The Evolving Concept of Private Law in Europe

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1. The Evolving Concept of Private Law in Europe

Laura Burgers, Marija Bartl, and Chantal Mak

Abstract

This introduction aims to set out some of the basic concepts of European private law, while providing a common ground for the rest of the handbook *Uncovering European Private Law.* The introduction starts by defining some key terms, such as private law, private autonomy, or freedom of contract, and then proceeds to unpack important processes and developments that have marked the constitution of private law in Europe, including materialisation and constitutionalisation of private law, as well as the Europeanisation and instrumentalisation of private law through positive and negative integration. Building on the reading of these terms and processes, we propose to understand European private law not only as a multi-level legal field but also a way of looking at private law that is necessarily transdisciplinary, comparative and contextual.

The handbook *Uncovering European Private Law* will allow you to do one of the very essential things in life, namely, to explain to others why your (future) area of expertise—European private law—is absolutely fascinating. Parties and family gatherings will never be boring again. The book's objective is to introduce you to important and topical debates in European private law, ranging from anti-discrimination, digital justice, sustainability to financial crises, data protection, and global supply chains. But before we delve into those, this introduction aims to refresh your memory on some key concepts in the area of private law in Europe. The aim is, firstly, to set common ground for the rest of the book. Secondly, we explain our specific understanding of the concept of European private law, which combines its study as a legal field with a necessarily transdisciplinary, comparative, and contextual approach.

Thus, the central question of this chapter is: what do we mean by European private law? We break up this question into smaller aspects. In Section 1, we discuss what the *private* in private law stands for. In Section 2, we introduce (and immediately relativise) the private legal principle of private autonomy to get a

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better idea of the implications of calling something private *law*. In Section 3, we discuss the lawmaker in private law not only being national but also *European*. In Section 4, we integrate these reflections into a formulation of the meaning of European private law for the purposes of this handbook.

1. The 'Private' in Private Law

'Everyone has three lives: a public life, a private life and a secret life', according to Gabriel García Márquez (1927–2014), a Colombian writer and winner of the Nobel prize in literature.[1] Though Márquez most likely did not think of it this way, we find the distinction between these three can serve as a metaphor to reflect on the concept of private law.

Public life is regulated by public law. Public law is typically understood as the law that regulates relationships between citizens, on the one hand, and public authorities handling in their public capacity on the other. Examples include constitutional law, setting out the main institutions of the State; administrative law, regulating how administrations take decisions and how citizens can object to these; and criminal law, stipulating which crimes are punishable by law. The legal relationship between a citizen, on the one hand, and public authorities on the other is frequently described as a 'vertical' relationship.

People's *private* lives are regulated by private law. Private law is typically understood as the law that regulates relationships between two or more private parties (i.e. individual humans, companies, associations, foundations etc.) or a public actor acting in a private capacity.[2] Examples include contract law, regulating the legal enforceability of agreements between parties acting in their private capacity; tort law, setting out conditions under which wrongdoing by one party to another should be compensated; company law, unfolding the conditions under which a legal person can legally function; property law, containing rules on, inter alia, transfer of ownership; and family law, regulating affairs like marriage, divorce, and guardianship over minors. The legal relationship between two or more parties acting in their private capacity is frequently described as a 'horizontal' relationship.

1 He reportedly told this to his biographer who inquired after a Parisian lover of Márquez. Cf. J. Wilson, 'Gabriel Garcia Marquez—A Life, by Gerald Martin', *The Independent* (24 October 2008), https://www.independent.co.uk/arts-entertainment/books/reviews/gabriel-garc-237-a-m-225-rquez-a-life-by-gerald-martin-5358667.html

2 This definition is common in civil law systems (see also below). In a similar fashion, Jan Smit defines private law as 'a unified whole of which the main branches—on contract, tort, property, family, and inheritance—are governed by conflicts between individual autonomy and countervailing principles. J. M. Smits, *Advanced Introduction to Private Law* (Cheltenham: Edward Elgar Publishing, 2017). The Harvard Law School's *Project on the Foundations of Private Law*'s definition comes rather close to ours too but refers to the common law (see below): '"Private law" embraces the traditionally common law subjects (property, contracts, and torts), as well as related subjects that are more heavily statutory, such as intellectual property and commercial law. It also includes areas of study that are today less familiar to students and scholars, including unjust enrichment, restitution, equity, and remedies.'. Cf. Harvard Law School, 'Project on the Foundations of Private Law', *Harvard University*, https://blogs.harvard.edu/privatelaw/

Note that private law also applies to public parties when they act in their private capacity. When you buy a chair, you handle it in your capacity as a private party, for example as a consumer or on behalf of a company. Likewise, a state agency may act in a private capacity when entering into a contract ordering chairs for its employees.

