THE EUROPEAN UNION PERSPECTIVE IN CIVIL LAW MATTERS: FROM DIRECTIVES TO REGULATIONS

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ABSTRACT

This study focuses on the extent to which traditional legal systems have been changed within the EU, considering that issues of civil law were initially regulated by directives and later by regulations. The study discusses a few points of private law to understand its position within the EU. First, there is a basic division of law into public and private law. Second, it is necessary to outline the importance of a long legal tradition among Member States of the EU. This helps to understand the EU competence in private law. Finally, this study examines the trend of adopting regulations in civil law matters, which is uncommon in this area and assesses whether there is a genuine need for the removal of legislative attention. The study concludes with proposals and conclusions about the issue.

KEYWORDS

legal tradition
civil law codes
unification
harmonisation
directive
regulation

1. Public and private law

Among lawyers on the European continent, division of law into public and private law followed their professional development from the very beginning of legal education and later, in legal practice. Principally, there is no normative ground to formally distinguish between these two antipodes of law. Distinguishing between public and private has its roots in legal history on the European continent. Modern European private laws are primarily based on Roman legal heritage. According to available historical literature, only one source of Roman law supplied clear definition of the two concepts. Justinian's Digests, provides a quotation by Ulpian explaining public and private law, in a manner

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that public law refers to the position of the Roman state, and private law refers to individuals.[2] This approach was not further developed until the second half of 19th century, when legal scholars offered several theories on criteria for distinction, which aimed to clearly explain these two confronted legal categories. Naturally, expressed opinions led to a new field for legal discussion, and each attempt to examine all attitudes and opposing views, could be considered too ambitious.[3] For the purpose of this research, crucial and common specifics of both will be presented.

Public law, roughly determined, protects interests of the public, community, or more precisely, state. Contrarily, private law supplies the legal framework to protect (or support) interests of individuals, natural or juridical persons, about their private sphere, part of life not perceptibly relevant for functioning of the state.

Vodinelić denied term of interest, as the most flexible, expandable, and therefore the least reliable, among almost forty that he observed.[4] As this study does not examine in detail all of them, for practical purpose, this theory would be a framework for our discussion on private law in EU, primarily because of its weak point: its flexibility. To understand reasoning, the object of protection, which means interest of state, or community, does not appear to vanish simply because that interest could be reshaped over and over, during the long history, whatsoever. Thus, it is comfortable to describe crucial differences, or rather principles that distinguish between the two categories of law.

Although norms on matters of public relevance, or state interest are imperative (*ius strictum*), in private law, dispositive nature of provisions (*ius dispositivum*) dominates. Therefore, scholars prefer to remark the principle of subrogation in public law affairs, and principle of coordination in private law relationships.[5] This is a natural consequence of the focus of law makers. At the first case, authorities attempt to set legal ground and institutional instruments for establishing a state, and society, functional and protective for all citizens. On the other side, authorities do not interfere into relationships between citizens on their own interests. These relations are created by their own, free will. Consequently, provisions in laws on private law matters primarily tend to eliminate potential gaps, to preserve voluntarily formed legal relationship. Expectedly, this distinction causes further difference, such as measures to achieve and maintain the goal, remedies, procedure *ex officio* or *ex privato*. However, the distinction between public and private is not absolute, rather fluid. Impact of the need to preserve public interest in private law regulations is visible (and necessary) in specific points, however, it could be implemented into the strict framework of imperative norms, or public order. It is common that there are boundaries to freedom to contract, parental issues are at certain point under the state control, civil procedure is strict, formal, and hence imperative.

The EU documents exceptionally mention private/public distinction, however, when it is the case, private law considers horizontal relationships between private parties (citizens, companies) or between the state, acting in its private-law capacity, and citizens,

2 | Padjen, 2007, p. 445.
3 | Detailed presentation of the theories about the distinction between public and private law see in Vodinelić, 1982, pp. 657–709.
4 | Vodinelić, 1982, pp. 672–673.
5 | Padjen, 2007, p. 449.

while public law regulates vertical relationships, in which the state exercises its subordination over citizens and companies.[6]

Legal system could not be functional, dependable, and efficient if it was divided sharply into two parts: public and private law. However, this approach lies in historical development of law on the European continent. Considering the need to preserve integrity of each legal system, we would like to point out that such division has already been made in national legal traditions in Europe.

