Chapter 2
Mapping Systematization in EU Law

A system is a network of interdependent components that work together to try to accomplish the aim of the system. A system must have an aim. Without the aim, there is no system.

–William Edwards Deming

We have seen in the first chapter that systematization has become increasingly prominent in EU product safety regulation. But we can identify a push into systematization not only in this field, but in a number of other areas of Union law. The need to collect, recast and codify the nowadays "impressive"[1] body of European regulation is recognised by legal scholars, practitioners, Member States, European institutions, and the EU's trade partners such as the USA, alike.

However, although there is mainly agreement on the general need to organize Union law in some way, a common understanding of the concept and impact of such systematization in EU law is missing. The few who have devoted time to research on the concept of systematization of EU law apply the same models to the EU that have been used for systematization in nation-states without having tested their suitability for the regulatory aims of EU law.[2] In relation to the impact of systematization on EU law, the picture is similarly very much incomplete. If one consults official documents of EU institutions and advisors, we find the topic of systematization is often dealt with as a tool for organizing and economizing regulation that is

[1] G. Majone, 'Europe's "Democratic Deficit": The Question of Standards', *European Law Journal*, No. 4, 1998, p. 13.

[2] G. Sydow, *Verwaltungskooperation in der Europäischen Union*, Tübingen, Mohr Siebeck, 2004, pp. 119 et seqq.; J. Basedow, 'The Challenge of Recodification Worldwide: Transjurisdictional Codification', *Tulane Law Review*, No. 83, 2009, p. 974; R. Zimmermann, 'Savigny's Legacy, Comparative Law, and the Emergence of a European Legal Science', *Law Quarterly Review*, No. 112, 1996, pp. 567 et seqq.

K. Purnhagen, *The Politics of Systematization in EU Product Safety Regulation: Market, State, Collectivity, and Integration*, Ius Gentium: Comparative Perspectives on Law and Justice 26, DOI 10.1007/978-94-007-6543-6_2,

perceived as being too cumbersome.[3] To a great extent, previous research on the systematization of EU law takes the same line and highlights only this rationalizing character.[4] This task of impersonal organisation has been described as the 'main tendency' of ordering legal material in EU law.[5] Systematization, it seems, is a necessary addendum to any market, which further clarifies the necessary rules and regulations upon which trade is based. In this respect, systematization becomes an economic notion, which is perfectly applicable in this era of growing trading states. The economy and especially foreign importers demand that rules be easier to understand. Also, more flexible and abstract system rules are viewed as being more desirable in order to react to the diversity of market players and interests.

I will show in this chapter, through the example of EU product safety law, that the customary views on systematization of EU law require major adjustments according to both the concept and impact of systematization. Using mainly *Max Weber's* theory on the rationalization of law as a methodological backdrop, I will show that the systematization of EU law follows a market-creating agenda that needs to be distinct from the role systematization has played in the nation-state.[6] This EU concept of legal systematization hence forms a mutation of the concept of systematization in the nation-state (2.1). Subsequently, I will show on the example of EU product safety regulation as a reference area, that rationalization through systematization in fact covers a number of impacts that the systematization of one area of EU law has on the EU and its legal system. As we will see, in the paradigmatic example of EU product safety law, systematization in fact influences the entire integration process significantly. In addition to its rationalizing feature,

[3] See especially the Conclusions of the European Council in Edinburgh in 11–12 December 1992, p. 37 et seqq.; Commission, 'Follow-up to the Sutherland Report – Legislative Consolidation to Enhance the Transparency of Community Law in the Area of the Internal Market' *COM(93) 361 final;* 'Sutherland Report', The Internal Market After 1992– Meeting the Challenge, Report to the EEC Commission by the High Level Group on the Operation of Internal Market, presided over by Peter Sutherland – October 28, 1992, *SEC(92), 2044*, especially sec. I, criteria 4, and sec. II; European Governance – A white paper, *COM(2001) 428 final*; the Commission's website on 'Better Regulation', available at http://ec.europa.eu/governance/better_regulation/simplification_en.htm.

[4] W. Voermans/C. Moll/N. Floijn/P. v. Lochem, 'Codification and Consolidation in the European Union: A Means to Untie Red Tape', *Statute Law Review*, 2008, No. 29, pp. 65 et seqq.; C. Joerges, 'The Europeanisation of Private Law as a Rationalisation Process and as a Contest of Disciplines – an Analysis of the Directive on Unfair Terms in Consumer Contracts', *European Review of Private Law*, No. 3, 1995, pp. 175 et seqq.; J. Wiener, 'Better Regulation in Europe', *Current Legal Problems*, No. 59, 2006, esp. pp. 497 et seqq. A fortunate exception is J. Bengoetxea, 'Legal System as a Regulative Ideal', in: Koch/ Neumann (eds.), *Praktische Vernunft und Rechtsanwendung*, ARSP-Beiheft 53, 1994, pp. 65 et seqq.

[5] M. Dawson, *New Governance and the Proceduralisation of European Law: The Case of the Open Method of Coordination*, Diss EUI Florence, 2009, p. 248.

[6] In this respect already, albeit using a more reserved language S. Grundmann, 'Das Thema Systembildung im Europäischen Privatrecht – Gesellschafts-, Arbeits- und Schuldvertragsrecht', in: Grundmann (ed.), *Systembildung und Systemlücken in Kerngebieten des Europäischen Privatrechts*, Tübingen, Mohr Siebeck, 2000, p. 1, pp. 2 et seqq.

understood in a narrow sense, it contributes to the building of the EU as a state, helps to identify a common European society, shapes the understanding of the role of law in the integration process, and establishes the limits of constitutional jurisprudence (2.2). The common concept of systematization is hence not transferable *pars proto toto* on the systematization of EU law. It moreover forms a mutation of the same species, which keeps its 'making' power, not to make a nation state, but an internal market (2.3).

2.1 The Concept of Systematization in the Nation-State and in the EU – A Mutation

The concept of systematization in EU law governs an exciting contrast. It shares a common heritage with systematization in the nation-state (Sect. 2.1.1); the respective techniques and tools of systematization are hence applicable to both systematization at nation-state level and EU level. However, the underlying values that govern systematization in the nation-state differ from those in the EU. The concept of systematization is hence not transferable *pars proto toto* on the systematization of EU law. It moreover forms a mutation of the same species (Sect. 2.1.2).

2.1.1 The Common Heritage of Systematization in Europe

Systematization is a typical feature of Western[7] legal thinking. As such, systematization establishes the basis for our understanding of Union law. In order to investigate the concept and impact of systematization in EU product safety regulation, we need to be clear about this common heritage. Giving this rich history of systematization, on the one hand, and the limited space in a piece such as this, on the other, I can only scratch the surface of the ideas and the development of systematic legal thinking in the West.[8] This subsection hence discusses the very basic lines of the early developments of systematic legal thinking (section "The early history of systematization – how it became a feature of law in Europe"), its basic technique of modelling (section "The technique of systematization – systematization through modelling") and the tools used to exercise systematization (section "The tools of systematization – legal casuistry").

[7] See for a description of the term 'West' H.-J. Berman, *Law and Revolution,* Cambridge (MA), Harvard University Press, 1983, pp. 1–7.

[8] See for a comprehensive overview of the recent development D. Kennedy, 'The Disenchantment of Logically Formal Legal Rationality or Max Weber's Sociology in the Genealogy of the Contemporary Mode of Western Legal Thought', *Hastings Law Journal*, No. 55, 2004b, pp. 1031 et seqq.

The Early History of Systematization – How It Became a Feature of Law in Europe

The idea of understanding law as one body, the *corpus iuris*, which develops in time, over generations and centuries was not taken for granted.[9] Generally, one refers to the private collections, *Codex Gregorianius* and *Codex Hermogenianus*, of the legal texts of the Eastern Roman Empire in the third and fourth century as the starting point of systematization. At that time, the sheer volume of Roman law had made it become virtually unmanageable.[10] *Theodosius II* hence introduced the first official collection of laws, the *Codex Thedosius*, in 438 AD. However, this collection proved unable to solve the problems resulting from such a vast body of disparate Roman laws. Emperor *Iustinian* hence established in 529 the *Codex Iustinianus*, which is, together with the subsequently published 50 books about the Digest,[11] today known as the *Corpus Iuris Civilis* or *Romanii*.[12]

Despite these very cautious steps, there was virtually no legal system until the late eleventh century. Of course, legal orders have governed societies ever since, but a distinct, structured, and from social custom differentiated legal and institutional system had not been developed. Even the design of the aforementioned 'codexes' in the Roman Empire barely meet the criteria for what, in our contemporary understanding, constitutes a set of systematic legal codes.[13] Until that time, "(l)aw was not consciously systematized".[14] By the end of the eleventh century, however, all that had changed. A professional courts system had been introduced, universities, where one could study legal science, had been founded, and a body of law had been developed which was perceived as a coherent system. What sparked these advances? The initial trigger of these developments was a struggle between the imperial and the papal party over supremacy of the clergy and the secular branch of society, which ultimately led to the well-known Investiture Conflict.[15] Both sides of the conflict began to systematically search in ancient legal documents for evidence to support their arguments of supremacy. The professionalism with which both sides harvested the legal material, the passion and the organization and the deductive approach were in fact the first attempts to consciously systematize the law.

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[9] This subsection necessarily provides only a very limited overview. See for a comprehensive account on the history, meaning and impact of systematization the illuminating study of H.-J. Berman, *Law and Revolution,* Cambridge (MA), Harvard University Press, 1983; id., *Law and Revolution II*, Cambridge (MA), The Belknap Press of Harvard University Press, 2003.

[10] See M. Maier, *Justinian – Herrschaft, Reich und Religion*, München, C.H. Beck, 2004, p. 41.

[11] M. Maier, *Justinian – Herrschaft, Reich und Religion*, München, C.H. Beck, 2004, pp. 41 et seqq.

[12] See inter alia R. van Caenegem, *European Law in the Past and Future*, Cambridge, University Press, 2002, 13; J. Schapp, 'Einführung in das Bürgerliche Recht: Die Anspruchsnormen und ihre Anwendung', in: J. Schapp (ed.), *Methodenlehre und System des Rechts*, Tübingen, Mohr Siebeck, 2009a, pp. 54 et seqq.

[13] See in this respect also R. Zimmermann, 'Codification: history and present significance of an idea', *European Review of Private Law*, No. 3, 1995, p. 96.

[14] H.-J. Berman, *Law and Revolution,* Cambridge (MA), Harvard University Press, 1983, p. 50.

[15] H.-J. Berman, *Law and Revolution,* Cambridge (MA), Harvard University Press, 1983.

At the law school of Bologna, legal systematizing research was professionalised in the aftermath of the papal revolution in order to find an ultimate truth of just authoritarian action. The rediscovered *codex iustinian,* which at that time had long been missing, established the basis of deductive legislative interpretation.[16] The scholastics involved related the logics of Greek philosophy to the technicalities of Roman Law in such a professional way that most lawyers today would agree that the main characteristic of Roman law was its systematization.[17] However, in the eyes of the Bolognese law school, the *codex iustinian* formed the ultimate source of law.

On these grounds, on the basis of *Gregory VII*'s terses, and because of the church's right acquired by the Cordat of Worms to settle all disputes brought to its attention the first modern legal system in the form of canon law was developed. The power and success of legal systems, of *corpi iurien*, spread in Europe. Secular law was developed according to the logic of canon law in order to strengthen the role of secularised authority. Feudal Law, Manorial Law, Mercantile Law, Urban Law and Royal Law were each developed in the shadow of the logic of the scholastics in order to legitimise and sophisticate various authorities.[18]

Ever since that time, Western lawyers have aimed to ensure that laws which overlap in substance are not contradictory.[19] The need to collect, organize and relate the law has been a prominent feature of the Western legal tradition ever since.[20] It is against this background that we shall read *Lon Fuller's* passage in the 'Anatomy of Law':

> "Those responsible for creating and administering a body of legal rules will always be confronted by a *problem of the system*. The rules applied to the decision of individual controversies cannot simply be isolated exercises of judicial wisdom. They must be brought into, and maintained in, some systematic interrelationship; they must display some coherent internal structure."[21]

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[16] J. Bengoetxea, *Legal System as a Regulative Ideal*, in: Koch/Neumann (eds.), Praktische Vernunft und Rechtsanwendung, ARSP-Beiheft 53, 1994, p. 65, at 71; J. Schapp, 'Einführung in das Bürgerliche Recht: Die Anspruchsnormen und ihre Anwendung', in: J. Schapp (ed.), *Methodenlehre und System des Rechts*, Tübingen, Mohr Siebeck, 2009a, pp. 54 et seqq.

