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Theoretical reflections on the public-private distinction and their traces in European Union law

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Abstract

From its inception, EU law has been organised with (economic) integration as its guiding paradigm. A public-private distinction as it is known in many civil law countries has never been a characterising feature of EU law. In the absence of such a divide in EU law, the public and the private sphere interact differently. First, the attempt to strike a balance between the state and the market reflects the struggle for a delineation between public and private power. Second, the evolution of the personal scope of EU internal market law and fundamental rights increasingly involves private parties at both sides. Third, the emergence of European contract law has led to conceptual clashes between the international trade law paradigm and the public-private distinction in the tradition of civil law countries. It will be argued that EU law scholarship and legal practice will have to re-conceptualise the role of the individual and private parties as subjects of the law, bearers of rights and addressees of obligations in order to flesh out what is known as the private law element in many national legal cultures.

Key words

European Union law; evolution of European Union law; public-private distinction; role of private parties in European Union law.

Resumen

Desde su creación, la legislación de la Unión Europea (UE) se ha organizado en base al paradigma orientador de la integración (económica). La legislación comunitaria nunca se ha caracterizado por una distinción público-privada como la existente en el derecho civil de numerosos países. Ante la ausencia de esta división en la legislación de la UE, la esfera pública y la privada interactúan de forma indiferente. En primer lugar, el intento de lograr un equilibrio entre el Estado y el

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mercado refleja la lucha por una delimitación entre el poder público y el privado. En segundo lugar, la evolución del alcance privado de la legislación sobre el mercado interno europeo y los derechos fundamentales hace que se impliquen cada vez más poderes privados en ambas partes. En tercer lugar, el surgimiento del derecho contractual europeo ha dado lugar a conflictos conceptuales entre el paradigma de derecho mercantil internacional y la distinción público-privada en la tradición del derecho civil de los países. Se argumentará que la comunidad científica de la UE en materia legislativa y la práctica jurídica tendrán que replantearse el papel de los entes individuales y privados como sujetos de derecho, portadores de derechos y obligaciones, con el fin de profundizar en lo que se conoce como el elemento del derecho privado en muchas culturas jurídicas nacionales.

Palabras clave

Derecho de la Unión Europea; evolución del derecho de la Unión Europea; distinción público-privado; sector privado en el derecho de la Unión Europea.

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1. Introduction

Conventional wisdom argues that the European Union (EU) legal order is by nature an incomplete and dynamic one. If we look at the focal points in the case law of the Court of Justice of the European Union (CJEU) during the first decade of the 21st century, we not only observe a tremendous number of cases situated in the area of freedom, security and justice, but also an increasing number of cases involving contractual relations, in other words, the nucleus of what is generally referred to as "private law" at a national level. Whereas the major concerns in the early days of European integration essentially involved the interplay between national and supranational law and the establishment, shaping and strengthening of what is traditionally called "public" authority at a supranational level, it is currently the role of horizontal relationships, i.e. legal relationships between private parties, which increasingly draw our attention.

Whether one deals with legislation, case law, academic drafts for future legislation or other model laws, all different sorts of principles or international instruments with varying degrees of binding and mandatory character, many of these sources and instruments affect or directly involve what the received wisdom in Europe assigns to the field of "private law". This applies, for instance, to the recent legislative activities in consumer protection (European Commission 2008a) and in anti-discrimination law (European Commission 2008c), the controversial expansion of (general) principles of EU law into areas such as contract law (CJEU, Case 412/06, *Hamilton* [2008] ECR I-02383; CJEU, Case 489/07, *Messner* [2009] ECR I-07315), labour law (CJEU, Case 144/05, *Mangold v Rüdiger Helm* [2005] ECR I-998; CJEU, Case 555/07, *Kücükdeveci* [2009] ECR I-4529) and company law (CJEU, Case 101/08, *Audiolux* [2009] ECR I-09823) or the future of the Draft Common Frame of Reference and related projects. Furthermore, non-binding instruments in the field of labour relations, social protection or commercial relations rooted in regional or international cooperation loom large in practice.

Against this backdrop, it seems worthwhile to take a closer look at what the terms "public" and "private", which we have so far used a little carelessly, actually mean. To begin with, I will briefly consider several viewpoints such as the analytical, a selective historical, and equally selective comparative perspective that may inform those terms and their distinction (2.1.-2.3.). Subsequently, I will address the question of whether there is a public-private distinction in EU law or, in the absence thereof, how both spheres interact otherwise (3.). A brief survey of where the terms "public" and "private" are used in the Treaties will remain inconclusive with respect to their meaning and conception (3.1.). This is owed to the fact that from the beginning, the Treaties and secondary legislation were organised with economic integration as the guiding paradigm (3.2.). This feature is still underlying today's EU legal order even though the economic integration paradigm is in urgent need of being complemented by conceptually sound non-market objectives and contractual relations, and ultimately replaced by a comprehensive constitutional approach. Three aspects are of utmost importance in this context: First, we will look at the familiar interplay between the state and the market in selected fields, i.e. scrutinise the impact of the powers held by Member States and private parties in the internal market involving their commercial and the public interest (3.3.). No longer focusing on the interplay between public and private power in the light of the market rules, we will then in a second step shift the focus to the subjects of EU law and the legal relationships between them. In this context, the evolution from inter-state relations via the vertical applicability of EU law to its applicability in horizontal relationships will be sketched out briefly (3.4). A field of interest of increasing significance with respect to the public-private distinction in EU law is the attempt to accommodate horizontal contractual relations within the EU legal framework at the substantive and procedural level (3.5.). Third, and in connection to the former, we will raise the question of how emerging EU private law can be adapted to the EU law *acquis* in a

meaningful manner against the backdrop of some heated debates concerning the legislative powers of the EU and the interplay between freedom and solidarity.

It will hopefully become obvious that the expansion of the EU legal order at the level of subject-matter cannot leave the role of its actors and subjects unaffected. EU law scholarship and legal practice will have to re-conceptualise the role of the individual as a subject of the law and a bearer of rights and an addressee of obligations. Hence, one must overcome the image of the individual as a law enforcement tool by taking an actor-based approach. Moreover, EU law is in urgent need of accommodating hybrid forms of governance, involving both the market and the state, and outlining the concept of the "public" interest.

2. Terms and concepts: the public and the private element in law

To rely on concepts without defining them often produces confusion, yet adequately defining them is a complicated task. Assigning any particular meaning to a term such as "public" or "private" law does not exclude necessarily any other meaning that other observers may put forward. The terms "private" law and "civil" (derived from the Roman citizen "civis" as opposed to the laws governing foreign peoples) law are used interchangeably in the present paper. Any definition that denotes the "public" or the "private" remains the reflection of a personal and, hence, subjective preference unless it is incorporated into the law in an authoritative manner. The role of any other more or less meaningful and mindfully used definition is unavoidably confined to that of a heuristic device. Hence, the theories underlying certain historical or contemporary concepts of what should be considered private and what public law cannot provide more than a toolbox if they are not given normative force. This applies even more at the EU level because due to the divergent forms of using those terms in different national contexts, a universally applicable definition of what is public and what is private law across legal orders proves difficult from the outset. The reliance on functional and autonomous terms and concepts that ensure a uniform application of the law helps to overcome this difficulty.

What matters ultimately is who defines those concepts, and in particular whether the defining body has the power to do this authoritatively or simply as an expression of a view that may be influential as a matter of fact, but lacks immediate legal consequences. Expressions of views of that kind frequently include scholarly opinions or a kind of "soft law" or policy documents that are voiced, criticised, reconsidered and modified over time. The delineation of concepts always includes value judgments so that it is of utmost importance to distinguish the authoritative accounts from the merely informative and persuasive accounts of public and private law.

2.1. Analytical: The reference points and criteria underpinning the distinction

The concepts of public and private law can be built upon various reference points: First, the legal nature of a given *actor* could serve as a reference point for the activities that he or she carries out. Hence, the classification of activities follows the legal nature of the respective actor, which amounts to a formal institutional concept. To give an example, according to this classification, the activities of a company incorporated under private law would generally be assigned to the realm of private law whereas actions carried out by a police officer whose legal status is governed by public law would be qualified as acts of public law. This view presupposes however that the realms of private and public law that underlie the classification of the actor are well-defined and severed from one another. It merely classifies the activities carried out by the respective institutions and bodies on the basis of that premise and regards all such classified acts as a homogeneous group.

Second, an act can be designated and categorised according to whether the *form of action* amounts to a typical instrument originating in the private sphere (such as a

contract) or rather in the public realm (such as legislation and the adoption of general and abstract rules as an emanation of public authority). This approach can be problematic, because the assessment of when something is typical presupposes a classification such that the value judgments underlying the distinction between the public and the private sphere would be taken for granted and hence simply shifted elsewhere.

Thirdly, the realm of public and private law can further be separated along the lines of the *object of the legal relations*. Accordingly, conventional wisdom tends to assign health care services or the care of the elderly to the public good rather than to the public sphere, and the construction of buildings is assigned to the private one. Here again, the choice that is intuitively made rests on assumptions that are based on premises that themselves require a justification.

Fourthly, and slightly distinct, situations could be classified as public or private according to the *objective and functions of the respective legal relations*. Hence, a distinction could be made between legal relations the goal of which goes beyond the needs of the parties involved such as the care of the elderly (in which the state also has an interest) and other legal relations that merely aim to serve the interests of the parties involved which seems to hold true for an ordinary commercial contract. Here again, value judgments about the extent to which each of these is intended to be in the public interest or discussion on what is the relationship between means and ends or between immediate and long term goals are inevitable and merely shifted elsewhere.

Fifthly and lastly, the public and the private sphere and at the same time public and private law can be distinguished according to whether the underlying legal relations are based upon *voluntary* acts or rather *coercion*. Even though this distinction may not be as circular as the ones previously mentioned with regard to the attributes "private" and "public", clarification is required as to what is "voluntary" or "coercive" legally speaking. Coercion can result from the threat of formally established pecuniary or non-pecuniary sanctions as well as from pressure as a matter of fact, not law – which presents problems as to how to grasp and measure it. Again, this distinction suffers from the defect of failing to provide unambiguous criteria clearly delineating between the two.

No matter which reference point, and hence reading of the public-private distinction, is preferred, it has hopefully become apparent that the ultimate criteria of these distinctions have to be fleshed out and justified in different contexts. What these reference points and readings are ultimately all about is seeking criteria from which we can determine the applicable law. These different reference points and readings may be relied on cumulatively or exclusively. They may apply at the level of substance or with respect to the applicable area of court jurisdiction or court procedure. What one can derive from this section, in any event, is that there are several reference points and criteria that may inform a formal distinction and ideally need to be unpacked.

2.2. Historical

The following section will sketch out the evolution of a classical vision advancing a simplistic and reductionist delineation of public and private law before this distinction as such and its viability in light of the impact of (changing) social and economic realities on the law will be questioned. Even if the origin of a distinction between private and public law can be traced to Roman law, the beginnings of a more consistent body of private law or public law did not develop until the 18th century. It will be impossible to describe the overall evolution as a uniform development, neither with respect to what today is a single state nor with respect to Europe as such never mind the Western world at large. The scope of the present paper takes a Eurocentric perspective and tries to offer a simplified account of the distinction between public and private law throughout Europe or the absence of

such a distinction (Freedland and Auby 2006; Jansen and Michaels 2007; Dagan 2008; Ruffert 2009, Micklitz 2011) although the figures and indications of dates may be very rough.