2. Is there any legal system in the EU?

The EU law could not consider legal system in the traditional meaning. Instead, the EU law comprises thousands of legal documents, adopted following sectoral approach, or aiming to achieve specific gain. Therefore, it is difficult to discuss legal area, as it is usual in national legal traditions. In the absence of full normative competence, and in addition, with a different legal binding power of the EU acts, institutions of traditional private law could be analysed through the legal rules. Moreover, in some official reports of the European Union *acquis communautarie* was determined as extremely complex, untidy, unsystematic, and disorganised. Moreover, numerous acts are out of date and hence inapplicable.[7] Considering this, it is not exaggerated to claim that EU law is extremely complex and difficult to apply or even understand. Therefore, to work in his own profession, a lawyer must be acknowledged of various sectoral legal act. If we add complexity of primary and secondary EU law, fear of possible weak functionality leads us to discussion on measures to achieve the chief goal of the EU.

3. Treaty on the Functioning of the European Union and private law

From the very beginning, the EU as well as its predecessors, did not distinguish between public and private law. Creators decided to adopt a functional approach, which appears to be in a course of gaining the purpose of common entity. Member States, by acceding to the EU, legally bound themselves to transfer one part of their sovereignty to the Union, to achieve economic and social progress of their States by common action to eliminate the barriers which divide Europe.[8] The essential objective of their efforts was to constantly improve the living and working conditions of their people, strengthen the unity of their economies, and ensure their harmonious development by reducing the differences existing between the various regions and the backwardness of the less favoured regions.[9] In accordance to Article 2/1 of the Treaty on the Functioning of the European

6 | Study Group on Social Justice in European Contract Law, 2004, p. 654.
7 | Nikolic, 2004, p. 107.
8 | TFEU, Preamble, para. 3.
9 | TFEU, Preamble, paras. 4, 6.

Union (TFEU), when the Treaties confer on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts; the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts.[10] When the competence is shared in a specific area, both the Union and the Member States may legislate and adopt legally binding acts in that area, however, the Member States shall exercise their competence to the extent that the Union has not exercised its competence, and to the extent that the Union has decided to cease exercising its competence.[11]

Hence, distinction between private and public law is not of importance in the EU law, but the function of the legislature. Thus, the EU legislature is not bound by traditional approach of the law of the Member States. Instead, a criterion for distinguishing is whether the matter of regulation is of common relevance. Consequently, there is no general competence of the EU regarding the private law in its entirety. Certain relevant aspects that naturally belong to private law should be and they are regulated within the EU, following relevant articles of the TFEU.

With respect to this, several provisions provide grounds for legislative authorities. The most important are provisions of Articles. 114, 115, and 352 of the TFEU. The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.[12] The Council, in addition, shall, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament and the Economic and Social Committee, issue directives for the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment of the internal market.

From the very beginning, the private law issues that were considered of common interest for internal market were those that regulated freedom of establishment (and therefore, company law), consumer protection, product liability, employment contracts, doorstep selling, credit contract and, recently, intellectual property. With this regulation, the EU tends to eliminate obstacles in internal trade, obtain equality in common market, and provide equal protection of citizens (and their rights) over the EU.

Measures adopted in general private law were in the legal form of directives. This implies that the EU provides a goal that Member States must achieve, however, each country needs to adopt its own law, to accomplish the objective. During this process, states create concrete provisions that are in accordance with their legal system, legal tradition, and hence familiar to their citizens and their own trade interests. Using such an approach makes laws more convenient, which makes integration of national law into the EU more spontaneous, and therefore, easier. This is in accordance with principle of subsidiarity, provided in Article 5/3 of the TEC, that is, under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by

10 | TFEU, Article 2/1.
11 | TFEU, Article 2/2.
12 | TFEU, Article 114/1.

reason of the scale or effects of the proposed action, be better achieved at Union level. In addition, when the Union act with regards to issues not governed by Union, under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the goals of the Treaties (Article 5/5).

To ensure proper application, protocol annexed to the Treaty establishing the European Community by the Treaty of Amsterdam (No 30)[13] described subsidiarity in a simple manner. Thus, community action has been reduced to the extent necessary for achievement of the desired object of the measurement, aimed to provide effective enforcement. The form of action shall be as simple as possible, which supposed that directives are preferred legal form of measure. Binding power of directives consumes itself with results that shall be reached, and national authorities have the choice of form and methods of achieving the result. Other things being equal, directives should be preferred to regulations and framework directives to detailed measures (Par. 6 of Protocol No. 30/1997), because of their direct applicability to the institution of the EU, and Member States.

