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DIALOGUE AND DEBATE: A SYMPOSIUM ON MARTIJN HESSELINK'S RECONSTITUTING THE CODE OF CAPITAL

Coding for the 99 per cent? Principles and the preconditions of capital minting

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Abstract

Martijn Hesselink proposes a 'Progressive code of European Private Law', which would seek to tame the 'legal steroids' that private law modules and savvy crafting by well-paid lawyers currently offer to to global capitalism. The present comment engages with one of the core characters of the proposed code, namely that it should 'consist of fundamental principles (not detailed rules)'. Rather than taking up the impossible task of suggesting (or speculating) what the principles should be, the paper aims to further operationalise certain aspects of what they should – or should not – do. To this aim, the role of principles is assessed in relation to attempts to 'code for the 99 per cent'. Hence, the paper revisits certain mechanisms of so-called weaker party protection or social law through Katharina Pistor's coding analytics (priority, durability, universality, convertibility). Private law principles and their legacy are part of the resistance, or backlash, against social coding. The paper concludes that a code of principles that aims to be progressive in the sense Hesselink highlights should consider at least two requirements: first, principles should be expressly formulated in such a way that they do not stand in the way of progressive detailed rules; second, they need to broaden the private legal imagination. It is on this account that 'any amount of regulatory private law could not achieve what a (constitutionalised) code of private law principles could accomplish'.

Keywords: private law; progressive charter; principles; code of capital; social law; private legal imagination

1. Introduction

Martijn Hesselink proposes a 'Progressive code of European Private Law' (PEPL), which would seek to tame the 'legal steroids' offered to global capitalism by private law modules and savvy crafting by well-paid lawyers. This code would 'be European (not national), be mandatory (not optional), have "constitutional" ie primary European Union (EU) law status (not merely secondary), consist of fundamental principles (not detailed rules), prioritise justice (not economic growth) and be radically democratic (not technocratic)'.[1]

The proposal can be perhaps labelled a 'utopia for realists', which, in contrast to other ambitious visions,[2] underwrites the priority of distribution over *re*distribution, while focusing – with Pistor[3] – on

[1]M Hesselink, 'Reconstituting the Code of Capital: Could a Progressive European Code of Private Law Help Us Reduce Inequality and Regain Democratic Control?' 1 (2) (2022) European Law Open 316–43.

[2]R Bregman, *Utopia for Realists* (Bloomsbury Publishing 2018).

[3]'Further legal interventions followed, but each was followed by countervailing moves that mobilized private law and/or law of different jurisdictions. Public law as a means for controlling private activities rarely settles a matter in favor of public interests; it typically only sets in motion an iterative process whereby different actors use different access points of power to foster their own ends. This is why in the book I focused on the creation of wealth, on pre-distribution, not re-distribution, as Herzog

the specific allocative role of private law. Of course, realists and idealists alike may question the broad contours of the proposal – and several contributions in this Symposium do exactly this, from different perspectives. I must, however, acknowledge here to being *so* partial to the proposal that I could not honestly engage in such challenges if I tried. In a less-than-realist utopian spirit, then, I will just wish many issues away and take most PEPL requirements at face value.[4] What I will mostly concentrate on in this short contribution is the relationship between fundamental principles and detailed rules postulated by Hesselink's idea of a 'short code', or, even, a charter of private law justice.

Hesselink, as we saw, claims that the PEPL charter should be made of 'principles (not detailed rules)'. He further speculates that 'a few dozen would probably suffice'.[5] An important reason for this choice, he explains, is that principles are better able to play the progressive game as they are harder for corporate lawyers to get around – an observation that resonates with Pistor's intuition, in her response, that 'less legal certainty' would be of help.[6] I tend to agree with this characterisation. However, what is principle and what is detail is not immediately obvious, including because it connects with what we consider – or not – private law. Most crucially, this is the case because – again, with Pistor – the devil is in the detail.[7] In other words, while principles are almost by definition open-ended, principles that are put in place to be 'progressive' should not too easily lend themselves to regressive interpretation – a risk that some of the examples below will illustrate.

I will, therefore, look at the relation between certain core principles and detailed rules, not in abstracto but by considering how selected rules outside of the traditional 'core' of private law have acted or sought to act in a way not dissimilar to the way classical doctrines have been mobilised to mint capital for the 1 per cent. At the same time, I will trace failures to code and the backlash against interventions and their significance for the PEPL charter project.

The paper's central section is structured along four themes, based on Pistor's analysis. While setting out the code of capital, she claims in particular that the core rules of private law – a core that is, however, broad enough to include insolvency, intellectual property and the law of trusts – bestow *four crucial attributes* on assets (be they material, like land, or immaterial, like credit), which turn such assets into capital. The four attributes are, in Pistor's words:

> Priority, which ranks competing claims to the same assets; durability, which extends priority claims in time; universality, which extends them in space; and convertibility, which operates as an insurance device that allows holders to convert their private credit claims into state money on demand.[8]

While Pistor concentrates on coding by private lawyers (the 'masters of the code' that *The Code of Capital*'s chapter 7 is devoted to), the mechanisms considered in section 2 are the result of direct regulatory intervention. The difference is not further explored in the paper. However, there is no reason to think that the attributes of priority, durability, universality and convertibility would hold analytical value (and 'capital-making' qualities) only when deployed by private parties.[9]

notes in her comments.' K Pistor, 'Theorizing beyond "The Code of Capital": A Reply' 11 (2021) Accounting, Economics, and Law: A Convivium 1, 65.