It is likely that people do not want anyone to interfere in their personal or secret lives, implying that interference through the means of law is unwanted as well. This observation helps us to reflect on the meaning of the 'private' in private law: private does not necessarily mean secret in this context. Marriage is usually not secret, nor is it to start a company or a foundation, or even to enter into a contract. The 'private' in private law rather refers to the capacity of actors entering into legal relationships not being public.

Privatisation—the process of handing over state activities to private parties—can make it difficult to determine whether a certain actor is handling in its private capacity. For example, the management of public transport and prisons, and the provision of energy and water, used to be in the hands of the public authorities in most states, but many such activities have been privatised.[3] Private companies thus often exercise a public function.

We will see time and again in this book how the so-called 'public/private divide' (i.e. the doctrinal distinction between public and private law) is constantly challenged by various 'struggles for recognition' by different subordinated groups,[4] as well as broader societal developments such as globalisation, privatisation, financialisation, digitalisation, and more. (See, for example, Chapter 7 on a new, social concept of ownership by Eva Vermeulen; Chapter 10 on social enterprises by Nena van der Horst and Marleen van Uchelen; Chapter 11 on financial crises by Guido Comparato and Chapter 13 by Antonio Davola on data subjects). Moreover, areas like economic law, including competition law, do not always fall clearly within either the category public or private as defined above.

At the same time, we may reflect on the concept and reach of 'law'. Insofar as people's personal or secret lives should be free from interventions, they remain outside of the scope of the law. Both public and private law, thus, have limits.

Think of the social sphere: The law does not, for example, attach consequences to your friend missing a lunch appointment.

Furthermore, consider the hiring of a painter for your house, a gardener for the backyard, or a babysitter for one's children. Public law establishes certain rules for such services, for instance regarding working hours and safety. Private law governs the contractual relationship, which, inter alia, concerns payment and working conditions. Since the hiring of services for one's home and family are of a personal nature, one may to some extent distinguish among applicants on the basis of personal preferences—including those that in the context of employment by a public authority or private company would not be allowed under non-discrimination law. As we shall see, however, it is a subject of debate where to draw the boundaries of law in such cases.[5]

3 See also D. Parker, *The Official History of Privatisation Vol. I: The Formative Years 1970–1987* (London: Routledge, 2009).

4 A. Honneth, *The Struggle for Recognition: The Moral Grammar of Social Conflicts* (Cambridge: John Wiley and Sons, 2018). In this seminal work, Honneth argues that the recognition of certain groups as rights holders is important for questions of distributive justice.

5 H. Collins, 'The Vanishing Freedom to Choose a Contractual Partner', *Law and Contemporary Problems*

2. Private Autonomy as a General Principle of Private Law

Every jurisdiction has its own particularities, but it is possible to enumerate some general principles of private law. Whole bodies of literature exist on this topic; we only present it briefly, focusing on one overarching principle with influence on both substantive and procedural private law, namely that of private autonomy.

> Another important private law principle, especially dominant in continental Europe, is that of good faith. (See Chapter 6 on *bona fides* by Talya Deibel.) Other private law principles include *pacta sunt servanda* (agreements must be kept), private property, equality of the parties, and freedom of contract. Many of these principles are interrelated.

a. Substantive Side of Private Autonomy

Substantively speaking, the principle of private autonomy finds expression in inter alia, the contract law principle of freedom of contract, according to which parties are free to decide (1) whether they want to enter into a contract; (2) with whom they want to enter into a contract; and (3) what the substance of that contract may be.

This principle assumes a certain equality between the parties. We call this *formal equality*, i.e. equality before the law.

> In the 19th century, the sociologist Max Weber asserted that *formality* offers legitimacy to the law.[6] He understood legitimacy as legality: according to Weber, the law is legitimate (i.e. people accept its authority and are willing to obey) when it is 1) systematic; 2) general; and 3) complete. That is, the law should offer an all-encompassing system that is formulated so as to apply generally without being tailored to specific situations, and yet be so complete that judges do not need to resort to personal convictions to be able to apply the rules.[7] Many private legal rules meet these requirements, for instance, the rule that property can be transferred from one legal subject to another.

In reality, power imbalances may exist between parties. At the end of the 19th century and over the course of the 20th, specific fields of private law emerged that aim to repair such power imbalances and thus to realise (some) *substantive* or *material equality* as well. Prominent examples include labour law, consumer law, and tenancy law.

> Have you ever entered into a negotiation with Amazon, Facebook, WhatsApp, or other large companies on the general terms and conditions of your usage of their products and services? Very likely, the answer is no. Such products and services are often offered on a 'take it or leave it' basis. Consumer law has the aim to recover some of the power imbalance between you—the consumer—and business entities.
>
> Other power imbalances exist in labour relations, especially where an individual worker performs a task that can be easily performed by others as well. Labour law

76.2 (2013), 71–88 (p. 71).