The Lisbon Treaty's provisions made significant changes to subsidiarity considerations. Article 5 of the TFEU states that the Union shall act only if and insofar the goals of the proposed action cannot be sufficiently achieved by the Member States, at central or regional and local level, but can rather, by reason of the scale or effects of the proposed action be better achieved at the Union level. Although the Lisbon Treaty introduced regional and local level in addition to national parliament, a mechanism of ensuring principle of subsidiarity intact, makes the very principle more exposed, particularly considering the provision of Article 352, which is flexible on the competence of the EU perspective (flexible clause). This provision empowers the EU to regulate issues of private law that are not under the specific competence rules. Sincerely, special conditions are stated, however, it does not change the expandable nature of the provision. That is, action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to reach one of the aims set out in the Treaties, and the Treaties have not provided the necessary powers. Under these circumstances, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the proper measures. Same is the case where the measures in question are adopted by the Council following a special legislative procedure: the Council shall also act unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament. Usually, legal basis provided in Article 352 is possible in occasions when EU legislation seeks to create new legal phenomena, instead of replacing or harmonising existing laws in Member States.[14]

Considering a functional approach of the EU legislative, the very purpose of protecting single market within the EU members, and furthermore the close correlation between trade and matters of private law nature, it is legally understandable why the EU selected legal form of regulation, instead of traditional form of directives. This is considering the matters previously regulated by directives, however, recently replaced by regulations.[15] The question is whether this tendency decreases or increases interrelationships in the

13 | Official Journal of the European Communities (OJEC). 10.11.1997, No C 340. [s.l.]. ISSN 0378-6986.

14 | Mańko, 2015, p. 12.

15 | For instance, General Data Protection Regulation (2016/679) has replaced Data Protection Directive (95/46/EC).

EU. Further, from the perspective of private law, more important question is whether this legislative contributes to the principle of equality, or whether it is the sign of incapacity to achieve equality.

4. Protection of the principle of subsidiarity – indirect protection of national legislative interests

As aforementioned, accompanied protocols[16] to Lisbon Treaty introduced added steps in legislative procedure, to improve and reinforce monitoring of the principle of subsidiarity. Accordingly, in the earliest stage of proposing legislative acts, the European Commission must access extensively, since this engagement allows consulting not only national, but also regional and local institutions and civil society. However, legislative proposal of the Commission must be accompanied with detailed explanation of compliance with the principle of subsidiarity and proportionality.

Protocol on the role of national parliaments (No. 1) provides that national parliaments are associated with the monitoring of the principle of subsidiarity that could be exercised in two ways. First, national parliament has a right of objection, owing to a lack of proper consideration of the principle of subsidiarity, which could result in dismissing a legislative proposal before the Commission. At a later stage of legislative procedure, national parliament has a right to submit a disposal application before the Court of Justice of the European Union, which discusses whether the principle of subsidiarity has been observed.

Case law on this matter is valuable, not only for discussion, but also for the fact that court made relevant interpretation of the principle of subsidiarity, essential for further legislative initiatives.

For illustration, ECJ considered the validity of Article 7 of Directive 2014/40 considering the principle of subsidiarity. *Phillip Moris Brands and British American Tobacco* requested for a preliminary ruling in a proceeding against the Secretary of State for Health (United Kingdom),[17] which concerned the interpretation and validity of numerous provisions of Directive 2014/40/EU on the approximation of the laws, regulations, and

16 | Protocol 1 and Protocol 2. In 2022, the European Parliament formally received 250 submissions from national Parliaments under Protocol No. 2 on the application of the principles of subsidiarity and proportionality. Of these 250 submissions, 34 (14%) were reasoned opinions and 216 (86%) were contributions (submissions not raising concerns about subsidiarity). By comparison, in 2021 there had been 227 submissions, of which 24 were reasoned opinions and 203 were contributions. In 2022, 13 out of 39 Parliaments/Chambers submitted reasoned opinions and 18 submitted contributions. Annual Report 2022 – Relations between the European Parliament and the EU National Parliament and the EU National Parliaments, p. 49.

17 | C-547/14, Judgement of the Court (Second Chamber), 4th May 2016 [Online]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62014CJ0547 (Accessed: 2 September 2024).

administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products and repealing Directive 2001/37/EC.[18]

Among other relevant questions, applicants asked for considering the validity of Article 7/1, 7/7, Article 8/3, 10/1, and 14, claiming that it is not in accordance with principle of subsidiarity and proportionality.

