The Architecture of Post-National European Contract Law from a Phenomenological Perspective

A Question of Comparative Institutional Analysis

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"Theory is the most important part of the dogma of the law, as the architect is the most important man who takes part in the building of the house."

Oliver Wendell Holmes, The Path of the Law: Harv. L. Rev. 10 (1896/97) 457–478 (477).

Contents

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Literature cited in *abbreviated form*: *Martijn Hesselink*, CFR & Social Justice, A short study for the European Parliament on the values underlying the Draft Common Frame of Reference for European private Law (2008) (cited: Social Justice); *Ralf Michaels/Nils Jansen*, Private Law Beyond the State?, Europeanization, Globalization, Privatization: Am. J. Comp. L. 54 (2006) 843ff. (cited: Private Law); *Wilhelm Schapp*, Die neue Wissenschaft vom Recht I (1930) (cited: Wissenschaft).

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In this article, I will take stock of the existing debates as to the "colour" of European contract law. I will map what I understand as the main approaches to European contract law and their respective critiques (I.). By adopting a phenomenological perspective, which shares quite a lot with what is nowadays commonly known as legal realism, I will subsequently introduce Wilhelm Schapp's idea according to which one has to differentiate contracts into two structures – an infrastructure and a superstructure – which, despite being intertwined, need to be assessed differently (II.). I will then apply these criteria to the debate in European contract law and locate the distinct approaches within them. By doing so, we will see that values and their transformation form the basis for legitimacy in European contract law. Crucial in the debate on European contract law is, therefore, which values are defined by whom as part of the superstructure of European contract law (III.). I will then argue for a post-national understanding of the superstructure of European contract law which consists of traditional, individual party-determined values and new values that are independent from the respective parties and thereby determined by other players. The only value that qualifies as typically post-national is the one of market creation (IV.). I will call for the need to base European contract law on the political idea of the achievement of an internal market. Each and every action taken in the making of European contract law, be it the Common Frame of Reference, comparative research, legislative or judicial action, or scholarly assessment, needs to be assessed in order to determine whether it contributes to the making of an internal market in the sense of Union law. The way forward for the development of European private law is the theory of comparative institutional analysis.

I. Taking stock of post-national European contract law

The best one could currently say regarding the scope, identity and definition of European contract law is that the debate about it is highly diverse and far from reaching an end.[1] Although the definition of European contract law

[1] See inter alia *Stefan Grundmann*, European Contract Law(s) of what Colour: European Review of Contract Law (ERCL) 1 (2005) 184ff. (cited: Colour); *id.*, The Structure of the

largely depends on individual features such as one's perception of (Union) law,[2] we may distinguish between two groups: Those who understand European contract law as some supranational legal order where regulative EU law forms the basis or at least part of European contract law (1.), and those who understand European contract law as a transnational legal order which originates in the private legal systems that are reflected in the laws of Europe's nation states (2.). This categorisation is neither watertight nor exclusive; however, it helps us to map the different views. As transnational European contract law for some may become ultimately supranational, these perspectives are not mutually exclusive. In addition, the debate on the colour of European contract law continues also within these groups.

1. European contract law as a supranational legal order

Among private legal scholars who perceive European contract law as a supranational order, the most resistant hardly believe that European contract law exists at all as an autonomous discipline. In their view, the forces of an autonomous EU law occasionally, but not necessarily intentionally, influence national private law as far as it is necessary to meet its market-creating purpose.[3] Such European contract law hence would form the sum of nation-

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DCFR – What Approach for Today's Contract Law?: ERCL 4 (2008) 225ff. (cited: Structure); *Martijn Hesselink*, Common Frame of Reference and Social Justice: ibid. 248ff. (cited: CFR); *Thomas Wilhelmsson*, The Legal, the Cultural and the Political – Conclusions from Different Perspectives on Harmonisation of European Contract Law: Eur. Bus. L. Rev. 13 (2002) 541ff.; *Moritz Röttinger*, Towards a European Code Napoléon/ABGB/BGB?, Recent EC Activities for a European Contract Law: Eur. L.J. 12 (2006) 807ff.; *Stephen Weatherill*, The Commission's Options for Developing EC Consumer Protection and Contract Law: Assessing the Constitutional Basis: Eur. Bus. L. Rev. 13 (2002) 497ff.; *Hans-Wolfgang Micklitz*, The Visible Hand of European Regulatory Private Law, The Transformation of European Private Law from Autonomy to Functionalism in Competition and Regulation, in: Yearbook of European Law 28:2009 (2010) 3ff. (cited: Visible Hand); *Hans-Wolfgang Micklitz/Fabrizio Cafaggi*, Introduction, in: European Private Law after the Common Frame of Reference, ed. by *id.* (2010) pp. viii–xlvi (cited: European Private Law).

[2] See in this respect *Wilhelmsson* (previous note) 546ff.; *Wulf-Henning Roth*, Europäische Verfassung und europäische Methodenlehre: RabelsZ 75 (2011) 787ff. (794).

[3] See for this view *inter alia Grundmann*, Colour (supra n. 1) 188ff.; *Leone Niglia*, The Transformation of Contract Law in Europe (2003); *Nils Jansen/Ralf Michaels*, Private Law and the State: Comparative Perceptions and Historical Observations: RabelsZ 71 (2007) 345 (355–356) (cited: Private Law and the State); *id.*, Private Law 861; *Paul Verbruggen*, The Public – Private Divide in Community Law: Exchanges across the Divide, in: The Impact of the Internal Market on Private Law of Member Countries, ed. by *Micklitz/Reich* (EUI Working Paper LAW 2009/22) 4ff.; *Micklitz*, Visible Hand (supra n. 1) 3ff.; *Micklitz/Cafaggi* (supra n. 1) pp. viii–xlvi; Hesselink highlights this feature as a dualist perception of EU law, see *Hesselink*, The Common Frame of Reference as a Source of European Private Law: Tulane L. Rev. 83 (2009) 919ff. (932ff.) (cited: Common Frame of Reference).

al private law that has been influenced by European primary and secondary law and by the European judiciary. As such, European contract law would be "Europeanised national contract law" at best, which remains in principle fragmented into the sectors of national private legal systems.

For some, this status quo is desirable because they understand a fragmentation of European contract law as an expression of the pluralistic structure of Europe. The cultures of Europe, in their view, are so heterogeneous that they deem further harmonising or systematising ideas as undesirable or even impossible. According to their view, a vital feature of European contract law is the competition of legal orders.[4] Others move a step further and seek to dissect legal principles and cultural elements from the existing secondary legislation that originally only selectively influenced national private law. These principles would then in a generalised way form an evolving European contract law.[5] For determined "European friendly" private scholars, these principles and cultural elements reflect certain values that may ultimately provide the basis for a political codification of European contract law,[6] which, however, would not supersede national codifications.

Those who define European contract law as a supranational legal order debate at a normative level whether, to what extent and to what end such influence on national private law is desirable.[7] Those in favour of supranational integration emphasise the regulatory function of European contract law,[8] which moved away from a mere technical framing of private autonomy to an increasingly interventionist, political law which functionally steers

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[4] *Gerhard Wagner*, The Virtues of Diversity in European Private Law, in: The Need for a European Contract Law: Empirical and Legal Perspectives, ed. by *Smits* (2005) 3; *Jan Smits*, European Private Law, A Plea for a Spontaneous Order, in: European Integration and Law, ed. by *Curtin et al.* (2006) 55 (75–78).

[5] See on principles *Jürgen Basedow*, Das BGB im künftigen europäischen Privatrecht, Der hybride Kontext: AcP 200 (2000) 445ff. (453): "Andererseits erlaubt aber die Verdichtung des europäischen Gemeinschaftsprivatrechts die Frage, ob nicht hinter den punktuellen Richtlinien Rechtsgrundsätze stehen, die sich für eine verbindende Sinngebung eignen und eine gewisse Verallgemeinerung gestatten." In English (translation K.P.): "The condensation of Community private law may allow asking whether there are legal principles behind the individual Directives that may suffice to identify generally binding interpretations and allow for a certain generalisation." Embracing this method also for cultural ideas *Jan Smits*, Law Making in the European Union – On Globalization and Contract Law in Divergent Legal Cultures: La. L. Rev. 67 (2007) 1181ff.; *id.*, Plurality of Sources in European Private Law, or: How to Live with Legal Diversity?, in: The Foundations of European Private Law, ed. by *Brownsword/Micklitz/Niglia/Weatherill* (2011) 323ff.

[6] *Hesselink*, Common Frame of Reference (supra n. 3) 919; *id.*, If you don't like our principles we have others: On core values and underlying principles in European private law: A critical discussion of the new 'Principles' section in the Draft CFR, in: The Foundations of European Private Law (previous note) 59ff. (CSECL Working Paper No. 10/2009).

[7] *Roth* (supra n. 2) 793ff.

