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**Does “European Regulatory Contract Law” Enhance
Citizens’ Rights?
An Analysis of Consumer and Services Law from
Theory to Practice**

by

Federico Della Negra

DOES “EUROPEAN REGULATORY CONTRACT LAW” ENHANCE CITIZENS’ RIGHTS?

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Abstract

The paper analyses the interplay between European regulatory private law and citizens' rights. The financial and sovereign debt crisis has strongly weakened the confidence of the European citizens in the European Union. The Author argues that European regulatory contract law, conveyed by EU secondary law, constitutes a valuable tool to strengthen the citizens' access to goods and services offered by the internal market. This hypothesis is supported by the analysis of recent developments of consumer and services law with regard to law-making and enforcement. In particular, the Court of Justice (ECJ) has assumed a prominent position in ensuring high standards of contractual protection for consumers, clients and users in mortgages and services markets (e.g. energy, telecoms). The high contractual protection of vulnerable parties does not only create the conditions for an effective functioning of internal market but it also grants access to essential goods and services.

Keywords: Union citizenship – European regulatory contract law – vulnerable consumer – access rights.

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I. INTRODUCTION

After the global financial crisis the EU has made strides toward financial, banking and monetary integration but it still struggles to guarantee uniform welfare and social standards for the European citizens across national jurisdictions. Despite of the introduction of the concept of “social market economy” in Article 3 of the Treaty on European Union (TEU), the EU has not been granted competence to harmonize social and welfare rights.¹ This “social deficit” of the EU challenges the idea that Union citizenship represents a transnational status for social integration.²

However, EU law has developed other legal mechanisms which may enhance the socio-economic inclusion of European citizens such as, in particular, consumer and services law. It must be borne in mind that services account for over 70% of economic activity in the European Union and a similar proportion of overall employment.³ Given their economic importance, the legal regulation of markets for services is essential to promote competition but also to guarantee to European citizens a fair and equal access to services of general interest. Access-right have become a great concern in the wake of the liberalization process which has turned former public services into services of general (economic and non-economic) interest provided by private parties via private law regimes.

This article aims at exploring the relationships between European contract law and citizens’ rights. The fundamental question to be answered is how contract governance and enforcement could foster the functioning of the internal market and, at the same, protect European citizens in consumer and services markets. In other words, the crucial point is to understand whether contract governance represents an appropriate instrument to achieve the functioning of the internal market and “promote social justice and protection” (Article 3 (3) TEU).

To address this question I start from the premise that European contract law ensures competition among market players and guarantees access to essential goods and services for the most vulnerable citizens. Competition and “access-rights” give shape to what it has been named “European regulatory contract/private law”.⁴ Whereas national contract law incentivises parties to pursue their own interest, European regulatory contract law drives the parties’ behaviour in order to achieve European integration

¹ See L. Azoulay, *The Court of Justice and the Social Market Economy: the Emergence of an Ideal and the Conditions for its Realization*, *CML Rev.* (2008) 45 p. 1337 ss.

² See S. Giubboni, *European Citizenship and Social Rights in Times of Crisis*, *German Law Journal* (2014), p. 935.

³ See recital n. 4 of the Directive 2006/123/EC of 12 December 2006 on services in the internal market.

⁴ See, in particular, H.-W. Micklitz, *The Visible Hand of European Regulatory Private Law. The Transformation of European Private Law from Autonomy to Functionalism in Competition and Regulation*, *EUI Working Papers* 2008/14. The notion of regulatory contract law used in this paper can be also associated with that of “governance by means of contract law” introduced by F. Moslein, K. Riesenhuber, *Contract Governance – A Draft Research Agenda*, *European Review of Contract Law* (2009) 3, p. 274

and views the traditional bilateral/individual exchange in the wider general/collective socio-economic context in which the transaction takes place.

The central thesis of this article is that the general/collective dimension, which characterizes regulatory contract law, makes it possible to build up a linkage between contract governance/enforcement and citizens' rights. EU law does not protect consumers, clients, users simply because they are weak contractual parties *vis-à-vis* the seller or supplier; rather, the contractual protection primarily aims at facilitating competition among sellers and suppliers and granting effective, equal and fair access to internal market (goods and services) for citizens.

Fair and equal access to good and services requires specific forms of contract governance (e.g. mandatory rules) in order to enable the most vulnerable parties to actively participate to the dynamics of European society. By the same token, the effective enforcement of EU law presupposes that national and European courts interpret principles and rules in order to achieve the objectives of the "regulatory state". For this reason, at the EU level, contract law, which might seem, at first sight, very distant from every citizenship discourse is indeed strictly intertwined with citizens' socio-economic rights and should contribute to rebuild citizens' confidence in the Union.⁵ If citizenship "is a key mechanism for inclusion and exclusion",⁶ regulatory private law is one of the driving factors capable of broadening citizens' rights.⁷

The most important contribution of this article is to analyse the developments of regulatory contract law along with the ongoing transformations of Union citizenship. In this regard, the Court of Justice (CJEU) has taken up a prominent position.⁸ The abundant case law on the EU citizenship shows that the link between citizens' rights and the exercise of a cross-border economic activity is more and more weak and Union citizenship has become a complex institution which ties up fundamental economic freedoms and fundamental rights.⁹ The recent case-law on consumer and services law materialises the concept of regulatory contract law by showing the importance played by social and market dynamics in the reasoning of the Court of Justice.

⁵ M. Monti, *A New Strategy for the Single Market. At the Service of Europe's Economy and Society. Report to the President of the European Commission*, 9 May 2010 (Monti Report). See also the Commission's initiatives *EU Citizenship Report 2010: Dismantling the obstacles to EU citizens' rights*, Brussels, COM (2010) 603 final; *Report on progress towards effective EU Citizenship 2007-2010* (Report under Article 25 TFEU) COM (2010) 602 and the *Report on the evaluation of the 2009 European Parliament elections* COM (2010) 605; *EU Citizenship Report 2013: EU citizens: your rights, your future*, Brussels, 8.5.2013 COM (2013) 269 final. See also the *Report On progress towards effective EU Citizenship 2011-2013*, COM (2013) 270 final.

⁶ P. Mindus, *Dimensions of Citizenship*, *German Law Journal, Special Issue* (2014) 5, p. 736.

⁷ Even though a difference can be drawn between citizenship rights and citizens' rights, for the sake of this paper, which aims at analysing the citizenship in the broader market context, I will refer to "citizenship" rights or "citizens'" rights without no substantial difference.

⁸ See, in particular, H.-W. Micklitz, B. De Witte (Eds.), *The European Court of Justice and the Autonomy of the Member States*, Intersentia, 2012 and J. L. da Cruz Villaca, *EU Law and Integration. Twenty Years of Judicial Application of EU Law*, Oxford, 2014.

⁹ G. Comandé, *The Fifth European Union Freedom: Aggregating Citizenship ... around Private Law*, in H.-W. Micklitz (ed.), *The Constitutionalization of European Private Law*, Oxford, 2014, p. 83.

I proceed as follows.

After having illustrated the transformation of Union citizenship in light of the most recent case law of the CJEU (section II), I will define the concept of “European regulatory contract law” (section III) and I will explain its potential impact on citizens’ rights (section IV). Then I will consider how contract governance may concretely shape B2c transactions in order to ensure competition and access-rights (section V). In the next section, I will map out the most relevant case-law of the CJEU in the field of consumer, energy, intellectual property (IP) rights (section VI). This case-law supports the hypothesis that regulatory contract law may constitute an effective and concrete tool to foster the citizens’ inclusion in the EU legal order (section VII). In the last section, I will sum up the most important findings of the paper (section VIII).

II. THE TRANSFORMATIONS OF UNION CITIZENSHIP

More than twenty years after the introduction of Union citizenship, the debate on its function, scope and objectives is very rich and encompasses a variety of legal dimensions. Whereas citizenship has been often studied from the constitutional and international law perspective, some have started to look at this “experimental institution”¹⁰ from the different perspective of private law trying to build up a linkage between typical economic rights granted by private law and citizens’ rights.¹¹ From the same point of view, this study explains how European regulatory contract law contributes to enhance citizens’ rights in law-making and enforcement.

Many of the legal issues related to citizens’ rights originate from the “dual” or “derivative” nature of Union citizenship.¹² The *status* of European citizen derives from that of national citizenship. It is not possible to be a European citizen without being a national citizen. Nevertheless, “the miracle of Union citizenship [lies in the fact that] it strengthens the ties between us and our States (in so far as we are European citizens precisely because we are nationals of our States) and, at the same time, it emancipates us from them (in so far as we are now citizens beyond our States)”.¹³

¹⁰ See D. Kostakopoulou, *The European Court of Justice, Member State Autonomy and European Union Citizenship: conjunctions and disjunctions*, in H.-W. Micklitz, B. De Witte (Eds.), *The European Court of Justice and the Autonomy of the Member States*, cit., p. 177.

¹¹ See H.-W. Micklitz, *The ECJ between the Individual Citizen and the Member States – A Plea for a Judge-Made Law on Remedies*, in H.-W. Micklitz, B. De Witte (Eds.), *The European Court of Justice and the Autonomy of the Member States*, Intersentia, 2012, p. 349; F. Benyon (ed.), *Services and the EU Citizen*, Hart, 2013, p. 50 ss.; G. Comandé, *The Fifth European Union Freedom: Aggregating Citizenship ... around Private Law*, in H.-W. Micklitz (ed.), *The Constitutionalization of European Private Law*, Oxford, 2014, 134 ss.

¹² See J. Habermas, *Citizenship and National Identity: Some Reflections on the Future of Europe*, 1992 J. Habermas, ‘Staatsbürgerschaft und nationale Identität’, in *Faktizität und Geltung. Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats*, Frankfurt, Suhrkamp Verlag, 1992, p. 649 ss.

¹³ Opinion of the Advocate General Poiares Maduro in Case C-135/08, *Rottmann* [2010] ECR I-0000, para 23.

The “denationalised”¹⁴ and “postnational”¹⁵ nature of Union citizenship reflects the unique institutional architecture of the EU. As the CJEU famously held in the *Van Gend en Loos* case, the EU is not a state or a super-state but a “new legal order of international law”.¹⁶ Unlike typical public international orders, the EU confers enforceable rights upon individuals (principle of direct effect) and its provisions take precedence over all conflicting national law (principle of supremacy).¹⁷

By virtue of the very nature of the EU citizenship, discrepancies may arise between the *status* of Union citizen and citizens’ *rights*. The *status* of Union citizen is neither a necessary precondition nor a sufficient guarantee of enjoyment of *rights* conferred by the EU to individual citizens.¹⁸ For example, whereas EU law confers economic rights (e.g. consumer rights) to individuals that may not be European citizens, it limits to a large extent welfare-related rights of workers, job-seekers, students who are European citizens.

Citizens’ rights, therefore, are not limited to those expressly conferred by the status of Union citizen for two essential reasons.¹⁹ In the first place, Article 20 TFEU draws an open-ended catalogue of citizens’ rights which are not restricted to those provided by EU primary and secondary law (e.g Directive 2004/38/EC).²⁰ Moreover, as the Advocate General Poiares Maduro correctly pointed out in the *Rottmann* case, although “access to European citizenship is gained through nationality of a Member State, which is regulated by national law, [...] it forms the basis of a new *political* area from which rights and duties emerge [...] and do not depend on the State”.²¹

This statement is of great importance because it adds to Union citizenship an innovative “political dimension”. For a long time, instead, the Court of Justice has viewed Union citizenship as one of the means to strengthen the free movement of workers, the freedom of establishment and the freedom to provide services.²² Citizenship had thus become a “market citizenship”²³ or “fifth economic freedom

¹⁴ See L. Bosnjak, *Citizenship Denationalized*, *Indiana Journal of Global Legal Studies*, 2000, p. 452.