Article 7 regulates issues of ingredients of tobacco, proposing that Member States shall prohibit the placing on the market of tobacco products with a characterising flavour (Article 7/1) and placing on the market of tobacco products containing flavourings in any of their components such as filters, papers, packages, capsules or any technical features allowing modification of the smell or taste of the tobacco products concerned or their smoke intensity. Additionally, filters, papers and capsules shall not contain tobacco or nicotine (Article 7/7).

Article 8(3), 9(3), 10(1)(g), and 14, impose various pack standardisation requirements, and provisions of Article 10(1)(a) and (c) require health warnings to cover 65% of the external front and back surface of the unit packaging and any outside packaging.

Discussing principles of subsidiarity and proportionality, ECJ highlights that under Article 5 of Protocol (No. 2) on the application of the principles of subsidiarity and proportionality, annexed to the EU Treaty and to the TFEU, draft legislative acts must consider the need for any burden falling upon economic operators to be minimised and commensurate with the objective to be achieved. However, the Court concluded that the EU legislature ensure that the negative economic and social consequences of the prohibition on the placing on the market of tobacco products with a characterising flavour were limited.[19] As applicants stated, using a standard formula, the EU legislature asserted that Article 7 is in compliance with principle of subsidiarity, however, disregarded clear demonstration that the internal market benefits derived from that prohibition are sufficient to justify action on the EU level, instead to leave public health protection at the level of Member States, where it is supposed to be sufficiently achieved.[20] Reminding that evaluation of the subsidiarity could not be limited to the wording of the contested act, but to its context and circumstances of the individual case, the Court concluded that there is no factor that could affect the validity of Article 7, with respect to principle of subsidiarity, in particular because the Commission's proposal for a directive and its impact assessment includes sufficient information demonstrating the advantages of taking action at EU level rather than at the level of Member States.[21]

18 | Directive 2014/40/EU of the European Parliament and of the Council of 3 April 2014 on the approximation of the laws, regulations, and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products and repealing Directive 2001/37/EC p. 1 [Online]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=oj:JOL_2014_127_R_TOC (Accessed: 2 September 2024).

19 | *Judgement of the Court (Second Chamber) of 4 May 2016. Philip Morris Brands SARL and Others v Secretary of State for Health***.** C-547/14, paras. 186–187 [Online]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62014CJ0547 (Accessed: 10 September 2024).

20 | *Judgement of the Court (Second Chamber) of 4 May 2016. Philip Morris Brands SARL and Others v Secretary of State for Health***.** C-547/14, para. 214.

21 | *Judgement of the Court (Second Chamber) of 4 May 2016. Philip Morris Brands SARL and Others v Secretary of State for Health***.** C-547/14.

In another case, the Court discussed on designation of Sunday as the weekly rest day. The second sentence of Article 5 of the Council, Directive 93/104/EC concerning certain aspects of the organization of working time, raises significant questions regarding the designation of Sunday as the designated weekly rest day, allowing Member States the autonomy to make this decision based on their unique cultural, ethnic, and religious contexts. However, the lack of clarity from the Council on why Sunday was specifically preferred over any other day of the week needs accepting the applicant's alternative claim. This leads to the annulment of the second sentence of Article 5, as it stands apart from the other provisions of the directive.

The primary objective of the directive is to safeguard workers' health and safety by establishing minimum standards for gradual implementation. In this context, Articles 100 and 100a were not suitable legal bases for its adoption. The applicant contends that the Community legislature failed to evaluate whether there were transnational issues that national measures could not effectively address, or whether existing national measures could potentially conflict with the EC Treaty or undermine the interests of Member States. Furthermore, the applicant argues that Article 118a should be interpreted considering the principle of subsidiarity. This interpretation suggests that such a broad directive may be unnecessary, considering the diverse national regulations governing working time.

While these arguments are compelling, they have not been framed as separate issues. Regarding the principle of proportionality, the Court concluded that the measures outlined in the directive, aside from the contested sentence of Article 5, are proper for promoting worker health and safety. Judicial review, in this case, is constrained to assessing whether the Council's discretion was exercised without clear errors or misuse of power. The Court decided that the directive's measures, except for the disputed sentence, align with its overarching goals.

