European Law Open (2023), **2**, 467–477
doi:10.1017/elo.2023.41

DIALOGUE AND DEBATE: SYMPOSIUM ON COMMODIFICATION AND EU LAW

Flexibility as commodification and contracts as local resistance

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(Received 1 March 2023; revised 3 August 2023; accepted 8 August 2023)

Abstract
The paper looks at contracts and contract law as a place of both commodification and resistance to commodification. Commodification and contract are connected through the lens of *flexibilisation*, seen in particular as one party's unilateral prerogative to adapt the content of the contract's performance. Flexibilisation in this sense works to entrench the market mechanism (*qua* responsiveness to price and demand dynamics) in situations where marketisation makes the realisation of long-term human needs rely on the short-term horizon of market operations. Two such contexts of marketisation in the context of European Private Law are considered as examples, namely transfer of enterprise and acquisition of a (household) customer portfolio in energy markets. The paper argues that 'taking contractual equality seriously' can contribute to decommodification – or at least throw some sand in the wheels of commodification.

Keywords: commodification; flexibilisation; expropriation; contract terms; unilateralism

1. Introduction

In this short Article, I look at the relationship between contract (law) and commodification in the context of consumer and employment contracts, both seen as *long-term contractual relationships*. Of course, the task just pictured would still be very broad. I therefore choose here to analyse one specific way in which commodification takes place, namely flexibilisation. In particular, I am interested in the naturalisation of *unilateral prerogatives* as a means to achieving both flexibilisation and stability (at least, for one party) in long-term relations. This is a significant delimitation: especially in employment, flexibilisation takes place both within and – perhaps most visibly – *without* the employment contract. Self-employment is one approach – interestingly often touted as the way to work flexibly, free from the shackles of managerial prerogative. Short-term contracts are another widespread way of avoiding commitment, next to or in combination with agency work. In this Article, however, the focus is set on how flexibility can be pursued *within* traditional employment; this happens by connecting the parties' reciprocal obligations (respectively: to work according to instructions; to make work available and remunerate it) to different conditions or parameters.

Flexibilisation intended in this sense, as the entrenchment of sweeping unilateral prerogatives, is also a common feature of long-term consumer contracts, whereby it is normally accepted that the service provider (aka the consumer's counterpart) must be granted the possibility to adapt the

terms of their own performance as well as the other party's obligations.[1] While contemporary developments – in particular so-called 'servitisation' – connect long-term contracts more directly to certain goods (means of transport, appliances etc),[2] the classical scenarios here concern contracts for utilities (energy, internet access) and financial products, in particular credit.

In order to understand the more granular relation between different registers of contract law rules and commodification, the Article proceeds as follows: I will first introduce flexibilisation as a mechanism of commodification that not only allows capital accumulation by locking in gains for the stronger party but also, in doing so, works as a form of *expropriation* against the disadvantaged counterpart (Section 2). This process is enabled, in particular, by certain contract terms and by the wide possibility to use contracts *as a tradable asset*. While this development may appear a logical consequence of contractualisation, I suggest that squaring unilateral flexibility and contract is no obvious enterprise and provide examples from the broad field of European private law to illustrate the tensions between contractual equality (and binding force) taken seriously and far-reaching flexibilisation (Section 3). Finally (Section 4), I draw some conclusions as to how contract law could help counter, or at least throw some sand in the wheels of, rampant commodification.

2. Flexibilisation as commodification

How is flexibilisation a route to commodification? In exploring this question, I rely on recent works in the area of materialist critique that analyse processes of commodification as a form of continued capitalist accumulation.[3] In these works, commodification is not criticised as a (chiefly) moral problem but (inasmuch) as it is seen to create negative effects for humans, societies and non-human systems, in particular by expanding an extractive profit-driven logic into an ever-growing range of human activities. Commodification here is not understood as mere marketability but rather as a sort of market (value) reductionism that changes the core features of what is exchanged: as such, that something is exchanged for money does not exhaust the commodification process and is not the core target of this line of critique.[4] This approach allows us to carry out an incremental (de)commodification argument in the context of activities normally associated with economic exchange – that is, even if we accept that, to an extent, work and consumer identities are 'non-commodities' that money *can* buy.[5] Labour's character as non-commodity or fictitious commodity has been often re-asserted over the past century[6] – while in recent decades much

[1]See for instance Directive 93/13, Annex, Art 2, section 3.B), excepting financial contracts from the already mild indictment of variation clauses under Art 1 j) of the same Annex.

[2]H Slachmuylders, 'Movable Servitization – Contractual Liability in the B2C Relationship' (15 April 2022) <https://papers.ssrn.com/abstract=4148434> accessed 1 August 2023.

[3]Mainly C Hermann, *The Critique of Commodification: Contours of a Post-Capitalist Society* (Oxford University Press 2021); N Fraser, *Cannibal Capitalism: How Our System Is Devouring Democracy, Care, and the Planet and What We Can Do About It* (Verso Books 2022).

