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**The European legal system and judicial
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Abstract

IT *Il presente lavoro esplora l'attività della Corte di giustizia dell'Unione Europea nel colmare le lacune del diritto privato europeo. Affronta il processo di dialogo, collaborazione e conflitto fra giudici europei e nazionali, così come i fattori che possono modificare tale rapporto. Riflette sull'esistenza di una forma di 'equity europea', in rapporto ai concetti di aequitas ed equity utilizzati rispettivamente nei sistemi giuridici di civil law e di common law. L'analisi si concentra sui settori della responsabilità dello Stato per violazione del diritto dell'Unione e sul diritto dei contratti e sulla tutela dei consumatori, in modo da esaminare le reciproche influenze fra giudici nazionali ed europei, e fra istituzioni operanti su diversi livelli di legalità.*

Keywords: CJEU - European Private Law - State Liability - Contract Law and Consumer Protection – Equity

EN *The aim of this working paper is to explore the judicial activism of the Court of Justice of the European Union and some leading cases within the European legal system. The paper will look at the “negotiation process” between European and national judges, and at factors that can modify this relationship; the paper also seeks to identify a legitimate form of ‘European equity’ inspired by the different notions of “equity” which have developed within the civil and the common law traditions. The areas of State Liability for breach of European law, of Contract Law and of Consumer Protection will be drawn on in order to better understand the “Europeanization of law”, that is, the product of reciprocal influence between national and supranational judges, and national and European institutions.*

Keywords: CJEU - European Private Law - State Liability - Contract Law and Consumer Protection - Equity

THE EUROPEAN LEGAL SYSTEM AND JUDICIAL CREATIVITY. REFLECTIONS FROM A PRIVATE COMPARATIVE LAW PERSPECTIVE.

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1. Introduction

This working paper collects the key ideas and reflections we presented at the international conference “Filling the Gaps: The Study of Judicial Creativity and Equity in Mixed Jurisdictions and Beyond”, which took place in Catania, on May 27-28, 2013¹. The conference explored sources, methods and approaches used by the courts in so-called “mixed jurisdictions”² when they face a *lacuna* in the law.

Our reflections in this paper³ relate to the Europeanization of law⁴, which seems to be evolving remarkably quickly and applying to various areas of law outside the areas of “conferred competence”, especially because of the creative function of both national and supranational courts. The Europeanization of law is not to be confused with the fact that the Court of Justice of the European

¹ This conference has been organized by the Protection Project at the John Hopkins University School of Advanced International Studies (SAIS), in cooperation with the World Society of Mixed Jurisdiction Jurists (WSMJJ), and the Tulane University Law School Eason Weinmann Center for Comparative Law.

² We consider the European Union as a “mixed-legal system”, cf. E. Orücü, et al (eds.) *Studies in legal systems. Mixed and Mixing*, Kluwer law International, The Hague, 1996. See also Vernon V. Palmer (ed.), *Mixed Jurisdictions Worldwide: the Third Legal Family*, 2nd ed., Cambridge University Press: Cambridge, 2012, pp. 19 ff.

³ A more detailed version of our article will be found in the book "Filling the Gaps: Judicial Creativity and Equity in Mixed Jurisdictions and Beyond", where all the Conference papers will be published (2014).

⁴ W. van Gerven, *The ECJ Case-Law as a Means of Unification of Private Law?* Chapter 6, pp. 101 ff., in A. S. Hartkamp & E. Hondius (eds.), *Towards A European Civil Code*, 3rd ed., Nijmegen: Kluwer Law Int, 2004; G..A. Benacchio, B. Pasa (vol. 1), *A Common law for Europe*, CEU Press, Budapest, 2005.

Union (hereinafter the CJEU) is exclusively competent on certain issues. By the expression “Europeanization of law” we refer to the phenomenon by which national laws are aligned to EU law through the process of interpretation carried out by national judges⁵.

This process of interpreting national law according to European principles applies mainly in two circumstances: a) in interpretation in compliance with EU law of national rules which result from implementation of a Directive; b) in interpretation of national rules which have no apparent functional link with EU law, that is, rules which do not derive from an express or implied obligation to comply with European law. This situation occurs each time a pre-existing internal rule would be in conflict with a later European rule that has not yet been implemented, if interpreted according to national criteria. The internal rule would thus be incompatible with the European rule, still to be implemented. In such a case, the national judge must adapt the interpretation of the national rule, so that he or she may continue to apply the national rule without running the risk that the CJEU will rule against it⁶.

When interpreting general principles, which the CJEU reads into or deduces from the structure and features of the European legal order, the Court’s preference for interpreting wording precisely leaves space for a different kind of interpretation that balances conflicting interests.

On the national side, many civil codes provide a hierarchical set of rules on this matter. Some examples are: Art. 12 of *Disposizioni Preliminari* of the Italian Civil Code, Arts. 6 and 7 of the Austrian ABGB, Art. 1 of the Swiss Civil Code, and Arts. 1 and 4 of the Spanish Civil Code⁷. At international level, the

⁵ Judicial style has also been changing in recent decades with the Europeanization of the law. The complexity of the issues arising in litigation in Europe, and the way in which litigation is conducted (mainly document-based trials) coupled with efficient databases, bear much of the responsibility for the ever-growing length of modern judgments, both at European and at national levels. We have more expansive judgments than before, that we could classify as “tonorial or agglutinative” (Chief Justice Cardozo, *Law and Literature*, 1925, reprinted in 48 *Yale L.J.* 489 at 493 (1939)), because they emerge “from the shears and the paste pot which are its implements and emblem” (i.e. by scissors and paste). On the increasing length of judgments, cf. Lady Justice Arden D.B.E., *Judgment Writing: Are Shorter Judgments Achievable?* in *Law Quarterly Review*, vol. 128, pp. 515 ff.

⁶ The ruling which formulated this duty for national judges related to the *Marleasing* case (1990) *Marleasing SA v. La Comercial Internacional de Alimentacion SA*, C-106/89 [1990] ECR I-4135. Rather than a presumption of conformity, here the principle of the supremacy of EU law over national law is operating.

⁷ In this respect, the two main European models of interpretation, the French and the German, the first a passive model of interpretation (cf. art. 4 of the *Code civil* that forces the judge to undertake a normative role if the law is obscure, and art. 5 that prevents the judge from overstepping the scope of the judicial power) and the second a theoretical activist model, which the Pandectists developed in the 19th century, have found their boundaries blurred by the Europeanization of national legal systems.

Vienna Convention on the Law of Treaties (1969, Arts. 31, 32 and 33) does the same⁸.

However, the European legal system, in itself, does not define the notion of “gap” in its Treaties. And there are no explicit CJEU rulings addressing the question of how to fill the gaps: indeed, in CJEU case-law we could not find any “coherent system” of hermeneutic criteria used to fill them. In other words, neither the European legislature nor the CJEU have clearly defined what a “gap” is. This is not surprising because the CJEU, both in its manner of applying the preliminary ruling procedure, and in its judging techniques, is not formalistic: its judicial criteria are inferred by legal scholars, and there is no official taxonomy of the rules of interpretation⁹.

This situation raises another question related to the possible existence of a kind of ‘equitable jurisdiction’ or ‘European equity’¹⁰, understood in both the civilian and the common law meanings. In fact, the term has at least two different meanings: *aequitas* as in the civil law tradition, and equity to refer to the equitable jurisdiction of the Chancellor in the development of English common law.

We have tested our hypotheses through a concrete approach, drawing on the CJEU’s judgments and the reaction of the national courts in two areas of law, State Liability, and Contract Law and Consumer Protection, which are of great concern to EU citizens, whose economic and social future may well be shaped by them. The reasons for this choice depend on a range of factors, which can be summarized by saying that while the former is one of the fields where judicial creativity has been evident from the nineties on, it is in the latter that the application of general principles has been producing innovative consequences, especially during the last decade. In other words, while the field of State Liability provides clear examples of judicial activism and of negotiation between European and national judges, we find a less developed but potentially

⁸ As recent literature testifies, there is continuing scholarly interest in interpretation, sometimes at the cost of over-theorizing. See R. Kolb, *Interprétation et création du droit international. Esquisse d'une herméneutique juridique moderne pour le droit international public*, Brussels, Bruylant, 2006; C. Fernández de Casadevante i Romani, *Sovereignty and Interpretation of International Norms*, Berlin, Springer, 2007; R. Gardiner, *Treaty Interpretation*, Oxford, Oxford University Press, 2008; U. Linderfalk, *On the Interpretation of Treaties. The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties*, Dordrecht, Springer, 2007; A. Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law*, Oxford, Oxford University Press, 2008.

⁹ Formal limitation of CJEU interpretative activity is indicated by the areas of competence attributed by the Treaties, according to Art. 5 (2) TEU. Cf. the Order of the Court (Third Chamber) of 12 July 2012 (reference for a preliminary ruling from the *Tribunale ordinario di Brescia*, Italy), *Gennaro Currà and Others v. Bundesrepublik Deutschland*, Case C-466/11, 12.7.2012, OJ C 347, 26.11.2011.

¹⁰ The expression ‘European equity’ does not appear either in primary, or in secondary European law.

more productive arena for judicial creativity in Consumer Protection and the Law of Contract¹¹.

This is the starting point of our analysis on the function of gap-filling in the European legal space and on the potential existence of a form of equity within the European legal system. We will first consider the various interpretative criteria and methods of filling legal gaps used by the CJEU.

2. Judicial creativity in Europe, interpretative methods and the problem of legal gaps

When judging on many issues in European law, the CJEU has to fill *lacunae* left by Treaties and legislative acts. This means that judicial creativity first appears at European level, because the CJEU fills gaps left by the primary and secondary sources of European law, as well as gaps left by its jurisprudence. Secondly, gap-filling relates to the multi-layer system of negotiation between the CJEU and national courts which has been established through the preliminary ruling procedure. As is known, the preliminary ruling, which has no equivalent in national legal orders¹², is the tool enabling communication and cooperation

¹¹ After much (still unresolved) debate, the area of contract law is understood as comprising consumer protection as well (both B2B and B2C transactions). This seems the outcome of the so-called Draft Common Frame of Reference for a European Contract Law, developed by the Joint Network on European Private Law: cf. C. von Bar, E. Clive, H. Schulte-Nölke (eds.), *Principles, Definitions and model Rules of European Private law, Draft Common Frame of Reference (DCFR)*, 2nd ed., Munich, Sellier, 2009. At national level, it is reflected in the adoption of the “monist model”, under which rules on consumer protection are inserted into the Civil code: this is the case of the BGB; however, see the plea for the reshaping of consumer law in a special statute outside the BGB: H. - W. Micklitz, *The Future of Consumer Law - plea for a movable system*, in *Journal of European Consumer and Market Law*, 2013, pp. 5-11. The “dualist model” is more common in Europe: this is the case of France, Italy and Spain, for example, which have a separate Consumer Code. Although English private law remains largely uncodified, the question of whether consumer law and contract law can be addressed together in one statute has been an issue at times: see for instance the Sales of Goods Act 1979. Recently, the UK has announced a new “Consumer Rights Bill” (to be presented before 2015): the specific consumer-related provisions of the Sales of Goods Act 1979 would be rewritten as part of this new act; it would provide an opportunity to bring together a range of measures implementing the various directives, as well as the enforcement provisions from the Enterprise Act 2002, and the criminal law sanctions found in the Consumer Protection from Unfair Trading Regulations 2008. Cf. C. Twigg-Flesner, *Comment on “The future of consumer law: plea for a movable system”* in *Journal of European Consumer and Market Law*, 2013, pp. 12-14.

