Public policy (ordre public)

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A comparative analysis of national, private international law, and EU Public Policy

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1. Introduction

The process of European integration brings an inherent tension between several levels of governance, in particular between the EU and national level.[1] This applies both in public law as well as in private law. In respect to public law, this concerns the fundamental prinicples of the organisation of the state, rules of human rights and mandatory laws and regulations, such as tax law or criminal law.[2] These are the direct result of a democratic process of law making. In respect to private law, which is the focus of this contribution, public policy also concerns the organisation of the state, but in the context of allowing private parties to give shape to their own legal relations. Internal coherence of national law is of high relevance here to allow parties to make use of the system of private law. Especially since the rise of Nation States in the 19th century, national systems of private law have been developed and maintained that differ from each other.[3]

1 Other areas of tension are between international standards and European law, or between norms set by private actors and national and/or European legislation.

2 Christian Joerges, Conflics-law Constitutionalism: Ambitions and Problems, ZenTra Workin Papers in Transnational Studies, n. 10 (2012), Christian Joerges, Poul Kjaer and Tommi Ralli, A New Type of Conflicts Law as Constitutional Form in the Postnational Constellation, in 2 Transnational Legal Theory 2 (2011), p. 153 *et seq*.

3 Raoul van Caenegem, European law in the past and the future. Unity and diversity over two millennia (Cambridge: Cambridge University Press, 2002), see, in the context of conflict of laws,

Note: I am indebted to Jan Smits and Sjef van Erp for their valuable comments, any mistakes – of course – remain my own.

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Of course these systems have always been brought into contact with each other through trade or by persons from one jurisdiction moving to another. Since the Middle Ages, therefore, legal systems have developed their own rules to deal with conflicts with foreign law. This, in modern terminology, purely national area of law, concerns the field of private international law (PIL) and has developed into a highly systematic and complex framework of rules. It's modern day content and shape is heavily determined by the work for Friedrich Karl von Savigny, who strongly held that jurisdictions can and must decide on the recognition of foreign relations and subsequently accommodate such relations according to the law of the receiving state.[4] Its focus is therefore on on accommodating foreign rights into the own legal system by transforming or assimilating these with national law. For many decades PIL has been a separate and well functioning system, with its own systematics, theories and group of academics and practitioners.

However, European Union (EU) law has – much more recently – developed a completely different perspective. In dealing with a pluralistic legal order, EU law bases itself on the country of origin principle, meaning that it sees to the application of rights as they were acquired in another legal system.[5] Since the landmark decision in *Cassis de Dijon*, in which the Court of Justice of the European Union (CJEU) introduced the principle of mutual recognition, based on this idea of country of origin, there is strong tension with the national laws of the Member States.[6] For example, in the area of family law, last names of persons given under the law of one Member State must generally be recognised by other Member States.[7]

Agustin José Menendez, United They Diverge: From conflicts of law to constitutional theory, 2 Transnational Legal Theory 2 (2011), p. 170–171.

4 See Friedrich Karl von Savigny, System des heutigen römisches Rechts VIII (Aalen: Scienta Verlag, 1981 (repr)). See also Joseph Story, Commentaries on the Conflict of Laws (Boston: Hilliard, Gray and Company, 1834), § 6, Kent Murphy, The Tradition View of Public Policy and Ordre Public in Private International Law, in 11 Georgia Journal of International and Comparative Law 3 (1981), 591, 601–603, Alex Mills, The Private History of International Law, 55 International and Comparative Law Quarterly 1 (2006) at pp.13, 36, 40.

5 See Christian Joerges, Rethinking European Law's Supremacy, with comments by Damian Chalmers, Rainer Nickel, Florian Rödl, and Robert Wai, EUI Working Paper LAW n. 2005/12, Christian Joerges, Conflics-law Constitutionalism: Ambitions and Problems, ZenTra Workin Papers in Transnational Studies, n. 10 (2012).

6 See on this Ralf Michaels, EU Law as Private International Law? Re-conceptualising the Country-of-Origin Principle as Vested Rights Theory, ZERP Discussion Paper 5/2006, Agustin José Menendez, United They Diverge: From conflicts of law to constitutional theory, 2 Transnational Legal Theory 2 (2011), p. 174–175.

7 Case C-148/02, *Garcia Avello* [2003] ECR I-11613; Case C-353/06 *Grunkin and Paul* [2008] ECR I-7639.

This idea of acquired rights is not new to PIL scholars: the doctrine of *droits acquis,* as its known in PIL terminology, is a long-rejected doctrine.[8] However, in EU law, which is supreme to national law, including PIL, the theory seems to be a reality: perhaps this is best illustrated by the case law of the Court of Justice of the European Union (CJEU) in respect to free movement of legal persons, where the CJEU set aside the real seat theory in national PIL, forcing companies with limited liability to take the form of company types created and governed by national law of the receiving Member State only. Instead, companies with limited liability that have been duly established in a Member State must be recognised as such in all other Member States.[9]

Member States defend themselves against this influence by foreign law, for – at least at first sight – good reasons. They desire to protect the fundamental norms of their own national legal order and the coherence between these, whilst at the same time accommodating foreign law to the extent that this is possible. From the perspective of national law this is done best by transformation or assimilation into the applicable national law. In our company law example that would mean adapting a foreign limited company type into a national equivalent. When this is not possible, the result is either a deviation in the application of national law in a single case only, so without effect to the rest of the national legal order, or a non-recognition. In EU law however, restrictions to access to the market of a Member State, even when they are potential restrictions, are generally prohibited by the four freedoms.[10] Member States must offer a ground for justification of such restriction that is then tested for proportionality by the courts.

In terms of recognition of foreign law many justifications are possible. Examples are consumer protection, internal coherence of the legal system, and -especially- public policy. Public policy, or *ordre public* in its commonly used version, refers to rules that Member States deem of special importance.[11] The meaning and interpretation of public policy is a matter of debate and there is no definition readily available. Usually public policy is defined through examples of its application

8 See Ralf Michaels, EU Law as Private International Law? Re-conceptualising the Country-of-Origin Principle as Vested Rights Theory, ZERP Discussion Paper 5/2006.

9 Case C-81/87 Daily Mail [1988] ECR I-05483, Case C-212/97 Centros [1999] ECR I-01459, Case C-167/01 Inspire Art [2003] ECR I-10155, Case C-208/00 Überseering [2002] ECR I-09919.

10 Case 8/74 Procureur du Roi v Benoît et Gustave Dassonville [1974] ECR-00837, Catherine Barnard, The substantive law of the EU. The Four Freedoms (Oxford, Oxford University Press, 2016), p. 117–118.

11 Most authors seem to agree that these concepts (public policy and *ordre public*) are the same. One argument can be made that public policy refers to the doctrine in English law, which is wider in scope than the doctrine of *ordre public* in civil law systems.

or by what it is not.[12] Public policy therefore is an open term that most of the time is filled in by legal systems on a case by case basis to ensure legal certainty at the national level, but without any general definition used by the EU or the Member States themselves.

Public policy is the doctrine with which legal systems enforce mandatory norms on society and all its actors. It is used to protect public interest, public morality as well as public security, primarily in a domestic setting.[13] Traditionally, however, the doctrine is also used in situations of private international law. Different than in national law, the mandatory norms of the state manifest itself in a defensive context in these situations: public policy is used to prevent the application of foreign law in the domestic legal order. Third, and very uniquely, in the context of the internal market also the EU enforces a concept of (EU) Public Policy. Contrary to the PIL-version of the doctrine, in the EU setting EU Public Policy is used to enforce foreign elements in a domestic setting in a Member State. In every legal system there are those that argue that these three levels of public policy are distinct concepts, that share terminology only.[14] I submit, however, they are manifestations of the same idea: the state enforcing the fundamental choices it has made in different context. A unitary analysis, as I will argue, sheds light on this phenomenon and its actual use. To distinguish different concepts that share nothing but the name does not do justice ot the way in which states uphold their fundamental norms. I argue, therefore, that there are different versions of the same public policy depending on what level the concept is considered.

At at least three levels, (i) national law, (ii) private international law, and (iii) European law, considerations of systematics and coherence are of extreme impor-

12 For example by stating that a contract with a criminal purpose, such as hiring someone to physically hurt another, is (when it is not against the law directly) against public policy (for example when the preparation of a certain crime is not punishable in criminal law), or in case a court does not not accept the use of public policy by the defendant state.

13 Farshad Ghodoosi, The Concept of Public Policy in Law: Revisiting the Role of the Public Policy Doctrine in the Enforcement of Private Legal Arrangements, 94 Nebraska Law Review 3 (2015) 685.

14 See Paul Vonken *et al.*, Internationaal Privaatrecht, Algemeen Deel 10-I IPR, Mr. C. Asser's Handleiding tot de beoefening van het Nederlandse burgerlijk recht (Deventer: Kluwer, 2013), n. 398 (Asser-Vonken), but see Etienne Picard, Introduction générale: la fonction de l'ordre public dans l'ordre juridique, in Marie-Joëlle Redor (Ed.), L'ordre public: Ordre public or ordres publics. Ordre public er droit fondamentaux (Caen: Nemesis/Bruylant, 2001), p. 19–20, Maria Castillo and Régis Chemain, La réserve d'ordre public et droit communautaire, in n Marie-Joëlle Redor (Ed.), L'ordre public: Ordre public or ordres publics. Ordre public er droit fondamentaux (Caen: Nemesis/Bruylant, 2001), p. 133.

tance.[15] Within national law public policy ensures coherence of especially mandatory norms or rules, such as public security (safety) and rules of consumer protection or rules of property law. Particularly in private law, which is the focus of this paper, the doctrine of public policy offers a limitation on party autonomy.[16] In PIL, public policy defends the national legal order against external influences. In EU law, finally, public policy is an obligation for Member States to apply certain parts of EU law regardless of private party- or national preferences.

In other words, each of these levels operates a concept of public policy (*ordre public*) that is not necessarily the same across all levels. It is perhaps because of this that legal systems generally do not provide a strict definition.[17] In legal doctrine, however, attempts to reach a definition have been made. Tim Corthaut states that public policy:

> 'is the complex of norms at the very heart of a political entity expressing and protecting the basic options taken by that entity in respect of its political, economic, social and cultural order.'[18]

A problem that complicates an analysis in this area is that the tensions between EU law and national law are still very much considered from the national perspective rather than from the EU perspective.[19] Although there is nothing wrong with this approach, looking at the EU from the Member State perspective is limiting. It, at least in principle, neglects the effect EU law has on other Member States and

15 There is also a doctrine of public policy in international law, but because of the very different nature of international law and its very limited effect on private law, the discussion of that falls outside the scope of this paper. See, on this, Alex Mills, The Private History of International Law, 55 International and Comparative Law Quarterly 1 (2006), p. 11, Christian Joerges, Poul Kjaer and Tommi Ralli, A New Type of Conflicts Law as Constitutional Form in the Postnational Constellation, in 2 Transnational Legal Theory 2 (2011), p. 155–156, Tena Hosko, Public Policy as an Exception to Free Movement within the Internal Market of the European Judicial Area: A Comparison, in Tamara Perisen and Iris Goldner Lang (Eds.), Croatian Yearbook of of European Law and Policy, volume 10 (Zagreb: Faculty of Law, Univeristy of Zagreb, 2014), 189 *et seq*.

16 There are other fields of law where the concept of public policy is used. See, e.g., Margaret Young, Regime Interaction in International Law: Facing Fragmentation (Cambridge: Cambridge University Press, 2012), p. 37 (using the term on *ordre public transnational*).

17 See Wolfgang Wurmnest, Ordre public, in Stefan Leible and Hannes Unberath (Eds.), Brauchen wir eine Rom 0-Verordnung? – Überlegungen zu einem Allgemeinen Teil des europäischen IPR, (München: Sellier European Law Publishers, 2013), p. 474–476.

18 Tim Corthaut, EU ordre public (The Hague, Kluwer International, 2012), n. I-6 (also available at https://lirias.kuleuven.be/bitstream/123456789/233756/1/TimCorthaut.pdf).

