The Transformation of Economic Law

Essays in Honour of Hans-W. Micklitz

Edited by
Lucila de Almeida
Marta Cantero Gamito
Mateja Durovic
and
Kai P. Purnhagen

With the assistance of Evgenia Ralli

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Introduction

LUCILA DE ALMEIDA, MARTA CANTERO GAMITO, MATEJA DUROVIC, KAI P. PURNHAGEN

This book is written in honour of Hans-W. Micklitz, an outstanding legal scholar and personality, who has gained international recognition for dedicating his extensive and fruitful career to diverse areas of law: European economic law, European private law, national and European consumer law and legal theory, theories of private law and social justice. This book is the product of the collaborative endeavours of its contributors, all of whom have a special connection with Hans-W. Micklitz as his doctoral supervisees or research assistants. In Summer 2019, the term of Hans-W. Micklitz as a holder of the Chair for Economic Law at the Law Department of the EUI – who is humble enough to insist on being addressed only as Hans – comes to an end. From 2007 to 2019, dozens of PhD and LLM supervisees, Max Weber and other post-doctoral fellows and research assistants have shared the wonderful experience of working and collaborating with Hans. In Summer 2019, Hans is also celebrating his 70th birthday.

During many decades of his impressive career, Hans has contributed to transforming the landscape the many areas of law listed above. Born in 1949, Hans studied law and sociology at Mainz, Lausanne/Geneva, Giessen and Hamburg. Prior to his appointment at the EUI, Hans was the Head of the Institute of European and Consumer Law (VIEW) in Bamberg. He worked as a consultant on diverse projects of the OECD, UNEP Geneva Switzerland/Nairobi Kenya and Consumers International (CI) Den Haag Netherlands/Penang Malaysia. Hans was a visiting scholar at the University of Michigan, Ann Arbor and Jean Monnet Fellow at the European University Institute, Florence. He was also a visiting professor at Somerville College at the University of Oxford and was a co-founder of the Centre of Excellence in Foundations of European Law and Politics at the University of Helsinki. The crowning of Hans' research excellence was that during his time at the EUI, he became the recipient of the extremely prestigious ERC Grant 2011–2016 on *European Regulatory Private Law: the Transformation of European Private Law from Autonomy to Functionalism in Competition and Regulation (ERPL)*. Hans is currently a Finland Distinguished Professor (FiDiPro), a funding programme of the Academy of Finland, for the period 2015–2020. He also keeps ongoing

consultancies for ministries in Austria, Germany, the UK, the European Commission, OECD, UNEP, GIZ and several non-governmental organisations. We are confident that Hans' scholarhip will not come to an end with his departure from the EUI, and that many new books, book chapters, articles, commentaries and theses will be written, edited and supervised under Hans' guidance.

This edited volume is a small gesture of appreciation to Hans from his EUI-related 'academic children'. Rather than representing a collection of chapters written by his academic peers, colleagues and friends (bearing in mind their number, such a project would certainly be unfeasible), this book has gathered the work of Hans' students. The collection of chapters is to be read as the influence of Hans' dialogues in the early stage of the academic career of 31 young legal scholars. The majority of the contributors are Hans' supervisees, but there are also post-doctoral researchers and research assistants who have had the chance to engage with his work in books and in person while at the EUI. Hans' scholarship has deeply influenced his supervisees and researchers to perceive the role and the rule of private and economic law in various social contexts, jurisdictions, and legal theories. The variety of legal issues covered in this book – from broad conceptualisation of consumer law and regulation to the role of national courts and the Court of Justice of the European Union – merely mirror Hans' relentless curiosity and academic excellence.

Besides being a leading legal scholar, Hans is a wonderful, wise and compassionate human being, always very kind, warm, supportive, ready to help and encourage his students and colleagues. This book celebrates Hans' career thus far, and explores the topical areas of law substantially shaped by his academic work. The 20 chapters of this edited volume are divided into three sections. Each section is devoted to a subject that has received Hans' attention while at the EUI:

I. EU consumer law;
II. European private law and access justice;
III. the CJEU between the individual citizen and the Member States.