The divide had already been formulated by Roman lawyers without being a conceptually clear-cut idea, and it remained so without considerable political implications. The study of law was divided into two branches; that of public and that of private law. Public law was that which regarded the government of the Roman State; private law was that which concerned the interests of the individuals (Ulpian, 1.1.4, later codified by Justinian, 1.1.1.2). It was not, however, until the Middle Ages that a framework of private law emerged in Europe. Private law developed on the basis of Roman law, ecclesiastical, feudal, local and commercial law and custom that was oftentimes applied in a pluralist manner. Natural law, liberalism and rationalism evolved and culminated in the founding of nation-states in many parts of Europe from the end of the 18th century and in the secularisation of authority. Characterised by rationalism and other values linked to enlightenment, private law was reformulated in continental Europe as an expression of the sovereign states and their new-born codifications, i.e. its existence began to depend on state authority. In contrast, common law's legal validity was considered independent of the state, yet found and later created by courts that derived their authority from the King in England. Even though the courts had become part of the centralised administration of the state (in England, of the Crown), they retained a strong collective professional identity and independence from the political government. The USA rejected the sovereignty of the English Crown and also the need to base the authority of the common law on the abstract idea of the state. Rather, its validity was derived from the people and formulated by the courts as its representatives. Classical liberalism and the protection of individual rights and equality was postulated beginning in the 18th and 19th centuries in Europe and the US, guaranteeing citizens in a bourgeois society a sphere without state interference where they could pursue their own (commercial) interests. In particular on the European continent, the state thus came to be considered as somewhat antagonistic vis-à-vis the individual and civil society. Contract, property and tort law influenced the relationships between individuals, whereas the parties of a contract were conceived of as bearers of equal status. Justice was understood as commutative rather than distributive. Legal relations were characterised by the creation of rights and obligations by virtue of voluntary acts such as contracts and obligations of reparations based on reciprocity or correlativity. The interaction between supply and demand was supposed to lead to the functioning of the market by virtue of the well-known "invisible hand" argument of Adam Smith.

Concerning what came to be known as the public side, an important change paved the way for the emergence of public law: So long as authority was intimately linked to the religious or secular ruler of a given territory, no public element could emerge. It was only when sovereign nation-states emerged on the European continent from fervid battles for civic virtues and values, a collective public interest was shaped that was divorced from transcendental authority or the ruling person as such. This was due to the tenets of natural law, liberalism and the evolution of universal human rights that brought about liberties and equality rights which could be invoked against political power from the emerging states. Not only did the new-born nation-states foster the codification of private law, but some of them, such as France and Spain, also contributed to the emergence of a highly sophisticated administrative law. Consequently, the states were regarded as clearly distinct from civil society, and the public interest came to be associated with the common good (the definition of which is obviously open to debate). The states' activities had to be based on specific unilateral powers leading to vertical relationships of subordination. The state and its officials' democratic legitimacy was grounded in, and ensured by, accountability requirements, increasingly enforced, in certain

cultures by means of judicial review. Public law therefore appeared as the prolongation of politics.

The public-private distinction was consolidated and was at the same time and somewhat paradoxically exposed to changing social and economic realities triggered by the industrialisation and technical progress in the 19th century. Classical liberal contract law underwent so-called "materialisation" tendencies, meaning that people lost belief in the formally stated equality of the contracting parties. Instead, courts began to interpret contracts in favour of the "weaker" or "vulnerable" party such as the worker and later the tenant in order to correct imbalances of power and thereby market failures. Thus, external collective goals, in other words public values reflected in market-correcting measures, began to impact the party relationship.

Ultimately, although they varied across Europe, these developments led to the rise of the welfare state throughout the end of the 19th and early 20th century. They brought about an extension of state functions, e.g., in the area of health care and social security. This tendency has continued in several more refined and more or less normatively and empirically well-founded forms until the end of the 20th century. Hence, even where state and public power used to be well-defined entities, traditional command and control instruments failed to cope with the complexities of modern societies.

The next step constituted the emergence of a protection of fundamental/human rights in Europe. In central and some parts of southern Europe following the end of WWII, in other parts of southern Europe following the end of totalitarian regimes, and since the fall of the Iron Curtain also in Eastern Europe, individuals and to a certain extent also legal persons were conferred rights against the interference of public power in the private sphere (classical negative dimension). Once it was perceived that a lack of resources and the opportunism of private parties were liable to infringe fundamental/human rights in a similar fashion to active restrictions of those rights, a positive dimension of human/fundamental rights emerged. The latter induced the imposition of duties upon states to act, for instance, by adopting protective measures or ensuring a certain level of material security. The latest stage in the evolution of fundamental rights theory is the controversial recognition of their horizontal effect (still known by various doctrinal labels and configurations) between private parties which reinforced what is often termed as the "constitutionalisation" of private law.

Most recently, we have been witnessing ambiguous developments. On the one hand, regulation expands and is assuming more and more sophistication, e.g. in the areas of consumer protection and anti-discrimination law in contractual relations, which amounts to an instrumentalisation of private law for political purposes. This tendency blurs the divide considerably and suggests that private law is a part of public law. On the other, we face the decline and transformation of (welfare) state functions in post-modern societies, which results in deregulatory tendencies. In the light of globalisation, territoriality is no longer a watertight point of reference. Mobility and the juxtaposition of jurisdictions may lead to situations in which the provider of benefits and their recipient do not belong to the same jurisdiction any longer. Furthermore, government actions are increasingly directed towards economic efficiency. New concepts taking due account of the increasing cross-border activities of central and local government, public choice, concepts that advance cost-benefit analyses and risk assessment replace traditional administrative and mainly institutional, static and hierarchical public law concepts that originated in the nation-state. They may be reflected in the privatisation and the out-sourcing of state functions (such as public security and public services) to private actors. These tendencies may also lead to the restructuring of welfare concepts: Currently the political objective of equality of outcome (where it has

existed) is gradually being replaced by the goal of equality of opportunities or the goal of inclusion and participation aimed at by anti-discrimination laws.

Another reason why a distinction between the public and the private element is not clear-cut is the recent tendency towards private law-making and the emergence of hybrid forms of law-making at the national and transnational level, e.g., in the area of commercial relations, labour relations, sports or liberal professions. In this context, it may be helpful to distinguish between situations where a public authority adopts legal norms that govern issues of both public and private law, as they are traditionally defined, on the one hand and situations where norms are adopted by private parties, on the other. The former embraces the Kelsenian legal positivist position that all private law and public law is state-made law and a distinction merely of ideological significance with regard to the opposition of law and power. Furthermore, those who consider the law to be instrumental to political objectives tend to view any sort of private law as public law, due to its goal-orientation. In contrast, the latter situation calls this apparent truism into question since the underlying assumption is that the state no longer has the monopoly to create and adopt norms. In order to avoid confusion, terminological precision is therefore of utmost importance.

All in all, the new approaches focus on more individual responsibility, oftentimes lead to complex interactions between the state and the private parties and the market and to private governance that lacks a sound theoretical framework. How the simplified bits and pieces of a public-private distinction have developed in selected EU Member States will be sketched out in the following section.

2.3. Comparative

Sharp divides between public and private law emerged for instance in France (Freedland and Auby 2006; Picard 2009), Spain (Velasco Caballero 2009) and Germany (Schneider 2009), albeit varying according to the respective historical, political and socio-economic context. Where the divide existed in one form or another at the substantive level, access to courts and judicial protection was traditionally organised strictly along the lines of this divide. This in turn led to the distinction between civil and administrative/constitutional jurisdictions in civil law traditions, which is mirrored in the academy as a strict dichotomy between public and private law in research and education.

Where the divide has existed in one form or another, it has been facing challenges due to the expansion of the welfare state and the more recent tendencies toward privatisation and liberalisation of state functions or mixed forms of ownership. The effect of fundamental/human rights on private parties as bearers of duties varies across those legal orders and the rationalisation of distributional choices has been moving into the foreground recently in most legal orders that traditionally relied on a clear-cut divide.

The public interest as opposed to the personal interest of the sovereign emerged in 16th century absolutist France where public power remained nonetheless concentrated in the hands of the king. From the 18th century onwards, the rise of liberal ideas reinforced the public-private distinction for the benefit of the individuals and against the absolute monarchy. Strong administrative law governing far-reaching powers of the executive branch as opposed to the other branches of government developed in France beginning with the French Revolution. The divide has been rather sharp at the level of court procedure, substance and in academia. More recently, both fields have been converging with respect to some procedural law aspects or economic regulation.

The public-private distinction has existed in Spain since the 12th century with the reception of Roman law, and it assumed significance in the 16th century, which was characterised by a strong natural law movement. In the 19th century, codes and the constitution were intertwined which rendered the divide hence less pronounced, whereas public law largely became understood as the newly emerging administrative law. Today, the horizontal effect of fundamental rights is not controversial in Spanish law, which softens the public-private distinction. The same follows from increasing overlaps between both spheres at the level of court procedure and substance in areas such as competition law.

In Germany, a separate public law started to emerge during the 16th and 17th centuries driven *inter alia* by religious conflicts and notably attempts coming from protestant religious currents at the academic and educational level in order to counter Roman law that was employed by Catholics and supporters of the Emperor in the Holy Roman Empire of the German Nation. Gradually, a genuine private law replaced the regulated economic life that was characterising feudalism and mercantilism in the second half of the 18th century. This evolution was further advanced in the 19th century. Since the late 19th century, market failures have led to the rise of the welfare state in particular in the area of social security protection, and in the beginnings of the welfare state, private and public law gradually began to intertwine. The public-private distinction is most prominent in the separation of public and private law courts. Overlaps do exist in particular where the administration acts to cover its own needs and where fundamental rights influence the interpretation of private law. Today, only the indirect effect of fundamental rights in horizontal relationships has been well-established.

Whereas a sharp divide between public and private law and a clear-cut concept of the state did not exist in the United Kingdom (UK) in the past, their relevance has increased in the second half of the 20th century (Dawn 1999; Donnelly 2009). This holds true in particular with respect to remedies and procedural law. From the outset, it has been well-established in the UK that public bodies are expected to act in the public interest and according to their limited powers. In contrast, private parties are free to act subject only to the limitations laid down by statute or the common law. Since the 1960s, public wrongs are to be challenged by peculiar, i.e. public, law remedies. The strengthening and broadening of the emerging public-private distinction in the UK followed the adoption of the Human Rights Act 1998 (in particular section 6 and the question of who is to respect the rights protected in the European Convention of Human Rights) and the increasing involvement of private actors in governance matters by virtue of legislation or contracts that raise important issues of delegation and accountability. A significant element of contemporary UK legal relations is hence the sharing of authority between the public and private, e.g. in the area of the provision of welfare and public security, aiming at benefitting from innovation, expertise and efficiency of the private sector.

Against this backdrop, the public-private distinction as suggested by classical liberal concepts of the separation between the state and civil society may serve as a simplistic analytical tool even though it has never existed in a uniform manner, not even across Europe, and where the distinction has existed, it has been blurred considerably. Private law has never been wholly autonomous, nor purely instrumental, or entirely dependent on any authority beyond the parties' relations (Dagan 2008). Even where its main concern is limited to commutative justice, private law has implications for the distribution of wealth even though they are not specifically intended (Dagan 2008; Collins 2009). In no legal order have contractual relationships entirely escaped the influence of external collective goals, in other words public values. Moreover, the concept of a state that has informed the notion of "public" law has been perceived differently in various cultures and has developed over time. Hence, whenever the terms "public" and "private" are used, they reflect the reductionist and relative meaning that can be distilled from the above overview.