6 On Weber, cf. S. H. Kim, 'Max Weber', in E. N. Zalta (ed.), *The Stanford Encyclopedia of Philosophy* (*Summer 2021 Edition*), https://plato.stanford.edu/archives/sum2021/entries/weber/

7 See e.g., A. J. Hoekema, *Legitimiteit door legaliteit, over het recht van de overheid* (Nijmegen: Ars Aequi Libri, 1991), p. 15.

therefore protects workers. Likewise, tenancy law protects tenants against the power of homeowners to, for instance, arbitrarily evict them from rented homes.

Thus, whilst contract law, traditionally speaking, was there to facilitate the legal enforcement of commitments between private parties deemed equal, with the introduction of fields like labour law, tenancy law and consumer law, private law took on another goal, namely the promotion of material or substantive equality. This can be called the 'social' or 'societal' dimension of private law. To the extent that the promotion is taken up by the judiciary, this is often called the 'materialisation' of private law (*Materialisierung* in German): private law application does not happen purely formally but involves the realisation of material goals.

This social dimension is not unique to contract law but occurred in other fields of private law as well. Take tort law. From the end of the 19th century and in the course of the 20th century, most tort law systems adopted variants of strict liability next to fault liability.[8] Thus, in some situations, they let go of the requirement of fault: a tort law obligation to pay damages can also arise out of a certain responsibility. For example, in principle, employers are liable for damage caused by faults of their employees, even if the employers themselves made no mistakes—one reason for this being that employers are more likely to be able to afford the damages than an individual employee. Car owners are at least partially liable when they end up in an accident, even if the accident was not their fault, because of the risk they took on by driving. Also, in principle, producers are made liable for products that turn out to be deficient within a certain period of time after the purchase, even if it is unclear whether there is actually a fault made in the production process. Hence, formal equality is let go to promote material equality as the end result.

Various authors are critical of the materialisation of private law. They feel that private law should merely be used to achieve *corrective justice*, i.e. to restore a just situation between two parties acting in their private capacity. They oppose the usage of private law to achieve *distributive justice*, i.e. to distribute (financial) means between different parties in society.[9] (See also Chapter 2 on justice in European private law by Martijn Hesselink).

Throughout the second half of the 20th century, another development gained traction, namely the constitutionalisation of private law. This concept refers to the horizontal application of fundamental, constitutional or human rights. These rights primarily pertain to the public law domain and are meant to protect citizens against state power. The goal of constitutionalisation is to ensure that material imbalances between private parties do not impede the enjoyment of fundamental rights. Private actors, thus, to some extent have to heed the public interest. (See also Chapter 5 on human rights in private law by Chantal Mak).

8 The distinction between fault and strict liability is however not that sharp in practice, see C. Van Dam, 'Strict Liability', in *European Tort Law*, 2nd edn (Oxford: Oxford University Press, 2013), pp. 297–306.

9 Cf. Notably E. Weinbrib, *The Idea of Private Law* (Oxford: Oxford University Press, 1995).

The application of human rights in private law often requires courts to conduct a balancing of rights and interests.[10] For example, the question has arisen whether the right not to be discriminated against based on sexual preference might be invoked against a Catholic bakery refusing to bake a cake celebrating gay marriage.[11] It is not difficult to see that such an application of the fundamental right not to be discriminated against would clash with the Catholic baker's private autonomy or freedom of contract. Thus, a case like this challenges a principle originally thought of as essential for contract law specifically and private law generally. It is also interesting to reflect on the question of whether this balancing of interests is different depending on whether the bakery is a small, family-owned business or a large chain.

b. Procedural Side of Private Autonomy

The procedural side of the principle of private autonomy has implications for civil procedure. It is for the parties to delimit the boundaries of the legal dispute. This is different from public law proceedings, in, say criminal law, where judges typically may research and inquire further about the facts of their own motion, and where the public prosecutor can choose to take a private party (i.e. an alleged criminal) to court. In private law, one of the parties decides what part of their conflict they want to take to court, and whether they want to do that at all.

In private law proceedings, judges usually rely on the facts put forward by the parties; they deem true those facts presented to them that were not (convincingly) disputed. This is true for civil procedure throughout Europe. Although there is no specific term for this in English, other languages designate it as a concept: *lijdelijkheid* in Dutch, for example, or the *principe dispositif* in French, the *Dispositionsmaxime* in German, *disposisjonsprinsippet* in Norwegian.

Materialisation can also impact this procedural side of private autonomy. For instance, in consumer law, in certain circumstances judges are required to *ex officio*—of their own motion, not because one of the parties asked to do so—check whether the general terms and conditions of a company are unfair under European Union (EU) law. It is thought that this is necessary, inter alia, because the length and technicality of general terms and conditions make them often incomprehensible for consumers. That is, if judges do not assess the fairness of such terms *ex officio*, it is likely that this will not happen at all, as consumers will not challenge terms that they have not read or understood.[12] (See Chapter 9 on consumers in European private law by Joasia Luzak.)