¹⁵ See Y. N. Soysal, *Changing Parameters of Citizenship and Claims-Making: Organized Islam in European Public Spheres*, in 26 *Theory and Society*, 509, 1997, p. 513; M. Everson, C. Joerges, *Consumer Citizenship in Postnational Constellations?*, *EUI working paper*, 2006/47, available at <http://ssrn.com/abstract=964187>.

¹⁶ ECJ, C-26/62, *Van Gend en Loos* [1963] ECR-3. See, however, the “monistic” view put forward by the Court in the case C-6/64, *Costa* [1964] ECR I-01141. See W. Van Gerven, *Private Law in a Federal Perspective*, in R. Brownsword, H.-W. Micklitz, L. Niglia, S. Wheatherill, *The Foundations of European Private Law*, cit., p. 346. See also R. Schütze, *On ‘federal’ ground: The European Union as an (inter)national phenomenon*, *Common Market Law Review* (2009) 47, p. 1069

¹⁷ See T. Tridimas, *Primacy, Fundamental Rights and the Search for Legitimacy*, in M. Maduro-L. Azoulai (eds), *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty*, Oxford, 2010, p. 55 ss.

¹⁸ See D. Kochenov, *Ius Tractum of Many Faces: European Citizenship and the Difficult Relationship between Status and Rights*, *Columbia Journal European Law* (2009) 15, p. 169 ss.

¹⁹ See for this view G. Tesauro, *Diritto comunitario*, Padova, 2005, p. 480.

²⁰ See, in particular, E. Guild-S. Peers-J. Tomkin, *The EU Citizenship Directive. A Commentary*, Oxford, 2014.

²¹ See the opinion of Advocate General Poiares Maduro in Case C-135/08, *Rottmann* [2010] ECR I-0000, para 23

²² Even before the Treaty of Maastricht the Court recognized “embryonic forms” of citizenship based on the principle of non-discrimination on the grounds of nationality in order to foster these economic freedoms. See ECJ, Case 143/87, *Stanton* [1988] ECR 3877; Case C-370/90, *Immigration Appeal Tribunal* [1992] ECR I-4265. For a comment see F. G. Jacobs, *Citizenship of the European Union—A Legal Analysis*, *European Law Journal* (2007) 13, p. 591 ss.

[namely] a freedom from discrimination”²⁴ and citizens’ rights had been acknowledged only when a national legislative or administrative measure undermined i) the freedom of movement between Member States; of ii) an “economically active” person. These two cumulative conditions have precluded the recognition of social and welfare rights to non-economically active persons, such as workers²⁵ and students²⁶, when they reside in host countries.

At the end of the Nineties, the ECJ has drawn direct enforceable citizens’ rights from the provisions of the EC Treaty (Article 18) namely by weakening the link between citizenship rights and exercise of the economic activity²⁷ and, more recently, citizenship rights have been acknowledged in purely internal situations.²⁸ For example, in the *Chen* case, the Court held that a young child (and her mother, as the person who is her primary carer) can invoke the citizens’ rights of free movement and residence even though the person never moved from one Member State to another Member State and did not exercise any economic activity.²⁹

In the *Rottmann* case the ECJ took its jurisprudence one step further by deciding that the situation of German national, whose nationality was withdrawn with retroactive effect for public interest reasons by the German authorities, falls within the scope of EU law.³⁰ For the first time the Court of Justice introduced a limitation to the discretion of the Member States to determine who their nationals are and whether the powers of the Member States to lay down the conditions for the acquisition and loss of nationality can still be exercised without any right of supervision for EU law. In the *Ruiz Zambrano* the Court conferred on a relative (third-country national) upon whom his minor children, who are European Union citizens, are dependent a right of residence in the Member State of which they are nationals and in which they reside.³¹

This case law “marks a process of emancipation of Community rights from their economic paradigm”³² and sets the basis for a new “citizen rights order”³³ based on three interrelated elements. First, Union

²³ See N. Shuibhne, *The Resilience of EU Market Citizenship*, *Common Market Law Review* (2010) 47 p. 1597 ss.

²⁴ F. Benyon, *Services and the EU consumer – or the EU Citizen?*, in F. Benyon (ed.), *Services and the EU Citizen*, Hart, 2013, p. 170. For a critical position against the “marketship” see the opinion of the Advocate General Jacobs in Case C-168/91, *Kostantinidis* [1993] ECR I-01191.

²⁵ ECJ, case C-344/87, *Bettray* [1989] ECR I-1621.

²⁶ ECJ, case C-39/86, *Lair* [1988] ECR I-3161.

²⁷ ECJ, Case C-85/96, *Martinez Sala* [1998] ECR I-2709; Case C-184/99, *Grzelczyk* [2001] ECR I-06193; Case C-413/99, *Baumbast* [2002] ECR I-7091. On these cases see, in particular, C. Jacqueson, *Union citizenship and the Court of Justice: something new under the sun? Towards social citizenship*, *European Law Review*, 2002, 27, p. 260 ss. More recently, see ECJ, case C-456/02, *Michel Trojani* [2004] ECR I-07573, C-140/12, *Peter Brey* [2013] n.y.r.

²⁸ See ECJ, case C-148/02 *Garvia Avello* [2003] ECR I-11613; Case C-403/03 *Schempp* [2005] ECR I-6421; Case C-145/04 *Spain v United Kingdom* [2006] ECR I-7917.

²⁹ ECJ, case C-200/02, *Zhu and Chen* [2004] ECR I-9925.

³⁰ ECJ, case C-135/08, *Rottmann* [2010] ECR I-01449, para 31.

³¹ ECJ, case C-34/09, *Ruiz Zambrano* [2011] ECR I- 01177.

³² Opinion of the Advocate General Mazák in Case C-158/07, *Förster v. IB-Groep*, [2008] ECR I-8507 para 54.

³³ H.-W. Micklitz, *The ECJ between the Individual Citizen and the Member States – A Plea for a Judge-Made Law on Remedies*, in H.-W. Micklitz, B. De Witte (Eds.), *The European Court of Justice and the Autonomy of the Member States*, cit., p. 349.

citizenship is a "fundamental status of nationals of the Member States";³⁴ second, citizens' rights can be directly derived from EU primary law (Article 20 ss. TFEU); third, they can be invoked in spite of the exercise of a cross-border economic activity. Although this strand of judgments adds a new dimension to that of market citizenship, it does not overcome it.³⁵

Without embarking on the discussion on the "European economic constitution",³⁶ free movement and economic rights (including contractual rights) still remain an essential foundation of the EU and Union citizenship.³⁷ Rather, the evolution of European case-law shows the emergence of a more complex and composite notion of Union citizenship which ties up fundamental economic freedoms and fundamental rights. This new "shadow Union citizenship"³⁸ seems to reflect more appropriately the "constitutional" objectives of the EU which should "establish an internal market, based on balanced economic growth and price stability, a highly competitive social market economy", but also "combat social exclusion and discrimination, and promote social justice and protection" (Article 3 TEU).

Given that citizens' *rights* are not necessarily restricted to those expressly conferred by the citizenship *status*, the issue arises what are the other rights upon which it is possible to materialize this innovative notion of Union citizenship. Fundamental rights represent the first element to substantiate the *status* of Union citizenship. There seems to be no reasonable explanation why European citizens may rely upon fundamental rights when they exercise economic activity or they cross national borders but not when they simply reside in another Member State.³⁹ The *Ruiz Zambrano* judgment, however, did not clarify whether fundamental rights (and, of course, which of them) may be regarded as citizens' rights *per se*.⁴⁰ A positive answer would enable citizens to invoke fundamental rights as their own rights in vertical as well as horizontal relationships without the limitations set out by Article 51 of the Charter.⁴¹ However, a counter-argument could be that Charter of Fundamental Rights draws a clear line between "citizens'

³⁴ See, inter alia, ECJ, case C-84/99 *Grzelczyk* [2001] ECR I-6193; Case C-413/99 *Baumbast* [2002] ECR I-7091; Case C-148/02, *Garcia Avello* [2003] ECR I-11613; Case C-200/02, *Zhu and Chen* [2004] ECR I-9925, p. 25; Case C-135/08, 2.3.2010, *Rottmann* [2010] ECR I-01449; Case C-34/09, *Ruiz Zambrano* [2011] ECR I- 01177.

³⁵ See in this regard, N. Shuibhne, *The Resilience of EU Market Citizenship*, cit., p. 1627. See also the recent cases ECJ, Case C-434/09, *Shirley McCarthy* [2011] ECR I- 03375; case C-256/11, *Murat Dereci* [2011]; joined cases C-356/11 and C-357/11, *Maahanmuuttovirasto* [2012] n.y.r.; opinion of the Advocate General Melchior Wathelet, in case C-333/13, *Elisabeta Dano* [2014]. For a critical comment of the most recent developments of the case law, see S. Coutts, *Union citizenship as probationary citizenship: Onuekwere*, *Common Market Law Review* (2015) 52, p. 531 ss.

³⁶ See, in particular, M.E. Streit, W. Mussler, *The Economic Constitution of the European Community: From 'Rome' to 'Maastricht'*, *European Law Journal* (1995) 1 p. 5 ss.; W. Sauter, *The Economic Constitution of the European Union*, *Columbia Journal of European Law* (1998) 4 p. 27 ss.; C. Joerges, *What is Left of the European Economic Constitution?*, *EUI Working Papers Law* 2004/13.

³⁷ See Opinion of the Advocate General Poiares Maduro, in case C-158/04 and C-159/04, *Alfa Vita Vassilopoulos AE* [2006] para 40. See also N. Reich, *A European constitution for citizens: Reflections on the rethinking of Union and Community law*, *European Law Journal* (1997) 3 p. 131.

³⁸ G. Comandé, *The Fifth European Union Freedom: Aggregating Citizenship ... around Private Law*, in H.-W. Micklitz (ed.), *The Constitutionalization of European Private Law*, cit., p. 83.

³⁹ See the opinion of Advocate General Sharpston in Case C-34/09, *Ruiz Zambrano*, para 84.

⁴⁰ Conversely, the Charter of Fundamental Rights states that certain citizens' rights are fundamental rights.

⁴¹ See, M. J. Van der Brink, *EU Citizenship and EU Fundamental Rights: Taking EU Citizenship Rights Seriously?*, cit., p. 278.

rights” and other fundamental rights.⁴² Further, unlike Article 20 TFUE which provides that political and residence rights are citizenship rights *inter alia*, the Charter lays down a “close catalogue” of “citizens’ rights” which includes only typical political and residence rights.

