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Publication date

2012

Document Version

Final published version

Published in

European Review of Private Law

[Link to publication](#)

Citation for published version (APA):

Mak, C. (2012). Hedgehogs in Luxembourg? A Dworkinian reading of the CJEU's case law on principles of private law and some doubts of the fox. *European Review of Private Law*, 20(2), 323-345. <http://www.kluwerlawonline.com/abstract.php?area=Journals&id=ERPL2012021>

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Hedgehogs in Luxembourg? A Dworkinian Reading of the CJEU's Case Law on Principles of Private Law and Some Doubts of the Fox

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Key words – European private law, principles of law, legal theory, Dworkin.

Abstract: To what extent can the case law of the Court of Justice of the European Union (CJEU) in the field of European private law be understood and explained on the basis of a theoretical model of adjudication that defends the unity and objectivity of value? In light of Ronald Dworkin's theory of adjudication, which defends value monism, it is submitted that some representative judgments of the CJEU that refer to 'principles of civil law' could be read as supporting such a holistic (hedgehog's) perspective. Making a comparison with other judgments engaging 'general principles of EU law' and fundamental rights, however, it appears that this view is not unequivocally reflected in the Court's reasoning. Rather, today's European private law seems subject to value pluralism. On the basis of an assessment of several pluralist (fox's) objections to a single-value theory of adjudication, it is suggested that future case law of the CJEU on matters of private law does not necessarily have to resolve the tension between the two views. It would, nevertheless, be desirable to develop a clear(er) methodological framework for the handling of arguments of principle in European private law adjudication. For this purpose, inspiration may be sought in the CJEU's case law involving fundamental rights.

Résumé: Dans quelle mesure est-il possible de comprendre et d'expliquer la jurisprudence de la Cour de justice de l'Union européenne (CJUE) dans le domaine du droit privé européen sur la base d'un modèle théorique de jugement qui défend l'unité et l'objectivité de valeur? A la lumière de la théorie de jugement développée par Ronald Dworkin, qui défend le monisme de valeur, il est avancé dans l'article présent qu'il existe des jugements représentatifs de la CJUE, faisant référence aux « principes du droit civil », qui pourraient être considérés comme soutenant une telle perspective holistique (du hérisson). En comparaison avec d'autres jugements concernant les « principes généraux du droit européen » et les droits fondamentaux, toutefois, il paraît que cette opinion n'est pas reflétée sans équivoque dans la jurisprudence de la Cour. Plutôt, le droit privé européen actuel semble sujet au pluralisme des valeurs. Sur la base d'une évaluation de plusieurs objections (du renard) d'une théorie de jugement fondée sur le monisme de valeur, il est proposé que la jurisprudence future de la CJUE concernant les questions de droit privé ne doive pas nécessairement résoudre la tension entre les deux points de vue. Pourtant, il est désirable qu'un cadre de référence méthodologique (plus) clair soit développé pour le traitement d'arguments de principe

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dans les jugements de droit privé européen. A cet effet, l'inspiration pourrait être cherchée dans la jurisprudence de la CJUE impliquant les droits fondamentaux.

Zusammenfassung: Bis zu welchem Grad kann die Rechtsprechung des Europäischen Gerichtshofes (EuGH) im Bereich des Europäischen Privatrechts auf der Basis eines theoretischen Rechtsprechungsmodells, das die Einheit und Objektivität des Rechts schützt, verstanden und erklärt werden? Im Licht von Ronald Dworkins, einen Rechtsmonismus verteidigenden, Rechtsprechungstheorie, wird vertreten, dass einige repräsentative Urteile des EuGH, die sich auf die "Grundsätze des Zivilrechts" beziehen, im Sinne einer Unterstützung dieser einheitlichen (*hedgehog's*) Perspektive gelesen werden könnten. Im Vergleich mit anderen Urteilen, die sich auf „allgemeine Grundsätze des EU-Rechts“ und die Grundrechte beziehen, scheint es jedoch, als ob sich diese Ansicht nicht einheitlich in allen Gerichtsentscheidungen des EuGH widerspiegeln. Vielmehr noch scheint das derzeitige Europäische Privatrecht Objekt eines Rechtspluralismus zu sein. Auf der Basis einer Untersuchung einiger pluralistischer (*fox's*) Argumente gegen die Einheitsrechtstheorie in der Rechtsprechung wird empfohlen, dass sich die zukünftige Rechtsprechung des EuGH bezüglich des Privatrechts nicht notwendigerweise auf eine Klärung der Spannung zwischen den beiden Ansichten richtet. Es wäre nichtsdestotrotz wünschenswert, einen klare(re)n methodischen Rahmen für die Anwendung von Rechtsgrundsätzen in der Rechtsprechung zum Europäischen Privatrecht zu entwickeln. Für diesen Zweck könnte die Rechtsprechung des EuGH im Zusammenhang mit den Grundrechten eine mögliche Inspiration darstellen.

1. Introduction

'But what is it that the hedgehog knows?' one may wonder when coming across the ancient Greek poet Archilochus' famous line 'the fox knows many things, but the hedgehog knows one big thing'.¹ In his latest book, *Justice for Hedgehogs*, Ronald Dworkin argues that one big thing is value.² Anyone taking the perspective of the hedgehog in regard to questions of ethics and morality will, accordingly, support a coherent view on what it means to live a good life well.³ Furthermore, taking the hedgehog's point of view when discussing matters of law implies embracing a model of adjudication in which judges align their answers to difficult legal questions with their community's idea of political morality.⁴ In short, a belief in the unity of value may, therefore, inspire the search for coherence and systematization of a legal order. From a fox's perspective, on the other hand, a pluralistic approach is called for. 'Knowing many things' means recognizing the many, sometimes contradictory ends one may pursue, in life as well as in law. From this point of view, it is not possible to relate all judicial decisions to one central value, that is, to resolve

1 I. BERLIN, *The Hedgehog and the Fox. An Essay on Tolstoy's View of History*, 1953; reprinted Phoenix, London 2009; N. KRAUSS, *Great House*, Penguin Books, London 2010, 108.

2 R. DWORKIN, *Justice for Hedgehogs*, Belknap Press, Cambridge, MA 2011.

3 *Ibid.*, p. 1; R. DWORKIN, 'What Is a Good Life?', *The New York Review of Books* 10 Feb. 2011, <www.nybooks.com/articles/archives/2011/feb/10/what-good-life/>.

4 DWORKIN, *Justice for Hedgehogs*, p. 405 *et seq.*

genuine conflicts between principles on the basis of a meta-principle. Rather, the question arises as to how to handle legal pluralism.

A field of law in which the debate on pluralism and coherence is of growing significance is that of European private law. Here, European private law is understood in a broad sense, comprising the domestic private laws of the Member States, as well as legislation and case law on matters of private law originating from the supranational level of the European Union (EU). On the one hand, it is regularly attested that EU legislation in the field of private law is of a fragmentary nature, singling out certain sectors and providing specific rules for these.⁵ On the other hand, the more and more frequent reference to ‘principles of civil law’⁶ in the case law of the Court of Justice of the European Union (CJEU) raises the question of whether this highest EU Court, situated in Luxembourg, is pursuing a more systematic agenda for European private law.⁷ Both EU legislation and adjudication, moreover, have an impact on national legal orders, which each themselves reflect a