In private international law—the legal field regulating the applicable law, competent court and enforcement in cross-border private legal conflicts—the principle of party

10 H. Collins, 'On the (In)compatibility of Human Rights Discourse and Private Law', in H.-W. Micklitz (ed.), *Constitutionalization of European Private Law* (Oxford: Oxford University Press, 2014), pp. 49–51.

11 European Court of Human Rights, fourth section decision, Application no. 18860/19, *Gareth LEE against the United Kingdom*, 7 December 2021.

12 This duty for judges to check compliance with the law *ex officio* applies to the bulk of European consumer law, with the limitations that the problem with consumer law must be material to the dispute at stake (i.e. no general court check); and that the intensity of the duty is connected to how much difference it can make: for example, if there is no remedy for the violation to be ascertained, then there is also little reason to act *ex officio*.

autonomy exists for the domain of contracts. This means that parties who enter into a contract, are free to negotiate what law applies to their contract and to which court or arbiter they will resort in case of conflict. Note that this principle is not applicable in, for instance, tort law. There it is usually the place where the tort took place, or where the damage occurs, that determines the applicable law and the competent court.

> The rules of private international law can thus render several courts, at the time, competent. So-called 'forum shopping' refers to the practice of certain parties to select the court that is most likely to rule in their favour. Sometimes, when a party is sued before one court, it starts proceedings in another court to block the first case. Parties with enough financial resources and/or legal knowledge and capacity can thus set the odds in their own favour. Hence, one could consider forum shopping as (mis)use of this procedural side of private autonomy.

3. The Maker of Private Law in Europe

a. Public and Private Lawmakers

In case you buy something, and the other party does not deliver, it is contract law that allows you to enforce your contract. The conditions under which one can enforce contracts are laid down in contract law, which is made by the public authorities. Contract law can be either codified in legislation or developed by the judiciary in case-law; the same holds true for other fields of private law, such as tort law, property law, company law, and family law.

Thus, in this book, we understand private law as law made by public authorities, i.e. legislatures and judiciaries.[13] Sometimes, people refer to private law when they speak of rules made by private parties. We understand these kinds of rules to fall within the sphere of freedom of contract or self-regulation (e.g. codes of conduct drafted by companies in a certain sector) that is shaped by publicly enacted rules of public and private law.

> Rules made by private parties can be laid down in a contract. For example, when a group of neighbours enters into an enforceable agreement not to vacuum clean on Sundays, they create a 'private law' amongst themselves to behave accordingly. Thus, the *substance of contracts* is sometimes referred to as 'private law' (though not in this book).
>
> Private law understood this way can also take other shapes. For example, many large multinationals subscribe to the OECD guidelines, pledging that they will respect human rights and environmental law. This type of *self-regulation* is quite common. It is not meant to be legally enforceable and can therefore not be considered a contract.
>
> Private standard-setting happens in all kinds of areas: for example, food producers develop their own logos for 'healthy' foods and electricity providers adopt common standards for the connectivity of charging stations for electronic vehicles. By some authors, such *standardisation by the private sector* is also called private law.

13 So, in addition to what we have been noting above in Section 1 on the difficulty of drawing a sharp line between private and public law, the *secret life of private law* may be that it is in fact public law.

In continental Europe, private law is often codified in national civil codes. 'Civil law' is frequently used as a synonym for 'private law'. Civil procedural law is typically laid down in codes of civil procedure. It refers to procedural rules in private legal disputes and contains rules on, for example: evidence, possibilities for appeals, and enforcement of judgments.

Note that 'civil law' is a term that is also used more generally to depict the legal systems of those states that have adopted a civil code (i.e. one comprehensive legal text containing private law provisions). In Europe, these are mostly the continental states. Civil law can refer to the legal system of those states as a whole—including private *and* public law. Using the term like this, civil law systems are contrasted to (mostly Anglo-American) common law systems, which do not have civil codes. Civil law systems are characterised by an emphasis of general rules laid down in legislation, and by *deductive* legal reasoning, applying a general rule to a specific case. Common law systems are characterised by an emphasis on judge-made law and by *inductive* legal reasoning, distilling general rules from specific cases. There are also other 'legal families'. Often, for instance, the Nordic countries are described as a separate category. (See also Chapter 16 on comparative law by Marieke Oderkerk.)

b. Europeanisation of Private Law

Within EU Member States, the public authorities who make laws that impact private legal relationships are not only national authorities, but also the EU and its institutions. The increasing influence exercised by the EU on national private laws is a process called 'Europeanisation' of private law.

EU law consists of:

- the constitutive treaties, i.e. the international agreements between the 27 Member States that constitute the EU as such, also known as primary EU law:
  - the Treaty on the European Union (TEU);
  - the Treaty on the Functioning of the European Union (TFEU);
  - the Charter of Fundamental Rights of the European Union (CFREU);
- secondary EU law, i.e. law enacted by the EU institutions that were created by the constitutive treaties. Such laws can take the shape of:
  - Regulations;
  - Directives;
  - Decisions;
- the interpretations of primary as well as secondary EU law by the Court of Justice of the European Union (CJEU) in its case-law.