[17] In fact, quite the contrary was true. Roman jurists looked at individual cases through the lens of practical economy, see further on this J. Dawson, *Oracles of The Law*, Ann Arbor (MI), William S Hein & Co, 1986, pp. 114 et seqq.

[18] See R. Caenegem, European Law in the Past and Future, Cambridge, University Press, 2002, 1–25. See particularly for German and French law B. Markensis/H. Unberath/A. Johnston, *The German Law of Contract*, Oxford, Hart, 2006, 6–25.

[19] J. Basedow, 'The Challenge of Recodification Worldwide: Transjurisdictional Codification', *Tulane Law Review*, No. 83, 2009, p. 974, put it this way: "Over time, statutory respones to social change often create a jungle, impenetrable even for the most knowledgeable and sophisticated lawyers."

[20] See in this respect H.-J. Berman, *Law and Revolution,* Cambridge (MA), Harvard University Press, 1983, pp. 1–7.; A. Schiavello, 'On "Coherence" and "Law": An Analysis of Different Models' (2001), *Ratio Juris*, No. 14, 2004, p. 235 even defines law as being systematic *per se.* He summarises that "in the legal field the topic of coherence has always occupied a central place, probably because of the systematic nature of law."

[21] L. Fuller, *Anatomy of the Law*, New York: Frederick A. Praeger; London: The Pall Mall Press, 1968, 94.

Due to this strong commitment in Western legal tradition to treat law as a coherent body, law collecting techniques and concepts have also been developed, used and promoted in all traditions of Western civilization. Indeed, what we may learn from these developments is that lawyers are currently not seen as to perform an individual act, "isolated from an existing normative system."[22] In other words, lawyers are commonly perceived to act impersonal in the *Weberian* sense, as they decide along the lines of pre-defined systematic doctrine, which enabled them to leave value-judgments aside. Interestingly, this perception is still common on the continent despite the fact that systematization has been initially developed as a policy tool for both, the imperial and the papal party.

However, in the recent century coherent systematic legal thinking, including this alleged impersonal feature, has been subject to huge debate.[23] Particularly with regards to the pluralistic structure of the EU, the systematization of Union law was seen as an undesirable method for European integration through law.[24] Many of these discussions stemmed from the ideas of legal realism in the USA as they were particularly advanced by the critical legal studies movement (hereinafter CLS) in the USA, which started in 1977 at a conference at the University of Wisconsin-Madison.[25]

> The CLS "movement has underlined the central ideas of modern legal thought and put another conception at their place. This conception implies a view of society and informs a practice of politics."[26]

Legal Realists have already convincingly put forward the argument that systematization as a deductive and autonomous science that draws decisions from the applications of legal principles and precedents is not possible without reference to the values, social goals, political or economic context that underlie it.[27] However, there shall be no qualitative judgments of these underlying values and concerns.

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[22] A. Barak, *The Judge in a Democracy*, Princeton, NJ, University Press, 2006, p. 12.

[23] See *inter alia* C. Callies/P. Zumbansen, *Rough Consensus and Running Code*, Oxford, Hart, 2010; S. Prechal/B. v. Roermund (eds.), *The Coherence of EU Law – The Search for Unity in Divergent Concepts*, Oxford, University Press, 2008; R. Alexy/A. Peczenik, 'The Concept of Coherence and Its Significance for Discursive Rationality', *Ratio Juris*, No. 3, 1990, pp. 130 et seqq.; G. Betlem, 'The Doctrine of Consistent Interpretation – Managing Legal Uncertainty', *Oxford Journal of Legal Studies*, No. 22, 2002, pp. 397 et seqq.; S. Bertea, 'The Arguments from Coherence: Analysis and Evaluation', *Oxford Journal of Legal Studies*, No. 25. 2005, pp. 369 et seqq.; D. Kennedy, 'Thoughts on Coherence, Social Values and National Traditions in Private Law', in: M. Hesselink (ed.), *The Politics of a European Civil Code,* Den Haag, Kluwer International, 2006, pp. 9 et seqq.; A. Schiavello, 'On "Coherence" and "Law": An Analysis of Different Models', *Ratio Juris*, No. 14, 2001, pp. 233 et seqq.; J. Raz, 'The Relevance of Coherence', in J. Raz (ed.), *Ethics in the Public Domain. Essays in the Morality of Law and Politics,* Oxford (MA), University Press.

[24] See especially L. Friedman/G. Teubner, 'Legal Education and Legal Integration', in: Cappelletti/Seccombe/Weiler (eds.), *Integration Through Law – Europe an the Federal Experience*, Vol. 1, Book 3, Berlin/New York, Welter de Gruyter, 1986, pp. 370 et seqq.

[25] J. Russel, 'The Critical Legal Studies Challenge to Contemporary Mainstream Legal Philosophy', *Ottawa Law Review*, No. 18, p. 1, at p. 3.

[26] R. Unger, 'The Critical Legal Studies Movement', *Harvard Law Review*, No. 96, 1983, p. 561, at p. 563.

[27] J. Russel, 'The Critical Legal Studies Challenge to Contemporary Mainstream Legal Philosophy', *Ottawa Law Review*, No. 18, p. 1, at p. 18; L. Schwartz, 'With Gun and Camera Through Darkest CLS-Land', *Stanford Law Review*, No. 36, 1984, p. 413, at p. 431.

> "A sound body of law (…) should correspond with the actual feelings and demands of the community, whether right or wrong."[28]

While CLS supported the Realist's argument against systematization being an autonomous science, they strongly opposed that the underlying values and concerns shall not be subject to qualitative assessment. They expanded and modified the Legal Realist's findings to a legal method that advanced

> "open ended disputes about the basic terms of social life, disputes that people call ideological, philosophical, or visionary."[29]

It follows that these ideas sit uneasy with the scholastic tradition which emphasized the coherency criterion as a basis for analysis. CLS hence not only accused such arguments as being not value-free scientific assumptions, but that they in fact formed ideological manipulations by simply hiding better the policy choices the systematizer aims to rationalize.[30]

From these discussions one submits an important point: Lawyers may decide along the lines of doctrine. However, first, these lines of doctrine are already implemented against the background of certain political goals, which may come in the guise of principles and values. Second, lawyers still *decide* on the basis of the code implementing their personal experiences in the decision. Hence, code-based reasoning is far from being impersonal. Systematization and the application of systems are highly influenced by individuals, which perform their actions in accordance with external factors such as legal culture.[31] Hence, systematization creates institutional ideals.[32] Systematizers do not re-present the law; they re-construct it in the view of their respective institutional ideal,[33] regardless of whether it stems from their individual or a collective sphere.[34] In the twenty-first century, however, we can already conclude that systematization and the *corpus iuris*, despite or maybe because this strong political impact,[35] have survived their main criticism.[36] It has

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[28] O. Holmes, *The Common Law*, Boston 1881, p. 41.

[29] R. Unger, 'The Critical Legal Studies Movement', *Harvard Law Review*, No. 96, 1983, p. 564.

[30] See especially D. Kennedy, *Legal Education and the Reproduction of Hierarchy: A Polemic Against the System: A Critical Edition,* New York, New York University Press, 2004a; D. Trubek, 'Where the Action is: Critical Legal Studies and Empiricism', *Stanford Law Review*, No. 36, 1984, pp. 575 et seqq.

[31] J. Bell, *French Legal Cultures*, London, Butterworths, 2001, 5.

[32] J. Bengoetxea, *Legal System as a Regulative Ideal*, in: Koch/Neumann (eds.), Praktische Vernunft und Rechtsanwendung, ARSP-Beiheft 53, 1994, p. 65, at p. 71.

[33] J. Bengoetxea, *Legal System as a Regulative Ideal*, in: Koch/ Neumann (eds.), Praktische Vernunft und Rechtsanwendung, ARSP-Beiheft 53, 1994, p. 65, at p. 71.

[34] J. Bell, *French Legal Cultures*, London, Butterworths, 2001, p. 5 highlights both possibilities.

[35] See inter alia R. van Caenegem, *European Law in the Past and Future*, Cambridge, University Press, 2002, pp. 89 et seqq.

[36] See especially T. Ackermann, 'Public Supply of Optional Standardized Consumer Contracts: A Rationale for the Common European Sales Law?', *Common Market Law Review*, No. 50, 2013, p. 11; V. Nourse/G. Shaffer, 'Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory?', *Cornell Law Review*, No. 95, 2009, p. 64, who emphasise that neither law and economics, simple legal doctrine nor CLS may be equipped to finding answers to contemporary challenges.

proven to be more than just a relic of earlier jurisprudential thinking,[37] as the vital use of systematization in EU product safety regulation has already proven. This does not mean, however, that this development is good or desirable.

The Technique of Systematization – Systematization Through Modelling

Although the idea of systematic legal thinking – although not in the same guise as we know it today – originally harkens back to the Roman Empire, the Bologna law school and pope *Gregory VII*,[38] the technique of systematization has only been subject to in-depth investigation in the framework of the growing nation-states from the eighteenth century onwards.[39] As part of most European countries' state-making agendas, systematization unfolded its massive power as a state-creating feature.[40] As such, the technique of systematization aroused the interests of several scholars, out of which *Max Weber*,[41] and *Carl v. Savigny* are still of major importance today.[42]

Savigny never explicitly defined the technique of the systematization of law. We may, however, apply his way of thinking about legal and society systems to understand the technique of systematization. In my view, his ideas, despite the criticism they have received,[43] still have a major influence on today's understanding of Western law.[44] According to *Savigny*, legal thinking aimed at detecting a 'general rule', which he called *Rechtsinstitut*. He was convinced that

> "the judgment over the single law is only possible through investigating the relationship of the special facts to a general rule, which masters the single laws."

This *Rechtsinstitut* is of an organic nature, consists of vital parts and is therefore subject to constant development.[45] The technique of systematization would be to find such general rules by objective scientific method and enshrine them into

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[37] G. Sydow, *Verwaltungskooperation in der Europäischen Union*, Tübingen, Mohr Siebeck, 2004, p. 118.

[38] See later in this Chapter.

[39] A. v. Bogdandy, 'Founding Principles', in: v. Bogdandy/Bast (eds.), *Principles of European Constitutional Law*, Oxford/München/Baden-Baden, Hart/C.H. Beck/Nomos, 2nd ed., 2010, pp. 11, at p. 15.

[40] R. van Caenegem, *European Law in the Past and Future*, Cambridge, University Press, 2002, pp. 90 et seqq.

[41] See A. v. Bogdandy, 'Founding Principles', in: v. Bogdandy/Bast (eds.), *Principles of European Constitutional Law*, Oxford/München/Baden-Baden, Hart/C.H. Beck/Nomos, 2nd ed., 2010, pp. 11, at p. 15.

[42] See D. Kennedy, 'The Disenchantment of Logically Formal Legal Rationality or Max Weber's Sociology in the Genealogy of the Contemporary Mode of Western Legal Thought', *Hastings Law Journal*, No. 55, 2004b, p. 1033.

[43] See R. Kiesow, 'Rechtswissenschaft – was ist das?', *Juristenzeitung*, 2010, pp. 585 et. seqq.

[44] R. Zimmermann, 'Savigny's Legacy, Comparative Law, and the Emergence of a European Legal Science', *Law Quarterly Review*, No. 112, 1996, pp. 567 et seqq.