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- 5 The European Commission’s aim to enhance the coherence of European contract law may be (partly) understood as deriving from this view. In its first Communication on this topic, of July 2001, the Commission observed that: ‘The EC legislator has followed a selective approach adopting directives on specific contracts or specific marketing techniques where a particular need for harmonisation was identified. The European Commission is interested at this stage in gathering information on the need for farther-reaching EC action in the area of contract law, in particular to the extent that the case-by-case approach might not be able to solve all the problems which might arise’. At the time of writing of this article, the latest instalment in the series of Commission documents on European contract law was the ‘Publication of the results of the feasibility study carried out by the Expert Group on European contract law for stakeholders’ and legal practitioners’ feedback’ of May 2011, in which a draft for a ‘self-standing instrument of European contract law’ is presented; <http://ec.europa.eu/justice/contract/files/feasibility-study_en.pdf>. In October 2011, the European Commission presented its proposal for a Regulation on a Common European Sales Law, COM (2011) 635 final.
- 6 ‘Principles of civil law’ and ‘principles of private law’ will be used as synonyms in this text. For an analysis of the possible distinction between the two, see K.P. PURNHAGEN, ‘Principles of European Private or Civil Law? A Reminder of the Symbiotic Relationship between the ECJ and the CFR in a Pluralistic European Private Law’, *European Law Journal* 2012 (forthcoming).
- 7 Recent analyses of the development of the CJEU’s principles case law can be found in W. DEVROE, ‘Impact van door het Europees Hof van Justitie ontwikkelde algemene beginselen op privaatrechtelijke verhoudingen’, in A.S. Hartkamp, C.H. Sieburgh & L.A.D. Keus (eds), *De invloed van het Europese recht op het Nederlandse privaatrecht. Deel 42-I*, Kluwer, Alphen a/d Rijn 2007, pp. 133–189; A. METZGER, ‘Allgemeine Rechtsgrundsätze im europäischen Privatrecht: Ansätze für eine einheitliche Methodenlehre im europäischen Mehrebenensystem’, *Rechtstheorie* 2009, pp. 313–335; K. LENAERTS & J.A. GUTIÉRREZ-FONS, ‘The Constitutional Allocation of Powers and General Principles of EU Law’, *Common Market Law Review* 2010, pp. 1629–1669; J. BASEDOW, ‘The Court of Justice and Private Law: Vacillations, General Principles and the Architecture of the European Judiciary’, *European Review of Private Law* 2010, pp. 443–475; M. SAFJAN & P. MIKLASZEWICZ, ‘Horizontal Effect of the General Principles of EU Law in the Sphere of Private Law’, *European Review of Private Law* 2010, pp. 475–486; A.S. HARTKAMP, ‘The General Principles of EU Law and Private Law’, *RebelsZ* 2011, pp. 241–259.

certain value or plurality of values that does not necessarily overlap with the views held in other Member States or on the EU level.⁸ Staying within the metaphor, it may, thus, be asked what the hedgehog and the fox can teach us about European private law.

Focusing on the role of judges in the development of European private law, this article addresses the question to what extent the case law of the CJEU in the field of private law can be understood and elaborated on the basis of Ronald Dworkin's theory of adjudication. For this purpose, first, it is determined if European private law can, in principle, be modelled in terms of 'integrity', a central idea in Dworkin's theoretical framework (section 2 of this article). Subsequently, selected cases of the CJEU are analysed on the basis of this model (section 3). The limitations of the integrity-oriented approach to European private law are then further explored, making a comparison with the CJEU's case law on general principles and fundamental rights (section 4). Finally, some conclusions are drawn on the question of which perspective seems to offer the most convincing descriptive and normative model for European private law adjudication, the hedgehog's or the fox's (section 5).

2. The Integrity of European Private Law

Framing European private law in Dworkinian terms requires us to, at least for the moment, adopt the hedgehog's perspective and conceive of a system of law that is based on the idea of objectivity of value. This implies accepting two principles of political integrity, one of legislative integrity and one of adjudicative integrity.⁹

In the first place, Dworkin's theory of law says that the legislature should follow a principle of legislative integrity. According to this principle, lawmakers have to try to make the total set of laws governing a society morally coherent.¹⁰ This legislative principle is connected to a model of community that recognizes integrity as a distinct political ideal, meaning that the members of the community 'accept that their political rights and duties are not exhausted by the particular decisions their political institutions have reached, but depend, more generally, on the scheme of principles those decisions presuppose and endorse'.¹¹ The legislature should, thus, make sure that any legislative action can be traced back to the scheme of principles endorsed by society.

8 An interesting project regarding the interface between national laws and the Common Frame of Reference is being conducted by Dannemann and Vogenauer; <<http://cfr.iuscomp.org/>>, 17 Aug. 2011.

9 DWORKIN, *Law's Empire*, Belknap Press, Cambridge, MA 1986, p. 176 *et seq.*

10 *Ibid.*, p. 176.

11 *Ibid.*, p. 211. Dworkin defends that, according to a constructive interpretation, American constitutional structure and practice to a great extent follow this model; *ibid.*, p. 215.

It may be doubted whether today's European private law fully corresponds to this view on the legislative process.¹² As a descriptive model, Dworkin's theory of 'law as integrity' seems to be unable to account for, for example, the resistance of some national legal systems against the implementation of Directives in the field of private law:¹³ If the multilevel system of private law in Europe could be traced back to one common value, should new legislative measures from the EU level not in principle be compatible with existing national laws? In addition, would national lawmakers not at least be expected to show a willingness to align their laws with the supranational measures rather than to resist against the Europeanization of their national laws? Furthermore, it seems difficult to explain the inconsistencies among EU Directives in the field of private law¹⁴ on the basis of this theoretical model: If the European legislature was trying to create a morally coherent set of laws, would it not have attempted to coordinate the drafting of the Directives to a greater extent?

Notwithstanding these doubts, certain features of the EU's current multilevel system of private law may, nevertheless, be considered to provide starting points for the further elaboration of an integrity-based theory of the European private legal order. The points of criticism raised here may be countered by the claim that the idea of a 'community of principle' does not refer to an actual situation but to an ideal model. It is meant to guide the interpretation of political and legal practices rather than give a full explanation of them.¹⁵ As a normative model, therefore, the Dworkinian framework might offer inspiration for the development of, in this case, European private law. The ideal of 'integrity in law' could be related to, for instance, the development of a Common Frame of Reference (CFR) for European contract law:¹⁶ This instrument is meant to define common principles that provide a 'toolbox' for the European legislature when drafting further legislative measures. It could, thus, contribute to the development of a morally coherent set of laws. Furthermore, the revision of the *acquis communautaire* in the field of consumer

12 It is assumed here that although Dworkin's model of adjudication has been developed for the US context, it can be meaningfully related to the European private law debate. For a more elaborate justification of this assumption, see C. MAK, *Fundamental Rights in European Contract Law. A Comparison of the Impact of Fundamental Rights on Contractual Relationships in Germany, the Netherlands, Italy and England*, Kluwer Law International, Alphen a/d Rijn 2008, pp. 197–199.

13 For example, CJEU 10 May 2001, Case C-144/99 *Commission v. the Netherlands* [2001] ECR I-3541, concerning the implementation of the Unfair Terms Directive in the Dutch Civil Code. See, in this context, M.W. HESSELINK, 'The Ideal of Codification and the Dynamics of Europeanisation: The Dutch Experience', *European Law Journal* 2006, pp. 279–305.

14 For example, different conceptions of legal concepts in the consumer Directives; see Annex I to the Commission's *Green Paper on the Review of the Consumer Acquis*, COM (2006) 744 final.