[4]This includes Hesselink's slightly ambiguous stance on 'primary EU law status', which is mentioned in one section as a core requirement but almost immediately relativised.

[5]M Hesselink (n 1).

[6]K Pistor, 'Legal Coding Beyond Capital' 1 (2) (2022) European Law Open 344–50.

[7]Ibid.

[8]K Pistor, *The Code of Capital* (Princeton University Press 2019) 3.

[9]Furthermore, applying the analytics to openly public interventions may help foreground the role of legislatures in rubber-stamping or even advancing private coding. Unlike much transnational law scholarship, I understand Pistor as making an

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2. Coding for the 99 per cent – service and service(s)

Coding of assets partly presupposes some pre-existing endowment; it is, however, just as much about being able – and brazen enough – to call the stakes and rally enough support around the idea that something should be considered an item suitable for trading and legal protection.[10] Shareholders, for instance, have had such good advocates that in day-to-day discourse we consider them as owners both of their shares – which they can trade separately from the company – and, collectively, of the company, which is to ignore the separability on which free share-selling rests.[11]

Pistor's reconstruction allows us to separate 'capital' from assets, making it possible to also re-read materialised private law[12] (or at least significant parts of it) as attempts to 'code for the 99 per cent' – that is, to graft some of the key attributes of priority, durability, universality and convertibility on to the 'assets' – be it the ability to work, credit-holding or other relevant positions – held by the counterparts of those traditionally considered as capital-holders. The examples below, thus, are in a way a thought experiment that re-reads prominent and less prominent measures of worker and consumer protection through Pistor's categories (priority, durability, universality, convertibility). While one could plausibly object that we should not now try to recast all interventions as 'coding' for fashion's sake, I think the resonance and peculiarity of the interventions highlighted here is such that the exercise is meaningful and offers actual (h)in(d)sight into specific types of intervention and their justification.

We know, for one thing, that labour's share of income has gone down over the past few decades in advanced economies, so there are reasons to believe that these attempts have not – or not all – been particularly successful.[13] We can, however, learn from their successes and failures in order to focus on whether a PEPL charter could or should do anything in particular in order to make space for – or, in other words, not stand in the way of – coding for the have-nots. While staying somewhat true to Hesselink's objections to experts trying to figure out the contents of a PEPL charter, this paper tries to set out some *conditions at the margin* – which are actually at the *core* (within the core principles) that represent conditions of possibility for giving progressive rules a chance.

For each sub-section, I select two core examples – one from employment, the other from consumer *services*. From a contract law perspective, the selection is relatively homogenous,

important point about the way in which state law directly or indirectly lends its backing to coding projects. I would like to thank in particular Giacomo Tagiuri for pushing me to clarify this point.

[10]While arguably trite, Rousseau's classical quote on this is just too fitting to be left out: 'Le premier qui, ayant enclos un terrain, s'avisa de dire : Ceci est à moi, et trouva des gens assez simples pour le croire, fut le vrai fondateur de la société civile. Que de crimes, de guerres, de meurtres, que de misères et d'horreurs n'eût point épargnés au genre humain celui qui, arrachant les pieux ou comblant le fossé, eût crié à ses semblables : Gardez-vous d'écouter cet imposteur ; vous êtes perdus, si vous oubliez que les fruits sont à tous, et que la terre n'est à personne.' In English: 'The first man, who, after enclosing a piece of ground, took it into his head to say, "This is mine," and found people simple enough to believe him, was the true founder of civil society. How many crimes, how many wars, how many murders, how many misfortunes and horrors, would that man have saved the human species, who pulling up the stakes or filling up the ditches should have cried to his fellows: Be sure not to listen to this imposter; you are lost, if you forget that the fruits of the earth belong equally to us all, and the earth itself to nobody!' The second part of the quote is often omitted in popularised English translations. See Jean-Jacques Rousseau, *Discours sur l'origine de l'inégalité* (1754), Oeuvres complètes de J.-J. Rousseau. Tome 6 / réimprimées d'après les meilleurs textes sous la direction de Louis Barré ; illustrées par Tony Johannot, Baron et Célestin Nanteuil, 257 accessible via the French National Library at <https://gallica.bnf.fr/ark:/12148/bpt6k57869493/f271.image.r=avisa>; translation from <www.gutenberg.org/cache/epub/11136/pg11136.txt> accessed 21 June 2022.

[11]Not different to viewing them as 'investors' – see L Palladino, 'End Shareholder Primacy Once and For All' (20 March 2020) *Boston Review* <https://bostonreview.net/articles/lenore-palladino-ban-buybacks-forever-not-just-now/> accessed 5 May 2022.

[12]I take this in a broad sense, in contrast, for example, to Collins' understanding as most recently framed in his contribution to this Symposium.

[13]The calculation is much more complex – and has less straightforward implications for progressive policy – for consumer vs producer surplus.