Finally, the applicant's assertion that the contested directive is redundant owing to the existence of Directive 89/391, which addresses similar areas, is addressed. While Directive 89/391 establishes general principles and guidelines for enhancing worker health and safety, it does not specifically harmonise aspects such as rest periods, breaks, and maximum working hours, which the contested directive explicitly aims to regulate. Thus, the directive serves a distinct purpose by presenting more detailed and targeted provisions in these crucial areas.[22]

5. Harmonisation of private law

The establishment of the internal market within the EU is grounded in four key supporting pillars: the prohibition of discrimination, the creation of a customs union along with fundamental economic freedoms, a system for fair market competition, and various private law frameworks. Each of these pillars plays a crucial role in helping

22 | *Judgement of the Court of 12 November 1996. – United Kingdom of Great Britain and Northern Ireland v Council of the European Union,* C-84/94, paras. 225, 226, 228 [Online]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61994CJ0084 (Accessed: 10 September 2024).

seamless economic interactions among Member States and fostering a cohesive market environment.

Private law plays an essential role in achieving the goals of a unified internal market. It upholds the principles of private autonomy and freedom of contract, allowing individuals and businesses to negotiate agreements that best serve their interests. Additionally, private law regulates the interactions between market participants, supplying clarity on mutual rights and obligations during legal transactions. Moreover, it serves to protect both property rights and non-property rights for individuals and legal entities.

From the very beginning of the EU, the issue of the harmonisation of private law has been one of the substantial legal challenges during the process of establishment, and later of maintaining internal market. On the European continent, private law has reflected national legal tradition and national identity, as it is the part of legal culture of each country. It is not only about regulations, but also the way of living since private law recognises a legally binding power of a will of individual in majority relations. That is one of the reasons why certain authors state that private law, and hence civil law, is considered protective bulwark against globalisation, and Brussels will not be able or even allowed to cross that border.[23]

However, significant variations in private law across Member States pose serious challenges to the internal market's establishment and functionality. These differences can lead to legal uncertainties and complications in cross-border transactions, which may hinder economic cooperation and integration.

5.1. Approaches to addressing legal differences

To tackle the challenges presented by these discrepancies in private law, the EU employs two primary approaches: negative and positive harmonisation. Negative harmonisation focuses on removing barriers to trade and ensuring compliance with fundamental economic freedoms. It is relieved through primary and secondary EU law, as well as the case law of the Court of Justice of the European Union (CJEU). Negative harmonisation seeks to prevent Member States from enacting regulations that would infringe upon these freedoms, thereby promoting a more integrated internal market. In contrast, positive harmonisation involves proactive measures adopted by EU legislators to align the legal frameworks of Member States. This is achieved through the development of the EU secondary legislation, which mandates Member States to harmonise specific legal provisions. By creating a more uniform legal landscape, positive harmonisation reduces legal discrepancies and enhances certainty for businesses and consumers engaged in cross-border transactions.[24]

The establishment of the internal market is supported by a robust framework comprising four pillars that collectively promote economic integration within the EU. While the private law frameworks are primarily ascertained by individual Member States, they play a critical role in easing relationships between market participants. The ongoing efforts to harmonise these frameworks through both negative and positive approaches are vital for overcoming the obstacles posed by legal diversity. These measures aim to

23 | Caruso, 2002, p. 2.

24 | As European private law deals extensively with the question whether harmonisation of law within Europe is required and, if so, how it should be achieved, some scholars highlight the role of comparative method. See: Smits, 2010, p. 34.

create a cohesive, efficient internal market that benefits all EU citizens and fosters sustainable economic growth throughout the region.[25]

The process of integrating into the EU legal framework, with respect to private law, even at early stage, has been described by certain authors as a process of denationalisation.[26] Integration means harmonised or unified rules within the EU Member States, as a final result or rather purpose of the EU establishment. For the Old World, this process is utterly sensitive task, owing to centuries of legal tradition. From the other side, harmonisation of laws, and on certain legal concerns, unification, is a ground for achievement of the gain. Therefore, the chief discussion among lawyers and politicians was and continues to be the proper method of achieving the harmonised or unified law.

Two such methods have manifested in theory and practice: the 'top-down' method of harmonisation and unification of private law, that is, by the adoption of regulations by the authorities of the European Union through the competences they have based on the founding treaties, and the 'bottom-up' method, which is based on the voluntary interventions of the Member States within their own legal systems, aimed at harmonisation and unification of private law.[27]

The 'top-down' method in the European Union framework is fundamentally about proving foundational principles and legislative models that promote uniformity across Member States. This approach emphasises the adoption of unified rules that fall within the EU's competencies.[28] At its core, this method relies heavily on regulations, which are binding legal acts that are directly applicable in all Member States without the need for further national legislation.