[4]In Hermann's words, '

> from the materialist perspective the problem is not that nannies or nurses are paid. The problem starts when care work becomes part of a profit-seeking operation and managers put pressure on care workers to spend less time with their clients in order to reduce costs' Hermann (n 3), 13.

In this way, it is also possible to speak of financialisation-driven commodification of *food, see* J Klapp and SR Isakson, *Speculative Harvests* (Fernwood Publishing 2018).

[5]MJ Sandel, *What Money Can't Buy: The Moral Limits of Markets* (Macmillan 2012).

[6]K Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (Beacon Press 2001), in particular chapter 6 (The Self-regulating Market and the Fictitious Commodities: Labor, Land, and Money). The idea is of course also reflected in the preamble to the International Labour Organization's 1944 'Declaration of Philadelphia' <https://www.ilo.org/static/english/inwork/cb-policy-guide/declarationofPhiladelphia1944.pdf> (last consulted 31 July 2023). See also A Supiot, *L'esprit de Philadelphie. La Justice Sociale Face Au Marché Total* (Média Diffusion 2010).

https://doi.org/10.1017/elo.2023.41 Published online by Cambridge University Press

scholarly and policy emphasis has been put on (the regulation and study of) labour *markets*.[7] At the same time, if the rise of consumerism – and consumer law – is in itself classically associated with and criticised as a form of commodification,[8] the commodification of *consumers* is a somewhat a more recent turn. The idea has mainly gained prominence recently with the advances of predictive algorithms, personalised advertisement and business models entirely based on monetised consumer data[9] – in particular, having failed to emerge as a major front of contestation during the financial crisis of a decade ago (which had been fuelled by what was effectively the commodification and high tradability of consumer home mortgage debt). The common practice of *en masse* 'transferring' contractual relations as highly movable assets to third parties is actively promoted in the European internal market, bringing with it the need to regulate its all-too-foreseeable effects on affected workers and consumers.[10] This background means that, in the framework adopted here, commodification does not stand in a one-on-one relationship with use of the contractual form. Flexibilisation via contract terms, however, significantly contributes to commodification in contractual relations.

Flexibilisation is the way in which the market mechanism is internalised and entrenched in contractual relations – typically in situations where marketisation/privatisation makes the realisation of long-term human needs rely on the short-term horizon of market operations.[11] This operation is quite easy to see if one thinks of a typical example from consumer contracts, namely flexible-rate energy contracts. Demand elasticity is limited for household energy supply, particularly so for vulnerable and less affluent consumers.[12] In the short term, the value of energy to household users has very little to do with fluctuating market prices[13] and much to do with outside temperature, day–night rhythm, age and health conditions of household inhabitants, local habits, the possibility to work from a different location, and so on.[14] As much as consumers may be enticed to think that they may also stand to gain from potentially favourable fluctuations, price

[7]Critical, R Dukes, *The Labour Constitution: The Enduring Idea of Labour Law* (Oxford University Press 2014). More descriptively, the development and tensions can be seen as epitomised by S Deakin and F Wilkinson, *The Law of the Labour Market: Industrialization, Employment and Legal Evolution* (Oxford University Press 2005).

[8]H Marcuse, *One-Dimensional Man: Studies in the Ideology of Advanced Industrial Society* (Routledge 2013); J Clarke and Others, *Creating Citizen-Consumers: Changing Publics and Changing Public Services* (Pine Forge Press 2007); Hermann (n 3).

[9]MFO Wannes, 'Personal Data as a Commodity: Is the Door Open for Small-Scale Data Processing?' (*CITIP Blog*, 4 August 2022) <https://www.law.kuleuven.be/citip/blog/personal-data-as-a-commodity-is-the-door-open-for-small-scale-data-processing/> accessed 28 February 2023; G Malgieri and B Custers, 'Pricing Privacy–the Right to Know the Value of Your Personal Data' 34 (2018) Computer Law & Security Review 289. European Data Protection Supervisor, *Opinion 4/2017 on the Proposal for a Directive on Certain Aspects Concerning Contracts for the Supply of Digital Content* <https://edps.europa.eu/sites/edp/files/publication/17-03-14_opinion_digital_content_en.pdf>.

[10]In particular, in the area of employment see 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, which is also relevant to the case of *Alemo Herron* discussed under section 3. For consumer law, a recent development is Directive 2021/2167 of 24 November 2021 on credit servicers and credit purchasers and amending Directives 2008/48/EC and 2014/17/EU, which was *expressly* meant to create an internal market for non-performing loans.

[11]In this sense, the 'welfare state' has been identified as an instance of decommodification to the extent that it made citizens less dependent on markets – see Hermann (n 3), 21 with reference to Offe.

[12]See eg for Germany, I Schulte and P Heindl, 'Price and Income Elasticities of Residential Energy Demand in Germany' 102 (2017) Energy Policy 512.

[13]It may be worth mentioning here that *wholesale* market prices fluctuate several times *per day*, and by no means to a marginal extent.