19 A notable exception exists in the work of Koen Lenaerts, see, e.g., Koen Lenaerts and Kathleen Gutman, "Federal Common Law" in the European Union: A Comparative Perspective from the United States, 54 American Journal of Comparative Law 1 (2006).

the effect this, i.e. the missing-out of the other MS-perspective, has on the own legal order. Moreover, looking at the EU through nationally determined glasses is often looking for something that does not exist.[20] National systematics or classifications often do not return at the EU level. EU law operates on the basis of an internal market functionalism that is very different from the very private-law doctrinal considerations of national law.[21] The result of this is somewhat dangerous in the sense that the national understanding of concepts are transposed to the EU level where they do not work or function in a completely different setting.[22] Concerning public policy, which is nationally determined almost automatically, this danger is very apparent.[23]

Depending on the level, the concept of public policy may very well be given a different meaning, although it is still very much a manifestation of the same idea. Even more so, as I will illustrate below, depending on the level, the concept of public policy is used differently, for different purposes, and resulting in different legal effects. From the perspectives of some legal systems, an argument can even be raised these are not the same concepts.[24] In different legal traditions public policy plays a different role in the system of private law.[25] I will therefore explore three dimensions of the concept of public policy. First, the difference in meaning and use of the concept depending on the level it is employed. Second, the difference in use of the concept at the same level between different legal traditions. Third, and final, the difference in use of these first two dimensions between the Member States in the European Union.[26]

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20 See, e.g., Flavio G.I. Inocencio, Reconceptualizing Sovereignty in the Post-National State: Statehood Attributes in the International Order (Bloomington: Authorhouse, 2014), p. 138 *et seq*.

21 See, on this difference in ‚functionalism' Bram Akkermans, The Use of the Functional Method in European Union Property Law, *European Property law Journal* (2013)/1, 95–118.

22 A legal transplant to a higher level. See on this Michele Graziadei, Comparative Law as the Study of Transplants and Receptions, in Matthias Reimann and Reinhard Zimmermann (Eds.), The Oxford Handbook of Comparative Law (Oxford: Oxford University Press, 2006), p. 441 *et seq*.

23 The exception is, of course, the definition and debate on EU Ordre Public. See Tim Corthaut, EU ordre public (The Hague, Kluwer International, 2012), n I-6 *et seq*.

24 This would especially apply for German and Dutch law, that use a strong concept of mandatory law at the (internal) level of their national legal system. See Asser-Vonken, n. 395 *et seq*, Christian von Bar, Internationales Privatrecht, Zweiter Band, Besonderer Teil (München, C.H. Beck'sche Verlagsbuchhandlung, 1991), p. 540 *et seq*.

25 Tim Corthaut also signals the existence of this problem, but -understandably- focuses his study on the EU level of public policy. See Tim Corthaut, EU ordre public, n. I-23.

26 Such an examination would be well worth the effort, but is somewhat outside of the scope of this paper. I will focus on the main difference between civil law (French and German) and common law (English and Welsh) legal systems.

My analysis will show how these three dimensions are not always complimentary and that this is problematic because of the legal uncertainty that results from this. Depending on the dimension at stake, therefore, the outcome of a situation can differ greatly. If public policy is the manifestation of the fundamental principles of the state, coordination between these different dimentions is crucial. There is already a great amount of uncertainty when it comes to the application of public policy, as it is used to fill lacunae in the system of (private) law or to correct its application.

In the first part of this contribution I will will take a neutral stance, and – from an EU perspective – analyse the different meaning and functions of public policy. The first section will concern internal national public policy (inPP) (section 2), after which will deal with external national public policy (enPP) (section 3). While doing so I will pay attention to different approaches taken by French, German and English law. I will then proceed to a concise treatment of European Union Public Policy (EUPP) (section 4) and will then present an overview of the complexity that results from this (section 5). In the final part, I will argue that the complex multilevel public policy concept that results is undesirable and must be reconsidered and where necessary re-aligned.

2. Internal national public policy (inPP)

Any legal system has a structure and underlying doctrine that provides clarity and systematics to the way in which it is organised, applied and maintained. Structure and doctrine lead to predictability of outcomes and therefore legal certainly in transactions that take place on an everyday basis. Moreover, predictability and legal certainly assist complex transactions as they provide a certain degree of foreseeability. Moreover, a legal system is not isolated from values that underly the society that it seeks to regulate. Law is a result of a political process and hence values and even political preferences make it into the legal rules as well.[27]

This context of systematic approaches and values governs behaviour of private actors in two ways. First, the rules that these actors must abide by are framed with this context in mind. Enforcing these rules is a crucial part of the

27 See for example Rachael Walsch, Private Property Rights in the Irish Constitution, PhD Thesis submitted at Trinity College Dublin (April 2011) who describes how Catholic values have made it into the Irish Constitution. See also Martijn Hesselink et. al., Social Justice in European Contract Law: a manifesto, 10 European Law Journal 6 (2004), p. 653. Martijn Hesselink, Five Political Ideas of European Contract Law, ERCL 2011/3, 295, and Martijn Hesslink, The politics of a European civil code, 10 European Law Journal 6 (2004), p. 295.

state's function.[28] Second, also in the legal relations that these private actors enter into, the legal- and value system has an effect. Freedom of contract is a crucial value in any modern-day society, and private actors are therefore generally free do enter into legal relations with each other. However, they do so within the framework of the legal system. A legal relation with an illegal objective or purpose is generally considered void because it is against the law. A classic example of such is to pay someone to kill another.[29] Other legal relations are not illegal but can still have an unwanted objective or purpose. It is here that the concept of public policy comes in. Through public policy countries steer private actors in respect to political, economic, social, or cultural policy choices made in the law-making process.

Already in Roman law there was a rule that legal relations would be void if they are against the law or good morals.[30] Through legislation, as an expression of the will of the people and of the legislature, the concept of public policy is established. At the same time, the legislature may leave open-norms or other gaps, for the courts to be filled in. Some public policy is therefore enshrined in legislation and hence for these cases, e.g. in German and Dutch law, a specific public policy requirement is not necessary, but in other cases, where gaps in the legislation exist, the concept of public policy is used to fill these gaps. Moreover, there is also a role for internal public policy to address issues that are not addressed by legislation.[31]

This distrinciton is further complicated by the rise of constitutionalism, both at a national and European level.[32] The constitutionalisation of private law has meant that fundamental rights play a role similar to that of public policy by pro-

28 In this context public policy is used to preserve the public order or public peace, for example through the state's police power.

29 See Jan Smits, Contract Law: a comparative introduction (Northampton: Edward Elgar, 2014), p. 177 *et seq*.

30 C.2,4,6. *Pacta, quae contra leges constitutionesque vel contra bonos mores fiunt, nullam vim habere indubitati iuris est*., see Arhur Hartkamp and Carla Sieburgh, Deel 6-III, Algemeen Overeenkomstenrecht, Mr. C. Asser's Handleiding tot de beoefening van het Nederlandse burgerlijk recht (Deventer: Kluwer, 2014), n. 331 (Asser-Hartkamp-Sieburgh).

31 Norbert Habermann et al., J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch: Staudinger BGB – Buch 1: Allgemeiner Teil §§ 134–138; Anh zu § 138: ProstG (Allgemeiner Teil 4a) (München: Verlag C.H. Beck, 2011), n 115 (Staudinger § 138)

32 See Christian Joerges, Conflics-law Constitutionalism: Ambitions and Problems, ZenTra Workin Papers in Transnational Studies, n. 10 (2012), Christian Joerges, Poul Kjaer and Tommi Ralli, A New Type of Conflicts Law as Constitutional Form in the Postnational Constellation, p. 153 *et seq*, on this especially Agustin José Menendez, United They Diverge: From conflicts of law to constitutional theory, 2 Transnational Legal Theory 2 (2011), p. 167 *et seq*.

viding limits to party autonomy.[33] Especially in countries with a constitutional court, such as Germany and France, a constitutional reading of private law arrangements offers an additional method to exercise control. I will take a focus on private law and return to these constitutional aspects in the conclusion to this contribition.

Public policy is therefore the more traditional method to deal with private law arrangements that are outside of the general framework of the legal system. How the method is applied depends on the situation at hand. There are three categories of internal public policy: (1) public policy in the form of legislation, (2) public policy to fill in gaps and open norms in legalization, and (3) public policy to regulate issues that are not regulated by legislation.[34]

There are many instances in private law where public policy shows itself, most notably in contract law. In this context, public policy is the outer limit of party autonomy: parties may contract with whom they want about what they want as long as both the aim and the content of the agreement are – apart from not illegal, i.e. against the law – not against the general context of the legal system. Public policy is therefore an additional tool for the courts to express their disagreement with a certain party agreement.[35] This is a much more nuanced tool than the provisions that declare agreements that are against the law void.[36]

Because of this there is an intricate relationship between the rules dealing with legislative limitations and public policy.[37] In German law, for example, the provision dealing with public morals, which includes public policy, are to be used only when other more specific rules do cannot be applied.[38] Also in Dutch law such hierarchy exists and public policy is used to deal with private law arrangements that cannot be dealt with my legislation.[39] Party autonomy is therefore limited by man-

33 See Olha Cherednychenko, Fundamental Rights, Contract Law and the Protection of the Weaker Party (München: Sellier European Law Publishers, 2007), Chantal Mak, Fundamental Rights in European Contract Law: a comparison of the impact of fundamental rights on contractual relationships in Germany, the Netherlands, Italy and England (Austin: Wolters Kluwer, 2008).

34 Staudinger § 138, n 666.

35 Asser-Hartkamp-Sieburgh, n 345.

36 See Article 3:40 Dutch Civil Code, § 134 BGB and Articles 1131 and 1133 C.Civ.

37 Staudinger § 138, n 172, Asser-Hartkamp-Sieburgh n. 311, 345, 347c.

38 Staudinger § 138, n. 175, 176. For example § 242 BGB dealing with good faith, § 157 BGB dealing with interpretation of contracts, or § 123 dealing with defects of consent. See LAG Berlin-Brandenburg 20 April 2016, 15 Sa 2258/15, on a worker working below minimum wage, but see also LAG Niedersachsen 13 September 2010, 12 Sa 1451/09 in which a contract with a student working for 7,87 euro was not void.

39 For example agreements that limit the exercise of voting rights by shareholders, which are not prohibited, but which are under scrutiny by the courts. J.M.M. Maeijer et al., Deel 2-II, De rechtsper-

datory rules, and only by public policy in exceptional cases. Voidness is the general rule and courts must appy these, even *ex officio*, but in both systems courts take flexibility to provide a more limited effect, such as the avoidance of provisions.[40]

In French law and in English law, public policy is a much more central concept. Here, the doctrine is used to limited party autonomy and a distinction between mandatory rules and public policy is not generally maintained.[41] French authors distinguish two concepts of public policy: the political public policy (*ordre public politique*) and economic public policy (*ordre public économique*).[42] The former is the traditional public polity, referring to the protection of the general interest for the defense of the State, defense of family life and morality. The latter refers to the general interest more widely and focuses on the functioning of the economy. This includes legislation that pursues such general interest, but also protective measures, for example, protecting minors or weaker parties such as consumers.[43] On top of this more constant factor, the economic public policy is much more fluent. Depending on the context, these are restrictions on the limits of party autono-

soon, Mr. C. Asser's Handleiding tot de beoefening van het Nederlandse burgerlijk recht (Deventer: Kluwer, 2015), n. 383 *et seq.* (Asser/Maeijer). HR 13 November 1959, NJ 1960, 472 (Melchers) en HR 19 February 1960, NJ 1960, 473 (Aurora), Asser-Maeijer, n. 384, see also HR 22 May 2001, NJ 2002/364, Asser-Hartkamp-Sieburgh, n. 345.