[8] *Micklitz*, Visible Hand (supra n. 1) 3ff.

markets in certain directions.[9] Methods of contract law, they believe, are better means for achieving goals or legitimising tasks of the EU in areas that have previously been reserved solely to the public law domain.[10] When the EU adopts such an approach to contract law, the EU acts like a state by "more and more adopting an 'American', instrumental approach to private law."[11] Among these scholars it remains unclear, however, which political function this instrument fulfils. For some, European contract law is to be used as a function to build a market, as the EU's main concern is the establishment of an internal market.[12] Hence, some emphasise that EU law is to be used to create efficiency in order to gain benefit from comparative cost advantages.[13] Others emphasise that private EU law is something other than a copy of the "American" functional understanding.[14] According to this view, it should therefore "move from the narrow focus of mere market building to a more inclusive approach in which other values and concerns also have their legitimate place."[15] For some, this means that European contract law is to be analysed in light of specific European social justice models.[16] For others, EU contract law should also be used to correct irrational market behaviour.[17]

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[9] *Julia Black*, Constitutionalising Self-Regulation: Mod. L. Rev. 59 (1996) 24 ff.; *Jody Freeman*, Private parties, public functions and the new administrative law: Administrative L. Rev. 52 (2000) 813 ff.; *Martijn Hesselink*, The Values underlying the Draft Common Frame of Reference: What Role for Fairness and "Social Justice"?, Study for the European Parliament (2008) 15; *Norbert Reich*, A European Contract Law: Ghost of Host for Integration?: Wisconsin Int. L.J. 24 (2005) 425 ff. (449).

[10] See inter alia *Harm Schepel*, The Constitution of Private Governance, Product Standards in the Regulation of Integrating Markets (2004) 30 ff.; *Daniela Caruso*, Private Law and State-Making in the Age of Globalization: N.Y.U.J. Int. L. Pol. 39 (2006) 1 ff. (5–7); *Colin Scott*, Private Regulation of the Public Sector, A Neglected Fact of Contemporary Governance: J.L. Soc. 29 (2002) 56 ff.

[11] *Jansen/Michaels*, Private Law and the State (supra n. 3) 355.

[12] *Jürgen Schwarze*, Europäisches Wirtschaftsrecht (2007) Rz. 31 ff.

[13] See *Stefan Grundmann*, Das Thema Systembildung im Europäischen Privatrecht – Gesellschafts-, Arbeits- und Schuldvertragsrecht, in: Systembildung und Systemlücken in Kerngebieten des Europäischen Privatrechts, ed. by *id.* (2000) 1 ff. (3); *Willem Molle*, The Economics of European Integration[5] (2006) 35–36 and 67; Recital (4) Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market, O.J. 2007 L 319/1: "It is vital, therefore, to establish at Community level a modern and coherent legal framework for payment services [...] which is neutral so as to ensure a level playing field for all payment systems, in order to maintain consumer choice, which should mean a considerable step forward in terms of consumer cost, safety and efficiency, as compared with the present national systems."

[14] *Guido Alpa*, Introduzione al diritto contrattuale europeo (2007) p. vii.

[15] *Hesselink*, Social Justice 59; see also *Study Group on Social Justice in European Private Law*, Social Justice in European Contract Law: a Manifesto: Eur. L.J. 10 (2004) 653 ff.

[16] *Hesselink*, Social Justice 21. Micklitz proposes access justice as such an EU model of social justice. Thereby, he combines ideas of social justice and market creation, see *Hans-Wolf-*

Critics of a supranational European legal order for contracts demand that the nation states' private legal methodologies must play a more important role in this supranational legal order.[18] They are concerned about the unity of customary national contract law[19] and fear that private autonomy as the legal basis for contract law is endangered.[20]

2. European contract law as a transnational legal order

Those who believe that European contract law describes a transnational legal order largely exclude supranational law, especially EU law,[21] from their definition. For them, European contract law already exists in private legal orders in Europe, which may be researched and dissected. According to some, this is an academic exercise. In their view, following Savigny's *Volksgeist* idea,[22] European contract law may be distilled out of national private law systems by comparative research.[23] The outcome of such research would be casebooks[24] or even a codification, which should, however, remain principally free from political influence.[25] Others contend that national courts

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gang Micklitz, Social Justice and Access Justice in Private Law, Introduction, in: The Many Concepts of Social Justice in European Private Law, ed. by *id.* (2011) 3ff.

[17] See *Jens-Uwe Franck/Kai Purnhagen*, Homo Economicus, Behavioural Sciences, and Economic Regulation: On the Concept of Man in Internal Market Regulation and Its Normative Basis, in: Law and Economics in Europe: Foundations and Applications, ed. by *Mathis* (forthcoming 2013).

[18] The debate revolves usually around the question of whether indefinite legal terms in European private law should be interpreted by the European or national institutions, see *Anne Röthel*, Die Konkretisierung von Generalklauseln, in: Europäische Methodenlehre[2], ed. by *Karl Riesenhuber* (2010) 351ff.; *Hans-Christoph Grigoleit*, Der Verbraucheracquis und die Entwicklung des Europäischen Privatrechts: AcP 210 (2010) 356ff. (417ff.).

[19] *Grigoleit* (previous note) 417ff.; *Carsten Herresthal*, Die Einheit des Privatrechts in der europäischen Integration – Palladion oder Relikt einer vergangenen Epoche?, in: Einheit des Privatrechts, komplexe Welt: Herausforderungen durch fortschreitende Spezialisierung und Interdisziplinarität: Jahrbuch Junger Zivilrechtswissenschaftler 2008 (2009) 139ff.

[20] See for a description *Michaels/Jansen*, Private Law 881ff.

[21] This has been pointed out by *Michaels/Jansen*, Private Law 862.

[22] *Reinhard Zimmermann*, Savigny's Legacy, Comparative Law, and the Emergence of a European Legal Science: L.Q. Rev. 112 (1996) 576ff.

[23] *Jan Smits*, European Private Law and the Comparative Method, in: The Cambridge Companion to European Union Private Law, ed. by *Twigg-Flessner* (2010) 33ff.

[24] See, for example, the Ius Commune Case Book series for the Common Law of Europe, published by Hart, Oxford.

[25] *Royston Goode*, The Harmonization of Dispositive Contract and Commercial Law – Should the European Community be Involved?, in: Denationalisierung des Privatrechts?, ed. by *Kieninger* (2005) 18ff. (28, 31).

should slowly but consistently create European contract law via dialogue and mutual citation.[26]

Among the transnationalists, the purpose of these exercises is already subject to debate. For some, the core idea of such a comparative understanding of European contract law is its identity-creating function.[27] Such a bottom-up approach excludes any regulatory intervention by European authorities since it is grounded in the respective European society. Others exercise such comparative research with a view towards creating or detecting an order that is ultimately supranational, such as a European common or internal market, or at least "supra-social", such as a pan-European society. In the eyes of most of the people involved, the Draft Common Frame of Reference, for example, amounts to an academic and apolitical piece, which nonetheless creates or has the potential to create a supranational legal order of European contract law.[28]

3. The common phenomenology and the lack of a theory

These different views have already been described elsewhere to varying degrees and with diverging connotations.[29] To the extent to which this variety of concepts, thoughts and approaches to European contract law is accepted, it is common knowledge that the phenomena of European contract law also change. With the publication of the horizontal Directive on consumer rights,[30] and even more when the proposed Regulation on a Common European Sales Law[31] would enter into force if passed, the regulatory rationale of EU law starts to dominate the notion of contract law. As the

[26] *Walter Odersky*, Harmonisierende Auslegung und europäische Rechtskultur: Zeitschrift für Europäisches Privatrecht (ZEuP) 2 (1994) 1 ff.

[27] *Nils Jansen*, Traditionsbegründung im europäischen Privatrecht, Zum Projekt eines "Gemeinsamen Referenzrahmens", in: Ökonomische Analyse der europäischen Zivilrechtsentwicklung, ed. by *Eger/Schäfer* (2007) 74 ff.

[28] *Goode* (supra n. 25) 18, 28, 31.

[29] *Michaels/Jansen*, Private Law 860 ff.; *Oliver Remien*, Europäisches Privatrecht als Verfassungsfrage: Europarecht 40 (2005) 699 ff. (700 ff.); *Ralf Michaels*, Of Islands and the Ocean: The Two Rationalities of European Private Law, in: The Foundations of European Private Law (supra n. 5) 139 ff. (cited: Of Islands).

[30] Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts – Statement by the Council and the Parliament re Article 6 (1) – Statement by the Commission re Article 3(1), first indent, J.O. 1997 L 144/19.

[31] Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law, COM(2011) 635 final.

European legislator requires that any measure must satisfy a specific internal market test,[32] the respective areas of contract law as well as the institutions that are subject to regulation in these acts undoubtedly become a political notion. The furthest reaching phenomenon of post-national European contract law we may observe is hence the blurring of the public and private divide,[33] which results from or is triggered by the increasing regulatory function of European private law.[34] This development goes hand-in-hand with at least a change in the role of private autonomy as a basis of legitimacy[35] and the rise of specific, originally European principles and values that have their origins in the private law domain[36] or touch upon it.[37]

For supporters of this view, such a development is a necessary and welcome continuation of the materialisation of formal private law that started already in the nation state.[38] Critics highlight the risk involved for private autonomy and free will as concepts supporting the legitimacy of contract law. In their view, people's formal freedom establishes the fundamental basis for the very nature of contract law.[39] Hence, according to this view, contract

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[32] *Bruno de Witte*, Non-market Values in Internal Market Legislation, in: Regulating the Internal Market, ed. by *Shuibhne* (2006) 61 ff. (75): "Internal market legislation, to be constitutionally valid, *must* satisfy a specific internal market test in the sense that the authors of the act must make a plausible case that the act either helps to remove disparities between national provisions [...] or helps to remove disparities that cause distorted conditions to competition."

[33] *Reich*, The public/private divide in European law, in: European Private Law (supra n. 1) 56 ff.; *Verbruggen* (supra n. 3) 4 ff.

[34] *Michaels/Jansen*, Private Law 881 ff.