¹² “This court structure is different from national systems of administration of justice. These are characterised by compartmentalisation and decentralisation. There are specialised courts for particular areas, such as tax, intellectual property law, labour law and social security, and distinctions may be made between private law courts and administrative ones. Multi-tiered systems of appeal result in only a very small proportion of cases reaching the more senior courts. The preliminary reference procedure, by contrast, allows all courts and tribunals within the European Union, no matter how high or low, to make a reference to a single court: the Court of Justice. The Community court structure is, therefore, a flat court structure of “first, and then equals”, in which all national courts are granted equal possibilities to make a reference to the Court of Justice, and no national

between the CJEU and the national courts¹³. Through it, in cases involving EU law, national courts, if in doubt as to the interpretation or validity of the law, can or, in some cases, must seek a preliminary ruling from the CJEU on the relevant issue (Art. 267 TFEU).

During the last few decades, the preliminary ruling has progressively acquired a fundamental role in shaping the European legal order. This is a double-faced tool for the national courts. Through it, the CJEU rules on interpretation and application of European law, and answers questions formulated by national courts; however, national judges maintain the last word on the compatibility of national rules with European law. Thus, national courts can reconcile the CJEU's case law with the particular features of national legal orders and the facts of the case before them¹⁴. As a consequence, judicial creativity has developed on two levels: the supranational level of the CJEU, and the national level of the 28 judiciaries of the Member States, which are governed by different procedural rules, and structured according to different models of constitutional review (such as diffuse or concentrated) and different bodies of professional and non-professional judges¹⁵.

This complex interaction is the basis for a cultural exchange which enhances reciprocal influence both from national judges on European institutions, and from the CJEU on national jurisprudence and national legal orders in general¹⁶. As we will see below, the mechanism called “cross-fertilization” consists in a deeper and more pervasive dynamic of mutual

law can disenfranchise any national court of the possibility of making reference”. D. Chalmers, A. Tomkins, *European Union Public Law*, Cambridge University Press, Cambridge, 2007, 291 - 292.

¹³ H.G. Schermers, D.F. Waelbroeck, *Judicial Protection in the European Union*, Kluwer Law International, The Hague – London – New York, 2001, 228. As is well known, the preliminary ruling is the main or rather the only means of communication and cooperation between the CJEU and the national courts. The preliminary ruling procedure enables national courts to question the Court of Justice on the interpretation or validity of European law. Accordingly, the incidental nature of the preliminary ruling, which can be promoted in the context of a conflict between private parties or a private party and public authorities, makes the national courts initiative crucial, not only related to the frequency of the rulings, but also to technique and ability skill in consulting the CJEU.

¹⁴K. Lenaerts, T. Corthaut, *Toward an Internally Consistent Doctrine on Invoking Norms of EU Law*, in S. Prechal, B. Van Roermund, *The Coherence of EU Law. The Search for Unity in Divergent Concepts*, Oxford University Press, Oxford, 2008, pp. 495 - 515, 501.

¹⁵ Each judiciary in Europe is nested with a set of relationships to a legal community, to institutions, and to the wider society. Cf. J. Bell, *Judiciaries within Europe. A Comparative Review*, CSICL, Cambridge: Cambridge University Press, 2006. On different models of judicial review (top-down v. bottom-up models, i.e. the traditional French model v. the emerging “dialogue” model) see R. Caranta, A. Gerbrandy (eds.), *Traditions and Change in European Administrative Law*, Europa Law Publ., 2011. Cf. also V. Barsotti, V. Varano (a cura di), *Il nuovo ruolo delle Corti supreme nell'ordine politico e istituzionale*, collana *Annuario di diritto comparato e studi legislativi*, ESI, Napoli, 2012.

¹⁶ A. Lazari, *Modelli e paradigmi della responsabilità dello Stato*, Giappichelli, Torino, 2005, 284.

imitation, which goes considerably further than balancing principles¹⁷. Thus, the preliminary ruling is the procedure by which the CJEU fills the gaps, although European law does not lay down any system or formal procedure for filling the gaps either in its Treaties or in its legislative acts.

As some scholars have noted, “activism” in relation to the CJEU indicates judgments issued with no basis in the Treaties or in the secondary binding measures based on the Treaties¹⁸. These sources make no provision on many matters, and this is when the Court is activist or pro-active. Moreover, the CJEU is also activist when a legal rule based on the Treaties or secondary binding measures exists and is interpreted broadly, in a teleological way, to justify a conclusion that would be contrary to the literal meaning of the legal rule itself.

The interpretative methods used by the CJEU¹⁹ have been studied by many commentators, who generally agree that there are at least three types of interpretative criteria used by the CJEU: (i) semiotic or linguistic arguments; (ii) systemic and context-establishing arguments; (iii) teleological, functional or consequentialist arguments²⁰. While the first two are less employed today, the CJEU often employs purposive considerations, in line with a generally functional view of European law. CJEU judgments reflect the *effet utile* approach, because the main objective in the CJEU’s interpretation and development of law is the practical effectiveness of European law. In reality, it is often not easy to distinguish between the teleological and the systemic method in the European legal order because “there is a clear association between the systemic (context) and teleological elements of interpretation in the Court’s reasoning. It is not simply the *telos* of the rules to be interpreted that matters, but also the *telos* of the legal context in which those rules exist”²¹. In the same way, *effet utile* and teleological methods are intertwined because teleological interpretation focuses

¹⁷ “Transplants involve the transposition of a doctrine from one legal system into another. (...) Cross-fertilisation implies a different, more indirect process. It implies that an external stimulus promotes an evolution within the receiving legal system. The evolution involves an internal adaptation by the receiving legal system in its own way. The new development is a distinctive but organic product of that system rather than a bolt-on. This process often gives rise to greater convergence between the receiving legal system and the external stimulus, but this need not to be the case”. J. Bell, *Mechanisms for Cross-fertilisation of Administrative Law in Europe*, in J. Beatson, T. Tridimas, *New directions in European Public Law*, Hart Publishing, Oxford, 1998, pp. 147 - 165, 147.

¹⁸ On judicial activism see recently M. Dawson, B. De Witte & E. Muir (eds.), *Judicial Activism at The European Court of Justice*, Cheltenham, Edward Elgar Publ., 2013.

¹⁹ For a synthesis, cf. H. Rösler, *Interpretation of EU Law*, in J. Basedow, K.J. Hopt & R. Zimmermann, *The Max Planck Encyclopedia of European Private Law*, Oxford University Press, Oxford, 2012, pp. 979-982, at 979.

²⁰ This classification is described in J. Bengoetxea, *The Legal Reasoning of the European Court of Justice*, Clarendon Press, Oxford, 1993, 233.

²¹ M. Poiaras Maduro, *Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism*, in *Electronic Journal of Law Studies*, 2, 2007, online at <http://www.ejls.eu/2/25UK.pdf>.

on the purposes of the EU, and the principle of effectiveness is intended to protect these purposes from Member States' autonomy.

Furthermore, because of the particular nature of the Treaties, characterized by many vague concepts and principles, the CJEU tends to examine the whole context in which a particular provision applies, and to give the interpretation which is most likely to support what the Court considers that provision sought to achieve²². For this reason, it may be inappropriate to analyse judicial creativity by focusing on the single interpretative approaches. It is difficult and perhaps unreasonable to define separately all the specific criteria adopted in each judgment, because the CJEU, despite sometimes being explicit about its interpretative approach, tends to avoid any explicit statement of the weight attributed to the different criteria²³. However, it is possible to analyse gap filling through the CJEU's actual practice, which consists of balancing conflicting principles, mainly of public law origin, such as supremacy, proportionality, equal treatment, efficacy, effectiveness, non-discrimination, equality, and equivalence. During the last decade, the CJEU has also relied on principles pertaining to the private law realm, such as *nemo venire contra factum proprium*, freedom of contract, freedom of form, abuse of right, good faith and fair dealing, unjust enrichment, or restitution and so forth. These principles are used to foster the construction of a European system of private law, with a view towards the final goal of integration. In other words, the CJEU uses principles to fill the gaps in EU law with substance, to refine existing national private law rules, and to create a multi-level system that should strive to ensure equity and justice.

3. Does a 'European equity' exist?

As we said in the introduction, our reflections on the function of gap-filling in the European legal space developed through our considering the potential existence of a form of 'European equity'. Is it possible and fruitful to do this? To give an answer to this question is neither easy, nor idle. The possible existence of a European equity emerges in the architecture of the European legal system, as well as in judicial interaction among judges. However, the fact that in CJEU case-law the term "equity" is not used explicitly as a parameter for deciding cases makes recognition of the existence of a 'European equity' rather complex, especially because of its different meanings in common and civil law traditions.

²² P. Craig, G. De Burca, *Eu Law. Text, Cases, and Materials*, Oxford University Press, 5th ed., Oxford, 2011, 64.

²³ In CILFIT (para. 20), the CJEU stated: "every provision of community law must be placed in its context and interpreted in the light of the provisions of community law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied". This excerpt was commented on in G. Conway, *The Limits of Legal Reasoning and the European Court of Justice*, Cambridge University Press, Cambridge, 2012, 24.

This recognition seems necessary in order to explain some aspects and dynamics of judicial creativity in EU law. We must define what we mean by European equity. Firstly, we need to distinguish between the common law and civil law meanings; and secondly, between European and national levels. According to the jurist Celsus (one of the most prominent jurists of the early second century AD), *jus est ars boni et aequi*; the Latin term *aequitas* in ancient Rome referred to a flexible concept used by judges to apply the law in the interest of justice, and not in a mechanical or automatic fashion. In its process of adjudication, the CJEU is always guided by principles which must be fair. Europe's equitable adjudication, like *aequitas*, consists in the exercise of balancing conflicting principles. So this is the civil law side of the meaning of 'European equity'. Furthermore, the functioning of this equitable jurisdiction is influenced by another key factor: interaction with national judges. As said above, preliminary rulings enable this interaction (Art. 267 TFEU), and permit European and national judges to influence each other in the development and assimilation of shared principles. Hence, by studying preliminary rulings, it is possible to understand the interactive, collaborative or conflictive relationships between supranational and national courts. Here the traditional English common law meaning of equity can be seen, in the sense of a concurrent jurisdiction which sought to solve disputes and created new remedies, items and doctrines, such as specific performance and injunction, trust, and undue influence²⁴. In our opinion, the CJEU's activity may be compared with that of the Court of Chancery which, from the 14th century, competed with the common law Courts, and progressively built a solid and complex system of rules. In fact, the equity of the Chancellor ("the keeper of the King's conscience") and the equity of the CJEU share a similar function, that is the development of legal doctrines and remedies which complete a legal system, intervening where other sources of law have left *lacunae*. A further analogy between the CJEU's and the Lord Chancellor's jurisdiction is that both courts develop their creative function but formally respect the legal order where they operate.