3. The public-private divide in EU law

3.1. Use of the terms "public", "private" or "civil" matters

The EU Treaties do not follow an express distinction between public and private law or legal relations. Rather randomly and absent any terminological or conceptual specification, we find the terms "public" and "private" mentioned throughout the Treaties.

Article 4 (2) k TFEU mentions "public health matters" within the allocation of competences. Article 36 TFEU refers to the justification of obstacles in the internal market on grounds of "public morality, public policy or public security". Similarly, Article 45 TFEU refers to justifications for the restriction of free movement rules on grounds of "public policy, public security or public health". Moreover, the Treaty exempts "public service" from the free movement of workers by virtue of Article 45 (4) TFEU. In the context of the free movement of establishment, Article 54 TFEU provides for the following definition: "Companies or firms' means companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit-making". Article 106 TFEU refers to "public undertakings" in the context of the provision of services of general economic interest. Article 123 (1) TFEU reads as follows: "Overdraft facilities or any other type of credit facility with the European Central Bank or with the central banks of the Member States (hereinafter referred to as 'national central banks') in favour of Union institutions, bodies, offices or agencies, central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of Member States shall be prohibited, as shall the purchase directly from them by the European Central Bank or national central banks of debt instruments". Article 179 TFEU on research and technology mentions "national public contracts". Concerning the jurisdiction of the CJEU, Article 272 TFEU provides that "[t]he Court of Justice of the European Union shall have jurisdiction to give judgment pursuant to any arbitration clause contained in a contract concluded by or on behalf of the Union, whether that contract be governed by public or private law."

Several Advocates General (AG) have advanced definitions, such as the classical definition of public authority given by AG Mayras to justify restrictions on the free movement of services: "Official authority is that which arises from the sovereignty and majesty of the State; for him who exercises it, it implies the power of enjoying the prerogatives outside the general law, privileges of official power and powers of coercion over citizens." (AG Mayras, Case 2/74, *Reyners* [1974] ECR 657, 664).

The largely deferential attitude towards the public-private distinction has left some even more explicit traces in the Treaty. It was stressed from the beginning that national rules governing the system of property ownership would not be affected by the Treaties (Article 345 TFEU). This principle highlights that the Treaties did not intend to impose any concept of the public-private distinction relating to property on the national legal orders.

Interestingly, in some of the model laws concerning the harmonisation of what is generally referred to as "European Private/Contract Law", we find hints that several documents and their authors assume that there is a valid distinction between public and private law without, however, undertaking any attempt to determine their respective meanings. The Communication from the Commission on European Contract Law (European Commission 2001b) was the initiating document. It mentions the harmonisation of "substantive private law, in particular contract law" (Introduction, 1.1.), and refers to the 16 March 2000 Resolution of the European Parliament concerning the Commission's Work Programme 2000, which mentions the "harmonisation of civil law". Also the European Council of Tampere as mentioned in the 2001 Commission Communication (1.3-1.4.) referred to the approximation of "civil matters" and "civil proceedings". Throughout the

Communication, the narrower term “contract law” is used. Interestingly, point 2.14 states that “[i]n certain areas of private law, contracts are not the only tools of regulation given the complexity of the relationship between the parties concerned. Areas such as employment law and family law give rise to particular issues and are not covered by this communication.” One may wonder whether the term “particular” points to certain corrective elements restricting contractual freedom that are not entirely shared by all Member States. One of the groups charged with the preparation of a harmonised “private law” was entitled “Research Group on Existing EC Private Law (the ‘Acquis Group’)”. The Draft Common Frame of Reference (DCFR) also refers to “European Private Law” in its subtitle “Principles, Definitions and Model Rules of European Private Law” without explaining or justifying this classification. The case law of the CJEU increasingly relies on the terms “private law” or “civil law” without, however, clarifying the concepts¹.

All in all, where the Treaty, case law or other documents mention the terms “public” and “private” law, they do not define them. The task to flesh them out as autonomous EU law concepts is left to the CJEU. In the absence of an authoritative judicial or legislative definition, it is left to the Member States to pursue their own approaches. This means that, except for the few provisions in the Treaties that point to either the public or the private element without defining them, EU law has deliberately left it to the Member States to determine how they implement their obligations flowing from EU law in light of their own national concepts of the existence or absence of a public/private law distinction. Whereas in the early days of European Integration the absence of exact classifications was less problematic, today’s breadth and depth of EU law and its mutual embeddedness with national law requires further effort to develop and define a European legal method that facilitates the interplay between both levels on the basis of common measuring units (Neergaard and Nielsen 2010b). The sources of EU law and the way how they interact proves of utmost importance in this context (Bengoetxea 1993, Chapter 1). Furthermore, the increasing role of the individual in vertical and horizontal relations urgently invites EU law scholarship and judiciary to find solutions for how to deal with the divide and its underlying rationale.

3.2. The functional structure of the Treaties: From where we come to where we go

In the absence of a classification of the Treaty provisions according to their public or private nature, a different guiding principle has prevailed since the inception of European Integration. Primary and secondary law was, and largely still is, organised along the lines of the overall objective of (economic) integration (Schmid 2005; Reich 2009; Azoulai 2010; Odudu 2010). EU law paid no heed to the distinction between private and public law, because the Treaties have been structured according to subject matter and policies, which were functionally related to economic integration and the implementation of adjoining policies. Nor has law enforcement at the national or supranational level ever been classified according to its public or private nature. The rationale behind a functional approach is to ensure that EU law applies in a uniform manner throughout the EU and applies precisely irrespective of how Member States conceive of the concepts of private and public law and their distinction.

If one wishes to take the existence of a public-private distinction as an analytical starting point, it seems that the EU has for a long time adopted only a public-(international economic)-law approach. State obstacles to cross-border economic activities were to be dismantled by the free movement provisions, whereas the competition rules as the only exception were addressed to private parties and were intended from the beginning to achieve the same goal (CJEU, Cases 56 and 58/64,

¹ In the area of the (general) principles of private/civil law, cf. CJEU, Case 412/06, Hamilton [2008] ECR I-02383, para. 42; CJEU, Case 489/07, Messner [2009] ECR I-07315, para. 26.

Consten Grundig [1966] ECR 299). The overall objective was wealth creation on the basis of a large market as a pre-condition to derive economic advantages from economies of scale and enhanced specialisation. Progress in the field of social policy was regarded as a consequence rather than a precondition of a functioning market (Barnard 2011). Non-market values played a minimum albeit increasing role. An overarching vision of distributive justice, or fairness, in contracts and other fields has clearly been missing in EU law. It has so far been displayed solely as market-building, mainly due to the lack of a comprehensive legislative competence in many policy fields that entail a strong non-market element.

Whereas the EU is commonly understood as a reflection of a public law entity originating in a public international law treaty, the *beneficiaries* according to the internal market rationale have always supposed to be business and consumers – in other words private parties. Different sorts of commercial or labour contracts between economic actors were certainly present in the minds of the founding fathers but, formally speaking, not in the foreground. Accompanied by empirical studies on cross-border trade obstacles (for further details, see Vogenauer and Weatherill 2005; Smits 2006), the need for a comprehensive harmonisation of contract rules culminated only recently in attempts to draft a common civil code. The scope of the work follows a traditional definition of private law as understood in civil law countries, in other words conceived of as a formal category in contrast to public law, but it struggles, however, with its correlation to the existing objective-driven EU law *acquis*. It can be classified as an attempt of a comprehensive act of positive integration as opposed to the scrutiny of non-harmonised national private law rules in light of the free movement provisions. Irrespective of whether a common contract law will ever be adopted, the project has brought about a fundamental shift with regard to the role of individuals in EU law.

The following sections of the present article grapple with several areas that are of relevance for the question of a public-private distinction in EU law. First, the role that the public interest plays in commercial relations and who is entitled to defend it will be analysed. Second, horizontal legal relations in the internal market context will be tackled, and finally they will be looked at from the perspective of contracts.

3.3. The market and the state in light of the public-private distinction

3.3.1. The state and the public interest versus the market and self-interest

One way to approach the public-private distinction is to look at the relationship between the market and the state and its challenges. As a general rule, as has been set out previously, the state has after the end of the Middle Ages been associated with the common good and the public interest while the market has been more closely linked with business transactions and the economic self-interest of private actors. One of the particularities of EU law has been that harmonisation of the economic legal framework was fostered at the EU level whereas the laws implementing non-market policies remained situated at the national level notwithstanding their review at EU level and some exceptions to this rule. What is at stake is the attempt to strike a balance between market and non-market goals and the question of who is entitled to pursue each set of goals. The relationship between market and non-market goals constitutes not only a question of substance, but also requires choosing the respective level of governance and institution (Maduro 1998). The following sections adopt an inductive approach seeking to infer the relationship between the state and the market in several fields of EU law from the case law. This implies that the EU legal framework as such does not allow for a solution to be deduced from Treaty Articles that contain the term “social market economy”, for instance, or other provisions like the cross-sector clauses that fail to provide for a solution on how to strike the balance between market and non-market goals.

To begin with, the scope and limits of the free movement and competition rules will be sketched out in light of the originally clearly complementary relationship between both sets of rules with respect to their addressees and the role of the public interest (3.3.2.-3.3.4). Subsequently, it will be demonstrated that a number of situations suggest that there is increasing overlap and interaction between both sets of rules. In addition, the state action doctrine will be set out briefly (3.3.5) as well as the role of private parties in governance matters (3.3.6). Furthermore, the examination of the rules on services of general (economic) interest (3.3.7.) and the public procurement rules (3.3.8.) illustrates that there is no clear-cut separation between the state and the market and hence no clear-cut public-private distinction.

3.3.2. The scope of the free movement rules and their limits

According to the original concept of the public international (economic) law concept, the Treaties initially attempted to dismantle national barriers to cross-border (economic) activities originating from Member States. As a general rule, the liberalisation provisions are addressed to Member States like the current Article 34 TFEU (which reads as follows: "Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States") or its equivalents with respect to the other freedoms such as Article 49 or 56 TFEU. This leads to three conclusions:

First, so long as restrictions can be traced to legislation or derived acts, the CJEU does not determine whether the respective national act is assigned to private or public law at the national level. As a general rule, national contract rules are a sort of precondition for the exercise of the fundamental freedoms, but they may also collide with the latter if the freedom given by the national legislative body is not broad enough (Leible 2008). Discriminatory private law rules have been largely abolished (Leible 2008), whereas the private law nature of obstacles as such has never prevented the CJEU from scrutinising them (CJEU, Case 93/92, CMC Motorradcenter [1993] ECR, I-5009; CJEU, Case 69/88, Krantz [1990] ECR, I-583; CJEU, Case 190/98, Graf [2000] ECR, I-493). However, the Court seems to have introduced a *de minimis* rule and has often denied the restrictive effects of a particular national measure (Leible 2008).