[14]See for instance, with reference to vulnerability and energy deprivation, M Hesselman, 'Energy Poverty and Household Access to Energy Services in International, Regional and National Law' in M Roggenkamp, K de Graaf & R Fleming (eds), *Energy Law, Climate Change and the Environment* (*Elgar Encyclopedia of Environmental Law*, Vol 9) (Elgar Publishing 2021) 698 with further references. It is fair to acknowledge here that this disconnection is particularly apparent in the short-term: of course, with a longer horizon in mind it is the case that use patterns adapt significantly – thus for instance over time relatively high gas prices would lead those who can to electrify their household, meaning at least for some consumers the use value of gas would also change.

https://doi.org/10.1017/elo.2023.41 Published online by Cambridge University Press

flexibility mainly aims to secure the viability of the supply contract from the perspective of the supplier: not only were fixed-tariff contracts made temporarily unavailable on several markets at the peak of the recent energy crisis,[15] in several cases companies tried to immediately terminate fixed-tariff contracts already in place.[16] If less intuitive, the reasoning holds for employment as well: employment at will, like all mechanisms that allow shifting the entrepreneurial risk onto workers, locks in the employer's utility from the transaction when the marginal cost of labour and other resources is below the potential market value of the product or service and is not particularly interested in determining whether the worker's input may still be useful when its market value is lower. Thus, a bar patron may not be interested in hiring waiters to keep their establishment open when they expect little clientele, even though the employees may well also need a salary on those slow days and their work would not be intrinsically less worthy during such off-peak hours. A profit-driven employer will tend to further disregard how opening would have positive communal effects in terms of eg street safety, offering shelter in case of adverse weather and other goods less profit-driven businesses can contribute to. Fixed-term schoolteachers, in contrast to their peers with open-ended contracts, can be treated as seasonal workers with no claim to salary or paid holidays when schools are closed. While these effects are often obtained outside the long-term, open-ended contracts, they can be achieved *inside* such contracts with a variety of techniques: 'dormant' obligations during off-peak periods, including work-on-call elements within a long-term contract, stipulation of fluctuating working hours and of course variable remuneration all are common tools to achieve similar effects. The appeal of such arrangements is that, unlike spot contracts, they offer the party designing them both stability and flexibility.

Stability is (crucial to turning assets or entitlements into) capital. We hear this all the time when it comes to companies, whether under the label of 'legal certainty', investment protection, predictability and so forth. Pistor provides examples of this when discussing the coding feature of *durability:* stabilising entitlements requires much subtler work than meets the eye.[17] Hence, to understand durability as an attribute of capital, we should not just look at the classical image of ownership as being eternal, absolute and exclusive as a starting point, but rather at how ownership or entitlements can be made to survive through actual adversity, for instance by making assets immune to seizure or otherwise shielded in bankruptcy – something that many evicted home-owners would have benefitted from during the last financial crisis.[18] When it comes to employees and consumers, however, the virtues of flexibility are emphatically extolled in much public and policy discourse: employees benefit from flexibility in terms of work-life balance and self-realisation, consumers can reap most benefit if they are free to change their purchase behaviour, switch providers and so on.

Flexibilisation in combination with stability, however, allows the stronger party to have their cake and eat it. By shifting risk away from companies/employers, flexibility in fact *locks in* profit, transforming it from hope to entitlement. We have got, over time, accustomed to flexibility as a way to appropriate cooperative surplus: emphasis on growth, financial stability and the supply-side focus, further legitimised by stronger or looser variants of trickle-down economics, have effectively institutionalised the idea that regulation has no say on the direct allocation of this surplus – except perhaps for marginal controls on the occasion of mergers or other competition-relevant operations. As such, this story is no different from baseline (Marxist) concerns with work exploitation.

[15]So much so that the recent EU proposal for a directive on Electricity Market Design requires that a fixed-rate contract be made available at all times – see COM/2023/148 final Art 2.

[16]See eg the Dutch case <https://www.acm.nl/en/publications/acm-takes-action-against-energy-companies-cancel-fixed-rate-energy-contracts> (last accessed 3 August 2023).

[17]K Pistor, *The Code of Capital* (Princeton University Press 2019) 14. In particular, Pistor says, 'legal coding can extend the life span of assets and asset pools, even in the face of competing claimants, by insulating them from too many creditors'. Chapters 2 and 4 on land and corporations are arguably the places in the book where durability emerges most prominently, but chapter 5 on intellectual property also offers interesting examples.

[18]For a similar point on the value on stability and hence on the plausibility of framing US employment law "at will" doctrines as expropriation (taking), see Racabi, 'At Will as Taking', forthcoming in 133 (2024) Yale Law Journal.