The editors of this book owe Evgenia Ralli, one of the youngest of Hans' PhD students, a debt of gratitude for her incredible help with this book. Evgenia really went above and beyond to help us setting up this entire project, so all her efforts need to be highly appreciated, for without her, the publication of this book would not have been possible. The editors would also like to thank Hans' very appreciated friends and colleagues Dennis Patterson and Thomas Roethe for their forewords. We would also like to express our appreciation to Claudia de Concini, Hans' administrative assistant at the EUI for all her help with the organisation of the conference in Hans' honour at the EUI.

Working with Hans means that it is not only his office door that is always open – he also warm-heartedly opens the doors of his home. Alongside him stands Alexa, such a wonderful person, and a generous hostess who kindly welcomes us in Florence as very dear guests. Getting to know Alexa is also one of the privileges of working with Hans. Her thoughtful support extends beyond Hans,

to his supervisees. Throughout and after our stays at the EUI, Alexa has remained a very important figure of our lives in Florence. We owe her much gratitude for being our 'accomplice' in making this possible. Danke, Alexa!

Finally, the editors wish to thank Hart Publishing, and Sinead Moloney in particular, for publishing this book and for the support shown to us from the very beginning. This unconditional support allows us, Hans' academic children, to pay our tribute and show our gratitude to the significant contribution that Hans-W. Micklitz has made to legal scholarship.

Part I. EU Consumer Law

EU consumer law is one of the cores of European private law. It is the subject that motivated Hans' legal scholarship throughout his academic career and the source of his inspiration to uphold claims about the foundations of the European justice.

Hanna Schebesta and *Kai P. Purnhagen* examine, in Chapter 2, the ambiguous concept of average consumer as established under Directive 2005/29/EC on unfair commercial practices. In particular, they examine how the CJEU has assessed the average consumer. In order to comprehend how the CJEU has understood the concept of average consumer, the authors apply a mixed-method approach combining doctrinal and empirical analysis. Doctrinal analysis determines where the 'average consumer' is used in EU law and how the respective legislative and juridical acts relate to each other. Subsequently, an empirical (qualitative software-supported) analysis determines how these legislative and juridical acts operationalise the 'average consumer' benchmark. Whereas a large bulk of jurisprudence concerns the average consumer test in primary law or has been applied to interpret secondary legislation which does not make explicit reference to the consumer benchmark, the analysis in this chapter is limited to those cases where a clear link between the wording of secondary law and the Court's jurisprudence can be established. This leaves aside the cases where the CJEU interpreted secondary legislation in light of primary law or primary law directly.

Mateja Durovic examines contract law remedies for the breach of the rules on unfair commercial practices. The main purpose of Chapter 3 is to assess recent developments in this area of law after the CJEU decision in *Bankia*. In *Bankia*, the CJEU provided some clarifications regarding the consequences of traders' engagement in unfair commercial practices and what national courts are expected (or rather not expected) to do according to the text of the Unfair Commercial Practices Directives (UCPD). The Court said that, contrary to the example of fairness of contract terms established by Directive 93/13/EEC on unfair contract terms, the national courts are not obliged to assess *ex officio*, ie by its own motion, whether a particular contract or any of its term has been concluded under the impact of unfair commercial practices. In such a manner, the CJEU has actually lowered the scope of protection offered by the UCPD and failed to provide a more

effective protection to an individual consumer who has been affected by an unfair commercial practice. Eventually, this chapter demonstrates that in its decision in *Bankia*, the CJEU failed to explicitly confirm a closer connection between the rules on unfair commercial practices and contract law, and expand the application of *ex officio* obligation of the national courts of the Member States to verify fairness of the contract terms to the assessment whether a contract has been concluded as a result of unfair commercial practice.

Peter Rott examines a consumer perspective on algorithms. Chapter 4 takes the subjective consumer perspective rather than the perspective of objective compliance with the law. It looks at automated decision-making through algorithms, that tend to give no reasons, as perceived arbitrariness on the part of business operators. Where decisions are made directly by an algorithm or are prepared by an algorithm and then implemented by a natural person that does not have the intention and/or the ability to review the 'recommendation' of the algorithm, this type of procedure must, first of all, be made explicit to consumers so that they can avoid it by turning to a different trader. Where this is impossible because the trader in question has a dominant position on the market or the same algorithm is used by the vast majority of traders, safeguards that are typical for decisions of public authorities must be in place. Then, constitutional principles such as human dignity, the right to equal treatment and the rule of law require the trader to give comprehensible reasons for the decision; and the reason cannot solely be the result of a calculation exercise.