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employment being ultimately born out of the notions of service contract and contract for services.[14] This move is bound to raise some questions and will also simply make some frown. Reasons for this unhappiness include: neither consumer nor employment law are *actually* private law; consumer contract law may still be private law, but labour law is an autonomous discipline; the whole idea of labour law is to emancipate the employment contract from the idea of service and services; finally, putting – as I do – work and housing in the same overview as 'consumption' may further elevate consumerism. While granting some (or much) merit to some (or most) of these propositions, I take here a different stance, comparable to that of 'life time contracts'[15] – both *assuming* and *asserting* the kinship between (some) consumer and employment relations.[16] The strategy should hopefully not be too controversial in the context of this short contribution: in particular the idea of a *progressive* European private law charter should learn all it can from experiences with 'progressive' legislation.[17]

Before delving into a short overview, one last word of caution is in order. If we are to recode with a progressive agenda, it is important to keep in mind that some differential coding is inevitable – law will always privilege some claims over others. These include the mechanisms we will be discussing below. In fact, the viciously selective operation of coding in employment law has led not only to successful (if instrumental) critiques of insider–outsider dynamics at the start of the century:[18] only recently, several groundbreaking cases have started to undermine the exclusion of domestic workers from the core part of employment protection on grounds of sex discrimination, reminding us how deeply embedded mechanisms of exclusion, oppression and marginalisation hide in the folds of supposedly protective regimes.[19] It would take at least a full paper to investigate the normative promises and pitfalls of progressive coding (as an alternative or complement to de-coding) with this critique in mind. In this contribution, coding is taken as a fact – something which is in essence inherent to contemporary as well as plausibly foreseeable globalised legal systems.[20]

[14]See, including some comparative reflections, S Deakin and F Wilkinson, *The Origins of the Contract of Employment* (Oxford University Press 2005); L Nogler, 'The Historical Contribution of Employment Law to General Contract Law: A Lost Dimension?' in *Life Time Contracts: Social Long-Term Contracts in Labour, Tenancy and Consumer Credit Law* (Eleven International Publishing 2014), 279–319.

[15]'Life time contracts are long-term social relationships providing goods, services and opportunities for work and income-creation. They are essential for the self-realisation of individuals and their participation in society at various stages in their life.' EuSoCo, 'Principles of "Life Time Contracts"' (2020) <https://www.eusoco.eu/?p=1012> accessed 21 June 2022.

[16]See L Nogler and U Reifner (eds), *Life Time Contracts, Social Long-Term Contracts in Labour, Tenancy and Consumer Credit Law* (Eleven International Publishing 2014); L Ratti (ed), *Embedding the Principles of Life Time Contracts, A Research Agenda for Contract Law* (Eleven International Publishing 2018).

[17]This includes where over-coding or over-protection could become all the more obvious thanks to the juxtaposition with more serious concerns.

[18]Not all the critiques have been instrumental in this sense; radical criticism of the same selectiveness has come from several corners in the feminist traditions and other non-mainstream scholarship; however, it seems relatively fair to assume that the criticism from the more economic corners hinted at in the text was the most successful in dictating deregulation agendas in Europe.

[19]See CJEU C-389/20, *CJ v Tesorería General de la Seguridad Social (TGSS)* ECLI:EU:C:2022:120 – declaring that Spanish legislation excluding domestic workers from unemployment benefits amounts to sex discrimination on account of the overwhelmingly female workforce in the sector; see also, for the United Kingdom (UK) rules exempting domestic work from minimum-wage rules, the case of *Puthenveettil v Alexander & ors*, discussed in N Sedacca, 'Domestic Workers, the "Family Worker" Exemption from Minimum Wage, and Gendered Devaluation of Women's Work' (2022) *Industrial Law Journal* <https://academic.oup.com/ilj/advance-article/doi/10.1093/indlaw/dwac005/6563675> accessed 7 April 2022.

[20]I thank in particular A Bagchi and L T S Len for raising the point of the paper's acquiescence to coding as a basic strategy (vs placing more emphasis on de-coding). While I would argue that certain attributes in certain contexts (for example, stability in housing) are normatively desirable from almost any perspective, a fully fledged analysis of social-law-as-coding would certainly have to highlight certain darker sides and raise normative question marks.

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A. Priority: consumer data and wages in insolvency

While insolvency is what contemporary lawyers may be drawn to think of when priority is mentioned, one can say that the whole system of (intellectual) property is connected to priority – lending legal weight to the claim that they have been the first to appropriate or create something.[21] The two aspects of priority are intimately connected; to give a contemporary example, the claim that cryptocurrencies are becoming a mainstream asset would be considerably boosted if they were to be covered by the netting schemes that secure other financial transactions against insolvency-connected uncertainties.[22]

To observe selective coding at play in the recognition or attribution of priority-qua-ownership in our scope of analysis, I will consider only one example, that of consumer (personal) data in the European Union (EU).[23,24] We all know by now the classic saying about free products on the internet: if you are not paying, then *you are the product*. Despite its uncanny fit to online business models, the statement was first made about commercial television channels and advertisements *before* big data and thus pertains to a time when advertisement was, by contemporary standards, hardly to be defined as *targeted*.[25] Over the past few years, however, an idea has started to make its way into policy circles, namely that consumers might not be just products, but also the *suppliers* of much sought-after raw materials – data, of course.