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If, on the other hand, we are serious about the fact that stability is crucial in turning entitlements into capital, and hence, crucially *lack of stability* is a capital-burning liability, it becomes quite reasonable to infer that flexibilisation, when unilaterally imposed (on workers and consumers),[19] is not 'just' exploitation but a form of expropriation, *taking something more* away from the consumer or worker.[20] Not only does it allow the companies to, risk-free, appropriate the cooperative surplus, allowing capital accumulation in the form of, essentially, grifting.[21] Pervasive flexibilisation depletes human and material capital and contributes to the crisis of social reproduction by making it harder or impossible to maintain and grow social ties, plan investments and expenses, and build a safety network shielded from market forces. German courts have argued,[22] for instance, that flexibilisation clauses affecting more than circa 25 per cent of an employee's working time or remuneration are highly problematic *because* they make it impossible for the employee to plan their life, both in terms of income and in connection with other practicalities.[23] Zero-hour contracts have left (foreign) workers in highly flexibilised sectors, such as the Dutch hospitality and even care sector, exposed to extreme income insecurity during the recent pandemic; this experience, and the heated post-pandemic labour market, may have contributed to increased scrutiny on a construction which allowed employers to have employees at their (obligatory) beck-and-call with a four-day notice.[24] Price and interest rate fluctuations, in the context of crucial contracts like energy supply or residential mortgages, can have comparable impact on consumers, making the 'privatised Keynesianism' based on consumer debt an extremely unstable equilibrium.[25] Debt is, in Fraser's words, a crucial mechanism by which people are laid bare to expropriation and accumulation happens undisturbed.

Counter to the commonly held idea that contracts are a tool deployed by parties in order to stabilise their mutual expectations,[26] we have over the last few decades set a system in place that uses a contract to *take away* such expectations from only one party. This is, importantly, most striking once one looks beyond the economy and considers the broader consequences of precariousness in terms of social capital (sic!) or social reproduction.[27] However, from the perspective of private law, the implication of framing flexibilisation as *taking* lies in the insight it delivers on the relationship between the concerned parties: thus framed, imposed flexibilisation is quite clearly at odds with corrective justice.[28] Due to its *unilateral* nature, the next section will submit, flexibilisation is also at odds with the related principle of contractual equality.

[19] <https://socialeurope.eu/unpacking-self-employment-flexibility>.

[20] Fraser underlines how the boundaries between exploitation and expropriation are historically not only marked by the distinction between surplus appropriation and primitive accumulation, but also along racial and geographical lines. As will be shortly explained, the argument here concurs with Fraser's contention that boundaries between exploitation and expropriation are currently being blurred away by financialisation. See Fraser (n 3).

[21] See for instance the fortunes accumulated by the (now departed) founders of Uber, a 'disruptive technology' company which has in face hardly ever made profit but has been lavishly covered in venture capital.

[22] See BAG 07. 12.2005, 5 AZR 535/04, NZA 2006, 423.

[23] While the exact boundaries of welcome flexibility may vary and be as such impossible to determine once for all, the reasoning seems more relatable and less disingenuous than narratives of digital nomadism embraced by post-pandemic popular and social media. See C Bonneau, J Aroles and C Estagnasié, 'Romanticisation and Monetisation of the Digital Nomad Lifestyle: The Role Played by Online Narratives in Shaping Professional Identity Work' 30 (2023) Organization 65.

[24] A reform eliminating zero-hour contracts has been proposed in April 2023 and an online consultation on the ministerial proposal was pending at the time of finalising this Article.

[25] G Comparato, *The Financialisation of the Citizen: Social and Financial Inclusion Through European Private Law*, vol 1 (Bloomsbury Publishing 2018); C Crouch, 'Privatised Keynesianism: An Unacknowledged Policy Regime' 11 (2009) British Journal of Politics and International Relations 382.

[26] See eg DM Vicente, 'Contracts' in *Comparative Law of Obligations* (Edward Elgar Publishing 2021) 235.

[27] See Fraser (n 3). R-M Rahal et al., 'Quality Research Needs Good Working Conditions' 7 (2023) Nature Human Behaviour 164.

[28] Of course, there are cases where flexibility is genuinely attractive to both parties. The likelihood of 'win–win' flexibility scenarios, however, should not be overestimated: while in certain cases it may be that consumers and workers are happy to pay (directly or indirectly) for forms of flexibility, these are typically the cases where they can actively play a role in acting upon

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3. Contract (law) as ambivalent tool

Formal equality between the contracting parties was a major achievement of post-*ancien régime* contract laws. Of course, with the shrewdness of a couple of centuries later, one could say that it's all but expected that contracts would be used by stronger parties as an instrument of domination over their weaker counter-parties; [29] however, I would like to argue here, it is unclear that contract as such would be the natural home for unilateralism of the kind expressed in the flexibilisation techniques discussed above. Namely, several rules and principles of classical, liberal contract law express a suspicion of unilateralism.[30] The principle of sanctity of contracts ultimately calls for restraint in interpreting any openings to unilaterally available uncertainty[31] – evidently, all the more so in non-negotiated contracts, as employment and consumer contracts typically are. Unilateral prerogatives are also intrinsically at odds with formal contractual equality and reciprocity – as they make the position of the parties also formally asymmetrical and the relation between performance and counter-performance less predictable. Even *before* extensive welfare state regulation, managerial prerogative ('subordination') was in fact what made it doctrinally difficult to square employment in late 19th-century factories and offices with the contractual form.[32] The employment contract, replacing the non-contractual devices of the master-servant relation and guild apprenticeship,[33] was coated in institutional language in several European systems not least in order to make sense of the power it granted to the employer in shaping the content of the performance.[34] The beauty of managerial prerogative, in this context, is that it allows flexibility without intervention on the terms of the contract, so that to this day the boundaries between prerogative and contract terms blow up occasionally as a site of struggle.[35] In the following, I mostly refer to the various grounds justifying a suspicion of unilateralism as 'contractual equality', while being aware that this does not do justice to the different facets of the doctrinal concerns I am to capture.