[45] C. v. Savigny, *System des heutigen römischen Rechts*, Aalen, Scientia, 1981 (reprint from original 1840), p. 9.

legislation. The contemporary reading of *Savigny's* concept of systematization may be exemplified by a passage of *v. Bogdandy's* work on EU principles. According to *v. Bogdandy's* analysis, in *Savigny's* eyes

> "positive legal material is being transcended, not by way of political, historical or philosophical reflection, but through structure-given concepts such as 'state', 'sovereignty', or 'individual rights in public law', which are perceived as specifically legal and thus autonomous, and thus fall under the exclusive competence of legal scholarship."[46]

Although *Savigny* hence formed the basis with which to understand the technique of contemporary systematization, its details and application in context were identified primarily by *Weber*[47]: Although it is true that the legal system nowadays is different to the one *Weber* observed,[48] his theory still has explanatory value. The alleged uniqueness of the European legal system compared to those of other civilizations forms the starting ground for *Weber's* analysis of legal systematization in Europe. In fact, the whole quality of European law derived from its logical systematization, which no other civilization had been capable of doing.[49] In his view, it basically differed in its formal and structural qualities, which he termed 'rationality'.[50] Rationalization of the law means the generalization of legal rules and the formation and systematization of legal institutions.[51]

The generalization and systematization of law in Europe thereby forms an essential part of the rationalization of law,[52] which would be highly conductive to Europe's capitalist development.[53] *Weber* distinguished between value rationality and instrumental rationality:

> "Examples of pure value-rational orientation would be the actions of persons who, regardless of possible cost to themselves, act to put into practice their convictions, of what seems to them to be required by duty, honor; the pursuit of beauty, a religious call, personal loyalty, or the importance of some "cause" no matter in what it consists. […] Action is instrumentally rational (zweckrational) when the end, the means, and the secondary results are all rationally taken into account and weighed."[54]

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[46] A. v. Bogdandy, 'Founding Principles', in: v. Bogdandy/Bast (eds.), *Principles of European Constitutional Law*, Oxford/München/Baden-Baden, Hart/C.H. Beck/Nomos, 2nd ed., 2010, pp. 11, at p. 15.

[47] Wherever the contextual interpretation of Weber's thought deems it to be necessary, I will quote secondary literature instead of Weber's original writing in order to explain Weber's thinking.

[48] H. Collins, *Regulating Contracts*, Oxford, University Press, 2005, p. 194.

[49] D. Trubek, 'Max Weber on Law and the Rise of Capitalism', *Wisconsin Law Review*, 1972, p. 724.

[50] D. Trubek, 'Max Weber on Law and the Rise of Capitalism', *Wisconsin Law Review*, 1972, p. 724.

[51] T. Raiser, 'Max Weber und die Rationalität des Rechts', in *Juristenzeitung*, Vol. 63 (2008), pp. 853–859, at p. 854.

[52] See in this respect also W. Schluchter, *Die Entwicklung des Okzidentalen Rationalismus*, Tübingen, Mohr Siebeck, 1979, pp. 132, p. 143.

[53] M. Weber, *Economy and Society*, Roth/Wittich (eds.), E. Fischoff et al. (trans.), Vol. II, Berkeley (CA), University of California Press, 1978, p. 883; D. Trubek, 'Max Weber on Law and the Rise of Capitalism', *Wisconsin Law Review*, 1972, p. 725; H.-J. Berman, *Law and Revolution,* Cambridge (MA), Harvard University Press, 1983, p. 11.

[54] M. Weber, *Economy and Society*, Roth/Wittich (eds.), E. Fischoff et. al. (trans.), Vol. II, Berkeley (CA), University of California Press, 1978, p. 26.

The crucial role that *Weber* hence assigned to rationality in the European legal system made it necessary for him to further investigate the content and design of the systematization of law. In line with his analysis of the specific features of the European legal system, law required the formulation of abstract principles that allow for deductive interpretation.[55] The method for the detection and organisation of such principles was 'systematization', which represented

> "an integration of all analytically derived legal propositions in such a way that they constitute a logically clear, internally coherent and, at least in theory, gapless system of rules.'[56] Systematization described 'the collection (…) by logical means of all the several rules recognized as legally valid into an internally consistent complex of abstract legal propositions."[57]

"Systematization", *Weber* believed, forms "a late stage"[58] in the process of the development of a legal order. Formal and material rationality read in conjunction, in fact, derived

> "from a combination of magical formalism and irrationality resulting from disclosure in the primitive legal process, maybe taking a detour over material and informal expedient rationalising based on a theocracy and patrimoniality to increasingly logical rationality and systematization and leads therefore – first of all from a solely external point of view – to an increasingly logical sublimation and deductive precision of the law and an increasingly rational techniques describe the legal process."[59]

In continuation of the interpretation of *W. Schluchter*, *M. Weber* hence differentiated between formal and material systematization, both of which required respective structural principles.[60] While formal systematization is concerned with the legal process, material rationality looks at the legal norms,[61] whether they are justifiable with general ethical and political maxims or economic objectives.[62] In my view, we should understand these differences as follows: Formal systematization looks at the process of systematization, that is its techniques, the act of making of the system such as the drafting of norms, the selection process of evaluating certain norms as systematic and leaving out other provisions etc. Material systematization is, by contrast,

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[55] M. Weber, *Wirtschaft und Gesellschaft. Grundriß der Verstehenden Soziologie*, Tübingen, Mohr Siebeck, 1922, p. 492.

[56] M. Weber, *Wirtschaft und Gesellschaft. Grundriß der Verstehenden Soziologie*, Tübingen, Mohr Siebeck, 1922, p. 363, translation as provided by M. Weber, *Economy and Society*, Roth/Wittich (eds.), E. Fischoff et al. (trans.), Vol. II, Berkeley (CA), University of California Press, 1978, p. 656.

[57] M. Weber, *Economy and Society*, Roth/Wittich (eds.), E. Fischoff et al. (trans.), Vol. II, Berkeley (CA), University of California Press, 1978, p. 657.

[58] M. Weber, *Economy and Society,* Roth/Wittich (eds.), E. Fischoff et al. (trans.), Vol. II, Berkeley (CA), University of California Press, 1978, p. 656.

[59] M. Weber, *Wirtschaft und Gesellschaft. Grundriß der Verstehenden Soziologie*, Tübingen, Mohr Siebeck, 1956, p. 504, translation by author.

[60] W. Schluchter, *Die Entwicklung des Okzidentalen Rationalismus*, Tübingen, Mohr Siebeck, 1979, p. 143.

[61] W. Schluchter, *Die Entwicklung des Okzidentalen Rationalismus*, Tübingen, Mohr Siebeck, 1979, p. 143.

[62] T. Raiser, 'Max Weber und die Rationalität des Rechts', in *Juristenzeitung*, Vol. 63 (2008), pp. 853–859, at p. 854.

concerned with the norms *per se*, which is to say it looks into the 'readiness' of legal material for systematization.[63] Accordingly, in order to acquire material structural principles, legal norms must have the design of objective norms.[64] Such objective norms need to have the ability to allow for abstraction, which means its deduced principles can be used as the basis for systematization and later judgments.[65] They then form 'modern law', which no longer rests on concrete and particularistic norms but on "a consistent system of abstract rules which have normally been intentionally established."[66] In short, formal structures of systematization describe the technique by which systematization is achieved (replacing or hiding value- or instrumentally rational arguments behind the smooth running along an abstract code), while material structures describe the principles, aims and goals on which they are based (may they be value-rational or instrumentally-rational).[67] This whole systematization exercise needs to be perceived in *Weber's* attempt to

> "removing public power from the "arbitrariness" of the ruler and switching to it the mechanical execution of legal statutes, systematically shutting down the ambitions and motivations of the actors so that the bureaucratic operation can only "run on track" within the narrow corridor of its rule-defined functionality."[68]

This 'running on track', however, triggers exactly the risk to hide the instrumentally and value-rational elements of law by methodologically controlled and logically structured doctrines.[69] It is exactly this fact, read together with the distinction between systematization's formal and material features that will later be of major importance in illustrating the active, political element of systematization as contribution to the nation-, respective market-building in Europe.

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[63] W. Schluchter, *Die Entwicklung des Okzidentalen Rationalismus*, Tübingen, Mohr Siebeck, 1979, p. 143.

[64] W. Schluchter, *Die Entwicklung des Okzidentalen Rationalismus*, Tübingen, Mohr Siebeck, 1979, p. 143.

[65] W. Schluchter, *Die Entwicklung des Okzidentalen Rationalismus*, Tübingen, Mohr Siebeck, 1979, p. 143.

[66] M. Weber, *Economy and Society,* Roth/Wittich (eds.), E. Fischoff et. al. (trans.), Vol. I, Berkeley (CA), University of California Press, 1978, p. 217, cited after W. Schluchter, *The Rise of Western Rationalism – Max Weber's Developmental History*, G. Roth (trans.), Berkeley (CA), University of California Press, 1981, pp. 107 et seqq.

[67] In this sense also K. Mathis, 'Cultures of Administrative Law in Europe: From Weberian Bureaucracy to 'Law and Economics', in: Helleringer/Purnhagen (eds.), *Towards a European Legal Culture*, München/Oxford/Baden-Baden, 2013 (forthcoming).

[68] K. Mathis, 'Cultures of Administrative Law in Europe: From Weberian Bureaucracy to 'Law and Economics', in: Helleringer/Purnhagen (eds.), *Towards a European Legal Culture*, München/Oxford/Baden-Baden, 2013 (forthcoming), with reference to E. Pankoke/H. Nokielski, *Verwaltungssoziologie*, Stuttgart et al., Kohlhammer, 1977, 13 et seqq.

[69] See to this end C. Joerges, 'The Europeanisation of European Private Law as a Rationalisation Process and a Contest of Disciplines – an Analysis of the Directive on Unfair Terms in Consumer Contracts', *European Review of Private Law*, 1995, p. 179 et seqq.; H.-W. Micklitz, 'Some Considerations on Cassis de Dijon and the Control of Unfair Contract Terms in Consumer Contracts', in: Boele-Woelki/Grosheide (eds.), *The Future of European Contract Law: Essays in Honour of Ewoud Hondius*, 2007, New York, Wolters Kluwer Aspen Publishing, p. 387.

In my view, we can only understand these ideas if we also take into account *Weber's* studies on the different types of social acting.[70] Weber differentiated *Idealtypen* from *Durchschnittstypen.*[71] While the investigated objects that make *Durchschnittstypen* belong to one type must be qualitatively homogenous, the selection of *Idealtypen* embraces a normative element that values certain features of heterogeneous objects of investigation as essential. *Weber's* principles in a gapless legal system may hence in fact be comparable to his ideas on the construction of an *Idealtypus*. However, the identification of such a type is, in *Weber's* theory, not subject to any transpersonal entity such as a 'Geist' or 'humanity'[72] but based on a selection procedure steered by 'logic'.[73] Accordingly, despite its impersonal character, systematization inherited a value element, which classifies legal data as belonging to the system or not. In contrast to *Savigny*, systematization in this respect is normative and hence subjective, not objective.

Today, scholars combine *Savigny's* and *Weber's* ideas of systematization and directly admit its political regulatory function. They describe the technique of systematization generally and more loosely as a construction of models.[74] In EU law, the starting point of systematic modelling in European law is the detection of a certain number of European legal acts, which are harvested for common basic structures. They will then be deduced to a coherent and consistent basic conception, which then allows for differentiation from other forms.[75]

The Tools of Systematization – Legal Casuistry

The so described analytical-synthetic work of lawyers results in a variety of legal casuistry.[76] They form several tools of systematization with different intensities and goals. I will broadly conceptualise the different concepts, terminology and meanings related

[70] *W. Schluchter* already rightfullly highlighted that each of *Weber's* sociological analysis need to be evaluated in context with the others. Particularly the analysis of authority and the one of law need to be evaluated jointly, see W. Schluchter, *Die Entwicklung des Okzidentalen Rationalismus*, Tübingen, Mohr Siebeck, 1979, p. 136.

[71] M. Weber, *Wirtschaft und Gesellschaft. Grundriß der Verstehenden Soziologie*, Tübingen, Mohr Siebeck, 1922, pp. 3 et seqq., 10 et seqq.