15 DWORKIN, 1986, pp. 214–215.

16 As proposed by the European Commission; see the documents mentioned in *supra* n. 5.

law¹⁷ may also be considered to reflect the legislature's ambition to bring European private law closer to the ideal of a community of principle, insofar as the revision will seek to enhance the coherence of the consumer *acquis* not only on the level of rules but also on that of principle. In sum, the current political and legislative practices within European private law do not appear to perfectly fit Dworkin's model, but it is not excluded that the model might be adopted as a guiding framework for the further development of the field.¹⁸

In the second place, then, 'European private law as integrity' regards the (ideal) functioning of the European courts, both on the national and supranational levels. Within the principle-based model of a political community, the judiciary is bound by a principle of adjudicative integrity.¹⁹ This means that judges, so far as possible, should identify legal rights and duties on the assumption that they were created by a single 'author of all laws' and thus express a coherent view on justice and fairness.²⁰ Hard cases, in which the law does not provide a clear rule, should be resolved by identifying the pre-existing rights of the parties within the scheme of principles that underlies the positive rules of law.²¹ In this context, it is assumed that there is a single 'right answer' for each case: It is the court's assignment to discover which party holds the strongest arguments for having the case decided in his or her favour and enforce that party's right to win the case.²² Accordingly, judges are required to interpret the law in such a manner that their case solutions fit within the morally coherent scheme of principles endorsed by society.

The CJEU's occasional references to 'principles of civil law' or 'principles of private law',²³ as well as to 'general principles' that have an impact on private legal

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- 17 The review of the consumer *acquis* has resulted in the Consumer Rights Directive, the text of which has been approved by the European Parliament on 23 Jun. 2011, <www.europarl.europa.eu/en/pressroom/content/20110622IPR22326/html/Consumer-Rights-Parliament-approves-new-EU-wide-rules-for-on-line-shopping>.
- 18 Still, under the assumption that the hedgehog's perspective of 'unity of value' is taken. The problematic aspects of this approach will be further discussed in sec. 4 *infra*.
- 19 DWORKIN, 1986, pp. 217 and 223.
- 20 DWORKIN, *Taking Rights Seriously*, Duckworth, London 1977; fourth impression with a Reply to Critics, Duckworth, London 1984, 105; DWORKIN, 1986, p. 225.
- 21 DWORKIN, 1977, p. 105 *et seq.*, where he introduces the figure of Hercules, a judge of 'superhuman skill, learning, patience and acumen', to illustrate the ideal model of adjudication.
- 22 *Ibid.*, p. 81.
- 23 CJEU 10 Apr. 2008, Case C-412/06 *Annelore Hamilton v. Volksbank Filder* [2008] ECR I-2383; CJEU 3 Sep. 2009, Case C-489/07 *Messner v. Firma Stefan Krüger* [2009] ECR I-7315; CJEU 15 Oct. 2009, Case C-101/08 *Audiolux SA and Others v. Groupe Bruxelles Lambert SA and Others* [2009] ECR nyr. Sometimes CJEU 8 Jul. 2007, Case C-277/05 *Société thermale d'Eugénie-les-Bains v. Ministère de l'Économie des Finances et de l'Industrie* [2007] ECR I-6415 is cited as a first example of a case in which the CJEU recognized a principle of civil law, insofar as it stated: 'In accordance with the general principles of civil law, each contracting party is bound to honour the

relationships,²⁴ raise the question of to what extent the principle of adjudicative integrity has possibly inspired the Court's reasoning.²⁵ In other words, to what extent can the CJEU's case law be explained on the basis of the Dworkinian model of adjudication? A subsequent question then is whether, from a normative legal-theoretical perspective, it would be desirable to promote the framing of the CJEU's contributions to the development of European private law in terms of 'law as integrity'. What would be the arguments in favour and objections against taking the hedgehog's perspective on European private law? These questions will be elaborated in the following two sections, the first taking up the descriptive analysis of the CJEU's case law on principles of private law and the subsequent one bringing in some points of criticism on the Dworkinian reading of the Court's case law.

3. General Principles and Private Law in the CJEU's Case Law

Can we find any hedgehogs in Luxembourg? The study of some representative CJEU judgments referring to principles that affect questions of private law may clarify to what extent the Dworkinian model can be traced in the Court's reasoning. It is not aspired to give a full overview of the CJEU's case law on the topic here²⁶ nor to discuss the functions²⁷ or possible taxonomy²⁸ of the general principles in European

terms of its contract and to perform its obligations thereunder' (no. 24); see, e.g., PURNHAGEN. Since the principle was not conclusive for the resolution of the case, the judgment remains outside of the scope of the present article.

24 CJEU 22 Nov. 2005, Case C-144/04 *Werner Mangold v. Rüdiger Helm* [2005] ECR I-9981; CJEU 19 Jan. 2010, C-555/07 *Seda Küçükdeveci v. Swedex* [2010] ECR nyr.

25 Here, it should be emphasized that the starting points and focus of the present analysis are 'principles of civil law' that the CJEU has mentioned in so many words. The Dworkinian model in principle does not require judges to explicitly mention the principles they base their decisions on in their judgments. The balancing of competing principles, in the model, takes place in the process of judicial decision-making but does not necessarily have to be spelled out in the judgments. For that reason, further research on the reasoning of the CJEU in light of Dworkin's model could be extended to cases in which 'principles' have not been explicitly referred to. The present article, however, is limited to the assessment of the 'principles' that have found expression in the CJEU's case law on matters of private law, since it aims at obtaining a better understanding of the nature of these principles.

26 For more comprehensive analyses, see the works mentioned in *supra* n. 7. For the purposes of the present analysis, a close reading of some cases seems most promising, since this gives the possibility of looking into the Court's line of reasoning in more detail.

27 Hartkamp distinguishes: (a) an 'interpretative' function; (b) a 'supplementing' or 'gap filling' function, including the creation of remedies; and (c) a 'controlling' or 'corrective' function; HARTKAMP, 'The General Principles of EU Law and Private Law', p. 242, with further references. See also A. METZGER, *Extra legem, intra ius. Allgemeine Rechtsgrundsätze im Europäischen Privatrecht*, Mohr Siebeck, Tübingen 2009, pp. 179–191; T. TRIDIMAS, *The General Principles of EU Law*, Oxford University Press, Oxford 2006, pp. 29–35.

28 Metzger proposes a differentiation on the basis of the method on the basis of which a principle is recognized; see METZGER, *Extra legem, intra ius. Allgemeine Rechtsgrundsätze im Europäischen*

private law. Furthermore, it is not intended to make any claims as to the persuasiveness of the Dworkinian model of adjudication as such. Rather, the objective is to study the nature of the principles the CJEU refers to in matters of private law and find out whether the selected cases can be explained on the basis of Dworkin's theory of 'law as integrity'. The aim of the analysis, thus, is to make a meaningful contribution to the debate on the nature of these principles, which could provide guidance for the future development of judicial reasoning in matters of European private law. For this purpose, two cases applying 'general principles of civil law' to questions of consumer law will be discussed (section 3.1), followed by two cases in which 'general principles of EU law' are related to matters of private law (section 3.2).

3.1. Principles of Private Law

3.1.1. Hamilton

On 17 November 1992, Ms Annelore Hamilton signed a loan contract with a bank, whose rights were later acquired by Volksbank, in order to finance the acquisition of shares in a real property fund.²⁹ Since the contract was concluded at Hamilton's home, the Doorstep Selling Directive³⁰ applied to the case. Neither at the time of conclusion of the loan contract nor at any later moment did the bank inform Hamilton of the fact that under this Directive she had a right to withdraw from the contract, without having to give any reason, within a period of seven days (Art. 5 of the Directive). Hamilton only became aware of this right through the CJEU's decision in another German case, the *Heiniger* judgment of 2002, in which the Court determined that the wording and purpose of the Doorstep Selling Directive did not allow the national legislature to limit the period in which the consumer could make use of the right of withdrawal to one year after conclusion of the contract, in case the consumer had not been provided with the necessary information about the right of withdrawal.³¹ On the basis of this judgment, Hamilton cancelled her loan contract with the bank on 16 May 2002 and brought an action for reimbursement of

Privatrecht and METZGER, 'Allgemeine Rechtsgrundsätze im europäischen Privatrecht: Ansätze für eine einheitliche Methodenlehre im europäischen Mehrebenensystem'. Hartkamp follows the distinction made by Devroe; A.S. HARTKAMP, *Asser 3-I**. *Vermogensrecht algemeen. Europees recht en Nederlands vermogensrecht*, Kluwer, Alphen a/d Rijn 2011, no. 108, referring to DEVROE. For a further overview of possible criteria for the classification of general principles of EU law, see TRIDIMAS, pp. 2–5. On the question of to which extent principles may contribute to the 'systematisation' of European private law, see V. MAK, 'A Shift in Focus: Systematisation in European Private Law through EU Law', *European Law Journal* 2011, pp. 403–428.

