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English common law versus German *Systemdenken*? Internal versus external approaches

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Introduction

When Professor Hondius asked me to participate in this conference focussing on the methods of the law, I felt especially honoured. The subject assigned to me provides an opportunity to return to the subject of my book on *System und Prinzipien des Europäischen Vertragsrechts* in 2003¹ which Ewoud Hondius had kindly mentioned – if with some critical hints – in his survey on publications on European Private Law 2002-2004.² And it further includes a challenge to go one

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1 K. Riesenhuber, *System und Prinzipien des Europäischen Vertragsrechts*, 2003. Some aspects are highlighted in K. Riesenhuber, 'System and Principles of EC Contract Law', 2005 *European Review of Contract Law*, no. 1, pp. 297-322.

2 E. Hondius, 'European Private Law – Survey 2002-2004', 2004 *European Review of Private Law*, no. 6, pp. 855, 860 et seq. I reproduce the relevant part of his review here as it may, together with the present text, give the reader an (other) impression of my position.

'With his *Erlanger Habilitationsschrift* on the system and the principles of European contract law, written under the supervision of Stefan Grundmann, Karl Riesenhuber takes place in a long list of German and Austrian *professorabiles* (Drexler, Franzen, Grundmann, Heiderhoff, Heiss, Jansen, Kieninger, Leible, Lurger, Remien, Schmidt, Schulte-Nölke, Vogenauer, Wurmnest and others) who are eager to provide a theoretical basis for European private law or part thereof. European private law may well be "pointillistic", after a celebrated word coined by Kötz, this does not preclude that there is a system, is the conclusion of Riesenhuber. This notwithstanding the fact that the European legislature seems to be unfamiliar with this system: "An dem Teppich des Gemeinschaftsprivatrechts weben viele Brüsseler Generaldirektionen, ohne ein Muster vor Augen zu haben" ("the tapestry of Community private law is being woven by many of the directorates-general in the absence of any master plan"). In the first part of his three-part book, Riesenhuber analyses the system of European private law in general. In parts two and three he then focuses on Contract law. He concludes that European contract law is now based on the following principles: the *formale Rechtsgleichheit aller Privatrechtssubjekte* ("formal equality of all citizens"), freedom of contract limited by the obligation to inform for enterprise, *Selbstverantwortung* ("self-determination"), *pacta sunt servanda* limited by cooling-off periods, the freedom to determine the contents of contracts limited by legislative or judicial control, the relativity of the binding force of contract (only as between the parties). In the view of Riesenhuber, there is no European principle of good faith, nor of the *Transparenzprinzip* so popular in Germany, or of consumer protection. Neither are the theories of Micklitz on a *kompetitives Vertragsrecht* ("competitive contract law") or Lurger on *vertragliche Solidarität* ("contractual solidarity") prevailing in Europe. Riesenhuber's conclusions are somewhat surprising, taking into consideration that many directives which form the basis for the harmonisation of contract law precisely have been elaborated to protect consumers.'

step beyond. The focus of this conference, as Ewoud Hondius described it in his invitation letter, is on ‘the link – if any – [of the methodology of legal research] with other disciplines, such as art, economics, history, linguistics, psychology and sociology’. More specifically, Hondius asked Professor Bell and myself: ‘What is the better approach: on a case by case basis (common law) or aiming for a systematic overview (Germany)?’ I will address both, the specific question as well as the more general theme. The essay first discusses the general question of what constitutes a ‘systematic approach to law’ (below, 1) and whether such an approach is suitable for European (private) law (2) and what methods it applies (3). This lays the ground for an answer to the first specific question on a comparison between a systematic approach and the common law approach (4). It is submitted that while the sources of the law of the respective legal systems differ, the methods have more in common than the question suggests. Both methods take an ‘internal perspective’ of the law and are thus to be distinguished from the ‘external perspectives’ of the various ‘law and ...’ disciplines (5). I conclude with a summary and the suggestion that methods of the law, too, will ultimately be chosen by the ‘market’ in which the different approaches compete (6).

1. A systematic approach to law

Before we consider the potential conflict any further, we need to shed some more light on what a systematic approach to the law entails. This is all the more important as different centuries had different notions of a ‘system’.³ This is not the place to discuss various approaches and their historical development, and I will restrict myself to describing what I mean when I speak of a system. I should make it explicit at the outset that I will talk about the *lex lata* as a system. Correspondingly, a systematic approach is concerned with what German lawyers describe as *Dogmatik*: the teachings and doctrines of current law.⁴ It is particularly important to make a strict distinction between, on the one hand, *lex lata* from the law as it could be or as it has been or as it is in other countries or legal systems and, on the other, *lex lata* from the law as it should be (from one perspective or another). *Dogmatik* or a systematic approach is a perspective *de lege lata* and not *de lege ferenda*.

Returning to our definition of a system, we can first differentiate between the outer order of the law as it occurs in its division into different statutes (of different ranking) and their organisation in books, chapters, articles, paragraphs and sentences. German-tongue methodology speaks of an ‘outer system’ (*äußeres System*) and distinguishes this from the ‘inner system’ (*inneres System*). Following Claus-Wilhelm Canaris we can consider ‘unity’ (*Einheit*) and ‘order’ (*Ordnung*), understood as coherence or consistency (*wertungsmäßige Folgerichtigkeit*), to be the characteristic elements of an inner system.⁵ When we speak of law as a system, we thus consider the legal rules as forming a ‘coherent whole’ (*geordnetes Ganzes*). Both consistency or coherence

I should point out that credit for the metaphor of a tapestry is owed to J. Basedow et al., ‘Editorial’, 1993 *Zeitschrift für Europäisches Privatrecht*, no. 1, pp. 1, 2.

3 F.-J. Peine, *Das Recht als System*, 1983, pp. 29 et seq.; C.-W. Canaris, *Systemdenken und Systembegriff in der Jurisprudenz – entwickelt am Beispiel des deutschen Privatrechts*, 1983, pp. 19-40; F. Bydlinski, *System und Prinzipien des Privatrechts*, 1996, pp. 1-116.

4 C.-W. Canaris, ‘Theorienrezeption und Theorienstruktur’, in H. G. Leser (ed.), *Wege zum japanischen Recht – Festschrift für Zentaro Kitagawa*, 1992, pp. 75 et seq. Canaris points out that German lawyers consider ‘dogmatic’ work to be inherently linked with a systematic approach: ‘As a consequence, it would seem appropriate to speak of dogmatic theory only where we are concerned - and be it only to a minimum - with the general context and consistency of a decision with a view to other problems. One should not speak of dogmatic theory where the considerations are limited to a pragmatic weighing of interests in the individual case or where a merely topical argumentation is being used.’ (My translation, K.R.).

5 Canaris, *supra* note 3, pp. 11-18, 40-46.

and unity can be understood as postulates of the idea of justice: the principle of equality with its generalising tendency that demands that like cases be treated alike and that different cases be treated differently according to the aspects and degree in which they differ. Canaris defines a system as ‘an axiological or teleological order of general principles’. In this definition, the element of a *teleological* order is meant to express the idea of consistency or coherence. The element of *general principles* is meant to express the aspect of inner unity.⁶

A systematic approach to law thus considers the numerous rules to constitute a ‘whole’ which follows an ‘inner order’ as expressed by the underlying principles. The basic idea underlying the systematic approach is the idea of equality as an aspect of justice. Systematic legal thinking thus emphasises the generalising tendency of justice according to which like cases should be treated alike and different cases should be treated differently.