[72] D. Kennedy, 'The Disenchantment of Logically Formal Legal Rationality or Max Weber's Sociology in the Genealogy of the Contemporary Mode of Western Legal Thought', *Hastings Law Journal*, No. 55, 2004b, p. 1036.

[73] M. Weber, *Economy and Society*, Vol. II, Berkeley (CA), University of California Press, 1978, p. 657 (G. Roth/C. Wittich, eds.).

[74] I am indebted to G. Sydow, from whom I borrowed the terminological combination of systematization through modelling ('Systembildung an Hand von Modellen') and systematization through their application to reference areas ('Systembildung an Hand von Referenzgebieten'), see G. Sydow, *Verwaltungskooperation in der Europäischen Union*, Tübingen, Mohr Siebeck, 2004, p. 119 et seqq.

[75] G. Sydow, *Verwaltungskooperation in der Europäischen Union*, Tübingen, Mohr Siebeck, 2004, p. 119 et seqq., who also provides an overview of the different functions commonly associated with such systematization.

[76] W. Schluchter, *Die Entwicklung des Okzidentalen Rationalismus*, Tübingen, Mohr Siebeck, 1979, p. 132.

thereto, depending on their density and the consequences attributed to them. The Council of the EU provided relatively strict definitions for two features of systematization, consolidation and codification, in its conclusions of the European Council in Edinburgh on 11–12 December 1992[77] and similarly for codification in the Interinstitutional Agreement of 20 December 1994 Accelerated working method for official codification of legislative texts.[78] However, codification and consolidation are only two out of a variety of legal casuistry that result from the analytical-synthetic work of lawyers.[79] I hence understand these concepts as a starting point only. Within this book, I will adopt a broader understanding of systematization, which also comprises other forms such as the collection of laws and systematization through application.[80] In particular, I also embrace phenomena that result from a specific systematic worldview such as grouping individuals as addressees of regulation. Depending on the development of the legal system and the consequences of systematization, the 'outcome' of systematization may be categorised in the mere collection of laws, which is usually connected to a timely factor (section "Collection"), the consolidation and compilation of law, which recasts existing law but does not supersede pre-existing law (section "Consolidation and compilation"), codification, which creates a comprehensive legal framework for society and abrogates all previous sources of law (section "Codification"), commentaries and law journals, which form the logical appendix of codifications (section "Commentaries and law reviews"), and finally systematization through application, which has recently become a prominent feature of new governance (section "Systematization through application ('New Governance')"). The findings will be summarised (section "Summary").

Collection

The collection of law comprises a publication of the statutes enacted in a certain timeframe. The timeframe ranges from annual publication[81] to publication on a daily basis.[82] Pre-existing law stays in force and the collection aims at ensuring accessibility to the sometimes scattered and difficultly obtainable legal acts. Such collection is usually carried out by the governmental or judicial administration. The Publications

[77] See Conclusions of the European Council in Edinburgh in 11–12 December 1992, p. 37 (Fn. 1).

[78] Interinstitutional Agreement of 20 December 1994 Accelerated working method for official codification of legislative texts, OJ C 102, 4.4.1996, p. 2–3.

[79] W. Schluchter, *Die Entwicklung des Okzidentalen Rationalismus*, Tübingen, Mohr Siebeck, 1979, p. 132.

[80] I am indebted to J. Basedow and W. Voermans, C. Moll, N. Florijn, P. van Lochem, from whose articles I borrowed parts of the terminological categorisation of systematization in this book. See in detail J. Basedow, 'The Challenge of Recodification Worldwide: Tranjurisdictional Codification', *Tulane Law Review*, No. 82, 2009, pp. 975 et seqq. W. Voermans/C. Moll/N. Floijn/P. v. Lochem, 'Codification and Consolidation in the European Union: A Means to Untie Red Tape', *Statute Law Review*, 2008, No. 29, pp. 74 et seqq.

[81] The Statutes of the United States at Large are published annually, see J. Basedow, 'The Challenge of Recodification Worldwide: Tranjurisdictional Codification', *Tulane Law Review*, No. 83, 2009, Fn. 1.

[82] The Official Journal of the EU get published daily, see the website of the Publication Office of the EU, hyperlink "about us", available at http://publications.europa.eu/about_us/index_en.htm.

Office of the EU, for example, publishes the Official Journal of the EU.[83] An older example for such compilations is the United States Statutes at Large.[84] Previously, they were published by the private firm of Little, Brown and Company, which was granted authority to do so by a joint resolution of Congress.[85] Since 1874, however, the US Government Printing Office[86] has been in charge of this collection.

Consolidation and Compilation

The consolidation and compilation of law describes a collection and recasting of the law of a specific legal sector in order to harmonise its terminology and consistency. It can be described as a tidying up of the messy work of legislators, judges and scholars, which led to several amendments of the initial documents and terminological inconsistencies.[87]

The intensiveness of consolidation and compilation, however, may vary depending on the exercise of the value element inherent in the selection process of the respective legal documents that are chosen for consolidation and compilation.[88] In its basic meaning, consolidation describes, according to the Conclusion of the Edinburgh European Council of 11–12 December 1992, the regrouping of the diverse fragments of legislation governing a given matter without affecting the validity of those fragments.[89] This understanding downplays the role of consolidation as it explicitly characterises such a regrouping exercise as having no legal effect.[90] Others accept such a value element in the selection process and allow for some certain legal impact of consolidation. In their eyes, consolidation and compilation explores structural decisions and a thereon constructed legal corpus of legal doctrine that constitute the identity of the respective discipline and are independent to a certain extent from the non-systematically law making practice of intergovernmental conferences.[91] With emphasis on EU law, consolidation sought to find

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[83] Accessable via eur-lex, available at http://eur-lex.europa.eu/JOIndex.do.

[84] See the website of the National Archives, available at http://www.archives.gov/federal-register/publications/statutes.html.

[85] H.R.J. Res. 10, 28th Cong. (1845), accessable via the website of the Library of Congress, available at http://memory.loc.gov/cgi-bin/ampage?collId=llsl&fileName=005/llsl005.db&recNum=836.

[86] See the website of the US Government Printing Office, available at http://www.gpo.gov/.

[87] See R. Posner, 'In Memoriam: Bernard D. Meltzer (1914–2007)', *University of Chicago Law Review*, No. 74, 2007, p. 437, although Posner rather subscribes these attributes to the work of a scholar, which therefore points more towards him describing codification.

[88] See for an illustrative description of the numerous consolidation techniques in Europe W. Voermans/C. Moll/N. Floijn/P. v. Lochem, 'Codification and Consolidation in the European Union: A Means to Untie Red Tape', *Statute Law Review*, 2008, No. 29, pp. 75 et seqq.

[89] See Conclusions of the European Council in Edinburgh in 11–12 December 1992, p. 37.

[90] See Conclusions of the European Council in Edinburgh in 11–12 December 1992, p. 37.

[91] A. v. Bogdandy, 'Europäische Prinzipienlehre' in: v. Bogdandy (ed.), *Europäisches Verfassungsrecht* (2003), p. 150, translation by author, in German original: "das Fokussieren der Aufmerksamkeit auf Strukturentscheidungen und einen darauf aufbauenden, die Identität der Disziplin bestimmenden Kernbestand rechtsdogmatischer Figuren, die einen gewissen Eigenstand gegenüber der nicht immer systematisch überzeugenden Rechtsetzungspraxis der Regierungskonferenzen aufweisen."

> "whether there are legal principles behind the punctual Directives, which may suffice to identify generally binding interpretations and allow for a certain generalisation".[92]

This technique is not only described as generalization, but also as penetration.[93]

Both groups agree on the fact that previous law regularly stays in effect, but changes are usually only adopted according to the new consolidated code. However, this criterion is not as rigid as it is with collection, as there are some codes that also supersede pre-existing law. However, the main aim of consolidation and compilation is to harmonise pre-existing law according to its terminology and consistency. It is usually conducted by the governmental or legislatory administration, and is sometimes ultimately approved by the legislator.[94] An indication of a consolidated text or compilation is usually its name. They are regularly referred to as 'code' or the equivalent in the respective language. Examples in this respect are the French *Code de la Consummation*, the Italian *Codice del Consumo* or the United States Code. However, this criterion is only valid to distinguish compilations from collections. Codifications may be referred to as 'code' as well. See *inter alia* the Louisiana Civil Code or the English translation of the *German Bürgerliches Gesetzbuch* as German Civil Code, which are both codifications rather than compilations. At EU level, a sound example of such compilation is the pharmacode.

Codification

Codification is understood as the adoption of a formal legislative Union act through the relevant procedures, and simultaneous repealing all pre-existing texts.[95] Codification of law hence aims at the creation of a comprehensive legal framework, a loose bundle of rules,[96] which reflects the belief, ideas, and values of society at

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[92] J. Basedow, 'Das BGB im künftigen europäischen Privatrecht – Der hybride Kontext', *Archiv für die civilistische Praxis*, No. 200, 2000, p. 453, translation by author, in German original: "Andererseits erlaubt aber die Verdichtung des europäischen Gemeinschaftsprivatrechts die Frage, ob nicht hinter der punktuellen Richtlinien Rechtsgrundsätze stehen, die sich für eine verbindende Sinngebung eignen und eine gewisse Verallgemeinerung gestatten". In the same vein H.-W. Micklitz, 'An Expanded and Systemized Community Consumer Law as Alternative or Complement?, *European Business Law Review*, No. 13, 2002, pp. 583 et seqq.

[93] H.-W. Micklitz, 'Book Review Bettina Heiderhoff: Grundstrukturen des nationalen und europäischen Verbrauchervertragsrechts, insbesondere zur Reichweite europäischer Auslegung' *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, No. 72, 2008, p. 409: "[…] Verbraucherrecht [hat] europäisch […] einen Grad an Verdichtung erreicht […], der jedenfalls nach kontinentaleuropäischen Rechtsverständnis eine systematische Durchdringung verlangt."

[94] See for details to this end W. Voermans/C. Moll/N. Floijn/P. v. Lochem, 'Codification and Consolidation in the European Union: A Means to Untie Red Tape', *Statute Law Review*, 2008, No. 29, pp. 74 et seqq.

[95] See Conclusions of the European Council in Edinburgh in 11–12 December 1992, p. 37 (fn. 1) and No. 1 of the Interinstitutional Agreement of 20 December 1994 Accelerated working method for official codification of legislative texts, OJ C 102, 4.4.1996, p. 2–3. On the literal meaning of codification and other forms of definition see R. Zimmermann, 'Codification: history and present significance of an idea', *European Review of Private Law*, No. 3, 1995, pp. 96 et seqq.

[96] G. Bachmann, 'Optionsmodelle im Privatrecht', *Juristenzeitung*, 2008, pp. 14–15.

large. It is an operating manual for society, which likewise bases on the society's culture and has an in-build mechanism for organic change.[97] It is the "late product"[98] of a development of a legal order, where a codified system of abstract legal principles ultimately substitutes all prior legislation in this sector.[99] Codification aims at providing exhaustive legislation on whole areas of the law by providing a set of provisions, which is, in principle, gapless.[100]

> "A 'code' […] is assumed to carry within it all the answers to all possible questions."[101]
> It provides for a "fresh start of the legal system, abrogating all previous sources of law."[102]

Such codification is regularly undergone by legal experts, which are – at least not officially – tied to any political decision-making.[103] As professors of law usually conduct these efforts,[104] such systematization is often referred to as creating

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[97] H. Collins, *The European Civil Code – The Way Forward*, Cambridge, University Press, 2008, pp. 130–132; H.-W. Micklitz/S. Weatherill, 'Federalism and Responsibility', in: Micklitz/Roethe/Weatherill (eds.), *Federalism and Responsibility – A Study on Product Safety Law and Practices in the European Community*, London/Dodrecht/Boston, Graham&Trontman/Martinus Nijhoff, 1994, p. 8 claim that any legal system 'contain an unavoidable, though in detail unseen, capacity for change'.