[35] *Grundmann*, Colour (supra n. 1); *Michaels/Jansen*, Private Law 881 ff.; *Gerhard Wagner*, Mandatory Contract Law: Functions and Principles in Light of the Proposals for a Directive on Consumer Rights: Erasmus L. Rev. 3 (2010) 47 ff. (47 f.): "Given that there is something of an overlapping consensus regarding the normative justification of party autonomy, it is surprising that, in reality, party autonomy is on the retreat."

[36] *Alpa* (supra n. 14) p. vii.

[37] See especially ECJ 15. 10. 2009 –Case C-101/08 *(Audiolux SA and Others ./. Groupe Bruxelles Lambert SA (GBL) and Others and Bertelsmann AG and Others)*, E.C.R. 2009, I-9823; *Editorial Comments*, The scope of the general principles of Union law: An ever expanding Union?: C.M.L. Rev. 47 (2010) 1569–1589; *Koen Lenaerts/José Gutiérrez-Fons*, The Constitutional Allocation of Powers and General Principles of EU Law: ibid. 1629 ff.; *Stephen Weatherill*, The "principles of civil law" as a basis for interpreting the legislative acquis: ERCL 6 (2010) 74 ff. (cited: The "principles of civil law"); *Arthur Hartkamp*, The General Principles of EU Law and Private Law: RabelsZ 75 (2011) 241 ff.

[38] See for the materialisation of national law *Claus-Wilhelm Canaris*, Wandlungen des Schuldvertragsrechts – Tendenzen zu seiner "Materialisierung": AcP 200 (2000) 273 ff.; for the alleged parallels between the national notion of materialisation and the development in European private law *Remien* (supra n. 29) 699, 715 ff.; *Christian Joerges*, The Europeanisation of Private Law as a Rationalisation Process and as a Contest of Legal Disciplines: European Review of Private Law (ERPL) 3 (1995) 175 ff.; *Gerhard Wagner*, Materialisierung des Schuldrechts unter dem Einfluss von Verfassungsrecht und Europarecht – Was bleibt von der Privatautonomie?, in: Obligationenrecht im 21. Jahrhundert, ed. by *Blaurock/Hager* (2010) 13 ff.

[39] Regarding formal freedom as the basis for contract law see the first chapter of *Tobias Lobinger*, Rechtsgeschäftliche Verpflichtungen und autonome Bindung (1999); *Caroline*

law is by definition apolitical.[40] They fear that these developments in European contract law will end this formal feature of contract law and introduce politics into contract law.

Most of this previous discussion has approached the question of what European contract law is from a centralised point of view, which is characteristic of the traditional nation state – and especially the welfare state – and is also used as an explanation at the European level.[41]

Understanding EU contract law from a non-functionalist perspective only denies the fact that nowadays political EU law influences European contract law. Such denial risks spawning private legal thinking that is trapped in an ivory tower, fostering Windscheidian legal thinking that has only minimal practical use.[42] The supranational private law scholars that understand European contract law as the sum of national private law influenced by EU law still perceive EU lawmaking in the fashion of disguised intergovernmental thinking. They see the EU as an organisation built on an institutional treaty that simply coordinates individual national states' interests because technically such problems may be solved better at the European level.[43] The "principleists" and 'codificationalists' tend to see the EU as another and bigger welfare state, maybe federally structured, or as a pan-European area in the making, which only takes over the tasks previously assigned to the individual nation states.[44] Accordingly, for some, the EU requires a private code in order to achieve the national unity that countries such as, for example, France and Germany attained with the Code Napoléon and the Bürgerliches Gesetzbuch (BGB), respectively.[45]

Meller-Hannich, Verbraucherschutz im Schuldvertragsrecht (2005) esp. 149 with an annotation of *Micklitz* discussing the various approaches to formal freedom in European contract law in RabelsZ 75 (2011) 439ff.

[40] *Goode* (supra n. 25) 18, 28, 31.

[41] Instead of many see *Giandomenico Majone*, The Regulatory State and Its Legitimacy Problems: West European Politics 22 (1999) 1ff.; *Adrian Favell*, The Nation-Centered Perspective, in: Dialogues on Migration Policy, ed. by *Giugni/Passy* (2006) 45ff.

[42] See to this end *Raoul van Caenegem*, European Law in the Past and the Future (2002) 99.

[43] Jörn Ipsen termed this theory "Zweckverbandstheorie", see: Der deutsche Jurist und das Europäische Gemeinschaftsrecht, in: Verhandlungen des 43. Deutschen Juristentages (1964) L 14ff.; *id.*, Europäisches Gemeinschaftsrecht (1972) 176ff.; Giandomenico Majone termed this theory "regulatory state", see Regulating Europe, ed. by *id.* (1996).

[44] *Beate Gsell/Carsten Herresthal*, Einleitung, in: Vollharmonisierung im Privatrecht, ed. by *id.* (2009) 1ff. (9): "Allgemein könnte dem nationalen Gesetzgeber durch vollharmonisierende Richtlinien die Möglichkeit zur Normsetzung genommen werden, ohne dass auf der Gemeinschaftsrechtsebene eine hinreichende Substitution erfolgt." Critical of this view *Guido Alpa/Mads Tønnesson Andenas/Maren Heidemann*, Grundlagen des europäischen Privatrechts (2010) p. IV.

[45] See inter alia *Röttinger* (supra n. 1) 807; *Reinhard Zimmermann*, Civil Code and Civil Law: The "Europeanization" of Private Law Within the European Community and the Re-emergence of a European Legal Science: Columbia J. Eur. L. 1 (1994–1995) 63ff.

Each of these approaches contains what elsewhere has been called an "invisible touch of stateness."[46] Not surprisingly, these views are contradictory because the multi-level governance models embodied in the EU bear little resemblance to the traditional, centralised nation-state models, bound to the will of one nation, territorially confined and hierarchically ordered and endowed with all functions of government.[47] What is lacking is a theory that provides an analytical framework that enables us to understand this development of European contract law in light of this new kind of statecraft.[48] As to the character of the EU as an explicit supranational system, this theory needs to cope especially with the question of the role of private parties, nation-state regulation and EU regulation from such a post-national[49] decentred perspective.[50] Although I am aware of the risks involved with the development of theories that try "to explain it all",[51] uncertainties about the connection between EU law and private law[52] have shown that European contract law

[46] *Jo Shaw/Antje Wiener*, The Paradox of the European Polity, in: The State of the European Union: Risks, Reform, Resistance and Revival, ed. by *Green Cowles/M. Smith* (2000) 65ff.

[47] See among the vast amount of literature inter alia *Caruso* (supra n. 10) 4; *Tanja Börzel/Thomas Risse*, Who is Afraid of a European Federation?, How to Constitutionalise a Multi-Level Governance System, in: What Kind of Constitution for What Kind of Polity?, Responses to Joschka Fischer, ed. by *Joerges/Mény/Weiler*, available at <http://centers.law.nyu.edu/jeanmonnet/papers/00/00f0101.html>.

[48] *Luisa Antoniolli/Francesca Fiorentini*, Introduction, in: A Factual Assessment of the Draft Common Frame of Reference, ed. by *id.* (2011) 1ff. (35).

[49] "Post-national" hereby describes somewhat misleadingly a decentred perspective, which does not take the nation or welfare state as the starting point of analysis. The notion of post-nationality, however, should not be interpreted as a negation of nation states. They are still the host of sovereignty, but share, however, this sovereignty with supranational organisations at least on an equal level. See, as to the role of nation states in post-national structures, *Luis Moreno*, Europeanisation, Mesogovernance and 'Safety Nets': Eur. J. Pol. Research 42 (2003) 271ff. (272); especially on this transformation of the role of Member States in the EU *Hans-Wolfgang Micklitz/Stephen Weatherill*, Federalism and Responsibility, in: Federalism and Responsibility, A Study on Product Safety Law and Practices in the European Community, ed. by *Micklitz/Roethe/Weatherill* (1994) 12ff.

[50] *Holger Fleischer*, Europäische Methodenlehre, Stand und Perspektiven: RabelsZ 75 (2011) 700 (706f.): "Wer auf dem Weg zu einer wahrhaft europäischen Methodenlehre weiter voranschreiten will, muss zunächst seine nationale Graugans-Prägung abstreifen."; *Christian Joerges*, The Challenges of Europeanisation in the Realm of Private Law, A Plea for a New Legal Discipline: Duke J. Comp. Int. L. 14 (2004) 149ff.; *Hans-Wolfgang Micklitz*, The Concept of Competitive Contract Law: Penn State Int. L. Rev. 23 (2004/05) 549ff.

[51] See in this respect the fundamental critique on Alexy's principles theory, *Jan Klement*, Vom Nutzen einer Theorie, die alles erklärt – Alexys Prinzipientheorie aus der Sicht der Grundrechtsdogmatik: JZ 2008, 756ff.