²⁴ As Maitland pointed out: "*We ought not to think of common law and equity as of two rival systems. (...) Equity had come not to destroy the law, but to fulfil it. Every jot and every tittle of law was to be obeyed, but when all this had been done yet something might be needful, something that equity would require.*" Equity formally respected every word of the common law and every right at law, but where the law was defective equity provided equitable rights and remedies. See F. W. Maitland, *The Forms of Action at Common Law. A Course of Lectures*, ed. A. H. Chaytor, W. J. Whittaker, Cambridge University Press, 1936. Even after James I, when the King solved the tension between the two rival jurisdictions, according to the maxim "Equity follows the law", the Court of Chancery was bound by the rules established by common law courts. However, the maxim was operative in a "narrow sense". In reality, the Court of Chancery could use its discretion in order to provide relief against abuse of the law or to allay its strictness. While in ordinary circumstances "Equity follows the law" without infringing rights that had been legally acquired, that maxim could yield if extraordinary circumstances called for relief.

State liability for breach of European law is an area where judicial creativity has developed through the balancing of conflicting principles; on the contrary, Consumer Protection and the Law of Contract is an area where judicial creativity has emerged only recently. As we will see below, they both provide examples of judge-made law through a ‘diffuse equity’, understood as the negotiation process between judges within the EU multi-layer judicial system.

4 The function of gap-filling at national level

As stated above, it is possible to find a form of equity in the common law sense at national level, in the judicial creativity that national courts show when they fill gaps. In what we have called ‘diffuse equity’, national judges are in a sense decentralized European judges²⁵, because they must apply European law, which means they must interpret and fill gaps when interpreting and applying European rules²⁶. In this case, filling gaps also relates to the multi-layer system of negotiation between the CJEU and national courts, established along with the transformation of the preliminary ruling procedure. As is well known, in general terms, the CJEU’s arguments and precedents influence national law and individuals’ rights through their incorporation into the decision-making process of national courts. This means that the vaguer or more open that European rules are, the more freedom national courts will enjoy in applying them. In order to guarantee achievement of the goals of European policies, the CJEU can decide to be more pro-active in judging a preliminary ruling. The transformation of the preliminary ruling procedure²⁷ was effected by the CJEU (under the previous Treaties, the European Court of Justice) which over the years created

²⁵ B. De Witte, *Direct Effect, Primacy, and the Nature of the Legal Order*, in G. De Burca, P. Craig, *The Evolution of EU Law*, Oxford University Press, Oxford, 2nd ed., 2011, pp. 323 - 362.

²⁶ More precisely, “*the national court is charged with ensuring respect for Community law in various ways: it is required to apply Community law; it must set aside national legislation incompatible with Community law; it is under the duty to interpret national law in conformity with Community law; and it is charged with finding a Member State in breach of Community law in accordance with the principle of State liability. In essence, the national court serves as the “juge de droit commun” in the Union legal order*”. K. Lenaerts, *The rule of law and the coherence of the Judicial System of the European Union*, in *CML Rev.*, 44, 2007, pp. 1625 – 1659, 1645.

²⁷ It was created in the European Coal and Steel Community (ECSC) as part of the review role of the Court: individuals could challenge the validity of High Authority (the predecessor of the Commission) decisions in national courts and have these challenges referred directly to the Court of Justice (see K.J. Alter, *Establishing the Supremacy of European Law. The Making of an International Rule of Law in Europe*, Oxford University Press, Oxford, 2001, at 9). Only with the Treaty of Rome, it was expanded to include questions of interpretation, reinforcing the ECJ’s role of filling the gaps, although the Commission remained the primary body responsible for interpreting the law and enforcing it.

the *direct effect*²⁸ and *supremacy* doctrines²⁹. The Court realized the metamorphosis through those techniques of legal interpretation mentioned above. From the 1963 *Van Gend en Loos* case, through *Costa v. Enel*, and then the *Simmenthal* decision in 1978³⁰, it granted access to private litigants to use European rules in order to challenge national rules and policies. Consequently, this has changed how CJEU decisions have been enforced³¹. The CJEU used a teleological approach, where the goal was to foster European integration and to increase the effectiveness of the European legal system³². Now that the authority of the CJEU is well established, the new issue arises: it is becoming part of an emerging system of checks and balances within the European multi-layer jurisdiction.

The activity carried out by the CJEU in private law is twofold: it formulates fundamental principles through comparison of national legal systems and it creates legal rules based on EU statutory interpretation³³. This raises the normative issue of the limits of EU intervention in national private law. Our concern in this paper is not to clarify the notion of “principle”, or whether any difference exists, in abstract terms, between “general principles”, “governing

²⁸ It established that European Law can create rights for individuals that could be invoked before national courts under certain conditions. The CJEU established rules for when Treaties’ provisions, regulations and directives can create (vertical and horizontal) direct effects, for example depending on the clarity of the legal text, or the unconditional nature of the obligation. See among others, Craig & De Burca, *EU Law* cit., *supra*.

²⁹ It established that European Law is the supreme law and has precedence over national law, even subsequent changes of national law: through revolutionary decisions, the CJEU allowed the Court itself and the national courts to monitor and enforce European law in the national setting, stating that Member States cannot escape their obligations by non-compliance. See among others J. H. H. Weiler, *The Transformation of Europe*, in *Yale Law Journal*, Vol. 100, No. 8, Symposium: International Law, 1991, pp. 2403-2483.

³⁰ See T. de la Mare & C. Donnelly, *Preliminary Rulings and EU Legal Integration: Evolution and Stasis*, in Craig & De Burca, *The Evolution of EU law* cit., *supra*, pp. 363-406.

³¹ As is well known, resistance by some Member State Constitutional Courts towards the supremacy doctrine came to an end in the 1980’s, when the vast majority of national judiciaries agreed to take on the role of enforcing European law in national territory. Legal scholars have identified many different variables that influenced national acceptance of this doctrine: a) the influence of the monist doctrine, where international law is already part of the national legal system and hierarchically supreme to national law, or the dualist doctrine, where international law is not part of the national legal system and requires incorporation into national law; b) the influence of a tradition of judicial review; c) government positions on European integration, because political factors shape judicial interpretation; d) the fact that some States entered the European Economic Community before European law was declared supreme to national law: for example, British legal scholars debated the doctrine of supremacy during the accession period, so it was part of what the UK accepted when it joined the Community. See further in Alter, *Establishing the Supremacy* cit., *supra*, pp. 28 ff.

³² D. Wincott, *The Role or The Rule of the Court of Justice: An ‘Institutional’ Account of Judicial Politics in the European Community*, in *Journal of Public Policy* 2(4), 1995, pp. 583-602; P. Craig, *Once Upon a Time in the West: Direct Effect and the Federalization of EEC Law*, in *Oxford Journal of Legal Studies*, 12(4), 1992, pp. 453-479.

³³ Among the EU legislative acts, principally Regulations and Directives.

principles” and “underlying principles” or “overriding principles”³⁴. Basically, all the principles mentioned in the judgments are of a highly political nature, for the protection of human rights, the promotion of solidarity and social responsibility, and the enhancement of an increasingly consumer-friendly and socially-oriented common internal market. What is at stake here is the relationship between the European market framework and national welfare systems, or - in other words - between, on the one hand, the core-issue of EU law, which is procedural justice³⁵ and the fairness of the institutional decision-making process³⁶, and, on the other hand, the more substantial current concern of national States, namely the social exclusion of citizens, workers and consumers, who risk being cut off from labor and consumer markets³⁷.

The growing contentiousness around sensitive areas of national control opens another phase of European integration, where conflicting legal interpretations voiced by the CJEU, national courts, national governments and the EU Commission play a decisive role in changing the boundaries between national sovereignty and European law³⁸.

5 An example of the activism of the Court of Justice: the Francovich doctrine

State liability for breach of European Union law has provided particularly fertile ground for gap-filling and judicial creativity in general. As is well known, the EC Treaty makes no provision on Member States liability for damages to injured parties for breach of EU law. However, the CJEU has intervened to

³⁴ On this point, among others see S. Whittaker, *Operation of the Common European Sales Law*, in *CML Rev.*, 2013, pp. 85-108; K. Lenaerts & J.A. Gutiérrez-Fons, *The Constitutional Allocation of Powers and General Principles of EU Law*, in *CML Rev* 2012, pp. 1629-1669; A.S. Hartkamp, *The General Principles of EU Law and Private Law*, in *RabelsZ* 2011, pp. 241-259; J. Basedow, *The Court of Justice and Private Law: vacillations, General principles and the Architecture of the European Judiciary*, in *ERPL*, 2010, pp. 443-475; M. Safjan & P. Miklaszewicz, *Horizontal effect of the General Principles of EU law in the sphere of Private Law*, in *ERPL*, 2010, pp. 475-486. Before, cf. B. Fauvarque-Cosson & D. Mazeaud (eds.), *European Contract Law Materials for a Common Frame of Reference: Terminology, Guiding Principles and Model Rules*, Sellier, Munich, 2008; C. von Bar, E. Clive, H. Schulte-Noelke (eds.), *Principles, Definitions and model Rules of European Private law, Draft Common Frame of Reference (DCFR)*, 2nd ed., Munich, Sellier, 2009.

³⁵ On “welfarism” in private law see T. Wilhelmsson, *Varieties of Welfarism in European Contract Law*, in *European Law Journal*, 10 (6), pp. 712-733, 2004, available at SSRN: <http://ssrn.com/abstract=605144> and R. Brownsword, G. Howells, T. Wilhelmsson, *Welfarism in Contract Law*, Dartmouth, University of Michigan, 1994.

³⁶ See in more general terms J. L. Gibson, *Understandings of Justice: Institutional Legitimacy, Procedural Justice, and Political Tolerance*, in *Law & Society Review*, 23(3), 1989, pp. 469-496.

³⁷ Cf. H.-W. Micklitz, *Judicial Activism of the European Court of Justice and the Development of the European Social Mode in Anti-Discrimination and Consumer Law*, in *EUI LAW* 2009/19, at 11.

³⁸ Cf. H.-W. Micklitz, D. Patterson, *From the Nation State to the Market: The evolution of EU private law*, in *EUI LAW* 2012/15, at 13 ff. They identified four parameters to describe the interaction between “nation state private law regimes” and “market state European private law regimes”: a) conflict and resistance, b) intrusion and substitution, c) hybridisation and 4) convergence.

argue that this is inherent to the EC Treaty³⁹, holding that it must be possible to take legal action against States to seek damages for breach of EC law⁴⁰.

The European Court of Justice has been active in this area since 1991, when it first established the conditions under which liability gives rise to the right to reparation⁴¹. As noted by many scholars of renown, the CJEU strategy, which was first to establish that States which infringe EC law incur liability just as European institutions do (Art. 340 TFEU, previously Art. 288 TEC), is another example of the CJEU's function of gap filling⁴². This activism developed even further when the Court clarified the conditions that must be fulfilled for the right to reparation to be effective, and applied the right to new kinds of breaches and to the State's behavior in any function or political form⁴³.

In the *Brasserie du Pêcheur* case, the CJEU stated that Community law confers a right to reparation where three conditions are met: (i) the rule or law infringed must be intended to confer rights on individuals; (ii) the breach must be sufficiently serious; and (iii) there must be a direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured parties⁴⁴. This vagueness, although criticized by commentators, is essential in order to protect the claimant better than Member State law does⁴⁵, enhancing interaction and communication with national courts. In other words, the strategy established by the CJEU, based on the minimal guidance provided by these three basic conditions, has permitted progressive extension and

³⁹ Judgment of the Court of 19 November 1991, *Andrea Francovich and Danila Bonifazi and others v. Italian Republic*, Joined cases C-6/90 and C-9/90, ECR 1991, I-05357, para. 37.