40 Asser-Hartkamp-Sieburgh, n. 347d, 347e.

41 This is, for example, how the doctrine of *numerus clausus* is upheld in French law: a party agreement that does not fit the pre-described rules of a certain property right, which are rules of public policy, cannot take effect. Cass. 3e civ 31 October 2012, n. 11–16.304, Cass. 3e civ 6 September 2016, n. 11–26.953. A right of servitude can therefore not contain a positive duty. See Article 686 C.Civ. See below for a discussion of the *numerus clausus* of property rights in relation to the EU Succession Regulation (Regulation 650/2012). The existence of a numerus clausus in French law is actually disputed; especially in the light of more recent case law discussed directly below. On French property law see Bram Akkermans, The Principle of *Numerus Clausus* in European Property Law (Antwerp: Intersentia, 2008), 155 *et seq.*

42 Philippe Malinvaud and Dominique Fenouillet, Droit des obligations, 11th edition (Paris; LGDJ, 2014), n. 263, p. 208.

43 The latter is sometimes also categorized as *ordre public social*. Philippe Malinvaud and Dominique Fenouillet, Droit des obligations, 11th edition (Paris; LGDJ, 2014), n. 263, p. 208–209, Jacques Flour et. al., Les obligations. 1. L'acte juridique, 11th edition (Paris: Armand Colin, 2004), n. 282, p. 205, n. 292ff, p. 213ff. Political public policy deals with (1) the defense of the state (*défense de l'État*), by which French doctrine means the rules and principles on the organization of the state, prohibiting – for example – to sell your right to vote. (2) the defense of family (*défense de la famille*), by which French doctrine refers to fiancés or spouses seeking to deviate from the rules of marriage , but also to the limits of contractual freedom for spouses to deviate from the default rules. Finally, political public policy includes (3) the defense of morality (*défense de la morale*), by which French doctrine refers to acts and agreements against fundamental rights, and the human nature of everyone (*la personne humaine*).

my in favor of the general economic interest, for example in agreements that restrict competitiveness or in labour contracts[44], but also prohibiting certain agreements to protects certain market participants such as lessees or consumers.[45] Parties are free, therefore, to make use of the legal system to their advantage, until their arrangements hit the fence formed by the political or economic public policy.

When that happens, the agreement will generally be void by force of Article 6 Code civil. When the public policy follows from a legislative act, the courts will, *ex officio* if necessary, declare voidness (*nullité absolue*) of the act. However, in the absence of concrete legislation, for example in case of protection of lessees or consumers in a certain case, the protective nature of economic public policy can bring a relative voidness (*la nullité relative*), meaning that parties must invoke it in front of a court.

Also in English law the doctrine of public policy is a central concept in private law. Judges use public policy to review the illegality of contracts to decide whether the contract can be enforceable or not.[46] Like in other legal systems, courts will search for a connection to legislation or other cases as a manifestation of public policy before going into the doctrine of public policy without legislative support or precedence.[47] No new head of public policy is to be invented by the courts.[48] There are some very authoritative statements that illustrate this approach.[49] Burrough J states in *Richardson v Mellish*:

> If it be illegal it must be illegal either on the ground that it is against public policy, or against some particular law. I, for one, protest … against arguing too strongly upon public policy; a very unruly horst, and when once you get astride it you never know where it will carry you. It may lead you from the sound law. It is never argued at all but when all other points fail.[50]

Lord Atkin states in *Fender v St. John Mildmay*:

> … the doctrine should only be invoked in clear cases in which the harm to the public is substantially incontestable, and does not depend upon the idiosyncratic inferences of a few

44 Philippe Malinvaud and Dominique Fenouillet, Droit des obligations, 11th edition (Paris; LGDJ, 2014), n. 272, p. 214–215.

45 Ibid., n. 273, p. 215–216.

46 See Benedicte Fauvarque-Cosson, Dennis Mazeaud, European Contract Law: Materials for a Common Frame of Reference (München: Sellier European Law Publishers, 2008)A, p. 125.

47 Ewan McKendrick, Contract: In General, in Andrew Burrows (Ed.), English Private Law, 3rd edition (Oxford: Oxford University Press, 2013) p. 708.

48 Ibid., p. 709, Janson v Driefontein Consolidated Mines Ltd [1902] AC 481, 491.

49 See also Tindal, C.J., *Horner v. Graves* (1831), 7 Bing. 743 ("Whatever is injurious to the interests of the public is void, on the grounds of public policy").

50 Richardson v Mellish (1824) 2 Bing. 229 at 252 per Burrough J.

> judicial minds. I think that this should be regarded as the true guide. In popular language, following the wise aphorism of Sir George Jessel cited above, the contract should be given the benefit of the doubt.[51]

The effect of an arrangements that is against public policy, e.g. because it is immoral, restricts marriage, prevents the course of justice, or restricts trade, is unenforceabilility.[52]

In most legal systems, however, there is no real criterion of public policy available.[53] The concept is defined, as described above, but when exactly it applies and how it is to be applied, remains open to the case at hand.[54] The positive side of this is that courts therefore have discretionary power to uphold the values of the legal system and adapt these to changing circumstances. This can result in an examination of the content of legal relations as well as their effect. In many legal systems the courts will use their discretionary power to amend the content of a legal relation so that it complies with public policy if possible but will declare a legal relation partially void or even void when necessary.[55]

The doctrine of public policy at the national level is a tool to enforce the important principles of the state on private actors. It is, also in a comparative perspective, a measure of last resort. The organisation of the State and other fundamental principles are maintained by legislation at various levels, protected by the courts. When legislation leaves – on purpose or not – room for judicial assessment, the doctrine of public policy can be used to maintain the State's fundamental principles contained in those acts of legislation. In the absence of legislation, the doctrine can be used as a last resort to maintain the same set of principles and restrict party autonomy if necessary. The effect is generally voidness of the agreement. In some circumstances, partial avoidance is also used to allow the rest of the legal arrangement to continue.[56]

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51 Fender v St. John Mildmay [1938] AC 1, at p. 5 per Atkin LJ.

52 See Ewan McKendrick, Contract: In General, p. 708 *et seq*.

53 Already Von Savigny recognised this problem, see Friedrich Karl von Savigny, System des heutigen römisches Rechts VIII (Aalen: Scienta Verlag, 1981 (repr)), S. 32.

54 Asser-Hartkamp-Sieburgh, n. 311–312.

55 See, for example, Article 3:40 Dutch Civil code. In German law this doctrine is known as *geltungserhaltende Reduktion*, meaning the reduction of the content of a legal relation to that part that passes the public-policy test and therefore may remain valid.

56 The considerations in doing so are generally of national internal considerations; the norms of the national legal systems must be maintained. It is only in Dutch law that the suggestion is made that also principles of international law can affect internal national public policy.

3. External national public policy (enPP)

There is also an external perspective to the manifestation of the organisation and fundamental principles of the State.[57] In this external perspective the objective of the doctrine of public policy is the defense against foreign law that violates such organisation or principles. In private international law public policy is usually referred to as *orde public* and is the subject matter of a very rich body of literature on the place and use of *ordre public*.[58] However, much like its internal national counterpart – which is generally considered a wider concept than external public policy – there is, besides general and often used examples as addressed below, not much known about its exact content.[59]

This defence against foreign influence is twofold, first of all to prevent access of foreign law that does not comply with the fundamental values of the receiving legal system, but also, secondly, in the application of foreign law in the receiving legal system.[60] Rules of private international law exist to give effect to foreign law, not to block it.[61] Although foreign law is therefore generally to be applied, the receiving legal system decides on the extent to which it does; through public policy the receiving state can continue to apply those elements of its law it considers crucial. However, from the perspective of the application of foreign law, the use of public policy must consequently be limited. Legal systems, in other

57 See also François Julien-Laferrière, Ordre public et droit des étrangers' in Marie-Joëlle Redor, L'ordre public: ordre public ou ordres publics? Ordre public et droits fondamentaux (Brussels: Bruylant, 2001), p. 286.

58 See, *inter alia*, E. de Szaszy, Droit transitoire et droit international privé. Les principes généraux du droit transitoire. Recuil des cours. Volume 47 (The Hague : academie de droit international de la Haye, 1934), p. 171, Joseph Mrázek, Public Order (Ordre Public) and Norms of Jus Cogens, Czech Yearbook of International Law (Huntington : Yuris, 2012), p. 81–82, Bernard Audit, Droit International Privé, 14th edition (Paris : Economica, 2006), p. 254 *et seq*.

59 See, *e.g.*, Wolfgang Wurmnest, Ordre public, in Stefan Leible and Hannes Unberath (Eds.), Brauchen wir eine Rom 0-Verordnung? – Überlegungen zu einem Allgemeinen Teil des europäischen IPR, (München: Sellier European Law Publishers, 2013), p. 457–458. 'Kernaufgabe des ordre public ist die Abwehr fremden Rechts, sofern dessen Anwendung aus Sicht des Forums zu schlichtweg untragbaren Ergebnissen führen würde. Diese Aufgabe besitzt der ordre public in allen nationalen Kollisionsrechten', see also François Julien Lafferrière, Ordre public et droit étrangers, p. 285–287, Alex Mills, The Dimensions of Public Policy in Private International Law, 201.

60 Julien Lafferrière, Ordre public et droit étrangers, p. 286, 290, Bruno Genevois, Remarques sur l'ordre public, in Marie-Joëlle Redor (Ed.), L'ordre public: Ordre public ou ordert publics. Ordre public et droit fundamentaux (Caen: Nemesis/Bruylant, 2001), p. 407 (using 'ordre pubic de protection' and 'ordre pubic de direction').

61 Wolfgang Wurmnest, Ordre public, p. 446.

words, can only use their public policy doctrine to prevent the application of foreign law in exceptional circumstances. This fundamental starting point was very nicely illustrated by Justice Warren Burger in *The Bremen v. Zapata O -Shore Co*[62]:

> "the expansion of American business and industry will hardly be encouraged if, not- withstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts. (...) We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws and resolved in our courts."[63]

Of course, this does not only concern business interests: countries recognise and apply foreign legal relations so that other countries will also recognise and apply relations governed by their legal system. In regard to enPP the private international law systems differ not so much in the way in which *ordre public* is applied, but – like their national law equivalent – in the aspects of their national law they consider as fundamental to the organisation of their State. Traditionally there are two aspects of ordre public that are defined: (1) the outer limit and the (2) inner limit.[64] The outer limit defines the fundamental principles of the state, such as human dignity and other fundamental rights. The inner limited defines the social- and other normative order of a legal system. This includes rules of procedural law, of property law and succession law.[65]

3.1 Public policy and overriding mandatory provisions

In private international law, with its long and very strong academic tradition of abstraction, a distinction is made between public policy and mandatory provisions of law. The difference is that of of a negative and a positive function. Public policy is to be used in as a negative means to defend the receiving legal system from undesirable effects of manifestly incompatible foreign law. For this to hap-

62 *The Bremen v. Zapata O -Shore Co.*, 407 U.S. 1, 9 (1972)

63 See Jürgen Basedow, Zuständigkeitderogation, Eingriffsnormen und ordre public, in Peter Mankowski and Wolfgang Wurmnest (Eds.), Festschrift für Ulrich Magnus zum 70. Geburtstag, (München: Sellier European Law Publishers, 2014), p. 352.

64 Wolfgang Wurmnest, Ordre public, p. 457 *et seq.*, Marc-Philippe Weller, Anknüpfungsprinzipien im Europäischen Kollisionsrecht: Abschied von der "klassichen" IPR-Dogmatik?, 31 IPRax 5 (2011), p. 430 *et seq.* This is German doctrine, and in, for example, Dutch law considered rather artificial. See Asser-Vonken, n. 404–405.

65 Asser-Vonken, n. 404–405.

pen, private international law must first recognise the applicability of foreign law and then consider this application of foreign law in the light of its own fundamental principles.[66]

Mandatory provisions, of which there are many in private law, can also play a role in private international law. When these mandatory provisions are fundamental to the organisation of the state, the economy, society or any other fundamental aspect of the state, they can be considered overriding mandatory provisions. Such provisions are also referred to as semi-public law, meaning they do only seek to regulate the relation of private actors, but have a more all-encompassing purpose.[67] Examples are rules of consumer protection and rules of labour law.[68] The difference, although the definition to come to what is an overriding mandatory provision is basically the same as that of public policy, is in the effect. An overriding mandatory provision applies, regardless of the applicable law.[69] It does not matter, in other words, which law applies, when a national court is asked to deal with a certain matter, it will, *ex officio*, apply these overriding mandatory rules of its national law. A very nice example of a definition of these mandatory provisions is offered by Article 9 of the Rome I Regulation:

> '1. Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation.'

In the following I will not consider overriding mandatory provisions and I will, in line with the above, focus on public policy. Through this comparative overview I aim to show how the concept of public policy differs from system to system, as rules private international law need to interact with rules of national law. I will return to mandatory provisions and the non-usefulness of the distinction in the conclusion to this section (see below section 3.3).