Although fundamental rights are not coextensive with citizens’ rights, they may have strong influence on rights conferred to citizens by EU primary and secondary law. The horizontal application of fundamental rights is one of the most important vehicles to strengthen legal protection of vulnerable contractual parties and “elevate” the worker, consumer, client to the status of European citizen.⁴³ Whereas fundamental economic freedoms turn citizens into a consumer (citizen-consumer), fundamental rights turn consumers into citizens (consumer-citizen) because they make them part of a social and political community. Some recent judgments handed down by the ECJ in consumer law show, however, that the “open constitutionalization” of consumer law does not necessarily increase contractual protection for vulnerable consumers.⁴⁴

It may be further asked what role should play (fundamental) socio-economic rights in the construction of the new Union citizenship. The idea of “social citizenship”, forged by T. H. Marshall in the aftermath of the Second World War,⁴⁵ has been recently analysed in light of the important institutional and economic changes that have transformed the structure of the welfare state.⁴⁶ Important efforts have been made to reconcile the principle of solidarity, which finds a legal basis in the Charter (chapter IV), but whose implementation depends very much upon Member States and the transnational nature of European economic freedoms.⁴⁷ But the global financial crisis has unveiled the difficulty of EU law to grant to European citizens “the right to access the social protection system in host states on the basis of complete equality of treatment with its citizens”.⁴⁸

Union citizenship seems to play the more limited role to establish criteria that ensure to European citizens access to national welfare mechanisms which remain fragmented across national jurisdictions.⁴⁹ The conflict between harmonized economic standards and fragmented social and welfare rights had already emerged in the *Viking, Laval, Rüffert, Commission v. Luxembourg* judgments handed down between

⁴² See for a critical perspective D. Sarmiento, *Who’s afraid of the Charter? The Court of Justice, national courts and the new framework of fundamental rights protection in Europe*, in *CML Rev.* (2013) 50, p. 1267 ss.

⁴³ See, in particular, G. Bruggemeier, A. Colombi Ciacchi, Comandé, *Fundamental Rights and Private Law in the European Union*, Cambridge, 2010; C. 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*, Kluwer, 2008; O. O. Cherednychenko, *Fundamental Rights, Contract Law and the Protection of the Weaker Party*, Sellier, 2007.

⁴⁴ See *infra* section VII.

⁴⁵ See T. H. Marshall, *Citizenship and Social Class*, Cambridge, 1949 (reprinted in 1991).

⁴⁶ See D. Sindbjerg Martinsen, *Welfare State and Social Europe*, in U. Neergaard et Al. (eds.), *Social services of General Interest in the EU*, Springer, 2013, p. 53.

⁴⁷ See S. O’Leary, *Solidarity and Citizenship Rights in the Charter of Fundamental Rights of the European Union*, in G. De Burca (ed.), *EU Law and the Welfare State. In Search of Solidarity*, Oxford, 2005, p. 39.

⁴⁸ S. Giubboni, *European Citizenship and Social Rights in Times of Crisis*, cit., p. 943.

⁴⁹ See L. Azoulai, *La citoyenneté européenne, un statut d’intégration sociale*, in *Chemins d’Europe: Melanges en l’honneur de Jean Paul Jacque*, 2010, p. 1.

2007 and 2008.⁵⁰ Here the Court has tried to find a delicate balance between freedom of establishment and freedom to provide services, on the one hand, and fundamental rights (right of collective action), on the other. It did not rank fundamental freedoms higher than fundamental rights but it recognized that the fundamental right of collective action can be subjected to limitations in certain circumstances.⁵¹ What rendered the balance undertaken by the CJEU particularly complicated is the fact that, notwithstanding of the new reference made by the Article 3 TUE to the "social market economy", the concrete means at disposal of the Union to achieve this objective remain limited and relate to instruments of coordination in relation to the social policies and social law of the Member States.⁵² The awareness on the intrinsic limits of social rights in the EU, however, does not necessarily prevent citizenship from becoming a "transnational status for social integration"⁵³ but it calls for the identification of other instruments which directly or indirectly promote social inclusion of the most vulnerable citizens.

III. THE CONCEPT OF "EUROPEAN REGULATORY CONTRACT LAW"

Little attention has been devoted so far to the impact of EU secondary law on citizens' rights. The reason is threefold. First, whilst EU secondary law (e.g. consumer and services law) deals with economic individual rights, citizenship has been traditionally associated to social, political and residence rights. Second, whereas consumer and services law regulate horizontal relationships between private parties, citizens' rights regulate vertical relationships between the citizen and the state. Third, as long as the parties to the contract operate within the same jurisdiction, nationality does not matter.⁵⁴ Recently, the legal doctrine has examined the hypothesis that enhanced contractual protection of the weaker parties strengthens economic and social inclusion of the European citizens.⁵⁵ The Monti Report as well as the Citizenship Reports issued by the European Commission in 2010 and 2013 follow the same

⁵⁰ See, respectively, ECJ, case C-438/05 *Viking* [2007] ECR I-10779-10840; case C-341/05 *Laval* [2007] ECR I-11767-11894; case C-346/06 *Rüffert* [2008] ECR I-1989; case C-319/06 *Commission v. Luxembourg* [2008] ECR I-4323. See, in particular, S. Deakin, *The Lisbon Treaty, the Viking and Laval Judgments and the Financial Crisis: In Search of New Foundations for Europe's "Social Market Economy"*, in N. Bruun (ed.), *The Lisbon Treaty and Social Europe*, 2012, p. 21.

⁵¹ See A. Colombi Ciacchi, *European Fundamental Rights, Private Law and Judicial Governance*, in H.-W. Micklitz, *Constitutionalization of European Private Law*, cit., p. 117.

⁵² See L. Azoulai, *The Court of Justice and the Social Market Economy: the Emergence of an Ideal and the Conditions for its Realization*, *Common Market Law Review* (2008) 45 p. 1337 ss.

⁵³ S. Giubboni, *European Citizenship and Social Rights in Times of Crisis*, cit., p. 937.

⁵⁴ See H.-M. Micklitz, *Introduction*, cit., p. 23.

⁵⁵ See M. Hesselink, *European Contract Law: A Matter of Consumer Protection, Citizenship, or Justice?*, *ERPL* (2007) 3, p. 323 ss. F. Benyon (ed.), *Services and the EU Citizen*, Hart, 2013, 60 ss.

direction.⁵⁶

These important “EU institutions-driven” initiatives have been often criticised for their overreliance on the “consumer-citizen” rhetoric.⁵⁷ Not every consumer is a European citizen and, more importantly, not every European citizen can afford to pay goods and services offered by the internal market. An Author has recently underlined the reductionist “market-building” view of the Commission by asking whether the EU suffers not only from a social but also a civil justice deficit which derives from the lack of harmonized standards of contractual justice across national jurisdictions.⁵⁸

The idea that contract law could be used to increase citizens’ protection might be challenged also from a different and opposite perspective. It may be argued that contract and private law do not represent the most appropriate regulatory instrument to increase citizens’ rights and upgrade social integration.⁵⁹ Along the same line of thinking it may be further added that in so far as contract law achieves commutative justice, rather than distributive justice, there is no space to design contracts in order to improve social and economic conditions of citizens.⁶⁰

Both of these views, which reflect very different conceptions on the role and function of contract law in society, address the *normative* question of how best contract law should be designed at the legal of the EU. Differently, this study attempts to answer the *positive* question of how European contract law works in practice and what implications derive from its functioning for European citizens. The fundamental premise is that European contract law is profoundly different from national contract law as regards its source, structure and function.

First and foremost, contract law, which is one of the many legal tools to regulate markets,⁶¹ derives from EU secondary law. Second, European contract law is not enshrined into a civil code or a consolidated text but it is fragmented across different sectorial-based disciplines. In the absence of any competence in the field of substantive private law (e.g. contract, tort, property), EU law has vertically intersected national contract law via sectorial directives (e.g. consumer, energy, telecom, public

⁵⁶ See M. Monti, *A New Strategy for the Single Market. At the Service of Europe’s Economy and Society. Report to the President of the European Commission*, 9 May 2010 (Monti Report). See also European Commission, *EU Citizenship Report 2010: Dismantling the obstacles to EU citizens’ rights*, Brussels, COM (2010) 603 final; *EU Citizenship Report 2013: EU citizens: your rights, your future*, Brussels, 8.5.2013 COM (2013) 269 final.

⁵⁷ See, N. Reich, *Book Review*, of F. S. Benyon (Ed.), *Services and the EU Citizen*, *CML Rev.* (2014), p. 710; C. Mak, *Europe-building through private law. Lessons from constitutional theory*, *ERCL* (2012) 3, p. 338.

⁵⁸ See M. Hesselink, *Unjust Conduct in the Internal Market. On the Role of European Private Law in the Division of Moral Responsibility between the EU, its Member States and their Citizens*, Centre for the Study of European Contract Law, Working Paper Series No. 2014-14

⁵⁹ See, in particular, L. Kaplow, S. Shavell, *Why the legal system is less efficient than the income tax in redistributing income*, *Journal of Legal Studies* (1994) 23, p. 667–681 ss.

⁶⁰ See on the distinction between distributive and commutative justice H.-W. Micklitz (ed.), *The Many Concepts of Social Justice in European Private Law*, Elgar, 2011, p. 30 ss.

⁶¹ See F. Moslein, K. Riesenhuber, *Contract Governance – A Draft Research Agenda*, cit., p. 274.

procurement law) adopted on the basis of Article 114 TFEU.⁶² Third, and most importantly, whereas national contract law incentivizes the parties to pursue their own interests, European contract law pushes the parties to design their rights and obligations in order to achieve European integration:⁶³ in other words, European contract law does not (only) facilitates the parties' autonomy but it rectifies it in order to achieve the functioning of the internal market.

These three elements account for the intrinsic "regulatory" nature of European contract law. Of course, the fact that regulators use contract law to achieve their objectives is not a novelty; what is new is that "European regulatory contract law" reflects the shift from the nation to the market state and mirrors the complex "constitutional" identity of the EU.⁶⁴ For this reason, European regulatory contract law does not simply transpose *ordo-liberalism* on the European level nor it can be reduced to a mere function of the internal market construction.⁶⁵ Besides competition (functioning of internal market), contract governance at the EU level promotes equal and fair access to essential goods and services for the most vulnerable citizens.

It is also important to underline that "European regulatory contract law" differs from the various projects of harmonization or codification (which often fall under the heading of "European contract law"), driven by the European academia⁶⁶ and the EU institutions⁶⁷, which aim to distil a common set

⁶² Article 81 TFEU concerns the judicial cooperation in civil matters having cross-border implications. See S. Wheelerill, *European Private Law and the Constitutional Dimension*, in F. Cafaggi (ed.), *The Institutional Framework of European Private Law*, 2006, p. 79.

⁶³ See, in particular, H.-W. Micklitz, *The Visible Hand in European Regulatory Private law*, EUI Working Paper 2008/14, p. 25; H. Collins, *Regulating Contract Law*, in C. Parker et al. (eds), *Regulating Law*, Oxford, 2004; F. Cafaggi, H. Miur-Watt (eds), *The Regulatory Function of Private Law*, Elgar, 2009; R. Michaels, *Of Islands and the Ocean: The Two Rationalities of European Private Law*, in R. Brownsword, H.-W. Micklitz, L. Niglia and S. Weatherill (eds.), *The Foundations of European Private Law*, Oxford, 2012, p. 139 ss.; A. Zoppini, *Diritto privato vs diritto amministrativo (ovvero alla ricerca dei confini tra stato e mercato)*, in *Riv. Dir. Civ.* 2013, 3, p. 515 ss. G. Bellantuono, *Contract Law and Regulation*, in P. Monateri (ed.), *Handbook of Comparative Contract Law*, Elgar, 2015. Available at: <http://ssrn.com/abstract=2486066>.