29 CJEU 10 Apr. 2008, Case C-412/06 *Annelore Hamilton v. Volksbank Filder* [2008] ECR I-2383.

30 Council Directive 85/577/EEC of 20 Dec. 1985 to protect the consumer in respect of contracts negotiated away from business premises, OJ 1985 L 372, 31.

31 CJEU 13 Dec. 2001, Case C-481/99 *Georg Heininger and Helga Heininger v. Bayerische Hypo- und Vereinsbank AG* [2001] ECR I-9945.

interest and repayment of the amount of the loan. Her situation, however, differed from the *Heininger* case on an important point: Whereas in the latter case the contract had not yet been fully performed when the Heiningers became aware of their right of withdrawal, Hamilton had already repaid the amount of her loan to Volksbank's predecessor in 1998, when she had rescheduled her debt because of reduced distributions from the real property fund she had invested in. Accordingly, Volksbank's predecessor had returned the security for the loan. The loan contract had, thus, been performed in full by both parties. The question was whether in these circumstances the national legislature could place a time limit upon the exercise of the right of withdrawal, which in this case would amount to one month after both parties had fully performed their obligations under the contract, being the end of May 1998. The CJEU came to the conclusion that, indeed, the national legislature was entitled to provide for such a limit in time of the right of withdrawal under the Doorstep Selling Directive.

The Court's reasoning in this case may be read as mostly complying with Dworkin's principle of adjudicative integrity. The CJEU considered that, although the principal aim of the Directive was to protect consumers in doorstep selling situations, this protection was subject to certain limits. The wording of (the preamble to) the Directive suggested that the right of withdrawal applied to obligations arising under a contract that was still in effect, taking into account that after full performance of the contract, the parties had no further obligations towards one another. The CJEU pointed out that this logic followed from 'one of the general principles of civil law, namely that full performance of a contract results, as a general rule, from discharge of the mutual obligations under the contract or from termination of that contract'.³² Although it did not specify where it found this principle, it is possible – or at least not impossible – to interpret the Court's formulation as referring to a European scheme of principles that is reflected in the provisions of the Doorstep Selling Directive. The application to the present case then confirmed that German legislation was in conformity with this scheme of principles.

It is interesting to note that Advocate General Maduro in his Opinion preceding the CJEU's judgment also made use of arguments of principle, albeit slightly different ones than the Court would eventually follow. He was of the opinion that the Doorstep Selling Directive did not preclude the national legislature from making the exercise of the right of withdrawal subject to a time limit, as long as the time limit would only start running once the consumer became aware, or could have become aware, of his or her right. As we just saw, the CJEU would answer the preliminary question in a similar way, though not making the starting point of the time limit conditional upon the consumer's awareness of his or her rights. Rather

32 CJEU, *Hamilton*, para. 42.

than relying on the ‘principle of full performance of a contract, resulting in the coming to an end of the parties’ obligations’ that the Court would refer to, Maduro based his conclusions on a ‘general principle of limitation’, that is, placing a time limit on the exercise of right. In his opinion, the principle of limitation could be considered ‘a principle common to the laws of the Member States’,³³ ‘which is also found at Community level’.³⁴ In this context, he furthermore remarked that ‘that principle might well ultimately appear at Community level in the context of the creation of a common frame of reference for European contract law’.³⁵ That prediction indeed seems to have come true, insofar as rules on limitation have been included in the Draft Common Frame of Reference (DCFR) published in 2009,³⁶ and can be found in the results of the recent Feasibility Study on European Contract Law.³⁷

If the (D)CFR is seen as a scheme of principles endorsed by society, that is, within the sphere covered by the rules of European private law, Maduro’s line of reasoning might be understood as being compatible with an integrity-based theory of adjudication:³⁸ It expresses the idea that the general principle of limitation, recognized in the laws of the Members States and on the European level, supports the conclusion that the national legislature may place a time limit on the exercise of the right of withdrawal.³⁹ The specific rule can, thus, be traced back to a general principle, the existence of which the judges may derive from the constructive interpretation of the Directives in the field of European consumer law.⁴⁰

33 *Hamilton*, Opinion AG Maduro, para. 24, referring to the Principles of European Contract Law (PECL), the Gandolfi Code, and the Acquis Principles.

34 *Hamilton*, Opinion AG Maduro, para. 30. Maduro adds that this principle only comes into play once it has been established that the consumer became aware, or could have become aware, of his right (para. 31).

35 *Hamilton*, Opinion AG Maduro, para. 24.

36 C. VON BAR, E. CLIVE & H. SCHULTE-NÖLKE (eds), *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR). Full Edition*, Sellier, Munich 2009, Ch. III.-7 (Prescription). Art. II.-3:109(1) DCFR provides that the right of withdrawal lapses after one year from the time of the conclusion of the contract.

37 ‘A European contract law for consumers and businesses: Publication of the results of the feasibility study carried out by the Expert Group on European contract law for stakeholders’ and legal practitioners’ feedback, 3 May 2011’, <http://ec.europa.eu/justice/contract/files/feasibility-study_en.pdf>, 21 Jun. 2011, Ch. 19 (Prescription).

38 Within the context of the present analysis, that is. In other publications, Maduro explicitly considers the manner in which the CJEU should handle questions of constitutional pluralism, e.g., M. POIARES MADURO, ‘Interpreting European Law. Judicial Adjudication in a Context of Constitutional Pluralism’, <<http://ssrn.com/abstract=1134503>>, 19 Aug. 2011.

39 See further sec. 4 *infra*.

40 Compare *Hamilton*, Opinion AG Maduro, para. 30.

3.1.2. *Messner*

The *Messner* case, like *Hamilton*, concerned the consumer's right of withdrawal, this time in the context of the Distance Selling Directive.⁴¹ Ms Pia Messner had bought a second-hand laptop from Firma Stefan Krüger but chose to withdraw from the contract because of a screen defect. In opposition to Messner's claim for reimbursement of the purchase price of the computer, Krüger requested compensation for value of use of the computer, since Messner had been using the laptop for a period of approximately eight months before withdrawing from the contract.⁴² Presented with a preliminary question concerning the Distance Selling Directive's position on compensation for use, the CJEU ruled that a general requirement to pay compensation for the value of use of consumer goods acquired under a distance contract was incompatible with the objectives of the right of withdrawal laid down in Article 6 of the Directive: A consumer could be dissuaded from exercising his or her right, if this involved charges other than the direct cost of returning the good.⁴³ However, the Court added that the consumer protection offered by the Directive was not intended to go beyond what was necessary to allow the consumer to effectively exercise the right of withdrawal.⁴⁴ As a consequence, the purpose and wording of the Directive did not, in principle, preclude a Member State from adopting a legal provision that required a consumer to pay compensation for use of the goods in the case where he or she had 'made use of those goods in a manner incompatible with the principles of civil law, such as those of good faith or unjust enrichment'.⁴⁵ In that case, the national court would have to make sure that application of such a rule would not adversely affect the functionality and efficacy of the right of withdrawal.⁴⁶

On the one hand, like the *Hamilton* judgment, *Messner* might be read as complying with Dworkin's model of principles. Assuming that principles of good faith and unjust enrichment form part of the scheme of principles endorsed in the EU, application of these principles could lead to the conclusion that a consumer's right of withdrawal is not so extensive that it would allow the consumer to invoke it

41 CJEU 3 Sep. 2009, Case C-489/07 *Pia Messner v. Firma Stefan Krüger* [2009] ECR I-7315, concerning the interpretation of Art. 6 of Directive 97/7/EC on the protection of consumers in respect of distance contracts, OJ 1997 L 144, 19.