The efficiency of this method is clear in that how regulations ease the creation of common rules across diverse legal systems. As they do not require implementation into national laws, regulations ensure a rapid and consistent application of the EU laws, promoting legal uniformity. This is particularly crucial for areas where discrepancies among national laws could impede the functioning of the single market or hinder cooperation among Member States. Thus, regulations serve as vital instruments for achieving harmonisation, addressing challenges that arise from the complexities of a multi-jurisdictional legal landscape.

However, some scholars critique the 'top-down' approach as being overly centralistic and invasive.[29] They argue that the significant interference in national legislative processes can lead to tensions between EU authority and national sovereignty. This perspective raises concerns about the balance of power within the EU, suggesting that such a centralised method may undermine the autonomy of Member States and diminish their legislative authority.

In contrast, the 'bottom-up' method offers an alternative that is characterised by its non-invasive and non-centralistic nature. This approach respects the legislative competencies of individual Member States and emphasises the importance of local contexts in shaping legal frameworks. Under this method, directives play a predominant role. Directives set out goals that Member States must achieve, but allow flexibility in how those

25 | Mišćenić, 2012, p. 697.
26 | Nikolić, 2004, p. 113.
27 | Novković, 2010, p. 270.
28 | Smith, 2006, p. 67.
29 | Nikolić, 2004, p. 115.

goals are implemented. This flexibility enables national authorities to adapt EU objectives to their specific legal, social, and cultural contexts, fostering a sense of ownership and commitment to the legislative process.

By promoting a more collaborative and participatory approach to law-making, the 'bottom-up' method encourages Member States to engage with EU policies in a manner that is more reflective of their unique circumstances. This can lead to a richer and more diverse legal landscape within the EU, where national identities and legal traditions are respected while continuing to work towards common goals.

In summary, the 'top-down' method, while effective in establishing uniformity through regulations, raises important questions about the centralisation of power and the potential erosion of national legislative authority. Conversely, the 'bottom-up' method, with its emphasis on directives, allows for greater flexibility and respect for national contexts, thereby fostering a more inclusive and balanced approach to the EU law-making. Each method has its merits and challenges, and the ongoing dialogue between these approaches is essential for the evolution of a cohesive yet diverse legal framework within the EU.

5.2. Harmonisation of private law – weakness of functional approach

Regarding the general principles of private law, the effort to harmonise, and thus, Europeanise national legal systems has faced significant challenges.[30] The process of achieving uniformity in legislation has not been straightforward. As new issues emerged, such as artificial intelligence, the EU's choice of regulation was seen to ensure consistency across Member States. This approach is understandable for two primary reasons. First, it is crucial for preserving the coherence of the internal market, ensuring that there is a level playing field for businesses and individuals across the EU. Second, regulation is often more effective in addressing new and complex legal issues, such as those related to the expanding use of artificial intelligence and machine learning technologies.

Despite this, there are concerns about the legal issues that have already been addressed through directives. The adaptation of legal forms has raised questions about whether the alignment of these forms has been effectively managed. This leads to a broader question about whether the principle of 'united in diversity' is being upheld. At the national level, there is ongoing debate about whether national laws on specific issues should be adjusted to align with EU-wide goals and the overarching EU framework, even when the proposed legislation may follow different rationales.[31]

This situation is complex because it involves balancing the need to support national legal traditions and specificities with the imperative to conform to the EU standards. When national legal systems and their underlying rationales differ from those at the EU level, it can lead to tensions and questions about the effectiveness of harmonisation efforts. The challenge is to achieve a balance that supports effective legal regulation across the EU while also respecting and accommodating national legal differences. This ensures that the legal framework remains cohesive and functional across all Member States without undermining the diversity of national legal traditions.

30 | Under the notion of Europeanisation, we may understand a shift of competences from the intrastate to the European level. Červenková, 2008, p. 5.

31 | Semmelmann, 2012, p. 10.

Considering the imperative of achieving an efficient single market, the concept of 'united in diversity' is much more challenged in private law area than it appears to be, in respect to nature of interests that private law regulates and protects.

5.3. Harmonisation of private law – from directives to regulations

In a recent EU legislative activity, referring to the goal of strengthening single market, directives were replaced by regulations. Scholars and practitioners have debated whether that is a proper approach, since the complexity of private law could be observed both on the EU level, as well as the national level. In addition, direct application of regulations, particularly regarding the issues that are part of traditional and well functional civil law, could endanger not only the concept of 'united in diversity', but also legal certainty.[32] For illustration, the European Union has established regulations that address various issues, including those related to general private law, such as the rules governing payment systems. One significant legislation is Regulation 1103/97,[33] which pertains to the introduction of the euro as the new official currency. This regulation includes specific provisions that outline how existing contracts should be converted from the former currency to the euro.