66 Asser-Vonken, n. 399–400, Bernard Audit, Droit international privé, p. 97 (*lois de police*).
67 See Bernard Audit, Droit international privé, p. 99.
68 Asser-Vonken, n. 473 *et seq*.
69 See, e.g., Article 3 C.civ, which states: 'Les lois de police et de sureté obligent tous ceux qui habitent le territoir'.

3.2 Public policy in national private private international law

3.2.1 German Law

In German private international law Article 6 of the EGBGB (*Einfürungsgesetz zum Burgerlischen Gesetzbuche*) deals with *Öffentliche Ordnung* and offers both the defence and control of application functions of public policy. In German terminology these are also known as the *kollisionsrechtlicher ordre public* and the *anerkennungsrechtlicher ordre public*.[70] It is in particular in relation to the former that Article 6 EGBGB is of particular relevance.

The concept of *ordre public* as developed here is separate from the rules discussed in section 2. *Ordre public* is a matter of private international law and not of substantive private law, which is governed by its own rules. This is a result of the legal order that was desired by *Von Savigny*.[71] This concerns a separation between the 'procedural rules' of private international law, i.e. those rules that point to which law is applicable without taking notice of the content of these rules (also known as *Von Savigny*'s blindfold), and 'substantive rules' of private law.[72] Although *ordre public* is governed by its own principles and rules, it still deals with the same objectives as its internal private law counterpart: the fundamental rules on the organisation of the state and society.[73]

An interesting and illustrative example is offered by the BGH judgment of 10 December 2014.[74] In this case a same-sex couple legally contracted a surrogacy agreement with a woman resident in California. The applicable law to the con-

70 Wolfgang Wurmnest, Ordre public, in Stefan Leible and Hannes Unberath (Eds.), Brauchen wir eine Rom 0-Verordnung? – Überlegungen zu einem Allgemeinen Teil des europäischen IPR, (München: Sellier European Law Publishers, 2013), p. 457 *et seq*., Marc-Philippe Weller, Anknüpfungsprinzipien im Europäischen Kollisionsrecht: Abschied von der "klassichen" IPR-Dogmatik?, 31 IPRax 5 (2011), p. 430.

71 See Paul Heinrich Neuhaus, Abschied von Savigny?, 46 RabelsZ (1982), p. 4 *et seq*.

72 This separation is not without criticism, but is the leading theory. Marc-Philippe Weller, Anknüpfungsprinzipien im Europäischen Kollisionsrecht: Abschied von der "klassischen" IPR-Dogmatik?, IPRax (2011), p. 429, plus J.H.J.Th Deelen, De blinddoek van von Savigny, Rede uitgesproken bij de openbare aanvaarding van het ambt van gewoon hoogleraar in de faculteit de rechtsgeleerdheid van de Katholieke Hogeschool te Tilburg, 15 december 1966 (Amsterdam: Scheltema & Holkema NV, 1966).

73 'Das Bundesverfassungsgericht versteht unter öffentlicher Ordnung die Gesamtheit der ungeschriebenen Regeln, deren Befolgung nach den jeweils herrschenden sozialen und ethischen Anschauungen als unerlässliche Voraussetzung eines geordneten menschlichen Zusammenlebens innerhalb eines bestimmten Gebiets angesehen wird.' BVerfGE 69, 315 (332),

74 Case XII ZB 463/13.

tract, considering that surrogacy agreements are against the law (para 1(1) 7 German embryo protection act and para 14b adoption placement act) in German law, was Californian law.[75] By judgment of the superior court of California legal parenthood was exclusively assigned to the appellants. However, upon return to Germany, the civil registry refused to record the appellants as the legal parents of their child. Prior to this judgment, German courts tended to take the position that the fact that surrogacy took place by itself was a violation of public policy. However, the BGH now held that the mere difference with German law was not enough and that by analogy to adoption and other similar solutions in German law, the situation *in casu* could be fitted in. Also in more complex cases this approach has become leading.[76] This case therefore illustrates a very nuanced approach to public policy in German law and shows how it is to be applied in exceptional cases only.

3.2.2 Dutch Law

Like in other countries, also Dutch private international law is focused on fostering and regulating trade.[77] Dutch scholarship distinguishes a substantive and a procedural *ordre pubic*. The substantive public policy is used to monitor the content of foreign law and preventing its application when it is manifestly incompatible with Dutch public policy.[78] Procedural public policy looks at the procedure that was followed to come to the measure of foreign law.[79]

Dutch law adheres to both the outer- and inner limit test of public policy. (1) Foreign law cannot be applied if its content is manifestly incompatible with Dutch law, and (2) it can also not be applied if the effects of its application would do so.[80]

75 See http://conflictoflaws.net/2015/german-federal-court-of-justice-on-surrogacy-and-german-public-policy/.

76 See Case Heiderhoff, NJW 2015, 485 and a Mayer, stAZ 2015,33. See also http://conflictoflaws.net/2015/german-federal-court-of-justice-on-surrogacy-and-german-public-policy/ for more references.

77 Article 10:6 Dutch Civil Code. Luc Strikwerda, Inleiding tot het Nederlandse Internationaal privaatrecht (Deventer: Kluwer, 2008), p 2. Asser-Vonken, n. 395.

78 Aukje van Hoek, Erkenning van vonnissen in het privaatrecht: een studie naar de grenzen van wederzijdse erkenning, NIPR 2003, p. 342.

79 Aukje van Hoek, Erkenning van vonnissen in het privaatrecht: een studie naar de grenzen van wederzijdse erkenning, p. 342.

80 Asser-Vonken, n. 404, HR 13 maart 1936 NJ 1936, 280, (Koninklijke); HR 13 maart 1936, NJ 1936, 281 (Bataafse); HR 11 februari 1938, NJ 1938, 787 (Rotterdam); HR 28 april 1939, NJ 1939, 895 (Messageries Maritimes).

An example of the difference is offered by family law. When a marriage is validly concluded abroad between two persons that are related as cousins, Dutch public policy cannot resist this. Dutch law recognises that the marriage is validly concluded under the law of another country and when this is allowed, it will be recognised in the Netherlands. However, when there is evidence that the marriage is concluded under pressure, public policy can be used to resist recognition.[81] A similar line of reasoning exists in relation to other areas of private law, such a company law and property law (such as the recognition of a trust relation[82], or the recognition of a right of floating charge[83]).

The content of public policy in Dutch private international law is, like in other legal systems, deliberately left open.[84] The content of public policy is therefore not static, but rather dynamic. Opinion in society on what is permissible will change over time.[85] The Dutch definition is different from the German definition of Article 6 EGBGB discussed above as it does not refer to Dutch law, but to public policy as a whole. This definition is very much in line with the open character of Dutch law, meaning that it can also concern public policy in a wider sense of the term, including provisions of EU and international law.[86] The meaning of Dutch public policy is therefore also subject to the effect of fundamental rights and EU law.[87]

It is clear that, like in other legal systems, public policy is to be used as an exception.[88] Article 10:6 BW therefore states 'kennelijk onverenigbaar' (manifestly incompatible) to express this. The fact that foreign law is different, is not enough to apply the public policy exception.[89] The difference with the relevant foreign law

81 Paul Vlas, Ontwerp: Wetsvoorstel Tegengaan huwelijksdwang, Staatscommissie voor het Internationaal Privaatrecht, 7 oktober 2014, available at https://www.eerstekamer.nl/overig/20150713/brief_staatscommissie_voor_het/document3/f=/vjvocptu2oy6.pdf. Reflected in Article 10:32 BW, see Memorie van Antwoord – Wijziging van Boek 1 en Boek 10 van het Burgerlijk Wetboek betreffende de huwelijksleeftijd, de huwelijksbeletselen, de nietigverklaring van een huwelijk en de erkenning van in het buitenland gesloten huwelijken (Wet tegengaan huwelijksdwang).

82 HR 26 September 2014, BNB 2015/98 (note MJ Hogeveen)

83 HR 14 December 2001, NJ 2002, 241.

84 It is "a core of a values and norm of the own legal order that are more or less inviolable for that legal order", Asser-Vonken, n. 412.

85 Asser-Vonken, n. 414.

86 Asser-Vonken, n. 415 *et seq*. The inclusion of international norms is also fitting because Dutch law adheres to a monist system, meaning Article 94 of the Dutch constitution prescribes that Treaties and decisions made by international organisation are directly part of the Dutch legal order.

87 Asser Vonken, n. 412.

88 Asser-Vonken, n. 408 *et seq*.

89 See AG Franx in HR 16 December 1983, NJ 1985/311.

must be deep and profound, meaning that the choices made by the other legal system are fundamentally in conflict with the choices made by Dutch law. For example, the recognition of punitive damages in traffic accidents are manifestly incompatible with the choice of the Dutch legislature to reject punitive damages.[90]

Not all rules of mandatory law at the national private law level are therefore to be considered of public policy in at the international level. Rules must be of a fundamental nature to be considered of *ordre public*. Moreover, the mere fact that a rule does not exist in Dutch law, is also not enough to assume an infringement on public policy.[91]

3.2.3 French Law

French law too, adheres to the two aspects of *ordre public*: its defence to access of foreign law on its territory, as well as the regulation of the effects of foreign law.[92] Public policy, like in other legal systems, refers to the fundamental principles of the French legal order. It is to be understood as an exception to the idea that the legal systems recognises the effect of foreign law. Like in German and Dutch law, the positive function of public policy is left to mandatory rules (also known as *lois de police*).[93] What remains is a narrowly interpreted concept of public policy, more narrow than its internal private law counterpart, used to protect the fundamental principles of French law.[94] It applies where there is a significant difference between the a foreign norm and the the fundamental principles of French law.[95] In the words of the French *Cour de cassation* public policy concerns a defence of the principles of universal justice considered in French public opinion as including absolute international value.[96] Examples concern clear situations, such as com-

90 HR 10 September 1999, NJ 2001/41, Asser-Vonken, n. 409.

91 See HR 3 December 2004, NJ 2005/562, Asser-Vonken, n. 413.

92 François Julien Laferrière, Ordre public et droit des étrangers, p. 287 *et seq*., Bernard Audit, Droit international privé, p. 254–255.

93 See Article 3 C.Civ., which states that 'les lois de police et de sûreté obligent tous ceux qui habitent le territoire' (Mandatory law and laws relating to security bind all those that are on the territory). Bernard Audit, Droit international privé, p. 256–257, in particular p. 257 note 1.

94 Or *ordre public au sense du droit international privé*. Bernard Audit, Droit international privé, p. 257–258.

95 Bernard Audit, Droit international privé, 14th edition (Paris: Economica, 2006), p. 258, 263, Civ 1er 30 May 1967, D. 67.639 note Malaurie (*Kieger*).

96 'principes de justice universels considérés dans l'opinion française comme doués de valeur internationale absolue', Cass 25 May 1948.

mercial surrogacy[97], and inequality[98], but also expropriation without compensation.[99]

Unlike German and Dutch law, there is no specific legislative provision on public policy. It is a doctrine of private international law, to be applied by the courts. The courts will take their lead from the French Civil Code, especially by its underlying fundamental principles. For example, Article 340 C.Civ, which states that one cannot enter in a second marriage before dissolving the first one. Also, the already mentioned Article 6 C.Civ., which restricts party autonomy by making use of the doctrine of public policy is relevant in the international context. Party autonomy is limited by national considerations of public policy in the national context, but of course also means that party agreements made elsewhere, but which are to be applied in France, must withstand a similar test. The same reasoning, in other words, that will fundamentally restrict party autonomy at the national level can be applied at the international level.[100]

Like in German and Dutch law, the French *ordre public* is to be used sparingly. Its effects are a refusal of recognition of a right acquired elsewhere as such. Of course, French private international law can still give effect to some of the foreign relation by substitution or adaptation.[101]

3.2.4 English Law

Public policy in English private international law is, although like in other legal systems a manifestation of the same idea of fundamental aspects of the organisation of the State, a different matter. Where in national law the use of public policy is subject to the doctrine of precedent, in private international law it is a matter of defence of the national legal system without such restriction.[102] It is, as Kent Murphy writes:

97 Ass. plén. 31 May 1991, RC 91.711.

98 Paris, 28 June 1973, RC 74.505.

99 Cass 23 April 1969, D. 69.341. See Bernard Audit, Droit international privé, p. 259.

100 See Bernard Audit, Droit international privé, p. 256. The additional of fundamental to the restriction is necessary, as not all national internal restrictions are automatically also national external restrictions. The restriction on party autonomy must concern the fundamental principles to the organisation of the state.