42 It may be noted here that Krüger's claim for compensation surpassed the purchase price of the computer (EUR 316.80 for a period of use of eight months, against a sales price of EUR 278).

43 CJEU, *Messner*, paras 19–22.

44 CJEU, *Messner*, para. 25.

45 Paragraph 29. The Advocate General in this case, Verica Trstenjak, also interpreted the Directive in the sense that it did not allow for a general provision of national law requiring the compensation for use. She did, however, not argue in favour of specific provisions for cases of abuse of the right of withdrawal but submitted that these cases could be resolved on the basis of 'general rules of civil law, in particular the relevant national law on unjust enrichment' (para. 91 of the Advocate General's opinion).

46 CJEU, *Messner*, paras 28–29.

in situations in which this would go against certain standards of what is perceived as good conduct towards the other party.

On the other hand, however, this reading of the case becomes problematic when taking into account the diversity of European systems of private law. In particular, this explanation of the Court's reasoning seems to largely disregard the difference in approach between national systems of Civil law (most continental European legal systems) and of Common law (within the EU: the laws of England and Wales and Ireland). Moreover, it does not take into consideration the variation in standards of conduct that may exist among the legal systems of the Member States, or at least it does not do so explicitly. When it comes to framing the EU's 'unity in diversity' in legal terms, therefore, the principles of private law referred to in the *Messner* judgment seem to be more controversial than the ones at stake in *Hamilton*. Whereas a principle of limitation indeed may be considered to form part of the laws of all EU legal systems, even if it has found different forms of expression,⁴⁷ it is doubtful whether a similarly general claim can be made for 'good faith'.⁴⁸ Common lawyers would probably not unequivocally adhere to the recognition of such a 'general principle of good faith', whereas civil lawyers might take different views on the application of the principle.⁴⁹ It is, therefore, regretted by some scholars that the CJEU did not articulate its views on the extent to which national approaches concerning the protection and promotion of 'good faith' might differ and how this would affect the enforcement of the right of withdrawal.⁵⁰

In sum, it does seem possible to fit the CJEU's reasoning in the *Messner* judgment within Dworkin's model of principles. Accepting this model of adjudication, however, could imply that judges on the European level would not be required to take into account different approaches in national systems of private law, that is, in this case the diverse nature of good faith protection that comes to the fore in comparative legal research.⁵¹ In this context, it may be asked whether the judges of the CJEU should explicitly address the existing plurality of values underlying European private law in their reasoning or may leave this unarticulated.⁵² In other words, the descriptive question of relating the CJEU's case

47 DCFR 2009, Comments to Art. III.-7:101; R. ZIMMERMANN, *Comparative Foundations of a European Law of Set-off and Prescription*, Cambridge University Press, Cambridge 2002.

48 R. ZIMMERMANN & S. WHITTAKER, *Good Faith in European Contract Law*, Cambridge University Press, Cambridge 2000.

49 ZIMMERMANN & WHITTAKER, pp. 15–16.

50 S. WEATHERILL, 'The "Principles of Civil Law" as a Basis for Interpreting the Legislative *Acquis*' (case note on *Hamilton* and *Messner*), *European Review of Contract Law* 2010, pp. 78–79.

51 This does, of course, not yet imply that this theory should be discarded as a normative model. On that question, see further sec. 4 *infra*.

52 Compare M. AVBELJ & J. KOMÁREK, 'Four Visions of Constitutional Pluralism', *EUI Working Paper LAW 2008/21*, <www.eui.eu>. I will come back to this question in sec. 4 *infra*.

law to Dworkin's model is closely related to the normative view taken on adjudication in the field of European private law.

3.2. Principles of EU Law Affecting Matters of Private Law

3.2.1. *Audiolux*

A third example of the CJEU's principle-oriented approach to certain matters of private law can be found in its judgment in the *Audiolux* case.⁵³ Although the case fell within the sphere of what would qualify as 'private law' in most Member States, viz. company law, the principle at stake in *Audiolux* was not given the label of a 'principle of civil law'. Rather, it was characterized as a 'general principle of Community law', which might have an impact on the relationship between private parties.

The case concerned the question of whether equal treatment of shareholders qualified as a general principle of Community law⁵⁴ and could as such be relied on by minority shareholders in case of a transfer of shares by the dominant shareholder in a company. *Audiolux* was a minority shareholder in the RTL Group. At a certain moment, the dominant shareholder, GBL, transferred a significant part of its shares in RTL to the German Bertelsmann Group. *Audiolux* claimed it had suffered losses because of this transfer, especially since it had not been given the opportunity to exchange its shares in RTL for shares in Bertelsmann under the same conditions as GBL. Since the case fell within the scope of several EU Directives in the field of company law, the CJEU was presented with a preliminary question concerning the position of minority shareholders within the framework of these Directives: Did minority shareholders have a right to be treated in the same way as the majority shareholders when a major shareholding in the company was transferred? In other words, could *Audiolux* rely on a 'general principle of equality of shareholders' in European (private) law? The CJEU answered the question in the negative, taking into consideration that the provisions of secondary Community law did not 'provide conclusive evidence of the existence of a general principle of equal treatment of minority shareholders'.⁵⁵ It added that such a principle could not be regarded as an independent general principle of Community law.⁵⁶

53 CJEU 15 Oct. 2009, C-101/08 *Audiolux v. Groupe Bruxelles Lambert* [2009] ECR I-9823.

54 Following the coming into force of the Lisbon Treaty, it might be more correct to speak of 'principles of EU law' rather than of 'principles of Community law'. However, as also pointed out by Hartkamp, the term 'Community law' is so well known in the pre-Lisbon legislation, case law, and literature that it should not be problematic to continue using it in some contexts. See Asser/Hartkamp 3-1*. *Vermogensrecht algemeen. Europees recht en Nederlands vermogensrecht*, no. 5.

55 CJEU, *Audiolux*, para. 52.

56 CJEU, *Audiolux*, para. 63.

Although the CJEU did not recognize a principle of Community law in the *Audiolux* case, it is possible to read its line of reasoning as following the Dworkinian model. The Court considered that the principle proposed by *Audiolux* was ‘characterised by a degree of detail requiring legislation to be drafted and enacted at Community level by a measure of secondary Community law’.⁵⁷ Therefore, the principle of equality of shareholders could, according to the CJEU, not be considered to form an expression of the general principle of equal treatment. The reason for this was that the general principle of equal treatment could not *in abstracto* ‘determine the choice between various conceivable means of protection of minority shareholders’⁵⁸ and could, thus, not be translated into a more specific ‘principle of equality of shareholders’. In Dworkinian terms: The principle of equality of shareholders, on which *Audiolux* sought to rely, was not recognized as forming part of the scheme of principles endorsed by the European community. It could not be distilled from a principle that was acknowledged as such, viz. the general principle of equal treatment. Accordingly, the European judges did not have to give effect to the proposed principle.