[52] Particularly illuminating is the term "horror iuris" as introduced by *Ernst Steindorff*, Anmerkung: JZ 1992, 95 to describe the influence of EU law's principle of proportionality on national private law; see for the influence of fundamental freedoms on contract law *Georg Bachmann*, Nationales Privatrecht im Spannungsfeld der Grundfreiheiten: AcP 210 (2010) 424ff. and the various discussions surrounding the principle of antidiscrimination, see for an

cannot develop without such theoretical exercises. We need a post-national framework (some sort of architecture[53]) that builds European contract law. It should be capable of helping us to understand, and maybe even to some extent guiding us, in the depths of these aforementioned struggles.[54]

II. Wilhelm Schapp's distinction between the super- and infrastructure of contracts

The theoretical framework or "architecture" that I am looking for, therefore, needs to fulfil three main purposes: First, it needs to explain contract law independent of a nation-state perspective and offer a more decentred starting point, providing sufficient room for the development of the specific characteristics of EU law. Second, it needs to incorporate specific features of Member State systems such as, for example, the still dominating liberal individualistic basis of the German BGB. Third, it needs to provide a forum for the analysis of the interdependencies of these different levels.[55]

My approach in this paper, however, is more modest as I will only try to provide answers to the first question. I will investigate whether Wilhelm Schapp's criterion of distinction between the superstructure and infrastructure of contract law might shed some light on the development of such a theory. I chose Schapp because he developed his theory within the framework of the legal phenomenologists[56] such as Husserl[57] and Reinach,[58] whose approach to the evaluation of contract law was based on a setting where

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overview *Norbert Reich*, Non-Discrimination and the Many Faces of Private Law in the Union – Some Thoughts After the "Test-Achats" Judgment: European Journal of Risk Regulation 2 (2011) 283ff.

[53] The Architecture of European Codes and Contract Law, ed. by *Grundmann/Schauer* (2006).

[54] *Martijn Hesselink*, A European Legal Method?, On European Private Law and Scientific Method: Eur. L.J. 15 (2009) 20ff. (33): "The aim of legal methods is to make it less messy, e.g. by developing standards of interpretation, by trying to demarcate the application of existing law and the creation of new law by the courts, and by telling the courts what to do when the law runs out"; *Fleischer* (supra n. 50) 701ff.

[55] Basedow has already convincingly explained these challenges, see *Basedow* (supra n. 5) 445–492, esp. 453; On the need for comparability of these levels, see also *Hans-Wolfgang Micklitz*, Europäisches Regulierungsprivatrecht: Plädoyer für ein neues Denken (II): Zeitschrift für Gemeinschaftsprivatrecht (GPR) (2010) 2ff. (4) (zitiert: Regulierungsprivatrecht).

[56] See for a horizontal overview on legal phenomenology *Sophie Loidolt*, Einführung in die Rechtsphänomenologie (2010).

[57] See on the influence of Husserl's theory on Wilhelm Schapp *Herbert Spielberg*, Phenomenology in Psychology and Psychiatry, A Historical Introduction (1972) 54ff.; for a profound analysis of Husserl's work, see The Cambridge Companion to Husserl, ed. by *B. Smith/Woodruff Smith* (1995).

[58] See for an assessment of Reinach's theory, *James Dubois*, Judgment and Sachverhalt: An Introduction to Adolf Reinach's Phenomenological Realism (1995); *Jean-François Kervégan*,

nation-state authority does not constitute the starting point for rulemaking in national contract law.[59] Thereby, they provided an intellectual framework for contract law that was independent of any authority such as the state. The legal phenomenologists shared the view that law is not "made" by whatever authority, it rather pre-exists beyond such law-making exercises and may be "detected" via phenomenological method.[60] Legal phenomenologists have therefore nowadays been described as early German "realists",[61] who argued against the rise of positivistic thinking in their time. However, they explicitly recognised the phenomenological "detection" as a normative exercise. A second normativity is then introduced by re-implementing the role of the state into the method as an arbiter between the different possibilities that arise from the observations. Among the legal phenomenologists I deliberatively chose Schapp since he viewed contracts through a conceptual architectural lens by using the concepts of infrastructure and superstructure. By doing so, he is the only classical legal phenomenologist who bases his analytics in the social world itself. His theory, therefore, has a much stronger footing because it is based on factual, existing social relations[62] rather than theoretical, academic social constructions such as the social acts construed, for example, by Reinach.[63] The basis of Schapp's approach might hence also be suitable to provide a theory for the architecture of a post-national European contract law.

Compared to other classic theorists in private law, Schapp has so far had little influence on the assessment of contract law in legal scholarship.[64] In philosophy and psychology, however, he is among one of the classic points of reference for the phenomenological study of contract law.[65]

Adolf Reinach, entre droit et phénoménologie: De l'ontologie normative à la théorie du droit (2008); *Purnhagen*, Grundlagen der Rechtsphänomenologie: Jura 2009, 666ff.

[59] Such a non-state-centred perspective was a revolutionary thesis at Schapp's time and is still uncommon among classic European jurists to date, see *Jansen*, The authority of an academic 'Draft Common Frame of Reference', in: European Private Law After the Common Frame of Reference (supra n. 1) 147ff. (151); *Michaels*, Globalizing Savigny?, The State in Savigny's Private International Law and the Challenge of Europeanization and Globalization, in: Dezentralisierung aktueller politischer und rechtlicher Steuerung im Kontext der Globalisierung, ed. by *Stolleis/Streeck* (2007) 119ff.

[60] See as to the term of "detection" *Karl Larenz*, Methodenlehre[2] (1969) 189ff. (esp. 103ff.).

[61] *Dubois* (supra n. 58).

[62] *Jan Schapp*, Sein und Ort der Rechtsgebilde, Eine Untersuchung über Eigentum und Vertrag (1968) 39 (cited: Rechtsgebilde).

[63] See on the social acts in Reinach's theory *Loidolt* (supra n. 56) 85ff.

[64] *Purnhagen* (supra n. 58) 666ff.; *Wolfgang Schur*, Leistung und Sorgfalt (2005) 233; *Patrick Gödicke*, Formularerklärungen in der Medizin (2008) 85–87.

[65] See in this respect *Spielberg* (supra n. 57) 55: "Schapp's dissertation had considerable influence [...] as one of the most original and fruitful demonstrations of concrete phenomenology". See for further works under the influence of Wilhelm Schapp's theory inter alia *David Carr*, Épistémologie et ontologie du récit, in: Paul Ricœur, Les métamorphoses de la raison herméneutique, ed. by *Greisch/Kearny* – Actes du colloque de Cerisy-la-Salle 1er–11

Schapp initiates his legal phenomenology with a study of the contract.[66] He distinguishes between reasonable contracts, unreasonable contracts, clauses and mutual contracts,[67] while clearly focusing his investigation on the latter category.[68] Throughout this piece, I will also refer to mutual contracts only. Schapp separates out two levels in such contracts: their infrastructure and their superstructure, whereby the infrastructure describes 'if' a contract will be concluded and the superstructure addresses the 'how':

1. The infrastructure (the world of values)

The starting point of Wilhelm Schapp's analysis is that any contract is based on an "infrastructure of mutual deliberations of the opponents."[69] Such deliberations follow a three-step process: In a first step, the value of a thing is estimated.[70] Subsequently, the estimated value is compared to the estimated value of another thing, ultimately leading to a decision.[71]

a) The estimation of the value of a thing (evaluation)

Estimating a value plays a central role in Schapp's methodology. He describes it as a particular "process between a human being and a thing", which "might be grounded in the sensual perception and knowledge of the thing", but must not be confused with perception itself.[72] To my mind, he thereby clarifies that estimating a value cannot be free from subjective impressions. In this sense, an ugly clock that nonetheless complements the collection of a clock lover might have a higher value for him than a doublet.[73] One has to

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août 1988 (1991) 205ff.; *Odo Marquard*, Narrare necesse est, in: Philosophie des Stattdessen, ed. by *id.* (2001) 60ff.; *Jean Naudin*, Binswanger & Schapp: Existential Analysis or narrative Analysis?: Journal of Phenomonological Psychology 29 (1998) 212ff.; *Barry Smith*, Law and eschatology in Wittgenstein's early thought: Inquiry 21 (Winter 1978) 425ff.; *C. E. Dark*, Morbus Philosophicus, A Case History of the German Disease as an Approach to the Philosophy of Wilhelm Schapp and Hans Blumenberg (2008); *Loidolt* (supra n. 56) 123ff.; *J. Schapp*, Rechtsgebilde (supra n. 62); *Walter Grasnick*, In Fallgeschichten verstrickt, Notizen zu einer narrativen Theorie des Rechts: Zeitschrift für Rechtsphilosophie 2003, 192ff.

[66] *W. Schapp*, Wissenschaft 182. The following passage rests on my (German-language) piece *Purnhagen* (supra n. 58) 666ff.

[67] *W. Schapp*, Wissenschaft 2.

[68] See in this respect also *J. Schapp*, Rechtsgebilde (supra n. 62) 38.

[69] *W. Schapp*, Wissenschaft 2.

[70] *W. Schapp*, Wissenschaft 2, 34.

[71] *W. Schapp*, Wissenschaft 34, 56.

[72] *W. Schapp*, Wissenschaft 2.

[73] *W. Schapp*, Wissenschaft 3.

keep in mind, however, that for Schapp the value itself is nonetheless objective in the same way that a thing is perceptible.[74]

I note at this point that objective values form the central focus of Schapp's theory on contracts. As such, the "value" deserves further attention. Schapp assumes that every human being lives in his or her own world of values, which is accessible through "enjoying" or "tasting".[75] He thereby explicitly excludes economic value-evaluating methods.[76] Schapp describes a subjective sensation of value as "enjoying", while he uses "tasting" to describe a more objective approach to the sensation of value. He illustrates this distinction with the example of a normal person who enjoys wine and a professional wine critic:[77] A normal person enjoys the wine, allowing it to affect his or her subjective sensation in order to evaluate the wine. A professional wine critic tastes the wine and compares it to the quality of other wine and to the market demand of such a wine. In both cases, the value itself is objective since it is attached to the thing. However, as the value has been evaluated subjectively, the value is variable and subject to normative assumptions, which originate in the respective person[78] or in his or her morals.[79] Such a value, regardless of whether determined by enjoying or tasting, forms the basis for any kind of contract.

b) The balancing of evaluations (decision)

In the next step the contracting party balances the value of his or her own thing against the value of the other's thing. This happens mainly via comparing their value. Here it may be necessary for one partner to let the other take part in his or her world of values, so that this partner has the opportunity to estimate the value himself or herself. For Schapp, this "supply of values" is the main field for jurisprudence.[80] The protection of the world of values against external interference is another one, which is exercised, for instance, through compensation of an incorrect balancing exercise through tort law.[81] If the balancing exercise, however, results in the conviction that the value of the other thing is higher than the one of his or her own thing,

[74] *W. Schapp*, Wissenschaft 8 ff.