A. Contract rules, contract terms and achieving flexibilisation

While boilerplate is far from a new phenomenon, the interest in contract terms as a means of managing long-term (mass) contracts has grown over the past few decades.[36] As concerns (long term) consumer service contracts, it is telling that civil codes contained several rules to make sure

flexible terms – whereas often the consumers involved may just have very limited understanding of what 'flexible' terms entail, see CJW Baaij and E van Schagen, 'Is de Energieconsument Klaar Voor de Groene Transitie? Een Kwantitatief Onderzoek Naar Consumentgeschillen Bij de Geschillencommissie Energie' (2022) *Tijdschrift voor Consumentenrecht* 178.

[29]F Kessler, 'Contracts of Adhesion–Some Thoughts About Freedom of Contract' 43 (1943) Columbia Law Review 629. See also recently on the significance of consent in employment and proposing a helpful recollection of Kahn Freund's thoughts on the issue, M Niezna and G Davidov, 'Consent in Contracts of Employment' (2023) Modern Law Review (online preview).

[30]See eg prohibition of *condizione sospensiva meramente potestativa*, certainty of *causa*, etc etc.

[31]See eg the limitations imposed on 'vountariness reservations' in German employment case-law D Quink, *Inhaltskontrolle von Freiwilligkeitsvorbehalten in Arbeitsverträgen*, vol 60 (Peter Lang 2010).

[32]See O Razzolini, 'The Need to Go Beyond the Contract: Economic and Bureaucratic Dependence' 31 (2009) Comparative Labor Law & Policy Journal 267.

[33]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 L Nogler & U Reifner (eds), *Life Time Contracts: Social Long-term Contracts in Labour, Tenancy and Consumer Credit Law* (Eleven International Publishing 2014) 279–319.

[34]At least on the continent. In particular, this is a flourishing debate in French law. P Lokiec, *Contrat et Pouvoir* (LGDJ Monchrestien Editions 2021); L-K Gratton, *Les Clauses de Variation Du Contrat de Travail* (Dalloz 2011); A Fabre, *Le Régime Du Pouvoir de l'employeur* (LGDJ 2010). This does not take away from the significance of the shift just mentioned and well discussed at the references under 8.

[35]See references above; also E Dockès, 'De La Superiorité Du Contrat de Travail Sur Le Pouvoir de l'employeur' in *Analyse juridique et valeurs en droit social : Mélanges en l'honneur de Jean Pélissier* (Dalloz-Sirey 2004); J Pélissier, 'Pour Un Droit Des Clauses Du Contrat de Travail A Partir de l'arrêt Société Leviel' 7 (2005) RJS 499.

[36]C Bessy, 'La Contractualisation de La Relation de Travail, Paris, LGDJ, Coll' (2007) Droit et Société', Série Économie.

https://doi.org/10.1017/elo.2023.41 Published online by Cambridge University Press

that unilateral prerogatives became mainstream: think for instance of the degree of flexibility allowed to credit or insurance providers by pre-welfare state civil codes. The fact that the privileged position of certain service providers was expressly anchored in statutory provisions may be nothing more than a codification of the expectations prevailing at the relevant time, but could also suggest that legislative coverage was put in place in order to avoid possible judicial rejection of self-granted contractual prerogatives.

In mass contracts, perhaps unsurprisingly, flexibility tends to be encapsulated in rather one-sided contract terms. Tech giants include sweeping reservations in their end user contracts, concerning their ability to modify their own terms and conditions more or less at will.[37] Banks in Spain have become notorious for their so-called 'floor clauses', preventing interest rate fluctuations to operate to their disadvantage.[38] EU rules had to be put in place to empower borrowers to repay parts of their debts earlier than agreed: previously, such early repayment usually led to a contractual fine as it would impact the lender's profit expectations.[39] Such unilateral reliance of the strong and its consequences on workers is beautifully illustrated by Veena Dubal's recent Article on 'gamification' of pay in Uber's algorithmic contract management.[40]

Flexibility has gradually become a broad normative expectation, not only at the micro level of contract content but also in enhancing the commodification of contracts themselves. Flexible business models inevitably see customers and employees as *assets*: bundles of contracts to be used as collateral, sold out or transferred when practical, acquired for investment or further resale and so on. Since it is assumed to be an intrinsic quality of any successful business operation, denial of – unilateral – flexibility *within the contract* further becomes an intolerable infringement.