According to the rulings of the European Court of Justice in the cases of *Verbraucher-Zentrale Hamburg*[34] and *Estager*,[35] this regulation embodies two fundamental legal principles. The first principle is the necessity of ensuring legal certainty for citizens during transition to euro. This is vital because individuals and businesses need to have confidence that their legal rights and obligations will be intact despite the currency change. The second principle emphasises the importance of maintaining the continuity of contracts and other legal instruments. Thus, the introduction of a new currency should not disrupt existing agreements or create ambiguity about their enforcement.

Considering these principles, a notable case involved a mobile telecommunications provider that sought permission to round up the per-minute calling rate to the nearest euro cent when converting prices from German Deutsche Marks to euros. The ECJ ruled against this practice, stating that such rounding up would lead to a significant increase in costs for consumers. This decision reinforces the idea that any changes resulting from the currency conversion must not place an undue financial burden on individuals, thereby upholding the core principles of legal certainty and contractual continuity.[36]

32 | As Twigg-Flesner explains, where a Regulation is applied, the particular area of private law will be visibly European, because instead of a national provision that gives effect to a European rule, it is the European rule that will be applied directly. Thus, a Regulation has the effect of overriding and displacing national law within its scope, whereas directives are categorised into, and become part of, national law. Twigg-Flesner, 2009, p. 5.

33 | Council Regulation (EC) No 1103/97 of 17 June 1997 on certain provisions relating to the introduction of the euro, Official Journal No. L 162, 19/06/1997.

34 | *Judgement of the Court (Grand Chamber), C-19/03, 14 September 2004* [Online]. Available at: https://www.bailii.org/eu/cases/EUECJ/2004/C1903.html (Accessed: 20 September 2024).

35 | *Judgement of the Court (Second Chamber) of 18 January 2007, C-359/05* [Online]. Available at: https://curia.europa.eu/juris/showPdf.jsf;jsessionid=66B41C536B13A2CBC415E8668325598C?text=&docid=65126&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=2701853 (Accessed: 20 September 2024).

36 | Hartkamp, 2016.

Legal certainty is fundamentally intertwined with traditional civil law practices across Member States. When the European Union opts for regulations rather than directives, it raises important questions about the potential counterproductive nature of such legislative actions.[37] Regulations, by their nature, have direct application in all Member States, which could inadvertently impose constraints on established legal principles that are vital for the functioning of private law.

In many jurisdictions, private law is primarily governed by dispositive provisions, which allow parties the freedom to contract according to their own needs and circumstances. This autonomy is essential for fostering innovation, flexibility, and individual rights within the marketplace. However, the adoption of rigid regulations could create undue burdens on the principle of freedom to contract and the autonomous will of the parties involved. Such restrictions may not be necessary for achieving the intended legislative goals, particularly since some of these goals have already been effectively addressed through existing legal frameworks.

Considering these concerns, it is crucial to reevaluate the legal measures proposed by the EU. Before implementing new regulations, it is essential to identify the actual weaknesses within the current legal systems that these measures aim to address. A careful analysis of the specific shortcomings will allow for a more targeted and effective legislative approach, ensuring that any new regulations enhance rather than hinder the principles of legal certainty and freedom in private law. This thoughtful reconsideration will not only uphold the integrity of Member States' legal traditions, but also contribute to a more harmonious and functional legal landscape within the EU.

In conclusion, while the transition from directives to regulations aims to foster greater integration and consistency within the EU, it is imperative to navigate this transition thoughtfully. By addressing the inherent challenges and limitations of regulations, the EU can work towards a legal framework that not only meets its objectives, but also upholds the fundamental principles of legal certainty and freedom in private law.

6. Conclusions on the EU perspective in private law

National systems of private law, particularly in continental countries, are marked by a cohesive and systematic approach. This means that there exists a consistent set of overarching principles that governs private law as a whole. These principles guide the interpretation of laws and assist in bridging gaps through judicial decisions, ensuring a degree of predictability and stability in legal outcomes.