Advocate General Trstenjak observed⁵⁹ that the *Audiolux* case in this respect had to be distinguished from an earlier, highly debated, judgment of the Luxembourg Court, viz. *Mangold*.⁶⁰ In the latter case, the Court classified the ‘principle of non-discrimination on the ground of age’ as a principle of Community law, based on the fact that this principle found protection in various international instruments and in the constitutional traditions common to the Member States.⁶¹ The same could not be said for the ‘principle of equality of shareholders’ proposed by *Audiolux*, according to Trstenjak.⁶² In her opinion, such a principle could not be derived from written primary EU law nor could it be found in international guidelines in the field of company law.⁶³ Furthermore, although various provisions of secondary EU law made reference to a requirement of equal treatment of shareholders, these provisions did not show the characteristics of general principles of Community law, viz. a general, comprehensive nature; a legally binding character; and a constitutional status within the Community legal order.⁶⁴ In addition, the proposed principle lacked general validity, since it remained restricted

57 CJEU, *Audiolux*, paras 62–63.

58 CJEU, *Audiolux*, para. 61.

59 *Audiolux*, Opinion AG Trstenjak, para. 115.

60 CJEU 22 Nov. 2005, Case C-144/04 *Werner Mangold v. Rüdiger Helm* [2005] ECR I-9981. See also the ‘follow-up’ to this judgment in CJEU 19 Jan. 2010, C-555/07 *Seda Küçükdeveci v. Swedex* [2010] ECR nyr.

61 CJEU, *Mangold*; see further *infra*.

62 *Audiolux*, Opinion AG Trstenjak, para. 115.

63 *Audiolux*, Opinion AG Trstenjak, paras 75–80.

64 *Audiolux*, Opinion AG Trstenjak, paras 81–96. The constitutional status of the general principles of Community law will be further addressed in sec. 4 *infra*.

to a specific area of law, namely company law.⁶⁵ Trstenjak thus elaborated on the criteria defining ‘general principles’ in EU law, emphasizing the inconsistency of case law and literature on this matter. At the least, a distinction could be made between principles derived directly from primary Community law and those derived from a comparison of the legal traditions of the Member States.⁶⁶ The CJEU, thus, was called upon to establish whether a ‘general principle of equality of shareholders’ could be found on the basis of either of these two methods. As we saw, in accordance with Trstenjak’s analysis, and in a manner compatible with the Dworkinian model of adjudication, the Court came to the conclusion that there was no support for the recognition of such a principle.

3.2.2. *Mangold*

Going back in time a little, and even though it has already created a tidal wave of legal writings,⁶⁷ the *Mangold* case may be deemed worth discussing once more in the present context. The judgment prominently raised the question of to what extent private parties have to heed the fundamental rights of their contracting partners, embodied in the general principles of EU law. It concerned the compliance of national legislation with EU law, in particular the principle of non-discrimination. The well-known case was constructed on the basis of an employment contract concluded between Mr Mangold, who at the time of conclusion of the contract was 56 years old, and Mr Helm, a practising lawyer. The contract was concluded for a limited period of time, which was in accordance with a German provision of law that was intended to make it easier to conclude fixed-term contracts with older workers (i.e., those above the age of 52). Mangold raised the question of whether this German provision was compatible with the EU’s Framework Agreement on fixed-term contracts and the Directive on Equal Treatment of Workers (Directive 2000/78), insofar as it allowed employers to offer less favourable employment contracts to older employees. In this context, it was of importance that the purpose of the German legislation was to promote the vocational integration of unemployed older workers, which was a legitimate aim of public policy and could as such in principle justify a different treatment of older and younger workers.⁶⁸ However, the means used to achieve this public policy objective had to be proportional.⁶⁹ The CJEU held that legislation that was based on the sole criterion of the age of the worker went beyond what was appropriate and necessary, when it had not been

65 *Audiolux*, Opinion AG Trstenjak, paras 94–96.

66 *Audiolux*, Opinion AG Trstenjak, para. 69.

67 For a recent overview and discussion of the reactions to the *Mangold* judgment, see M. DOUGAN, ‘In Defence of Mangold?’, in A. Arnall, C. Barnard, M. Dougan & E. Spaventa (eds), *A Constitutional Order of States? Essays in EU Law in Honour of Alan Dashwood*, Hart Publishing, Oxford 2011, pp. 219–244.

68 CJEU, *Mangold*, para. 59.

69 Article 6 of Directive 2000/78.

shown that fixing an age threshold is objectively necessary for attaining the aforementioned public policy aim.⁷⁰ The fact that the period for transposition of Directive 2000/78 into national law had not yet expired at the time the contract was concluded did not affect this assessment.⁷¹ Moreover, the fact that Directives in principle had no direct effect on private parties⁷² did not influence the Court's evaluation either.

The Court's reasoning was based on the consideration that Directive 2000/78 did not itself lay down the principle of equal treatment in the field of employment and occupation.⁷³ Rather, according to the CJEU, the source of the principle underlying the prohibition of the forms of discrimination prohibited in the Directive could be found in various international instruments and in the constitutional traditions common to the Member States.⁷⁴ In the Court's words, '[t]he principle of non-discrimination on grounds of age must thus be regarded as a general principle of Community law'.⁷⁵ National courts had to ensure the full effectiveness of the rules based on this principle, setting aside any provisions of domestic law that conflicted with it.⁷⁶

This line of reasoning reflects – or at least does not contradict – the Dworkinian scheme insofar as it refers to the general principles that the CJEU judges define within the framework provided by the common constitutional traditions of the Member States and international instruments. Moreover, the Court specifically adds that national judges have to give effect to the principle of non-discrimination as it is interpreted on the European level. It thus could be said to affirm the Dworkinian position that the judges have to interpret the rules of (European) private law on the assumption that these rules were all created by a single author, thus fitting their judgments in a morally coherent legal framework.

Still, the fact that the *Mangold* judgment met with a considerable amount of criticism⁷⁷ implies that it is not that easy to fit the Luxembourg Court's 'principles and private law' case law in an integrity-based legal-theoretical framework. Questions arise as to the competence of the CJEU to recognize principles of private

70 CJEU, *Mangold*, para. 65.

71 CJEU, *Mangold*, para. 66 *et seq.*

72 For example, CJEU 26 Feb. 1986, Case 152/84 *Marshall v. Southampton* [1986] ECR 723; CJEU 14 Jul. 1994, Case C-91/92 *Faccini Dori v. Recreb* [1994] ECR 3325.

73 CJEU, *Mangold*, para. 74.

74 CJEU, *Mangold*, para. 74.

75 CJEU, *Mangold*, para. 75.

76 CJEU, *Mangold*, para. 77.

77 See *supra* n. 67.

law, the methodology used for defining these principles,⁷⁸ and, more in general, the nature of the multilevel system of European private law. Rather than to the realm of the hedgehog, these questions seem to lead to that of the fox....

4. European Private Law for Foxes⁷⁹

The CJEU's case law in the field of European private law suggests that (some of) its judges recognize certain principles of private law and seek to interpret and apply them in such a way as to fit within a larger scheme of principles. In particular, the *Hamilton* and *Audiolux* judgments provide indications for such a reading of the Luxembourg Court's case law in the field of private law. The reasoning in *Mangold*, furthermore, might be read as supporting an integrity-based view of European private law in light of more general principles of EU law that affect contractual relationships.

It would, however, be too hasty a conclusion to assert that Luxembourg's hedgehog population is flourishing – in the legal-theoretical sense, that is, of course. From a pluralist or fox's perspective, several reservations may be made, taking into account, respectively, the specific context of the cases discussed here and the more general framework for European private law adjudication.

There are at least three somewhat pragmatic, or perhaps realist, arguments against the assertion that the CJEU's method follows the Dworkinian model. First of all, as mentioned earlier, the judgments discussed here only form a sample of the much larger body of case law of the CJEU. More research would have to be done to affirm that a similar line of reasoning can be found in other private law cases engaging principles of law, either in an implicit or in an explicit manner.⁸⁰ In the second place, and more importantly, the reception of the discussed judgments in national legal systems and in legal writings indicates that there is a certain resistance on the national level against the idea of a 'European private legal community' based on principle.⁸¹ Criticism of the generalization of certain principles of private law (e.g., 'good faith' in *Messner*) and the recognition of general principles outside of the scope of the Directives (e.g., the principle of non-discrimination on the ground of age in *Mangold* and *Küçükdeveci*) demonstrate

78 See, once more, METZGER, *Extra legem, intra ius. Allgemeine Rechtsgrundsätze im Europäischen Privatrecht*; METZGER, 'Allgemeine Rechtsgrundsätze im europäischen Privatrecht: Ansätze für eine einheitliche Methodenlehre im europäischen Mehrebenensystem'; and LENAERTS & GUTIÉRREZ-FONS.