[98] M. Weber, *Wirtschaft und Gesellschaft. Grundriß der Verstehenden Soziologie*, Tübingen, Mohr Siebeck, 1922, p. 396, translation by author. For a larger context of the interpretation of Max Weber's idea of systematization as a late product see W. Schluchter, *Die Entwicklung des Okzidentalen Rationalismus*, Tübingen, Mohr Siebeck, 1979, p. 133.

[99] W. Teubner, *Kodifikation und Rechtsreform in England*, Berlin, Duncker & Humblot, 1974, p. 22–23; J. Basedow, 'The Challenge of Recodification Worldwide: Tranjurisdictional Codification', *Tulane Law Review*, No. 83, 2009, p. 975; A. v. Mehren, 'Some Reflections on Codification and Case Law in the Twenty-First Century', *University of California Davis Law Review*, No. 31, 1998, p. 668.

[100] B. Fauvarque-Cosson, 'The Need for Codified Guiding Principles and Model Rules in European Contract Law', in: Brownsword/Micklitz/Niglia/Weatherill (eds.), *The Foundations of European Private Law*, Oxford, Hart, 2011, p. 73, at p. 79 'A code is a coherent set of rules in a specific fields of the law.'

[101] G. Gilmore, 'Legal Realism: Its Cause and Cure', *Yale Law Journal*, No. 70, 1961, p. 1037, at p. 1043.

[102] J. Basedow, 'The Challenge of Recodification Worldwide: Tranjurisdictional Codification', *Tulane Law Review*, No. 83, 2009, p. 975.

[103] This is not to say that codification is hence free from political determinations. In fact, the impact of political determinations on codification has been subject to debate, see *inter alia* H. Schepel, 'Professorenrecht? The Field of European Private Law', in Jettinghoff/Schepel (eds.), *In Lawyers' Circles – Lawyers and European Legal Integration*, The Hague, Elsevier Reed, 2004; id., 'Professorenrecht? Le champ du droit européen', *Critique Internationale*, No. 26, 2005a, pp. 147 et seqq.; J. Basedow, 'The Challenge of Recodification Worldwide: Tranjurisdictional Codification', *Tulane Law Review*, No. 83, 2009, p. 976, described political influence on codification as follows: "Codifiying the law is much more than picking fruit ripened on the trees of legal theory. The abrogation of the previous law, which is inherent to codification, always affects vested interests regardless of the consistent or inconsistent, uniform or nonuniform character of the previous rules."

[104] See for an in-depth analysis of the involvement of law specialist in law making M. Weber, *Economy and Society,* Roth/Wittich (eds.), E. Fischoff et. al. (trans.), Vol. II, Berkeley (CA), University of California Press, 1978, pp. 775 et seqq. U. Schneider assigns legal consultance being an integral part of legal science. In his view, one of the main tasks of legal science is to build a bridge between society and politics, see U. Schneider, 'Zur Verantwortung der Rechtswissenschaft', *Juristenzeitung*, No. 33, 1987, pp. 699 et seqq.

Professorenrecht.[105] However, the differences between codification and consolidation of law may only be understood if one puts them into their respective historical contexts, which will be the task of the rest of this chapter. At this point it should be pointed out that codification ideas stem largely from the *grand ideès* of the period of Enlightenment and natural law, while consolidation may be seen as an offspring of pragmatism and rationalism.[106] The most prominent examples of codifications are the French *Code Civil* and the German *Bürgerliches Gesetzbuch*. EU product regulation, however, is also getting close to codifications. We may already identify REACH as just such a codification.

Commentaries and Law Reviews

Commentaries and law reviews may be seen as the logical appendix of codifications. If codifications have a built-in mechanism for organic change, commentaries illustrate this process. The purpose of commentaries and law reviews is indeed twofold. First, they correct the static nature of the black letter code and adjust it to changing societal values and needs. Commentaries and law reviews aim at merging the black letter law with its application in practice, by putting the respective legal acts into the context of the legal environment. Commentaries and law reviews therefore ensure that law goes beyond the classical 'law of the books', but is applied as 'law in action'.[107] The existence of commentaries and law reviews are the practical example that law does not exist as codified *Gesetzesinstitute* and *Rechtssätze*, but rather relies on many sources, factors and materials and, last but not least, judge-made law. Indeed, it is nowadays undisputed, as the former Vice President of the German Supreme Court *Bundesgerichtshof J. Wenzel* held in 2008 that "finding justice without grabbing at least one commentary does practically not take place."[108] Although this role of commentaries in the way *Wenzel* described them might be subject to the particularities of the German legal system, we find in fact in any European legal system evidence of a legal community that influences the legal system via published analysis in commentaries or law reviews. The EU legal system in general and

[105] H. Schepel, 'Professorenrecht? The Field of European Private Law', in Jettinghoff/Schepel (eds.), *In Lawyers' Circles – Lawyers and European Legal Integration*, Elsevier Reed, 2004; id., 'Professorenrecht? Le champ du droit européen' (2005a), *Critique Internationale*, No. 26, pp. 147 et seqq.

[106] See for the difference between the periods H.-W. Micklitz, 'Introduction – social justice and access justice in private law', in: H.-W. Micklitz (eds.), *The many concepts of social justice in European Private Law*, Cheltenham, Edward Elgar 2011, p. 3, at pp. 8–15.

[107] The distinction between 'law of the books' and 'law in action' dates back to the 1910 article of R. Pound, 'Law in the books and Law in action', *American Law Review*, No. 44, 1910, pp. 12 et seqq. and was further developed especially at the University of Wisconsin-Madison Law School as the "Wisconsin idea", see P. Carrington/ E. King, 'Law and the Wisconsin Idea', *Journal of Legal Education*, No. 47, 1997, pp. 297 et seqq.

[108] J. Wenzel, 'Die Bindung des Richters an Gesetz und Recht', *Neue Juristische Wochenschrift,* No. 61, 2008, p. 341, at p. 348, translation by KP.

European product safety regulation based on risk is no exception in this respect.[109] *J. Esser* best describes the purpose of commentaries in this sense, although he described in the respective passage only the content of the theory of 'comparative jurisprudence' and did not intend to discuss the purpose of commentaries or law reviews. However, the ideas fit perfectly into the reason and scope of commentaries:

> "(…) das Gesetzesinstitut und der kodifizierte Rechtssatz (ist) nur eine Kategorie unter den entscheidungsbildenden Faktoren und Materialien: Logik, Prinzipien und Begriffe des Rechts, Präjudizien und andere Fundstellen von rules. Diese bestimmen insgesamt den Vorgang der "Interpretation" und "Fallbearbeitung" oder "-einordnungen", wobei die Einheit des "Systems" angesichts des notwendigen Antagonismus mehrer Prinzipien und Faktoren nicht im vorgegebenen corpus iuris liegt, sondern im Auslegungsakt jeweils neu hergestellt wird."[110]

Esser hence highlighted the second purpose of commentaries and law reviews. The legal system, as he highlighted, does not develop out of the *corpus iuris* itself, it develops through interpretation. Hence, the scientific evaluation of judgments[111] and the interpretation of the code not only helps to secure stability and continuity of the legal system,[112] it in fact creates it on the basis of the current society. In continental Europe especially, many pieces of legislation would be scarcely manageable if they were not ordered and put into the context of the respective legislation and interpretation. *R. Pound* has briefly and brilliantly summarised this feature of the *corpus iuris*:

> "Hence all thinking about law has struggled to reconcile the conflicting demands of the need of stability and of the need of change. Law must be stable and yet it cannot stand still."[113]

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[109] See for the EU legal system M. Maduro, 'Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism', *European Journal of Legal Studies*, No. 1 (2), p. 15. "The Court of Justice is one in a community of legal actors that 'constructs' the EU legal order. Such constitutional pluralism means that the development of EU law is dependent on a discursive process with other actors and that it is both shaped by that discourse and has to be shaped in the light of its likely 'appropriation' by those actors." See inter alia the European Journal of Risk Regulation, which aims exactly at such a purpose, see A. Alemanno, 'The Birth of the European Journal of Risk Regulation', *European Journal on Risk Regulation*, No.1, 2010, p. 2: "It is time to transcend these partial and fragmented approaches and recognise – through a new journal – the emergence of a novel field of studies: the EU law of risk regulation. It is true that many different approaches to risk and its management have been developed over the past decades. What is lacking is a unified theory of European risk regulation. The main purpose of the Journal is therefore to promote and develop the study and understanding of European risk regulation. The EJRR offers a forum for informed and scholarly discussion on why, how and by whom new and old risks are managed and regulated across policy domains in Europe and beyond."

[110] J. Esser, *Grundsatz und Norm in der richterlichen Fortbildung des Privatrechts*, Tübingen, Mohr Siebeck, 1964, p. 20.

[111] G. Roth highlights this evaluation as the main purpose of commentaries, see G. Roth, '§ 241 BGB, Methode der Rechtsschöpfung und –darstellung', in: *Münchener Kommentar zum BGB*, 5th (old) ed., München, C.H. Beck, 2007a, para 36.

[112] J. Wenzel, 'Die Bindung des Richters an Gesetz und Recht', *Neue Juristische Wochenschrift,* 2008, p. 345 (348).

[113] R. Pound, *Interpretation of Legal History,* 1923, 1.

Commentaries and law reviews are, as they form the logical appendix to codification, also regularly edited and authored by legal scholars. There are numerous examples of commentaries of a wide number of legal acts existing, both international and national. A recent development of these commentaries is, however, of great interest. Commentaries emerge that do not look into one single legal act but rather understand law as a multi-level system that needs to investigate the development of one legal institute across acts, jurisdictions and legal categories.[114]

Systematization Through Application ('New Governance')

In recent years, a new field of systematization has emerged, which is often labelled as new governance. One of the features of the highly debated field of new governance describes, *inter alia*, the systematization of non-coherent legal structures through an ordered and systematic institutional application. In short systematization through governance describes the institutional and substantial formalization of interactions between Member States and the EU, and thereby creates European systems.[115] The systematic application of law through institutions such as agencies and private players therefore compensates for the lack of traditional coherent legal systems. That is why this method of systematization has become prominent especially in areas where the *corpus iuris* is still very young or by definition designed to be fragmented, such as regulation and certain areas of EU law.

With regard to EU law, the method of governance understood as a systematization of institutional action is perceived

> "as a way of turning both the restrictions of the Treaty, and Europe's very diversity, to Europe's advantage, creating and pooling more de-centralised regulatory standards in service of common goals."[116]

Understood in this way, systematization looks more into procedure than into values in the *Weberian* sense.[117] Supporters of this idea emphasize the need for rules and principles in order to establish a basis for the legal control of the political bargaining process between jurisdictions in the EU.[118] Within the 'new

[114] See inter alia the ius commune series published at Hart, Oxford.

[115] See to this end L. Moreno, 'Europeanisation, Mesogovernance and 'Safety Nets", *European Journal of Political Research*, No. 42, 2003, p. 272.

[116] M. Dawson, *New Governance and the Proceduralisation of European Law: The Case of the Open Method of Coordination,* Diss EUI Florence, 2009, pp. 47–48.

[117] G. Majone, 'Foundations of Risk Regulation: Science, Decision-Making, Policy Learning and Institutional Reform', *European Journal of Risk Regulation*, No. 1, 2010, pp. 5 et seqq.; K. Mathis, 'Cultures of Administrative Law in Europe: From Weberian Bureaucracy to 'Law and Economics', in: Helleringer/Purnhagen (eds.), *Towards a European Legal Culture*, München/Oxford/Baden-Baden, 2013 (forthcoming).

[118] See C. Joerges/J. Neyer, 'Politics, risk management, World Trade Organisation governance and the limits of legalisation', *Science and Public Policy*, No. 30, 2003, pp. 219, at p. 221; G. Majone, 'Foundations of Risk Regulation: Science, Decision-Making, Policy Learning and Institutional Reform', *European Journal of Risk Regulation*, No. 1, 2010, pp. 5 et seqq.

governance'-idea, these rules and principles may be derived from the bargaining process itself with a view of achieving common goals of the EU, as systematization detects its underlying structures and translates them into legal documents.