The most usual way of intervention of the CJEU in private law is through the so-called 'preliminary reference procedure'. This procedure denotes a possibility, and at times an obligation, for national courts to refer questions of interpretation of EU law to the CJEU.

> The CJEU has the final interpretative authority in the matters of EU law. Furthermore, in principle, EU law (and its interpretations), take precedence over national law, including constitutional law ('primacy of EU law').[14]

EU law does *not* as such distinguish between private law and public law.[15] All EU legal sources can however influence private legal relationships. After all, the EU goal of establishing the internal market is dependent on private law facilitating market transactions—without, for instance, financial law, contract law, company law, and property law it would be difficult to sustain this market.[16]

> The goal to establish this EU-wide market might seem politically neutral at first sight because it merely aims at economic cooperation. Likewise, the ostensibly technical rules of private law may look politically neutral. Yet, as argued convincingly by Katharina Pistor, private law *enables* the market to exist, and therefore, private law is anything but neutral: it has been used to create capital by the *haves* and they have thus contributed to the growing material, social and political inequality. In turn, changes in private law can also effectively change the distribution of wealth, power, and environmental harms.[17] (See also Chapter 15 on private law and the political economy by Marija Bartl.)
>
> Indeed, to put central the goal of establishing an internal market, might marginalise other goals that one could deem essential for European societies. Social justice is one of them (see further below), but one could equally think of environmental sustainability. Whilst a high level of consumer protection might be effective for the promotion of the internal market, it is not precisely environmentally sustainable to ship goods around over large distances, nor to replace rather than repair broken consumer goods. The European Commission is aware of this and issued a 'Green New Deal' in December 2019, a series of policy proposals which should address inter alia these questions. (See also Chapter 14 on EU sustainable finance regulation by Jennifer de Lange-Collins.)

The constitutive treaties of the EU can exercise influence on private legal relationships through, firstly, so-called negative integration of the internal market. That is, they forbid cartels and national regulation that pose barriers to the four 'fundamental freedoms' of the EU, which should facilitate the goal of the EU to create an internal market:

1. the free movement of persons;
2. the free movement of goods;
3. the free movement of capital; and
4. the free movement of services.

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14 The CJEU also has the competence to, inter alia, rule in cases instigated by the European Commission against EU Member States, or in cases against the EU institutions. See Articles 251–281 TFEU.

15 Even in national legal systems this distinction is mostly made by scholars. In EU law, there is no separate codification of rules of private law, but nor is there in many common law systems.

16 C. U. Schmid, 'The Instrumentalization Thesis in a Nutshell', in C. Joerges and T. Ralli (eds), *European Constitutionalism without Private Law; Private Law without Democracy* (Oslo: ARENA, 2011), pp. 17–27.

17 See K. Pistor, *The Code of Capital; How the Law Creates Wealth and Inequality* (Princeton, NJ: Princeton University Press, 2019).

Negative integration is aimed at national deregulation, that is, at removing barriers to the cross-border movement of persons, goods, services, and capital. These barriers, which EU law thus requires be removed, can have their origin in what is seen as private law at a national level, or they have their origin in rules that influence private legal relationships (see Chapter 3 on negative integration by Jaap Baaij).

> The *Bosman* ruling may serve as an example. Jean-Marc Bosman was a professional football player. The rules of the UEFA, the FIFA, and the Belgian football association allowed his club to ask for a very high transfer sum to be paid, even though his contract had already expired. Bosman argued this prevented his free establishment as a worker, because the sum was so high that it effectively prevented him from working for another football club. The CJEU agreed, and thus the free movement of workers applied horizontally in the conflict between Bosman and the football associations.[18]

Secondly, *general principles of EU law* that, according to the CJEU, flow from these fundamental freedoms may apply directly between private parties, notably the prohibition of discrimination.

> The *Mangold* case, on age discrimination, can serve as an example. Mangold argued that he was discriminated against on the basis of age since, unlike younger employees, he could not get a permanent position. The employer invoked German labour legislation stipulating that no objective reason was needed to refuse permanent positions to people above fifty-two. This piece of legislation aimed to improve the flexibility of the labour market for older employees. Yet according to Mangold, the relevant provision was discriminatory. The CJEU agreed, saying that non-discrimination is a general principle of EU law. Mangold could thus invoke this general principle of EU law in the legal proceedings against his employer, requiring the national law to be set aside.[19]

Thirdly, horizontal application of certain provisions of the CFREU can impact private legal relationships. Such horizontal application of the CFREU constitutes a form of the aforementioned constitutionalisation (see Chapter 5 on human rights in private law by Chantal Mak).