Second, neither does the Court bother with whether the restriction results from the state as a formal concept. The Court interprets the scope of the free movement provisions broadly and hence, subjects as many situations as possible to the internal market rules. Examples illustrating this broad and functionally, as opposed to formally or institutionally, conceived personal scope include, for example, private law bodies that are controlled by the state and that have been deemed to fall under the scope of the free movement rules (CJEU, Case 249/81, Commission v Ireland (Buy Irish) [1982] ECR 4005).

Third, the Court has adopted a broad and functional, again as opposed to formal, institutional interpretation to the concept of reviewable state authority with regard to the legal nature of the professional activity exercised in the context of the free movement of persons and in particular its exceptions. It has only exempted very few situations under the public-service exception rubric and far from all employment positions that are governed by public law. According to the Court, Member States can reserve those posts for Member State nationals alone which involve "direct or indirect participation in the exercise of powers conferred by public law and duties designed to safeguard the general interests of the State or of other public authorities and thus presume on the part of those occupying them the existence of a special relationship of allegiance to the State and reciprocity of rights and duties which form the foundation of the bond of nationality in order not to jeopardise the uniform interpretation and application of the free movement law" (CJEU, Case 149/79, Commission v Belgium [1980] ECR 3881; CJEU, Case 405/01, Colegio de Oficiales de la Marina Mercante Española [2003] ECR, I-10391). This narrow view was confirmed in several infringement procedures on the nationality

criterion for the access to notaries in several Member States (cf. CJEU, Cases 47/08 (European Commission v Belgium) and 51-53/08 (European Commission v Luxembourg, Portugal, Austria) and 61/08 (European Commission v Greece), nyr).

Another matter that the Court has refused to exempt from the free movement provisions is the "golden shares" cases that deal with the special rights of states in relation to privatised companies. The thorny question in these cases is whether these special rights merely flow from the regular application of corporate law which could arguably prevent the applicability of the free movement provisions *ratione personae*, or, whether they flow from the exercise of public authority and are hence unambiguously caught by the free movement rules. The starting point is that property is one of the crucial elements and preconditions for doing business. National rules governing the system of property ownership are not affected by the Treaties (Article 345 TFEU). Irrespective of European Integration, states had created monopolies or granted special or exclusive rights to private companies, for example, in the health care or energy sector. Moreover, certain companies were state-owned, state-controlled or state-financed in some sectors. Their activities formed part of the welfare state and hence the public interest in those Member States. Even after privatisation, states retained special rights with regard to decision-making in those privatized companies and related to their commercial activities, such as the right of prior approval from public authorities (CJEU, Case 463/00, Commission v Spain 2003] ECR, I-4581; CJEU, Case 282/04 and 283/04 Commission v Netherlands [2006] ECR, I-9141) or special voting rights (CJEU, Case 112/05, Commission v Germany (VW), [2007] ECR I-8995; CJEU, Case 171/08, Commission v Portugal, nyr; CJEU, Case 543/08, Commission v Portugal, nyr). These particularities became known as "golden shares" and have come under scrutiny in the light of the free movement of capital and the freedom of establishment. In several more recent cases, the defendant governments claimed that the "golden shares" at issue were merely preferred shares under private law and even invoked fundamental rights to the property of the shareholders involved. The Court rejected this argument, pointing to the Member State's use of its public authority in enacting the enabling legislation under which the golden shares were created, and their subsequent use by the state instead of the normal application of corporate law (CJEU, Case 171/08, Commission v Portugal, nyr, paras. 41-42, 51-55; CJEU, Case 543/08, Commission v Portugal, nyr, paras. 51-52.). All of these cases demonstrate, and at times expressly highlight, that the state can control the commercial activity of privatised companies only under very narrow and well-defined conditions linked to the public interest. It has been emphasised that Member States are precluded from arguing that, by retaining and exercising special powers, governments are acting according to the normal application of private corporate law from which they derogate given that they hold non-transferable shares. The outcome of these decisions of the CJEU was little surprising given that according to established case law obstacles, in principle, include both restrictions flowing from private and public law.

3.3.3. Justification of state obstacles in the internal market on public interest grounds

Justifications for restrictions emanating from Member States are conceivable and accepted by the Court on various non-market grounds related to the public interest. This corresponds to the received wisdom that the state enjoys the necessary legitimacy by virtue of the political process in order to define and implement the national public interest. At times, the Court has stretched the requirement that justification grounds are to be non-economic in nature (e.g., CJEU, Case 158/96, Kohll [1998] ECR I-1931, para. 41). This situation is to be compared with the one under the competition rules, in which the public interest beyond economic efficiencies is hardly alluded to outright.

3.3.4. The personal scope of the competition rules and the concept of an undertaking

As set out previously, the free movement rules have a counterpart that addresses restrictions originating from private parties. The EU competition rules have been applicable between private parties since the adoption of the Treaty of Rome (CJEU, Case 231/83, *Leclerc* [1985] ECR 305, para. 16; CJEU, Joined Cases 177 and 178/82, *Van de Haar* [1984] ECR 1797, para. 24 clearly stressing that the competition rules are not addressed to states). It was stated beautifully in the early competition decision *Consten Grundig* (CJEU, Joined Cases 56/64 and 58/64, *Consten-Grundig v Commission* [1966] ECR 299), which involved the prohibition of absolute territorial protection through vertical agreements that “the Treaty, whose preamble and content aim at abolishing the barriers between states, and which in several provisions gives evidence of a stern attitude with regard to their re-appearance, could not allow undertakings to reconstruct such barriers. Article [101(1) TFEU] is designed to pursue this aim, even in the case of agreements between undertakings placed at different levels in the economic process” (p. 340).

The functional concept of the “undertaking” (and the entities equated to an undertaking mentioned in Article 101 and 102 TFEU) is the focal point of the competition rules and determines their scope of application, in contrast to the free movement provisions which are geared towards public actors. An “undertaking” is defined in functional terms as “every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed” (CJEU, Case 41/90, *Höfner&Elser* [1991] ECR, I-1979, para. 21 in the context of employment procurement). According to the logic that private parties pursue their own commercial interests, the public-interest justification for restrictions on competition are not generally provided in the Treaties. The Commission and the Courts have, on occasion, identified public interest justifications for anti-competitive measures. It is unclear, however, whether, and to what extent, a reference to a justification based on environmental protection, labour protection or the safeguard of professional ethics crosses over to generate pro-competitive effects, or whether, on the other hand, it has effects beyond a competition and efficiency analysis, hence allowing private parties to pursue a public policy goal, which would prove to be highly controversial.

This double duality between the free movement rules and the competition rules on the one hand and between the public international economic law discourse and the role of contracts and private law on the other does not mean that things have not developed in various directions.

As set out earlier, the key to determining the scope of competition law, as opposed to the realm of the free movement provisions, is the concept of an “undertaking”. The *Höfner* formula cited above proposes a functional test that is blind to the institutional structure of the respective entity and instead looks at its function. Notwithstanding the applicability of more specific rules, state ownership or control would not preclude the application of the competition rules. Whether this test can be satisfied is to be determined with regard to each activity under scrutiny. Accordingly, the Court has exempted from the competition rules all activities that are non-economic in character, which includes the exercise of official authority in the public interest and also those that regulate markets in the public interest. The latter is to be viewed in contrast to the participation of an entity in the market, which consists of offering goods and services in a given market (CJEU, Joined Cases 180/98 to C-184/98, *Pavlov and Others* [2000] ECR, I-6451, para. 75). Activities that lead to an exemption include public interest tasks, such as the maintenance of air navigation safety (CJEU, Case 364/92, *SAT Fluggesellschaft* [1994] ECR, I-43, paras. 30-31) or the protection of the environment (CJEU, Case 343/95, *Diego Cali&Figli* [1997] ECR, I-01547, para. 16), which are considered to form part of the essential functions of the state. In the health and insurance sector, no economic

activity exists where an exclusively social objective of an activity dominates and market mechanisms are entirely absent (for an overview of the case law see, e.g., AG Maduro, Case 205/03, FENIN [2006] ECR, I-6295 paras. 16-22). So far, the Court has considered the nature of the purchase of a certain good and its subsequent use as non-severable (CJEU, Case 205/03, FENIN [2006] ECR, I-6295, para. 26; CJEU, Case 113/07, SELEX [2009] ECR, I-2207, paras. 102 et seq.). Certain collective bargaining agreements concluded between employers' and employees' representatives and also encouraged by the Treaty have been exempted from the competition rules (CJEU, Case 67/96, Albany [1999] ECR, I-5751; CJEU, Joined Cases 115-117 and 119/97, Brentjes 1999 ECR, I-6025). All in all, the competition rules are only inapplicable under limited conditions in which the genuine exercise of public authority in a strict sense is at stake or the market mechanism entirely absent.

To sum up, the functional concept of the undertaking is the focal point that determines the extent of competition rules as opposed to the domain of the free movement provisions. This dichotomy can in turn be said to reflect the EU's own brand of public-private divide. The details of its characterising feature, the economic activity, remain fuzzy. As a general rule and as a mirror image of the free movement rules, the personal scope of the competition rules is interpreted quite broadly. Only the total absence of market mechanisms and the exercise of genuine public authority in a narrow sense and viewed in relation to a particular activity can justify exemptions from the competition rules.

3.3.5. State action doctrine

Another similar yet slightly distinct field of overlap between the public and the private element has led to the creation of a European "state action doctrine". The major issue underlying this doctrine is that the state backed by the democratic process facilitates or reinforces the anti-competitive conduct of private parties based on their alleged involvement in the public interest. The starting point remains that the Articles 101 and 102 TFEU are concerned solely with the conduct of undertakings and not with regulatory measures emanating from the Member States. In relation to the competition rules, however, read in conjunction with Article 4 (2) TEU, the CJEU has developed several categories of cases in which the competition rules require Member States not to introduce or maintain measures in force, even those of a legislative or regulatory nature, which may render ineffective the competition rules applicable to undertakings (for a recent decision see, e.g., CJEU, Case 198/01, Consorzio Industrie Fiammiferi ("CIF") [2003] ECR, I-8055, para. 45). Accordingly, the Articles 4 (2) TEU and 101 TFEU are infringed when a Member State "requires or favours the adoption of agreements, decisions or concerted practices contrary to Article [101 TFEU] or reinforces their effects, or when it divests its own rules of the character of legislation by delegating responsibility for making decisions affecting the economic sphere to private economic operators". This has become particularly relevant in the context of (sometimes state-influenced) self-regulation of certain professions such as lawyers or medical doctors and their professional bodies. What moves to the foreground is the identification of the exact role of the state and the public-interest criteria that potentially influence the conduct of the private parties in contrast to a conduct which is exclusively imputable to, and, in the interest of, the undertakings. An autonomous delegation-test has to date not been outlined in unambiguous terms and the case law has not always been consistent (Sauter and Schepel 2009). Relevant cases deal with the interaction of state legislation with private parties' conduct. Examples include the interaction of legislation that fixes retail prices with the anti-competitive conduct of the market participants (CJEU, Case 198/01, "CIF"[2003] ECR, I-8055,) or state measures that approve, on the basis of a draft produced by a professional body of members of the Bar, a tariff fixing minimum and maximum fees for members of the profession (CJEU, Case 35/99, Arduino [2002] ECR, I-1529; CJEU, Joined Cases C-94/04 & C-202/04, Cipolla v. Fazari

[2006] ECR, I-2049). Where undertakings are required by national legislation to engage in anti-competitive conduct, they cannot be held accountable for the infringement of the competition rules. In these cases, national law precludes undertakings from engaging in autonomous conduct that prevents, restricts or distorts competition. If there remains room for the autonomous conduct of the private parties, the allocation of responsibilities is highly controversial. These cases show that functionalism (here doctrinally construed by reliance on the loyalty clause read in conjunction with the competition rules) has also impacted cases in which public and private power interact in a way that leads to the infringement of competition rules. Nonetheless, the blurred line between the competition and free movement rules has been complicated by the "state action doctrine" and, more precisely, by the failure to determine clearly the existence of and the role for the public interest and the link between the state and private conduct in the respective cases.