2. EU private law as a system

The present conference is not specifically dedicated to European private law. Yet, it is well known that Professor Hondius has a keen interest in and that much of his research (and presumably that of his Ph.D. students) is dedicated to European private law.⁷ Furthermore, the development of a ‘European’ legal method is certainly one of the most important challenges for jurisprudence today. Thus, a few words on the issue may not go amiss, given that *Systemdenken* is an approach that was initially developed as a method of national law. I will first look at EU law and discuss aspects of the (Draft) Common Frame of Reference for European contract law⁸ afterwards. Methodological aspects of the interrelationship between both have been discussed elsewhere.⁹

2.1. EU private law

Can EU private law be properly understood as a system? Law-making in the area of EU private law has often been characterised as merely ‘pointillistic’.¹⁰ With this rather extravagant term, Hein Kötz intended to characterise how the legislator, instead of codifying a whole area of the law such as sales, lease or torts merely regulates isolated ‘points’ of the law such as rules on doorstep selling, liability rules for package travel contracts or controlling unfair terms in consumer contracts. While recent legislation on occasion aims at so-called codification,¹¹ the basic tenet holds true even today. In common usage, however, pointillism describes a technique of expressionist art where the painting consists of numerous individual points and where the

6 Canaris, *supra* note 3, pp. 46-60.

7 See e.g. E. Hondius, ‘Fifteen Years of European Private Law – At the Occasion of the 15th Birthday of the Trento/Torino Common Core of European Private Law Project’, 2009 *Opinio Juris* 2, paper n. 5, pp. 1-20, <<http://lider-lab.sssup.it/opinio>>, online publication October 2009; A. Hartkamp et al. (eds.), *Towards a European Civil Code*, 2010.

8 C. von Bar et al., *Principles, Definitions and Model Rules of European Private Law – Draft Common Frame of Reference (DCFR) - Outline Edition*, 2009.

9 K. Riesenhuber, ‘Systembildung durch den CFR – Wirkungen auf die systematische Auslegung des Gemeinschaftsrechts’, in M. Schmidt-Kessel (ed.), *Der Common Frame of Reference – Ein Werkzeugkasten für die Kommission*, 2008, pp. 173-215.

10 H. Kötz, ‘Gemeineuropäisches Zivilrecht’, in H. Bernstein et al. (eds.), *Festschrift für Konrad Zweigert*, 1981, pp. 481-500.

11 See e.g. Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), OJ L 204, 26.7.2006, pp. 23-36.

viewer can only grasp the whole picture once he steps back.¹² While EU private law legislation still consists of only rather few ‘points’, it is argued that an order can nonetheless be discerned.¹³

The central aspect of a systematic approach is coherence (above, 1). Certainly, coherence is much more easily achieved where a legislator regulates all aspects of, say, contract law. That does not mean, though, that coherence is not possible where only specific aspects such as rights of withdrawal or obligations to inform are being regulated.¹⁴ Recent developments confirm this approach, given that the EU legislator expressly attempts to achieve greater coherence.¹⁵ In the area of contract law, the Commission first announced this goal in its 2001 communication.¹⁶ And it is this starting point that leads to both the proposal for an integrated consumer protection directive¹⁷ as well as the (Draft) Common Frame of Reference (DCFR). The former is yet another example of so-called codification. In the area of employment legislation, the recent Sex Discrimination Directive 2006/54 pursues the same approach of consolidation and greater coherence. The DCFR, on the other hand, is, from this perspective of current EU legislation, a tool that has been devised specifically to enhance coherent legislation.¹⁸ In this function, it provides a ‘frame of reference’ for the legislature and enables it to locate the multitude of individual, if you will: punctual rules on the map of a (more or less) complete system of contract law.¹⁹ Integrated into the DCFR are the *Acquis Principles*:²⁰ A set of rules devised to reflect the *acquis communautaire* of EU contract law (or patrimonial law) as it stands today, however with appropriate adaptations to ensure coherence.²¹ The *Acquis Principles* also reflect an endeavour to promote coherence in EC legislation.²²

Certainly, these aspects of EU legislation cannot prove that the legislator always intentionally aimed to adopt rules that fit into a system. On the contrary, it has to be acknowledged that many rules of existing EU legislation in the area of private law are *not* coherent. The obvious examples are different lengths and beginnings of withdrawal periods. From a principled approach, one could challenge the right of withdrawal in the Distance Selling Directive²³ as

12 See only E.H. Gombrich, *The Story of Art*, 1995, pp. 544 et seq. On the use of the metaphor in the context of EC private law harmonisation, see already W.-H. Roth, ‘Transposing “Pointillist” EC Guidelines into Systematic National Codes’, 2002 *European Review of Private Law*, pp. 761, 762; K. Riesenhuber, ‘System and Principles of EC Contract Law’, 2005 *European Review of Contract Law*, no. 1, pp. 297, 298.

13 S. Grundmann, *Europäisches Schuldvertragsrecht*, 1999; Riesenhuber 2003 and 2005, *supra* note 1.

14 See e.g. J. Basedow, ‘Die Europäische Union zwischen Marktfreiheit und Überregulierung – Das Schicksal der Vertragsfreiheit’, in Stiftung Gesellschaft für Rechtspolitik, Trier/Institut für Rechtspolitik an der Universität Trier (ed.), *Bitburger Gespräche Jahrbuch 2008/I*, 2008, pp. 95-97; J. Basedow, ‘Freedom of Contract in the European Union’, 2008 *European Review of Private Law*, no. 6, pp. 914-916.

15 The need for *Systembildung*, striving for coherence, in EU private law was first explored (systematically) in a volume edited by S. Grundmann (ed.), *Systembildung in Kerngebieten des Europäischen Privatrechts*, 2000.

16 Communication from the Commission to the Council and the European Parliament on European Contract Law of 11 July 2001, COM(2001) 398 final.

17 Proposal for a Directive of the European Parliament and of the Council on consumer rights, COM(2008) 614 final.

18 H. Beale, ‘The Future of the Common Frame of Reference’, 2007 *European Review of Contract Law*, pp. 257, 260; Riesenhuber, *supra* note 9, pp. 188 et seq.; D. Staudenmayer, ‘Weitere Schritte im Europäischen Vertragsrecht’, 2005 *Europäische Zeitschrift für Wirtschaftsrecht*, pp. 103 et seq.

19 The function of PECL and other sets of rules as frames of reference for existing legislation has been emphasised earlier; see Riesenhuber 2003, *supra* note 1, pp. 47-49.

20 Research Group on the Existing EC Private Law (Acquis Group) (ed.), *Principles of the Existing EC Contract Law (Acquis Principles). Contract I - Pre-Contractual Obligations, Conclusion of Contract, Unfair Terms*, 2007; Research Group on the Existing EC Private Law (Acquis Group) (ed.), *Contract II*, 2009.

21 For a critical introduction, see N. Jansen et al., ‘Restating the *Acquis Communautaire*? A Critical Examination of the “Principles of the Existing EC Contract Law”’, 2008 *Modern Law Review*, pp. 505-534.