This idea is known in the European context as 'data as consideration', hinting that data is a large part of the way consumers pay for making use of online services.[26] The idea ultimately made its way into one – otherwise somewhat underwhelming – recent Directive,[27] raising considerable debate within the Member States required to implement it. In order to pass, the idea had to be dressed in neutral language that stays as far as possible from suggesting that consumer data is made object of an *exchange*.[28] Much of the opposition to 'data as consideration' is of a principled nature: it sees data as the object of a fundamental right that should not be commodified.[29] However, from the same perspective it is easy to see that the principled opposition was also short-sighted: only half a decade later, for instance, the European Data Protection authorities managed to issue a comparably principled rebuke of the core *source* of consumer data commodification – targeted advertising, and *not* on grounds of commodification in fact.[30] We are, thus,

[21]In Pistor's story, this mechanism gets particularly egregious under the guise of 'discovery'.

[22]H Nabilou, 'Probabilistic Settlement Finality in Proof-of-Work Blockchains: Legal Considerations' (31 January 2022) <https://doi.org/10.2139/ssrn.4022676> accessed 21 June 2022.

[23]Of course, much – in fact, too much for the ambitions of this paper – could be said about the story of labour commodification, or even by reference to other life time contracts: in tenancy, one can easily think of rules granting tenants an option to buy 'their' apartment in the case of it being put on the market.

[24]In fact, several by now abandoned mechanisms of labour market regulation worked with priority; countries which have a 'concour' system for public employment could be considered to still guarantee a 'priority' claim to winners of a given selection procedure.

[25]See <https://quoteinvestigator.com/2017/07/16/product/> accessed 22 June 2022.

[26]The reference to 'consideration', instead of 'price', seems instrumental in this case in at least two ways: first, it sounds to most European English speakers less crude and more abstract; second, it comes closer to the broad idea of counter-performance, which in the case of some online contracts may anyway be a better description than price. In addition, speaking of consideration or counter-performance avoids potentially endless discussions about the money-like nature of data.

[27]Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services.

[28]Article 3(1): 'This Directive shall also apply where the trader supplies or undertakes to supply digital content or a digital service to the consumer, and the consumer provides or undertakes to provide personal data to the trader, except where the personal data provided by the consumer are exclusively processed by the trader for the purpose of supplying the digital content or digital service in accordance with this Directive or for allowing the trader to comply with legal requirements to which the trader is subject, and the trader does not process those data for any other purpose.'

[29]See European Data Protection Supervisor, 'Opinion 4/2017' (14 March 2017) 7 <https://edps.europa.eu/sites/edp/files/publication/17-03-14_opinion_digital_content_en.pdf> accessed 21 June 2022.

[30]Informally: Wojciech Wiewiórowski, 'It Is Time to Target Online Advertising' (European Data Protection Supervisor Blog 2022) <https://edps.europa.eu/press-publications/press-news/blog/it-time-target-online-advertising_en> accessed; as

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living with a cognitive dissonance according to which consumer protection should not commodify consumer data, but priority qua protection of various data rights, trade secrets and even intellectual property is granted to those who harvest and manipulate consumer data for commercial purposes.

As concerns insolvency, in contrast, an easy example can be drawn from the sphere of employment: wage credits have been warranted enhanced protection in insolvency since as early as the second part of the 20th century.[31] Indeed, priority is a manifold concern in situations of company distress, just like in the examples mentioned by Pistor, where it is assumed that at least *some* of the claims against a debtor will have to go unfulfilled. Another example from the same context would be that of collective dismissals, where priority in rehiring is often granted to (sub-sections of) dismissed employees and social criteria are also not uncommon in deciding whose jobs should *not* be cut.[32] While priority for wage credits is mainly undermined by securitisation and over-leveraging,[33] priority in rehiring or job security can be considered problematic from the perspective of EU non-discrimination rules.[34] In section D we will see how insolvency protection is also an issue in consumer contracts, but one that is remarkably addressed via different routes.

B. Durability: limits to at-will termination and disconnections

Durability – that is, the ability to rely on the advantages of an entitlement for a prolonged period of time – is an important goal in so-called life time contracts. This is most obvious when one thinks of employment or tenancy contracts, but holds some truth also when one considers financial contracts – ranging from insurance to mortgage credit – and utilities. Next to the obvious need for guarantees against sudden termination, consumers of financial services need to be able to rely on predictable conditions and are advantaged when they can lock in favourable prices and terms that they have at some point managed to obtain. This is why an important task of in-house lawyers drafting credit, insurance or even utilities terms and conditions is to make sure that the service provider has as much freedom as possible to adapt the offer – we saw this at play only a few months ago, when ill-backed energy providers went bankrupt once they could not immediately increase their tariffs in reaction to the 2021 gas price spike.