> "In the context of new governance, it must treat the national context to which it applies not as uniform, but as a diverse constituency, whose very diversity may itself create new opportunities for adaption, and policy learning."[119]

From the perspective of regulation, the proponents of this idea also highlight its possible effect on the effectiveness of regulation. The systematization of regulation understood in the way regulators and addressees respond to each other, can display some logical coherence in their actions.

> "Really responsive regulation (…,) seeks to identify the different regulatory logic applied to different regulatory tasks."[120] With respect to the effectiveness of regulation, exactly this "(c)oherence of logic matters because confusion detracts from effective regulation."[121]

By looking specifically into the logic of the 'responsive' part of regulation and not into the black letter law underlying the respective regulatory actions, (i.e. 'law in action' not 'law of the books') we can identify that patterns taking the "institutional problems which arise when different regulatory bodies play different and non-harmonious roles within a regime" into account as constituent part of the analysis, and not as an exception.

> The systematization of responsive regulation hence governs the "(c)ommunication problems" that "are caused when different logics are based on different assumptions, value systems, cultures and founding ideas so that messaging across logics involves distortions and failures of contact." It thereby crosses the logics of the different systems, and "encounters such issues in a more complex framework (and to a degree addresses complementarities and inconsistencies of approach)."[122]

Within 'new governance', systematization is conducted mainly through the administrative staff of the respective entities or the self-regulatory behaviour of market participants within responsive regulation approaches. The method of regulatory governance, comitology-procedure, and the open method of coordination provides a prominent example in EU product safety regulation.

Summary

The different forms of systematization may be summarised in the following table (Table 2.1):

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[119] M. Dawson, *New Governance and the Transformation of European Law*, Cambridge, University Press, 2011, p. 176.

[120] R. Baldwin/J. Black, 'Really Responsive Regulation', *Modern Law Review,* No. 71, 2008, pp. 59, at p. 71.

[121] R. Baldwin/J. Black, 'Really Responsive Regulation', *Modern Law Review,* No. 71, 2008, pp. 59, at p. 71.

[122] R. Baldwin/J. Black, 'Really Responsive Regulation', *Modern Law Review,* No. 71, 2008, pp. 59, at p. 71.

Table 2.1 The categories of systematization

	Collection	Consolidation/compilation	Codification	Commentary and law reviews	Systematization through application
Technique	Collection of pre-existing law in regular intervals	Compile law sectorally and adjust terminology	Creation of a comprehensive framework for society	Collection and evaluation of societal responses to the code	Ensuring coherent application of law through operator
Effect on pre-existing law	No effect	Depends, usually little effect, future developments often adapted only to the code	Superseding pre-existing law	No formal effect, but highly influential on application	No formal effect
Aim	Improve accessibility of law	Harmonise terminology and initial law with later amendments	Fresh start of the legal system	Reflect society	Compensate noncoherent law
			Reflect society	Coherent application of the code	Legal certainty
			Legal certainty	Legal certainty	
Systematiser	Governmental or judicial administration	Governmental or Legislator administration, approval by Legislator	Scholars, approval by Legislator	Legal scholars or influential practitioners	Administrative staff Market participants
Examples	The Official Journal of the EU	Code de la Consummation	Bürgerliches Gesetzbuch	Münchener Kommentar	Comitology, open method of coordination, regulatory governance
	The United States statutes at large	Codice del Consumo United States Code Directive 2001/83/EC (EU Drug Code)	Regulation No. 1907/2006 (REACH)		

2.2 The Limited Transferability of The Nation-State's Concept of Systematization on The EU

The concept of the systematization of law in Europe as discussed in the previous subchapter harkens back to the Roman Empire. However, as the short analysis of *Weber* and *Savigny* in relation to the technique of systematization has revealed, our understanding of today's legal systematization has been shaped mainly according to its role in the construction of the nation-state (Sect. 2.2.1). The differences between nation-states and the EU, however, necessitates a different view on systematization (Sect. 2.2.2).

2.2.1 Systematization in the Nation State – Breaking Feudal Systems to Make Territorially Confined Communities of Destiny

Today's idea of systematization harkens back to the role systematization played in the nation-state.[123] Although systematization was developed in the guise of a neutral science,[124] it was used to construct instead of identify common patterns of nationhood in several states across Europe, and so to also construct *Verbandseinheit* or *material rationality*, which necessarily required the elimination of cultural disparity. Legal systematization hence was used as a means of constructing a nation by homogenous unification.[125] The instrumental use of systematization is therefore

[123] This analysis builds in part on my previous paper K. Purnhagen, 'Competition of Agencies in European Pharmaceutical Law – Does It Exist, Is It Desirable and How to Handle It?', *European Journal of Risk Regulation*, No. 1, 2010a, pp. 227 et seqq.

[124] See on the example of Max Weber L. Kaplan, 'The Political – From Weimar to the Present', in Kaplan/Koshar (eds.), *The Weimar Moment*, Plymouth, Lexington Books, 2012, pp. 185, at p. 186.

[125] See on civil law D. Caruso, 'Private Law and State-Making in the Age of Globalization', *New York University Journal of International Law and Politics*, No. 38, 2006, pp. 24 et seqq.; H. Collins, *The European Civil Code – The Way Forward*, Cambridge, University Press, 2008, p. 130; J. Gordley, 'Myths of the French Civil Code', *American Journal of Comparative Law*, No. 42, 1994, pp. 459 et seqq.; C. Joerges, 'The Science of Private Law and the Nation State', in: F. Snyder (ed.), *The Europeanisation of Law: The Legal Effects of European Integration*, Oxford, Hart, 2000, p. 48; R. Schulze, 'A Century of Bürgerliches Gesetzbuch: German Legal Uniformity and European Private Law', *Columbia Journal of European Law*, 1999, p. 462; F. Wieacker, *Privatrechtsgeschichte der Neuzeit unter besonderer Berücksichtigung der deutschen Entwicklung*, Göttingen, Vandenhoeck & Ruprecht, 1967, p. 443; See on the area of constitutional law C. v. Gerber, *Grundzüge eines Systems des Deutschen Staatsrechts*, Leipzig, Verlag von Bernhard Tauchnitz, 1865 see also O. Jounjan, 'Carl Friedrich Gerber at la constitution d'une science du droit public allemand', in: Beaud/Wachsmann (eds.), *La science juridique française et la science juridique allemande de 1870 à 1918*, Strasbourg: Presses Universitaires de Strasbourg, 1997.

no feature of "younger […] legal scholarship", which results in a diminishing of its instrinsic value.[126] Quite the contrary: Systematization has always been instrumental right from the start. When assessing systematization in Union law, the guiding question to start with is hence the one about the goals of systematization in Union law.[127]

Our current understanding of systematization as nation-state building originates in the pre-field of the French revolution. In the sixteenth century, scholars such as *Montaigne* critically reflected on the existing knowledge and values of that time. Along with this *Zeitgeist* most scholars faded away from the traditional scientific scholastic methods, which had prevailed for centuries, and started to search for a real 'truth' beyond what was accessible through the deductive method.[128] This developed fully in the seventeenth century, when the 'truth' was subject to research. Scholars such as *R. Descartes* developed several 'truth'-seeking methods out of reason and nature.[129] The thoughts of this time period, later known as 'enlightenment', provided the intellectual basis for understanding systematization as a concept on which to build the nation-state in the prefield of the French revolution.

In addition, the political circumstances in the Old Regime in France endorsed the rise of systematization. The crown faced serious problems in removing office holders from their posts. This lack of power deprived the crown of an essential means of controlling its agents.

> "The French monarchy sought to address this principal-agent problem by creating a competing administrative system, internalising administrative functions within the state while also creating an elaborate system of *tutelle*, or the right of administrative approval or control over the actions of corporate bodies, whether communal, ecclesiastical or professional."[130]

This administrative system on the one hand empowered the monarch and hence the state, however, it also added to the general profligacy and suppression of French people in absolutism that ultimately resulted in the French revolution.

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[126] On dogmatism R. Stürner, 'Das Zivilrecht der Moderne und die Bedeutung der Rechtsdogmatik', *Juristenzeitung*, 2012, pp. 10 et seqq., at p. 17.

[127] S. Grundmann, 'Das Thema Systembildung im Europäischen Privatrecht – Gesellschafts-, Arbeits- und Schuldvertragsrecht', in: Grundmann (ed.), *Systembildung und Systemlücken in Kerngebieten des Europäischen Privatrechts*, Tübingen, Mohr Siebeck, 2000, p. 1, p. 2.

[128] H.-W. Micklitz, 'Introduction – social justice and access justice in private law', in: H.-W. Micklitz (eds.), *The many concepts of social justice in European Private Law*, Cheltenham, Edward Elgar 2011, p. 3, at pp. 15–16.

[129] R. Descartes, *Discours de la méthode pour bien conduire sa raison et chercher la verité dans les sciences,* Leiden, 1637.

[130] P. Lindseth, "Always Embedded' Administration: The Historical Evolution of Administrative Justice as an Aspect of Modern Governance', in Joerges/Stråt/Wagner (eds), *The Economy as Polity – The Political Constitution of Contemporary Capitalism,* London, UCL Press 2005, pp. 117 et seqq., at pp. 119 et seqq.

The important impact of this period on our current understanding of legal systematization in Europe was hence fourfold.[131] First, intellectual preconceptions at that time required the search for an ultimate 'truth', *les grand idées*, a law *a priori*, which needs to be found and may guide the hand of lawmakers. Second and consequently thereto, theory has priority over practice. Such an understanding provided, third, the means to break feudal constraints. The smooth running along the lines of pre-defined systematic legal criteria which originate in an independent sphere of ultimate truths provided a model with which to question the legitimacy of monarchical rule-making. Fourth, the centralisation of administration through the Old Regime also contributed to making the later systematization of law more feasible.

Indeed, after the revolution, *Napoléon* thankfully took over and expanded the Old Regime's centralised and systematized effective administration in order to govern the rapidly expanding French empire. He also strongly promoted the codification project as part of his state-making agenda,[132] which promised to become one of the cornerstones of the success of *Napoléon's* imperial visions.[133]

Political and religious chaos was the main reason for German law remaining fragmented under the (first) German Reich until its formal demise at the hands of *Napoléon*.[134] The Northern and Eastern regions had fallen under the domination of the Prussian land law of 1794, the Rhine countries have moved closer to France adopting at least informally the French Civil Code.[135] Bavaria tried to ascertain its cultural and legal independence by adopting its own Civil Code.[136]

However, the decisive criteria that shaped the intellectual concept of systematization as nation-building were developed in response to the ideas of the French revolution. In fact, they were constructed according to how the French revolutionary ideas were perceived and discussed mainly in German speaking countries during their time of nationalization.[137] The break with the scholastic method and the introduction of the

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[131] See in a similar vein with regard to 'social justice' H.-W. Micklitz, 'Introduction – social justice and access justice in private law', in: H.-W. Micklitz (eds.), *The many concepts of social justice in European Private Law*, Cheltenham, Edward Elgar 2011, p. 3, at pp. 8–18.

[132] D. Caruso, 'Private Law and State-Making in the Age of Globalization', *New York University Journal of International Law and Politics*, No. 38, 2006, p. 6, pp. 24 et seqq.; J. Gordley, 'Myths of the French Civil Code', *American Journal of Comparative Law*, No. 42, 1994, pp. 459 et seqq.

[133] J. Gordley, 'Myths of the French Civil Code', *American Journal of Comparative Law*, No. 42, 1994, pp. 459 et seqq.

[134] B. Markesinis/H. Unberath/A. Johnston, *The German Law of Contract – A Comparative Treatise*, 2nd ed., Oxford, Hart, 2006, at p. 7.

[135] B. Markesinis/H. Unberath/A. Johnston, *The German Law of Contract – A Comparative Treatise*, 2nd ed., Oxford, Hart, 2006, at p. 7.

[136] B. Markesinis/H. Unberath/A. Johnston, *The German Law of Contract – A Comparative Treatise*, 2nd ed., Oxford, Hart, 2006, at p. 7.