Simultaneously, the European legislator did not adopt a preformed or comprehensive strategy for harmonisation. Instead, the process has been unsystematic, driven by the immediate need for legal regulation in specific areas where issues have arisen. This reactive approach means that harmonisation measures have often been implemented in response to challenges or concerns that affect the functioning of the internal market.

However, the involvement of the European Union in these areas, shaped by a functionalist perspective, has introduced a more fragmented structure. This fragmentation is particularly clear in that how EU competences are defined at the Treaty level, resulting

37 | Some scholars explain this process as more creative than destructive. See: Micklitz, 2008, p. 27.

in a series of specific and isolated areas of the EU jurisdiction. Consequently, in a legal landscape, the EU and the rulings of the Court of Justice of the European Union (CJEU) are only a shadow of unified EU private law. Diverse national private laws, each with its own unique characteristics and rules, continue to prevail.

This fragmentation raises significant concerns among legal scholars and practitioners. Some of them argue that it undermines vital values such as coherence and the systematic nature of legal frameworks. When laws are not uniformly applied or interpreted across Member States, it can lead to confusion and uncertainty. Additionally, this lack of coherence can diminish legal certainty and transparency within the overall legal system.

For individuals and businesses working in this environment, navigating their rights and obligations becomes increasingly complex. They may find it challenging to understand which laws apply in cross-border situations or how to comply with varying regulations across different jurisdictions. This uncertainty can hinder economic activity and discourage investment, affecting the goal of achieving a well-functioning internal market within the EU.

In summary, while the integration of the EU law aims to create a more unified legal framework, the resulting fragmentation can have significant implications for the coherence and predictability of private law across Member States. This situation underscores the need for ongoing dialogue and efforts to bridge the gaps between the EU legislation and national legal systems, fostering a more harmonious legal landscape for all stakeholders involved.[38]

The harmonisation efforts have primarily focused on key private law institutes that are significant for the internal market and are commonly recognised across Member States. These institutes include essential legal concepts and frameworks that ease economic interactions and ensure consistency in legal practices. However, the process has also involved introducing entirely new regulations and legal provisions designed to address emerging needs and complexities in the market.

By selectively harmonising existing private law institutes and creating new ones, the EU aims to enhance legal certainty and reduce barriers to trade and investment. This approach will ensure that legal frameworks are not only coherent and aligned with the internal market's goals, but also responsive to the evolving economic landscape.

While the lack of a systematic harmonisation strategy presents challenges, the EU's targeted efforts to address specific legal issues are crucial for fostering a more integrated internal market. This ongoing process highlights the need for adaptability and responsiveness in the face of new legal and economic realities, ensuring that the legal framework continues to serve the interests of both individuals and businesses across Member States.

To facilitate the integration of the European 'foreign bodies' into the private law systems of Member States, directives have long served as the primary harmonisation instrument. These directives prove minimum standards that must be adopted into national law, ensuring a baseline level of compliance across the EU. Importantly, this approach allows national legislators to maintain or implement new national measures that provide a higher degree of protection than those stipulated by the private law directives. While this flexibility can empower Member States to enhance legal protections for

38 | Mańko, 2015, p. 14.

their citizens, it also introduces the potential for significant deviations during the transposition of directives into national law. Consequently, this has resulted in various differences in the organisation and application of the relevant legal institutes across Member States. The outcome is a fragmented landscape of the European private law, which is understood and defined in diverse ways within the legal doctrine. In a narrower sense, the European private law encompasses the private law rules outlined in the EU Treaties and the later legislation enacted based on these treaties, standing for the formal legislative framework of the EU. This includes directives, regulations, and decisions that directly affect private law matters. Conversely, when considered in a broader sense, the European private law extends beyond the rules contained in the EU primary, secondary, and tertiary law. It also incorporates the national laws of Member States that derive from these EU sources, effectively creating a hybrid legal environment. Furthermore, it encompasses internationally unified private law, non-binding legal principles developed by scholarly groups (such as the Principles of European Contract Law[39]), and the case law of the Court of Justice of the European Union. This broader definition reflects the complex interplay between the EU law and national legal systems, illustrating that European private law is not only shaped by formal legislation, but also by the diverse legal traditions and practices of Member States. As such, it underscores the challenges of achieving true harmonisation while respecting the unique legal identities of each Member State. Overall, the evolving nature of the European private law highlights the need for ongoing dialogue and cooperation among Member States to foster a more coherent and integrated legal framework that supports the internal market.[40]

39 | Dudaš, 2012, pp. 323–327.
40 | Mišćenić, 2012, pp. 699–700.

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