Irina Domurath examines the legal framework for consumer profiling under the new EU General Data Protection Regulation (GDPR). The problems discussed in Chapter 5 deals with privacy – including consent, anonymisation and data minimisation as well as discrimination. Manifold gaps in the legal framework with regard to data protection hinder individuals from understanding, tracing, or contesting the use of their data and profiles. Irina claims that because of the normative power of algorithmic governance generally and consumer profiles in particular, a system of 'technological totalitarianism' has developed, which escapes individual and traditional regulatory control. Recognising the vast research possibilities in this field, this chapter shows that many tools and principles already exist in the GDPR that could help to overcome those challenges, if they are strengthened with regard to unambiguity and enforcement and streamlined into all cross-cutting fields of law, including private law. Political debate needs to make explicit the societal effects and discuss the desirability of technological governance, if individuals and regulators are not to be subjected to unfettered algorithmic control of private companies.

Agnieszka Jabłonowska and *Przemysław Pałka* consider the interplay between the EU consumer law and artificial intelligence. Chapter 6 begins by addressing three topical issues in law and artificial intelligence (AI) scholarship: the definition of 'artificial intelligence', the problem of the 'black box' and liability for the actions of AI. Moreover, it addresses certain misconceptions present is legal discourses, and proposes conceptual distinctions to remedy them. The argument of the

chapter subsequently moves forward to three issues specific to consumer law: the asymmetry between businesses and consumers; the emergence of AI applications in consumer markets; and some of the potential challenges which they raise, particularly those to consumers' autonomy. Deeper intellectual engagement with the challenges posed to the doctrine and the practice of consumer law by the development of AI is necessary before one can move to recommendations on how the law should be changed. The chapter concludes with a plea to develop AI-based applications empowering the consumers and the civil society.

Part II. European Private Law and Access Justice

Hans-W. Micklitz's legal scholarship has been rounded off with the development of his distinct vision on European private law. He understood that the guiding principles informing national private law, namely autonomy and freedom of contract, differed from those underpinning the EU legal order – European private law was not the harmonisation of domestic legal private law regimes. Moving away from the mainstream legal scholarship focused on the construction of a civil code for Europe, Hans became persuaded by the idea of understanding the positive and normative features of a private law that was genuinely EUropean.

Guido Comparato and Rónán Condon compare, in Chapter 7, the transformations taking place in European private law in recent years to the transformations first described a century ago in French legal scholarship, when confronted with the interpretation of the French Code Civil in a deeply changed social context. That scholarship, epitomised by personalities like Léon Duguit, challenged the dominant legal formalism. The authors argue that Duguit's legal functionalism remains a useful lens through which to examine contemporary transformations of private law and the state in an EU context. The contribution thus highlights the characteristics of those transformations separated by a century of legal evolution, attempting to trace them in the specific area of European private law.

Unlike the rules contained in nineteenth century codes, and that informed domestic private law regimes, Hans found that EU rules on private law had a regulatory purpose. These rules, moreover, were not to be found as a separated or dedicated branch of EU law, but were scattered along different internal market rules, at the intersections between public and private law. He was determined to identify and systematise these rules, and to test whether they had the necessary elements to constitute a legal regime of their own. This endeavour earned him an ERC Grant (2011–2016) to develop his ERPL Project at the EUI.

One of the main hypotheses on which ERPL was built was 'self-sufficiency'. *Marta Cantero Gamito and Federico Della Negra* sketch the postulates of this hypothesis in Chapter 8. Using the examples of telecommunications and investment services regulation, they find that the hypothesis of self-sufficiency is actually reflected in the law-making and enforcement of these two key sectors

of the internal market. Both sectors are informed by a sector-specific rationality that permeates the contract rules contained in the sector-specific legal regimes. A sector-specific rationality emerges as a result of the configuration of the sector to attain regulatory outcomes, ie competition or consumer protection. This results in a transformed private legal order, created and enforced at the European level via old and new modes of governance.