⁴⁰ M. Ross, *Beyond Francovich*, in *Modern Law Review*, 56, 1993, pp. 55 - 73.

⁴¹ *Francovich cit.*, *supra*.

⁴² Commentators noted that “the tort rules laid down in the two lines of case law, one relating to Community institutions and the other relating to Member States, are used by the Court, back and forth, as a source of inspiration”. W. van Gerven, *The Emergence of a Common European law in the Area of Tort Law: the EU Contribution*, in D. Fairgrieve, M. Andenas and J. Bell, *Tort Liability of Public Authorities in Comparative Perspective*, BIICL, London, 2002, pp. 125 - 147, 132. This analogy produces several consequences. For example, the Court ruled that the State is liable whichever of its organs is responsible for the breach and regardless of the internal division of powers between constitutional authorities. R.W. Davis, *Liability in Damages for a Breach of Community Law: Some Reflection on the Question of Who to Sue and the Concept of "the State"*, in *European Law Review*, 31, 2006, pp. 69 - 80.

⁴³ As we will see in the following sections, from the *Brasserie du Pêcheur* case, the Court established that “individuals suffering loss or injury thereby are entitled to reparation where the rule of Community law breached is intended to confer rights upon them, the breach is sufficiently serious and there is a direct causal link between the breach and the damage sustained by the individuals?”. *Brasserie du Pêcheur*, para. 4.

⁴⁴ *Brasserie du Pêcheur*, para. 51.

⁴⁵ In other words, the CJEU is sanctioning the State's failure to act under a test of liability in order to pursue the telos of the effectiveness of European law, more than the protection of the claimant's rights. This is a typical international law feature. M. Graziadei, *Rights in the European Landscape: A Historical and Comparative Profile*, in S. Prechal & B. van Roermund, *The Coherence of EU Law*, Oxford University Press, Oxford, 2008, pp. 63 – 90, 89, in relation to the comparison between the stance of the CJEU and German Law.

clarification of the principle of Member State liability, as a result of CJEU creativity, and continuous interaction between European Courts and national judges. In the case of State liability, the Court's aim was to enhance the principle of effectiveness of EU law, which is not limited to making the meaning of a rule clear, but also to it being effectively applied or producing the desired effects. Indeed, the CJEU stated that State liability for breach of European law should be seen as a necessary corollary of the doctrine of direct effect⁴⁶. As a result, the principle of Member State liability has been progressively clarified and extended also in the case of infringement of European law attributable to a decision by a national court adjudicating at last instance⁴⁷.

The area of State liability for breach of European law is one of the classical cases where the CJEU is guided by the principles of primacy and effectiveness of European law, equivalence and autonomy of Member States, which interact and temper each other reciprocally⁴⁸. The balancing between these principles in the area of State liability for breach of European law is related to the complex nature of the remedy. Using reparation to protect European citizens whose rights have been violated as a result of a breach of European law directly influences the relationship between citizens and Member States to which the

⁴⁶ Francovich, para. 3: “*The full effectiveness of Community rules would be impaired and the protection of the rights which they grant would be weakened if individuals were unable to obtain reparation when their rights are infringed by a breach of Community law for which a Member State can be held responsible. Such a possibility of reparation by the Member State is particularly indispensable where the full effectiveness of Community rules is subject to prior action on the part of the State and where, consequently, in the absence of such action, individuals cannot enforce before the national courts the rights conferred upon them by Community law. It follows that the principle whereby a State must be liable for loss and damage caused to individuals by breaches of Community law for which the State can be held responsible is inherent in the system of the Treaty. A further basis for the obligation of Member States to make good such loss and damage is to be found in Article 5 of the Treaty, under which they are required to take all appropriate measures, whether general or particular, to ensure the implementation of Community law, and consequently to nullify the unlawful consequences of a breach of Community law*”.

⁴⁷ In the Köbler case the CJEU ruled that “*The principle that Member States are obliged to make good damage caused to individuals by infringements of Community law for which they are responsible is also applicable where the alleged infringement stems from a decision of a court adjudicating at last instance where the rule of Community law infringed is intended to confer rights on individuals, the breach is sufficiently serious and there is a direct causal link between that breach and the loss or damage sustained by the injured parties*”.

⁴⁸ According to the principle of primacy (CJEU Case 26/62, *Van Gend & Loos* [1963] ECR 3) and the principle of effectiveness (CJEU Case 6/64, *Costa v. E.N.E.L.* [1964] ECR 1141) of European law, national procedural rules may not be so framed as to render virtually impossible or excessively difficult the exercise of rights conferred by European law. In conformity with the principle of national procedural autonomy, the CJEU has often stated that it is for the “*domestic legal system of each Member State to designate the courts having jurisdiction and to determine the procedural conditions governing actions at law intended to ensure the protection of the rights which citizens have from direct effect of Community law*”. On the other hand, this principle is tempered by the principle of equivalence, according to which remedies under European law cannot be treated less favourably than remedies under national law. These principles have been studied and applied to the State liability, in Schermers & Waelbroeck, *Judicial Protection in the European Union* cit., *supra*, at 199.

violation is attributable. In other words, State liability directly affects the relationship between the European Union and Member States, and recently was even applied to adjudication.

This principle, applied also to judicial function, is a reaffirmation of the primacy of European law and of the universality of remedies. On the other hand, it undermines the finality of last instance decisions and establishes a more hierarchical relationship between the CJEU and national supreme courts. In other words, the point of balance between principles has been shifted in favour of the effectiveness of European law. Especially in the *Traghetti del Mediterraneo SpA v Repubblica italiana* and *Commission v. Italy* cases⁴⁹, the CJEU applied the *Köbler* precedent even more directly, establishing that Italian legislation had imposed requirements which were stricter than those of a manifest infringement of the applicable law, and for this reason directly violated European law⁵⁰. These are only the most evident cases where the CJEU, in stating that a national law infringes European law⁵¹, has modified the balance between the Europeanization of remedies and respect for national autonomy. In general, these cases demonstrate that, at this respect, there are evident points of resistance in national case-law.

As is well known, while the CJEU established the three conditions for State liability, the national courts must apply them, and everything that is not regulated at European level must be regulated at national level. This involves many important areas, such as “the admissibility of an action, *locus standi* of the

⁴⁹ Judgment of the Court (Grand Chamber) of 13 June 2006, *Traghetti del Mediterraneo SpA v Repubblica italiana*, Case C-173/03, ECR I-05177; Judgment of the Court (Third Chamber) of 24 November 2011, Case C-379/10, *European Commission v Italian Republic*.

⁵⁰ *Traghetti del Mediterraneo*, para. 46: “Community law precludes national legislation which excludes State liability, in a general manner, for damage caused to individuals by an infringement of Community law attributable to a court adjudicating at last instance by reason of the fact that the infringement in question results from an interpretation of provisions of law or an assessment of facts or evidence carried out by that court. Community law also precludes national legislation which limits such liability solely to cases of intentional fault and serious misconduct on the part of the court, if such a limitation were to lead to exclusion of the liability of the Member State concerned in other cases where a manifest infringement of the applicable law was committed, as set out in paragraphs 53 to 56 of the *Köbler* judgment”.

⁵¹ For this reason, recently Italian doctrine has been very active in this field. See G.M. Flick, *La responsabilità civile dei magistrati. Proposte di modifica fra disinformazione e realtà*, in *federalismi.it*, 11, 2012, pp. 1 - 10; F. Bonaccorsi, *Clausola di salvaguardia e responsabilità dello Stato per l'illecito del magistrato*, in *Danno e Responsabilità*, 10, 2012, pp. 981 - 990; N. Trocker, *L'Europa delle Corti sovranazionali: una storia di judicial activism tra tutela dei singoli ed integrazione degli ordinamenti giuridici*, in *Annuario di diritto comparato e di studi legislativi*, 2011, pp. 91 - 128; F.P. Luiso, *La responsabilità civile*, in *Foro Italiano*, 10, 2011, pp. 285 - 290; M.P. Iadicicco, *Integrazione europea e ruolo del giudice nazionale*, in *Rivista Italiana di Diritto Pubblico Comunitario*, 2, 2011, pp. 393 - 446; N. Zingales, *Member state Liability vs. National Procedural Autonomy: What Rules for Judicial Breach of EU Law?*, in *German Law Journal*, 11, 4, 2010, pp. 419 - 438; V. Amato, *La responsabilità dello Stato giudice. Profili civilistici interni*, in *Persona e danno*, www.personaedanno.it, 2010, pp. 1 - 37; A. Lazari, “*Là où est la responsabilité, là est le pouvoir*”. *Il nuovo ruolo del giudice nel paradigma comunitario dopo la sentenza Traghetti*, in *Revista Electrónica de Estudios Internacionales*, www.reei.org, 2008.

applicant, time limits for bringing action, evidential rules, nature or categories of damage to be compensated, its assessment, the calculation of compensation to be paid, the form of redress, the award of interest”⁵². For these reasons, the “Francovich doctrine” has been assimilated in a rather variable way in domestic legal systems. Indeed, especially in the last few years, this has been an area of much judicial creativity, influenced by two main factors. Primarily, national courts can apply the “Francovich principle” by selecting rules and legal concepts from their own national legal system. This means that their discretion is expanded, once the principles of equivalence and effectiveness are fulfilled, because actions for damages are governed by national rules on liability⁵³.

The vagueness of the three conditions leaves great discretion as regards their concretion to national judges, and further possibility for developing judicial creativity⁵⁴. Indeed, the clearest factor encouraging judicial creativity is the vagueness of the “sufficiently serious breach” of European Law⁵⁵ (or, in other words, “whether the Member State has manifestly and gravely disregarded the limits on its discretion”); it has been developed and clarified in those CJEU judgments which in the last fifteen years have progressively extended the *Francovich* remedy to new forms of breach⁵⁶. With these judgments, “in terms of legal analysis, the Court has concentrated on elaborating the condition of seriousness of the breach. In terms of judicial policy, the cases evince a tendency to leave more matters to national courts and, perhaps, in some respects a tactical relaxation of liability”⁵⁷. Accordingly, national courts apply the broad concept laid down by the CJEU, taking the legal content from their own national legal

⁵² S. Prechal, *Directives in EC Law*, Oxford University Press, New York, 2006, 293.

⁵³ *Brasserie du Pêcheur*, para. 67.

⁵⁴ R. Caranta, *On Discretion*, in S. Prechal, B. Van Roermund, *The Coherence of EU Law. The search for unity in divergent concepts*, Oxford University Press, Oxford, 2008, pp. 183 - 215: “*Liability actions are an almost ideal field for a comparative review of discretion at European level*” at 196.

⁵⁵ The ambiguity of the division of functions between the CJEU and the national courts, as well as the complex application of the three conditions by the English courts, have been recently analysed in P. Giliker, *English Tort Law and the Challenge of Francovich liability: 20 years on*, in *Law Quarterly Review*, 128, 2012, pp. 541 – 563, 551. Referring to the second condition, national courts only follow guidelines laid down by the CJEU in order to determine whether the threshold of seriousness has been reached.

⁵⁶ In Judgment of the Court of 4 July 2000, *Salomone Haim v Kassenzahnärztliche Vereinigung Nordrhein*, Case C-424/97, ECR 2000, I-05123, para 2, the CJEU stated that “*In order to determine whether a mere infringement of Community law by a Member State constitutes a sufficiently serious breach, a national court hearing a claim for reparation must take account of all the factors which characterise the situation put before it. Those factors include, in particular, the clarity and precision of the rule infringed, whether the infringement and the damage caused was intentional or involuntary, whether any error of law was excusable or inexcusable, and the fact that the position taken by a Community institution may have contributed towards the adoption or maintenance of national measures or practices contrary to Community law*”.