101 See Bernard Audit, Droit international privé, p. 265 *et seq*. The exact workings of substitution and adaptation, as well as the difference between these doctrines, fall outside the scope of this paper.

102 Kent Murphy, The Tradition View of Public Policy and Ordre Public in Private International Law, in 11 Georgia Journal of International and Comparative Law 3 (1981), p. 593. Adrian Briggs,

> 'the forum's reserved right to set aside conflicts rules in order to reach decision more compatible with justice or morality as locally conceived.'[103]

English judges therefore take more freedom when they apply public policy to protect the internal English legal order. In practice this may result in a more conservative approach, but public policy remains to be considered an exception to the main principle of recognition of foreign law in appropriate cases.[104]

This exception is, like in other legal systems, therefore not to be taken lightly.[105] Clear guidelines for judges do not exist, it remains an open concept on purpose, but through case law of the higher court's principles for its application do come forward.[106] In addition to the careful approach to consider international trade as leading in the assessment whether English law should restrict the application of foreign law, English courts specifically take the responsibility to protect the interest of the United Kingdom as well.[107] The analysis made by English courts is therefore on the content of foreign law, the effect of foreign law on national law, the interests of the parties involved, and on overriding principles of English law.[108] With that, even though English courts have more freedom than their continental counterparts, the use of the public policy exception is not altogether different. Its focus is on the fundamental values of English law, mostly, but not exclusively, used in family law.[109]

Private International Law, in Andrew Burrows(Ed.) English Private Law (Oxford: Oxford University Press, 2013), p. 1189.

103 Kent Murphy, The Tradition View of Public Policy and Ordre Public in Private International Law, in 11 Georgia Journal of International and Comparative Law 3 (1981), p. 593.

104 Adrian Briggs, Private International Law, p. 1231.

105 See e.g. *Addison v Brown* [1954] 2 ALL ER 2013 (about the recognition of an exclusion of jurisdiction clause) and *Radmacher (formally Granatino) v Granatino* [2010] UKSC 42 (about the recognition of an discriminatory prenup).

106 Kuwait Airways Corporation v Iraqi Airways Co & Anor [2002] UKHL 19. See Alex Mills, The Dimensions of Public Policy in Private International Law, 202 *et seq*.

107 Lemenda Ltd v African Middle East Co [1988] QB 448, Peter B. Carter, The rôle of public policy in English Private International Law, 42 International and Comparative Law Quarterly 1 (1993), p. 4–5.

108 It could be argued this is an interest-based analysis focused primarily on the protection of English law. Peter B. Carter, The rôle of public policy in English Private International Law, 42 International and Comparative Law Quarterly 1 (1993), p. 7. See also Adrian Briggs, Private International Law, p. 1189–1190.

109 See Adrian Briggs, Private International Law, p. 1190, but see also p. 1235, 1240–1241.

3.3 In Summary: External national public policy

The above illustrates that the fundamental values of the state in a foreign perspective are worth protecting. National legislation is the result of a political process and an internal balancing. When such processes are 'threatened' by the processes of other countries, the friction that results must be addressed. Countries do this by themselves, but in a remarkably similar manner.

Alex Mills describes how there are three perspectives in which public policy can be considered.[110] First, there is the perspective of choice of law, in which public policy serves as a limitation on the effects of such choice. Second, that does not entail that public policy can simply be used to establish the superiority of the own legal system above others. There must be a degree of proximity to the case at hand, meaning close ties to the receiving legal system, before such system exercises its authority. Proximity therefore means restraint for the receiving legal system. Third, there is a strong element of relativity., meaning that the content of the specific rule of public policy matters. A local law is to have different effect than a universally accepted fundamental right.[111]

In every legal system discussed above arguments are made how the doctrine of public policy in private international law is different than in national private law. There is some truth in this when the specific application in specific cases it looked at: in a private international law setting, of course, the function of public policy, i.e. the defence of the receiving legal system's fundamental principles, is different from a purely national setting. That difference however is not that serious and seems a matter of authors repeating each other. Public policy concerns the fundamental principles of the state that are protected by enforcing these on private parties by preventing their legal relation from taking effect.

4. European Union public policy (EUPP)

Up until this point in this contribution, the search for public policy has been a matter of national law. In private international law this is national law in an international perspective, but still national law. At the same time, there is a concept of *ordre public* at the EU level, in (primary and secondary) legislation as well as in the case law of the Court of Justice of the European Union (CJEU).

110 Alex Mills, The Dimensions of Public Policy in Private International Law, p 32.
111 Ibid.

There is a complex relationship between these different levels of public policy and there are several dimensions that the concept of public policy addresses. National public policy, both internal and external, is recognised by EU law, but EU law also maintains its own concept of EU *ordre public*. These concepts are used to navigate between horizontal conflict between normative orders, as well as in vertical conflicts between these orders in the multi-level legal order of the European Union.[112] European public policy serves (1) to provide a limit to the pluralist nature of the landscape of national legal orders, (2) as a means to protect the coherence of EU law, and (3) can serve as an additional method to limit private (horizontal) arrangements. Before I go into an analysis of the interrelationship of these concepts and dimensions, I will first -shortly- shed light on national and EU *ordre public*.

4.1 National public policy (both internal and external) from the perspective of EU law

Public policy, in fact, was woven into the EEC Treaty, the predecessor of the current Treaty on Functioning of the European Union (TFEU) as a recognition that the Member States had their own way of organising their society.[113] However, early on, the CJEU already made clear this was to happen under supervision of the Court.[114]

4.1.1. Public policy in Primary EU Legislation

In the EU Treaties the concept of public policy is mostly dealt with in the context of the four freedoms (freedom of movement of goods, persons, services and capital), where it serves as a ground for justification for EU Member States when their

112 See, on this analysis of horizontal and vertical (and even diagonal) conflicts, Christian Joerges, Poul Kjaer and Tommi Ralli, A New Type of Conflicts Law as Constitutional Form in the Postnational Constellation, p. 154–155.

113 See Catherine Kessedijan, *Ordre Public*, 1 Erasmus Law Review 25, p. 28–29, Tena Hosko, Public Policy as an Exception to Free Movement within the Internal Market of the European Judicial Area: A Comparison, in Tamara Perisen and Iris Goldner Lang (Eds.), Croatian Yearbook of of European Law and Policy, volume 10 (Zagreb: Faculty of Law, Univeristy of Zagreb, 2014), p. 189–190, 209–212.

114 See, e.g. Case 41/74 *Yvonne van Duyn v Home Office* [1974] ECR 01337 on a Dutch citizen that was refused entry to the United Kingdom to work for the Scientology Church, an organisation not illegal, but deemed against UK public policy.

national measures prevent the free movement in any of these four categories.[115] When we consider the concept of public policy as the manifestation of the principal organisational aspects of a state, also other provisions of the EU Treaties can be seen as public policy. Tim Corthaut also mentions provisions relating to war and national defense as examples of the latter.[116]

In its case law the Court of Justice of the EU (CJEU) has set forth a method to view and protect the functioning of the EU Internal Market. It has developed this method since the 1950s and has fine-tuned it to a very sophisticated method. Article 19 Treaty of the European Union (TEU) set forth that the CJEU is to ensure the interpretation and application of the Treaties. Protecting the Internal Market, as set forth by the Treaty on Functioning of the European Union (TFEU), is one of its crucial responsibilities. In doing so the CJEU looks at measures of national law in the context of the functioning of that Internal Market. Any measure of national law which hinders that functioning is caught in the net of EU Internal Market Law. In its *Dassonville* judgment the CJEU gave a classic definition of this principle when it stated that any measure of national law that hinders, directly or indirectly, actually or potentially, the functioning of the EU Internal Market. Discriminatory measures are always under scrutiny, and under this *Dassonville*-reasoning rules that are not directly discriminatory can also be caught. Similar reasoning applies to all of the four freedoms and a part of this is sometimes described in terms of market access: if a measure of national law that does not seek to discriminate prevents or hinders access to the market of such member state, it is caught by EU internal market law. National provisions and with that national regulatory choices are therefore constantly under scrutiny, on a case-by-case basis, of the CJEU.[117]

Such a conclusion does not mean any measure of national law is also prohibited under EU law. It merely signals a reversal of the burden of proof: when the national rules fall under EU scrutiny it is for the Member State to prove that its measure is justified in the EU framework. It is in this context that public policy surfaces, as it is one of the primary grounds for justification to be used by a Member State.[118] Member States may, referring to their national legal system, argue that a certain measure is of public policy.

Member States will use their own legal framework to argue that their measure is of public policy, but the CJEU will scrutinize this from the perspective of EU

115 See also Tim Corthaut, EU ordre public, n II-7.

116 Tim Corthaut, EU ordre public, n II-5–II-6.

117 See, on this, Catherine Barnard, The substantive law of the EU. The Four Freedoms (Oxford, Oxford University Press, 2016), p. 145–147.

118 See articles 36, 45, 52, and 65 TFEU.

internal market law. The decision what is of public policy is therefore not a national but an EU concept. This EU public policy is construed by the CJEU as a much narrower concept.[119] Member States cannot simply argue that a measure is of public policy in their national context. The measure, so the Court stated in its *Airblade* judgment must be 'understood as applying to national provisions compliance with what has been deemed to be so crucial for the protection of the political, social or economic order in the Member State concerned as to require compliance therewith by all persons present on the national territory of that Member State.[120] The CJEU, with that definition, uses its own concept of public policy to which the public policy of the Member States must comply. If so, the existence of the national measure may be justified.[121]

Apart from justification, there in one other criteria that a measure must comply with, before it can be deemed to be in conformity with EU Law: when such justification is accepted, it must also be considered proportional in the light of the restrictive effect of the measure of national law.[122]

4.1.2. Public policy in Secondary EU Legislation

Public policy also surfaces in secondary EU legislation, but then usually in a different form.[123] Many EU legislative instruments refer to the public policy of the forum as an exception for Member States to avoid application of (positive) rules of EU law. This is especially the case for measures of European Union private international law. Here, different from the context of the internal market law mentioned above, it is not a measure of national law that potentially infringes EU law,

119 Catherine Barnard, The substantive law of the EU. The Four Freedoms, p. 152–156. See e.g Case 177/83 *Kohl v Ringelhan & Rennett SA* [1984] ECR 3651.

120 C-376/96, *Arblade* [1999] ECR, 1–08453. See also Catherine Kessedjian, Public Order in European Law, p. 30.

121 See, e.g., Case C-36/02 Omega Spielhallen- und Automatenaufstellings-GmbH v Oberbürgermeisterin der Bundesstadt Bonn [2004] ECR I-9641, where national public policy, i.e. the protection of human dignity, was considered in line with EU public policy as well. On this see also Catherine Kessedjian, Public Order in European Law, p. 35–36.