3.3.6. Private parties and governance

There is an increasing shift towards private governance, different forms of self-regulation of certain sectors and hybrid regulatory systems instead of legislation while self-regulatory tendencies have prevailed in some fields for historical reasons. Self-regulation, or any other form of private regulation, is cherished in particular for its potential to enhance (substantive) self-determination in certain sectors by representing and balancing affected interests and democratic legitimacy, along with increasing efficiency by enhancing expertise and flexibility (Schiek 2007).

Self-regulation faces a number of concerns (Ogus 1996). Because it was created to serve the interests of the regulatees, the rules may in fact be in tension with the public interest. Ideally, self-regulation should not foster monopolisation, but instead enable two or more self-regulation agreements to formulate alternative regimes. The self-regulation of professions, for instance, can restrict entry into the market, serve the professions rather than the consumers, and distort price competition. Moreover, where public functions are delegated to private actors, public accountability mechanisms are inevitably lost and the preservation of legal responsibilities for those acting on behalf of the public authorities becomes crucial (Gilmour and Jensen 1998). Hence, uncontrolled self-regulation cannot be accepted. Along with the conceptual difficulties in separating the public and the private spheres, fundamental differences remain. The fact that state bodies are politically and legally accountable to the electorate or its representatives is regarded as legitimising their powers and providing individuals with protection against abuses. Where private parties undertake to achieve public goals, they would, first and foremost, have to define what the public interest is and whether they do indeed pursue the public interest. Secondly, their link to the political process would have to be discussed.

At the EU level, self-regulation was, *inter alia*, mentioned and defined in the Inter-institutional Agreement on Better Law Making (European Parliament *et al.* 2003). Private regulation has been particularly encouraged by competition policy documents and other guidelines since the beginning of the new millennium in the area of environmental protection as a new method of governance in the form of voluntary commitments and agreements. The Commission's Green Paper on corporate social responsibility and a subsequent Commission Communication generally underscored this approach, according to which companies voluntarily decide to contribute to a better society and a cleaner environment by the integration of social and environmental concerns into their business operations (European Commission 2001a).

More restrictive approaches have been voiced to the extent that in very recent interpretative guidelines, which also departed from their previous versions, horizontal environmental agreements were no longer displayed as a separate category of a horizontal agreement (European Commission 2011b). This means that

the test for environmental agreements would be the general one developed under Article 101 TFEU. In other words, it all depends on the concept of economic efficiencies and the notion of the consumer, causality criteria and their ability to stretch in order to include environmental protection. It is needless to recall that the only authoritative interpretations are the decisions of the CJEU. Contrary to the categories of cases discussed in the previous sections where the influence of the state and/or the public interest could lead to the application of free movement rules or the state action doctrine, the CJEU occasionally, and a little surprisingly, has preferred to base its decision exclusively on the competition rules even though there was a link to the public interest. The Court has ruled that where there is neither state influence with regard to the appointment of members of the governing bodies of the Bar in a Member State, nor a requirement to take into account the public interest in self-regulation matters, the professional organisations such as the Bar are regarded as an association of undertakings. A decision that refuses to authorise partnerships between members of the Bar and accountants hence could *a priori* fall under Article 101 TFEU (CJEU, Case 309/99, *Wouters*, [2002] ECR, I-1577, paras. 57-72). However, according to a sort of “public interest rule of reason”, the Court has held that such a prohibition of multi-disciplinary partnerships could be reasonably considered necessary in order to ensure the proper practice of the legal profession (*Wouters*, paras. 73-110). The Court argued that the anti-competitive effects of the respective rules on the organisation, qualifications, professional ethics, supervision and liability were inherent in the pursuit of the objectives to ensure that the ultimate consumers of legal services and sound administration of justice are given necessary guarantees in relation to integrity and experience (para. 97). This approach was confirmed with respect to the anti-doping rules adopted by international sporting associations (CJEU, Case 519/04 P, *Meca Medina* [2006] ECR, I-6991, paras. 42 et seq).

The previous competition law cases allegedly allowing for public policy considerations are conceptually problematic because they lack the explicit involvement of the state, yet they nonetheless involve aspects which are generally classified as public interest, without simultaneously establishing links to the political process and providing for accountability mechanisms. They are an excellent reminder that a sound theoretical legal framework over and above soft law documents is imperative for self-regulation and corporate responsibility. Such a legal framework would also ideally address the question of when the public interest translates into economic efficiencies (Semmelmann 2008). It goes without saying that competition law offers only one way of looking at private governance alongside the perspective of fundamental rights and other constitutional principles that may interact with the competition analysis.

3.3.7. Services of general (economic) interest

Another border between the state and the market are the services of (general) economic interest² that find expression in Article 14 TFEU, Article 36 of the Fundamental Rights Charter, Article 106 (2) TFEU, Protocol 26 attached to the Lisbon Treaty and numerous soft law documents. Even though the Commission recognises the need to shield certain traditions in relation to the regulation of access to energy, telecommunications, transport or postal services from the market, the general rule is that their legal arrangements should comply with the Treaties unless they meet the conditions set out in Article 106 (2) TFEU, which is directly effective, as a service of general economic interest entrusted to privileged undertakings. According to the CJEU, in “allowing derogations to be made from the

² The concept of “services of economic interest” has until its incorporation into Protocol 26 to the Lisbon Treaty only been mentioned in soft law documents and tends to refer to services provided in the non-economic public interest. The concept of “services of general economic interest” in contrast constitutes the well-known legal concept that is anchored in the Treaties. See further (Neergaard and Nielsen 2010 b, 475).

general rules of the Treaty on certain conditions, that provision seeks to reconcile the Member States' interest in using certain undertakings, in particular in the public sector, as an instrument of economic and fiscal policy with the Community's interest in ensuring compliance with the rules on competition and the preservation of the unity of the common market" (CJEU, Case 202/88, Terminal Directive [1991] ECR, I-223, para. 12). The obligation to provide services in the public interest must ultimately be based on a public act (CJEU, Case 127/73, BRT v Sabam [1974] ECR 313, para. 20).

Contrary to the former test which appeared to be based strictly on economic criteria, non-market criteria such as environmental protection or equality concerns seem to have cautiously found their way into the catalogue of justification criteria, which brings this provision closer to the mandatory requirements under the free movement provisions (Neergaard and Nielsen 2010 b). Article 106 (2) TFEU has also been relied on in order to exempt certain subsidies from the notion of state aid (CJEU, Case 280/00, Altmark Trans [2003] ECR, I-7747; CJEU, Joined Cases 34-38/01, Enirisorse [2003] ECR, I-14243). The ongoing developments suggest a great deal of legal uncertainty, but they tend to enhance the discretion of national bodies to define their services of general (economic) interest in the absence of European legislation and to justify their impact on the market by virtue of an increasingly lenient proportionality test (Sauter and Schepel 2009). All in all, the existing norms and documents illustrate that the Treaty provides for a mechanism to balance the competition rules and the use of certain undertakings for the purposes of legitimate public policy.

3.3.8. Public procurement between the state and the market

Public procurement directives have been adopted at the EU level in particular for the award of public contracts in the supplies, works and service sectors as well as in public utilities in order for economic operators to benefit fully from the free movement rules in the area of public procurement. In addition to the objective of rendering award procedures more rational, transparent and fair, the potential lack of commercial discipline in public purchasing and the potential for preferential treatment in favour of national or local economic operators are meant to be counteracted by the public procurement rules (European Commission 2011a).

The public procurement rules govern activities of "the state" that are less based on the exercise of public authority than on the need to secure the functioning of its own activities. In the present context, which entities the public procurement rules apply to is of utmost interest while the role of public policy in the form of non-market objectives also deserves some attention.

Two major directives define the term "contracting authority" that determines the personal scope of the public procurement rules (Article 2 Directive 2004/17 and Article 1(9) Directive 2004/18). Whereas the term "state" and "local and regional authorities" therein are relatively straightforward and understood in a functional as opposed to a formal institutional sense (according to CJEU, Case 31/87, Beentjes [1988] ECR 4635, para. 11, the concept of the "state" includes bodies that the state entrusted by legislation with certain tasks), the third alternative "bodies governed by public law" is more complex, essentially depending (cumulatively) on the purpose for which it is established (general interest or industrial / commercial character), whether it has legal personality and the degree of state control in terms of financing or supervision. The Court interprets this functional notion broadly (CJEU, Case 373/00, Truley [2003] ECR, I-1931, para. 43). This ensures the efficient enforcement of the public procurement rules regardless of the particularities in Member States' legal orders. Ultimately depending on a case-by-case analysis, taking into account factors such as the degree of competition in the market, the concept of need in the general interest and the issue of profit and

allocation of risks, public bodies may escape the reach of the public procurement rules under narrow conditions (European Commission 2011a).³

Large projects involve considerable financial efforts and carry a number of risks that invite co-operation in order to share the burden. Under EU law, public authorities are free to pursue economic activities themselves or to assign them to third parties.

In several judgments the CJEU has invoked the right to local self-government and made it clear that the possibility for public authorities to use their own resources to perform the public-interest tasks conferred on them may be exercised in cooperation with other public authorities. Public-public cooperation, including in-house situations and horizontal non-institutionalised cooperation, under certain conditions may be excluded from the scope of the public procurement rules.⁴

Public entities may also co-operate with private companies, which is known under the label of “public-private-partnerships” (“PPPs”). This is, however, not a legal term. If PPPs qualify for public contracts or works concessions (service concessions are excluded from the procurement rules and subject to the free movement provisions and general principles of EU law), they must comply with the public procurement rules at EU level, notwithstanding the general applicability of the free movement provisions and the general principles of EU law such as equality, transparency and proportionality. From the outset, *contractual* PPPs including concessions, for instance (minor aspects are governed by the public procurement directives), are distinguished from *institutionalised* PPPs that involve the establishment of an entity held jointly by the public and the private partner, which are also known by the name “joint venture”. The creation of a mixed-capital entity is not in itself covered by the public procurement rules whereas the award of tasks may fall under the directives or EU law in general. The “competitive dialogue” laid down in Article 29 of Directive 2004/18 may be relevant in this context. PPPs tend not to escape the public procurement rules as soon as one partner is privately owned, even to a small extent.⁵

As to the second aspect that touches upon the interplay between the public and private element, the public procurement rules have in one form or another taken into account the influence of public policies such as social policy or environmental protection. Contracting authorities are in general free in the basic decision as to “what to buy” as long as the characteristics of the works, products and services are transparent and non-discriminatory, whereas the public procurement rules apply in particular with regard to the question of “how to buy”. As a general rule, these objectives, such as environmental protection or social policy aspects, can be

³ On these aspects, in particular on the issue of the need in the general interest, cf. CJEU, Case 360/96, BFI Holding [1998] ECR, I-6821, paras. 43-44 (removal and treatment of household refuse); CJEU, Case 373/00, Truley [2003] ECR, I-1931 (funeral undertakers); CJEU, Case 44/96, Mannesmann Anlagenbau [1998] ECR, I-73, para. 26 (printing business); CJEU, Case 18/01, Kohonen [2003] ECR I-5321, para.51 (buying, selling and leasing properties and organising and supplying property maintenance services).