⁵⁷ T. Tridimas, *Liability for Breach of Community Law: Growing up and Mellowing down?*, in D. Fairgrieve, M. Andenas, J. Bell, *Tort Liability of Public Authorities in Comparative Perspective*, BIICL, London, 2002, pp. 149 - 181, 151.

culture⁵⁸. As many scholars have pointed out, judges are products of specific national legal systems, they absorb specific features of their national legal culture, and adopt their own legal reasoning and a consequent distinctive style of framing and resolving legal questions⁵⁹. In applying and clarifying the condition of seriousness of breach, balancing principles and judicial dialogue operate at maximum level. In fact, the vagueness of this condition and the CJEU's indicators to national judges for determining the seriousness of the infringement demonstrate that this is very much the kind of field which can enhance the dynamics of incremental cooperation between judges and the consequent mutual influence called "cross-fertilisation"⁶⁰. Thus, national judges are not limited to applying national law in compliance with European law; they can also interpret the remedy according to their national legal structures⁶¹.

In the area of State liability some analogies can be seen between European judicial cooperation and equity, because of the wide area of discretion left by the CJEU to national autonomy. However, instead of only one court, there are

⁵⁸ That is a "cryptotype": see R. Sacco, *Legal Formants: A Dynamic Approach to Comparative Law (Installment II of II)*, in *American Journal of Comparative Law*, 39(2), 1991, pp. 343 - 401, 387: "Normally, a jurist who belongs to a given system finds greater difficulty in freeing himself from the cryptotypes of his system than in abandoning the rules of which he is fully aware. This subjection to cryptotypes constitutes the "mentality" of the jurist of a given country, and such differences in mentality are the greatest obstacle to mutual understanding between judges of different systems. Cryptotypes may be identified and explored only through the use of comparison at a systemic and institutional level".

⁵⁹ Moreover, "other features of national legal culture include a particular understanding of the role of courts in relation to legislative bodies, differing specifically on the extent to which judges "make" law in the process of interpretation and application of legislative provisions and the extent to which they can fill the gaps in those provisions". W. Mattli, A. Slaughter, *The Role of National Courts in the Process of European Integration: Accounting for Judicial Preferences and Constraints*, in A. Slaughter, A. Stone Sweet, J.H.H. Weiler, *The European Court of Justice and National Courts - Doctrine and Jurisprudence*, Hart, Oxford, 1998, pp. 252 - 276, 272.

⁶⁰ J. Bell, *Mechanisms for Cross-fertilisation of Administrative Law in Europe* cit., *supra*, 165.

⁶¹ M. Künnecke, *Divergence and the Francovich Remedy in German and English Courts*, in S. Prechal, B. Van Roermund, *The Coherence of EU Law. The Search for Unity in Divergent Concepts*, Oxford University Press, Oxford, 2008, pp. 233 - 253, 233. In general terms, they can even decide on the nature of the remedy, applying European law directly or some equivalent national rule. This topic, further discussed at the end of this section, relates to the equivalence of the European principle with the possible equivalent in national law. In Judgment of the Court (Grand Chamber) of 26 January 2010, *Transportes Urbanos y Servicios Generales SAL v. Administración del Estado*, Case C-118/08, ECR 2010, I-00635, the CJEU stated that "In relation to the principle of equivalence, it should be borne in mind that, according to settled case-law, this requires that all the rules applicable to actions apply without distinction to actions alleging infringement of European Union law and to similar actions alleging infringement of national law". That means that, in order to determine whether the principle of equivalence has been complied with, it is necessary to decide whether, in the light of their purpose and their essential characteristics, the action for damages brought by the claimant, alleging breach of European Union law, and the action that could have been brought through a national specific remedy (e.g. a specific remedy for judicial liability), may be regarded as similar. This decision will have many consequences on the rules which must be applied to the case, as well as the potential mutual influence between the European and national remedy .

as many “Equity courts” as there are national legal systems. As in the relationship between the English courts of common law and of Chancery in the past, in the area of Member State liability national judges have also often put up resistance to EU jurisprudence, basically for two different reasons. Firstly, there are the institutional difficulties that public liability for judicial acts has always met at national level. Judicial liability has been an extremely problematic political question, largely due to the peculiar features of the judicial function and especially its independence with respect to the other constitutional powers. As is well-known, judicial liability has also been conditioned by heavy restrictions because of the principles of the authority of *res judicata* and of legal certainty⁶².

Secondly, resistance appears to relate to the fact that, in the area of State liability for breach of European law attributable to the courts adjudicating at last instance, CJEU judgments can override national courts’ authority. This can be explained through the so-called “theory of interpretative competition” according to which courts have their own interests, and conflict of interests constitutes a limit for legal integration⁶³. As a consequence, national courts that wish to resist adverse European case-law may react primarily by treating a harmonized area of law as a form of foreign body⁶⁴. In cases of Member State liability for breach of European Law, national judges have tried to isolate European law in order to avoid the confluence between European and national law⁶⁵. In the only Italian case where the principle of State liability for judicial

⁶² Both these questions were referred to the CJEU in the Köbler case. For the first time, the CJEU seems to have applied comparative methodology in order to arrive at its final ruling. Opinion, Advocate General Léger in the case C-224/01, Köbler, para. 77, cited in K.M. Scherr, *Comparative Aspects of the Application of the Principle of State liability for Judicial Breaches*, in *ERA Forum*, 12(4), 2012, pp. 565-588, 572. The same essay analyses the “rather diverse spectrum of national legal concepts of public liability for judicial breaches”.

⁶³ This is the inter-court competition explanation, which examines courts as bureaucracies and sub-bureaucracies with their own interests and bases of institutional support. According to this approach, judges share certain interests, and they are primarily interested in promoting their independence, influence, and authority. Accordingly, they act strategically vis-à-vis other courts, “calculating the political context in which they operate so as to avoid provoking a response which will close access, remove jurisdiction authority, or reverse their decision”. Cf. Alter, *Establishing the Supremacy* cit., *supra*, at 46.

⁶⁴ P. Larouche & F. Chirico, *Conceptual Divergence, Functionalism, and the Economics of Convergence*, in B. van Roermund, S. Prechal, *The Coherence of EU Law. The Search for Unity in Divergent Concepts*, Oxford University Press, Oxford, 2008, pp. 463 - 494, 487.

⁶⁵ One of the fundamental gaps in this field is related to the State’s liability for legislation. In that case the inter-court competition approach explains also the competing interest of lower and higher courts with respect to legal integration. In this case, national judges have reacted in variable ways because it is a principle not accepted in the majority of European Member States, if we consider domestic law. For example, Italian judges have been especially reluctant to apply this case law. European commentators, following the national case-law of national courts (i.e. the *Bundesgerichtshof* and the *Corte di Cassazione*), assert that Member State liability is a sui generis remedy, separated from other national remedies for governmental liability. P. Giliker, *English Tort Law and the Challenge of Francovich liability...* cit., *supra*.

breach has been applied, the *Tribunale di Genova* assimilated the “Francovich doctrine” through general liability law (Art. 2043 Civil Code) and not through specific regulations regarding judicial liability (l.117/88)⁶⁶. This solution⁶⁷ can be classified, in our opinion, as an attempt to block the mutual influence between European and national law, which arises as the logical consequence of integration between legal orders.

6. Contract Law and Consumer Protection

The CJEU pursues justice (cf. Art. 2 TEU, Art. 19 TEU⁶⁸), in the sense of just and fair solutions, resulting from a balance between interacting principles, for any given case. In other words, justice acquires substance through principles, which generate detailed rules as a result of the interpretation of the courts⁶⁹. The role of the CJEU is to balance conflicting interests behind those principles, and achieve equilibrium between opposing forces: in this sense, justice shares the same root as the Latin term *aequitas*, and a part of its meaning. The solutions of the CJEU are quite similar to the way *jus* was applied in ancient Rome to achieve *aequitas*: using the law in its dynamic and open dimension, in pursuit of what is *bonum*, that is to say right, and what is *aequum*, that is to say fair.

From the start, the Court of Justice explicitly stated that “*unless the Court is to deny justice, it is therefore obliged to solve the problem by reference to the rules acknowledged by the legislation, the learned writings and the case-law of the Member countries*”⁷⁰. More than once the Court has affirmed that it is not sufficient to consider the textual data of the written law, but “*it is necessary to consider also the indications provided by the constitutional rules and practices of the nine Member States*” in order to establish whether a particular principle is to be considered common to all⁷¹. The reference

⁶⁶ Ruling of the Tribunale di Genova, 23 aprile 2008.

⁶⁷ E. Scoditti, *Violazione del diritto dell'Unione europea imputabile all'organo giurisdizionale di ultimo grado: una proposta al legislatore*, in *Foro Italiano*, I, 2012, pp. 22 - 26; V. Piccone, *La responsabilità del giudice nell'ordinamento integrato*, in *personaedanno.it*, 2011, pp. 1 - 16.

⁶⁸ Art. 2: “*The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail*”. Art. 19 (1): “*The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation and application of the Treaties the law is observed. Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.*”

⁶⁹ On the function of principles, see T. Tridimas, *The General Principles of the EU Law*, Oxford, 2006 (interpretative, derogating and supplementing functions); compare it with C. Sieburgh, *Principles in Private Law: From Luxury to Necessity – Multi-layered Legal Systems and the Generative Force of Principles*, in *ERPL*, 2012, pp. 295–312 (who, to these, added the generative function), at 300. The entire issue 2/2012 of the *ERPL* is focused on principles and the law.

⁷⁰ Cf. joined cases 7/56, 3/57 to 7/57, *Algeria & others v. Common Assembly of the European Coal & Steel Community*, [1957] ECR I- 81.

⁷¹ Cf. § 20 of the judgment in *Liselotte Hauer v. Land Rheinland-Pfalz*, C-44/79, [1979] ECR I- 3727.

to general principles and their impact on private law⁷², or to principles of private law⁷³ came later as regards the area of State liability, for instance with the *Bellone* case (1998)⁷⁴ and with *Leitner* (2002)⁷⁵. It has continued in recent decisions, such as the *Mangold* case (2005)⁷⁶, *Hamilton* case (2008)⁷⁷, *Messner* case (2009)⁷⁸, *Sturgeon* case (2009)⁷⁹, and *Küçükdeveci* case (2010)⁸⁰.

From the principle of freedom of form expressed in the field of commercial agency contracts (*Bellone*), the CJEU stated the more controversial principle of compensation for non-material damage resulting from the non-performance or improper performance of the services constituting a package holiday (*Leitner*). The Court also clarified the role of the principle of good faith in distance contracts (*Messner*) within B2C transactions; it applied the principle of non-discrimination on the grounds of age in employment contracts (*Mangold* and *Küçükdeveci*)⁸¹, and finally recognized a general “principle of limitation”⁸² placing a time-limit on exercise of the right of withdrawal (*Hamilton*), and the principle of compensatory damages for delay, or loss of time (*Sturgeon*)⁸³.

⁷² The Treaties recognise fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law (see Art. 6(3) TEU) and establish that general principles, common to the laws of the Member States, shall apply in the case of non-contractual liability (see Art. 340(2) TFEU).