79 After M.W. HESSELINK, 'Five Political Ideas of European Contract Law', *European Review of Contract Law* 2011, pp. 295–313.

80 See *supra* n. 25.

81 In this context, mention may be made of a research project on 'National Resistance against the Europeanisation of Private Law', the results of which will be available shortly, <www.hiil.org/research/main-themes/private-actors/research-project-national-resistance-against-the-europeanisation-of-private-law/>, 19 Aug. 2011.

that the borders between EU law and national (private) law are being closely guarded. Even if the judges of the CJEU intend to follow a principle-based method of adjudication, it therefore remains to be seen to what extent national legal systems will accept the principles recognized by the Court. The German Constitutional Court's *Honeywell* judgment seems to offer some space for further development here, insofar as it promotes an 'EU law friendly' approach of national courts towards the *ultra vires* check on the actions of European institutions.⁸² Still, and this leads us to a third fox-like observation, differences may continue to exist on the level of the Member States, especially where some legal systems do not accept certain principles of private law that others do (such as 'good faith').

There are also at least two substantive points of doubt regarding the modelling of the CJEU's principles case law along the lines of Dworkin's scheme. These concern the normative strength of the model in the field of European private law: Is this field of law in need of principles for its further development? If so, does the integrity-based model offer the best framework for the recognition and application of such principles?

Answering the first of these questions requires a more in-depth study of the functioning of the EU's multilevel system of private law than is possible in the context of this article. Nevertheless, on the basis of available research on principles in European private law, it might be said that while there is as yet no consensus about the principles that underlie the field, there is a tendency towards the formulation or creation of such principles. This is perhaps most clearly visible in the work that has been done on the development of a CFR for European private law.⁸³ The drafts for this instrument included relatively elaborate considerations on the principles it was to express.⁸⁴ Moreover, an article that provided that a contract concluded under the DCFR's rules is void to the extent that it infringes a 'principle recognised as fundamental in the laws of the Member States of the European Union' was included.⁸⁵ Yet, rather than further harmonizing the conception of 'fundamental principles' in the EU, these drafts seemed to emphasize the fact that a common view on the values underlying European private law was missing.⁸⁶ Even a

82 BVerfG 6 Jul. 2010, 2 BvR 2661/06, *Honeywell*, para. 58.

83 *Communication from the Commission to the European Parliament and the Council. A more coherent European Contract Law. An Action Plan*, COM (2003) 68 final; *Communication from the Commission to the European Parliament and the Council. European Contract Law and the revision of the acquis: The way forward*, COM (2004) 651 final.

84 See the *Introduction* to DCFR 2009. See also B. FAUVARQUE-COSSON & D. MAZEAUD (eds), *Principes contractuels commun. Projet de cadre commun de référence*, Société de Législation Comparé, Paris 2008.

85 Article II.-7:301 DCFR, which copies Art. 15:101 of the PECL.

86 C. MAK, 'Constitutional Aspects of a European Civil Code', in A.S. Hartkamp, M.W. Hesselink, E.H. Hondius, C. Mak & C.E. du Perron (eds), *Towards a European Civil Code*, 4th edn, Kluwer, Alphen a/d Rijn 2011, pp. 347–348. See also M.W. HESSELINK, 'If You Don't Like Our Principles

reference to a ‘necessarily broad idea of fundamental principles’, supported by European treaties,⁸⁷ could not conceal that such a European understanding of shared values underlying private law was difficult, if not impossible, to find at that moment.⁸⁸ Not surprisingly, therefore, the Expert Group on European contract law, which was installed in 2010, did not include any provisions on contracts infringing fundamental principles in its recent feasibility study for an (optional) instrument of European contract law.⁸⁹ On the other hand, however, the Expert Group did include ‘general principles’ of freedom of contract, good faith and fair dealing, and the absence of formal requirements for the conclusion of a contract under the instrument.⁹⁰ Like the principles recognized in *Hamilton* and *Messner*, these latter principles appear to be of a mainly private law nature, as opposed to, for instance, the ones based on fundamental rights that were at issue in *Audiolux* and *Mangold*. Both legislative initiatives and case law on matters of private law, thus, continue to seek guidance in principles. Further research and developments in practice will have to show what could explain the attraction of this type of reasoning in the field of European private law.⁹¹

Assuming, for the moment, that principles of private law will play a role of some significance in the future case law of the CJEU, the question remains if

We Have Others. On Core Values and Underlying Principles in European Private Law: A Critical Discussion of the New “Principles” Section in the Draft Common Frame of Reference’, in R. Brownsword, H.-W. Micklitz, L. Niglia & S. Weatherill (eds), *The Foundations of European Private Law*, Hart Publishing, Oxford 2011 (forthcoming), pp. 59–71.

87 Such as the Treaty on the Functioning of the European Union, the European Convention on Human Rights, and the EU Charter of Fundamental Rights; DCFR 2009, Comment B to Art. II.-7:30.

88 Hesselink rightly observed that ‘not only does the call for a set of underlying principles seem to imply the endorsement of a widely held but nevertheless controversial position in legal theory (law as integrity), but even within that theory principles seem to be of the nature that they can hardly be listed in advance, before the interpretation and further development of the DCFR starts (except by a Herculean judge)’; HESSELINK, ‘If You Don’t Like Our Principles We Have Others. On Core Values and Underlying Principles in European Private Law: A Critical Discussion of the New “Principles” Section in the Draft Common Frame of Reference’, p. 63.

89 Expert Group on European Contract Law 2011, <http://ec.europa.eu/justice/contract/files/feasibility-study_en.pdf>, 19 Aug. 2011. The recent proposal for a Regulation on a Common European Sales Law, mentioned in *supra* n. 5, does not include any provisions of this type either.

90 Section I.1.2 of the Expert Group’s ‘feasibility study’.

91 Apart from the functions mentioned in *supra* n. 27, one may think of a contribution to the definition and reconciliation of values that should find expression in European private law. Elsewhere, I have suggested that, for the purpose of creating a legal framework that would allow for this type of balancing, inspiration may be found in theories of constitutional pluralism and deliberative constitutionalism; see C. MAK, ‘Instrumentalisme, legitimiteit en de onderstroom van het Europees contractenrecht’, in M.W. Hesselink, A.A.H. van Hoek, M.B.M. Loos & A.F. Salomons (eds), *Het Groenboek Europees contractenrecht: naar een optioneel instrument?*, Boom Juridische uitgevers, Den Haag 2011, pp. 41–52. I hope to elaborate this thought in a subsequent article.

Dworkin's model of adjudication should be the prevailing one for the development and understanding of the Court's case law referring to 'principles of civil law'. In the previous sections, an attempt has been made to illustrate to what extent the model would fit. On the basis of this analysis, the hedgehog might find that the discussed cases can, indeed, be understood as giving effect to European principles deriving from a single value. The fox, though, might reply that a purely Dworkinian reading of the CJEU's case law ignores the fact that underlying European private law there still is a plurality of values,⁹² which as yet does not correspond to a European 'community of principle'. In order to illustrate its point, the fox may refer to EU case law on fundamental rights, such as *Grogan*⁹³ and *Omega*,⁹⁴ in which the Court refrained from interfering with the discretion of national legislators and judges to determine whether certain services (as diverse as abortion and laser gaming, respectively) could be legally provided in their countries. It may add that an extrapolation of this case law to questions of private law makes clear that no uniform principles seem to decide these hard cases:⁹⁵ Depending on the national conception of a fundamental right (in *Omega*: human dignity), a national judge will determine whether the protection of the fundamental right justifies a restriction of an EU freedom (in this case: the freedom to provide services). Accordingly, contracts related to the activities under scrutiny will be affected (e.g., a restriction of the freedom to provide laser game services implies the nullity of contracts concerning the acquisition of laser game equipment and technology and contracts concerning the exploitation of a laserdrome).