B. An unexpected turn: contract as local resistance

The tension between taking contractual equality seriously and commodifying flexibilisation is aptly illustrated with reference to transfer of contracts, which severs the links between the original parties. I will discuss the scenario here by way of two examples taken from case-law: a recent case concerning a failed Dutch energy provider, on the one hand, and the somewhat notorious Court of Justice of the European Union (CJEU) decision in *Alemo-Herron* on the other hand. In both cases the central question under consideration concerns unilateral adaptation and the flexibility granted to company operations: does a transfer automatically entail that the new employer/provider should be enabled to change the contract terms under which the previous owners/managers operated?

A recent Dutch case is exemplary. In 2018, energy company Innova bought the customer list of an insolvent competitor and immediately proceeded to increase the delivery prices for its newly acquired customers. In October 2022,[41] a civil court decided that the price increase was illegitimate: the company was bound to respect the original contract between supplier and customer and could not unilaterally replace that contract with its own terms and conditions (including prices of supply). Buying a customer logbook is not a stand-alone act, the court claimed, but entails in fact transfer of pre-existing obligations that could not be unilaterally changed.

[37]M Loos and J Luzak, 'Wanted: A Bigger Stick. On Unfair Terms in Consumer Contracts with Online Service Providers' 39 (2016) Journal of Consumer Policy 63.

[38]F de Elizalde, 'The Rain in Spain Does Not Stay in the Plain -Or How the Spanish Supreme Court Ruling of 25 March 2015, on Minimum Interest Rate Clauses, Affects European Consumers' 4 (2015) Journal of European Consumer and Market Law 184.

[39]See Art 16 Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC, OJ L 133, 22.5.2008, pp 66–92.

[40]V Dubal, 'On Algorithmic Wage Discrimination' (19 January 2023) <https://papers.ssrn.com/abstract=4331080> accessed 2 August 2023; Z Teachout, 'Algorithmic Personalized Wages' (2023) Politics & Society (Online First).

[41]Rechtbank Amsterdam, 10 October 2022, ECLI:NL:RBAMS:2022:6001.

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The immediate reaction of, *nota bene*, consumer associations was to say that the case is just a *local* win[42]: in the future, companies intervening to replace a bankrupt supplier would simply have to go via the administrative route prescribed by Dutch law in order to be able to increase prices at will. The reason for this prediction is that the applicable administrative rules expressly say that *consumers* cannot change providers after a bankruptcy, until they have been assigned one,[43] whereas providers who have been appointed by the Competition Authority to replace an insolvent competitor are free to keep or adapt the terms of delivery.[44]

This is a reminder that 'liberalisation', such as pursued by the European Union in the case of energy, does not mean absence of legal regulation: rules are *expressly* put in place to secure that losses are never internalised by those who hope to take part in the profits.[45] Profits, on the other hand, have become an entitlement rather than an objective: thus the 'price cap' set in place last winter by the Dutch government[46] consists of a generous programme of subsidies for energy companies that were guaranteed a certain margin of profit while consumers will be held immune from particularly high prices.[47] The upside of this *may* be the discovery that calculating what reasonable profit would be seems not beyond human means; on the other hand, it further cements the idea that entrepreneurial risks for providers need to be reduced or annulled by essentially relying on public resources, while their profits are of course a private matter.

The outcome of the particular court case, however, is interesting here because a rather plain application of contractual principles represents what seems to be the *only* counterbalance to corporate profit-seeking offered in the system of 'supply security' rules. Incidentally, contrary to the consumer association's suggestion, the court's decision may actually affect the ways in which companies would negotiate with the consumer authority: if they cannot have their way by private acquisition, this in principle increases the authority's leverage. It is once again not just a rule of nature, but perhaps rather the instructions the government laid out for the authority that prevent it from seeking a better deal for users.[48]

This brings us to our second example. The idea that, on the one hand, companies can dispose of the expectations held by their clients and employees by means of transfers – but meanwhile are themselves entitled to expect that such transfer gives them an enforceable right to a clean slate – is not less problematic in labour law. A significant degree of protection here is offered by European rules that prevent transfer of an enterprise as such to constitute reason for dismissal of previously employed workers.[49] It should be no surprise that the concerned Directive has been a difficult compromise and is subject to litigation and critique. Recast in 2001 as a reaction to the effects of

[42]<https://www.bnnvara.nl/kassa/artikelen/rechter-oordeelt-klant-failliet-energiebedrijf-mag-niet-duurder-uit-zijn>.

[43]Decision of 14 February 2006 containing rules concerning provisioning in respect of supply security (Besluit leveringszekerheid Elektriciteitswet 1998).

[44]Besluit Art 6 c: supply is continued by the new provider 'with a contract of indefinite duration and otherwise under [the supplier's] own conditons'. The proposed Electricity market design directive (COM/2023/148 final) also aims to amend the Electricity Directive (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) to further regulate providers of last resort – with a similar approach requiring providers to 'promptly communicate the terms and conditions to transferred customers' once they are appointed – see Art 2 proposal.