⁴ Cf., e.g., CJEU, Case 107/98, Teckal [1999] ECR 8121 (in-house situation: control of public body over entity in a similar way to that in which public bodies control their own departments); CJEU, Case 26/03, Stadt Halle [2005] ECR I-1; CJEU, Case 458/03, Parking Brixen [2005] ECR, I-8585 and the follow-up case law such as CJEU, Case 324/07, nyr, Coditel; CJEU, Case 573/07, Sea [2009] ECR, I-8127, para. 46; CJEU, Case 480/06, Commission v Germany [2009] ECR I-4747, para.45 (contractual horizontal non-institutionalised cooperation with public authorities); for details, e.g., Sauter and Schepel 2009, Commission 2011 a and http://ec.europa.eu/internal_market/publicprocurement/partnerships/cooperation/index_en.htm (including a recent staff paper on public-public cooperation).

⁵ For details, cf. http://ec.europa.eu/internal_market/publicprocurement/partnerships/public-private/index_en.htm; Bovis, 51 et seq., and the case law CJEU, Case 26/03, Stadt Halle [2005] ECR, I-1; CJEU, Case 410/04, ANAV [2006] ECR, I-3303; CJEU, Case 196/08, Acoset [2009] ECR, I-9913 (double competitive tendering procedure is not required in connection with the award of contracts to, or the conferral of certain tasks on, newly established PPPs if certain conditions are met); CJEU, Case 215/09, Mehiläinen Oy, nyr. 32 et seq.; on joint procurement (aggregate demand) see Commission 2011 a, 23.

incorporated into the requirements of the subject matter of a contract, the technical specifications, the selection criteria, the award criteria and the contract performance (European Commission 2011a). Some of these possibilities can be found in the case law.⁶ Thus, as the recent Green Paper of 2011 points out, the first objective of the envisaged modernisation is to increase the efficiency of public spending. A complementary objective is to make better use of public procurement in support of societal goals, whilst this does not exclude a conflict of goals. This shows rather that even though the state does not act as a public authority in a narrow sense, but rather at an earlier stage in order to enable the exercise of public authority, it is entitled to pursue public policies in addition to the efficiency goal in the context of public procurement (Losada 2012).

3.4. From inter-state concepts via vertical relationships to horizontal relationships

It has already been highlighted that the interplay between the state and the market is a very complex issue, characterised by the attempt to subject as many situations as possible to the market rules by adopting functional approaches with respect to the personal scope of the free movement and competition rules (the competition rules understood in a broad sense). A further important area displaying the functional organisation of the Treaties and its evolution is the development of legal relations covered by EU law. In the inception of European Integration, legal relations were situated amongst Member States and between Member States and the EU. The Court shifted the focus toward vertical relations between private parties and public power in the 1960s. Today, EU law grapples increasingly with horizontal legal relations, i.e. legal relations between private parties on both sides. This development draws our attention to the personal scope of primary and secondary EU law. Taking the question of the personal scope of EU law a step further, it also includes the evolution of liability for breaches of EU law in vertical and horizontal relationships.

According to the original concept of the public international (economic) law Treaty, the Treaties in the first place aimed at dismantling national barriers to cross-border (economic) activities originating from Member States. The view of the treaty provisions as norms governing inter-state-relations and the relationship between the EU and its members has been fundamentally modified since the introduction of the direct effect of the free movement provisions in the early 1960s in the case *Van Gend en Loos*. In this seminal judgment, the Court underscored that the new legal order entailed Member States and individuals as its subjects, and that the Treaty expressly and implicitly confers rights and imposes obligations on Member States and on individuals (CJEU, Case 26/62, *Van Gend en Loos* [1963] ECR 1). The direct effect of EU primary law led to the enforcement of (economic) integration goals vis-à-vis public power before national bodies, i.e. vertically. The direct effect within the meaning of the *Van Gend en Loos* judgment is still a highly controversial concept, but it is basically a question of the precise and unconditional character of a norm. Some emphasise that direct effect has merely encouraged the instrumentalisation of private parties for integration purposes by allowing for efficient enforcement of EU law irrespective of its implementation in or transposition into national law (Rutgers 2009), in other words, as an additional means of enforcing EU law next to

⁶ See, e.g., CJEU, Case 513/99, *Concordia Bus Finland* [2002] ECR, I-07213 (on environmental protection as award criterion); CJEU, Case 76/81, *Beentjes* [1982] ECR 417 (on the requirement of employment of long-term unemployed persons); CJEU, Case 384/07, *Wienstrom* [2008] ECR, I-10393 (environmental protection as award criterion); see, however, CJEU, Case 346/06, *Rüffert* [2008] ECR, I-1989 (whether to respect wage conditions of a collective agreement as award criterion for public works contract; the case was ultimately decided on the basis of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services); cf. the initiatives at the political level and, in particular, within the Commission forming part of socially responsible governance set out in the documents on green, social and innovative public procurement at http://ec.europa.eu/internal_market/publicprocurement/other_aspects/index_en.htm.

the infringement action and the preliminary ruling. However, others have elaborated more extensively on the rights-language also alluded to in the *Van Gend en Loos* judgment because they advocate a genuine rights-language as it is known in some national legal systems or consider the direct effect as the beginning of the end of inter-governmentalism to an extent (Mestmäcker 1978; Müller-Graff 2001; Halberstam 2005; Grundmann 2008).

The Court's language allows for both interpretations or favoured one over the other one in certain stages of EU integration (Maduro 1998; Halberstam 2005; Bengoetxea 2008; Azoulai 2010; de Witte 2011) when it held that the new legal order "produces direct effect and creates individual rights which national courts must protect". Echoing the submission of the Commission, the Court ruled that "this Treaty is more than an agreement which merely creates mutual obligations between the contracting parties". This does not prevent differences in national procedural law to lead to nuanced outcomes across Member States. To date, it has remained notoriously unclear when a rights-language prevails that may lead to a "substitution effect" at a national level and when the impact of EU law is confined to an "exclusionary effect" vis-à-vis conflicting national law (Bengoetxea 2008; de Witte 2011).

No matter whether one stops at the idea of the instrumentalisation of private parties as an additional enforcement instrument or whether one goes further and follows up on the rights-language of the Court, private parties entered the game as then exotic players for some time only as law enforcers and/or bearers of rights, i.e. in a vertical dimension. The direct effect of primary law was refined in subsequent decisions with regard to its concept, conditions, and its applicability to secondary legislation (de Witte 2011).

The next step was the application of EU law between private parties, i.e. its horizontal dimension. The horizontal application of the free movement provisions targets restrictions on cross-border economic activities arising between private parties and thereby imposes obligations on individuals. In addition to the question of justiciability discussed in the context of the direct effect in vertical situations, the core of the direct applicability of a norm in horizontal settings lies in the controversial public-private distinction. In other words, the applicability of a norm in a contractual relationship is not only a justiciability issue, but also a question of the substance and the nature of the underlying relationship. It has to do with the question of on whom a norm can impose obligations, and, whether there are more specific sets of rules governing the relationship between private parties pursuing their self-interest such as the competition rules. Contractual relations including labour relations or corporate law by their very nature do involve non-state actors on both/all sides.

The horizontal application of primary and secondary law has remained controversial to date. In *Defrenne II*, the Court recognised the horizontal applicability of the principle of equal pay between men and women in employment even though the respective provision was and still is formally addressed to Member States (CJEU, Case 43/75, *Defrenne II* [1976] ECR 455, para. 31). The Court accepted the indirect horizontal applicability of the free movement rules in two cases by establishing a duty of state bodies to observe fundamental rights and freedoms in horizontal proceedings (CJEU, Case 265/95, *Commission v France* [1997] ECR, I-6956; CJEU, Case 112/00, *Schmidberger* [2003] ECR, I-5659). The direct horizontal applicability of free movement provisions was recognised with regard to the free movement of persons (CJEU, Case 36/74, *Walrave* [1974] ECR 1405; CJEU, Case 415/93, *Bosman* [1995] ECR, I-4921; CJEU, Case 281/98, *Angonese* [2000] ECR, I-4139 and follow-up cases such as CJEU, Case 94/07, *Raccanelli* [2008] ECR I-05939), services (CJEU, Case 341/05, *Laval* [2007] ECR, I 11767) and the freedom of establishment (CJEU, Case 438/05, *Viking* [2007] ECR, I-10779) even though its rationale has remained open to multiple interpretations. So

far, bodies that are not public authorities may be addressees of obligations under EU law in relation to rules that aim at regulating gainful employment or the provision of services in a collective (*Walrave, Bosman*) or individual manner (*Angonese*). This has been extended to the collective action of trade unions which, according to the Court, also ultimately aims at regulating gainful employment or is at least inextricably connected to regulating gainful employment (*Viking, Laval*). An important argument to equate the private with public power under the free movement provisions was the functional argument, combined with the *effet utile* argument. The *effet utile* dimension of it is that in relation to the goal, namely to establish and maintain an internal market, the abolition of state obstacles must not be neutralised by bodies that are not governed by public law (*Walrave, Bosman, Angonese*). The other element of the argument is that with respect to employment, only a functional view is liable to avoid certain inequalities in the application of EU law since working conditions in the different Member States are sometimes governed by provisions laid down by law or regulation and sometimes by collective agreements and other acts concluded or adopted by private persons (*Walrave, Bosman, Angonese, Viking*). The legal autonomy and certain rights of these non-public actors have often been vaguely indicated in this context (*Walrave, Viking*) but unfortunately not discussed in more detail. Another argument in favour of imposing obligations on non-state actors was to stress the weakness of the textual argument that pointed to the Member States as addressees of the free movement provisions or Article 157 (1) TFEU (*Defrenne II, Angonese, Viking*). Regrettably, the line between the direct and indirect horizontal application of free movement provisions has not been delineated clearly by the Court (*Mangold, Küçükdeveci*).

The crucial question remains to determine the criteria for why and under what conditions EU law can impose obligations on non-state actors, i.e. complement the rights-dimension of the free movement provisions if one accepts it by a duty-dimension. The case law appears to equate obstacles originating from the private sphere with public power on the basis of criteria such as the normative/regulatory/quasi-regulatory power and mere socio-economic power comparable to the one inherent in state action.