Notwithstanding these doubts of the fox, it may be submitted that precisely in the contemplation of the CJEU's case law on fundamental rights inspiration may be found for the understanding and further (judicial) elaboration of principles of European private law.⁹⁶ Fundamental rights form part of the general principles of EU law that are safeguarded by the CJEU: They can be derived from primary and secondary EU laws and from the common constitutional

92 Compare R. SLOANE, 'Human Rights for Hedgehogs?: Global Value Pluralism, International Law, and Some Reservations of the Fox', *Boston University Law Review* 2010, p. 977, who points out that Dworkin explicitly recognized the empirical fact of value pluralism in his earlier work.

93 CJEU 4 Oct. 1991, Case C-159/90 *The Society for the Protection of Unborn Children Ireland v. Stephen Grogan and Others* [1991] ECR I-04685.

94 CJEU 14 Oct. 2004, Case C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I-09609.

95 See also MAK, 'Constitutional Aspects of a European Civil Code', pp. 337–339.

96 Compare WEATHERILL, p. 83, who points out the dangers of this approach: 'Such a process would be more contested in the area of private law than it ever has been in the field of fundamental rights. There is a significantly greater acceptance of the feasibility and desirability of developing truly European standards of fundamental rights protection than could ever be said of the elucidation of general European principles of private law'.

traditions of the Member States.⁹⁷ In a similar manner, it seems that the Luxembourg judges, and sometimes also the Advocates General, have sought to find a basis for (some of) their ‘principles of civil law’ in the shared legal traditions of the Member States, for example, for the principle of limitation in the *Hamilton* judgment and for the principle of ‘good faith’ in *Messner*. Accordingly, irrespective of the nature of the principle (‘fundamental’ or of a purely private legal character), the methodology for its recognition may, in general, follow the one developed for general principles of EU law, including fundamental rights.⁹⁸ Within that methodological framework, it would be possible to make a distinction between different types of principles, for instance, those enjoying a constitutional status and those not qualifying as such. By further clarifying the legal prerequisites for the acknowledgement of principles of European private law, a common space may then be shaped for the deliberation of their content.⁹⁹

So, where does that leave the hedgehog? The search is for an approach to European private law adjudication that may contribute to enhancing the coherence of the field of law,¹⁰⁰ while at the same time recognizing the (empirical) fact of value pluralism.¹⁰¹ It is assumed, here, that principles of private law may guide the reasoning of the CJEU in hard cases. Yet, rather than aspiring to fit in such principles in a coherent, single-value scheme endorsed by a ‘European community of principle’, some room should be left for differentiated applications of these principles on the national level. In a more specific form, the method of resolving a hard case could then look like this: In cases in which a rule solution is not at hand, the CJEU might refer to principles of private law deriving from EU law or from the common traditions of the Member States. In doing so, it would have to pay heed to the fact that not all principles are conceived of in the same way in all Member States. Accordingly, on the one hand, the Court might come to the conclusion that a principle does not find sufficient support in order to be recognized as a principle of European private law.¹⁰² On the other hand, it might acknowledge a principle of private law, while leaving a margin of appreciation to the national legislators and judges to determine how to give effect to the principle on the national level.¹⁰³ In this context, a differentiation may be made according to the nature of principles,

97 Cf. Art. 6(3) of the Treaty on European Union.

98 Compare METZGER, ‘Allgemeine Rechtsgrundsätze im europäischen Privatrecht: Ansätze für eine einheitliche Methodenlehre im europäischen Mehrebenensystem’; BASEDOW, pp. 460–461.

99 Remindful of J. HABERMAS, *Faktizität und Geltung. Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats*, Suhrkamp, Frankfurt am Main 1993, p. 272. On the consequences of such a model for legal certainty, see *ibid.*, pp. 269–271.

100 See the European Commission’s Communications mentioned in *supra* n. 5.

101 Compare SLOANE, p. 1001 *et seq.*

102 Cf. CJEU, *Audiolux*.

103 Cf. CJEU, *Omega* and, similarly, CJEU 1 Apr. 2004, Case C-237/02 *Freiburger Kommunalbauten v. Hofstetter* [2004] ECR I-3403.

their degree of abstraction, and the objectives they aim to fulfil.¹⁰⁴ By thus leaving room for interaction between the EU and national levels, a principle-based European private law could find stronger support in the national traditions of the Member States.

In such a scheme, the legal-theoretical question of whether ‘value’ should be conceived of as an indivisible concept can, in principle, remain open. The model focuses on the reconciliation of views on how to resolve difficult legal questions rather than aiming at defining one ‘best’ solution that reflects a single value underlying the system of European private law. This does not mean that this model precludes the possibility that an indivisible value may underlie the solutions found. However, at the same time, it does not deny the possibility that different values may co-exist. Effectively, it accommodates the empirical fact of value pluralism and does not insist on the definition of one ‘conception of the good’ for the further development of European private law.¹⁰⁵ As a descriptive model, it, thus, certainly comes closer to the fox’s perspective on value. As a normative model, it leaves room for further discussion on the foundations of European private law and the applicability of Dworkin’s *Justice for Hedgehogs* to the CJEU’s case law.

5. Conclusion

In this article, the question was posed whether an integrity-based legal-theoretical framework could capture the essence of the CJEU’s line of reasoning in private law cases. In the eyes of European judges, is European private law conceived as a system based on an indivisible value, and should it be; or can a more convincing case be made for a theory of adjudication that presupposes a plurality of values to underlie private law? In other words, do (and should) the Luxembourg judges take the hedgehog’s or the fox’s perspective?

The analysis of a selection of relevant judgments of the CJEU leads to the conclusion that Dworkin’s model of ‘law as integrity’ partly fits the line of reasoning the Court followed in some of its judgments (e.g., in *Hamilton* and *Audiolux*). In other cases, however, the application of the Dworkinian scheme to the Court’s considerations proves more problematic (e.g., *Messner*, *Mangold*, *Omega*). When considering a normative model for the CJEU’s case law, moreover, several doubts were expressed as to the possibility to translate ‘law as integrity’ to a system of European private law that has to deal with many different values proclaimed by different actors at different levels. Somewhat paradoxically, from a pluralist perspective, the answer to the question of value does not seem to matter so much for the further development of European private law. From the fox’s point of view, it is

104 Compare BASEDOW, p. 464.

105 As SLOANE, p. 1005, observes, this also is in accordance with Dworkin’s account of human rights, which leaves room for ‘reasonable, good-faith disagreements, within some margin of appreciation, about how concrete human rights should be understood and applied in different polities’.

more important to establish a legal framework for the deliberation of different conceptions of legal principles and rules than to be able to trace back all case solutions to one fully coherent scheme of principles of European private law. For the further elaboration of such a framework, inspiration may be sought in the CJEU's case law on fundamental rights protection.

Admittedly, this is not a conclusive response to the question of whether Dworkin's 'law as integrity' fits the Luxembourg Court's adjudication of private law matters. As in so many cases, the model only partly seems to explain reality. Contemplating its applicability to the selected cases, however, has brought to the fore aspects of the relationship between values, principles, and rights in European private law that deserve further thought. Perhaps, then, one thing that the hedgehog knows could be that sometimes searching for the right questions might be as valuable as looking for the right answers.