[75] *W. Schapp*, Wissenschaft 7.

[76] *W. Schapp*, Wissenschaft 41.

[77] *W. Schapp*, Wissenschaft 8.

[78] *W. Schapp*, Wissenschaft 16 ff.; *id.*, In Geschichten verstrickt, Zum Sein von Mensch und Ding (1976) 1 ff.

[79] *W. Schapp*, Wissenschaft 14.

[80] *W. Schapp*, Wissenschaft 22.

[81] *W. Schapp*, Wissenschaft 22; also *Gödicke*, Bereicherungsrecht und Dogmatik (2002) 184.

the partner will conclude the contract.[82] The conclusion of a contract hence always includes an exchange of parts of one's world of values with parts of another's world of values.[83] The task of jurisprudence is henceforth to deal with the question of how to conduct these exchanges.[84]

2. The superstructure (the conclusion of a contract)

Wilhelm Schapp names the part that is concerned with the exchange between both worlds of values the "superstructure".[85] In his view, it is difficult to assess the exact point in time when a sustainable infrastructure exists and the moment is reached to conclude the contract.[86] Schapp imagines the contracting parties in a space that lacks any law and lets them perform an exchange agreement. In order to succeed with that task, the minimum requirement is some expression of intent to enter a commitment.[87] According to Schapp, two or more parties must express their declarations of intent a priori to form a contract.

The importance of the interaction of infrastructure and superstructure becomes evident upon evaluation of the type of contract the parties concluded. For example, depending on the estimated value attributed by each party, one may consider the agreement a sales contract or a promise to make a gift.[88] For purposes of illustration, if both parties assign the same estimated value to a thing and nonetheless transfer the piece from one's world of values to the other's, the transfer can be defined as gift.

3. Interim conclusion

The conclusion of a contract takes place during a three-step process.[89] At the first step the thing is evaluated.

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[82] *W. Schapp*, Wissenschaft 2ff. See also *J. Schapp*, Rechtsgebilde (supra n. 62) 38, who, however, uses the term "performance" instead of "values".

[83] *W. Schapp*, Wissenschaft 27.

[84] *W. Schapp*, Wissenschaft 27.

[85] *W. Schapp*, Wissenschaft 34: "In all [contracts, addendum] the infrastructure consists of estimating the values to be transposed, and the superstructure consists of expressions, which effectuate these transposition."

[86] *W. Schapp*, Wissenschaft 29.

[87] *W. Schapp*, Wissenschaft 30.

[88] *W. Schapp*, Wissenschaft 31. It should be noted here that as a German jurist, Schapp based his theory on his knowledge of German law in which a promise to make a gift is, unlike in common law, regarded as a contract.

[89] See in this respect *W. Schapp*, Wissenschaft 56.

> "On the basis of these evaluations one takes decisions. These decisions then lead to a stage where the expression of declarations of intent becomes possible."[90]

These declarations of intent then result in a contract. The layer of values is described as infrastructure, and the layer concerned with the conclusion of the contract is called superstructure. One could also characterise these two layers with "if" and "why". The infrastructure bears all the criteria that help determine "if" a contract is concluded. The superstructure in turn is concerned with the "how". What is crucial to my research question here is that Schapp identifies values as the basis for rulemaking in contract law. Following the tradition of private autonomy at that time, these values are connected to the determination of the contracting parties. It is interesting to note, however, that Schapp already recognised that some cases require regulation that enables one of the parties to access the other's world of values. Only by doing so, Schapp reasons, can the other party estimate the value of a thing. From my point of view, we see here already in very basic terms a justification for interference with private autonomy, no matter if we see the basis as reasons of social justice or the establishment of the prerequisites of private autonomy.

Placing Schapp's theory within the broader context of American Legal Realism, we see that Schapp was, in fact, quite in line with the American jurisprudential thinking of that time. Legal Realists have argued that systematisation as a deductive and autonomous science that draws decisions from the applications of legal principles and precedents is not possible without reference to the values, social goals, political context or economic context that underlie it.[91] However, Legal Realists have also emphasised that there shall be no qualitative judgments of these underlying values and concerns.

> "A sound body of law [...] should correspond with the actual feelings and demands of the community, whether right or wrong."[92]

Schapp would have most probably agreed with both findings of the Legal Realists: It is exactly these Realist's underlying values and more that Schapp found to be constitutive for the infrastructure of contracts. However, he did not deny the need for coherent systematisation in jurisprudence. Schapp also acknowledged the need to reflect the values in the legal doctrine of the su-

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[90] See in this respect *W. Schapp*, Wissenschaft 56.

[91] *J. Stuart Russel*, The Critical Legal Studies Challenge to Contemporary Mainstream Legal Philosophy: Ottawa L. Rev. 18 (1986) 1ff. (18); *Louis B. Schwartz*, With Gun and Camera Through Darkest CLS-Land: Stanford L. Rev. 36 (1984) 413ff. (431); see furthermore in the context of European scholarship on contract law *Thomas Ackermann*, Der Schutz des negativen Interesses (2007) 9, who rightly classifies the disclosure of underlying values an "imperative of scientific honesty".

[92] *Oliver W. Holmes*, The Common Law (1881) 41.

perstructure. Yet, as the State only makes decisions within the respective values available, he also excludes any qualitative judgment of these values.

III. Theorizing the post-national European contract law in light of Wilhelm Schapp

If we apply Schapp's idea that contracts are based on values to the struggle over the definition of European contract law, we see that the discussion essentially revolves around the determination of values. The core of the struggle is formed by two questions: whose values constitute the infrastructure of European contract law (1.) and how should European contract law respond to these values within the superstructure (2.). This struggle acts as a catalyst for the fundamental question of the link between the infra- and superstructure in European contract law. Or in other words: Which institutions are best suited to reflect the infrastructural values at the superstructural level (3.)?

1. The infrastructure of European contract law

As we have learned from the existence of fundamental freedoms,[93] as well as from the case law of the European Court of Justice (ECJ),[94] contractual freedom is an integral part of EU law. Hence, the basis for any contract is without doubt the parties' value evaluation of a thing. In order to assure a just comparison of value determination, information requirements in EU contract law should guarantee that one party has access to the other party's world of value.[95] If this access is provided insufficiently, withdrawal and rescission rights compensate for the missing value-basis of the contract.[96] Furthermore, principles such as unjust enrichment[97] work as well towards this end. In accordance with Schapp's theory, this compensation of structural failure in party value determination forms the main field of jurisprudence.[98]

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[93] See *Peter-Christian Müller-Graff*, Europäisches Gemeinschaftsrecht und Privatrecht, Das Privatrecht in der europäischen Integration: NJW 1993, 13ff. (14) (cited: Europäisches Gemeinschaftsrecht).

[94] ECJ 8.7. 2007 – Case C-277/05 *(Société thermale d'Eugénie-les-Bains ./. Ministère de l'Économie, des Finances et de l'Industrie)*, E.C.R. 2007, I-6415.

[95] See *Stefan Grundmann*, Information, Party Autonomy and Economic Agents in European Contract Law: C.M.L. Rev. 39 (2002) 269ff. (272) (cited: Information).

[96] See on this feature of EU information rights *Grundmann*, Information (previous note) 269, 272.

[97] ECJ 3.9. 2009 – Case C-489/07 *(Pia Messner ./. Firma Stefan Krüger)*, E.C.R. 2009, I-7315, para. 26.

[98] *W. Schapp*, Wissenschaft 27.

These phenomena, however, are still not unique features of post-national contract law since they occur, or may occur, in a similar way at the national level as well.[99]

So what makes European contract law post-national? What values are so specifically post-national that they cannot be explained by national legislation, such as validity through party autonomy,[100] and need supra-national regulation? By asking these questions, we move from Schapp's idea of merely identifying the respective values within the infrastructure to actually discussing and determining them. Again, the parallel to the development of Legal Realism in American jurisprudential thinking is obvious: In the 1970s the Critical Legal Studies movement advanced and modified the Legal Realist's findings that legal science is never value-neutral to a new conception[101] which "implies a view of society and informs a practice of politics."[102] Instead of merely identifying values, the critical legal scholars furthered a legal method that asked for "open ended disputes about the basic terms of social life, disputes that people call ideological, philosophical, or visionary."[103] It is exactly these conceptual debates that post-national European contract law needs in order to be able to ascertain its infrastructure, such an understanding being a precondition for assessing the legitimacy and accountability of rulemaking in European contract law.

> "Such a common method can only be developed in a dialogue between all those affected, i.e. the legislator, the courts and scholars on all levels of governance (notably the national and the Community level) – an open method of coordination as it were."[104]

Such interdisciplinary debates, however, carry the risk that as a scholar one may cross the demarcation line of the respective discipline. We therefore need to take care that lawyers stay within the limits of legal analysis in order to assure that they know what they are doing and are in a position to evalu-

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[99] See, on the progression from the will-theory to the inclusion of non-party values in national contract law, *Duncan Kennedy*, Three Globalizations of Law and Legal Thought: 1850–2000, in: The New Law and Economic Development, A Critical Appraisal, ed. by *Trubek/Alvaro Santos* (2006) 19ff.