> Note the difference and overlap between the fundamental freedoms, general principles of EU law like non-discrimination, and fundamental rights. *Fundamental freedoms* are foundational for the internal market. *Fundamental rights* are foundational for the democratic rule of law and human dignity. *The general principle of non-discrimination* might be foundational for both—non-discrimination is not only a general principle of EU law, but also a human right recognised in, for instance, the United Nations International Covenant on Civil and Political Rights.
>
> In the past decades, many authors and organisations have expressed criticism

18 Case C-415/93 *Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal club liégeois SA v Jean-Marc Bosman and others and Union des associations européennes de football (UEFA) v Jean-Marc Bosman* [1995] ECLI:EU:C:1995:463.

19 Case C-144/04 *Werner Mangold v Rüdiger Helm* [2005] ECLI:EU:C:2005:709. An interesting aspect of this case is that it was actually constructed. Mangold's employer, who was a lawyer, had earlier challenged the German labour legislation, claiming it violated EU law. He and Mangold created this case and it triggered the prejudicial question by the German Court to the CJEU. So, in fact, they were both proved right.

towards the EU for merely focusing on the economic aim of establishing the internal market.[20] This critique is often labelled as the 'social deficit' of the EU. Partly in response hereto, the EU had the CFREU enter into force in 2009. Yet the problem of the social deficit seems not fully solved, as will be discussed in a number of chapters in this book (see, for example, Chapter 12 on housing by Irina Dorumath).

Secondary EU law can exercise influence on private legal relationships through so-called positive integration, i.e. by creating new EU-wide rules—these rules may fall within areas that affect the private laws of the Member States. For example, the EU adopted the Consumer Rights Directive, which influences the national contract laws of the Member States, as well as the Commercial Agency Directive, which influences national company law (see Chapter 4 on positive integration by Marco Loos).

EU law can have 'direct vertical effect', 'direct horizontal effect', or 'indirect horizontal effect', depending on the circumstances.

Decisions and regulations are pieces of EU law that do not need implementation to have direct effect in the Member States in vertical as well as horizontal relationships. In other words, the parties to a dispute can invoke these pieces of legislation as soon as they are enacted by the EU and have entered into force.

Directives are dependent upon implementation by the State and do not, in principle, have a direct effect in horizontal nor vertical relationships. Thus, parties can only invoke them in a legal dispute once these directives are transplanted in the national law. In case Member States implement directives too late, however, private parties may invoke them against public authorities under certain conditions (vertical direct effect). Moreover, the CJEU interpreted a number of *treaty provisions* to apply directly, some in only vertical relationships, some in horizontal relationships as well.

Subject to certain conditions, *treaty provisions and directives* can also have an indirect effect on private legal relationships. The notion 'indirect horizontal effect' is used to refer to various phenomena.[21] These include: 1) there is an obligation on part of the State to prevent impediments to fundamental rights and freedoms in private legal relationships; 2) the national judiciary interprets open norms that do apply between private parties in line with the relevant EU provisions, a practice known as 'harmonious' or 'consistent interpretation'.[22]

Implementation of EU law can differ between Member States. State liability, for instance, is usually a matter of administrative (i.e. public) law in Italy, whereas in the Netherlands, the default is to sue the State in tort (i.e. private) proceedings. This is related to the EU law principle of procedural autonomy, which does not refer to the autonomy of parties to a conflict, but rather to the autonomy of EU Member States to implement and enforce EU law in a way they deem fit.[23]

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20 See, for instance, the contributions to D. Kochenov, G. de Búrca and A. Williams (eds), *Europe's Justice Deficit?* (Oxford: Hart Publishing, 2015).

21 Cf. A. Hartkamp, 'The Effect of the EC Treaty in Private Law: On Direct and Indirect Horizontal Effects of Primary Community Law', *European Review of Private Law* 18.2 (2010), 527–548.

22 If it is not possible to interpret national law in conformity with EU law, courts may, in certain circumstances, be required to set aside national law. In that case, the effect of EU law may be considered to be direct rather than indirect.

23 See also B. Krans and A. Nylund (eds), *Procedural Autonomy across Europe*, 1st edn (Antwerp: Intersentia, 2021).

4. The Meaning of 'European Private Law'

The term 'European private law' can be understood in several ways. Firstly, in a narrow sense, it may refer to *EU law* impacting private legal relations, i.e. law emanating from the EU level, or 'EU private law'. This comprises treaty provisions, secondary law (most importantly directives) and CJEU case law on matters that, according to the national laws of Member States, fall within the scope of private law.[24]

For a long time, it was thought that to promote the EU's goal of the single market, it would be convenient to have one set of rules that would govern all private law transactions within the EU. For over two decades, from 1989 onwards, attempts were made to draft a civil code for the European Union. However, no consensus could be reached, which in turn exposed how legally and politically salient issues of private law are, and what importance civil codes have for national identities.[25] It also raised the question of the competence of the EU, as it was debated whether the treaties offered a legal basis for the EU to enact such comprehensive legislation in the field of private law.[26] Nonetheless, the harmonisation of law continued in specific areas of private law. This resulted in numerous EU legal instruments, mostly directives.