⁷³ For a comprehensive analysis, C. Mak, *Hedgehogs in Luxembourg? A Dworkinian Reading of the CJEU’s Case Law on Principles of Private Law and Some Doubts of the Fox*, in *ERPL*, 2012, pp. 323-346. According to her, the first example of a case in which we find a clear reference to “principles of civil law” is case C-277/05, [2007], *Société thermique d’Eugénie-les-Bains v. Ministère de l’Économie, des Finances et de l’Industrie*, ECR I-6415.

⁷⁴ C-215/97 [1998] ECR I-2191, paragraph 15. See E. Arroyo i Amayuelas, B. Pasa, A. Vaquer Aloy, *Form*, in *ACQUIS Principles, Contract II: General Provisions, Delivery of Goods, Package Travel and Payment Services*, Munich, Sellier, 2009: Comments to Art. 1-304, pp. 75 ff.

⁷⁵ Case C-168/00 [2002] ECR I-2631.

⁷⁶ Case C-144/04 [2005] ECR I-9981. Cf. M. Beyer-Katzenberger, *Judicial activism and judicial restraint at the Bundesverfassungsgericht: Was the Mangold judgement of the European Court of Justice an ultra vires act?*, in *Era forum*, 2011, 11, pp. 517–523; M. Dougan, *In defence of Mangold?*, in A. Arnall, C. Barnard, M. Dougan & E. Spaventa. (eds.) *A Constitutional Order of States? Essays in EU Law in Honour of Alan Dashwood*, Hart Publ., 2011, pp. 219-244.

⁷⁷ Case C-412/06 [2008] ECR I-2383.

⁷⁸ Case C-489/07 [2009] ECR I-7315.

⁷⁹ Joined cases C-402 & 432/07 [2009] ECR I-10923.

⁸⁰ Case C-555/07 [2010] ECR I-365.

⁸¹ The CJEU applied also the principle of non-discrimination on the grounds of sexual orientation. See L. Pech, *Between judicial minimalism and avoidance: The Court of Justice’s sidestepping of fundamental constitutional issues in Römer and Dominguez*, in *CML Rev.* 2012, pp. 1841-1864, at 1842.

⁸² Cf. the opinion of the AG Maduro, who handles the question in *Interpreting European Law*. cit., *supra*.

⁸³ See K. Riesenhuber, *Interpretation and judicial development of EU private Law. The example of the Sturgeon-Case*, in *ERCL*, vol. 6(4), 2010, pp. 384 -408; S. Garben, *Sky-high controversy and high-*

In the *Sturgeon* case, the CJEU even re-drafted a piece of European legislation differently from the EU legislature, to the advantage of consumers⁸⁴. The preliminary ruling related to Regulation n. 261/2004 that laid down common rules on compensation and assistance to passengers in the event of denied boarding, flight cancellations, or long flight delays. The Regulation grants, in case of cancellation, a number of rights to passengers, including compensation, while in case of delayed flights compensation is not provided for. The CJEU held that these provisions were against the equal treatment principle, which requires that comparable situations must not be treated differently, and different situations must not be treated in the same way, unless such treatment is objectively justified. The CJEU argued that the situation of passengers whose flights are delayed is comparable with the situation of passengers whose flights are cancelled, because a “long delay”⁸⁵ results in a comparable “loss of time” suffered equally by both types of passengers. The Court then decided that the damage should be redressed by compensation. The Regulation was not annulled, but interpreted broadly, to justify a conclusion that was contrary to the literal interpretation of the Regulation itself. In this case the Court demonstrated that it is willing to “oppose the free market to the advantage of consumers”⁸⁶.

Clearly the CJEU has been one of the key actors in the creation of the internal market, engaging in both negative integration, with the dismantlement of national barriers to promote free competition inside the common market, and positive integration, through the principle of mutual recognition. Although initially the CJEU was involved in the neo-liberal project to create a European space for free movement, without paying so much attention to the effective protection of citizens (but only to categories of people, such as consumers, customers, and clients), at present it is counterbalancing some bias in this process, and is promoting the anti-discrimination test on grounds of nationality, of age, and of gender, acting also in the private law domain as a “socially activist Court”⁸⁷. On this last point, it appears to be impossible to predict whether the CJEU is ready to take responsibility for promoting social welfare in the realm

flying claims? The Sturgeon case law in light of judicial activism, Euroscepticism and Eurolegalism, 50 *CML Rev.*, 2013, pp. 15-46.

⁸⁴ Cf. the scholars reactions in different Member States: J. Balfour, *Airline Liability for Delays: The Court of Justice of the EU Rewrites EC Regulation 261/2004*, in *Air and Space Law*, 35(1), 2010, pp. 71-75; L. González Vaqué, *Reglamento n° 261/2004 sobre asistencia y compensación de los pasajeros aéreos: el TJCE clarifica (ma non troppo) los conceptos de retraso y cancelación de un vuelo*, in *Unión Europea Aranzadi* 3, 2010, pp. 7-17; A. Leandro, *Passeggeri con diritto al rimborso forfezzato anche quando il volo ha un ritardo di tre ore*, in *Guida al Diritto*, 49, 2009, pp. 111-113; J. Stuyck, *Indemnisation pour les passagers de vols retardés en Europe*, in *La Semaine Juridique*, 7, 2010, pp. 359-363.

⁸⁵ “Long delay” was interpreted contextually within the “extraordinary circumstances”, of the Recital 15 of the Regulation.

⁸⁶ Garben cit., *supra*, at 36.

⁸⁷ *Ibid.*, 37.

of private law⁸⁸. Nevertheless, these recent judgments are interesting because they explore the boundaries of the CJEU's function in relation to the political process⁸⁹. The Court has found general principles within the common legal traditions of European Member States, and has reformulated them within the framework of European law, sometimes circumventing the intentions of the European legislature.

In fact, the Court's activism is criticized for two main reasons. On the one hand, according to the "horizontal separation of powers" objection, the judiciary should respect the prerogatives of the democratically elected legislature. On the other hand, by trespassing over the limit of its judicial function, the CJEU, as a supranational judiciary, creates law extrapolating rules from (allegedly common) general principles to the detriment of national courts, especially with respect to their independence and other constitutional powers ("vertical separation of powers" objection).

The *Wünsche* judgment⁹⁰ made it clear that a national court can make "further reference" to the CJEU when it does not understand how to apply the rule expressed in a CJEU precedent; but the national court cannot use this right to refer further questions to the CJEU to contest the validity of its precedents. Otherwise, the areas of jurisdiction of national courts and of the CJEU would be subverted⁹¹. However, national courts can dissent without further reference to the CJEU, simply deciding not to apply the CJEU precedent to the case⁹².

⁸⁸ Cf. H-W. Micklitz (ed.), *The Many Concepts of Social Justice in European Private Law*, Cheltenham: Edward Elgar Publ. 2011; for an early critique of the technical, neutral and apolitical character of the European Contract Law projects see *Social Justice Study Group, Social Justice in European Contract Law: A Manifesto*, in *European Law Journal*, 10(6), 2004, pp. 653-674; U. Mattei & F. G. Nicola, *A 'Social Dimension' in European Private Law? The Call for Setting a Progressive Agenda*, in *Global Jurist*, Vol. 7:1 (Frontiers), 2007, Article 2, available at <http://www.bepress.com/gj/vol7/iss1/art2>; for outcomes see M. W. Hesselink, *CFR & Social Justice*, Centre for the Study of European Contract Law, Working Paper Series No. 2008/04 available at http://www.sssup.it/UploadDocs/3330_SSRN_ID1152222_code764687.pdf.

⁸⁹ Cf. N. Baeten, *Judging the European Court of Justice: The Jurisprudence of Aharon Barak Through a European Lens*, in *Columbia Journal of European Law*, 18(1) 2011, pp. 135-155, at 148.

⁹⁰ Case 69/85, [1986] ECR I- 947. See also Art. 104 (5) of the Rules of Procedure of The Court of Justice, OJ EU L 265/1, 29.9.2012, and Art. 43 of the Statute of the Court of Justice of the European Union, OJ EU C 83/210, 30.03.2010.

⁹¹ For example, the CJEU did not decide on some preliminary rulings after *Sturgeon*, which could have been considered against the *Wünsche* doctrine: cf. the Order of the President of the CJEU of 17 January 2013 a propos of the *Van de Ven*, case, (Case C-315/11, discussed in Garben, cit., at 31), ordering that the case be removed from the Register (OJ EU C 108/18, 13.4.2013).

⁹² For example, German and English courts decided to suspend any claim in respect to compensation for delay, until the CJEU provided "additional justification" to *Sturgeon*, deciding other preliminary rulings from the High Court of Justice (England & Wales) Queen's Bench Division (admin. Court) (Joined cases C-581/10 & 629/10, [2012] *TUI Travel plc*, not yet published) and from *Landgericht Köln*, (Case C-413/11, [2013], *Germannings*, OJ EU C 225/41, 3.8.2013). The two cases were eventually decided reiterating the interpretation of the EU Regulation already given in *Sturgeon*: the principle of equal treatment requires all passengers

This means that, although Art. 4 TEU imposes a general duty of loyalty on national and supranational institutions to give full effect to EU law, judicial activism is amplified at national level by the fuzzy judicial activism of domestic courts, that can boycott European judgments.

Differing behaviors may be observed in national courts: traditionally, the courts of last instance resist and the lower courts follow the CJEU's precedents. Lower courts are generally willing to apply CJEU precedents because, by adhering to the Court's precedent and applying the principle of supremacy and direct effect, they can bypass the national judicial hierarchy. Moreover, contrary to the highest jurisdictions within the Member States, they do not feel constrained by the specific duty to protect the national Constitution and to guarantee predictability and legal certainty⁹³. However, evidence of their resistance is to be found in the controversy which developed in Germany, the UK and the Netherlands after the *Sturgeon* case in 2011, where, German and English courts decided to suspend any claim with respect to compensation for delay, until the CJEU provided additional justification to *Sturgeon*⁹⁴. Consistency would demand that a lower court should be bound by the CJEU interpretation and should not re-interpret this again⁹⁵. On the other hand, most national supreme courts or constitutional courts support the "activism through self-empowerment of the CJEU"⁹⁶, because they prefer to use a consistent interpretation (reading in/out, reading down the legal rules contained in the transposition measures or in the Regulations or Treaties), rather than an annulment or dis-application of the rule. An interpretation in conformity with one of the general principles⁹⁷ is more deferential and respectful of the legislative process as regards an annulment.

In any case, the CJEU's contextual and teleological interpretations of principles used to fill the gaps highlight the fact that law and policy issues should go together. They should be reasonable, consistent and adequate to serve the

whose flights are delayed and those whose flights are cancelled to be treated equally, because they suffer the same loss of time, which is not governed by the Montreal Convention on certain rules on international carriage by air. For an overview cf. also C. Zatschler, *European Union Litigation*, in *European Review of Contract Law*, 8(4), 2012, pp. 456–469.

⁹³ Cf. De Witte, *Direct effect, Primacy and the nature of Legal order* cit., *supra*; K. Alter, *Explaining National Court Acceptance of European Court Jurisprudence: A Critical Evaluation of Theories of Legal Integration*, in A. Slaughter, A. Stone Sweet & J.H.H. Weiler, *The European Court* cit., *supra*, pp. 227-252, at 232.

⁹⁴ See the example in ft. 92.