In my view, a viable test can hardly be based on the mere effects of a measure that are allegedly equated to the one of a state measure. It seems that labour relations enjoy a particular role as a partly regulated area, whereas it would be desirable to stress whether the Court proceeds from the assumption that there is an imbalance of power between both sides, or why the application of the competition rules should not apply to both industrial relations, which is not at all obvious. This imbalance of power argument would however only apply to the application of the free movement provisions against the "stronger" side, i.e. the employers. What should matter, in my view, is whether or not any of the addressees of obligations under the free movement provisions act in the public interest (Streinz and Leible 2000; Baquero Cruz 2002; Odudu 2006, 2010; Semmelmann 2010; de Witte 2011), which may vary among Member States in relation to both parties in employment relations. Going beyond the requirement of a public interest criterion would unnecessarily blur the borderline between the competition and the free movement rules and overly stretch the scope of the justification grounds. Assuming that in light of the maturation of EU law competition law is not considered sufficient to capture private power, contracts as such need to be accommodated by the functional economic integration paradigm on a more comprehensive doctrinal basis in order to put an end to the era where rights exist without duties (see at 3.5.). The Court would be relieved from subjecting employment relationships to the free movement provisions by adopting an overly broad concept of functionalism if their roots in contract law were openly recognised and if a body of EU private law developed, and in one way or another included, labour relationships.

In secondary law, and in particular with respect to directives, the classical reading is that as additional enforcement instruments directives apply in horizontal

relationships only under exceptional conditions. This stance was softened by the broadening of the notion of the state. The Court took an institutional as opposed to a functional approach with regard to the role of the state as an employer which deviates from the otherwise preferred functional approach. In order to ensure the effectiveness of a directive in the case of improper implementation, it ruled that the well-established doctrine on the vertical direct effect of directives applies to the state regardless of the capacity in which it is acting, "whether as an employer or as public authority" (CJEU, Case 152/84, Marshall [1986] ECR 723, para. 49; CJEU, Case 188/89 Foster [1990] ECR, I-03313, para. 17). While the reach of the so-called incidental direct effect in triangular relationships is not crystal-clear (cf. AG Bot, Case 555/07, nyr, Küçükdeveci), recent judgments may suggest that the lines towards the horizontal direct effect of directives have become more indistinct than ever before (CJEU, Case 144/04, Mangold [2005] ECR I-9981; CJEU, Case 555/07, nyr, Küçükdeveci). As a general rule, however, and irrespective of the unusual and complex interaction between general principles and directives in those cases, obligations directly derived from directives in horizontal relationships remain the exception rather than the rule. It is obvious that labour relationships and hence the content of certain directives (that is to be divorced from mere enforcement) cause particular difficulties also in this context.

Once the personal scope of a given EU law norm has been established in the light of the principles set out above, one also has to examine liability questions in case of breaches of the respective EU law norm. When it comes to secondary judicial protection, the principle of state liability has been firmly established as an additional tool for non-state actors to have damages compensated if the Member States fail to fulfill their duties under EU law (CJEU, Joined Cases 6/90 and 9/90, Francovich [1991] ECR, I-5357). Taking this vertical liability a step further leads us to the issue of the still underdeveloped horizontal liability of private persons. So far, liability originating in EU law in horizontal relationships has only been accepted in cases involving breaches of EU competition law by private parties (CJEU, Case 453/99, Courage v Crehan [2001] ECR, I-6297; CJEU, Joined Cases 295-298/04, Manfredi [2006] ECR, I-6619). This is hardly surprising given that competition law as such applies directly between economic actors who exercise an economic activity as undertakings. Article 101 (2) TFEU deals with the impact of an infringement of the competition rules on a commercial contract by stating absolute and automatic nullity of a contract in this event. The liability of private parties in horizontal relationships in other areas such as any sort of contract law has so far been left to the procedural autonomy of the Member States, modified by the principles of equivalence and effectiveness. This is a little surprising given that a common European contract and tort law as the classical area for reciprocity and commutative justice is not yet existent -although it is emerging. With a view to effective and uniform remedies throughout the EU and a growing focus on the individual in EU law (Article 47 Charter, 19 (1) TEU, CJEU, Case 432/05, Unibet [2007] ECR, I-2271), further sophistication of horizontal liability in cases of breaches of EU law appears inevitable.⁷

Even if we have so far refrained from a genuine rights-language in the EU internal market context, the consolidation of fundamental rights protection no longer allows for such a limited view. Instead, it invites us to take a fresh look at the role of individuals and private parties. According to Article 51 of the EU Fundamental Rights Charter, its provisions are addressed to EU public power and Member States when they implement EU law (which is, arguably, to be understood in a broad sense). The Convention did not tackle the issue of the horizontal application even though the title "solidarity" entails several social rights and principles that traditionally govern the relations between private parties such as the right to strike,

⁷ On the continuation of the Laval-saga as liability case before the Swedish courts, Bernitz and Reich; for a recent view of the CJEU on the liability question in labour relations, CJEU, Case 282/10, nyr, Maribel Dominguez.

which is laid down in Article 28 of the EU Fundamental Rights Charter, which seems to make their horizontal applicability inevitable. Moreover, it remains conceivable that one day free movement rules and economic fundamental rights will be merged so that their horizontal application equally requires a solution. For the time being, fundamental rights, which have so far been recognised as general principles of EU law, will continue to co-exist alongside the codified rights and principles, although a certain convergence of sources incorporating fundamental rights is highly desirable. The question of the direct applicability of general principles has remained opaque in the recent case law in particular with respect to horizontal situations and in cases where the prohibition of age discrimination reflected in a general principle interacted with the relevant Directive 2000/78 and possibly also with the respective overlapping provision laid down in the EU Fundamental Rights Charter (cf. *Mangold, Küçükdeveci*, cf. also irrespective of age discrimination AG Trstenjak, Case 282/10, nyr, *Maribel Dominguez*).

Whereas typically, EU law and its interpretation by the Courts has been restrictive with respect to the imposition of obligations on private parties, the Court will have to develop a sound theoretical framework for why and under what conditions EU law imposes obligations on non-state actors. The Court will not have to rely on such criteria, like the effect of obstacles that result from private power, if the need to take into account contractual relations under EU law is clarified. This leads us to the issue of the emergence of a common European contract law, its scope and its theoretical soundness, which will be tackled in the next section.

3.5. Evolution of a genuine private law and the issue of public values therein

The third field of interest with respect to the evolution and challenge of the functional (economic) integration concept is the emerging body of European private law. The terminology and the concepts used in the existing model law involving European private/contract law which is organised according to a subject-specific-approach obviously clash with the functional approach aimed at (economic) integration. Two aspects are worth mentioning that touch upon the public-private distinction in EU law. On the one hand, the lack of a comprehensive European private law can be traced to the fact that the allocation of competences has been shaped by a different guiding principle and even acts relating to consumer or labour protection were adopted on the internal market legal bases which has provoked considerable confusion. On the other hand, "public" values have intruded in contractual relations that are governed by private law according to the received wisdom in market economies.

3.5.1. Contractual relations and the emergence of a "European private law"

As mentioned earlier, the term "private" law appears in the Treaties even less frequently than its "public" counterpart. Why then at the beginning of the new millennium did the Commission start an initiative for a common European Contract law (European Commission 2001), which is currently in the process of being implemented? The reasons that have been advanced include the persistent obstacles to, or hidden potential of, cross-border commercial activities – in particular with respect to smaller and medium sized businesses, consumer contracts and confidence, financial services and e-commerce. Furthermore, the existing piecemeal harmonisation has caused some discontent due to its inconsistencies and the constitutional problem of its legal basis, because all major contract law directives so far have been enacted on the basis of the internal market competence even though consumer protection has been a driving force (Weatherill 2010). The need for harmonisation is normatively and empirically not uncontroversial (Vogenauer and Weatherill 2005; Smits 2006; European Commission 2010). The same holds true with respect to the material scope of any future common private law. First, some suggest a distinction between business-to-business contracts and business-to-consumer contracts. Second, it is controversial

whether European private law should include only contract law or also related liability questions. Third, the discussions have revealed disagreement about whether it should include only cross border contracts or all contracts including domestic contracts (European Commission 2010). The Commission has presented several options for how to apply the existing model law with varying degrees of binding character and mandatory force (European Commission 2010) that would co-exist with other international instruments of equally varying nature in relation to their binding and mandatory character. Recently, the Commission has proposed a regulation for an optional sales law (European Commission 2011c). Academic scholarship currently considers using the DCFR as a model for the CJEU to interpret existing and future EU legislation affecting contract law to be a highly significant though controversial function (Whittaker 2009; Vogenauer 2010). So far, the opinions of several Advocates General have relied on the various existing documents and model laws as non-binding "soft law" documents (AG Trstenjak, Case 215/08, Friz, nyr; AG Trstenjak, Case 489/07, Messner [2009] ECR, I-07315, para. 85 and para. 94; AG Maduro, Case 412/06, Hamilton [2008] ECR, I-02383, para. 24).

3.5.2. Emerging European private law and the public-private distinction

There are two aspects that raise important constitutional questions related to the public-private distinction. One is the thorny issue of the legal basis for the adoption of private law measures, and the second is the increasing influence of what is referred to as "social", "constitutional", "public" or "political" values in private law.

As to the competence issue, there is no express general authorisation of the EU to operate under the label of "private law". This is little surprising given that the allocation of legislative powers has followed a functional structure aiming at (economic) integration and given that the label "private law" has never been present. There are, however, various provisions that can be relied on to adopt legislation that concerns private law as it is generally understood, such as Article 169 (2) b TFEU introduced by the Treaty of Maastricht (support, supplement and monitor the competence of the Member States in the area of consumer protection), Articles 67-81 TFEU on the judicial cooperation in civil matters or the Articles 114 and 115 TFEU (internal market competence) (Weatherill 2010). Since the early days, the competence areas of the EU in fields such as labour protection or consumer protection have evolved gradually, even though in most cases the respective measures have been displayed as measures linked to market integration.

With respect to consumer contract law, the internal market competence provisions, Article 114 and 115 TFEU, were relied on for all significant legislative measures even after the introduction of a genuine consumer competence provision (Article 169 TFEU, which has only been rarely used) and even though it has been openly acknowledged that some of the former directives "disguised the political reality that the Member States were committed to the development of an EC consumer policy" (Vogenauer and Weatherill 2005).⁸

⁸ The legislative *acquis* in relation to consumer contracts includes the following instruments: Directive 85/577 (doorstep selling); Directive 90/314 (package travel); Directive 2008/122 replacing 94/47 (timeshare); Directive 2008/48 replacing 87/102 (consumer credit); Directive 97/7 (distance contracts); Directive 2007/64 (payment services in internal market); Directive 2000/31 (electronic commerce); Directive 2002/65 (distance marketing of consumer financial services); Directive 93/13 (unfair terms in consumer contracts); Directive 99/44 (certain aspects of the sale of consumer goods and associated guarantees). See also – again based on Article 115 TFEU – the Commission's proposal for a Directive on consumer rights, http://ec.europa.eu/consumers/rights/cons_acquis_en.htm. The proposal merges the existing EU consumer directives into one set of rules. At the same time it updates and modernises existing consumer rights, bringing them in line with technological change (e-commerce, online auctions) and improving provisions particularly in sales negotiated away from physical business premises (e.g. door to door selling). For legislative measures relating to commercial contracts: Directive 86/653 (rules on self employed commercial agents); Directive 2000/35 (late payment in commercial transactions); Directive 2006/123 (services directive).