> In other words, the integration of the internal market by means of harmonising the private laws of the EU Member States is nowadays rather fragmented. Instruments include the Product Liability Directive, the Doorstep Selling Directive, the Package Travel Directive, the Unfair Terms Directive, the Regulation on the law applicable to contractual obligations (Rome I), the Consumer Rights Directive, the Digital Content and Distance Sales Directives, and many more.

Although a European civil code was never realised, the process towards it has underlined the importance of research on European private law in a second sense, namely on what constitutes the 'common core' of the private law systems in the EU Member States.[27] National systems of private law in Europe display overlap, as they are all to varying degrees influenced by Roman law and medieval canon law. This overlap is furthered, of course, by the fact that EU law is applicable in all Member States, with the CJEU issuing common interpretation.

> Within the inter-European research project, *The Common Core of European Private Law*, numerous books have been published that search for similarities and differences in the national systems of private law in Europe.[28]

In a third, wider sense, European private law is understood as the field of law

24 Recall that EU law itself does not make a distinction between public and private law.

25 Cf. also M. Hesselink, 'The Politics of a European Civil Code', *European Law Journal* 10.6 (2004), 675–697 (p. 675).

26 In case you are interested in the debate, see also P. Legrand, 'Against a European Civil Code', *Modern Law Review* 66.1 (1997), 44–63; H. Collins, *The European Civil Code: The Way Forward* (Cambridge: Cambridge University Press, 2014).

27 For more information on the project, cf. Common-core, 'Welcome to The Common Core of European Private Law', *Common-core* (2020), https://common-core.org/.

28 Ibid.

comprising the rules governing private legal disputes within the multi-level legal order of both EU law and national private laws.[29] In other words, European private law includes national private laws, EU (private) law, and the interplay between the two. This wider sense comes closest to how we perceive European private law for the purposes of this book.

In our view, the latter is the most appealing approach for it allows us to understand better the positive law, as well as many scholarly critiques to European private law. It allows for a thorough understanding of the positive law because EU law and national law are co-dependent: national private law cannot be interpreted without the understanding of the transformations brought about by EU law, including the role of the CJEU, while EU private law depends for both its full meaning and enforcement on national private laws.

At the same time, the broader definition also helps us understand scholarly critiques, which express a fear that EU law threatens the coherence, essence or autonomy of national private laws.

> A number of authors, including notably Christoph Ulrich Schmid, are very critical of private law being used as an instrument by EU law to achieve the goal of the internal market, a process called instrumentalisation of private law.[30] According to Schmid, national private law leans on a specific type of justice, namely commutative justice, i.e. justice *between the parties*, free from external considerations. 'The party relationship must not be instrumentalised by external collective goals', he writes.[31] Yet that is precisely what happens when national private law is used as an instrument to give effect to EU law aiming to establish the internal market. With the Europeanisation of private law, Schmid posits, private law is instrumentalised 'excessively'.

At this point, it is good to note that our approach to European private law in this handbook goes beyond understanding European private law only as a substantive field of law, such as 'German company law' or 'French tort law' once might have been. Importantly, we see European private law also as a certain way of *looking at* private law, as an approach to study questions of private law in Europe, which requires a method that can be transdisciplinary, comparative, and contextual.

The method can be *transdisciplinary,* because it is not confined to one legal discipline: international law, EU law, as well as national law, is of relevance for the study of private law in Europe. As private law is delineated differently in the Member States, scholars of European private law cannot remain in the private law silo. The method can be *comparative,* because European private law might work out differently in various Member States—an awareness of similarities and differences is therefore vital to understand European private law's operation and impact. Lastly, the method can be *contextual*, because studying European private law requires an awareness of

29 Cf. C. Mak, 'Rights and Remedies—Article 47 EUCFR and Effective Judicial Protection in European Private Law Matters', *Amsterdam Law School Legal Studies Research Paper* 2012.88 (2012), https://papers.ssrn.com/abstract=2126551

30 Schmid, 'The Instrumentalization Thesis in a Nutshell'.

31 Ibid., p. 22.

at least the political, historical, sociological, and economic context in which it comes about.

European private law is fundamentally interested in the boundary struggles between what is public and what is private, what is individual and what is collective, across boundaries of various political communities. It is a field where different conceptions of justice clash, not only between the EU and the Member States, but also amongst and within the Member States, and (as everywhere) between scholars. Such clashing conceptions of justice do often lead to high controversies, concerning the interpretation of the law by the CJEU and national courts, which can reveal (or obscure) the political and economic stakes behind the law.