⁹⁵ A common idea in the U.K.: Francis Bennion, *Statutory Interpretation*, 5th ed., London, 2008, pp. 167 ff.; already in Rupert Cross & James W. Harris, *Precedent in English Law*, 4th ed., Clarendon Press: Oxford, 1991, pp. 178 ff.

⁹⁶ Garben, cit. *supra*, at 34.

⁹⁷ For example, equal treatment in the *Sturgeon* case, from which the CJEU derives the principle of compensatory damages for loss of time; or prohibition of discrimination on grounds of age in the *Mangold* case, from which it derives the principle of good faith.

interests of the citizens. They should be debated in a broader institutional framework.

Briefly, on the policy issues: it is particularly curious that in the Law of Contract and Consumer Protection the CJEU omits any reference to the Charter of Fundamental Rights after the entry into force of the Lisbon Treaty, given that the Charter “has the same legal value as the Treaties” (Art. 6.1 TEU). As a primary source of EU law, any reference to it would render the judicial activism of the CJEU more acceptable: the national judges may be more willing to enforce a Charter, or a Constitution containing principles and rules, disregarding any national provision contrary to it, than to follow CJEU precedents based on general principles. An express reference to the Charter of Fundamental Rights of the EU could legitimize, within the separation of powers doctrine, the judicial activism of the CJEU. This approach would reassure national courts and governments, who would feel the horizontal separation of powers threat to a lesser extent. At the same time, it would not irritate common lawyers, because the “new common law as an interpretation of a statute” is gaining importance in daily adjudication of private law claims in England⁹⁸. What matters is doing justice for the parties in the case⁹⁹.

Differences, nevertheless, will continue to exist among national legal systems.

The judiciary is a bureaucracy, not only an epistemic community: judges are civil servants working for the State¹⁰⁰. The 28 judiciaries of the Member States and the CJEU are not neutral arbiters in the process of adjudication. A

⁹⁸ See A. S. Burrows, *The Relationship between Common Law and Statute in the Law of Obligations*, 128 *Law Quarterly Review*, 2012, pp. 232-259, at 240. Statute law cannot have the effect of freezing or turning back the development of the common law; moreover, statute law can be used by analogy in developing the common law (as the interpretation of the Human Rights Act 1998 gave stimulus to stronger protection of privacy for breach of confidence, see *Campbell v. Mirror Group of Newspapers Ltd* [2004] UKHL 22). This is not to be confused with the different idea of “equity of the statute”. The mediaeval idea, which raised a different question as to how far one can interpret a statute by analogy, fell out of favor in the 18th century because it allowed much room for the courts to enlarge statutes so as to apply them to situations that were not covered by the words of the statutes but were regarded by the courts as within the spirit of the law and analogous. See P. Atiyah, *Common Law and Statute Law*, 48 *MLR* 1, 1985, at 7 ff. As against this view, some commentators have noted that the two processes merely differ in degree and not in kind. N. Mac Cormick wrote that the process of reasoning from or with precedents is not radically different from that of reasoning from or with statutes: the differences are in fact at most differences of degree, not in kind. Cf. the author in *Legal Reasoning and Legal Theory*, Oxford, 1978, at 213. Cf. N. Mac Cormick, R. S. Summers, *Interpreting Statutes: A Comparative Study*, London, 1991, pp. 178 ff.

⁹⁹ Burrows, cit. at 247.

¹⁰⁰ In Europe the selection and appointment of judges is not political (as in the USA), but depends on academic qualifications and practical experience, and (in civil law countries) on a state exam as well. See Alter, *Establishing the Supremacy*, cit., at 47; D. Piana, *Judicial Accountabilities in New Europe*, Farnham, Ashgate, 2010; and Bell cit., *supra*.

theory of judicial interests¹⁰¹ has been outlined starting from the assumption that political interests are *inherent* to the legal process, and that in this process some actors win while others lose. Judges' specific interests are primarily their independence (legal autonomy from political bodies), their authority (the court is a strategic actor in calculating the political context in which it operates, so as to avoid the risk of provoking a reaction that reverses its decision) and their influence (the ability to make decisions that influence the policy process); these are the key factors which qualify the judiciary and its activity. So, differences are not necessarily a product of technical (legal) factors, such as an interpretation "not in conformity" with European law, or a failure to recognize certain principles of private law that other national courts apply, due to the *common law vs. civil law* division.

The case of good faith illustrates this point well. The general view among commentators appears to be that in English contract law a principle of good faith of general application is absent¹⁰². However, as Mr. Justice Leggatt noted recently¹⁰³:

"It would be a mistake, moreover, to suppose that willingness to recognise a doctrine of good faith in the performance of contracts reflects a divide between civil law and common law systems or between continental paternalism and Anglo-Saxon individualism. Any such notion is gainsaid by that fact that such a doctrine has long been recognised in the United States. The New York Court of Appeals said in 1918: "Every contract implies good faith and fair dealing between the parties to it": Wigand v Bachmann-Bechtel Brewing Co, 222 NY 272 at 277. The Uniform Commercial Code, first promulgated in 1951 and which has been adopted by many States, provides in section 1-203 that "every contract or duty within this Act imposes an obligation

¹⁰¹ Alter, *Establishing the Supremacy*, cit. at 45 ff.

¹⁰² *Chitty on Contract Law* (31st ed.), Vol 1, 2012, para 1-039, pp. 31 ff. On the "traditional English hostility" towards a doctrine of good faith see also McKendrick, *Contract Law* (9th ed.), 2012, pp. 221 ff. Cf. the following observations of Bingham LJ in *Interfoto Picture Library Ltd v. Stiletto Visual Programmes Ltd* [1989] 1 QB 433 at 439: "In many civil law systems, and perhaps in most legal systems outside the common law world, the law of obligations recognises and enforces an overriding principle that in making and carrying out contracts parties should act in good faith. This does not simply mean that they should not deceive each other, a principle which any legal system must recognise; its effect is perhaps most aptly conveyed by such metaphorical colloquialisms as 'playing fair', 'coming clean' or 'putting one's cards face upwards on the table.' It is in essence a principle of fair open dealing... English law has, characteristically, committed itself to no such overriding principle but has developed piecemeal solutions in response to demonstrated problems of unfairness."

¹⁰³ *Yam Seng Pte Limited v. International Trade Corporation Limited*, [2013] EWHC 111 (QB), 01/02/2013. It was a claim for breach of contract and misrepresentation, brought by YSP, a distributor in Singapore, against ITC, an English supplier. The goods in question were some fragrances bearing the brand name of the football team "Manchester United". The distribution agreement gave YSP the exclusive right to promote and sell these products in duty-free markets throughout Far East and China. At the time the agreement was entered into, however, ITC had not yet acquired all the rights it purported to license. The issue at stake is whether an implied term in the Agreement that the parties would deal with each other in good faith exists.

of good faith in its performance or enforcement.”¹⁰⁴. Similarly, the Restatement (Second) of Contracts states in section 205 that ‘every contract imposes upon each party a duty of good faith and fair dealing in its performance and enforcement’.¹⁰⁵ Leggatt went on to say:

“Under English law a duty of good faith is implied by law as an incident of certain categories of contract, for example contracts of employment and contracts between partners or others whose relationship is characterised as a fiduciary one. I doubt that English law has reached the stage, however, where it is ready to recognise a requirement of good faith as a duty implied by law, even as a default rule, into all commercial contracts. Nevertheless, there seems to me to be no difficulty, following the established methodology of English law for the implication of terms in fact, in implying such a duty in any ordinary commercial contract based on the presumed intention of the parties (...). As a matter of construction, it is hard to envisage any contract which would not reasonably be understood as requiring honesty in its performance. The same conclusion is reached if the traditional tests for the implication of a term are used. In particular the requirement that parties will behave honestly is so obvious that it goes without saying. Such a requirement is also necessary to give business efficacy to commercial transactions.”¹⁰⁶.

Not surprisingly, this implicit recognition of good faith in all commercial contracts within English law emerged after that the controversial Academic Common Frame of Reference was published (the well-known ‘tool-box’ for harmonizing European private law¹⁰⁷), and a new Regulation on the optional instrument for European Sales Law (CESL) proposed¹⁰⁸. In these instruments, which are paving the way for a European restatement (or codification) of contract (or private) law, “good faith and fair dealing” is a recognized principle, based on Treaties such as the Treaty on the Functioning of the EU, the European Convention on Human Rights and the EU Charter of Fundamental Rights¹⁰⁹.

While a sort of codification of the Law of Contract¹¹⁰ has become the main object of the full (targeted) harmonization strategy of the European legislature, the CJEU case-law is showing in this field, and in the inter-related

¹⁰⁴ According to D.G. Baird, *Pre-contractual disclosure duties under the Common European Sales Law*, in 50 *CML Rev.*, 2013, pp. 297-310, at 298, the UCC was remarkably successful in unifying the commercial law of fifty different jurisdictions and good faith and fair dealing is entirely in the mainstream of the American commercial law tradition.

¹⁰⁵ See the judgment *Yam Seng Pte Limited*, at para. 125.

¹⁰⁶ See paras. 131 and 137 of the judgment *Yam Seng Pte Limited*.

¹⁰⁷ See *supra* ft. 11 and 34.

¹⁰⁸ On the issues of good faith and fair dealing in the courts’ assessment on the basis of the DCFR and CESL provisions, cf. S. Whittaker, *Operation of the Common European Sales Law*, 50 *CML Rev.*, 2013, pp. 85-108, at 104 ff.

¹⁰⁹ Cf. the Introduction to the DCFR cit., *supra*. On the definition of good faith see Comments Book I, Art. 1:103.

¹¹⁰ At the moment, a codification of all private law seems out of the question.

field of consumer contracts and consumer protection¹¹¹, that principles of private law are used to mediate the liberal perspective with a socially-oriented approach: for example, the principle of freedom of contract with the good faith and fair dealing principle, where the latter is used as a rule of interpretation for the “moralization” of contract law.

Conflicting interests, that is a high level of economic performance on one side, and public policies aimed at protecting disadvantaged parties on the other side, have recently found a compromise in the so-called “result-oriented” approach¹¹². As the CJEU recently recalled “*in applying national law, the national court called upon to interpret it is required to do so, as far as possible, in the light of the wording and the purpose of the directive, in order to achieve the result pursued by that directive and thereby comply with the third paragraph of Article 288 TFEU*”¹¹³. The CJEU assumes that national rules which go beyond the scope of a directive are prohibited, because they would run counter to the directive’s full harmonization strategy.

This is well illustrated also by the CJEU’s judgments on the unfairness of terms in consumer contracts under Art. 3.1 of Directive 93/13¹¹⁴. In order to substantially define the concept of “unfair term”, the CJEU provides guidance to national courts as to how to apply the interpretation provided in response to a request for a preliminary ruling. However, it does not rule on the application of these general criteria in a given case, because the national court is entitled to

¹¹¹ As we said above, after much and still unresolved debate, the area of contract law is understood as comprising consumer protection as well (both B2B and B2C transactions). This is reflected, at national level, in the adoption of a monist model, according to which the rules on consumer protection have been inserted into the Civil code (as in the case of the BGB in Germany). It is less evident in other countries that adopted the dualist model, i.e. a Consumer code separate from the Civil code (as in the case of France, Italy and Spain, for example), where nevertheless Civil Codes rules are used to fill the gaps of the consumer law.