122 See, on this method, Catherine Barnard, The substantive law of the EU. The Four Freedoms, p. 17 *et seq*.

123 See, Etienne Pataut, The public-policy exception and the Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession. A note written for the Legal Affairs Committee of the European Parliament (Brussels: European Parliament, 2010), p. 8 *et seq*.

but a measure of EU law that infringes national public policy in such a manner that the application of the EU rule can perhaps be set aside. Examples of this are offered by Article 45(1)(a) of the Brussels I (recast) Regulation, Article 21 of the Rome I Regulation and Article 35 of the Succession Regulation.[124]

Also here, there is a narrowly construed concept of public policy. The EU legislative texts state that the rule of EU law must be *manifestly incompatible* with the public policy of the forum. The result of this is, similarly to the use of public policy in the context of EU internal market law, that Member States may invoke their national public policy considerations. The CJEU will test these in the perspective of the functioning of the measure of secondary EU legislation and the general effectiveness of EU law. The result of this is that Member States can only invoke their 'most fundamental values, which are at the very core of their system'.[125]

A very interesting example is offered by the case of *Diageo Brands BV v Simiramida-04 EOOD* that dealt with the recognition of a Bulgarian judgment by a Dutch court, the content of which was considered in violation of Dutch public policy.[126] In short, the case regards a parellel import of Johnny Walker brand whiskey made to Bulgaria in violation of trade mark protection of Diageo Brands BV. The load of whiskey was ceased by Diageo as a result. The Bulgarian courts decided, contrary to the EU trademark protection rules, that this was allowed, and the seizure was lifted, and a damages case brought before the court in the Netherland, where Diageo has its headquarters. Confusion arose as to whether the Bulgarian judgment could be enforced in the Netherlands, as it was a violation of EU law and hence of Dutch public policy. The Dutch Supreme Court (*Hoge Raad*) stayed proceedings to ask prejudicial questions to the CJEU. In its judgment the CJEU reiterates that the

124 Regulation 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and enforcement of judgements in civil and commercial matters (recast) (Brussels I (recast)), Regulation 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), and Regulation 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession (Succession Regulation). See, on the relation to EU *ordre public*, Tim Corthaut, EU ordre public, p. 158, Tena Hosko, Public Policy as an Exception to Free Movement within the Internal Market of the European Judicial Area: A Comparison, in Tamara Perisen and Iris Goldner Lang (Eds.), Croatian Yearbook of of European Law and Policy, volume 10 (Zagreb: Faculty of Law, Univeristy of Zagreb, 2014), p. 194–198.

125 Catherine Kessedjian, Public Order in European Law, p. 31. Case 30/77 Regina v Pierre Bouchereau [1977] ECR, 1999, Case C-367/96 Arblade [1999] ECR I-08453, Case C-100/01 Olazabal [2002] ECR I-10981.

126 Case C-681/13 *Diageo Brands BV v Simiramida-04 EOOD* [2015] 2015:471.

public policy exception, by which the application of the Brussels Regulation is set aside, is to be used in exceptional circumstances only.[127] The CJEU continues:

> '42. In accordance with the Court's settled case-law, while the Member States in principle remain free, by virtue of the proviso in Article 34(1) of Regulation No 44/2001, to determine, according to their own national conceptions, what the requirements of their public policy are, the limits of that concept are a matter of interpretation of that regulation. Consequently, while it is not for the Court to define the content of the public policy of a Member State, it is none the less required to review the limits within which the courts of a Member State may have recourse to that concept for the purpose of refusing recognition of a judgment emanating from a court in another Member State (...)
> 44. Recourse to the public-policy clause in Article 34(1) of Regulation No 44/2001 may therefore be envisaged only where recognition of the judgment given in another Member State would be at variance to an unacceptable degree with the legal order of the State in which recognition is sought, inasmuch as it would infringe a fundamental principle. In order for the prohibition of any review of the substance of a judgment of another Member State to be observed, the infringement would have to constitute a manifest breach of a rule of law regarded as essential in the legal order of the State in which recognition is sought or of a right recognised as being fundamental within that legal order (...)'

With that, the CJEU presents the idea that EU public policy is part of the national public policy of the Member States, even though these States are fee – within the boundaries of the EU Treaties – to set their own level of public policy. Before going into this point (see below under 4.3), the concept of EU *ordre public* must be explored.

4.2 The EU concept of EU *ordre public*

Apart from EU law referring to national provisions which are deemed of public policy and which are to be set by the national courts, over the years the CJEU has developed a concept of EU *ordre public*. This concept refers to rules of EU law that are of such a mandatory nature that they apply regardless of their context. These can be rules of both primary and secondary EU law.

Such rules concern, first and foremost, matters of security and constitutional order.[128] Examples are the fight against terrorism[129], internal security[130], the limits of legal competence of the EU Institutions and the Court[131], and the division of

127 Para 41.
128 See Tim Courthaut, EU order public, p. 216 *et seq*.
129 Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism.
130 Case 72/83 *Campus Oil* [1984] ECR 2727.
131 See Case 294/83 *Parti Ecologiste 'Les Verts' v. European Parliament* [1986] ECR 1339.

competence between the Union and the Member States.[132] EU Public Policy therefore also includes the doctrines of supremacy and direct effect, as well as other fundamental principles that ensure the effective application of EU law.[133] The most important of these is the loyalty between Member States, which plays a crucial role in the CJEU's case law on public policy.[134]

Member State's are to act in the spirit of sincere cooperation (Article 4(3) TEU) and shall uphold the principle of non-discrimination (Article 9 TEU). This Member State loyalty is usually linked to the doctrine of interpretation in conformity with EU law.[135] Such provision are therefore part of the EU's constitutional order, but are therefore also of public policy. In that way, they can be invoked against a non-cooperative Member State.

At the same time, however, a Member State does not have to accept all EU law automatically as well. Tim Corthaut emphasizes how also the national procedural autonomy, as a principle of EU law, must be of EU public policy, and how a balance between the doctrine of sincere cooperation and this autonomy is a necessary part of the EU's balance of power.[136]

A final aspect of EU public policy worth mentioning – there are other aspects such, for example, as financial stability – is EU citizenship. EU citizenship is certainly of EU public policy and, as such, a central part of the EU's policy.[137] Also in the case law of the CJEU, citizenship is a central element. After the court establishes that a person is an EU citizen using its rights conferred by the EU Treaties, usually free movement, the Court will enforce those rights based on the principle of non-discrimination already mentioned above.[138] EU Citizenship as such, therefore, is to be taken by the Member States as it is, although their procedural autonomy of course remains to apply.

132 Case C-119/05 Lucchini Siderurgica [2007] ECR I-6199.

133 Case 26/62, *Van Gend & Loos v. Netherlands Inland Revenue Administration* [1963] ECR-1, Case 6/64, *Costa v. E.N.E.L.* [1964] ECR-585, Case 9/65 San Michele v. High Authority [1965] ECR 27. See, specifically, Tim Corthaut, EU ordre public at 222 *et seq*.

134 Case C-105/03 *Pupino* [2005] ECR I-5285, Tim Corthaut, EU ordre public, p. 225.

135 Tim Corthaut, EU ordre public, p. 225, see, e.g., C-403/01 *Pfeiffer* [2004] ECR I- 8835.

136 Tim Corthaut, EU ordre public, p. 226 *et seq*., but also p. 236 *et seq*. in the context of an analysis of federalism.

137 Tim Corthaut, EU ordre public, p. 242 *et seq*.

138 See, e.g., Case C-456/02 *Trojani* [2004] ECR I-7573, Case C-34/09 Zambrano v Office national de l'emploi (ONEm) [2011] ECR I-0–1177, Case C-148/02 *Garcia Avello* [2003] ECR I-11613, Case C-353/06 Grunkin and Paul [2008] ECR I-0000.

4.3 The relationship between national- and EU public policy in EU law

On 1 August 1994, the German company Omega opened a 'laserdrome' in Bonn, Germany. Originally it has used toy laser gun equipment, but soon Omega purchased professional laser-tag equipment from an UK based company called Pulsar. Already before its opening, several citizens had protested the existence of a war-game simulation. On 14 September 1994 the local authorities prohibited the undertaking forbidding it from 'facilitating or allowing its [...] establishment games with the object of firing on human targets using a laser beam or other technical devices [...]'.[139] The local authorities did so as they considered these activities contrary to 'fundamental values prevailing in public opinion'.[140]

Omega appealed, lost the appeal, and finally presented its case in an appeal on a point of law to the German *Bundesverwaltungsgericht*. From an EU perspective, the issue centered on the freedom to provide services of Omega and the free movement of goods in the EU Internal Market.[141] At the *Bundesverwaltungsgericht* the central question was on the question whether a killing game violates the concept of human dignity in the German Basic Law and can constitute a justification to the free movement of services or goods. The German Court stayed proceedings and started a preliminary rulings procedure with the CJEU.

The CJEU held that the order restricts the freedom of Omega to provide a service and that justifications for the measure must be examined.[142] A fundamental right, as protected by the German Basic Law is a matter of public policy. Under reference to its earlier case law, the CJEU considers that such 'public policy may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest in society'.[143] Public policy, as a ground for justification, must be interpreted strictly and should – if possible – provide a unilateral standard so that it can be applied throughout the EU. However, because, the CJEU admitted, of the special circumstances in which an appeal to public policy is made, the concept 'may vary from

139 Case C-36/02 Omega Spielhallen- und Automatenaufstellings-GmbH v Oberbürgermeisterin der Bundesstadt Bonn [2004] ECR I-9641, para 5.

140 Case C-36/02 Omega Spielhallen- und Automatenaufstellings-GmbH v Oberbürgermeisterin der Bundesstadt Bonn [2004] ECR I-9641, para 7.

141 A franchising agreement with a UK based company allowed Omega to provide its services, thereby establishing an cross-border dimension needed for the application of EU law.

142 Case C-36/02 Omega Spielhallen- und Automatenaufstellings-GmbH v Oberbürgermeisterin der Bundesstadt Bonn [2004] ECR I-9641, para 25.

143 Case C-36/02 Omega Spielhallen- und Automatenaufstellings-GmbH v Oberbürgermeisterin der Bundesstadt Bonn [2004] ECR I-9641, para 26. See also Opinion of AG Stix-Hack of 18 March 2004 to this case making the same point, [2004] ECR I-9611.

one country to another and from one era to another. The competent national authorities must therefore be allowed a margin of discretion within the limits imposed by the Treaty'.[144] Justification on ground of public policy was therefore accepted.

Even though the *Omega* case provides a complex picture, it highlights the division of tasks between EU public policy, in this case the functioning of the internal market by offering the freedom to provide services, and national public policy, in this case the specific protection of human dignity in the German constitution: national public policy is the result of a national consideration and serves as an expression of a fundamental principle of the organization of the State. EU public policy is a much more functional, as opposed to fundamental, concept: it serves to protect the existence and functioning of the EU legal order. Even though there is supremacy of EU law, the dynamics between national- and EU public policy are more complex because of the subject matter they deal with.

This becomes even more complex when the aspect of public policy dealt with concerns fundamental rights. When fundamental rights are involved, the CJEU will refer to the European Convention on Human Rights (ECHR) and the European Court of Human Rights (ECtHR) as guiding.[145] The ECtHR has since long developed its own ideas about public policy.

In *Loizidou v Turkey* (1996), the ECtHR dealt with refugees that had been forced out of their land in Cyprus after Turkish occupation in 1974.[146] Turkey, having been convicted by the ECtHR before for violations of Article 1 Protocol 1 (the right to property) of Cypriot land owners, tried to argue, under reference to a declaration it made based on Article 25 ECHR, that the ECHR did not apply to the territory as well as that the ECtHR did not have jurisdiction.[147] Article 25 states that Contracting Parties, upon acceding to the ECHR, make a declaration that petitions against violations of fundamental rights protected by the Treaty are admissible. Turkey argued it has made such declaration only for matters of violations on its own territory and that hence a Cypriot victim could not bring a complaint against it.[148] The ECtHR reasons in its paragraph 75:

> "75. Article 25 (art. 25) contains no express provision for other forms of restrictions (see paragraph 65 above). (...)

144 Case C-36/02 Omega Spielhallen- und Automatenaufstellings-GmbH v Oberbürgermeisterin der Bundesstadt Bonn [2004] ECR I-9641, para 31. See, also, Catherine Barnard, The substantive law of the EU. The Four Freedoms, p. 463.

145 See, e.g. Case C-36/02 Omega Spielhallen- und Automatenaufstellings-GmbH v Oberbürgermeisterin der Bundesstadt Bonn [2004] ECR I-9641, para 33.

146 Loizidou v Turkey (preliminary objections) of 23 March 1996, case 15318/89.

147 See, Tim Corthaut, EU ordre public.

148 Loizidou v Turkey (preliminary objections) of 23 March 1996, para 65–67.

> If, as contended by the respondent Government, substantive or territorial restrictions were permissible under these provisions, Contracting Parties would be free to subscribe to separate regimes of enforcement of Convention obligations depending on the scope of their acceptances. Such a system, which would enable States to qualify their consent under the optional clauses, would not only seriously weaken the role of the Commission and Court in the discharge of their functions *but would also diminish the effectiveness of the Convention as a constitutional instrument of European public order (ordre public)* (...)"[149]

The ECtHR therefore uses the concept of European public order, its own equivalent to EU *ordre public*, to strengthen integration, but this comes as a paradox: at the same time the Court must accept the margin of appreciation of the Contracting States to deal with matters in their own manner.[150] The CJEU referring to the ECHR therefore also must take this paradox into account when considering its own cases.