[137] See D. Kennedy, 'The Disenchantment of Logically Formal Legal Rationality or Max Weber's Sociology in the Genealogy of the Contemporary Mode of Western Legal Thought', *Hastings Law Journal*, No. 55, 2004b, p. 1033, who referes to each of these development as an authority of source for systematization.

new 'truth'-seeking approach was in fact heavily discussed by eighteenth and nineteenth century German philosophers such as *Kant*, *Hegel*, *Thibout*, *Puchta, Windscheid* and *v. Savigny*. While each of them was somehow influenced by and appreciated the ideas of the French revolution, many of them remained resistant to breaking with the traditional scientific past of the scholastic method.

The idea of the nation as the only legal basis for the legitimate state had been widely adopted by a progressive group of scholars in Wilhelmine Germany.[138] In this respect, the *Staatsrechtslehre* promoted a profound change in the way one needs to perceive the state.[139] The conceptions of most of the *Staatsrechtslehrer* moved away from an understanding of the state as the machinery-like operating tool of absolutists,[140] at that time still a relic from monarchical systems, to perceiving the state to be particularly connected to the concept of a nation, representing the spiritual internal and external life thereof.[141] In particular, the state theory of *G. Jellinek* needs to be perceived in this context. *Jellinek*, a strong liberal supporter of constitutional monarchy,[142] developed a concept of a state where the will of the people as a whole, as a nation, was given strong attention. Although the state was the ultimate source of will, the people's will was represented in state organs such as the parliament. In fact, the root of the state was a function of the social implications between men. For *Jellinek*, if these social implications showed coherency, if they constituted a *Verbandseinheit*, one could speak of a nation. In other words, the more united or coherent a nation was, the closer it was to a state.

Jellinek's idea of *Verbandseinheit* largely contributed to the understanding of the desire to identify a German nation in order to form a legitimately valid German state.[143] In fact, the *Verbandseinheit* is the necessary connection to the rationalization theory of *Weber*, who required the legal material to have a sort of material structural principle in order to allow for its systematization. When I perceive systematization as nation-building here, *Verbandseinheit* or *material structural principles,* which have been developed as prerequisites of systematization, are in fact

[138] See for an extensive and profound analysis D. Kelly, 'Revisiting the Rights of Man: Georg Jellinek on Rights and the State', *Law and History Review*, No. 22, 2004, paras 33 et seqq.

[139] E.-W. Böckenförde, *Organ, Organismus, Organisation, politischer Körper, Geschichtliche Grundbegriffe*, Stuttgart, Klett-Cotta, 1982, 4:561.

[140] See on this idea B. Stollberg-Rillinger, *Der Staat als Maschine,* Berlin, Duncker & Humblot, 1986.

[141] A. Müller, *Die Elemente der Staatskunst,* Berlin, 1936.

[142] D. Kelly, 'Revisiting the Rights of Man: Georg Jellinek on Rights and the State', *Law and History Review*, No. 22, 2004, para 48.

[143] Even today, Jellinek's 'three elements theory', which is based on the concept of Verbandseinheit, is prominently used to define the term 'state' in international public law, see *inter alia* Art. 1 of the Convention on Rights and Duties of States (inter-American); December 26, 1933 (Montevideo Convention): 'The state as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other states.'; Verwaltungsgericht Köln, *Deutsche Verwaltungblätter*, 1978, *Sealand*, pp. 510–512.

turned into the opposite function – into the aim of systematization – where they are used as a political tool in order to form a nation rather than identify a nation. This is the brilliant turn in *Napoléon's* idea to use codification as a political tool to form what later has become known as the French nation. He applied formal structural principles by way of codification, by only assuming the existence of the material structural principles of the features of a nation. *Napoléon* thereby took material principles of systematization and perverted them for his nationalizing agenda. Elsewhere, this French political conception of systematization, which bases on universal principles and values that need to be achieved, have been described more positively as "forward looking".[144]

Napoléon's idea also provided a valuable opportunity to form nation-states via systematization all over Europe.[145] Already in 1865 German lawyers such as *C. F. v. Gerber* highlighted the possibility and need to distillate a general constitution out of existing law that would today be described as administrative law.[146] *O. Mayer*,[147] *L. v. Stein*,[148] and *F. F. Meier*[149] shared a similar approach. Also in line with *Napoléon's* original aim, Germany pushed for the codification of civil law, which resulted, as we know today, in the German BGB. In fact, all over Europe, states rushed into codification as a means of contributing to the building of a nation-state.[150] The following are just some examples: the Netherlands introduced the *Burgerlijk Wetboek* in 1838, Italy its *Codice Civile* in 1865, the Portuguese the *Código Civil* in 1867, the Spanish the *Código Civil* in 1888–1889, the Romanians their Civil Code in 1865.[151] Receptions of these codifications, featured in Austria, Greece, Serbia, Switzerland, and the new versions of the codes in Italy, the Netherlands and Turkey.[152]

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[144] H.-W. Micklitz, 'Introduction – social justice and access justice in private law', in: H.-W. Micklitz (eds.), *The many concepts of social justice in European Private Law*, Cheltenham, Edward Elgar 2011, p. 3, at pp. 14–15.

[145] See R. Zimmermann, 'Codification: history and present significance of an idea', *European Review of Private Law*, No. 3, 1995, pp. 101 et seqq.

[146] C. v. Gerber, *Grundzüge eines Systems des Deutschen Staatsrechts*, Leipzig, Verlag von Bernhard Tauchnitz, 1865 see also O. Jounjan, 'Carl Friedrich Gerber at la constitution d'une science du droit public allemand', in: Beaud/Wachsmann (eds.), *La science juridique française et la science juridique allemande de 1870 à 1918*, Strasbourg, Presses Universitaires de Strasbourg, 1997.

[147] Deutsches Verwaltungsrecht (2 volumes), 3rd ed. 1924.

[148] Verwaltungslehre (8 volumes), 1866–1884.

[149] Grundzüge des Verwaltungs-Rechts und -Rechtsverfahrens, 1857.

[150] See for an overview C. Bollen/G.-R. de Groot, 'The Sources and Backgrounds of European Legal Systems', in: Hartkamp/Hesselink (eds.), *Towards a European Civil Code*, Aalphen an den Rijn, Kluwer Law International, 1994, pp. 97 et seqq.

[151] See R. Zimmermann, 'Codification: history and present significance of an idea', *European Review of Private Law*, No. 3, 1995, p. 102.

[152] See R. Zimmermann, 'Codification: history and present significance of an idea', *European Review of Private Law*, No. 3, 1995, p. 102.

It is no wonder that the aforementioned philosophical struggle over the value of the French 'truth'-seeking approach also manifested itself in the discussions about the desirability of a Civil Code, especially in Germany.[153] While *Thibout* enthusiastically fought for a break with the Bolognese deductive tradition in the sense of the French revolution – for law deriving from reason and nature – *v. Savigny,* by contrast, supported law that was based on the historical spirit (*Volksgeist*) of the German people as it became evident through the Roman law.[154] He hence presumed it to be independent from social and political movements.[155] *v. Savigny* held Roman law being vastly superior to the technically imperfect code civil.[156] One could therefore say that *v. Savigny* stipulated that

> the task of the lawyer is not to constitute a meaningful legal order for the human beings, but to collect and systemise the legal material produced by the spirit of the people. Law in this sense is *kantesian*-formal, not inspired by 'nature' and 'reason' as *Hegel* claimed."[157] "(N)ational systems of law reflect as a matter of fact the normative order of the underlying society; such as a normative order is coherent or tends toward coherence on the basis of the spirit and history of the people in question."[158] Hence legal scientists "can and should elaborate the positive legal rules composing the system on the premise of its internal coherence.[159]

The outcome of this discussion was a sort of compromise between the old scholastic method and the codification idea of the French revolution. The BGB of 1900 and its subsequent interpretation reflected both of these developments. While codification remained necessary, the basis for the code was both, the 'truth' that lay behind the code, and the spirit of the society (*Volksgeist*) as expressed by

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[153] See inter alia R. van Caenegem, *European Law in the Past and Future*, Cambridge, University Press, 2002, pp. 90 et seqq.; B. Markesinis/H. Unberath/A. Johnston, *The German Law of Contract – A Comparative Treatise*, 2nd ed., Oxford, Hart, 2006, at. 8; J. Schapp, 'Probleme einer europäischen Juristenausbildung', in: Schapp (ed.), *Methodenlehre und System des Rechts*, Tübingen, Mohr Siebeck, 2009b, p. 227 et seqq.

[154] H.-W. Micklitz, 'Introduction – social justice and access justice in private law', in: H.-W. Micklitz (eds.), *The many concepts of social justice in European Private Law*, Cheltenham, Edward Elgar 2011, p. 3, at pp. 18–19.

[155] See on this interpretation also C. Grechenig/M. Gelter, 'The Transatlantic Divergence in Legal Thought: American Law and Economics vs. German Doctrinalism', *Hastings International and Comparative Law Review*, No. 31, 2008, p. 343.

[156] R. van Caenegem, *European Law in the Past and Future*, Cambridge, University Press, 2002, p. 91.

[157] H.-W. Micklitz, 'Introduction – social justice and access justice in private law', in: H.-W. Micklitz (eds.), *The many concepts of social justice in European Private Law*, Cheltenham, Edward Elgar 2011, p. 3, at p. 19.

[158] D. Kennedy, 'The Disenchantment of Logically Formal Legal Rationality or Max Weber's Sociology in the Genealogy of the Contemporary Mode of Western Legal Thought', *Hastings Law Journal*, No. 55, 2004b, p. 1033.

[159] D. Kennedy, 'The Disenchantment of Logically Formal Legal Rationality or Max Weber's Sociology in the Genealogy of the Contemporary Mode of Western Legal Thought', *Hastings Law Journal*, No. 55, 2004b, p. 1033.

Roman law and society.[160] Hence, although *v. Savigny* argued against a German civil code, his ideas in fact paved the way for a more progressive code, which aimed at deriving principles from society rather than displaying academic discussions.[161] Needless to say that such a code, due to the variety of German cultures at this time, sought to find consistency in German culture where there was none. It was moreover used as a means to regulate certain values that could be used as evidence of a unified nation.

2.2.2 Systematization in the EU – Making the Internal Market

As discussed in the first chapter on the example of EU product safety regulation, systematization is nowadays increasingly exercised in the Union law. If we combine this fact with the aforementioned findings – that systematization was aimed primarily at the creation of a nation and thereby contributed to the making of nation-states – this result is surprising. The traditional nation-state bears little resemblance to the multi-level governance models embodied in the EU.[162] In this sense, according to its values, its institutional setting, its tools, and organisation, the EU is beyond the nation-state: the literal meaning of supranational (section "The limited explanatory value of nation-state models to describe the EU"). So why does the prominence of systematization increase despite the fact that the defining supranationality of the EU is fundamentally different to those of nation-states? I will argue that the internal market agenda of the EU in fact functionally supplements the concept of nations in the nation-state. Instead of the construction of a single nation, the EU aims at the construction of an internal market in order to be able to better provide welfare, a goal that was formerly assigned to nation-states (section "The contrast between the EU's supranational multi-level structure and it's increasing nation-state responsibilities"). Systematization aims towards this end. The features of the rationality of formal law, in the sense developed by *Max Weber*, read in conjunction

[160] See R. Kiesow, 'Rechtswissenschaft – was ist das?', *Juristenzeitung*, 2010, p. 589, who highlights that 'legal science' after the introduction of the BGB lived on via the subsequent interpretation of the code.

[161] See D.-J. Mann, '(Legal) Culture in the European Union and the United States - A Comparative Political Science Perspective', in: Helleringer/Purnhagen, *Towards a European Legal Culture*, München/Oxford/Baden-Baden, C.H. Beck, Hart, Nomos, forthcoming 2013; The first draft of the German Civil Code in 1888 was criticised as 'little Windscheid' as it has been perceived as being too professorial, see v. Caenegem, *European Law in the Past and the Future,* Cambridge, University Press, 2002, p. 99.