For employees and tenants, it goes without saying that durability is of the utmost importance: not only are income and shelter the basis for life planning (including financial as well as personal decisions), *good quality* employment and housing are a source of additional disposable income: a nine–five job makes it possible not to rely on expensive pre-cooked meals or after-hours childcare; stable income means most consumption does not need to be financed with high-interest credit and so on; convenient housing will often entail either reduced commuting costs and/or the availability of a sufficient variety of suppliers servicing or delivering to one's neighbourhood.[35]

network: European Data Protection Board, 'EDPB Adopts Guidelines on the Interplay between Art 3 and Chapter V GDPR, Statement on Digital and Data Strategy & Appointment of EDPB Representatives to TFTP Joint Review' (19 November 2021) <https://edpb.europa.eu/news/news/2021/edpb-adopts-guidelines-interplay-between-art-3-and-chapter-v-gdpr-statement-digital_en> accessed.

[31]See ILO Protection of Workers' Claims (Employer's Insolvency) Convention, 1992 (No. 173) <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C173>.

[32]M Aleksynska and A Muller, 'The Regulation of Collective Dismissals: Economic Rationale and Legal Practice' (International Labour Organization Working Paper 4 2020) <https://www.ilo.org/wcmsp5/groups/public/—ed_protect/—protrav/—travail/documents/publication/wcms_745125.pdf> accessed 21 June 2022.

[33]As generally employee credits enjoy priority over other unsecured credit, but not over secured credit typically held by financial institutions.

[34]For instance: age or sex discrimination; see Aleksynska and Muller, 'The Regulation of Collective Dismissals' 27, mentioning controversies in Romania and the UK.

[35]This is the mirror image of the so-called poverty penalty; see, originally, D Caplovitz, *The Poor Pay More: Consumer Practices of Low-Income Families* (The Free Press 1963). Abundant literature has meanwhile further shown this effect.

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Unstable housing, in contrast, leads to many extra costs – from those incurred by having to move frequently to laundry expenses and anything in between.

In employment law, the main instrument to guarantee durability is limits to at-will termination of open-ended contracts – something which most European legal systems embraced during the 20th century and which has been only partly rolled back in recent decades. Even relatively mild limitations, in fact, allow employees to 'capitalise' on their about-to-terminate employment, by extracting severance pay or other favourable conditions. The proliferation of short-term contracts is, then, the real way in which this capital has been un-coded, with the concerning effects we are now seeing, on productivity *and* the social compact.

In consumer law, efforts to limit the unilateral modification of contract terms are paired with limited guarantees against termination;[36] on occasion, certain particularly egregious terms in consumer credit contracts have been invalidated through – or in the shadow of – European consumer protection rules.[37] Acknowledging the crucial role of certain contracts in building fundamental socio-economic *capital*, however, would entail a very different approach. For instance, it could lead to conceptualising the disconnection from energy or internet supply as a form of expropriation, given the loss it entails for the users of the ability to generate wealth in the form of savings, the ability to look for occasions to invest one's work abilities and so on. In this respect, it is remarkable that the 2019 Energy Directive only provides that 'each Member State shall define the concept of vulnerable customers which *may refer* to energy poverty and, inter alia, to the prohibition of disconnection of electricity to such customers in critical times' (emphasis added).[38]

C. Universality

The beauty of property and the corporate form, of course, is that they are not bound to the privity limitations that come with contract. So, can one think of universality in any meaningful ways outside these forms? I think we can.

First, EU private international law rules have tried to make consumer and employment rights applicable beyond national borders, tying them to the worker's place of work and the consumer's place of habitual residence.[39] Scholars of EU law know how contentious this operation has been, in particular as concerns securing the territoriality of labour law via private international law in the context of free movement. Interestingly, after the havoc caused by the CJEU's famous decisions in the 'Laval quartet',[40] the political reaction has been to reinforce the equal pay/equal protection principle included in the original Directives, in a move which can be regarded as a new constitutional moment for European labour law or as an entrenchment of benefits for workers at the core with unclear consequences for those in the periphery.[41]

[36]For example, annex to Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, especially items f–l.

[37]*Clausulas suelo*, which protected the bank's margin in case of interest rate falls but did not offer consumers comparable guarantees in case of interest rate rises; and acceleration clauses, allowing banks to terminate if the consumer failed to pay even one instalment in a long-term financing. Both types of terms have been somewhat tamed as a result of CJEU interventions.

[38]Article 28 Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU.

[39]Article 6 (consumer) and article 8 (employment), Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).

[40]Also referred to by Cherednychenko, 'Pathways to interpersonal justice in European private law: Top-down or bottom-up?' 1 (2) (2022) European Law Open 423–435; for a reconstruction of the post-Laval developments, see V Bogoeski, 'The Aftermath of the Laval Quartet: Emancipating Labour (Law) from the Rationality of the Internal Market in the Field of Posting' (PhD thesis, Hertie School 2021).

[41]See Bogoeski, The aftermath (n 40); A Somek, 'From Workers to Migrants, from Distributive Justice to Inclusion: Exploring the Changing Social Democratic Imagination', 18 (5) (2012) European Law Journal, 711–726; D Kukovec, 'Law and the Periphery' 21 (3) (2015) European Law Journal, 406–428.