An example of such a case, finally, comes from *Carpenter*.[151] Mrs. Carpenter was a Philippines national legally residing in the UK for six months starting from 18 September 1994. She overstayed her time in the UK, not asking permission to stay longer, and on 22 May 1996 married Peter Carpenter, a UK national. Mr. Carpenter runs a business, established in the UK, but with clients from all over Europe, requiring him to travel frequently. Mrs. Carpenter applied for a right to remain in the UK after she got married, but her application was refused, and the Secretary of State sought a deportation order against her. Mrs. Carpenter appealed this decision and claimed she was entitled to remain in the UK based on EU law. Her husband, so she argued, conducted business throughout the internal market and was able to provide these services because she stayed home looking after the children from mr. Carpenters first marriage.[152]

In its judgment the CJEU links the exercise of the fundamental freedom of Mr. Carpenter to the fundamental right to a family life. Such right is also protected by Article 8 ECHR and a Member State wishing to invoke a reason of public interest, such as public policy, to justify restricting a fundamental freedom such as the freedom to provide services, may do so only if that measure is compatibel with the fundamental rights that the CJEU ensures.[153] The CJEU held that:

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149 Loizidou v Turkey (preliminary objections) of 23 March 1996, para 75, emphasis added by author.

150 See, on that latter aspect, Stephen Hall, The European Convention on Human Rights and public policy exceptions to the free movement of workers under the EEC Treaty, 16 European Law Review 1991, p. 466 *et seq.*, Tim Corthaut, EU ordre public, p. 25 *et seq.*

151 Case C-60/00 Mary Carpenter v Secretary of State for the Home Department [2002] ECR I-6305.

152 Case C-60/00 Mary Carpenter v Secretary of State for the Home Department [2002] ECR I-6305, paras 13-17

153 Case C-60/00 Mary Carpenter v Secretary of State for the Home Department [2002] ECR I-6305. para 40.

> '43. A decision to deport mrs. Carpenter, taking in circumstances as those in the main proceedings, does not strike a fair balance between the competing interests, that is, on the one hand, the right of Mr. Carpenter to respect for his family life, and on the other hand, the maintenance of public order and public safety.'[154]

This example shows how the ECHR public policy serves to strengthen EU public policy. The CJEU makes use of the public policy nature of the fundamental rights protected by the ECHR to give further effect to its own fundamental freedoms, especially the free movement of persons.[155] National law, in such situations, must make way for the force of fundamental rights, both on its own (ECHR public policy) as in combination with the application of EU Internal Market Law (EU public policy).

National public policy is still very much *national* law, but it is clear it cannot exist in isolation of the international legal order.[156] It must give way when the functioning of EU law is at stake, especially when fundamental rights are involved. In such a case there will not be a vacuum, but EU public policy will take over from national public policy. To a certain extent (see below in section 4.4) an argument can be made for national law incorporating EU public policy instead.[157]

4.4 A suggestion to completely incorporate EU public policy into national public policy

National public policy is an expression of national sovereignty. It concerns the fundamental aspects of organization of the state. It is, especially in a context where it is invoked, a defense of national policy choices. There is both a positive and a negative way of looking at this. From a positive point of view, it is how a state can manage some of the uncertainties that result in everyday life. When private parties enter into a legal relation, they may do so within certain limitations. These limitations are positive choices made in a political order: a contract for commercial surrogacy, for example, will not always be valid. From a negative point of view, public policy offers a restriction on individual freedom. Parties that enter into a legal relation may not always agree with the restrictions that are im-

154 See also Joined Cases C-482 and 493/01 Orfanopoulos [2004] ECR I-5257, Catherine Barnard, The substantive law of the EU. The Four Freedoms, p. 461–462.

155 See also Stephen Hall, The European Convention on Human Rights and public policy exceptions to the free movement of workers under the EEC Treaty, p. 488.

156 See, e.g. Asser-Vonken 10-I, n. 415 *et seq*.

157 See, e.g. Asser-Vonken 10-I, n. 417–418.

posed on them. Moreover, they may seek to conclude their legal relation elsewhere, where the public policy of another legal system does allow them to enter into their legal relation. Public policy then becomes the defense mechanism to protect the fundamental choices of the original legal system.[158]

This has traditionally been a workable system, but especially in situations where legal systems have become closely linked – for example by becoming part of the ECHR and the European Union – a new and overarching concept of public policy has arisen that limits the national freedom. This offers a new type of (vertical) problem: in the context of these international legal orders, a double burden, i.e. compliance to more than one set of mandatory requirements, becomes much more difficult to accept. Especially in a supranational legal order such as the European Union, the traditional system whereby a foreign legal relation must comply with the public policy of both the state of origin and the state of reception, is considered undesirable.

The response of the European legal order is to offer a concept of EU public policy that is not completely the same as its national law equivalent. At the EU level, public policy concerns not only substantive, but also procedural principles such as supremacy and direct effect. At the national level, these dynamics, such as in federal system as Germany, are dealt with separately by public law.[159]

It is a matter of balancing between national and international interests in most situations; a balance between internal and external criteria. This balancing act is not between equals: the European legal order will take effect over and to the detriment of the national legal order if it decides so. The national, sometimes historical, considerations and norms are then set aside for market functionalism.[160] A tension therefore arises between traditional (national) considerations and European market-functionalism, whereby not the national level, but the European level takes almost automatic preference. Moreover, national considerations are therefore set aside by a completely different set of norms that take a very different objective (market functionalism vs national (behavioural) norms).

There are, however, ways to resolve this tension. One of these is to incorporate the EU public policy in the national public policy where possible.[161] National courts, complying with the principle of sincere cooperation, recognizing supremacy of EU law, direct effect and the four freedoms, but also the principle of procedural autonomy of the Member States, can perform their own balancing act

158 See Bernard Audit, Droit international privé, n. 313, p. 260.

159 See Articles 72 to 74 German Basic Law (*Grundgesetz*).

160 See, on this tension, Bram Akkermans, The Functional Method in European Property Law, p. 95.

161 See Asser-Vonken 10-I, n. 417.

applying a single concept of public policy to private parties. In fact, see *Diageo, Omega and Carpenter*, they must do so already.[162]

Most cases, following the doctrine of acte éclair can be solved by national courts in this way. Controversial cases will remain subject to scrutiny from the CJEU. However, the perspective could be different if the national court has already explicitly taken the EU legal order into consideration: the principle of procedural autonomy, equally of EU public policy, could give rise to a much more nuanced approach, almost by way of a judicial review, by the CJEU.

5. Case study: EU Succession Regulation

An incorporated concept of public policy, in which national law, private international law and EU law are combined, is worth considering in exceptionally difficult cases. Such case, I submit, is offered by the EU Succession Regulation.[163] This regulation is the result of the European Commissions policy to strengthen the rights of EU citizens.[164] With this, even through it mostly concerns private international law aspects only, EU legislation moves deep into an area of private law that is traditionally considered national law: the law of succession.[165] The EU Succession Regulation deals with jurisdiction, applicable law, recognition of authentic instruments and introduces an EU Declaration of Succession that EU citizens can use throughout the whole Union.

Imagine person A with assets in different countries. A owns land in Germany and in France, as well as a bank account in the Netherlands and France where he is originally from. A has both Dutch and German nationality and spend his last

162 Case C-681/13 *Diageo Brands BV v Simiramida-04 EOOD* [2015] 2015:471, Case C-36/02 Omega Spielhallen- und Automatenaufstellings-GmbH v Oberbürgermeisterin der Bundesstadt Bonn [2004] ECR I-9641, Case C-60/00 Mary Carpenter v Secretary of State for the Home Department [2002] ECR I-6305.

163 Regulation 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession (Regulation 650/2012).

164 See, on Regulation 650/2012, Elise Goossens, De Europese Erfrechtverklaring Diss. Leuven (2016).

165 See, for a comparative perspective, Kenneth Reid, Marius de Waal and Reinhard Zimmermann (Eds.), Comparative Succession Law, Volume I: Testamentary Formalities (Oxford: Oxford University Press, 2011), Kenneth Reid, Marius de Waal and Reinhard Zimmermann (Eds.), Comparative Succession Law, Volume II: Intestate Succesion (Oxford: Oxford University Press, 2015).

years living in the south of Germany occasionally visiting France. A already lost his partner B and leaves two children, X and Y, who live in Germany (X) and France (Y). Before A passes away, he specifically makes a last will with a Dutch notary in which he chooses Dutch law as the applicable law to his succession. In the will he also expresses his discontent with child Y and prescribes X is to receive 75 % of the assets, especially the house in Germany is to be for X, and Y only 25 % of the value, in compliance with the Dutch mandatory shares of inheritance for children.[166] Moreover, he creates a right of usufruct on the share of Y of the money on the bank accounts, including the special power provided for in the Dutch civil code to consume the money during the life of the right of usufruct.[167] Y's children (A's grandchildren) are to be the bare owners.

X and Y are now faced with the challenge of claiming the assets to which they are entitled as heirs of A. According to Article 4:182 of the Dutch Civil Code, X and Y have become entitled to A's assets, but most of the assets are located in other Member States.

Several problems arise:

1) Dutch law will apply to the whole succession (Article 21 and 22 Succession Regulation). However, the registration of the entitlement of X and Y to the respective immovable assets will be subject to the relevant *lex rei sitae*.
2) French law uses a different mandatory division of assets than Dutch law does. Hence, the arrangement, valid under Dutch law, will create problems with French mandatory rules. A foreign mandatory division scheme is currently not accepted by French law.[168]
3) The specific provision (legacy) of the house in Germany made to X, must be registered. Under the provisions of Dutch law, most notably Article 4:201 and Article 4:117 Civil Code, X has received a claim on this share in the inheritance of A (the *legatum per damnationem*). However, under French law, the heirs

166 Article 4:65 BW.

167 See Article 3:215 BW which states: "When upon creation of a right of usufruct, or after that, the power to partially or completely alienate or use up the objects under usufruct is given to the usufructu- ary, the principal right-holder may demand the retro-transfer of the objects under usufruct or the objects substituted for these, unless the usufructuary or acquirers of his right prove that the objects were used up or vanished by coincidence." (translation by author). See on this Bram Akkermans, The Principle of *Numerus Clausus* in European Property Law, p. 266–267.

168 See Maarten Jan van Mourik, Het erfrecht bij versterf: de wettelijke verdeling, in MJA van Maurik et al, Handboek Erfrecht (Deventer: Kluwer, 2011), p. 56 *et seq*. French law operates its own systematics in Articles 912 *et seq*. C.Civ. See Cass. civ. I, 21 March 2000, D.00.539, Bernard Audit, Droit international privé, p. 97, p. 718 *et seq*., In context of Regulation 650/2012, see consideration 54 of that Regulation.

have automatically become owner of the assets they receive under a legacy (the *legatum per vindicationem*). A conflict of laws, therefore, arises.[169]

4) The special right of usufruct created on the bank accounts will be recognized in Dutch law, but does not, as such, exist in France. French private international law traditionally transforms such a right into a quasi-usufruct, a transfer of ownership with the obligation of returning the similar value of the assets at the end. That means, however, that Y becomes owner and not usufructuary.

Part of the Succesion Regulation is a form that the notary or court with jurisdiction will fill that will form the European certificate of succession.[170] The official, notary or court, that gives the EU declaration, will do so in his or her own language. The certificate is to have 'its effects in all Member States, without any special procedure being required'.[171]

Using a European certificate of succession can therefore result in an authentic document that is not drafted in the language of the land registry to which it is offered. In fact, there are usually legal provisions that require documents offered for registration to be in the language(s) of the relevant country. Problem 1 identified above offers a conflict between the Regulation, which deviates from the *lex rei sitae* rule and the *lex registrationis*, which is determined by the *lex rei sitae* outside of the scope of the Regulation. The language of the land registry, which seeks to fulfill the property law principle of publicity, is very important to the functioning of a State. Hence, the argument that provisions on the language in which authentic documents are offered, can be deemed national internal public policy without any controversy. They are also applied in a private international law setting, occasionally foreign documents – such as foreign certificates of succession – are offered to land registries, where the language-requirement usually translates into a request to re-offer the document through a nationally authorized official.