⁶⁴ See H.-W. Micklitz-D. Patterson, *From the Nation State to the Market: the Evolution of EU Private Law*, EUI Working Papers LAW 2012/15

⁶⁵ See H.-W. Micklitz, *Introduction*, cit., p. 5. See also for the concept of *ordo-liberalism* S. Grundmann, *The Concept of the Private Law Society: After 50 Years of European and European Business Law*, *European Review of Private Law* (2008) 4, p. 554.

⁶⁶ See, in particular, O. Lando-H. Beale, *Principles of European Contract Law*, Parts I and II, 2000; C. Von Bar-E. Clive-H. Schulte Nölke (eds.), *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR)*, Munich, Sellier, 2009.

⁶⁷ See the EU Parliament Resolution of 26 May 1989 on action to bring into line the private law of the Member States, OJ C 158 and the resolution of 6 May 1994 on the harmonisation of certain sectors of the private law of the Member States, OJ C 205. See also the Communication from the Commission to the Council and the European Parliament on European contract law COM (2001) 398; Communication to the European Parliament and the Council - A more coherent European contract law - An action plan COM(2003) 68; Communication to the European Parliament and the Council - European Contract Law and the revision of the *acquis*: the way forward COM(2004)651; Green Paper on policy options for progress towards a European Contract Law for consumers and businesses COM(2010) 348; European Commission, Expert group's feasibility study on European contract law (IP/11/523 Brussels, 3 May 2011).

of contractual rules from national legal systems.⁶⁸ The Commission's proposal for a regulation setting out a Common European Sales Law (CESL) is the most advanced project of harmonization of European contract law.⁶⁹ The proposal was meant to establish an optional instrument the parties can choose in order to enter into B2c cross-border sales contracts. Although the proposal was backed by the European Parliament,⁷⁰ it has been withdrawn by the new Commission⁷¹ which shifted its focus from the harmonisation of the sale's contracts to the harmonisation of the contract law related to the e-commerce in order to foster the Digital Single Market.⁷² The withdrawal of the CESL witnesses the difficulty to reconcile the "regulatory" nature of European contract law with the codification-driven ambitions supported by a part of academia and EU institutions.

In truth it seems hard to reconcile regulatory contract law with the harmonization/codification ambitions of academics and EU institutions.⁷³

First of all, harmonization and codification projects build up a coherent, rational and systematic set of principles and rules which overcome the vertical-based regimes of regulatory contract law and replicate the systematic structure of national civil codes.⁷⁴ But the silo-based structure of regulatory contract law responds to the need of customizing regulatory regimes on the specific nature of the economic activity regulated. The specific technicalities which characterize banking, telecom, energy sectors may render particularly ineffective a uniform horizontal regulatory regime. Moreover, unlike regulatory contract law, harmonization/codification projects reflect a traditional understanding of contract law and private autonomy: the problem of competition and access fall outside the perimeter of the PECL, DCFR and CESL which focus exclusively on the individual/bilateral model of contractual transactions.

⁶⁸ See, for the discussion on the harmonisation of national contract law, G. Alpa-M. Andenas, *Fondamenti di diritto privato europeo*, Milano, 2005 and recently R. Schulze, H. Shulte-Nolke, *European Private Law – Current Status and Perspectives*, Munich, Sellier, 2011.

⁶⁹ Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law Brussels, 11.10.2011 COM(2011) 635 final 2011/0284 (COD). See for a discussion concerning the EU competence with regard to the Optional instrument: J.J. Kuipers, *The Legal Basis for a European Optional Instrument*, *European Review of Private Law* 5 (2011), p. 545 ss.; See G. Low, *Unitas via Diversitas: Can the Common European Sales Law Harmonize Through Diversity?*, *Maastricht Journal of European and Comparative Law* (2012) 1 ss.; H.-W. Micklitz-N. Reich, *The Commission Proposal for a 'Regulation on a Common European Sales Law (CESL)' – Too Broad or Not Broad Enough?*, *EUI Working Papers LAW* No. 2012/04, p. 5.

⁷⁰ European Parliament legislative resolution of 26 February 2014 on the proposal for a regulation of the European Parliament and of the Council on a Common European Sales Law (COM(2011)0635 – C7-0329/2011 – 2011/0284(COD)).

⁷¹ Commission, Communication "Work Programme 2015. A New Start", Annex, Strasbourg, 16.12.2014, COM(2014) 910 final.

⁷² Commission, Communication "a Digital Single Market Strategy for Europe", Brussels, 6.5.2015 COM(2015) 192 final.

⁷³ See G. Bellantuono, *Contract Law and Regulation*, cit., p. 8.

⁷⁴ See Académie des Privatistes Européens, *Code européen des contrats*, Milano, 2001; A. S. Hartkamp-C. Von Bar, *Towards a European Civil Code*, Nijmegen, 1998. See, for a critical perspective, P. Legrand, *Against a European civil code*, *The Modern Law Review* (2003) 60 p. 44 ss.

IV. THE IMPACT OF "EUROPEAN REGULATORY CONTRACT LAW" ON CITIZENS' RIGHTS

The dual objective of ensuring competition and increasing citizens' access rights attaches a *collective* or *macro* dimension to "European regulatory contract law". Contracts do not only make it possible the individual/bilateral exchange between the parties but they also foster the general/collective interest of large categories of citizens, such as consumers and users. Regulatory contract law is the most evident sign of the societal transformation from a society organized by status towards one organized by markets.⁷⁵ This shift produces important consequences on citizens' rights.

Regulatory contract law goes far beyond the paradigm of commutative justice because it considers the implications of contractual exchanges for the overall society and very often regulates long-term relationship which presuppose an organizational structure.⁷⁶ For this reason, H.-W. Micklitz pointed out that regulatory contract law is governed by the model of *access justice/Zugangsgerechtigkeit* (justice through access) based on anti-discrimination rules and access-rights.⁷⁷ As I will show below, access-rights have gained particular importance in the context of universal services and information society.

The shift of contract governance from the *individual* to the *collective* level is strictly related to the ongoing process of liberalisation which has gradually transformed public services supplied by public entities into services of general (economic and non-economic interest) supplied by private entities (*economisation*).⁷⁸ The vertical/bilateral relationships between the state (supplier/provider of goods and services) and the consumer has been turned into a triangular relationship between the State (regulator), consumer and supplier.⁷⁹ A remarkable consequence is that citizens need to enter into a contract in order to obtain services (e.g. energy, water, telecoms) that are of utmost importance for his social and economic integration.

The "collective" dimension of regulatory contract law calls for a reconceptualization of the relationship between contract law and citizens' rights. They become a constitutive part of contractual relationships and inform regulatory and enforcement strategies. As I will show below, horizontal application of fundamental rights (*constitutionalisation*) further crumbles the traditional individual/bilateral dimension of contractual transaction and upgrades consumer and users to the level of European citizens. The use of

⁷⁵ See C. Godt, *Intellectual Property and European Fundamental Rights*, in H.-W. Micklitz, *Constitutionalization of European Private Law*, cit., p. 210 ss.; S. Frerichs, T. Juutilainen, *Rome Under Seven Hills? An Archaeology of European Private Law*, *Helsinki Legal Studies Research Paper No. 32/2014*. Available at SSRN: <http://ssrn.com/abstract=2465873>.

⁷⁶ See S. Grundmann, F. Cafaggi, G. Vettori, *The Organizational Contract: From Exchange to Long-term Network Cooperation in European Contract Law*, Ashgate, 2013.

⁷⁷ H.-W. Micklitz, *Social Justice and Access Justice in Private Law*, EUI Working Papers Law, 2011/02.

⁷⁸ See J.D. Kearney, T. Merrill, *The Great Transformation of Regulated Industries Law*, *Columbia Law Review*, 1998, 6, p. 1324 ss.; O. Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, *Minnesota Law Review*, (2004) 89, p. 262.

⁷⁹ See H.-W. Micklitz, *Universal services: nucleus for a social european private law*, *EUI working paper Law*, 2009/12, p. 10.

contract governance to achieve market or social-oriented goals might raise the doubt whether regulatory law is a manifestation of private law or should be regarded as a form of public law.

The intricate problems regarding the actual relevance and significance of the public/private law distinction fall outside the scope of this paper. The importance of this distinction, however, should not be overestimated. Whereas the *collective/individual* dichotomy accounts for the structural and functional differences between EU and national law because it reflects the changes produced in society by the regulatory state, the *public/private* divide does not seem any longer a useful device to distinguish legal relationships in the EU context. The reason is the following. At the EU level, private as well as public entities must respect the four economic freedoms and provisions that allow Member States and public entities to derogate from competition rules are exceptional (e.g. Article 107 TFEU). Contracts are the legal facilities that enable the competitive functioning of internal market between private and public parties (e.g. public procurement).

This consideration, however, does not eliminate any difference, in terms of governance and enforcement, between contract law and other regulatory regimes. Contract governance confers rights and remedies to the parties to the contract regardless of their public or private status.⁸⁰ The parties can enforce their rights by means of judicial or extra-judicial enforcement proceedings.⁸¹ In vertical-based “administrative” regimes, instead, parties do not have private causes of action to enforce their rights and remedies. Enforcement is driven by the initiative of public entities which act on the basis of the public/general interest.

This important structural difference between private and public governance clearly emerges from EU law. Whereas in certain sectors contract regulation plays a crucial role (consumer law), in others markets are regulated by means of vertical regimes usually implemented and enforced by administrative agencies (financial law).⁸² Although parties may resort to their own national private law regimes, EU law does not introduce any form of contract governance and enforcement. Of course, it can be questioned the extent to which European regulatory contract law is autonomous or self-sufficient from national contract law or, to put it differently, whether national contract categories are necessary to ensure the functioning of European regulatory contract law.⁸³ At any rate, the profound differences between the contract (horizontal) governance and the administrative (vertical) governance of the transaction cannot be ignored.

⁸⁰ Contract law must be distinguished from self-regulatory regimes established and enforced by the parties themselves.

⁸¹ See F. Cafaggi, *Introduction: The transformation of transnational private regulation: enforcement gaps and governance design*, in F. Cafaggi (ed.), *Enforcement of Transnational Regulation*, Elgar, 2012, p. 1 ss.

⁸² See, for a deeper discussion, F. Della Negra, *The private enforcement of the MiFID conduct of business rules. An overview of the Italian and Spanish experiences*, *European Review of Contract Law* (2014) 4, p. 571 ss.

⁸³ See for this hypothesis H.-W. Micklitz, *The Visible Hand of European Regulatory Private Law. The Transformation of European Private Law from Autonomy to Functionalism in Competition and Regulation*, cit., p. 15.