[45]See especially Ch 2 (on mechanisms of commodification) in Hermann (n 3).

[46]Regulation of the minister for climate and energy of 12 December 2022 [xxx] containing rules concerning a subsidy for suppliers to finance a cap on energy fees for small users in 2023 (Subsidieregeling bekostiging plafond energietarieven kleinverbruikers 2023).

[47]The United Kingdom (UK) version, if more confusing in implementation, is not too dissimilar, see <https://commonslibrary.parliament.uk/research-briefings/cbp-9714/>. Remarkably if not surprisingly, British Gas and other energy companies covered by the UK scheme have reported record profits in the first half of 2023 <https://www.theguardian.com/business/2023/jul/27/british-gas-record-profit-price-cap-increase> (last accessed 31 July 2023).

[48]Interestingly enough, the rules further stabilise the companies' entitlements and expectations by indicating that division of the client portfolio should happen mainly on the basis of market share.

[49]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.

https://doi.org/10.1017/elo.2023.41 Published online by Cambridge University Press

'economic trends' on 'the structure of undertakings, through transfers of undertakings, businesses or parts of undertakings or businesses to other employers as a result of legal transfers or mergers',[50] the Directive is a classic example of what Hans Micklitz has observed to be the typical pattern in EU regulatory private law: where liberalisation and free movement rules in the context of the internal market have brought about structural uncertainty and vulnerability, a degree of private law protection takes place to soften the effects and try to secure a degree of market justice.[51]

In this context, the case of *Alemo-Herron v Parkwood Leisure Ltd* enjoyed a degree of celebrity almost a decade ago.[52]

In this case, a company was transferred from public to private ownership and the question arose whether the new owners were still bound by a reference, included in the employment contracts of the employees that were transferred along with the company, to collective agreements negotiated in a specific negotiation body. The ECJ decided that to maintain such a reading would entail an unacceptable restriction of the defendant's freedom to conduct a business, and more specifically of their freedom of contract, since '*the transferee must be in a position to make the adjustments and changes necessary to carry on its operations*'.[53]

In particular, the Court reasoned,

> Since the transfer is of an undertaking from the public sector to the private sector, the continuation of the transferee's operations will require significant adjustments and changes, given the inevitable differences in working conditions that exist between those two sectors.[54]

Effective changes require, apparently, some degree of unilateral prerogative: negotiating changes to the employment contract with the concerned employees was seen as a hindrance.[55] The applicable rules of contract law did anyway offer a *minimum* of stabilisation for the concerned employees: the salary levels included in the last collective agreement concluded before the transfer of enterprise would still apply. The reason for this is that the salary provisions had become part of the individual agreement between the employer and the concerned employees, which were transferred along with the company. This means the contractual entitlement limited at least the employer's ability to further reduce remuneration, which of course still entailed a real-terms pay cut for the employees over time.

In both cases, we see how the broad set-up – in terms of 'public' law and, apparently, market expectations – allowed the concerned companies to regard the transferred consumers and employees as less-than-equal contractual partners, which could be expected to accommodate the asserted needs of the transferee company. Against this framework, asserting the basic principle that contract terms are not by default at one party's full disposal becomes a small act of resistance.

[50]Ibid., second recital.

[51]H-W Micklitz, *The Politics of Justice in European Private Law: Social Justice, Access Justice, Societal Justice* (Cambridge University Press 2018).

[52]Case C-426/11 *Alemo-Herron and Others v Parkwood Leisure Ltd,* ECLI:EU:C:2013:521. Among the most scathing critiques, see S Weatherill, 'Use and Abuse of the EU's Charter of Fundamental Rights: On the Improper Veneration of "Freedom of Contract". Judgment of the Court of 18 July 2013: Case C-426/11, Mark Alemo-Herron and Others v Parkwood Leisure Ltd' 10 (2014) European Review of Contract Law 167.

[53]*Alemo Herron* (n 52) para 25.

[54]para 27.

[55]See for extensive criticism of the Court's expansive understanding of the 'essence' of freedom of contract M Bartl and C Leone, 'Minimum Harmonisation after Alemo-Herron: The Janus Face of EU Fundamental Rights Review: European Court of Justice, Third Chamber Judgment of 18 July 2013, Case C-426/11, Alemo-Herron v Parkwood Leisure Ltd' 11 (2015) European Constitutional Law Review 140.

https://doi.org/10.1017/elo.2023.41 Published online by Cambridge University Press

4. Resisting commodification via contract law?

Taking contractual equality seriously, the above suggests, offers some path to resisting commodification. The examples also suggest two levels where commodification via 'flexibilisation' is an obvious concern for contract law and should be clearly identified as such.