[100] Herewith, I take for granted that the validity of the expression of will does not flow from the individual's expression alone (will-theory), but from the fact that the lawmaker assigns legal validity to this expression (Geltungstheorie), see as to this point *Werner Flume*, Allgemeiner Teil des Bürgerlichen Rechts II[3]: Das Rechtsgeschäft (1979) 45ff.; *J. Schapp*, Grundfragen der Rechtsgeschäftslehre (1986) 44ff.

[101] See on the relationship between Legal Realism and Critical Legal Studies *Axel Metzger*, Extra legem, intra ius: Allgemeine Rechtsgrundsätze im Europäischen Privatrecht (2009) 85–89.

[102] *Roberto Unger*, The Critical Legal Studies Movement: Harvard L. Rev. 96 (1983) 561ff. (563).

[103] *Unger* (previous note) 564.

[104] *Hesselink*, A European Legal Method? (supra n. 54) 38.

ate the consequences of their actions. This does not mean that lawyers should not take recourse to findings of other sciences. Quite to the contrary, market establishing as a political imperative requires taking into account findings from other disciplines such as economics, sociology, and political science. It is, however, one thing to use them and another to determine them. In such interdisciplinary debates it is important to highlight that the subject and object of legal science is the law, and law is what society defines as law.[105] Hence, for lawyers, the starting point for analysis is the wording of the respective legislative or judicial provisions in their societal contexts. With regard to our question of the determination of a post-national infrastructure, the ECJ has demonstrated through a variety of highly disputed[106] judgments that principles such as anti-discrimination,[107] good faith,[108] and coherency[109] constitute such values of European contract law. However, apart from the emphasis that such values are "principles" and that they are "constitutional,"[110] the court has remained silent as to their nature.

> "Are these genuinely general principles of civil law? If they are, are they appropriate as the basis for the interpretation of provisions of EU law? And: how many more such general principles lurk, awaiting embrace by the Court, and where will the Court get them from?"[111]

Hence, it has not even been attempted to elaborate on what makes these values supranational and thereby legitimises the ECJ to judge upon them. Or are these values rather, as *Weatherill* assumes,[112] products of judges that have been trained in civil law countries, largely neglecting common legal traditions? If so, they could never qualify as post-national values because they are still rooted exclusively in national thinking. So, are supranational values indeed only subject to the question *who* decides on them?[113] Acts become law through their manner of interpretation and acceptance by society. The same is true for the determination of post-national values of European contract

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[105] *Niklas Luhmann*, Das Recht der Gesellschaft (1995) 143ff.; *Christoph Möllers*, Staat als Argument (1999) 206.

[106] *Jürgen Basedow*, Der Grundsatz der Nichtdiskriminierung im europäischen Privatrecht: Zeitschrift für Europäisches Privatrecht (ZEuP) 16 (2008) 230ff.; *Reich* (supra n. 52) 283ff.; *Weatherill*, The "principles of civil law" (supra n. 37) 74ff., *Paul Craig*, The ECJ and *Ultra Vires* Action, A Conceptual Analysis: C.M.L. Rev. 48 (2011) 395ff.

[107] ECJ 22.11. 2005 – Case C-144/04 *(Werner Mangold ./. Rüdiger Helm)*, E.C.R. 2005, I-9981; 19.1. 2010 – Case C-555/07 *(Seda Kücükdeveci ./. Swedex GmbH & Co. KG)*, E.C.R. 2010, I-365.

[108] ECJ 3.9. 2009 (supra n. 97) para. 26.

[109] ECJ 1.3. 2011 – Case C-236/09 *(Association Belge des Consommateurs Test-Achats ASBL and Others ./.Conseil des ministres)*, E.C.R. 2011, I-773.

[110] ECJ 15.10. 2009 (supra n. 37) I-9823.

[111] *Weatherill*, The "principles of civil law" (supra n. 37) 78.

[112] *Weatherill*, The "principles of civil law" (supra n. 37) 78.

[113] *Kai Purnhagen*, Principles of European Private or Civil Law?: Eur. L.J. 18 (2012) 844ff.

law. As valuable as a free academic debate on these issues might be, at the end of the day only EU law and its application by the Member States and society determines these values for the purposes of court litigation and other dispute resolution systems.

Seen through this lens, the previous analysis overlooked the functional aspect that contracts were assigned in post-national EU law.[114] Although the fundamental freedoms pre-suppose party-value-determination,[115] these freedoms have not been introduced to spread private autonomy transnationally. The main argument for introducing consumer protection, information requirements and distance selling regulations in the EU was not to ensure the individual's ability to make a just value judgment.[116] Rather, these regulatory steps were implemented with the idea of establishing an internal market.[117] Contract law, and especially the individual contractor, was identified as having a powerful function that may be used to foster market integration in Europe.[118] Admittedly, individual private autonomy and market creation are hence intertwined in several respects:

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[114] See for the theory of functionalism in EU law *Schwarze* (oben N. 12) paras. 31ff.; for EU private law the functional theory was first elaborated by *Ernst Steindorff*, EG-Vertrag und Privatrecht (1996) 195 and later elaborated by *Hans-Wolfgang Micklitz*, Perspektiven eines Europäischen Privatrechts: ZEuP 6 (1998) 253ff.; *id.*, The Visible Hand 3ff.

[115] For this reason, private autonomy forms one of the cornerstones of EU law, see *Jürgen Basedow*, A Common Contract Law for the Common Market: C.M.L. Rev. 33 (1996) 1169ff. (1179ff., 1181–1184); *Peter-Christian Müller-Graff*, Basic Freedoms – Extending Party Autonomy Across Borders, in: Party Autonomy and the Role of Information in the Internal Market, ed. by *Grundmann/Kerber/Weatherill* (2001) 133ff.; *id.*, Europäisches Gemeinschaftsrecht (supra n. 93) 14; *Fritz Rittner*, Die wirtschaftliche Grundordnung der EG und das Privatrecht: JZ 1990, 838ff. (841ff.).

[116] See, for the argument that EU consumer protection was transposed into the German *BGB* based solely on the need to outbalance the insufficiency of consumers' ability to exercise their formal freedoms, *Jan Hoffmann*, Verbraucherwiderruf bei Stellvertretung: JZ 2012, 1156ff. Against such an interpretation, see *Wagner* (supra n. 35) 67ff.: "[T]he assumption of weak consumers is untenable in several respects. To begin with, it is simply implausible to assume that the vast majority of the population (consumers) suffers from some congenital psychological 'weakness'. It is also unrealistic, since the causes as well as the presumed consequences of this weakness are not explained. Are consumers unable to understand the product and the contract terms they are offered? Are they incapable of forming a rational will and of expressing it properly? Or are consumers aware of what they want, but simply unable to get their way because they lack bargaining power? Framed in such broad terms, consumer weakness is a poorly-reasoned artefact. This is not to deny that consumers employ the same cognitive shortcuts and suffer from the same psychological shortcomings as any other human beings. In fact, consumers do not form a distinct class of human beings at all, since the concept denotes a social role rather than a social group. In some regards, everyone is a consumer."

[117] As recently clearly articulated in recitals 3ff. of the Consumer Rights Directive. To this end, see also *Jansen/Michaels*, Private Law and the State (supra n. 3) 355–356; *Franck*, Europäisches Absatzrecht (2006) 412ff. This feature of the market creation idea in Franck's book was also highlighted in its review by *Heike Schweitzer*, ERCL 7 (2011) 104ff.

[118] See *Wulf-Henning Roth*, Europäischer Verbraucherschutz und BGB: JZ 2001, 475 (478ff.); *Steindorff* (supra n. 114) 195; *Christoph Schmid*, The Instrumentalist Conception of the

> "The common core of markets and human rights rests on 'normative individualism', i. e. respect for personal autonomy and individual diversity, and for the dependence of values on individual preferences and consent."[119]

However, this is only relevant as long as such "normative individualism" is indeed fit to actively establish an internal market. Safeguarding private autonomy in the EU therefore means securing the parties' interest in the validity of cross-border transactions simply because it is needed for the creation of an internal market and not to ensure individual freedom per se.[120] Only by making the provision of individual freedom a necessary prerequisite of market-creation are we able to see that the enabling of private autonomy is indeed the basis of fundamental freedoms.[121]

It is therefore no surprise that distance selling contracts, which have the potential to become transnational, have always been among the first contracts to be regulated by the EU.[122] The identity of post-national European contract law is therefore built on other values that are independent of the party's evaluation but nonetheless use contracts as a functional tool to enforce supranational values.[123] Steindorff anticipated already in 1974 such a functional transformation of private law, which seeks to incorporate politics rather than the telos of the lawmaker as "economic law".[124] With regard to EU law, these supranational values are mainly stipulated in Art. 2 TEU and

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Acquis Communitaire in Consumer Law and its Implications on a European Contract Law Code: ERCL 1 (2005) 211 ff. The role of consumers should, however, not be overemphasised. As Franck and Grundmann correctly highlight, the consumer is only one out of several actors who contributes to the creation of the internal market, see to this end *Franck* (previous note) 323 ff.; *Stefan Grundmann*, Verbraucherrecht, Unternehmensrecht, Privatrecht – Warum sind sich UN-Kaufrecht und EU-Kaufrechtsrichtlinie so ähnlich?: AcP 202 (2002) 40 ff. (43).