V. THE CONTRACT-LAW MAKING FOR EUROPEAN CITIZENS

Within the theoretical framework of "European regulatory contract law" the fundamental question arises whether and to what extent the "contract governance" or contract law-making established by EU secondary law influences economic and social conditions of the European citizens.⁸⁴ Indeed, consumer and services (e.g. financial, telecom services) law, have been often criticised for being too much rooted in the stereotype of the *homo oeconomicus*.⁸⁵ After the Lisbon Treaty important areas of secondary law have been shaped by maximum harmonisation directives (in the field of consumer, energy, financial law) which have strongly reduced the margin of manoeuvre of the Member States to introduce higher standards of consumer/investor protection.⁸⁶ Consequently contract governance has been based on the model of reasonable consumer/user/investor which is capable of "reaping" the benefits of the market by purchasing good and services in other Member States.⁸⁷ The underlying assumption is that maximum legal harmonization may determine market integration, increasing cross-border commercial exchanges, as long as consumers are "reasonably well-informed and reasonably observant and circumspect".⁸⁸

However, the application of the *homo oeconomicus* model to consumers' behaviour is not unproblematic. Empirical evidence shows that individual decisions are driven by bounded rationality.⁸⁹ In the banking and financial sector, commercial choices are often grounded on poor financial literacy and over-reliance on the oral information received by the financial intermediaries.⁹⁰ Furthermore, the extension of such model to the services of general economic/non-economic interest may go to the detriment of the most vulnerable citizens who need these services (e.g. water, energy, transport) to participate to the social community. For this reason, Article 36 of the Charter of Fundamental Rights provides that these services should be regulated in order to "promote the social and territorial cohesion

⁸⁴ For the notion of "contract governance" see, in particular, F. Möslin-K. Riesenhuber, *Contract Governance – A Draft Research Agenda*, in *European Review of Contract Law* (2009) 5, p. 1614 ss.

⁸⁵ See, recently, M. Everson, *A Citizenship in Movement*, in *German Law Journal, Special Issue* (2014) 15, p. 966.

⁸⁶ See in particular H. W. Micklitz, *Introduction*, in H. W. Micklitz (ed.), *The Many Concepts of Social Justice in European Private Law*, Elgar, 2011, p. 12 ss.

⁸⁷ *EU Consumer Policy strategy 2007-2013. Empowering consumers, enhancing their welfare, effectively protecting them*, 13.3.2007 COM (2007) 99 final.

⁸⁸ See, *inter alia*, ECJ, cases C-362/88, *GB-INNO-BM* [1990] ECR I-0667; Case, C-220/98, 13.10.2000, *Estée Lauder* [2000] ECR I-117; Case C-356/04, 19.9.2006, *Lidl Belgium* [2006] ECR I-8501.

⁸⁹ See D. Awrey, *Complexity, Innovation and the Regulation of Modern Financial Markets*, cit., p. 10. Bounded rationality is a semi-strong form of rationality pursuant to which economic actors are assumed to be "intendedly rational, but only limitedly so". See, in this regard, O. Williamson, *The Economic Institutions of Capitalism*, New York, 1985, p. 45.

⁹⁰ See B. Henderson-N. Pearson, *The dark side of financial innovation: a case study of the pricing of a retail financial product*, in *Journal of Financial Economics* (2011) 100, p. 227 ss.

of the Union”⁹¹.

To this aim the legislator has introduced specific and differentiated forms of contract governance in the energy sector (gas and electricity) based on the paradigm of the “vulnerable consumer.” The latter refers to “a group of consumers which run the risk of being isolated from social and economic life, be it by over-indebtedness, illness or a lack of possibilities to communicate”.⁹² Therefore, their economic behaviour should be legally assessed in light of concrete difficulties (e.g. infirmity, age, credulity) he/she may face in economic transactions.⁹³ This idea, which was already put forward by the Council Resolution issued in 1975, regarding a Preliminary Program for a Consumer Protection and Information Policy, now emerges in the second and third package directives in electricity, gas, telecom sectors which coined the notion of the “vulnerable customer”.⁹⁴ They acknowledge that the benefits deriving from the markets liberalisation (due to the legal separation between distributor and transmission systems operations and the ownership unbundling) would be vanished, unless an “efficient and non-discriminatory network access” is granted to vulnerable customers.⁹⁵ The third package adopted in 2009 further strengthens the link between vulnerability and consumer protection.⁹⁶ One of the most important corollaries is that, as the Court stated in the *Federutility* case, the price of the supply of natural gas to final consumers should be set “at a reasonable level having regard to the reconciliation [...] between the objective of liberalisation and that of the necessary protection of final consumers pursued by Directive 2003/55”.⁹⁷

The extent to which the concept “vulnerability” can affect the contractual rights, remedies and procedures laid down by these directives remains unclear. Article 5 (2) of the Directive 2005/29/EC provides that “the economic behaviour only of a clearly identifiable group of consumers who are particularly *vulnerable* to the practice or the underlying product because of their mental or physical infirmity, age or credulity in a way which the trader could reasonably be expected to foresee, shall be

⁹¹ H.-W. Micklitz, *Universal Services: Nucleus for a Social European Private Law*, cit., p. 21.

⁹² See H.-W. Micklitz, *Do Consumers and Businesses need a New Architecture of Consumer Law? A Thought-Provoking Impulse*, EUI Working Papers, 2012/23.

⁹³ See M. Granovetter, *Economic Action and Social Structure: The Problem of Embeddedness*, *American Journal of Sociology*, 91, 1985, p. 481. See also for this view: T. Wilhelmsson, *Varieties of Welfarism in European Contract Law*, *European Law Journal*, 10, 2004, p. 712 ss.

⁹⁴ Respectively, Internal Market in Electricity Directive 2003/54/EC and the Internal Market in Natural Gas Directive 2003/55/EC and directives 2009/72/EC and 2009/73/EC. In this sense see also the recital n. 7 of the Universal Service Directive (2002/22/EC) which provides for effective conditions of access to services “in particular for the elderly, the disabled and for people with special social needs”.

⁹⁵ See recitals n. 2 of the directives 2003/54 and 2003/55/EC. For a similar wording see the recital n. 20 of the recent directive 2012/27/EU on energy efficiency. See M. Bartl, *The Affordability of Energy: How Much Protection for the Vulnerable Consumers?*, cit., p. 230.

⁹⁶ It is also worth recalling, from a literal viewpoint, that in the 2009 version of the electricity and gas directives the adjective “vulnerable” is mentioned much more times than in the 2003 versions (9 against 3).

⁹⁷ ECJ, case C-265/08, *Federutility* [2010] ECR I-03377.

assessed from the perspective of the average member of that group.”⁹⁸ Even though it is difficult to define the exact scope of the “economic behaviour”, it may be argued that it is referred to the evaluation of the misleading attitude of the practice addressed to the consumer in the circumstance of the case.⁹⁹ Yet, is it possible to generalise the model of the vulnerable consumer to the cases for which the directives do not expressly provide such exception?

In literature it has been proposed that the shift from the reasonable to the vulnerable consumer model entails the passage from a "market-rational" regulation, based on default rules and procedural fairness, to a "market-rectifying" regulation, based on mandatory rules and substantive fairness.¹⁰⁰ The most difficult problem is whether this different form of contract governance presupposes a specific legal basis or can be drawn from the particular social and economic context in which the transaction takes place. This issue assumes particular importance when EU law does not provide for specific remedies in order to support and enforce its “market-rectifying” regulation. For example, the new mortgage credit directive (Directive 2014/17/EU), which aims at strengthening consumers’ access to the residential immovable property market,¹⁰¹ does not refer to the concept of vulnerability nor it does distinguish between different categories of borrowers.¹⁰² It only provides that pre-contractual information must be “personalised” (Article 14). Does this suffice to establish a special contractual regime for the consumer-borrower capable of taking into account his weakness and vulnerability *vis-à-vis* the bank-lender?

VI. THE EUROPEAN JUDICIAL ENFORCEMENT OF REGULATORY CONTRACT LAW

This question hides a paradox that has been highlighted by N. Reich. Whereas “the liberal deregulation and privatisation movement as undertaken by the EU has been quite successful in reducing state functions and in opening public services, [it] has, however, not been able to transfer with similar

⁹⁸ See G. Howells, *Unfair commercial practices: future directions*, in R. Schulze, H. Schulte-Nolke, *European Private Law: Current Status and Perspectives*, Sellier, 2011, p. 156 ss. Such provision should be read in light of the Buet case (Case C-382/87, *Buet* [1989] ECR I-1235) the Court, for the first time, recognized that consumers can be often vulnerable with regard to particular commercial practices, advertisings, businesses’ behaviours.

⁹⁹ See also the Recital n. 16, Directive 1993/13/EEC according to which the fairness test regarding contracts “providing for collective services which take account of solidarity among users, must be supplemented by a means of making an overall evaluation of the different interests involved.”

¹⁰⁰ T. Wilhelmsson, *Varieties of Welfarism in European Contract Law*, in *European Law Journal* (2004) 10, p. 719.

¹⁰¹ Directive 2014/17/EU of 4 February 2014 on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010.

¹⁰² See for a differentiated approach to client protection the directive 2004/39/EC (MiFID) and 2006/73/EC (Mifid implementing directive).

success the obligations flowing out of these services to private actors”.¹⁰³ In short, EU law provides for individual rights but not for remedies. For this reason, individuals must resort to their national law and courts in order to enforce the rights derived from EU law.¹⁰⁴

By virtue of the principle of procedural autonomy, in the absence of Union law provisions governing the subject, the rights conferred by EU law must be exercised before the national courts in accordance with the conditions laid down by national law.¹⁰⁵ Procedural conditions and remedies, however, must not be less favourable than those relating to similar actions of a domestic nature (principle of equivalence) and must not make it impossible in practice or excessively difficult to exercise the rights derived from EU law (principle of effectiveness).

This decentralized structure of private enforcement creates frictions between the EU and Member States. National legal orders often resist to the intrusion of European regulatory contract law and obstacolate access to remedies and justice for consumers, users, clients. The preliminary reference procedure, however, has become a formidable instrument to overcome such national resistances and has conferred to the Court of Justice the crucial institutional and regulatory function of settling conflicts between EU and Member States. I will then examine the important role gained by judicial governance in the enforcement of consumer, energy and intellectual property law.

1. CONSUMER LAW

One of the areas of consumer law where the tension between national contract law and European regulatory contract law is most evident is that covered by the unfair terms directive (1993/13/EEC). Over the last ten years, the Directive 1993/13 has been at the centre of an intense judicial dialogue between national courts and the Court of Justice. Through a long line of judgments the Court has set in motion a process of “proceduralization” of this cornerstone Directive by introducing in national legal systems new procedural remedies such as, in particular, the *ex officio control* on unfair terms, in order to increase the level of consumer protection across national jurisdictions.¹⁰⁶

The financial crisis has further increased the regulatory function of the Directive 1993/13. More and more often the Court is called upon to deal with conflicts between over-indebted consumers and

¹⁰³ N. Reich, *The Interrelation between Rights and Duties in EU Law*, in P. Eeckhout, T. Tridimas (eds), *Yearbook of European Law 2010*, Oxford, 2010, p. 122.

¹⁰⁴ See in particular, M. Dougan, *The Vicissitudes of Life at the Coalface: Remedies and Procedures for Enforcing Union Law*, in P. Craig, G. de Burca (eds.), *The Evolution of EU Law*, Oxford, 2011, p. 420 ss.; Trstenjak-E. Beysen, *European Consumer Protection Law: Curia Semper Dabit Remedium*, *CML Rev.* (2011) 48, p. 121.

¹⁰⁵ See Case 33/76, *Reve-Zentralfinanz and Reve-Zentral* [1976] ECR 1989.

¹⁰⁶ See H.-W. Micklitz-N. Reich, *The Court and Sleeping Beauty: the Revival of the Unfair Contract Terms Directive (UCTD)*, *CML Rev.* (2014) 51, p. 771 ss.

creditors which have a strong social impact on the Member States.¹⁰⁷ The wave of national litigation related to defaults on mortgage payments has reached the European level with the *Mohamed Aziz* case.¹⁰⁸ In this landmark case the consumer was sued by the Bank for the failure to pay mortgage loan instalments. In the course of enforcement proceedings, the consumer asked the Tribunal to declare the nullity of contract term upon which debt enforcement proceeding was initiated. Since the Spanish procedural law in force at the time of main proceedings did not allow the judge of declaratory proceedings to stay enforcement in order to ascertain the unfairness of contract term, the referring court asked to the CJEU whether this procedural regime undermines the effective judicial protection of the consumer's rights.