First, the (bulk) circulation of contracts as such between large entities should be looked at with much more suspicion. As mentioned above, such circulation happens all the time not only in the field of energy, but also very prominently in credit and debt management. Consumer debt is routinely sold for a fraction of its nominal value to debt collection agencies or other 'credit servicers' that proceed to demand the full amounts from the debtors.[56] Proposals empowering debtors (or public entities assisting them!) to 'buy' their debt for the same amounts are routinely rejected – or even challenged as unconstitutional, in a staggering condemnation of moral hazard only when it comes to non-systemic actors.[57] At the same time, demanding a basic degree of *care* on the side of these new contractual counter-parties when performing their 'services' may already go some way towards de-commodifying consumer debt.[58,59]

Second, unilateral flexibilisation as a result of contract terms should not be easily accepted as a natural corollary of long-term relationships and some broad policy goal (efficiency or financial stability).[60] Much like other doubtful bargains, at the very least it should be accompanied by tangible, directly related benefits for the employee or consumer/user – if one wants, a remuneration for surrendering the expectation and benefits of durable, stable entitlements. These benefits should emphatically not be speculative – where (as in many flexible rate contracts) the costs of increased rates are likely to be very real and the advantages of lower rates to a large extent

[56]See for an entertaining and disconcerting example <https://www.theguardian.com/us-news/2016/jun/06/john-oliver-medical-debt-forgiveness-last-week-tonight-reporting> how a popular TV host was able to forgive $ 15 million in medical debt with an investment of $ 60 000.

[57]See the objections raised in *DECIZIA Nr.140 din 13 martie 2019 referitoare la obiecția de neconstituționalitate a dispozițiilor Legii pentru completarea Ordonanței de urgență a Guvernului nr.50/2010 privind contractele de credit pentru consumatori, Monitorul Oficial nr.377 din 14.05.2019*. While the attacked regulations were declared unconstitutional on procedural grounds, arguments raised were broad ranging and substantial: the rules would undermine both free markets and their stability, did not sufficiently distinguish between bona fide and negligent debtors, did not respect private property. I would like to thank Catalin Gabriel Stanescu (University of Southern Denmark) for explaining the case in the context of an email exchange.

[58]See for a recent take on the US experience TL Brito and Others, 'Racial Capitalism in the Civil Courts' (1 July 2022) <https://papers.ssrn.com/abstract=4151678> accessed 26 January 2023. The automasitation of debt collection claims has been at the centre of much reporting in The Netherlands, see 'Routinematige Intimidatie – De Groene Amsterdammer' <https://www.groene.nl/artikel/routinematige-intimidatie> accessed 3 August 2023. '*Alleen door schuldpapieren in bulk in te kopen; volautomatisch brieven en appjes te sturen en exorbitante incassokosten en 'vertragingsrentes' te rekenen, wordt handel in schulden rendabel. Persoonlijk overleg of betalingsregelingen vormen een onnodige kostenpost.*' ('The only way to make trading in debts profitable is to buy claims in bulk, send texts and letters with no scrutiny and charge extravagant fees and "default interests". Any personal contact and repayment plan are just an unnecessary cost.'); *In a recent debate, Dutch bailiff representativesdescribed procedural requirements in the case of execution proceedings* in absentia as '*capital-burning activities*'. See for further references A van Duin and C Leone, 'Incasso in Consumentenzaken Blijft Problematisch Ondanks Nieuwe Wet' 98 (2023) Nederlands Juristenblad 360–368.

[59]In this respect, the recent EU directive on credit servicers and credit purchasers, 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 (Text with EEA relevance) seems to suffer from a cognitive dissonance: on the one hand, it aims to put debt commodification on steroids by facilitating the 'circulation' of non-performing loans; on the other hand, several of its provisions require credit collectors to operate carefully vis à vis debtors, see Arts 27–8.

[60]Grundmann and Badenhoop have most recently claimed that highly volatile foreign currency loans should 'arguably' have been prohibited but seem to make the matter one of policy rather than (contractual) justice. See S Grundmann and N Badenhoop, 'Foreign Currency Loans and the Foundations of European Contract Law – A Case for Financial and Contractual Crisis?' 19 (2023) European Review of Contract Law 1.

https://doi.org/10.1017/elo.2023.41 Published online by Cambridge University Press

nominal (because of eg stagnating wages in case of low inflation), reciprocity should not be a sufficient excuse. In very egregious cases of commodification via flexibilisation – think of rental contracts with an indexed rental price typical of corporate landlords owned by eg pension funds – requiring reciprocity, that is allowing the rent to go *down* under not merely virtual circumstances may be a start. Stricter application of judicial control under available contract law principles could, in this way, again do some work to rein in flexibilisation clauses – in and beyond consumer contracts. While likely not more than a handful of sand thrown in the wheels of commodification, such paths are worth exploring – if only for the contradictions they instil in the storytelling of commodified contracting.

Competing interests. The author has no conflicts of interest to declare.

Cite this article: Leone C (2023). Flexibility as commodification and contracts as local resistance. *European Law Open* **2**, 467–477. https://doi.org/10.1017/elo.2023.41