[119] *Ernst-Ulrich Petersmann*, Constitutional Economics, Human Rights and the WTO: AWD 58 (2003) 49 ff. (57).

[120] See *Jürgen Basedow*, Kodifikationsrausch und kollidierende Konzepte – Notizen zu Marktbezug, Freiheit und System im Draft Common Frame of Reference: ZEuP 16 (2008) 673 ff.

[121] See *Franck/Purnhagen* (supra n. 17).

[122] See Directive 97/7/EC (supra n. 30) which is among the first Directives directly targeting contracts. Also, within the debate on the review of the consumer acquis, distance selling was the first contract area where a switch to full harmonisation was seriously discussed, see *Carsten Frölisch*, Endlich Vollharmonisierung im Fernabsatzrecht?, Auswirkungen der geplanten Europäischen Verbraucherrichtlinie: Multimedia und Recht 2009, 75 ff. On the discussion of the switch to full harmonisation in EU consumer law in general, see *Ackermann*, Buying Legitimacy?, The Commission's Proposal on Consumer Rights: Eur. Bus. L. Rev. 21 (2010) 587 ff.; *Hans-Wolfgang Micklitz/Norbert Reich*, Crónica de una muerte anunciada, The Commission Proposal for a "Directive on Consumer Rights": C.M.L. Rev. 46 (2009) 471–519; *Smits*, Full Harmonisation of Consumer Law?, A Critique of the Draft Directive on Consumer Rights, ERPL 18 (2010) 5 ff.

[123] *Micklitz*, Regulierungsprivatrecht (supra n. 55) 2 ff.

[124] *Ernst Steindorff*, Wirtschaftsordnung und -steuerung durch Privatrecht?, in: Funktionswandel der Privatrechtsinstitutionen, FS Ludwig Raiser (1974) 621 ff. (624).

work towards the creation of a "highly competitive social market economy" (Art. 3 III 2 TEU). To this end, supranational values such as pluralism, multilingualism, mixed legal approaches as well as basic rights and fundamental principles, such as anti-discrimination, work side-by-side and are intertwined with party-determined values in European contract law to functionally create a supranational market. Just as contract law served as a powerful tool for creating European nation states beyond the borders of the respective cultural regions,[125] contract law in the EU serves as a tool to create an internal market beyond nation-state borders.[126] The infrastructure of post-national contract law hence consists of values derived from party-evaluation and post-national values that are independent of party determination.[127]

There is, however, debate about the colour of such party-independent values that form the infrastructure of European contract law.[128] Is European contract law to be based on, for example, social justice arguments,[129] (behavioural) economics arguments,[130] or Member State methodology?[131] Each of these arguments aims to equip the individual contractor with tools to allow them to better assess the opponent's values in the respective contract. They hence better fit into national, welfare state systems and do not qualify as post-national values. So it is correct to highlight that post-national organisations are by definition based on values that go beyond national settings such as those of the welfare state.[132] It is therefore no surprise that the EU

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[125] *Caruso* (supra n. 10) 1.

[126] *Kai Purnhagen*, The Politics of Systematization in EU Product Safety Law (forthcoming 2013).

[127] Grundmann therefore rightly emphasises that European contract law is equally based on both private autonomy and regulation, see *Grundmann*, Structure (supra n. 1) 238.

[128] See to this end *Ole Lando*, The Structure and the Legal Values of the Common Frame of Reference (CFR): ERCL 3 (2007) 245 ff.

[129] In this sense inter alia *Social Justice Group in European Private Law*, Social Justice in European Contract Law: A Manifesto: Eur. L.J. 11 (2004) 653 ff.; *Hesselink*, Social Justice 59; *Brigitta Lurger*, The Common Frame of Reference/Optional Code and the Various Understandings of Social Justice in Europe, in: Private Law and the Many Cultures of Europe, ed. by *Wilhelmsson/Paunio/Pohjolainen* (2007) 177 ff. (186).

[130] See the contributors to The Common Frame of Reference, A View from Law & Economics, ed. by *Wagner* (2009); *Horst Eidenmüller*, Why withdrawal rights?: ERCL 7 (2011) 1 ff. On the role of (behavioural) law and economics in (contractual) regulation *Cass R. Sunstein*, Humanizing Cost-Benefit Analysis: Eur. J. Risk Regulation 2 (2011) 3 ff.

[131] *Grigoleit* (supra n. 18) 417 ff.; The lack of consideration of national private law theory by the ECJ is frequently expressed by experts in national law, see, for example, *Stephan Lorenz*, Ein- und Ausbauverpflichtung des Verkäufers bei der kaufrechtlichen Nacherfüllung: NJW 2011, 2241 ff., criticising the lack of German methodological arguments in ECJ 16. 6. 2011 – joint cases C-65/09, C-87/09 *(Gebr. Weber GmbH ./. Jürgen Wittmer und Ingrid Putz ./. Medianess Electronics GmbH)* (not yet published).

[132] See for a comprehensive analysis in this respect, *Philipp Bobbitt*, The Shield of Achilles: War, Peace and the Course of History (2002); *Dennis Patterson/Ari Afilalo*, The New Global Trading Order (2008).

defines in Art. 3 III 2 TEU the internal market in the form of a "highly competitive social market economy" as the core of EU law.

This market-orientation of the EU in post-national settings is indeed supportable also from a normative point of view. Since the beginning of recorded history markets have always been the "cultural centers not only for the exchange of economic goods but also of social services."[133] It is the market where people of different cultures and beliefs meet and interact because trade obliges human beings to take into account ideologies and worldviews insofar as it is necessary for the trade relationship.[134] The market hence facilitates the creation and governing of pluralistic societies such as the EU.[135] It is further noteworthy that humans meet in markets not only in spite of but also because of their different cultural backgrounds, languages and habits. The variety of goods and services stemming from myriad cultural backgrounds constitutes the very element of markets. Functioning markets hence need to secure and foster diversity. That is also what distinguishes the EU from markets such as the US. While the post-war US has moved towards "nationalisation" and "unification" by employing uniform standards, a national language and the like, the EU takes advantage of its diversity in the market.[136] Therefore, the market is a good fit to turn the obstacles of European integration, such as diversity, into its greatest advantages.

This market-oriented view does not eliminate the need to give other values and concerns – such as social justice, economic welfare, social responsibility, plurality, cost/benefit analysis[137] and comparative research – a legitimate place in European contract law.[138] In fact, they also have a market-related feature, which builds the basis of European contract law. Understood in this way, these other values and concerns such as social justice[139] or the results of comparative analysis need to be assessed through the lens of EU

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[133] *Petersmann* (supra n. 119) 56.

[134] *Ackermann* (supra n. 91) 112–113. It should be noted, however, that the trade relationship may also require the adoption of a compatible cultural understanding of those involved in the relationship for longer periods, so-called relational contracts (see *inter alia Ian Macneil*, Relational Contract: What we do and do not know: Wisc. L. Rev. 1985, 483 ff.).

[135] *Ackermann* (supra n. 91) 112 ff.

[136] See inter alia Art. 114 IV TFEU.

[137] In this respect, see *Roman Inderst*, Consumer Protection and the Role of Advice in the Market for Retail Financial Services: Journal of Institutional and Theoretical Economics 2011, 4 ff. with comments by *Thomas Ackermann*, ibid. 22–25 and *Christian Laux*, ibid. 26–29. On the assessment of withdrawal rights in this respect, see *Eidenmüller*, Why withdrawal rights? (supra n. 130) 1 ff.

[138] Hesselink has emphasised that we need "to move from the narrow focus of mere market building to a more inclusive approach where other values and concerns also have their legitimate place" within the Europeanisation of private law, see *Hesselink*, Social Justice 59. See for social justice as a legitimate aim of EU law *Weatherill*, The Constitutional Competence of the EU to Deliver Social Justice: ERCL 2 (2006) 136 ff. (144) (cited: Competence).

[139] Lurger has convincingly called for debate on a European notion of social justice which,

law as a functional tool for the creation of the internal market.[140] Social justice values, for example, come in the guise of "feeder objects" for the internal market, allowing individuals to participate in the market. In the EU, market understanding transforms social justice into "access justice."[141] This connection of functional market-creation values and social justice was convincingly illustrated by the example of the principle of anti-discrimination.[142] In light of EU law's functional aim to create a common "highly competitive social market economy" (Art. 3 III 2 TEU), anti-discrimination law is used as an instrument to "maximise the productivity of the workforce, to ensure that as many people as possible could become good economic actors."[143] This understanding, however, does not indicate that the "broader field of welfare provision and regulation is left essentially to the states."[144] Quite to the contrary, if the successful provision of a regulatory framework for markets requires supranational regulation, the EU is ready to do so via Art. 114 TFEU,[145] whose third paragraph provides guidance on implementing social arguments into the internal market. Those who emphasise the functional feature of EU private law are hence right in doing so; however, if they tie the function of EU law solely to the question whether it is best fit to achieve social justice,[146] they neglect EU private law's main function as a market-creation tool.

Mainly supranational, European private law scholars who emphasise the functional feature of European private law describe the latter phenomenon of the introduction of post-national values that are independent of party-determination. They highlight the market-creating value of contracts and spotlight the regulative character of European contract law.[147] Their understanding of European contract law is hence mainly devoted to the changing nature of the infrastructure (the "if") of contracts, while often neglecting the superstructure of post-national contracts.

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in her view, is however in opposition to market-rational ideas, see *Lurger* (supra n. 129) 186; in support of Lurger *Hesselink*, Social Justice 21.