Following the opinion of the Advocate General Kokott, the Court decided that Spanish legislation was not compatible with the Directive 1993/13/EEC and allowed the judge of declaratory proceeding to stay the debt enforcement in order to assess the alleged unfairness. In the absence of this remedy effective protection of consumers would have been utterly undermined because, since the final vesting of mortgaged property in a third party is irreversible, the declaratory judgment could have, at best, awarded the debtor compensation.

Most importantly the Court further added that the disadvantage of the consumer-debtor *vis-à-vis* business-creditor is even more evident when "the mortgaged property is the family home of the consumer whose rights have been infringed".¹⁰⁹ This paragraph is ground-breaking because the Court recognizes the evictions' repercussions on the consumer and his family members. Consumer's family members, albeit not formally parties to the contract, may suffer severe repercussions from the eviction. In this way the Court underlined the social or collective dimension of mortgage loan agreements thus overcoming the traditional individual/bilateral view of contractual exchange. The Court, however, decided not to substantiate this reasoning with an express reference to fundamental rights and in particular Article 34 (3) of the Charter which grants the right to "social and housing assistance".

In spite of that, the *Mohamed Aziz* judgment has produced a huge impact on the Spanish legal system and EU law. After this ruling the Spanish law 1/2013 conferred to the debtor the right to contest the mortgage enforcement proceedings on the ground that the contractual clause upon which the enforcement is based is unfair (Article 695 (1)). Moreover, numerous questions for a preliminary ruling

¹⁰⁷ See I. Domurath-G. Comparato-H.-W. Micklitz, *The over-indebtedness of European consumers : a view from six countries*, EUI Working paper LAW 2014/10. See also European Commission, National measures and practices to avoid foreclosure procedures for residential mortgage loans, Staff Working Paper, Brussels, 31.3.2011 SEC(2011) 357 final.

¹⁰⁸ ECJ, case C-415/11, *Mohamed Aziz* [2013] ECR I-n.y.r.

¹⁰⁹ ECJ, case C-415/11, *Mohamed Aziz* para 61. This element has been taken into account also by the Advocate General Kokott but with less emphasis (Opinion, case C-415/11, *Mohamed Aziz* [2013] para 52).

have already been submitted by national courts to the CJEU in order to ascertain the compatibility of national mortgage enforcement proceeding with the Directive 1993/13.¹¹⁰

In two recent *Mohamed Aziz* follow-on cases the ECJ has paved the way to the “open” constitutionalization of consumer law. In the *Sánchez Morcillo* judgment the Court held that the limitation to the right of appeal against the order which dismisses the debtors’ objection against the mortgage enforcement proceeding infringes the right to an effective remedy, to a fair trial and to equality of arms, guaranteed by Article 47 of the Charter.¹¹¹ In the *Kušionová* judgment the Court held that an out-of-court mortgage enforcement proceeding (voluntary auction), by which the creditor (applicant for the auction) determines the amount of the debt he wants to recover and the secured property is sold by a private undertaking (auctioneer) to a third person of its choice without any judicial assessment of the claim, is compatible with EU law.¹¹²

However, since “the loss of a family home [...] places the family of the consumer concerned in a particularly vulnerable position”, the Court held that national law must provide for effective remedies in order to protect the fundamental “right to accommodation” guaranteed by Article 7 of the Charter.¹¹³ To support this argument the Court made a direct reference to the case-law of the European Court of Human Rights (ECHR) which had already acknowledged that the loss of a home is one of the most serious breaches of the right to respect for the home and that any person who risks being the victim of such a breach should be able to have the proportionality of such a measure reviewed.¹¹⁴

¹¹⁰ See the judgments in joined cases C-482/13, C-484/13, C-485/13 and C-487/13, *Unicaja Banco SA* [2015] ECR I-nyr and C-169/14, *Sánchez Morcillo* [2014] ECR I-nyr; C-280/13, *Barclays Bank SA* [2014] ECR I-nyr. See the orders in cases C-486/13, *Caixabank* of 13.3.2014; C-93/14, *Zurbano Belaza and Artieda Soria* of 9.9.2014; C-208/14, *Antonia Valdivia Reche v Banco de Valencia SA* of 17.10.2014; C-54/14, *Villafañez Gallego e Pérez Anguio* of 21.10.2014; C-645/13, *Cajas Rurales Unidas* of 18.11.2014. See the pending cases C-116/13 *Banco de Valencia*, C-602/13, *Banco Bilbao Vizcaya Argentaria*, referred on 25.11.2013; C-8/14, *BBVA*, referred on 10.1.2014; C-548/13 *Caixabank*, referred on 10.1.2014; C-75/14 *Banco de Caja España de Inversiones, Salamanca y Soria*, referred on 11.2.2014; C-90/14, *Banco Grupo Cajatres*, referred on 24.2.2014; C-122/14, *Aktiv Kapital Portfolio Investment*, referred on 14.3.2014; C-90/14, *Banco Grupo Cajatres*, referred on 2.5.2014; C-421/14, *Banco Primus, S.A. v Jesús Gutiérrez García*, referred on 10.9.2014; C-539/14, *Juan Carlos Sánchez Morcillo*, referred on 27.11.2014; C-568/14, *Ismael Fernández Oliva v Caixabank, S.A.*, referred on 9.12.2014.

¹¹¹ ECJ, case C-169/14, *Sánchez Morcillo* [2014] ECR I-nyr. See for a comment F. Della Negra, The uncertain development of the case law on consumer protection in mortgage enforcement proceedings: *Sánchez Morcillo* and *Kušionová*, *Common Market Law Review* (2015) 52, p. 1009 ss.

¹¹² ECJ, case C-32/14, *Kušionová* [2014] ECR I-nyr.

¹¹³ ECJ, case C-34/13, *Kušionová*, p. 64. See also the opinion of the Advocate General Wahl in case C-482/12, *Peter Macinský*, p. 83.

¹¹⁴ See, ECHR, case *McCann v. the United Kingdom*, no. 19009/04 [2008], § 50; case *Zehentner v. Austria*, no. 20082/02 [2009] p. 59; case *Rousk v. Sweden*, no. 27183/04 [2013] p. 137. See for a comment F. Della Negra, *Diritto alla tutela giurisdizionale effettiva e diritti dei consumatori*, in *Convenzione europea per la salvaguardia dei diritti dell'uomo e delle libertà fondamentali, Commentario del Codice Civile Scialoja-Branca-Galgano*, a cura di G. De Nova, Bologna-Roma, 2015, p. 1567 ss.

¹¹⁴ ECJ, case C-34/13, *Kušionová*, para 66.

2. ENERGY LAW

The RWE case concerns a dispute between a gas supplier and its clients.¹¹⁵ In the national proceedings, a consumer organisation claimed from RWE (an energy supply undertaking) the reimbursement of additional amounts paid to it by those consumers following price increases.¹¹⁶ The contract allowed the supplier to vary gas prices unilaterally without stating the grounds, conditions or scope of the variation, while ensuring, however, that customers would be informed of the variation and would if appropriate be free to terminate the contract. Against this backdrop, the referring Court asked to the CJEU to clarify the interpretation of the transparency criteria provided by Article 3 and 5 of the Directive 93/13, in conjunction with point 1(j) and the second sentence of point 2(b) of the annex to that directive, and Article 3(3) of, in conjunction with points (b) and/or (c) of Annex A to, Directive 2003/55/EC.

The Court's reasoning was based on two fundamental points. First and foremost, the lack of pre-contractual information cannot be compensated for by the mere fact that consumers are informed during the performance of the contract about the variation of the charges and of their right to terminate the contract.¹¹⁷ Second, account must be taken to the fact that the right of termination conferred on the consumer can be effectively exercised in the specific circumstances.¹¹⁸ The National Court has been called upon to assess whether "the market concerned is competitive, the possible cost to the consumer of terminating the contract, the time between the notification and the coming into force of the new tariffs, the information provided at the time of that communication, and the cost to be borne and the time taken to change supplier".¹¹⁹ This reasoning reinforces transparency in two respects. First, the Court considers *contractual* transparency by taking into account parties' rights and obligations in the individual-bilateral contractual dimension. Second, it stresses the importance of *competitive* transparency which serves to make the market for services more efficient and competitive.¹²⁰ Competitive transparency introduces a new "regulatory" dimension in contract law since it frames parties' rights and obligations in the collective perspective of the market context.

The same "regulatory" driver emerges also in the recent *Alexandra Schulz* case.¹²¹ The *Bundesgerichtshof* asked to the CJEU whether Article 3(5) of the Directive 2003/54/EC is compatible with a provision of national law which does not specify the grounds, preconditions and scope of the price adjustments but ensured that customers have the right to terminate the contract if they are unwilling to accept the

¹¹⁵ ECJ, case C-92/11, *RWE Vertrieb* [2013].

¹¹⁶ RWE had made the price increases for four times from 2003 to 2005 on the basis of a contractual clause that refer to or contain provisions identical to the national legal regulation.

¹¹⁷ ECJ, case C-92/11, *RWE Vertrieb* [2013], para 53-54.

¹¹⁸ ECJ, case C-92/11, *RWE Vertrieb*, para. 54. See, similarly, ECJ, case C-472/10, *Invitel* [2012] n.y.r.

¹¹⁹ Case C-92/11, *RWE Vertrieb*, para 55.

¹²⁰ See H.-W. Micklitz, *Introduction*, cit., p. 24.

¹²¹ ECJ, Joined cases C-359/11 and C-400/11, *Alexandra Schulz* [2014] n.y.r.

amended contractual terms. Although, differently from the RWE case, the obligation to provide pre-contractual information to the client was not based on Directive 93/13 the Advocate General Wahl and the CJEU held that the national provision infringed the Directive 2003/54/EC.

But the Advocate General and the Court reasoned in two different ways. In his opinion the Advocate General pointed out that “the main objective of the Energy Directives is not consumer protection, but market liberalisation, the need to protect customers must be reconciled with the interests of electricity and gas suppliers”.¹²² By contrast, the ECJ held that “consumer protection concerns underpin the provisions of Directives 2003/54 and 2003/55 [which are] closely linked both to the liberalisation of the markets in question and to the objective, also pursued by those directives, of ensuring a stable electricity and gas supply.”¹²³ Therefore, even if the Directive 1993/13/EEC was not applicable to this case, since contract terms reflected mandatory statutory provisions (Article 1 (2) Directive 1993/13), the ECJ held that in order to be able to effectively exercise the right to terminate the contract “customers must be given adequate notice, before that adjustment takes effect, of the reasons and preconditions for the adjustment, and its scope”.¹²⁴

It is also important to recall that neither in the *RWE* nor in the *Alexandra Schulz* ruling, the CJEU referred to the fundamental rights (in particular Article 36 of the Charter) to strengthen the consumer contractual protection. Likewise in the *Mohamed Aziz* case, where the Court did not resort to the paradigm of the horizontal application of fundamental rights, these two judgments witness that regulatory contract law may achieve high levels of consumer protection without any need to open the doors to the process of constitutionalization.