¹¹² The two-track concept of full harmonization is traced in V. Mak, *Full Harmonization in Europe Private Law: a two-track concept*, in *ERPL* 2012, pp. 213-236. The “result oriented” approach is to be found in contract law and has been adopted in recent cases on Unfair Commercial Practice, while the “basis of liability” approach has been developed by the Court of Justice interpreting the Product Liability Directive in *Commission v. France*, Case C- 52/2000 [2002] ERC I – 3827, and it is applied to tort law (both are discussed in her article).

The point is that both approaches, “basis of liability” and “result-oriented”, are still possible in their respective areas of development (product liability and unfair commercial practices); however, these approaches are perhaps no longer appropriate for the CJEU, since the European institutions now view EU integration more in terms of full harmonization.

¹¹³ Case C-428/11, *Purely Creative Ltd, et al. v. Office of Fair Trading* [2012], nyr.: the preliminary ruling concerns interpretation of paragraph 31 of Annex I to Directive 2005/29/EC on Unfair Commercial Practices. It comes from the Court of Appeal (England and Wales) (Civil Division); the dispute was between five undertakings specialized in the distribution of mailings together with a number of people who had worked for those undertakings and the Office of Fair Trading (OFT), which is responsible for enforcing consumer protection laws, regarding the practices used by the trader.

¹¹⁴ For a synthesis, cf. J. Stuyck, *Unfair terms*, in G. Howells, R. Schultze (eds.), *Modernising and Harmonising Consumer Contract Law*, Munich, Sellier, 2009, pp. 115 ff.

decide itself whether a contract term is unfair¹¹⁵. It is for national courts to explain the significance of what is contrary to the requirement of good faith causing a significant imbalance of the parties' rights and obligations arising from the contract. In fact, it requires evaluation of the particular legal context, to be balanced against any other relevant elements, such as the nature of goods and services for which the contract was concluded, all the circumstances attending the conclusion of the contract and all the other terms of the contracts (or of another contract on which it is dependent), according to Art. 4.1 Dir. 93/13. Although Member States currently seem to converge towards acceptance of a general duty of good faith and fair dealing in contracting, national courts may seize on the wording of the general principle and use the metaphorical open texture language of good faith¹¹⁶, leaving unchanged the existing discrepancies among national legal systems¹¹⁷. Thus, there remains considerable room for increasing judicial intervention, notwithstanding the CJEU's detailed guidance: the attempt to balance the plurality of values and principles underlying private law with the goal of substantive justice leaves considerable room to *manoeuvre* to national judges, who give effect to principles at national levels¹¹⁸.

7. Final Remarks

In this paper we have examined the function of gap-filling by the CJEU in the European legal space and the potential existence of a 'European equity'. In conclusion, if a European equity exists, it expresses the core principles central to justice, and it is used by the CJEU in balancing conflicting interests behind general principles. Moreover, this concept is essential to achieve compromise between the European Union and the Member States, whose main actors are citizens who are both national and European citizens at the same time. Accordingly, the system can work as a whole only if European equity is applied in the interest of European citizens. In fact, the *telos* of the principle of supremacy is that national courts are required to give immediate effect to provisions of directly effective European law in cases which arise before them,

¹¹⁵ Cf. *Freiburger* case, C-237/02 [2004] ECR I-3403, overruled to *Océano Grupo Editorial* judgment C-240-244/98 [2000] ECR I-4941, where the CJEU was willing to hold a term "unfair" in a consumer contract under Directive 93/13. Cf. also the *Pereničová and Perenič* judgment, Case C-453/10 [2012], nyr; *Imitel* judgment, Case C-472/10, [2012], nyr; *Banco Español de Crédito* judgment, Case C-618/10 [2012], nyr; and also the *RWE Vertrieb AG* judgment, Case C-92/11 [2013], nyr.

¹¹⁶ See C. Balzanella, L. Morra, P. Rossi, *Metaphor in legal language: clarity or obscurity?*, in Cacciaguidi- Fahy S. & Wagner A. (eds.), *Clarifying Legal Drafting: Practice and Tools*, Oxford, Peter Lang, 2006; and B. Pasa, *Old terms for new concepts in consumer contracts?* in *Jean Monnet Working Papers NYU School of Law*, n. 09/07, pp. 1-31, 2007, at <http://www.jeanmonnetprogram.org/papers/07/070901.html>, at 11 ff.

¹¹⁷ Cf. L. Antonioli, F. Fiorentini (eds.), *A Factual Assessment of the Draft Common Frame of Reference*, Munich, Sellier, 2010, at 255.

¹¹⁸ *Freiburger* case, cit. *supra*. ft 115.

and to ignore or to set aside any national law which could impede the application of European law. On the other side, the principle of equivalence is aimed at preventing discrimination (European or national) based on rights that have been infringed. Finally, the principle of national autonomy permits European citizens to enforce their rights according to their own national legal rules, which they will be most familiar with.

Analysis of the function of gap-filling reveals similarities between European judicial creativity and the Chancellor's jurisdiction which developed in England from the 14th century. In its attempts to fill *lacunae*, the CJEU acts under the Treaties, and formally respects the legal order where it operates. The CJEU creates its doctrines according to European law, but sometimes against existing national legal rules and principles, in the same way that the Chancellor's doctrines "*followed the law*": they were formally compatible with the common law Courts' jurisdiction, but they substantially impinged on the application of common law rules.

National courts are also developing a similar function, filling the *lacunae* left by European law within national remedial frameworks; however, the relationship between European and national levels, as we said above, is conflictual. At the same time, European equity encompasses all general principles provided for by the common constitutional traditions of the Member States and international instruments, and this can make interaction less conflictual¹¹⁹.

Considerable criticism of the CJEU's activism reflects national governments' concerns regarding the multi-layer system of European private law in general. In addition, national courts' resistance against the alleged competence of the CJEU to extrapolate common principles of private law from more general values is due to the lack of a shared methodology for distilling principles¹²⁰, as well as of a common policy on what should be the driving or underlying principles in European private law¹²¹. In this respect, commentators have noted both the "EU-friendly approach" of national constitutional and supreme courts, and the "boycotting decisions" of national lower courts¹²². Consistency would demand that national courts should be bound by the CJEU interpretation and should not re-interpret the case again. But the judiciary is a

¹¹⁹ Cf. Mak cit., *supra*, 338.

¹²⁰ Mak cit. 338; see also A. Metzger, *Extra legem, intra ius: Allgemeine Rechtsgrundsätze im Europäischen Privatrecht*, Mohr Siebeck, 2009; Lenaerts & Gutiérrez-Fons cit., *supra*.

¹²¹ See also Mak, *Constitutional Aspects of a European Civil Code*, in A.S. Hartkamp, M.W. Hesselink, E.H. Hondius, C. Mak, C.E du Perron, (eds.), *Towards a European Civil Code*, 4th ed, Kluwer, 2011, at 347; M.W. Hesselink, *If You don't Like Our Principles We have Others. On Core Values and Underlying Principles in European Private Law: A Critical discussion on the New Principles Section in the Draft Common Frame of Reference*, in R Brownsworth, H-W. Micklitz, L. Niglia, S. Weatherill (eds.), *The Foundations of European Private law*, Hart publ., Oxford, 2011, pp. 59-71.

¹²² See for example the German Constitutional Court's *Honeywell*, BVerfG 6 July 2010, 2 BvR 2661/06, *Honeywell*, para. 58, in Mak, cit., at 340.

bureaucracy, as we recalled above. Adjudication, in the sense of application of the law, requires value judgments, which will inevitably be political. While judges present themselves as neutral, operating under the fidelity-to-law doctrine, many allegedly neutral judicial opinions are not convincingly so¹²³. This raises the question of what really determines operational rules, beyond arguments claiming to be based on principles used by judges¹²⁴. Legalism fails with its assumption that legal reasoning is conclusive and that it alone shapes judicial behaviour: legal texts and legal methods alone can seldom resolve interpretative disagreement. Neo-realism fails because it misidentifies how political factors shape judicial behaviour, overstating the link between judges and national interest. Neo-functionalism¹²⁵ seems to be more promising because it recognizes that judges, like all actors in a legal system, pursue their “self-interest”; but how judicial self-interest is defined remains unclear¹²⁶.

¹²³ D. Kennedy, *A Critique of Adjudication (fin de siècle)*, Harvard, 1998, at pp. 29 ff., distinguishes five general strategies dealing with the question. The first (neutrality) associated with classical positivism of Hart; the second one associated with Kelsen, Unger and others, showing the opposite, i.e. that the application of a rule cannot be isolated from subjective influences (relying on linguistic philosophers); the third position associated with Oliver W. Holmes, which accepts that what is not rule application is at least methodologically indistinguishable from judicial legislation; the fourth position associated with Cardozo, Llewellyn, Fuller, Hart and Sacks, to Ronald Dworkin, which proposes a middle term in between rule application and judicial legislation, through the method of “coherence” or “fit”, a method that is focused on the choice among different proposed rules to fill the gap (the judge is making law, but without consulting his own preferences, because he is following a prior case or other rules of the system enacting the system itself, in other words, he is following a rational plan; a fifth position, that he called the civil law version of adjudication, which addresses the problem from the presumption that the Code is the coherent framework with a particular conceptual structure, and when the case cannot be solved by semantic or deductive analysis then the judge will apply a teleological approach, in order to disclose the social purpose of the norm.

¹²⁴ The distinction between operational rules and legal concepts (i.e. symbolic sets of rules) implies that is necessary to deconstruct the law beyond the peculiar legal discourse of one legal system, in order to understand how the legal actors of the system are working. Cf. R. Sacco, *Legal formants* cit., *supra*. The phenomenon is explained through the theory of legal formants which are all those formative elements that make any given legal rule (such as statutes, general propositions, particular definitions, judgments, reasons, holdings, customs, and usage). All of these formative elements are not necessarily coherent with each other within each system. Only domestic jurists assume such a coherence. On the contrary, legal formants are usually conflicting and can better be pictured in a competitive relationship with one another. Thus, within a given legal system, the rules are not uniform, not only because one rule may be given by case law, another by scholars and yet another one by statutes. Within each one of these sources formants also compete with each other.

¹²⁵ A-M. Burley, W. Mattli, *Europe before the Court*, in *International Organization*, 47(1), 1993, pp. 41-76.

¹²⁶ Accordingly, the CJEU’s legal thought could not shape national courts behavior. Through the neo-functionalist approach, the European legal system has expanded and prospered by creating individual incentives to motivate actors within European institutions and within national legal systems, to promote legal integration. K. Alter, *Explaining National Court*

Opposition by national courts during recent years has led the CJEU to practise judicial minimalism (or self-restraint). To avoid rupture with national courts, the CJEU can find reasons not to apply existing precedents to a specific case, or find a way to avoid certain policy issues, exactly as it is doing in the private law domain. Thus, the interaction between national and supranational judges is not so dramatic, as described by some authors with reference to apocalyptic metaphors¹²⁷. We have analysed two specific areas in order to consider to what extent we can share these catastrophic points of view. Our conclusion is that we need fresh contributions to the debate on the European multi-layer system of adjudication from a private comparative law perspective.

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Acceptance of European Court Jurisprudence: A Critical Evaluation of Theories of Legal Integration, in A. Slaughter, A. Stone Sweet & J.H.H. Weiler, *The European Court* cit., pp. 227-252.

¹²⁷ See for example A. Dyevre, *Judicial non-compliance in a Multi-level, Non-hierarchical Legal Order: Isolated Incident or Omen of Judicial Armageddon?* paper 2012, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2084639.