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More specifically, however, we can think here of two interesting examples – first, I will briefly discuss the preservation of employee rights in transfers of enterprises; second, I will borrow from Tereszkiewicz to depict the 'package travel' model and draw a comparison with the paradoxical failure to apply the same model to platforms.[42] Neither case can be considered an example of universality in the way ownership makes us think of it, but both expand the range of the protected party's claim beyond their original counterparty – in this representing clear deviations from privity of contract.

The fate of employment contracts in transfer of enterprise is a fraught issue. Since the early liberalisations and market integration in the EU brought about the first waves of collective dismissals and transfers of undertakings – and up to today's controversies around the specific boundaries between transfers and insolvency – the tension between employment protection and evolving business practices has been obvious. In order to create a level playing field, the EU has adopted a Directive requiring Member States to ensure that employment contracts are transferred with the enterprise and that, in principle, dismissals as a result of the transfer alone are unlawful.[43] An expansive interpretation of the Directive, however, has been essentially pre-empted by the CJEU in a notorious decision based on a presumed infringement of freedom of contract.[44] The assertive language used in this specific case – 'the transferee must be able to assert its interests effectively in a contractual process to which it is party and to negotiate the aspects determining changes in the working conditions of its employees with a view to its future economic activity'[45] – has not been relied upon too often in later case-law, but nevertheless represents a bold statement of what freedom of contract requires on behalf of someone who, after all, could simply have chosen not to acquire a company in the first place. It is worth mentioning, in passing, that in order to achieve this result it was enough for freedom of contract to be hinted at in non-binding documents as a component of the freedom to conduct a business protected by the European Charter of Fundamental Rights article 16. At the same time, the Directive *in itself* remains an item of contention, whose application businesses are keen to avoid whenever possible – most recently, with reference to 'pre-pack' business restructuring in the Netherlands.[46] So far, the CJEU has resisted pressures by providing a relatively expansive reading of *transfer of undertaking* in situations bordering insolvency.[47]

Our second example concerns relations between consumers and intermediaries. As is well known to consumer lawyers, an early piece of European consumer protection legislation harmonised the responsibility of travel brokers in the context of package travel. According to the so-called Package Travel Directive,[48] the organiser is liable to the consumer for defective performance by any of the service providers involved in the realisation of the holiday package. Obviously, the broker or agency has no direct influence on the performance, but they are, in this context, expected to take responsibility vis à vis the consumer, for whom they are the most trusted point of reference. This stands in stark contrast, as aptly observed by Tereszkiewicz, to the deference shown to platforms' claims of being entirely external to the contracts between consumers and professionals that they facilitate. The maturation of platform markets means the paradoxical results of such policy

[42]P Tereszkiewicz, 'Digital Platforms: Regulation and Liability in the EU Law' 26 (6) (2018) European Review of Private Law, 903–920.

[43]Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses J L 82, 22.3.2001, p. 16–20.

[44]CJEU Case C-426/11, *Mark Alemo-Herron and Others v Parkwood Leisure Ltd* ECLI:EU:C:2013:521.

[45]Alemo-Herron, para 33.

[46]CJEU case C-237/20, *Federatie Nederlandse Vakbeweging v Heiploeg Seafood International BV, Heitrans International BV* ECLI:EU:C:2022:321.

[47]CJEU case C-126/16, *Federatie Nederlandse Vakvereniging and Others v Smallsteps BV* ECLI:EU:C:2017:489.

[48]Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements, amending Regulation (EC) No 2006/2004 and Directive 2011/83/EU of the European Parliament and of the Council and repealing Council Directive 90/314/EEC.

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are now being certified by court adjudication: most recently, in a case concerning Booking.com's confirmation buttons – a case which the company was, however, simply not part of.[49] Selective non-coding here has allowed platforms to capture the benefits of network effects without bearing, essentially, any significant risk or responsibility.

D. Convertibility

Convertibility secures the ability to translate one's claims into state money on demand. Pistor identifies this feature mainly with reference to the financial system and shadow banking, which ultimately rest on the fluidity between private and public debt.[50] Convertibility can, however, also take much less subtle forms – as we will see in the next two examples. As has been mentioned above ('priority'), consumer protection in insolvency does not prominently take the form of priority rules.[51]

In the EU, a relatively established playbook in fact socialises consumer losses through industry- or taxpayer-backed schemes: while the Package Travel scheme in place for disappointed travellers may be most familiar to EU private lawyers,[52] for more than a decade a harmonised system of deposit guarantee schemes has been in place that protects private deposits up to 100 000 euros.[53] This directly secures the conversion of claims against providers and companies into state-backed guarantees.

To an extent, unemployment benefits in some countries – where these are linked to one's previous employment status, income, etc. – can be considered a similar tool. *Having had a job once* meant, in these schemes, maintaining a relatively durable claim to state support once unemployment happened, quite separate from general benefit schemes. This was, for instance, the case of the Italian *mobilità*, which allowed for two years of unemployment benefits without any significant conditionality for employees.[54] Modern systems, however, such as the Italian NASpI[55] (up to two years after four years of active work) and Dutch unemployment benefits[56] (capped at a shorter duration) tend to make access to benefits conditional on job-seeking; the Italian rules even require beneficiaries to take any 'adequate' offer or forsake their benefits – with the definition of what constitutes an adequate job getting ever more encompassing as the months go by. When unemployment benefits take the form of workfare contracts,[57] all evidence suggests that their role and significance change significantly and they lose much of their asset-minting ability.