3. IP LAW AND INFORMATION SOCIETY

The regulatory function of contract law emerges also in a recent strand of cases where the CJEU was called upon to decide legal conflicts which involved three different intertwined rights: the intellectual property rights of Authors, the rights of the Internet service provider (ISP) and the rights of the users/clients of these services.¹²⁵ The following three cases present a very similar factual and legal pattern. An organisation representing authors, composers and editors of musical works sought an order to require an ISP to disclose the personal data of a group of users who could possibly have infringed

¹²² Opinion AG Wahl delivered on 8 May 2014, in Joined Cases C-359/11 and C-400/11, *Alexandra Schulz*, para 60.

¹²³ ECJ, Joined cases C-359/11 and C-400/11, *Alexandra Schulz*, para 40.

¹²⁴ ECJ, Joined cases C-359/11 and C-400/11, *Alexandra Schulz*, para 47.

¹²⁵ See, in particular, C. Godt, *Intellectual Property and European Fundamental Rights*, in H.-W. Micklitz, *Constitutionalization of European Private Law*, cit., p. 210 ss.

copyrights (*Promusicae*¹²⁶) or to prevent the customers to send or receive in any way, files containing a musical work without the permission of the right holders (*Scarlet*¹²⁷ and *Netlog*¹²⁸). Whereas in *Promusicae* the balance to be struck concerned the IP right of the copyright holder and the right to the protection of personal data, in the other two cases also the freedom to conduct business of the ISP was at stake.¹²⁹ In all of them the CJEU started from the premise that the fundamental right to property is not absolute and must be balanced against the protection of other fundamental rights.¹³⁰ They do not only include the right to protection of personal data (Article 8 of the Charter) and the freedom to receive or impart information (Article 11) but also the freedom to conduct business (Article 16). Even though the latter was not expressly mentioned by the referring Court it became the crucial tool to reach a fair balance between IP and users' rights. Interestingly, the freedom to conduct a business is not protected *per se* but for the specific objective of ensuring an effective access to the ISPs's services for the users and citizens.¹³¹

The instrumental function of freedom of contract was brought to the light also in the *Sky Austria* case.¹³² Here the Court had to decide the compatibility of Article 15(6) of the Audiovisual Media Service Directive 2010/13 with Article 16 and 17 of the Charter.¹³³ In this case property and contractual rights, on the one hand, needed to be balanced with the freedom to receive information and the freedom and pluralism of the media, on the other. Unlike in the *Scarlet* and *Netlog* cases, "the importance of safeguarding the fundamental freedom to receive information and the freedom and pluralism of the media guaranteed by Article 11 of the Charter" led the Court "to give priority, in the necessary balancing of the rights and interests at issue, to public access to information over contractual freedom".¹³⁴ As the latter is not absolute, it may be subjected to a broad range of interventions on the part of public authorities which may limit the exercise of economic activity in the public interest.¹³⁵ The Court then concluded that "the safeguarding of the freedoms protected under Article 11 of the Charter

¹²⁶ ECJ, case C-275/06, *Promusicae* [2008] ECR I-00271.

¹²⁷ ECJ, case C-70/10, *Scarlet Extended* [2011] n.y.r.

¹²⁸ ECJ, case C-360/10, *Netlog* [2012] n.y.r.

¹²⁹ In fact the latter were required by the copyrights holders to install costly filtering system to monitor the data relating to all of its service users in order to prevent any future infringement of intellectual-property rights.

¹³⁰ See ECJ, case C-275/06, *Promusicae* [2008] p. 62 ss.; ECJ, case C-70/10, *Scarlet Extended* [2011] p. 43; ECJ, case C-360/10, *Netlog*, para 41.

¹³¹ See, the two communications: *A Digital Agenda for Europe*, COM (2010) 245 final, 19.5.2010 and *EUROPE 2020 A strategy for smart, sustainable and inclusive growth*, COM (2010) final, 3.3.2010. See D. Leczykiewicz, *Horizontal Application of Fundamental Rights. In Search of Social Justice or Private Autonomy in EU law*, University of Oxford, *Legal Research Papers*, 38/2013.

¹³² ECJ, case C-283/11, *Sky Austria* [2013], n.y.r

¹³³ In particular, the question was whether Article 15(6) infringed the fundamental rights of the holder of exclusive broadcasting rights, since the holder of those rights was required to authorise any other broadcaster, established in the European Union, to make short news reports, without being able to seek compensation exceeding the additional costs directly incurred in providing access to the signal.

¹³⁴ ECJ, case C-283/11, *Sky Austria*, para 66.

¹³⁵ Ivi, p. 45. On the freedom to conduct a business see, in particular, P. Oliver, *What Purpose Does Article 16 of the Charter Serve?*, in U. Bernitz, X. Groussot, F. Schulyok, *General Principles of EU Law and European Private Law*, cit., p. 281 ss.

undoubtedly constitutes a legitimate aim in the general interest the importance of which in a democratic and pluralistic society must be stressed in particular”.¹³⁶

More recently, “the interest of the general public in having access to the information” has played a determinant role in the *Google Spain* case.¹³⁷ Mr. González lodged with the Spanish Data Protection Agency (AEPD) a complaint against La Vanguardia Ediciones SL, which publishes a daily newspaper with a large circulation, and against Google Spain requesting to remove certain personal information from their websites.¹³⁸ The AEPD dismissed the complaint against *La Vanguardia* and upheld that Google Spain. The latter thus brought an appeal against that decision before the *Audiencia Nacional* (National High Court) which stayed the proceeding and referred to the CJEU three questions for a preliminary ruling concerning the interpretation of the Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data. These questions raise the issue of what obligations are owed by operators of search engines to protect personal data of persons concerned who do not wish that certain information, which is published on third parties’ websites are made available to internet users indefinitely. The Court was required to strike a balance between the i) “right to be forgotten” laid down in Article 7 and 8 of the Charter; ii) the “economic interest of the operator”; iii) the “general interest of the public in having access to certain information.”¹³⁹

The Court held that the fundamental rights enshrined in Articles 7 and 8 of the Charter override, in general, these other rights but in exceptional circumstances the general interest of the public must prevail if it is justified by a “preponderant interest [to have] access to the information in question”.¹⁴⁰ Therefore, considering that this case did not only involve the right to seek and receive information under Article 11 of the Charter was at stake (as in the *Sky Austria* case) but also the right to respect for private life under Articles 7 and 8 of the Charter, access-rights have been much more restricted. Notably, the Court uses the adjective “preponderant” to stress that only in exceptional circumstances access rights shall prevail on the right to respect for private life.

¹³⁶ ECJ, case C-283/11, *Sky Austria* para 55.

¹³⁷ ECJ, case C-131/12, *Google Spain* [2014] n.y.r.

¹³⁸ The information was about an announcement mentioning the applicant’s name in the context of a real-estate auction connected with attachment proceedings for the recovery of social security debts.

¹³⁹ ECJ, case C-131/12, *Google Spain* [2014] n.y.r., p. 66.

¹⁴⁰ Ivi, p. 99.

VII. STRENGTHENING CITIZENS' RIGHTS THROUGH JUDICIAL GOVERNANCE

The preceding case-law "materialises" the concept of regulatory contract law. In all the judgments examined above the Court analyses parties' rights and remedies in the wider dimension of European market and society. Regulatory objectives pursued by EU law, such as competition and access, absorb the typical individual/private essence characterising national contract law.

Mohamed Aziz and its follow-on cases (*Sánchez Morcillo* and *Kuřionová*) illustrate how the Directive 1993/13, a legal device aimed at approximating "the laws, regulations and administrative provisions of the Member States relating to unfair terms" (Article 1 (1)) in B2c contracts, may become a tool to protect over-indebted consumers and enhance access to the mortgaged credit market. To achieve this objective the Court emphasized the socio-economic repercussions for consumers and his family members of foreclosures and evictions.¹⁴¹ This produces important implications.

First of all, with this reasoning the Court transformed the "negative" assessment which typically underpins the principle of effectiveness (national law must not make it impossible or excessively difficult the exercise of rights conferred to the individual by EU law) into a "positive" evaluation of whether national remedies are "adequate" to ensure effective judicial protection.¹⁴² The "adequate protection" test will not only require Member States to remove barriers to effective remedies but also, by virtue of Article 19 (1) TEU, to introduce new remedies that comply with the standard of adequacy.¹⁴³

Second, the emphasis on the detrimental effects of the evictions on the consumers' family home loosens the link between the UCTD, the declaratory and the enforcement proceedings which was built up by the *Mohamed Aziz* case. Declaratory proceedings do no longer bridge the UCTD and the enforcement proceedings with the notable result that enforcement proceedings can be stayed even if consumers do not plead the unfair nature of the contract term and declaratory proceedings have not been initiated yet.¹⁴⁴

The *RWE* and *Alexandra Schulz* cases highlight the *competitive* function of regulatory contract law. Pre-contractual information does not only protect the weaker party but it also strengthens the efficient functioning of energy markets. Without an effective pre-contractual information regime competition

¹⁴¹ H.-W. Micklitz, *Unfair Contract Terms – Public Interest Litigation before European Courts. Case C-415/11 Mohamed Aziz*, in V. Colaert-E. Terry (eds.), *Landmark Cases of EU Consumer Law – in Honour of Jules Stuyck*, Intersentia, 2013, p. 615 ss.

¹⁴² See Case C-415/11, *Mohamed Aziz*, para 60; joined cases C-537/12 and C-116/13, *Banco Popular Español SA/Banco de Valencia SA*, para 56; case C-169/14, *Sánchez Morcillo* para 43. For the "positive theory" of legal protection see W. Van Gerven, *Of Rights, Remedies and Procedures*, *CML Rev.* (2000) p. 529; S. Prechal-R. Widdershoven, *Redefining the Relationship between 'Reve-effectiveness' and Effective Judicial Protection*, *Review of European Administrative Law* (2011) 4, p. 41.

¹⁴³ See N. Reich, *The Principle of Effectiveness and EU Private Law*, in U. Bernitz-X. Groussot-F. Schulyok, *General Principles of EU Law and European Private Law*, Kluwer, 2013, p. 309.

¹⁴⁴ See ECJ, joined cases C-537/12 and C-116/13, *Banco Popular Español SA/Banco de Valencia SA*, para 57.

among suppliers would be seriously affected because consumers would not be able to compare different offers before entering the transaction and take informed decisions during the long-term contractual relationship. Indirectly, therefore, the *RWE* and *Alexandra Schulz* enhance also the effective, fair and equal *access* to energy markets for consumers.