[140] *de Witte* (supra n. 32) 75.

[141] *Micklitz*, Regulierungsprivatrecht (supra n. 55) 3.

[142] See, for a fundamental theoretical background, *Micklitz*, Social Justice (supra n. 16), also available as EUI Working Paper LAW No. 2011/02, esp. 24ff.

[143] *Charlotte O'Brian*, Equality's False Summits: New Varieties of Disability Discrimination, "Excessive" Equal Treatment and Economically Constricted Horizons: Eur. L. Rev. 2011, 26ff. (28).

[144] *Gráinne de Búrca*, Towards European Welfare?, in: EU Law and the Welfare State, ed. by *id.* (2005) 1ff.

[145] See in this way also *Weatherill*, Competence (supra n. 138) 136ff.

[146] See in this way *Grigoleit* (supra n. 18) 414ff.

[147] *Micklitz*, The Visible Hand (supra n. 1) 3ff.

2. The superstructure of European contract law

The superstructure of post-national contract law (the "how") is the area that is regularly researched by transnational, European contract law scholars. In their view, pan-European values transcend into national private law, which may then be harvested via comparative research in order to determine common solutions for a European contract law. Not very surprisingly, the results mirror the traditional nation-state contract law based on party-determined values or nation-state debates about how they could be overcome.[148] Although such an approach is needed and valuable, since no one would doubt that parties still conclude contracts after a value-determination and value-comparison, it runs the risk of overlooking the functional dimension of contract law in a post-national environment. Just as party-determined values transcend into rules of consent, damage and torts in the superstructure of national contract law in order to first and foremost secure private autonomy, post-national values transcend into rules reflecting these underlying post-national values. As the major criterion in this respect is market creation, the institutions used on the "superstructural" level mirror this function. The right of withdrawal in distance contracts stipulated in Art. 6 of Directive 97/7/EC does not primarily aim at consumer protection as a social justice argument.[149] When the ECJ judges on provisions of tort law, it does not look into compensation in order to secure the individual a proper restitution in kind. Rather, it uses the consumer or tortfeasor as a tool to create an internal market.[150] Understood in this way, improvements of withdrawal rights either on the basis of cost/benefit analysis[151] or social justice[152] are only legitimate as long as these ideas incorporate the market-creation value enshrined in the post-national infrastructure of contracts. That means that they must contribute to the creation of the internal market. Neither cost/benefit analysis nor social justice constitute autonomous values as to the infrastructure of European contract law, this dynamic being necessary to justify rules within the superstructure.

However, EU legislation demonstrates that effective market creation requires more than only withdrawal rights. In addition to the well-known

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[148] See for a blueprint of such an analysis *Lurger*, The Future of European Contract Law between Freedom of Contract, Social Justice, and Market Rationality: ERCL 1 (2005) 442ff.; *Hesselink*, Social Justice 13ff.

[149] See for the different options for the justification of withdrawal rights, *Eidenmüller*, Why withdrawal rights? (supra n. 130) 7ff.

[150] See inter alia ECJ 20. 9. 2001 – Case C-453/99 (*Courage Ltd. ./. Bernard Crehan*), E.C.R. 2001, I-6297; 17. 9. 2002 – Case C-253/00 *(Antonio Muñoz y Cia SA, Superior Fruiticola SA ./. Frumar Ltd., Redbridge Produce Marketing Ltd.)*, E.C.R. 2002, I-7289, paras. 53–54.

[151] See to this end, *Omri-Ben Shahar/Eric Posner*, The Right to Withdrawal in Contract Law: J. Leg. Stud. 40 (2011) 115ff.; *Eidenmüller*, Why withdrawal rights? (supra n. 130) 1ff.

[152] *Hesselink*, Social Justice 59.

consumer rights in contracts and competition law, the market-creation values increasingly translate externalities into market surveillance mechanisms. The need to use regulatory measures to foster market creation results also in the rise of public law measures in the superstructure of contract laws. Directive 2004/2006/EC, for example, introduces a network of Member States' authority to ensure the effective creation of a single market. For the same reason, the Markets in Financial Instruments Directive also regulates extensively the authority's surveillance of the financial market.[153] The market-creation value is even used to introduce maximum harmonisation in different areas of European contract law such as in various areas of the consumer rights Directive. It is no surprise that such excessive justification of the introduction of legal institutions based on the market-creation value has received criticism as to the link between the respective institution and the market-creation.[154] In the words of Schapp's theory: A question whether there is a connection between the infrastructure and superstructure of European contract law.

3. The architecture of European contract law: a question of comparative institutional analysis

The fundamental question about the design of the superstructure of European contract law is hence the question which legal institutions (superstructure) are best suited to reflect the market-integration values (infrastructure). Crucial for European private law is asking the question about the link between the superstructure and infrastructure.[155] By doing so, we must add to classical, internal legal thought methods from the external analysis of law. To this end, European contract law theory necessarily takes into account both external and internal analysis of law,[156] as well as a combination of comparative research and internal market arguments.[157] Particularly, we need to ask the fundamental question of which institution of European contract law is best suited to realise the internal market goal, and the answer will come from comparative institutional analysis.[158] Which law is needed to empower which institution to enable the creation of the internal market?

[153] See *inter alia Jean-Pierre Casey/Karel Lanoo*, The MiFID Revolution (2009) 190–192.

[154] See for a critique of the link between full harmonisation and an increase of cross-border trade *Rott/Terryn*, The Proposal for a Directive on Consumer Rights: No Single Set of Rules: ZEuP 17 (2009) 456ff. (460).

[155] On the example of the link between comparative research and internal market law, see *Michaels*, Of Islands (supra n. 29) 149.

[156] See to this end *Hesselink*, A European Legal Method? (supra n. 54) 20, 45; *von Bogdandy*, Deutsche Rechtswissenschaft im europäischen Rechtsraum: JZ 2011, 1ff. (5).

[157] *Michaels*, Of Islands (supra n. 29) 149.

[158] See for a theory on comparative institutional analysis *Neil Komesar*, Imperfect Alterna-

Shall Member States or the EU substantiate indefinite terms? Shall lawmakers or courts take action? Are consumers or entrepreneurs better equipped to enforce the creation of the internal market? Some of these issues have already been decided. For example, the principles of conferral, subsidiarity and proportionality, stipulated in Art. 5 TEU and the protocol on subsidiarity and proportionality, already limit the exercise of comparative institutional choice. At the end of the day, it will not be comparative research alone that determines the superstructure of European contract law, but rather which institution is best suited to enforce the internal market goal.

The implications of these findings will be illustrated briefly by the following examples: When the Commission surveys the national legal systems for the "best solutions"[159] in order to codify European contract law, the result can only be understood as what is optimal for the creation of an internal market. This is the way to overcome the puzzle of bringing together such a universal approach and the difference in local traditions and cultures.[160] When scholars, courts or any other actor evaluate rules and principles of European contract law, they should not evaluate them on the grounds of whether or not they like these solutions but rather on what is needed for the internal market. The measure for assessing whether certain provisions of contract law are in opposition to EU anti-discrimination law is not whether they are coherent with other provisions,[161] but whether these provisions hinder access to the internal market. Consumer protection is a value of European contract law only as long as it contributes to the creation of the internal market. This implies that where consumer law hinders such a development, the level of consumer protection will ultimately decrease.[162]

IV. Conclusions

Assessing European contract law through the criteria of infrastructure and superstructure provides a powerful lens to understand and channel the debate on its presence and future. In national private law, the infrastructure of contract law consists mainly of values determined by the parties to the contract. Party-related values indirectly fulfil the function of establishing a basis

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tives (1994). For its application on European law, see *Miguel Maduro*, We the Court – The European Court of Justice and the European Economic Constitution (1998).

[159] A More Coherent European Contract Law, An Action Plan, Brussels, 12. 2. 2003, COM(2003) 68 final, 62.

[160] *Lorenz Kähler*, Conflict and Compromise in the Harmonization of European Law, in: Private Law and the Many Cultures of Europe (supra n. 129) 125 ff.

[161] Confusing in this respect ECJ 1. 3. 2011 (supra n. 109) I-773.

[162] See in this respect *Herresthal*, Die Ablehnung einer primärrechtlichen Perpetuierung des sekundärrechtlichen Verbraucherschutzniveaus: EuZW 2011, 328 ff.

for a just value evaluation between the parties in the contractual process. The infrastructure of post-national contract law, on the contrary, is based on values that are principally not determined by the contracting parties. In this respect, the qualifying value is market creation. Social justice, efficiency, and cost/benefit analysis each aim to better equip individual contractors with tools to better evaluate the price of the opponent in the respective contract. For this reason, their place is in national contract law, and they do not qualify as values of post-national contract law. There is, however, a legitimate place in European contract law for arguments drawn from social justice, economics or comparative research. If they qualify as 'feeder objects' for the ultimate goal of market creation, they also form a basis for European contract law. Seen through this lens, social justice, for example, may function to grant access to the internal market.

Just as the superstructure of national contract law reflects party-determined values of the infrastructure in the respective codifications and contracts, the superstructure of post-national European contract law expresses the market-creation value. The identification of the superstructure of post-national contract law cannot be determined by comparative research alone. The requirement of the establishment of an internal market leads to other features of post-national contract law that exceed what is accessible through comparative research of Member States' legal systems. As the infrastructure of European post-national contract law relies on the market-creation paradigm, each and every measure within the superstructure of contracts has to be measured for its effectiveness towards this end. Hence, comparative institutional analysis will act as the crucial method for the determination of the superstructure of European contract law.