In Chapter 9, *Lucila de Almeida and Fabrizio Esposito* engage with the distinct concept of access justice as proposed by Hans in his latest book, *The Politics of Justice in European Private Law*. The book is a thorough reflection on the relevant findings of his five-year ERPL project. By comparing the mature account and the critiques to the earlier account of 'access justice', the authors aim to shed lights on the most important features of Hans' theory of justice. The chapter first introduces the three conditions that materialise the notion of access justice – its distinctive normative ground represented by the ideas of fair access, the access to justice, and the societal justice. Second, the three conditions of the mature account of access justice are illustrated in the context of the EU energy law throughout the 30 years of positive integration. Third, the authors consider early critiques to access justice and reflect upon how the mature account of access justice addresses them. They conclude that the mature account of access justice has been largely successful in addressing these critiques.

The aspirations of the EU legal order to function independently from domestic legal regimes cover other areas beyond Services of General Economic Interest (SGEIs), for example, taxation and insolvency law. In this light, while the EU legal basis for the regulation of SGEIs is generally not contested, EU initiatives in other areas may involve a more complex justification. In this line, *Katerina Pantazatou* illustrates in Chapter 10 how a combination of recent developments has crafted a detailed justification for EU action in direct taxation. She shows how the financial and economic crisis, in conjunction with the globalisation and the digitalisation of the economy, has shifted the focus of EU taxation from the taxpayer to the Member States; from the elimination of double taxation to the prevention of tax avoidance. These advancements aim at promoting a fair and efficient tax system for the Digital Single Market, and may lead to the phasing out of intra-EU tax competition.

Annika Wolf and Heikki Marjosola in Chapter 11 provide an account of the evolution of EU insolvency law with a view to demonstrating that, in its attempts to harmonise insolvency law across Member States, the EU might adopt more drastic regulatory approaches (eg passing a Regulation) if Member States render incapable the putting in place of a coherent level playing field for insolvency proceedings across the EU.

Among the different regulatory approaches for the regulation of ERPL, the European Commission does not completely abandon the idea of crafting a unified EU contract law. This is the claim of *Antonio Marcacci* in Chapter 12. In his view, the European Commission is paving the way for establishing a 'brand new contract standard' for digital financial cross-border transactions. To conclude, new modes of governance are also identified in the EU regulation of food chains and financial markets.

In Chapter 13, *María Paz de la Cuesta de los Mozos and Elena Sedano Varo* examine experimentalism in these two sectors. They demonstrate that borrowing experimentalism as a governance and regulatory choice in the EU approach to food chains and financial markets is a manifestation of the broader ERPL phenomenon.

Shortly after the ERPL project was rolled out, Hans realised that the characteristics of this phenomenon were spilling over the internal market. The transformations operated in private law were also visible in the non-EU world. Therefore, after five years developing the positive and normative postulates of European Regulatory Private Law within the EU, he embarked in a journey to find ERPL in the legal practice that takes place beyond the confines of the EU marketplace. Hans is currently investigating this dimension in the context of his ongoing project on The External Dimension of European Private Law (EDEPL), funded by the Academy of Finland. Two chapters in this volume show that there is certainly a tendency towards the external impact of European private law.

Barbara Warwas and Zdeněk Nový focus in Chapter 14 on how arbitration has contributed to the development of ERPL not only in its internal but also in its external dimension. Providing a thorough analysis of the implications of the CJEU judgment in *Achmea* (C-284/18) and paying attention to EU rules on out-of-court procedures, they contend that a perceived embryonic EU proceduralisation of arbitration results in the harmonisation of dispute settlement in international economic law.

Rozeta Karova focuses in Chapter 15 on the development of the Energy Community and its importance in the second decade of its existence. The Energy Community, covering the territories from Lisbon to Tbilisi, is an example of how the EU internal energy market could be extended to third countries. Through a historical tour of the organisation, she illustrates that the Energy Community serves as a template for exporting EU values, principles and rules beyond the EU's borders. Even though the Energy Community became a central piece in the EU's external energy policy and a reference point for regional cooperation in energy, the full potential of the Energy Community Treaty has not yet been explored. Finally, the Energy Community serves as a framework for energy relationships with the EU neighbours.