Access assumes paramount importance also in the *Promusicae*, *Scarlet*, *Netlog* and *Sky Austria* cases. Likewise in the energy cases *access* in this context specifically refers to the *access-rights* as referred to the bundle of rights and entitlements that enable users to materially access to the service and to afford it via a stable and continued network. In the context of IP cases the Court of Justice has broadened users' rights by balancing the principle of freedom of contract enshrined in Article 16 of the Charter with Article 11 of the Charter. This reasoning consolidates the move towards a more public conception of IP rights which should be protected in so far as they grant access to information and services to users.¹⁴⁵

However, the techniques used by the ECJ to enhance competition and access-rights are very different. Although all of these judgments regarded the interpretation of EU secondary law, in consumer and energy cases the regulatory function of contract law has been achieved by means of the principle of effectiveness of EU law; in the IP cases regulatory objectives have been achieved through the balancing between competing fundamental rights. Historically, the Court of Justice has resorted to horizontal application of fundamental rights much more frequently in remote areas of European private law, such as labour law and information society, rather than in typical contract law cases.¹⁴⁶

However, constitutionalization of contract law is in rapid ascendance. References to the Charter of Fundamental Rights in European consumer law legislation¹⁴⁷ and case-law on private law disputes are more and more frequent.¹⁴⁸ In consumer law cases constitutionalization certainly reflects the tendency of national courts to make references to Articles 38 and 47 of the Charter in order to seek an interpretation of EU consumer law "in light" of these provisions.¹⁴⁹ But there is no direct correlation between national courts and ECJ references to fundamental rights. Whereas in some cases the ECJ

¹⁴⁵ See C. Godt, *Intellectual Property and European Fundamental Rights*, cit., p. 230.

¹⁴⁶ See, See G. Comparato, H.-W. Micklitz, *Regulated Autonomy between Market Freedoms and Fundamental Rights in the Case Law of the CJEU*, cit., p. 133. See also F. Della Negra, *Il controllo d'ufficio sul significativo squilibrio nella giurisprudenza europea*, in www.personaemercato.it (2014), p. 71 ss.

¹⁴⁷ See recital n. 66 of the Directive 2011/83/EU of 25 October 2011 on consumer rights; recital n. 45 of Directive 2008/48/EC of 23 April 2008 on credit agreements for consumers. See also the recital n. 166 of the Directive 2014/65/EU of 15 May 2014 on markets in financial instruments (MiFID II); recital n. 37 of the proposed regulation on a Common European Sales Law of 11 October 2011.

¹⁴⁸ See for an overview G. Comparato-H.-W. Micklitz, *Regulated Autonomy between Market Freedoms*, in U. Bernitz-X. Groussot-F. Schulyok, *General Principles of EU Law and European Private Law*, Kluwer, 2013, p. 303.

¹⁴⁹ See M. Safjan-D. Dusterhaus, *A Union of Effective Judicial Protection: Addressing a Multi-level Challenge through the Lens of Article 47 CFREU*, *Yearbook of European Law*, (2014), p. 15.

considered fundamental rights even if they were not mentioned by the referring court,¹⁵⁰ in others the Court did not take into account the fundamental rights mentioned by national courts.¹⁵¹

The most important question arises whether the horizontal application of fundamental rights enhances consumer protection and, broadly speaking, the access to goods and service for the European citizens. In consumer law cases it is doubtful whether constitutionalization of contract law will add something more to the protection already afforded to consumers by EU secondary law and the principle of effectiveness of EU law.¹⁵² It is true that in *Sánchez Morcillo* indeed Article 47 of Charter "served" the effectiveness of EU law by reinforcing its "social-oriented" inclination.¹⁵³

But in several other cases, Article 47 of the Charter limited (the consumer-oriented interpretation of) the principle of effectiveness of EU law. In *Banif Plus Bank* the Court held that the principle of *audi alteram partem*, based on Article 47 of the Charter, prevented a national court which had established *ex officio* that the contract term is unfair from declaring it invalid without informing the parties to the dispute of that finding and to invite each of them to set out its views on the issue.¹⁵⁴ In *Photovost*, the Court held that the UCTD, read in conjunction with Articles 38 and 47 of the Charter, did not afford to consumer protection associations the right to intervene in support of a consumer in enforcement proceedings of a final arbitration award against the consumer.¹⁵⁵ Similarly in *Kušionová* the Court, in spite of the reference to fundamental rights, held that the national proceeding at stake complied with the principle of effectiveness of EU law.

These cases reveal that constitutionalization of consumer law does not necessarily increase consumer protection. The reasons are manifold. In the first place, the Charter of Fundamental Rights primarily addresses the rights of the person and only exceptionally those of consumers and other weaker contractual parties (e.g. workers). Thus, fundamental rights may be a "double-edged sword" for consumers. On the one hand, they upgrade consumers to the level of "consumer-citizen"¹⁵⁶ but on the other hand, they allow them to be treated in the same way as other citizens with the result that their fundamental rights are subjected to a balancing test with other fundamental rights.¹⁵⁷ This balancing test may lead to very different results. For example, the consumer right to effective judicial protection

¹⁵⁰ See, ECJ, case C-34/13, *Kušionová* [2014] n.y.r.

¹⁵¹ See, in particular, ECJ case C-227/08, *Eva Martín Martín* [2009] ECR I-11939; case C-413/12, *Asociación de Consumidores Independientes de Castilla y León* [2013] n.y.r.

¹⁵² See also S. R. Weatherill, *Article 38 – Consumer Protection*, in S. Peers, T. Hervej, J. Kenner and A. Ward (eds.), *The EU Charter of Fundamental Rights: A Commentary*, Oxford, Hart, 2014, p. 1008.

¹⁵³ M. Safjan-D. Dusterhaus, *A Union of Effective Judicial Protection: Addressing a Multi-level Challenge through the Lens of Article 47 CFREU*, *Yearbook of European Law*, (2014), p. 15 who recall, for the same function, the case C-93/12 *Agroconsulting* [2013] ECR I-nyr, para 59 and C-317/07, 317/08, 318/08, 319/08, 320/08, *Alassini* [2010], para 61.

¹⁵⁴ Case C-472/11, *Banif Plus Bank Zrt* [2013] ECR I-nyr, para 36.

¹⁵⁵ Case C-470/12, *Pobotovost' s. r. o.* [2014] para 52-53.

¹⁵⁶ See S. Iglesias Sanchez, *Unfair terms in Mortgage Loans and Protection of Housing in Times of Economic Crisis: Aziz v. Catalunyaixa*, cit., p. 970.

¹⁵⁷ H. Collins, *The Impact of Human Rights Law on Contract Law in Europe*, *European Business Law Review* (2011) p. 433.

(Article 47 (1)) may be balanced with the freedom to conduct a business (Article 16) or even with the right to defence of the seller (Article 47 (2)). It is also worth noting that so far Article 38 of the Charter, which lays down the principle of consumer protection, has produced a very little impact on the interpretation of the UCTD.¹⁵⁸

Another problem related to the constitutionalization of consumer law lies in the fact that the balancing test should be carried out at two different layers. In the first one, the Court of Justice interprets EU secondary law in light of fundamental rights; in the second one, national courts interpret national law in conformity with EU law and EU fundamental rights.¹⁵⁹ The ECJ may decide, just as in the *Sanchez Morillo* judgment, not to confine itself to the interpretation of fundamental rights (first layer) but to provide guidance on how they should be applied by the national court to the dispute at stake (second layer). Alternatively, it may leave for the national courts, just as in the *Kušionová* judgment, the task to determine whether the national procedure was effective in light of Articles 7 and 47 of the Charter. Both of these solutions are problematic. Whilst the former would drag the Court into the resolution of complex political and social conflicts and would push it beyond its institutional boundaries, the latter leaves too much leeway for the interpretation to national courts in a field, such as national procedural law, which is not harmonised by EU law.

That being said, it is not suggested that the horizontal application of fundamental rights does not have any importance. First and foremost, the combination between fundamental rights (especially Article 47 of the Charter) and the principle of effectiveness provides for a uniform, coherent and autonomous standard of judicial protection namely by “upgrading” the national remedies to the European constitutional dimension.¹⁶⁰ In addition to this, fundamental rights may play a persuasive or *lato sensu* political function driving national judges in the interpretation and application of national law. The entrance of fundamental rights in the private law discourse entails that contract law should be interpreted by taking into more account the socio-economic context in which the transaction takes place avoiding abstract application of remedies based on the model of *homo oeconomicus* or reasonable consumer. The latter generally fits the regulation of B2b transactions but might be unsuitable to govern B2c transactions in consumer or services law.

This does not mean, in my view, that the notion of consumer, user, client provided by EU secondary

¹⁵⁸ See in this regard, S. R. Weatherill, *Article 38 – Consumer Protection*, in S. Peers, T. Hervey, J. Kenner and A. Ward (eds.), *The EU Charter of Fundamental Rights: A Commentary*, Oxford, Hart, 2014, p. 1008.

¹⁵⁹ Case C-283/11, *Sky Österreich GmbH* Case [2013] ECR I-nyr para 60; case C-360/10, *SABAM v Netlog NV* [2012] ECR I-nyr para 43; case C-70/10, *Scarlet Extended* [2011] ECR I-11959, para 45; case C-275/06 *Promusicae* [2008] ECR I-271, para 65-66. See in particular A. Colombi Ciacchi, *European Fundamental Rights, Private Law and Judicial Governance*, in H.-W. Micklitz (ed.), *Constitutionalization of European Private Law*, cit., p. 123.

¹⁶⁰ N. Reich, *The Principle of Effectiveness and EU Private Law*, in U. Bernitz-X. Groussot-F. Schulyok, *General Principles of EU Law and European Private Law*, Kluwer, 2013, p. 309; C. Mak, *Rights and Remedies*, in H.-W. Micklitz, *Constitutionalization of European Private Law*, cit., p. 253.

law can be simply replaced by the general category of "citizen" neither that consumer rights be included in a longer list of citizenship rights. Rather, it means that the social, economic and legal conditions of the citizen, as emerged in the *Aziiz* and *RWE* cases should be carefully considered in order to assess the effective possibilities for the citizen to access to the market. Access, therefore, should not only be equal (non-discriminatory) but also fair in the sense that the different social and economic conditions of the parties should be assessed in order to interpret and apply EU law.

VIII. CONCLUSION

Law-making and enforcement show that citizenship and contract law are more and more intertwined. The process of liberalisation of the public services has diluted the distinction between private and public law and hybridised citizens and consumers/users. The rise of the regulatory state requires contract law to turn from the law securing freedom towards the law granting effective access and competition in the internal market.¹⁶¹

The Court of Justice has become the crucial actor of this transformation. Its recent case law supports the hypothesis that "European regulatory contract law", conveyed by EU secondary law, strengthens the fair and effective access of the citizens to strategic fields of the internal market (e.g. mortgage credit, energy, telecommunications) protecting those who risk to be excluded from the circuit of the "market-economy." Moreover, the ECJ has also weakened the link between the exercise of the citizens' rights and the market freedoms showing that citizens' rights, derived from this status, may be conferred even to the citizens who do not exercise economic activities.

It is early to say whether Union citizenship may become a transnational status for social integration. The lack of competence of EU in social and welfare matters inevitably reduces the social potential of Union citizenship. In spite of that, this contribution shows that contract law-making and enforcement do not only enhance the efficient and competitive functioning of the internal market but they also provide high level of protection for European citizens in consumer and services markets.

Certainly further research needs to be done to understand the impact of the recent case-law of the ECJ on regulatory contract law. The recent trend toward the constitutionalization of contract law deserves particular attention. Although the horizontal application of fundamental rights acknowledges the importance of consumer and users rights in the European society, it is not unproblematic. The divergent interpretations of fundamental rights across national jurisdictions and the difficulty of balancing competing rights of consumers and sellers may potentially reduce consumer protection

¹⁶¹ See C. Godt, *Intellectual Property and European Fundamental Rights*, cit., p. 234.

afforded by EU secondary legislation. To avoid this undesirable outcome, the ECJ should clarify the circumstances in which the horizontal application of fundamental rights is really necessary to interpret EU relevant legislation and the criteria that should be adopted by the national judge in order to balance competing fundamental rights.