[49]CJEU case C-249/21 *Fuhrmann-2 GmbH* ECLI:EU:C:2022:269.

[50]A seminal text for showing the connection – via money – of private and political obligation is Christine Desan's, *Making Money: Coin, Currency, and the Coming of Capitalism* (Oxford University Press 2014).

[51]In fact, there are cases where the problem may arise more prominently – in particular, in the case of insolvency after a collective settlement or collective award. This became apparent in a recent US case which raised some questions for European lawyers, too: Melody Schreiber, 'OxyContin Victims Fight for Their Share in Purdue Bankruptcy Case' (*Guardian* 2022) <https://www.theguardian.com/us-news/2022/feb/27/oxycontin-victims-sacklers-perdue-pharma-bankruptcy-opioid-crisis> accessed 21 June 2022.

[52]See H-W Micklitz, 'On the Intellectual History of Freedom of Contract and Regulation' 4 (1) (2015) Penn State Journal of Law & International Affairs, 1–32.

[53]Directive 2014/49/EU of the European Parliament and of the Council of 16 April 2014 on deposit guarantee schemes.

[54]In fact, *employers* were incentivised to hire from so-called 'liste di mobilità', containing the names of unemployed workers on benefits.

[55]Art 1 ff Decreto legislativo 4 marzo 2015 (n 22), available at <https://www.gazzettaufficiale.it/eli/id/2015/3/6/15G00036/sg> accessed 22 June 2022.

[56]Art 15 ff Wet van 6 November 1986, tot verzekering van werknemers tegen geldelijke gevolgen van werkloosheid (Werkloosheidswet) <https://wetten.overheid.nl/BWBR0004045/2022-01-01> accessed 22 June 2022.

[57]K Veitch, 'Social Solidarity and the Power of Contract' 38 (2011) Journal of Law and Society 189. The phenomenon is broadly discussed as a movement 'from welfare to workfare' – see, for example, Jennifer Mittelstadt, *From Welfare to Workfare: The Unintended Consequences of Liberal Reform, 1945–1965* (University of North Carolina Press 2005); Ian Gough, 'From Welfare to Workfare: Social Integration or Forced Labour?' (LSE Research Online 2000) <http://eprints.lse.ac.uk/61809/1/Gough_From_welfare_to_workfare.pdf> accessed 21 June 2022.

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3. Where does this leave us?

We have now seen a few examples of coding and non-coding in employment and consumer (service) contracts. Very few, if any, of the rules/interventions considered would, as such, be likely to feature in a PELP charter like the one Hesselink proposes.[58] However, the reasons why many of them failed or were scaled back often come from the core of private law – private law principles, in other words – that the charter would need to redraw, be the core black-letter or ideological. The next few paragraphs will be devoted to outlining some ideas as to what these examples have to say to principles and the conditions of existence of progressive rules.

Some of the interventions, in fact, are in remarkably good shape at the time of writing: this is the case for claims by both consumers and employee creditors in case of insolvency – at least for the latter to the extent that they are not pre-empted by various financial workarounds. We have seen, however, some crucial challenges, some perhaps more expected than others.

It comes as no surprise that freedom of contract would need to be tackled in a progressive recodification. In particular the idea that freedom of contract would guarantee not only *access* but specific outcomes – that freedom of contract, in other words, would entail a right to profit – stands in the way not only of specific rules on employee protection in transfer of enterprise. The principle also provides a core ideological justification for the hugely expensive state support for speculative finance.[59]

Less intuitively, the examples suggest that we – the citizens and representatives who would be called to deliberate on the charter – should have an adult conversation on non-discrimination: while the contrast between this principle and freedom of contract has been the most explored and occasionally decried, the accommodations non-discrimination and (social) solidarity require of each other should not be left out of private law discourse. While price discrimination is an emerging topic in consumer law,[60] EU labour law seems to be strict on a formal approach to age discrimination and rather permissive on discriminating against Muslim women. An approach building on the one recently used to condemn Spanish rules excluding domestic workers from social benefits[61] seems more promising in order to prevent non-discrimination from becoming a mechanism of arbitrary (if somewhat predictably so) selective coding.

This is no trivial task for principles: even though detailed legislation will always be both necessary and a potential challenge to the principles' 'constitutional' intents, well-crafted principles offer both stability and the normative anchorage that enables day-to-day critique and incremental developments.[62] Coding-aware principle deliberations, furthermore, could help ask some difficult questions – for instance, why do we use public resources to grant convertibility to disappointed travellers but deny a strong protection of durability to users of fundamental services? However, the main role of the PEPL charter would arguably play out at a higher level of abstraction.

While it is hardly in question that some of the downturns tracked in the examples are mainly a result of non-legal factors (which some would call 'the economy' or 'markets', others ideology or neo-liberalism), I want to highlight here a different emphasis – our limited legal imagination. Consumer data commodification is a case in point: if we think that outright

[58]This, and the fact that I cannot remotely claim to be an expert on all the issues within the overview, should save the paper from the charge of attempting 'world creation by expert'.