22 See <<http://www.acquis-group.org/>>: ‘As a reaction on activities of EU institutions in the field of European contract law, the Acquis Group targets a systematic arrangement of existing Community law which will help to elucidate the common structures of the emerging Community private law. For this purpose, the Acquis Group primarily concentrates upon the existing EC private law which can be discovered within the *acquis communautaire*. The research of the Acquis Group will be published as “Principles of the Existing EC Contract Law”.’

23 Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts, OJ L 144 4.6.1997.

unwarranted.²⁴ Yet, the fact that individual rules do not ‘fit’ does not refute the idea that the sum of norms should be understood as a consistent whole. (It does, however, pose specific questions of interpretation [see below, 3]).

Robert Rebhahn recently vigorously argued for a systematic method of EU private law: He concludes on a pessimistic note, though. ‘Let us finally ask whether traditional methods of interpretation provide for orientation in the analysis of decisions of the European Court of Justice in the first place. Jurisprudence or legal method in a traditional sense seems to presuppose three things: first, an endeavour of all actors involved – legislator, courts and observers – to build a coherent legal order which, to the extent possible, is free of contradictions and, in this sense, “systematic”; secondly, the conviction that the applicable law should be deduced from statutes and thus be “found” rather than “made” by the courts; as well as, third, the conviction that such deduction should follow certain rules which have to be obeyed by the courts and the observation of which can be appreciated by outside observers (so that, consequently, the observers are not restricted to merely reporting decisions and, apart from that, to applauding). Today, each of these three prerequisites is, on the level of EU law, rather less developed than on the level of the national law of the Member States. More often than not, it is rather unclear which basic structure of legal reasoning the courts follows: Is it normative or topical or a “thinking in concrete orders”, especially that of the internal market? What role legal method should play in future EU law is a question which turns on the behaviour of all actors involved. Without a clear jurisprudence, there is no rule of law, questions of methods are constitutional issues.’²⁵

2.2. *The (Draft) Common Frame of Reference*

The (Draft) Common Frame of Reference is devised as a multifunctional tool, and while one of its functions is to serve as an aid for the legislator (above 2.1. at note 19), it can also serve as a set of rules in its own right. The draftsmen have always considered the possibility that the ‘political CFR’, to be developed out of the DCFR, could, in the future, be chosen as the applicable law.

The DCFR displays elements of a system, thus warranting a systematic method, in more than one way. First, it is a good example of a systematic codification. The various subjects are presented in an orderly form, structured in books, chapters, articles, paragraphs and sentences,²⁶ and those form an ‘outer system’ (*äußeres System*). It was Franz Bydlinski who specifically emphasised that the formal order of the law in an outer system should not be neglected and is, indeed, an important element for achieving an inner order.²⁷ The ‘inner system’ (*inneres System*) as opposed to the formal order of the outer system is constituted by the principles underlying the rules. Again, the DCFR displays an express explicit commitment to a systematic approach. The drafters have now adopted a new introductory part, specifically dedicated to ‘The underlying principles of freedom, security, justice and efficiency’.²⁸

24 See e.g. Th. Schäfer, ‘Widerrufsrechte – Herstellung oder Aushöhlung der Privatautonomie?’, in K. Riesenhuber et al. (eds.), *Wandlungen oder Erosion der Privatautonomie?*, 2007, pp. 187-198.

25 R. Rebhahn, ‘Europäisches Arbeitsrecht’, in K. Riesenhuber (ed.), *Europäische Methodenlehre*, 2010, § 18 Para. 77 (My translation, K.R.).

26 On the structure of the DCFR, see W. Ernst, ‘Zur Struktur des CFR’, in M. Schmidt-Kessel (ed.), *Der Common Frame of Reference – Ein Werkzeugkasten für die Kommission*, 2008, pp. 55-70; W. Ernst, ‘Der Common Frame of Reference aus juristischer Sicht’, 2008 *Archiv für die zivilistische Praxis*, no. 208, p. 248.

27 Bydlinski, *supra* note 3, pp. 50 et seq.

28 Von Bar et al., *supra* note 8 pp. 60-99.

3. Systematic approach and method

The systematic approach has practical consequences for the methods of the law. It is a central element of both the interpretation²⁹ as well as the development (*Rechtsfortbildung*)³⁰ of the law.

Systematic interpretation is a traditional element of interpretation. In its most basic application, it is rather self-evident: If we want to understand the meaning of a word, we have to read it in the context of the whole sentence, paragraph, article, book and statute. It thus presupposes an outer system and the expectation that the rule-maker intended a meaningful order. While the role of interpretation with regard to the outer system can hardly be overemphasised, an interpretation with regard to the inner system is equally important. Bydlinski speaks of *prinzipiell-systematische Auslegung* (a principled-systematic interpretation)³¹ and thus hints at its relation to purposive interpretation. With a principled-systematic approach, we refer to the principles underlying the rules for the construction of a provision.

Again, while a systematic interpretation is based on a presumption that the law constitutes a coherent whole, we often encounter provisions that do not seem to fit (*systemfremde Normen*). Certainly, where the legislator intended to digress from the system or even change it, courts have to accept this and are not entitled to derogate from the rule. Yet, where an individual rule does not fit into the system, it may be warranted to construe it narrowly with regard to the general system of the law.³²

A systematic approach is equally important where courts further develop the law beyond the literal meaning of the rules (*Rechtsfortbildung*),³³ e.g., by means of analogy. When we apply a norm by analogy, we extend its scope of application to a case not covered by the rule but materially equivalent to those covered in a case of *lacunae*. The basic principle underlying analogy is the principle of equality that requires treating like cases alike. The conclusion by analogy is thus inherently linked to systematic thinking (*Systemdenken*).

4. Common law versus *Systemdenken*?

Let us now return to the question posed by Professor Hondius whether a case-by-case approach is preferable to a systematic approach. The question presupposes a fundamental difference, and one may well doubt whether it exists.

Certainly, the differences between continental European civil law and common law should not be underemphasized; in fact, they have often been stressed.³⁴

‘There is no *Wissenschaft* at common law!’³⁵ ‘The common law is a historical development rather than a logical whole, and the fact that a particular doctrine does not logically accord

29 For more detail and further reference see K. Riesenhuber, ‘Die Auslegung’, in K. Riesenhuber (ed.), *Europäische Methodenlehre*, 2010, § 11 Para. 22-29; Riesenhuber 2003, supra note 1 pp. 26-30.

30 For more detail and further reference see J. Neuner, ‘Die Rechtsfortbildung’, in K. Riesenhuber (ed.), *Europäische Methodenlehre*, 2010, § 13 Paras 26-43.

31 F. Bydlinski, *Über prinzipiell-systematische Rechtsfindung*, 1995.

32 Canaris, supra note 3, p. 47.

33 On the distinction between interpretation, on the one hand, and the further development of the law (*Rechtsfortbildung*), on the other, see Riesenhuber 2010, supra note 29, § 11 Para. 3; Neuner, supra note 30, § 13 Para. 2.

34 P. Legrand, ‘Against a European Civil Code’, 1997 *Modern Law Review* 60, pp. 44-63; G. Teubner, ‘Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences’, 1998 *Modern Law Review* 61, pp. 11, 19 et passim. See also I. Schwartz, ‘30 Jahre Rechtsangleichung’, in E.-J. Mestmäcker et al. (eds.), *Eine Ordnungspolitik für Europa – Festschrift für Hans von der Groeben*, 1987, p. 344.