Part III. The CJEU between the Individual Citizen and the Member States

Time and again the CJEU comes under fire. Sometimes this is from the Member States, claiming loss of sovereignty; at other times it is from the trade unions and public interest groups, who fear the downgrading of 'the Social'. Hans, instead, has argued the exact opposite, at least concerning the remedies in the social and the citizens' rights order. For Hans, only more judicial activism can overcome the lacunae which results from a rights-remedy-procedure mechanism that is too much

designed to enforce economic freedoms. The CJEU's judgments have, therefore, been the starting point of many of Hans' works.

Bosko Tripkovic and Jan Zglinski demonstrate in Chapter 16 that there are certain structural and theoretically significant similarities between constitutional and private law pluralism in EU law. Using the notions of contestation and accommodation, the authors develop a comprehensive analytic framework, which accounts for the multiplicity of interactions between European and Member State legal, political, and evaluative structures, and integrates public and private law pluralisms into one coherent narrative. In contrast to the received wisdom that judicial institutions are at the forefront of contestation, the authors demonstrate that courts in fact facilitate the silent process of quotidian accommodation that occurs behind the scenes of grandiose legal and political conflicts.

Barend van Leeuwen claims that psychoanalytical concepts shed light on why preliminary references are made and on how the CJEU deals with them. In Chapter 17 the author examines a number of preliminary references to the CJEU from a psychoanalytical perspective to argue that psychoanalysis helps us to understand the interaction between national courts and the CJEU. Barend presents his argument in four steps. First, judges possess a legal 'mind', which is shaped by their national culture, national law and national legal training, in which EU law has to be accommodated. Second, the preliminary reference procedure establishes a therapeutic relationship between national courts and the CJEU. Third, psychoanalytical dynamics can be identified in this therapeutic relationship. Fourth, an analysis of these dynamics gives a better insight into the relationship and interaction between national courts and the CJEU in the preliminary reference procedure.

In Chapter 18 *Marija Bartl and Keiva Marie Carr* ask what lessons, if any, can be drawn from the decision in *Whitman and Others*, the most recent pronouncement on Brexit, if looked at through the prism of Kennedy's 'Three Globalisations of Legal Thought'. Setting out in turn the core characteristics of Classical Legal Thought, The Social, and Neo-Formalism, the authors proceed to critically examine the judgment, asking what light it sheds on the relation between law and politics in the EU. Kennedy's 'Three Globalisations of Legal Thought' in this regard provides useful analytics with which to explore the different legal consciousnesses that appear to co-exist in the judgment. Ultimately, the authors claim, *Wightman and Others* draws predominantly on the 'Social' legal thought, giving priority to the political expression and collective democratic rights of EU citizens.

Betül Kas explores, in Chapter 19, the transformation of the legal field by drawing on the socio-legal reconstruction of the *Janecek* case. *Janecek* concerns the private enforcement of EU environmental law before the national courts in the situation where the national authorities failed to comply with their planning obligations for clean urban air. Taking the 'law in action' the chapter draws on the perspective of the legal realist to reveal that no clear boundaries can be outlined between rights derived from the EU legal order and their enforcement by national institutions, remedies and procedures. Substance and procedure mutually influence each other.

Marco Rizzi and Lécia Vicente apply a comparative matrix methodology to distinguish the notions of defectiveness and, more prominently, causation as developed by the Supreme Court of the United States (SCOTUS) and the CJEU in vaccine liability cases. Chapter 20 discusses the legal frameworks governing the liability of vaccine manufacturers in the US and the EU to analyse then how the two courts have elaborated the nature and scope of the causal link. While the CJEU, continuing a controversial line of French jurisprudence on this matter, has adopted a form of dialectical reasoning in its interpretation of the Product Liability Directive, the SCOTUS stands firmly by a deductive way of causal inquiry, and follows a purely textual or plain meaning approach to the black letter law of relevant provisions.

In Chapter 21, *Annett Wunder* explores the use of the word 'solidarity' in the judgments of the CJEU. Solidarity has become a notion used frequently in the literature and the decisions of the Court. It appears on its own, but sometimes it is linked with other terms like European solidarity, national solidarity, financial solidarity, and furthermore, sometimes it is used as a synonym for equality or identity. The chapter argues that this knowledge may help us to better understand its usage in case law. The first part of this chapter defines solidarity; the second section looks at the use of the term 'solidarity' in the judgments of the CJEU; and the final part summarises the findings.