The argument that such a provision is of national external public policy is also to be expected. However, the rule of the Succession Regulation that no special procedure can be required to give effect to the EU declaration is the complete opposite of this. The doctrine of effectiveness of EU law and the principle of sincere cooperation by the Member States, which are both of EU public policy, could very well force the national reasoning to make way.

169 See, on this, Jan Peter Schmidt, Die kollisionsrechtliche Behandlung dinglich wirkender Vermächtnisse, 77 RabelsZ (2013), p. 4–5, Jan Peter Schmidt, Challenged Legacies – First Decision of the European Court of Justice on the EU Succession Regulation (ECJ, 12 October 2017, C-218/16 (Kubicka)), in 7 European Property Law Journal 1 (2018), p. 4 *et seq.*

170 Article 68 and Article 80 EU Succession Regulation.

171 Article 69 EU Succession Regulation.

A similar type of reasoning can be applied to the systems of mandatory division of assets. Of course, every Member State is entitled to use its own reasoning to come to a fair distribution of assets between heirs: there is national procedural autonomy. However, articles 21 and 22 of the Regulation clearly state that the applicable law to the succesion shall be applied as a whole. Member States must therefore accept the conformity of the succession to the law of the Member State of applicable law. A double burden, such as imposing your own rules on the mandatory division of assets, even though these are of public policy within the national legal order, seems unlikely to pass the scrutiny of the CJEU. Articles 21 and 22 are too of EU public policy, since they form the very core of the Regulation addressing precisely what the existence of the Regulation seeks to remedy.[172]

The third problem arises from the difference in treatment of legacies. Whereas in French law, the legatee becomes owner upon death, in German and Dutch law a personal right arises against the heirs for the transfer of ownership of the asset.[173] The European certificate of succession will have to describe precisely what the rights of the legatee are.[174] A legatee with a personal right, such as in the fact pattern above, is likely to be treated as the owner by French law. This is not as problematic as the reverse situation in which an owner-legatee in France is treated as a non-owner-holder-of-a-personal-right in German or Dutch law. The choice to work with the *legatum per damnationem* is usually made explicitly in a legal system and is closely connected to fundamental property law principles such as the closed system of property rights and the principle of publicity.[175] Hence, applying the Succession Regulation in this respect will also require national tradition to make way.

172 Considerations 7 and 8 of Regulation 650/2012 state to this effect: "(7) The proper functioning of the internal market should be facilitated by removing the obstacles to the free movement of persons who currently face difficulties in asserting their rights in the context of a succession having cross-border implications. In the European area of justice, citizens must be able to organise their succession in advance. The rights of heirs and legatees, of other persons close to the deceased and of creditors of the succession must be effectively guaranteed.
(8) In order to achieve those objectives, this Regulation should bring together provisions on jurisdiction, on applicable law, on recognition or, as the case may be, acceptance, enforceability and enforcement of decisions, authentic instruments and court settlements and on the creation of a European Certificate of Succession."

173 See Jan Peter Schmidt, Die kollisionsrechtliche Behandlung dinglich wirkender Vermächtnisse.

174 Article 68(j) Regulation 650/2012.

175 Jan Peter Schmidt, Die kollisionsrechtliche Behandlung dinglich wirkender Vermächtnisse, p. 17 *et seq*.

The fourth problem raised is perhaps the most complex one. In order to prevent the Succession Regulation from affecting national systems of property law, there is a specific exclusion of its effects on 'the nature of rights *in rem*' in Article 1 (see above) and a specific provision in Article 31 to deal with the transformation of foreign property rights. These provisions serve to protect the national principle of *numerus clausus* of property rights, which is usually deemed of public policy by property lawyers.[176] French law therefore does not need to automatically recognize a special type of Dutch usufruct. However, at the same time the Succession Regulation specifically creates a choice of law so that EU citizens can choose a legal system of their liking. In many cases, citizens will choose one specific legal system because it offers a specific advantage, such as the Dutch special right of usufruct, generally unavailable in other legal systems.[177] This scenario deals precisely with the tension between supremacy of the EU rule, rights of citizens, as well as effectiveness of EU law and the national (procedural) autonomy of the Member States. A decision by the CJEU will have to provide an answer to this.

6. Conclusion

Tim Corthaut refers to the EU's motto of Unity in Diversity and to federalism to address the tension between the EU's objectives and the Member States' autonomy.[178] Public policy, as the manifestation of a State's fundamental principles, addressed at national and private international level by such States themselves, directly shows the difficulty that arises in applying EU law to national law. Private law as a system is certainly subject to EU law and the case study above shows that even when a specific part of private law, in this case succession law, is deal with, other areas of private law are also affected.

176 Consideration 15 of Regulation 650/2012 states specifically: "(15) This Regulation should allow for the creation or the transfer by succession of a right in immovable or movable property as provided for in the law applicable to the succession. It should, however, not affect the limited number ('*numerus clausus*') of rights *in rem* known in the national law of some Member States. A Member State should not be required to recognise a right *in rem* relating to property located in that Member State if the right *in rem* in question is not known in its law." For a treatment of the principle of *numerus clausus* and its public policy value see Bram Akkermans, The Principle of *Numerus Clausus* in European Property Law.

177 See, on this, Bram Akkermans and William Swadling, Property Rights on Immovables (Land) and Goods in Sjef van Erp and Bram Akkermans (Eds.), Text, Cases and Materials on Property Law. *Ius Commune* Casebooks for the Common Law of Europe (Oxford: Hart Publishing, 2012), p. 253 *et seq*.

178 Tim Corthaut, EU ordre public, p. 236.

At the same time, if Member States are sincere about their desire to be part of the European Union, they will have to accept its legal order and the methodology of EU law.[179] This means incorporating EU law into national law, and incorporating EU *ordre public* into the national concept of public policy. In the four difficult problems above, the national officials will have to consider the objectives of the EU and of the Succession Regulation in particular to give shape to what they consider the national *ordre public*. That does not mean blindly following directions from the EU institutions, but a balancing act between those supranational objectives and the national procedural autonomy. The starting point of national law should not be how to restrict party autonomy and how to protect the national legal order, but rather how effect can be given to common, i.e. national and European, objectives. That must mean that national law must sometimes make place for European law, but also that the application of national law can be adapted – if possible – to suit a common objective. France can, for example, choose to recognize a right of usufruct with special powers, because it gives effect to the application of the EU Succession Regulation. That does not open up the French *numerus clausus* of property rights, as French citizens can still only choose from their own menu of property rights, but those that are entitled to make a choice under the Regulation must be able to do so. That is, the positive side of public policy.

When we use the term public policy, we mean one thing: the fundamental principles relating to the organization of the state.[180] From that perspective it is therefore strange that hardly any legal system offers such a definition. There are, of course, many further qualifications of this, delving into politics, economics, sociology and culture, but these are all manifestations of this organizational principle. Depending on the level at which these fundamental principles are used, we speak of national (internal) public policy, national (external) public policy, and European (and even international) public policy.[181] These are, at least in my view, manifestations of the same thing, of the same idea, but the technique differs.[182]

179 See, Bram Akkermans, The Functional Method in European Property Law, p. 95.

180 See also Tena Hosko, Public Policy as an Exception to Free Movement within the Internal Market of the European Judicial Area: A Comparison, in Tamara Perisen and Iris Goldner Lang (Eds.), Croatian Yearbook of of European Law and Policy, volume 10 (Zagreb: Faculty of Law, Univeristy of Zagreb, 2014), p. 203–207.

181 See above, Sections 2, 3 and 4 respectively.

182 See, exactly on this, Etienne Picard, Introduction Générale: la fonction de l'ordre public dans l'ordre juridique, in Marie-Joëlle Redor (Ed.), L'ordre public: Ordre public ou ordres publics. Ordre public et droits fondamentaux. Actes du colloque de Caen des jeudi 11 et vendredi 12 mai 2000 (Caen: Nemesis/Bruylant, 2001), p. 20–21, Tena Hosko, Public Policy as an Exception to Free Movement within the Internal Market of the European Judicial Area: A Comparison, in Tamara Perisen

Moreover, the concept is not to be confused with the technique in which it is applied to claim there is a difference.[183]

In the past decades, this somewhat traditional approach to public policy has been blurred by the rise of constitutionalism in both public and private law. The effect of fundamental rights, not only on vertical, but also on horizontal legal relations, has supplemented the existing framework of public policy. Especially in legal system with a constitutional court, the limitations on private autonomy have mostly come from this direction. This may also explain why the concept of public policy remains relatively underdeveloped as a method of last resort. After all, when a specific fundamental right is infringed, it makes much more sense to use the fundamental rights catalogue. At the same time, at the EU level, fundamental rights are clearly part of the EU public order. As such, they are incorporated in the approach the EU takes to limiting private autonomy, such as in *Omega*.

The European Union is a supranational legal order, which means its law comes before the laws of its Member States. The justification for this is that Member States have a say in the making of EU law through a vote in the Council of the EU. Sometimes they will be outvoted – if the voting procedure is by qualified majority voting – but they are bound by the decisions made.[184] In fact, they are bound by the principle of sincere cooperation (Article 4(3) TEU), which requires them:

> Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.
> The Member States shall take any appropriate measure, general or particular, to ensure fulfillment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.
> The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.

The EU Treaties with its positive EU *ordre public* provide another constitutional framework within which Member States must find their place. It does not mean every aspect should be dealt with by the EU, but it does mean that the EU, where it is – and as far as it is – competent, can coordinate and steer the direction of the

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and Iris Goldner Lang (Eds.), Croatian Yearbook of of European Law and Policy, volume 10 (Zagreb: Faculty of Law, Univeristy of Zagreb, 2014), p. 212–213.

183 Etienne Picard, Introduction Générale: la fonction de l'ordre public dans l'ordre juridique, in Marie-Joëlle Redor (Ed.), L'ordre public: Ordre public ou ordres publics. Ordre public et droits fondamentaux. Actes du colloque de Caen des jeudi 11 et vendredi 12 mai 2000 (Caen: Nemesis/Bruylant, 2001), p. 20–21.

184 See Paul Craig and Gráinne de Búrca, EU Law: Text, cases and materials. 6th edition (Oxford: Oxford University Press, 2015), p. 124–160, 266 *et seq*.

development of law.[185] In doing so, the EU must respect the national procedural autonomy of the Member States and find a balance between unity and diversity. EU public policy therefore does not only concern substantive principles, but also structural principles such as supremacy and, perhaps included in that, direct effect.

EU public policy therefore exists at three different levels: (1) as a limit to the diversity of the national legal systems of the member states, (2) as a limit to the idea that all legislation in the EU should be the same, by alowing member states freedom to have their own public policy, and (3) as a direct limitation on the party autonomy in horizontal legal relationships, but also limiting the range that Member States may use to not recognise the legal effects of a horizontal relationship originating in another Member State.

Public policy should therefore not be negatively conceived, defining the defense-line of the Member State against the influence of EU law or other Member State law, but rather positively as giving effect to a common objective. This objective is usually the functioning of the EU Internal Market in the context of EU law, including the promotion of EU citizenship and the protection of weaker parties.

Member States must therefore incorporate these common objectives into their own open norms, especially public policy. They should not resist European market integration on the basis of their traditional norms but should actively find a way to re-align these national norms with the European legal oblgiations these states have entered into. Judges, at every level, within the Union they are both judges of national and European Union law, have a primary responsibility to do this.[186] Rather than separating these tasks, such as the national court did in *Diageo,* applying a single concept of public policy whilst motivating how EU law and national law are aligned in the specific case, and integrated approach by national courts will allow for a marginal supervisory role of the CJEU. It will, in any case, give voice to the procedural autonomy of the Member State, allowing for a much more equal balancing than just taking the supremacy of EU law.

185 On the allocation of powers see Bram Akkermans, EU Constitutional Property Law, in Bram Akkermans *et al* (Eds.), Who Does What? On the allocation of regulatory competences in European Private Law (Antwerp: Intersentia, 2015), p. 165.

186 See Monica Claes, The National Courts' Mandate in the European Constitution (Oxford: Hart Publishing, 2006).