35 P. Legrand, ‘Against a European Civil Code’, 1997 *Modern Law Review* 60, pp. 44, 54. On the peculiarities of the English legal method, see in detail W. Fikentscher, *Methoden des Rechts in vergleichender Darstellung*, Vol. II, 1975, pp. 1-150.

with another or others is no ground for its rejection.’³⁶ ‘Arguments based on logical consistency are apt to mislead for the common law is a practical code adapted to deal with the manifold diversities of human life (...).’³⁷ ‘The Englishman is naturally pragmatic, more concerned with result than method, function than shape, effectiveness than style; he has little talent for producing intellectual order and little interest in the finer points of taxonomy.’³⁸ ‘By and large English lawyers and writers have tended to think of it as almost a virtue to be illogical, and have ascribed that virtue freely to their law; “being logical” is an eccentric continental practice which common-sensical Englishmen indulge at their peril.’³⁹

There are, however, opposite voices and tendencies as well.⁴⁰ This is certainly true with regard to statutory law.⁴¹ To begin with, the Law Commission⁴² (in the phase before a statute is devised and enacted) arguably pursues a systematic approach and contributes to a systematic development of the law. Its task is ‘to take and keep under review all the law (...) with a view to its systematic development and reform’.⁴³ Not surprisingly, statutes in the UK are drafted in a systematic fashion and display a systematic order. Consequently, systematic interpretation plays an important role here too. Thus, English courts resort to a ‘contextual interpretation’ in order to understand the meaning of words and sentences, thus referring to the ‘outer system’ of the law.⁴⁴ Their interpretation rests on ‘guiding principles’ of the law, thus referring to the ‘inner system’ of the law.⁴⁵ The shift from a rather formal approach to interpretation, constrained by the

36 Lord Porter, in *Best v. Samuel Fox & Co. Ltd* [1952] AC 716, 727 (H.L.).

37 Lord Macmillan, in *Reads v. Lyons & Co.* [1947] A.C. 156, 175 (H.L.).

38 T. Weir, *International Encyclopedia of Comparative Law*, Vol. II, 1974, ch. 2 Tz. 82 (p. 77). See also T. Weir, ‘Contracts in Rome and England’, 1992 *Tulane Law Review* 66, pp. 1615, 1646 et passim.

39 N. McCormick, *Legal Reasoning and Legal Theory*, 1994, p. 40.; J.R. Spencer, ‘Motor Cars and the Rule in *Rylands v. Fletcher*: A Chapter of Accidents in the History of Law and Motoring’, 1983 *The Cambridge Law Journal* 42, pp. 65, 70 ironically speaks of ‘manly disregard for vulgar logic which makes the common law so much superior to other systems’.

40 With an emphasis on historical commonalities R. Zimmermann, ‘Der europäische Charakter des englischen Rechts’, 1993 *Zeitschrift für Europäisches Privatrecht*, pp. 4-51; R. Zimmermann, *Savigny’s Vermächtnis*, 1998, pp. 34-41; R. Zimmermann, ‘“Common law” und “civil law”, Amerika und Europa’ and ‘Law Reviews – Ein Streifzug durch eine fremde Welt’, in R. Zimmermann (ed.), *Amerikanische Rechtskultur und Europäisches Privatrecht*, 1995, pp. 1-10 and 87-131; J. Gordley, ‘Common law and civil law: eine überholte Unterscheidung’, 1993 *Zeitschrift für Europäisches Privatrecht*, pp. 498-518. Discerning a gradual convergence B.S. Markesinis, ‘Learning from Europe and Learning in Europe’, in B.S. Markesinis (ed.), *The Gradual Convergence*, 1994, pp. 1-32; to the same effect T. Koopmans, ‘Towards a New “Ius Commune”’, in B. de Witte et al., *The Common Law of Europe and the Future of Legal Education*, 1992, pp. 43-51; W. van Gerven, ‘A Common Law for Europe: The Future Meeting the Past?’, 2001 *European Review of Private Law*, pp. 485-503; for a different view, see only P. Legrand, ‘European Legal Systems are not converging’, 1996 *The International and Comparative Law Quarterly* 45, pp. 52-81. K. Schiemann, *Vom Richter des Common Law zum Richter des Europäischen Rechts*, 2005 ZEW-Schriftenreihe issue 145, p. 8 = 2005 *Zeitschrift für Europäisches Privatrecht*, p. 745 recently described the following: ‘The caricature of the German judge is that he judges each case without regard to precedent and makes up his own mind afresh in each one. The caricature of the British judge is that he blindly follows every precedent. In real life I suspect that a judge of either tradition tries in general to produce a result which accords with his instinctive sense of justice of the case and would meet with approval of the vast majority of his colleagues. To do otherwise is to waste the parties’ time and money in appellate proceedings.’ The latter description is, of course, pragmatic and it presupposes a peculiar method which one may characterise as sociological.

41 I here leave aside the relation between common law and statutory law. With regard to that, it is pointed out that the two bodies of law cannot be considered as a coherent whole; Max-Planck-Institut, ‘Zur neueren Entwicklung des Vertragsrechts in Europa’, in Bundesminister der Justiz (ed.), *Gutachten und Vorschläge zur Überarbeitung des Schuldrechts*, Vol. I, 1981, p. 59. Indeed, their relation is described as that of two streams which remain separate like oil and water; cf. J. Beatson, ‘Has the Common Law a Future?’, 1997 *The Cambridge Law Journal* 56, pp. 291, 307-312, and, for his own position, pp. 313 et seq.

42 On the Law Commission, see K. Zweigert et al., *An Introduction to Comparative Law*, 1998, p. 211.

43 Law Commissions Act 1965, c. 22.

44 R. Cross et al., *Statutory Interpretation*, 1995, pp. 50 et seq., 113 et seq.; S. Vogenauer, *Die Auslegung von Gesetzen in England und auf dem Kontinent*, Vol. II, 2001, pp. 974 et seq.

45 Vogenauer, supra note 44, p. 976.

mischief rule,⁴⁶ to the purposive construction has also contributed to a systematic method, based on the purpose of the law.

As the example of Roman law illustrates, a case law approach can, at the same time, be systematic.⁴⁷ Common law lawyers also emphasize the necessity of understanding the law as a coherent whole.⁴⁸ And indeed, one can discern a systematic approach not only in statutory law but in the common law as well.⁴⁹ Thus, it should be noted that the common law method of developing the law on a case-by-case basis requires a comparison of cases, likening and distinguishing, a method that is committed to the principle of equality.⁵⁰ Even equity jurisprudence reveals signs of a generalising tendency of justice. While its hallmark is the consideration of all aspects of the individual case, it does so in a relatively fixed order of rules developed over centuries.⁵¹ The law of restitution is another example. Based on the seminal works of Goff and Jones,⁵² as well as Birks,⁵³ courts increasingly consider this area of the law as a structured whole.⁵⁴ Not only legal practice, but scholarship too displays a systematic approach. Thus, standard textbooks not only present the material in a systematic order⁵⁵ but place special emphasis on not only describing the individual rules but revealing the underlying principles.⁵⁶ Indeed Lord Mansfield famously said about the common law that it ‘does not consist of particular cases, but of general principles which are illustrated and explained by those cases’.⁵⁷

46 On the mischief rule, see Cross et al., supra note 44, pp. 11 et seq. See also R. Zimmermann, ‘Statuta sunt stricte interpretanda? – Statutes and the Common Law: A Continental Perspective’, 1997 *The Cambridge Law Journal* 56, pp. 315-328.