The provisions that served as an entry point for consumer-related aspects into harmonisation based on internal market legislation can be found in the current Article 114 (3) TFEU: "3. The Commission, in its proposals envisaged in paragraph 1 concerning health, safety, environmental protection and consumer protection, will take as a base a high level of protection, taking account in particular of any new development based on scientific facts. Within their respective powers, the European Parliament and the Council will also seek to achieve this objective". According to the current Article 12 TFEU, introduced with the Treaty of Maastricht, consumer protection requirements "shall be taken into account in defining and implementing other Union policies and activities". The complex interaction between the internal market rationale and consumer protection are to be viewed in the light of the Tobacco Advertising cases of the CJEU and their follow-up cases (Weatherill 2011). It was argued that "in so far as Brussels derives its functional competence from the goal of establishing an internal market, it enjoys potentially unlimited powers in private law subjects" (Caruso 1997).

The situation has been similar with respect to social policy. As a starting point, employment policy relating to macro-economic issues should be severed from labour relations and the protection of the workers, which are both more relevant for the public-private distinction. Many labour-related directives were adopted upon general or more specific legal bases rooted in the internal market, such as the current Article 115 TFEU or the Treaty provisions on the free movement of services, and are facing the same struggle for their soul between market-building and market-correction (Barnard 2011).⁹ The role of the social partners in legislation was strengthened with the introduction of the social policy protocol attached to the Treaty of Maastricht.¹⁰ Article 9 TFEU, the social policy cross-sector clause, has been broadened with regard to its material scope and moved to a more prominent place in the TFEU. Social fundamental rights are assuming increased significance for promoting solidarity, and yet they await the clarification of their application between private parties. The horizontal application of fundamental rights has been recognised in some jurisdictions, such as Portugal, Spain and Ireland, but it is generally regarded as the exception, an issue which will inevitably need to be tackled at the EU level as well (de Witte 2009). The right to strike, laid down in Article 28 of the Charter of Fundamental Rights, may serve as an example that the Court has recognised it as a fundamental right (*Viking, Laval*) without ever fleshing out its personal scope. All these achievements demonstrate the enormous potential underlying the social aspects. Yet, the social dimension still lacks a comprehensive catalogue of precise and enforceable instruments. This dilemma has only been overcome with respect to anti-discrimination laws in employment matters, as it will be shown below.

The dilemma of the shaky legal basis, which was due to the economic integration paradigm and an overly broad interpreted functionalism, could be considered as overcome on two grounds, one linked to the question of legal basis and legislative activity and the other to the clarification of the interpretative approach of the Court with regard to holistic Treaty interpretation. First, the creation and gradual consolidation of several legal bases related to labour and consumer protection and anti-discrimination have paved the way for the evolution of EU law in these areas grounded in market-independent, self-standing constitutional values. Specific areas of private law have been the objects of harmonisation, such as the areas of health and safety at work pursuant to Article 153 TFEU or the principle of equal pay for

⁹ E.g., Directive 75/117 (equal pay); Directive 76/207 (access to employment); both directives have been replaced by Directive 2006/54; Directive 75/129 (collective redundancies, now replaced); Directive 80/987 (insolvency protection) (now replaced by Directive 2008/94); Directive 77/187 (transfer of undertakings) and Directive 91/553 (information of workers); Directive 96/71 (posted workers). On the struggle to legislate in the social domain, CJEU, Case 84/94, *UK v Council*, [1996] ECR I-5755 (on legal basis of working time directive).

¹⁰ Article 155 (1) TFEU, Directive 96/34 (Parental leave); Directive 97/81 (part time work); Directive 99/70 (fixed term work).

equal work between men and women introduced by the Treaty of Amsterdam and now set forth in Article 157 (3) TFEU¹¹. The Treaty of Amsterdam introduced what is currently Article 19 TFEU as a general legal basis allowing for the adoption of anti-discrimination measures, which has triggered the adoption of a number of anti-discrimination directives in employment and elsewhere. These developments suggest that fundamental rights, and in particular the equal treatment principle, serve to overcome the never-ending controversies concerning the balance between market-building and market-correction.

Secondly, the Court has at least in theory, and derived from holistic Treaty interpretation, recognised the co-existence of a plurality of constitutional goals including non-market goals (*Defrenne II*, *Viking*, *Laval*) so that the respective legal basis in each of the relevant fields in the future can be conceptually uncoupled from the functional economic integration paradigm. Theoretically speaking, there would no longer be a need to view the benefits of consumer protection or labour protection in economic terms. This tendency has been affirmed by the ongoing consolidation of the EU's fundamental rights regime and is being reinforced where human rights inspire legislation. On the side of non-market goals and values, a category of Trojan horses has assumed growing relevance, namely the (general) principles (of EU law) as sources of EU law. Although details have remained opaque and controversial, the recognition of several expressions of the equal treatment principle has strengthened and extended the protection against discrimination, e.g., on grounds of age and sexual orientation (*Mangold*, *Kücükdeveci*, *Römer*). This does not mean, however, that their effects do not have to be accommodated within the vertical and horizontal allocation of powers.

What does this picture tell us? Private law or contract law are shallow terms that include areas involving labour and consumer protection, which have been influenced by public values. Hence, the economic integration paradigm in its pure form and the asymmetries with regard to legislative competences appear at best reductionist in light of the complexity underpinning the interface between the market and intervention. Due to ideological controversies and the lack of a comprehensive catalogue of competences at the EU level, internal market competence provisions have been used abundantly. This will hopefully no longer be necessary in the future given that more specific legal bases are available and that a consolidating human rights protection is increasingly serving as a driving force behind constitutional norms and legislative measures.

In addition to the need to render the issue of the legislative basis more transparent, another distinct, albeit related, issue remains to be tackled with regard to a proposal for a legislative measure concerning contract law, namely the question of the interplay between freedom and solidarity in any sort of contract law. The original idea of the creation of an academic draft proposal initiated by the Commission was supposed to lead one day to its adoption at the legislative level. Methodological and substantive details remain highly controversial, not least because of ideological battles over how to reconcile freedom and solidarity, which cannot be discussed here in detail (Cherednychenko 2007; Ciacchi 2010; Brüggemeier, Ciacchi and Comandé 2010).

One of the thorniest current questions regards the role of the principle of equal treatment in contractual relations. Should the principle of equal treatment indeed govern contractual relations that are, according to the classical reading, flowing from contractual freedom? It has widely been accepted that market failures require corrections in order to reach substantive equality between both sides of a contract, an issue which reflects the concern of commutative as opposed to distributive justice. This view does not obviously herald the instrumentalisation of private law by external goals. Things are rendered more complex by bringing in constitutional

¹¹ Directive 76/207 amended by Directive 2002/73 and Directive 2006/54.

values such as consumer protection or labour protection if and when they go beyond the correction of market failures. The highest degree of complexity is reached where specific equality claims on the basis of sex or age are introduced and applied not only in unproblematic vertical situations but also in labour relationships (*Mangold, Küçükdeveci*) and, even more extensively, which is particularly controversial (e.g. in relation to access to goods and services or in the relationship between shareholders in company law (*Audiolux*)).

Many commentators assume that there is an unwritten principle of equality (Tridimas 2006; Besson 2008) that has been concretised in several norms at the legislative and constitutional level in the EU.¹² The body of equality law is highly fragmented and incoherent with respect to the different grounds of discrimination, its conceptual approaches as well as its material scope. Discrimination on grounds of nationality and all the grounds listed in Article 19 TFEU are prohibited in employment and occupation. Only nationality, gender and racial or ethnic discrimination to varying degrees are prohibited outside the labour market. Whereas the prohibition of discrimination on grounds of sex as regards equal pay between men and women in employment matters has long been recognised as a fundamental right (CJEU, Case 149/77, *Defrenne III* [1978] ECR 1365, paras. 26-29), other specific equality principles have been qualified as fundamental rights only recently (*Mangold, Küçükdeveci, Römer*). This shows that the equality principle enjoys a considerable and still growing degree of acceptance that might not be the case with respect to other rights. This is so because it meets the requirements of generality to the extent that it can be applied in a comprehensive way across national legal orders and, arguably, across (many) branches of law alike. The equality principle appears to have crossed the public-private divide in EU law in areas such as labour law and struggles to gain acceptance in contract or corporate law. This particularity vis-à-vis other rights and principles might be due to the absence of independent substantive claims and the advantage of its relational, access-oriented nature (European Commission 2008b). The creation of conditions for the eradication of social exclusion and participation rights, in other words equality of opportunity as opposed to the equality of outcome, has become increasingly accepted and appears to reflect a "third way" thinking (Barnard 2011). What is decisive is the balance between contractual autonomy and intervention in contractual relations, which amounts ultimately to a political choice.

4. Conclusion

A formally classified public-private distinction has existed in one form or another in many civil law countries. A formal separation of the two spheres aims to ensure the rule of law and shield the legislature from undue intrusion from the courts. However, social and economic changes and subsequent political and legal reactions have blurred the distinction over time, demonstrating that law cannot be divorced from its social, economic and political context. Conversely, in jurisdictions which have not traditionally had a strict and watertight distinction, the divide has become more apparent in response to international human rights commitments. This justifies assuming a certain convergence across the EU states. The purpose of this paper was not to solve EU-level problems, given that they have not yet been solved at the national level. Rather, this paper constitutes a modest attempt to clarify whether there is indeed a public-private distinction – or an alternative – at the EU level. From the outset, market integration has dominated the legal framework of

¹² The latter include the following provisions and instruments: Articles 18, 19, 157 TFEU, Articles 20-23 EU Charter of Fundamental Rights; Directive 2000/43 (equal treatment irrespective of race and ethnic origin in employment and beyond (education, supply of goods and services, social advantages)); Directive 2000/78 (equal treatment in employment); Directive 2006/54 (equal treatment for men and women in matters of employment and occupation); Directive 2004/113 (equal treatment between men and women as regards the access to and supply of goods and services); proposal for a directive implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, COM (2008) 426 final, 2008/0140.

the EU. Under a functionalist construction, integration has been sought to make the law instrumental to a given need, in our case, the need to create wealth and progress by integrating national economies and, ultimately, political communities. Yet, this goal-orientation failed to illuminate the nature of the relationship between the actors concerned (Weinrib). Notably, the only set of European rules to govern private parties from the outset has been EU competition law. The economic integration paradigm was first challenged by the growing significance of non-market values. Today, EU law urgently needs to accommodate hybrid forms of governance which involve both the market and public power, and to accurately define the concept of the public interest and the means necessary for its protection. Beyond this, the continuing expansion of the material scope of EU law cannot but affect the role of its actors and subjects, which has led to a second challenge, namely of the public (international economic) law legacy. EU law scholarship and legal practice will have to re-conceptualise the role of the individual as being concomitantly a subject of the law, a bearer of rights and an addressee of obligations with regard to various sources of EU law. Hence, EU law must move beyond the image of the individual as simply a tool of law enforcement. For that purpose, a distinction appears suitable between on the one hand refining questions of the effect of EU law on both vertical and horizontal relationships under national law and the determination of the personal scope of various sources of EU law on the other. The third challenge results from clashes between the existing *acquis* and the implicit distinctions between public and private law underlying the model laws for a common European contract law, which correspond to the public-private divide known in civil law countries. The harmonisation of contract law in the EU, its constitutional basis, its scope and the role of public values therein are doubtlessly delicate and difficult issues. The EU Courts and the legislature seem to be pursuing a hidden agenda when grappling with employment and consumer contracts by stretching the functionalist and the *effet utile* argument in the context of the horizontal application of primary and secondary law or the choice of the legal basis of legislation. By doing so, they side-step an important constitutional dimension of this tricky issue. This hardly does justice to the actors involved nor the underlying interests at stake.

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