> For example, our approach allows us to qualify the so-called *People's Climate Case* against the EU as a case relevant for the study of European private law. In this case, a number of families from all over Europe brought a case against the European Commission and the European Parliament, before the CJEU, for failing to formulate effective climate policy. The claim was based on Article 340 TFEU—which lends its inspiration from national tort law systems. The case brings together elements of national tort law, European secondary legislation, provisions from the CFREU, international climate change law as well as climate science. Thus, a transdisciplinary (and even interdisciplinary) approach is necessary to comprehend this case.[32] Moreover, the case was inspired by the success of a famous Dutch tort law case, *Urgenda*, in which the State of the Netherlands was ordered to formulate more ambitious greenhouse gases reduction targets.[33] A comparative law approach is thus required to contextualise this case. What ought to be done against climate change is an issue that is (geo-)politically very salient, and democratically challenging. It is against this background that one can understand (though not necessarily agree with) the Court's decision to declare the claim inadmissible.

It is with this lens that we asked a number of very well qualified authors to write chapters on various aspects of European private law. Not all of them include all of these aspects in their chapters, but most weave in at least a number of the above elements. The structure of the book is as follows.

The most important basics of European private law are treated in Part I of the book, entitled 'Foundations': the highly diversified concepts of justice in European private law (Chapter 2), negative integration (Chapter 3), positive integration (Chapter 4), and the constitutionalisation of European private law (Chapter 5).

The following parts of the book cover relevant topics of European private law, based on the expertise of the Amsterdam Centre for Transformative Private Law (ACT) affiliated collective of authors who wrote this book. In this sense, the book does not aim to be comprehensive and the collection of contributions is somewhat

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32 For the purposes of this book, we understand *transdisciplinarity* as a method studying different legal disciplines, and *interdisciplinarity* as a method studying different scientific disciplines. The contextual approach taken in this book comes close to using an interdisciplinary method, but the scholars who contribute to this book are primarily legal scholars who borrow insights from other disciplines rather than engage themselves into those disciplines like sociology, economy, climate science etc.

33 Hoge Raad der Nederlanden (Dutch Supreme Court) *Urgenda v State of the Netherlands* [2019] Dutch original ECLI:NL:HR:2019:2006; English translation ECLI:NL:HR:2019:2007.

path-dependent: chapters do not cover the whole array of European private law, but a selection of topics based on the authors' expertise. Hence, Part II of the book moves to delve into some, but certainly not all, important 'Institutions' of European private law: the principle of good faith (Chapter 6), concepts of ownership or property (Chapter 7), limited liability (Chapter 8), as well as the consumer (Chapter 9). Other chapters may be added here in subsequent editions of this *Handbook*.

Part III of the book, entitled 'Transformations', studies recent or topical developments and their impact to European private law: the emergence of the so-called 'social enterprise' (Chapter 10), the financial crisis (Chapter 11), housing (Chapter 12), data subjects (Chapter 13), and sustainable finance (Chapter 14). This part also lends itself for expansion in subsequent editions of the handbook. Given the immanent challenges posed by both digitalisation as well as environmental sustainability issues, it is likely that we will devote more attention to topics related hereto in the future.

The final Part V of the book treats two methodologies that can be of use to students writing their master's thesis: political economy (Chapter 15) and comparative law (Chapter 16). Naturally, many other methodologies can be equally interesting, for example law and economics, law and literature, an empirical method, etc. The reason that we chose to highlight these two in the first edition are the following. A political economy lens has become very popular in European private law (EPL) scholarship more recently, in no small measure due to Katharina Pistor's groundbreaking 'private law' bestseller, *The Code of Capital*. Given the growing interest in this type of institutionalist analysis, we hope that the chapter will provide a set of helpful questions and tools. As for the comparative method, this evergreen in private law scholarship does not require much justification. Historically, as in the present, it is one of the most widely used methods in private law. In the upcoming editions, we aim to further expand this methodological section, as we believe that reading about methods helps students also to develop logical and critical thinking more generally.

We asked every author to include reflections on the legal context of their topic, i.e. to situate their topic in the multi-level legal order of national, European, and international law; to underline the societal relevance of their topic, i.e. to make the stakes behind it clear; and to raise some points for further reflection in the form of questions. When studying the chapters in this book, allow yourself some time to think about these questions, and where possible, discuss them with your fellow students.

5. Points for Reflection

Q1: The EU has grown from an international economic cooperation between nation-states into an organisation with its own parliament, fundamental rights document and bureaucracy. Given that the cooperation has become so intense, what do you think of the fact that the goal to establish an internal market remains the most important legal basis to enact secondary legislation in the area of private law in Europe?

Q2: Should the resolution of conflicts between private parties be guided by a different conception of justice than the resolution of conflicts between citizens and public authorities?

Q3: Should private law be coherent?

Q4: Is private law a form of public law?

Q5: What issues should absolutely be regulated by private law, and what issues by public law, if any? And what issues require European instead of national regulation?

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