47 J.D. Harke, ‘Juristenmethode in Rom’, in K. Riesenhuber (ed.), *Europäische Methodenlehre*, 2010, § 2.

48 P.B.H. Birks, ‘The Need for the Institutes in England’, 1991 *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung*, pp. 708-715; P.B.H. Birks, ‘More Logic and Less Experience: The Difference between Scots Law and English Law’, in D.L. Carey Miller et al. (eds.), *The Civilian Tradition and Scots Law: Aberdeen Quincentenary Essays*, 1997, pp. 167-190, 167-190; P. Stein, ‘Logic and Experience in Roman and Common Law’, 1979 *Boston University Law Review* 59, pp. 433-451; P. Stein, ‘The Quest for a Systematic Civil Law – Maccabaeian Lecture in Jurisprudence’, 1996 *Proceedings of the British Academy*, no. 90, pp. 147-164; Lord Simon, in *National Carriers v. Panalpina (Northern) Ltd.*, [1981] AC 675, 701 (H.L. 1980) (‘The law should if possible be founded on comprehensive principles: compartmentalism, particularly if producing anomaly, leads to injustice of different results in fundamentally analogous circumstances.’); J. Beatson, ‘Has the Common Law a Future?’, 1997 *The Cambridge Law Journal*, pp. 291, 313; see also R. Zimmermann, ‘Codification: History and Present Significance of an Idea.’, 1995 *European Review of Private Law*, pp. 95, 111; R. Zimmermann, ‘Statuta Sunt Stricta Interpretanda? Statutes and the Common Law: A Continental Perspective’, 1997 *The Cambridge Law Journal*, pp. 315-328.

49 F. Pringsheim, ‘The Inner Relationship Between English and Roman Law’, 1935 *The Cambridge Law Review*, no. 5, pp. 347, 351 (‘(...) it is only in recent times that, by the increase of scientific study, the unsystematic and purely evolutionary character of English law is slowly being converted into the shape of a system’.); J. Basedow, ‘Anforderungen an eine europäische Zivilrechtsdogmatik’, in R. Zimmermann (ed.), *Rechtsgeschichte und Privatrechtsdogmatik*, 1999, pp. 84 et seq.; J. Esser, *Grundsatz und Norm*, 1956, p. 284. See e.g. Lord Denning, in *Lloyd’s Bank v. Bundy* [1975] Q.B. 326, 339 (C.A.).

50 Canaris, supra note 4, pp. 60 et seq. (‘Even a simple “reasoning from case to case” cannot be done without recourse to the common denominator of the cases concerned, in other words it presupposes a certain generalisation.’ [My translation, K.R.]; W. Fikentscher, *Methoden des Rechts in vergleichender Darstellung*, Vol. II, 1975, pp. 63 et seq. (p. 69: ‘Every decision in a new case requires the judge to relate the case at hand to one or more earlier cases and thus inevitably implies a systematic approach which, together with other such systematic approaches and partial systems, merges into a greater whole which is necessary in order to “locate” the individual cases and to make the area as a whole understandable and teachable.’ [My translation, K.R.]). See also G. Radbruch, *Der Geist des englischen Rechts*, 1956, pp. 31 et seq.; C. Schmitthoff, ‘Systemdenken und Fallrecht in der Entwicklung des englischen Privatrechts’, 1967 *Juristenzeitung*, pp. 1, 2 et seq., describes the binding nature of precedents as the procedural side of a systematic approach.

51 See e.g. Zweigert et al., supra note 42, pp. 187-191.

52 R. Goff et al., *The Law of Restitution*, 2009.

53 P. Birks, *An Introduction to the Law of Restitution*, 1989.

54 On the history of restitution under English law, see D. Ibbetson, *A Historical Introduction to the Law of Obligations*, 2001, pp. 264-293; M. Martinek, ‘Der Weg des Common Law zur allgemeinen Bereicherungsklage – ein später Sieg des Pomponius?’, 1983 *Rechtszeitschrift für ausländisches und internationales Privatrecht*, no. 47, pp. 284-335; R. Zimmermann, *The Law of Obligations – Roman Foundations of the Civilian Tradition*, 1996, pp. 891-895; further R. Zimmermann, ‘Unjustified Enrichment: The Modern Civilian Approach’, 1995 *Oxford Journal of Legal Studies* 15, pp. 403, 414-416; P. Schlechtriem, *Restitution und Bereicherungsausgleich in Europa I*, 2000, pp. 63-67.

55 See V. Zeno-Zencovich, ‘The European Civil Code, European legal traditions and neo-positivism’, 1998 *European Review of Private Law*, pp. 349, 356 et seq.

56 See e.g. G. Virgo, *The Principles of the Law of Restitution*, 2006.

57 *R. v. Bembridge*, [1783] 3 Dougl. 332 (per Lord Mansfield). See also F.A. von Hayek, *Law, Legislation and Liberty - Volume 1 - Rules and Order*, 1973, pp. 85 et seq.

Lawyers trained in civil law systems, on the other hand, certainly do not disregard case law.⁵⁸ On the contrary, even in a codified legal system, case law plays an important role. This is certainly true for areas where the law is not codified at all as is the case, for example, with the German law of industrial action (*Arbeitskampfrecht*). Furthermore, codifications often, perhaps even necessarily contain general clauses that need to be structured by case law. The principle of *Treu und Glauben* (good faith) in § 242 BGB is a prominent example. And finally, interpretation also contains an element of the development of the law and is thus open to further structuring by the courts. Indeed, as codifications grow older, the layer of jurisprudence that interprets, supplements and sometimes derogates from or covers it becomes thicker and, to some extent, a systematic approach may be complemented with a case-by-case approach.

Much of what common law lawyers do thus certainly seems to be rather akin if not identical to a systematic legal method. And, on the other hand, civil law lawyers do proceed, in certain areas, on a case-by-case basis.⁵⁹ In other words, the sources of the law seem to differ more than the methods. Indeed, the common law method has aptly been described as *proceeding by analogy*, a method that we have identified as being also inherently linked to a systematic approach (above, 3). And where the English courts interpret statutes, they proceed on similar terms as continental courts. Here too, a systematic interpretation with its reference to both the outer and the inner system of the statute is a central part of interpretation.⁶⁰

Thus, it is perhaps not so much a competition between methods that should be considered but rather a difference in the sources of the law. The question then is not whether a case-by-case approach is preferable to a systematic approach, but rather whether the sources require the one or the other.

Indeed, we find ample examples of both systematic and case-oriented approaches where lawyers trained in common law countries and lawyers trained in civil law countries deal with a single subject. Consider some of the various books on EU employment law for example. Catherine Barnard's book⁶¹ certainly displays a systematic order of the subject-matter. Her discussion is, however, rather more case-oriented than my own treatment⁶² which, for the most part, focuses on a systematic exploration of the issues. Fuchs and Marhold,⁶³ both trained in continental legal systems, combine a textbook approach with an intensive discussion of exemplary cases, thus effectively achieving a mixture of textbook and casebook.

