These projects have in

⁶² One might with some imagination read the Kadi logic (ECJ C-402/05P and C-415/05 P 2008 ECR I-6351 into the TNT judgment ECJ 4.5.2010, Case C-533/08 TNT v. AXA, 2010 ECR I-nyr at 49, where the ECJ strongly argued that international commercial law rules must be 'equivalent' to the EU rules. However, in TNT the ECJ does not refer to Kadi.

⁶³ H.-W. Micklitz, International Regulation and Control of the Production and Use of Chemicals and Pesticides: Perspectives for a Convention, *Michigan Journal of International Law*, 3, (1992), 653-697.

⁶⁴ M Cremona and B de Witte (eds.) *EU Foreign Relations Law – Constitutional Fundamentals*, Hart Publishing, 2008.

⁶⁵ B. Kingsbury/N. Krisch/R.B. Stewart, The Emergence of Global Administrative Law, *Law and Contemporary Problems* 68 (2005) 15.

⁶⁶ G.-P. Calliess/P. Zumbansen, *Rough Consensus Running Code*, 2009.

⁶⁷ J. W. Smith, *Mercantile Law* (ed. Hart and Simey, 1905), in favour K-P. Berger, *The New Law Merchant and the Global Market Place – A 21st Century View of Transnational Commercial Law*, <http://www.trans-lex.org/000002>.

common that they link theoretical concepts to empirical evidence or empirical research. However, the European Union and its role in the various areas of services remain under-investigated. start from the hypothesis that the European Union is playing a very active role in these new modes of governance, though striving for keeping a rather low profile. These new forms of governance form the perfect ground for strengthening the market state profile of the EU.

(Contd.) _____

⁶⁸ C. Scott/F. Cafaggi/L. Senden (eds.) The Challenge of Transnational Private Regulation Conceptual and Constitutional Debates, *Journal of Law and Society Special Issues*, 2011.

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