[59]See also M Fabre-Magnan, 'The Paths to a Progressive European Code of Private Law' 1 (2) (2022) European Law Open 436–445, on speculative contracts.

[60]M Grochowski et al, 'Algorithmic Price Discrimination and Consumer Protection: A Digital Arms Race?' (2022) Technology and Regulation 36–47.

[61]See section 2, fn 19.

[62]Thanks to an anonymous colleague for raising this point after reading an earlier version of the paper.

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capitalising of consumer data is an unappealing solution for the producers of those data,[63] this need not mean going along with data enclosure.[64] Rather, we need more ways of owning,[65] or perhaps new forms of collective self-determination (but the connection property–sovereignty is not new).[66]

This is also shown by one last example, drawn from recent developments in European financial/consumer law: non-performing loans (NPLs).

The financial crisis left the balance sheets of many European banks littered with NPLs. A decade later, these were still hampering bank profitability. After several years of negotiations, in 2021 the EU approved a new Directive on Credit Purchasers and Credit Servicers,[67] which is meant to foster secondary markets for NPLs: supposedly banks do not have the expertise to take care of NPLs and that is, among others, a reason why they should be able to easily discharge them.[68] Consumer associations were not enthusiastic about the original proposal, arguing (in essence) that consumers have little to gain from professionalised foreclosures.[69] The text finally approved includes several guarantees for consumers – from forbearance to assistance duties – but essentially keeps in place the idea that NPLs are best coded as a specific type of asset so that supposedly 'market' mechanisms will bring about efficiency and turn problems into opportunities.[70]

The resulting Directive tries to patch up new and old vulnerabilities but ultimately reproduces known paths: using public money to create assets that are unlikely to yield evenly distributed wealth, based on ideas of freedom of contract and the usual unilateral coding of credit as capital. Alternative legal and institutional constructions, however, are conceivable – consumer mutualisation funds, properly public buyers with the competence to screen cases, not to mention different loan schemes would all be different ways of helping banks get rid of toxic assets on a short- or long-term basis. These are currently hindered among other things by path dependence and, once again, tunnel vision and limited imagination.

It is especially in this sense that a PELP charter could be a game changer: besides taming some self-reinforcing mechanisms of wealth accumulation and clearing the way for progressive intervention,[71] the charter's main contribution would be to broaden the private legal imagination. Climate change, digitalisation and changing societies require private law to provide a better

[63]On normative/moral as well as practical grounds: see G Malgieri and B Custers, 'Pricing Privacy – The Right to Know the Value of Your Personal Data' 34 (2) (2018) Computer Law & Security Review, 289–303.

[64]E Ernst, 'Big Data and Its Enclosure of the Commons' (Social Europe 2019) <https://socialeurope.eu/big-data-and-the-commons> accessed 22 June 2022.

[65]On the need for plural forms of ownership, see H Dagan, *A Liberal Theory of Property* (Cambridge University Press 2021). For scepticism about the potential of pluralism 'left to itself', see M Bartl, 'On the Chances of Structural Pluralism in the Liberal Theory of Property' 18 (2) (2022) International Journal of Law in Context, 247–49.

[66]M R Cohen, 'Property and Sovereignty' 13 (1) (1927) Cornell Law Review 8–30.

[67]Directive (EU) 2021/2167 of the European Parliament and of the Council of 24 November 2021 on credit servicers and credit purchasers and amending Directives 2008/48/EC and 2014/17/EU.

[68]Recital 6: 'Where loans become nonperforming, more efficient enforcement mechanisms for secured loans would allow credit institutions to implement a holistic strategy to enforce NPLs, subject to strong and effective safeguards for borrowers. Nevertheless, should NPL stocks become too high, credit institutions should be able to sell them in efficient, competitive and transparent secondary markets to other operators.' Enforcement mechanisms should be thus assigned to 'credit servicers', whereas 'credit purchasers' would be the secondary-market solution the final sentence refers to.

[69]BEUC, 'Secondary Market for Non-Performing Loans: The European Commission's Proposal Is a Bad Deal for Distressed Borrowers' (2018) <https://www.beuc.eu/publications/beuc-x-2018-068_secondary_market_for_non-performing_loans.pdf> accessed 22 June 2022.

[70]Notice, however, that in several Member States the process has been kick-started with public money, even requiring exemptions from the EU State Aid regimes. See J Surala, 'Non-Performing Loans' Legacy versus Secondary Markets' (Bruegel 2019) <https://www.bruegel.org/2019/12/non-performing-loans-legacy-versus-secondary-markets/> accessed 22 June 2022.

[71]As Hesselink puts it in his article at the centre of this symposium: 'It would provide the "ground rules" for the allocation and distribution of wealth in society. In particular, it would prevent and sanction unjust market conduct, would define principled restrictions on commodification, and, thus, would pose constitutionally entrenched moral limits to the internal market.'

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vocabulary to address prerogative, care and obligation.[72] If nothing else, it is on this account that 'any amount of regulatory private law could not achieve what a (constitutionalised) code of private law principles could accomplish'.[73]

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[72]For what I read as an attempt in this direction, see Scott Veitch, *Obligations: New Trajectories in Law* (Routledge 2021).
[73]Hesselink (n 1).

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