5. Internal and external perspectives

Let us consider the relation of a systematic approach to other disciplines. Professor Hondius mentions art, economics, history, linguistics, psychology and sociology. One may even add comparative law as a sub-discipline of law. In fact, the systematic method employed in 'System und Prinzipien des Europäischen Vertragsrechts' has been criticised for insufficiently taking

58 Cf. B. Markesinis, 'Judicial Style and Judicial Reasoning in England and Germany', 2000 *The Cambridge Law Journal* 59, pp. 294-309.

59 Even though German legal theory does not seem to have an elaborated case law method; this could be an area for cross-fertilisation between common law and civil law.

60 Cross et al., supra note 44, pp. 31 et seq., 113 et seq.; Vogenauer, supra note 44, pp. 974-982.

61 C. Barnard, *EC Employment Law*, 2006.

62 K. Riesenhuber, *Europäisches Arbeitsrecht*, 2009.

63 M. Fuchs et al., *Europäisches Arbeitsrecht*, 2010.

comparative law into account.⁶⁴ Similarly (though with some differences) it could be criticised for not considering other disciplines such as art, economics, history, linguistics, psychology and sociology.

A systematic approach is what Hesselink has recently described as an internal perspective as opposed to the external perspective⁶⁵ of the ‘law and ...’ disciplines such as law and economics, behavioural law and economics, law and literature etc. Both English common law and continental civil law traditionally take an internal perspective. The internal perspective is the result of what lawyers perceive their task to be: Traditional scholarship is concerned with how courts (do and should) decide cases. Courts, however, do not *make* the law but, following the division of powers, *apply* the law.⁶⁶ This is certainly true for the civil law but even applies with regard to common law jurisdictions. It is true that common law courts have a more open way of reasoning and arguing.⁶⁷ Still, a case-by-case approach finds its justification in the binding force of precedent rather than in the law-making powers of the judge. Here too, the judge is being considered as a law-finder rather than a law-maker.⁶⁸

This internal perspective is thus a common feature of both the systematic method and the case-by-case approach, and it distinguishes both from the external perspective of art, economics, history etc. As ‘other’ disciplines they stand outside the law and thus cannot – or not without further requirements – contribute to finding the law. If a legal rule is inefficient from an economic perspective, this does not invalidate the legal rule. If a legal rule is counterproductive because it disregards the insights of behavioural theory, again, this does not render the rule invalid or inapplicable. If a legal rule disregards the lessons we can learn from history or the experience of other legal systems, this still does not derogate from the rule.⁶⁹

This is not to say that other disciplines may never play any role for the internal perspective. Where, as for example in the law of capital markets, the legislator lays down the achievement of efficiency as an objective of the rule, lawyers may have to take economic insight into consideration when interpreting and applying the law (purposive or historical interpretation).⁷⁰ Certain fields of the law may be open to or even require input from other disciplines. This is, for example, the case where the rules of competition law such as Articles 101(3), 102 TEU presuppose economic analysis.^{71, 72} Similarly, the law against unfair commercial practices may be open to taking the insight of behavioural theory into account. Where the law pursues the enhancement

64 T. M. J. Möllers, ‘Besprechung von Riesenhuber, System und Prinzipien des Europäischen Vertragsrechts’, 2004 *JuristenZeitung*, pp. 1067-1068; M. Schmidt-Kessel, ‘Besprechung von Riesenhuber, System und Prinzipien des Europäischen Vertragsrechts’, 2007 *Zeitschrift für Europäisches Privatrecht*, pp. 402-406.

65 M.W. Hesselink, ‘A European Legal Method? – On European Private Law and Scientific Method’, 2009 *European Law Journal* 15, pp. 20, 28 et seq.

66 Somewhat pessimistic (or even cynical) is Schiemann, *supra* note 40, p. 9.

67 See e.g. the discussion by Lord Goff in *White v. Jones* [1994] 2 AC 207, 254 et seq. See also the candid words of Schiemann, *supra* note 40, p. 746.

68 I. McLeod, *Legal Method*, 2009, pp. 150 et seq.

69 On the relation between *Dogmatik* (understood as the scholarship on current law) and comparative law, see Canaris, *supra* note 4, pp. 74-94; C.-W. Canaris, ‘Schutzgesetze – Verkehrspflichten – Schutzpflichten’, in C.-W. Canaris et al. (eds.), *Festschrift für Karl Larenz*, 1983, pp. 27-110. For an opposite view, A. Flessner, ‘Juristische Methode und europäisches Privatrecht’, 2002 *JuristenZeitung*, pp. 14-23 (arguing for a ‘topical’ approach); Zweigert et al., *supra* note 42, pp. 18-21.

70 H. Eidenmüller, *Effizienz als Rechtsprinzip*, 2005, pp. 414 et seq., 450 et seq.; H. Fleischer, ‘Gesellschafts- und Kapitalmarktrecht als wissenschaftliche Disziplin’, in Ch. Engel et al., *Das Proprium der Rechtswissenschaft*, 2007, p. 76; S. Grundmann, ‘Methodenpluralismus als Aufgabe – zur Legalität von ökonomischen und rechtsethischen Argumenten in Auslegung und Rechtsanwendung’, 1997 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 66, pp. 423, 437; J.-U. Franck, ‘Vom Wert ökonomischer Argumente für Gesetzgebung und Rechtsfindung für den Binnenmarkt’, in K. Riesenhuber (ed.), *Europäische Methodenlehre*, 2010, § 6; S. Kalss, ‘Europäisches Kapitalmarktrecht’, in K. Riesenhuber (ed.), *Europäische Methodenlehre*, 2010, § 20 paras. 1, 26h, 36a.

71 Note: an economic analysis of the behaviour in question, not of the law!

72 Th. Ackermann, ‘Europäisches Kartellrecht’, in K. Riesenhuber (ed.), *Europäische Methodenlehre*, 2010, § 21 Paras. 2, 13, 18-22.

of uniformity on an international scale, a national court may be entitled to consult a comparative legal insight.⁷³ Again, where the law appeals to good morals, good faith or even justice, a judge may be entitled to have recourse to ethics or sociology. Furthermore, other disciplines or comparative law may have an inspirational function and open up the panorama of possible interpretations or developments.⁷⁴ In this latter case, though, other disciplines or comparative law do not play a formal role in the interpretation and application of the law: A judge may or may not make use of such instruments: if he does not, he certainly cannot be accused of a *déni de justice*; if he does, on the other hand, he can still not evade the binding commands of the law. In other words: However inspirational the solution of another country's legal system may be, however inspirational economic, psychological or sociological considerations for the 'best' law may be, a judge has to apply the law as it stands.

Other disciplines thus need to find a door to enter into the sphere of the law in order to become *part of the internal perspective*, and these doors are rare and fairly narrow. Therefore, other disciplines play a limited role only in adjudication where an internal perspective is required. There is a good reason for this. It has already been mentioned that the division of legislative and adjudicative powers is the central principle that requires a distinction between internal and external perspectives. While the legislator may entrust the courts with the task of pursuing, say, economic goals such as efficiency, there are reasons of principle and of practicability that limit this option. As a matter of principle, a transfer of rule-making powers to the courts must be limited where a division of powers reigns. As a matter of practicality, the courts do not make good law-makers. They lack the necessary infrastructure⁷⁵ to even adequately pursue comparative legal work.⁷⁶ The sobering insight of different studies is that when courts engage in comparative law, there is a good possibility that they will get it wrong.⁷⁷ Similarly, while some public agencies such as the German *Bundeskartellamt*, the EU Commission or comparable antitrust offices are specially equipped to carry out specific economic investigations, courts simply do not have the instruments to make economic, psychological or sociological studies. Where, however, the necessary economic, psychological or sociological material was available, we again encounter an objection of principle. Courts do not have the authority to decide which of various competing strands of thought of, say, economics, psychology or sociology the law should follow. That is a matter for parliaments to decide.

73 C.-W. Canaris, 'Die Bedeutung allgemeiner Auslegungs- und Rechtsfortbildungskriterien im Wechselrecht', 1987 *JuristenZeitung*, pp. 543, 549.

74 S. Grundmann et al., 'Die Auslegung des Europäischen Privat- und Schuldvertragsrechts', 2001 *Juristische Schulung*, pp. 529, 533; to the same effect C.-W. Canaris, 'Die Stellung der "UNIDROIT Principles" und der "Principles of European Contract Law" im System der Rechtsquellen', in J. Basedow (ed.), *Europäische Vertragsrechtsvereinheitlichung und deutsches Recht*, 2000, pp. 5-31 (with a distinction being made between sources of the law, sources for the perception of the law [*Rechtserkenntnisquellen*] and sources for the extraction of the law [*Rechtsgewinnungsquellen*]); Canaris, *supra* note 4, pp. 84, 93 ('Furthermore, a comparative lawyer who uses inspirations from other legal systems for the development of the law of his home country – an approach that may well be possible where the law leaves sufficient room for discretion – acts in a "dogmatic" function if [and in so far as] he aims at integrating the foreign ideas harmoniously and systematically into the current law. On the other hand, comparative law reveals the wealth of possible solutions and legal thoughts, the richness of which surpasses the imagination of even the most productive dogmatic lawyer and which has the advantage of already having been probed in practice. Comparative law will often also open one's eyes to the most advanced trends in legal development. On the whole, it may be said that comparative law and dogmatic theory work together, each with its own specific task.' (My translation, K.R.)

75 With regard to the general situation of the English courts, see McLeod, *supra* note 68, pp. 225 et seq. (lack of training and lack of information).

76 W. Ernst, 'Gelehrtes Recht – Die Jurisprudenz aus der Sicht des Zivilrechtslehrers', in Ch. Engel et al., *Das Proprium der Rechtswissenschaft*, 2007, p. 19.

77 C.-W. Canaris, 'Die Bedeutung allgemeiner Auslegungs- und Rechtsfortbildungskriterien im Wechselrecht', 1987 *JuristenZeitung*, pp. 543-553; U. Drobnig, 'Rechtsvergleichung in der deutschen Rechtsprechung', 1986 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 50, pp. 610-630.

If their contribution to the work of the courts is thus inherently limited, other disciplines may be all the more important where we take an external perspective. To say that *courts* take an internal perspective does not mean that *lawyers* never take an external perspective. This is in particular the case where law-making is concerned. In fact, it was Claus-Wilhelm Canaris who said that good scholarship work always has the law-making perspective in mind too.⁷⁸

Take, for example, the rights of withdrawal. From a private law theory point of view, rights of withdrawal are certainly critical in that they interfere with the principle of the binding nature of the contract (*pacta sunt servanda*).⁷⁹ At the same time, they can be considered as minimally intrusive, given that they merely provide for a procedural mechanism that gives the consumer the possibility to have a second decision concerning the contract, yet with an inverse onus of action (he has to do something to avoid the contract).⁸⁰ From the perspective of the law-maker, it has to be considered, though, whether rights of withdrawal actually work in practice, i.e. whether they give the consumer an effective opportunity to reconsider. Empirical studies seem to show that only a very small, even negligible, percentage of consumers make use of their right of withdrawal.⁸¹ This may indicate that such rights do not ensure an adequate protection of the free will and the self-determination of the consumer or protect them from disadvantageous contracts. It has been suggested that behavioural theory may provide some understanding of why consumers do not withdraw from a contract once concluded.⁸² Different psychological mechanisms may be at work here. One could be the so-called endowment effect: We value things more once we have acquired them.⁸³ Furthermore, we avoid cognitive dissonance: Once we have made a decision, we endeavour to confirm it and selectively perceive information that supports our decision more than information that does not.⁸⁴ An extraordinarily low withdrawal rate may be due to those (and/or other) psychological mechanisms.

What follows from that? Certainly, all this has little, if any, effect on the law as it stands (the *lex lata*). Following various EU directives, rights of withdrawal are a central instrument of consumer protection in the national laws of the Member States. If it should transpire that the right of withdrawal is not a good mechanism, this does not change the law. In this particular case, there is arguably little room for courts to take behavioural insight into account at all. In adequate cases (i.e.: where the national law so allows) the courts may, perhaps, use behavioural insight when

78 Canaris, *supra* note 4, p. 75: ‘This is not to say, of course, that dogmatic theory was irrelevant to policy considerations or legislation; on the contrary, (good) dogmatic theory will always have an eye on policy considerations and contributes to an improvement of the law, just as, conversely, legislation requires a clear dogmatic basis if it is to avoid unnecessary mistakes’ (My translation, K.R.). See also Ernst, *supra* note 76, pp. 19 et seq.; Fleischer, *supra* note 70, pp. 64 et seq., 74 et seq.

79 K. Riesenhuber, *Europäisches Vertragsrecht*, 2006, Paras. 400, 905-909; for a different perspective, see now J.-D. Harke, *Allgemeines Schuldrecht*, 2010, Para. 82.

80 C.-W. Canaris, ‘Wandlungen des Schuldvertragsrechts – Tendenzen zu seiner “Materialisierung”’, 2000 *Archiv für die civilistische Praxis*, no. 200, pp. 273, 343 et seq.; see also Riesenhuber, *supra* note 79, Para. 909.

81 Office of Fair Trading, Study on doorstep selling, Annex L - Consumer Survey, p. 49; available at <http://www.oft.gov.uk/advice_and_resources/resource_base/market-studies/completed/doorstep-selling#below>. For an older assessment, cf. Bundesrat, ‘Entwurf eines Gesetzes über den Widerruf von Haustürgeschäften und ähnlichen Geschäften’, *Bundestags-Drucksachen* 10/2876, pp. 7 et seq. (quoting a ‘withdrawal rate’ of 1.8 % where a right of withdrawal is contractually agreed).

82 H. Eidenmüller, ‘Der homo oeconomicus und das Schuldrecht – Herausforderungen durch Behavioral Law and Economics’, 2005 *JuristenZeitung*, pp. 216, 221 et seq. (considering a replacement of the right of *withdrawal* with the requirement to *confirm* the contract after a warming-up period *de lege ferenda*); H. Eidenmüller, ‘Die Rechtfertigung von Widerrufsrechten’, 2010 *Archiv für die civilistische Praxis*, no. 210, pp. 67, 93 et seq.; J.-U. Franck, ‘Vom Wert ökonomischer Argumente für Gesetzgebung und Rechtsfindung für den Binnenmarkt’, in K. Riesenhuber (ed.), *Europäische Methodenlehre*, 2010, § 6 Para. 44.

83 R. Thaler, ‘Toward a Positive Theory of Consumer Choice’, 1980 *Journal of Economic Behavior & Organization*, no. 1, pp. 39, 44; D. Kahneman et al., ‘The Endowment Effect, Loss Aversion, and Status Quo Bias: Anomalies’, 1991 *The Journal of Economic Perspectives*, no. 5, pp. 193, 194 et seq.

84 Cf. the seminal book by L. Festinger, *A Theory of Cognitive Dissonance*, 1957, reissued: 1962. E. Aronson et al., *Social Psychology*, 2010, pp. 180 et seq.

they judge whether consumer information about the right of withdrawal has been sufficient.⁸⁵ But, then again, why should they? The EU legislator had not taken today's behavioural theory into account when it installed the rights of withdrawal. Neither had it instructed courts to do so – and perhaps for good reason. If behavioural theory should inform us that consumers behave in a systematically irrational manner, what follows from that? We (the legislator!) may accept such findings and decide to paternalistically steer consumer behaviour ('de-biasing'), basically treating consumers like foster-children who cannot decide on their own. We (again: the legislator) may, on the other hand, install a legal mechanism that allows consumers to care for themselves once they overcome the behavioural barriers. Other consequences are conceivable too. There is, indeed, a vigorous debate between neoclassical economics and behavioural economics and the latter is by no means universally accepted.⁸⁶ The discussion re-emphasises that we encounter value judgements of a nature that are not for courts but for legislators to make.

The example can further illustrate that courts are not well equipped to make such value judgements either. While there may be behavioural explanations for a low withdrawal rate, these may or may not be correct or conclusive. Indeed, it seems that they can be challenged with the instruments of behavioural theory itself. Behavioural studies have pointed out that an endowment effect does not occur where the possessor acquires something with a view to later giving it away again.⁸⁷ Other studies indicate that rights of withdrawal make consumers less happy with their choice as they leave the decision process open, thus effectively preventing the activation of mechanisms that would normally lead to the avoidance of cognitive dissonances.⁸⁸ – I do not claim here that these insights could (fully) explain a low withdrawal quota. They do indicate, though, that there can be serious doubts as to whether behavioural theory conclusively explains a low withdrawal rate; the issue at hand may well be debated even on the ground of behavioural theory. Where lawyers do not have training in behavioural theory,⁸⁹ they are thus not well equipped to rely on such theory. All this makes the discussion on the basis of behavioural theory intrinsically difficult. It does not, of course, prevent lawyers from taking adequate notice of the state of the art in, say, economics, psychology, sociology etc. As a bottom line, I would still maintain that lawyers can profit from taking an insight from other disciplines into account in the law-making discourse. Indeed, this will often seem an indispensable complement to the (limited) internal perspective where law-making and thus policy decisions are concerned.

Beyond their role as tools for the legislator, other disciplines can enhance our understanding of the law. Take the example of the control of unfair contract terms. Controlling the content of contracts conflicts with the fundamental principle of freedom of contract which covers the freedom to determine the content of a contract. Where the law trespasses on the freedom of contract, this requires a justification. Economic theory can contribute to our understanding of the rules on the control of unfair contract terms.⁹⁰ It tells us that in a market economy the legal

85 Cf. L. Klöhn, 'Verträge über unbekanntes Nutzungsarten – §§ 31a, 32c UrhG – Eine Behavioural Law and Economics Perspektive', in K. Riesenhuber et al. (eds.), *Urhebervertragsrecht im Lichte der Verhaltensökonomik*, 2010, pp. 91-93.

86 See e.g. O. Bar-Gill, 'The Behavioral Economics of Consumer Contracts', 2007-2008 *Minnesota Law Review* 92, pp. 749-802; R. Epstein, 'The Neoclassical Economics of Consumer Contracts', 2007-2008 *Minnesota Law Review* 92, pp. 803-835; R. Posner, *Economic Analysis of Law*, 2007, pp. 17-20.

87 N. Novemsky et al., 'The Boundaries of Loss Aversion', 2005 *Journal of Marketing Research* 62, pp. 119-128.

88 Aronson et al., supra note 84, pp. 186-188. H. Eidenmüller, 'Die Rechtfertigung von Widerrufsrechten', 2010 *Archiv für die zivilistische Praxis*, no. 210, pp. 67, 95, does not refer to these studies but partly considers that, restricted to the case of the right of withdrawal in distance selling, consumers may not activate mechanisms to avoid cognitive dissonances where they effectively purchase 'on trial'.

89 In some countries, legal education encompasses an introduction to other disciplines such as economics. On legal education in Europe, see the projects of F. Ranieri, *Die Juristenausbildung in Europa*, <<http://www.europaeische-juristenausbildung.de/>> (with further references).

90 Note, though, that, again, the intrusion of economic theory requires a 'door' (see the text around note 70, supra). Where the economic rationale discussed below is not supported by legislative history, it may well be challenged.

system does not usually have to worry about the fairness of contractual exchange, given the control of supply and demand by market forces. While the theory of the invisible hand is nowadays much debated the basic tenet still holds true. With standard contract terms, market forces cannot fulfil their controlling function. For market control presupposes that the market works and this presupposes that demanders on the market can see, understand and compare what is being offered. While the price and the qualities of, say, a car are easy to detect and to compare, this is different for standard contract terms. They are difficult to understand in the first place and ‘competing’ standard terms of different offerors can hardly be compared, certainly not efficiently. Thus, it is certainly justifiable for the legislator to step in to rectify a market failure here. If we look at the EU Unfair Contract Terms Directive we find that the main subject-matter and the price are not, in principle, subject to judicial control. This conforms to our considerations on market control, as does the counter-exception pursuant to which the subject-matter and the price may be subject to judicial control if the clauses are not transparent. This economic rationale may also be useful for the application of the law in borderline cases. If the failure of market control is the underlying consideration, then judicial control is warranted where the market does not exert effective control. Aspects of the contract that receive sufficient attention by the consumer and are thus subject to market control do not need to be judicially controlled.⁹¹

6. Conclusion

Let me pull the strings together and come to some conclusions. I have tried to demonstrate that the systematic approach has its merits. For one thing, it finds a solid basis in the principle of equality. For another, its core aspect of coherence conforms to the express or implied intention of the legislator. This is also true for EU legislation. The codification of existing directives and the Common Frame project are ample evidence of striving for coherence.

While the common law tradition and the continental legal systems differ substantially with regard to the sources of the law, it is submitted that they do not differ as much with regard to the methods for finding the law. A case-by-case approach proceeds by analogy or distinction and is no less concerned with equality or coherence than a systematic approach on the basis of codified law. Both, common lawyers and civil lawyers have in common that they pursue internal approaches to the law. This distinguishes their approach from that of other disciplines such as comparative law, law and economics, behavioural law and economics etc. which take an external perspective on law. Such external approaches are of the utmost interest for legislators. Their contribution to the application of the *lex lata* is more limited, though; it requires a ‘door’ through which external insights can enter into the sphere of the law.

I cannot, of course, claim the position of an authoritative judge in a competition of legal methods in Europe, and neither would I want to. Such competition, it is submitted, will be decided by the legal community, a market for legal or methodological ideas, if you like. It is this forum that will also decide about the appropriate place of other legal methods in the adjudication of the law. The internal systematic approach favoured by many lawyers trained in continental legal systems certainly has much to be commended. But, again, it should be stressed that it certainly does not deny the role of court decisions or the need to accommodate them within the legal system.

91 See e.g. M. Stoffels, ‘Schranken der Inhaltskontrolle’, 2001 *JuristenZeitung*, pp. 843-849.