[162] See among the vast amount of literature *inter alia* D. Caruso, 'Private Law and State-Making in the Age of Globalization', *New York University Journal of International Law and Politics*, No. 38, 2006, p. 4.

with *Napoléon's* idea to make political use of these features for the nation-state, are best equipped to work towards this end (section "The market-making function of systematization in the EU").

The Limited Explanatory Value of Nation-State Models to Describe The EU

Previous attempts to describe the state-character of the EU have largely relied on the concept of a nation-state, as it was developed in the aftermath of the French revolution,[163] and therefore deny the state-character of the EU.[164] These concepts provide little explanatory value. The EU was never built upon the concept of the creation or emergence of a collectivity such as a European nation, which would be comparable to the situation in the aftermath of the French revolution. Therefore, theories that are built on the same criteria that define the nation-state do not only bear little resemblance with the EU model, they in fact start from the wrong premise.

The most prominent member of these nation-statealists is the German *Bundesverfassungsgericht*, who in its Maastricht-decision,[165] which has been confirmed by its Lisbon-judgment,[166] rejected the concept of the EU state[167] on the reasons of non-fulfilment of the criteria of *Jellinek's* 'three elements-theory.'[168] The main argument that the *Bundesverfassungsgericht* brought forward in this

[163] See for an extensive and profound analysis D. Kelly, 'Revisiting the Rights of Man: Georg Jellinek on Rights and the State', *Law and History Review*, No. 22, 2004, paras 33 et seqq.

[164] In this respect inter alia T. Lock, 'Why the European Union is Not a State – Some Critical Remarks', *European Constitutional Law Review*, No. 5, 2009, pp. 407 et seqq.; see for an overview H.-W. Micklitz/S. Weatherill, 'Federalism and Responsibility', in: Micklitz/Roethe/Weatherill (eds.), *Federalism and Responsibility – A Study on Product Safety Law and Practices in the European Community*, London/Dordrecht/Boston, Graham&Trontman/Martinus Nijhoff, 1994, p. 13, who emphasise that the range of arguments in fact reach from 'no state' to a 'Community state'.

[165] Bundesverfassungsgericht 2 BvR 2134, 2159/92, Decision of 12 October 1993, *Maastricht*, BVerfGE 89, 155, para 90.

[166] Bundesverfassungsgericht, 2 BvE 2/08, Decision of 30 June 2009, *Lissabon*, BVerfGE 123, 267, para 229; English translation available at http://www.bverfg.de/entscheidungen/es20090630_2bve000208en.html, see for a critical assessment on the Lisbon-judgment *inter alia* J. Ziller, 'Solange III (or the Bundesverfassungsgericht's, Europe Friendlyness) On the Decision of the German Federal Constitutional Court Over the Ratification of the Treaty of Lisbon', *Rivista Italiana di Diritto Pubblico Comunitario*, 2009 pp. 973 et seqq.

[167] Bundesverfassungsgericht 2 BvR 2134, 2159/92, Decision of 12 October 1993, *Maastricht*, BVerfGE 89, 155.

[168] See for a practical impact of the 'three elements theory' *inter alia* Art. 1 of the Convention on Rights and Duties of States (inter-American); December 26, 1933 (Montevideo Convention); T. Lock, 'Why the European Union is Not a State – Some Critical Remarks', *European Constitutional Law Review*, No. 5, 2009, pp. 407 et seqq. also analyzes the state character of the EU using Jellinek's three-elements theory.

respect is the allegedly non-existence of a European nation.[169] In order to substitute the non-existing nation-state at EU-level, nation-statealists create new forms of organisation aimed at describing the EU. As a consequence from "deep epistemic assumptions carried over from the Westphalian age",[170] these concepts dissect the EU according to nation-state criteria by highlighting the nation-state features the EU does not have. Rather than taking the opportunity to positively describe the new features of the supranational European order, they negatively highlight the EU's different setting in contrast to the nation-state.[171] The *Bundesverfassungsgericht* provided a textbook example by establishing the term 'Staatenverbund' for the EU in its Maastricht-decision[172] and defining it in its Lisbon-judgment in the aforementioned negative way[173]:

> "The concept of *Verbund* covers a close long-term association of states which remain sovereign, an association which exercises public authority on the basis of a treaty, whose fundamental order, however, is subject to the disposal of the Member States alone and in which the peoples of their Member States, i.e. the citizens of the states, remain the subjects of democratic legitimisation."[174]

Even the concepts that aim at positive descriptions of EU features and processes often involve an "invisible touch of stateness."[175] They assume that the EU is built on an institutional treaty that simply coordinates single Member State's interests because, technically, such problems can be solved better at European level.[176]

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[169] See for an in-depth analysis J. Weiler, 'Der Staat "über alles". Demos, Telos und die Maastricht-Entscheidung des Bundesverfassungsgerichts', *Jahrbuch des Öffentlichen Rechts*, No. 44, 1996, pp. 91 et seqq.

[170] N. Walker, 'The Idea of Constitutional Pluralism', *The Modern Law Review*, No. 65, 2002, p. 317, at p. 321.

[171] See inter alia T. Lock, 'Why the European Union is Not a State – Some Critical Remarks', *European Constitutional Law Review*, No. 5, 2009, pp. 407 et seqq.

[172] BVerfGE 89, 155, para 90. The terminology relies on a highly contested concept developed by *Paul Kirchhof,* who was able to promote this concept during his time as judge of the Bundesverfassungsgericht in spite of the heavy criticism in German and international academia see J. Weiler, 'Der Staat "über alles". Demos, Telos und die Maastricht-Entscheidung des Bundesverfassungsgerichts', *Jahrbuch des Öffentlichen Rechts*, No. 44, 1996, pp. 91 et seqq.; M. Ruffert, 'An den Grenzen des Integrationsverfassungsrechts: Das Urteil des Bundesverfassungsgerichts zum Vertrag von Lissabon', *Deutsches Verwaltungsblatt*, No. 124, 2009, p. 1198. See for a highly valueable response to Kirchhof's view C. Tomuschat, 'Wer hat höhere Hoheitsgewalt?', *Humbold Forum Recht*, Beitrag 8, 1997, para 3: "Hat aber einmal die Bundesrepublik Deutschland einer Übertragung von Hoheitsgewalt (…) zugestimmt, so kann sie diese Bindung nicht mehr einseitig von sich abschütteln."

[173] J. Weiler, 'Der Staat "über alles". Demos, Telos und die Maastricht-Entscheidung des Bundesverfassungsgerichts', *Jahrbuch des Öffentlichen Rechts*, No. 44, 1996, pp. 91 et seqq.

[174] BVerfG, 2 BvE 2/08 of 30.6.2009, para 229; available at BVerfGE 123, 267; English translation available at http://www.bverfg.de/entscheidungen/es20090630_2bve000208en.html.

[175] J. Shaw/A. Wiener, 'The Paradox of the European Polity', in: Green Cowles/Smith (eds.), *The State of the European Union 5: Risks, Reform, Resistance and Revival*, Oxford, University Press, 2000, p. 65.

[176] G. Majone, 'The Rise of the Regulatory State in Europe', *West European Politics* 3, No. 17, 1994; as well as id. (ed.), *Regulating Europe*, London, 1996.

The "sole purpose of the EU" would then be "to pool sovereignty and regulate issues with greater efficiency than the Member State government would be able to do individually".[177] In this respect, some emphasise the "interdependence" of nation states that are "mutually dependent on and vulnerable to what other states do."[178]

Such negative analysis, which evaluates the EU according to nation-state-criteria, starts from premises of little explanatory value. The EU was never built upon the concept of the creation of a nation. Except for the ideas promoted at the very beginning of the European integration process after the Second World War, the EU never linked the idea of a 'European nation' to the 'European state'. The reference to the undisputed criteria of the EU as a *supra*national organisation bears witness to the fact that national ideas do not play a major role in the EU. Quite the opposite: According to its genesis, the EU is a deeply anti-nationalistic endeavour.

An in-depth analysis of the relationship between the EU and the concept of 'nation' has been conducted elsewhere.[179] There is hence no need to revisit the arguments here; instead, I will rely on the text of the EU Treaty. If we consult the Preamble of the EU Treaty, the peoples are never referred to as the peoples of Europe, but are only tied to their respective Member State. The respective head of Member States are (each italic emphasis by KP)

> "DESIRING to deepen the solidarity between *their* peoples while respecting *their* history, *their* culture and *their* traditions (…), DETERMINED to promote economic and social progress for *their* peoples."

Even more clearly, the concept of 'nation' remains tied to the Member States, while the more technical 'citizenship' may be acquired within the EU (italic emphasis by author)[180]:

> "RESOLVED to establish a citizenship common to nationals of *their* countries."

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[177] H. Hofmann/A. Türk, 'The Development of Integrated Administration in the EU and its Consequences', *European Law Journal*, No. 13, 2007, p. 253, at p. 264.

[178] See critical in this respect esp. A.-M. Slaughter, 'Abram Chayes: A Tribute', *Harvard Law Review*, No. 114, 2001, p. 682, at p. 684.

[179] See except of many J. Weiler, 'Der Staat "über alles". Demos, Telos und die Maastricht-Entscheidung des Bundesverfassungsgerichts', *Jahrbuch des Öffentlichen Rechts*, No. 44, 1996, pp. 91 et seqq.

[180] Some authors such as T. Lock, 'Why the European Union is Not a State – Some Critical Remarks', *European Constitutional Law Review*, No. 5, 2009, p. 418 highlight that the TEU refers to the EU's subjects after Lisbon more often as 'citizens' as the previous treaties did. In their view, this fact should be interpreted as moving towards one people of Europe. They, however, disregard first the fact that 'citizen' as a technical term refers to political and social rights, which should be clearly distinguished from 'people' that describes a nation based on common identities and values. This argument, however, is not a strong one as citizenship is increasingly subject to a material interpretation, see e.g. F. Trentmann, 'Citizenship and Consumption', *Journal of Consumer Culture*, No. 7, 2007, pp. 147 et seqq.; However, Lock's argument is problematic as second the 'citizen' language is used seldomly in secondary law, and third the fact that European citizenship is accessory to Member State nationality, , see in detail the analysis of D.-J Mann/K. Purnhagen, 'The Nature of Union Citizenship Between Autonomy and Dependency on (Member) State Citizenship – A Comparative Analysis of the Rottmann Ruling, or: How to Avoid a European Dred Scott Decision?, *Wisconsin International Law Journal*, No. 29, 2011, pp. 484 et seqq.

See in this respect also Art.20 (1) Sentences 2 and 3 TFEU that stipulates the accessory character of European citizenship to Member State nationality:

> "Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship."

The separation of the concept of 'nation' with the 'European state' becomes evident within one phrase of the Preamble and in Art. 1 (2) TEU. The respective part of the preamble reads (italic emphasis by author):

> "RESOLVED to continue the process of creating an ever closer union *among the peoples of Europe"*

Art. 1 (2) TEU stipulates (italic emphasis by author):

> "This Treaty marks a new stage in the process of creating an ever closer union *among the peoples of Europe*, in which decisions are taken as openly as possible and as closely as possible to the citizen."

The use of the plural in this sense and the word 'among' highlights the separation of the different people. The concept of the European state has indeed never been built on the idea of a European nation and hence needs to be distinguished from the concept of the 'nation'.

The Contrast Between the EU's Supranational Multi-level Structur e and It's Increasing Nation-State Responsibilities

If the EU is not a nation-state, neither in full, nor in the making, what is it? As systematization seeks to further an institutional ideal,[181] we need to be clear about the institution systematization seeks to construct.[182] If we apply a positive definition of the EU that we know today, we perceive the Union as a new legal order, which poses challenges to government of the exciting interplay between its multilevel, supranational setting on the one hand, and its emerging task of fulfilling traditional nation-state purposes on the other.

On the one hand, the EU's defining feature as a supranational organisation manifests itself in new forms of legitimacy, power distribution and decision making that have been referred to as multilevel-system.[183] The traditional nation-state, bound to the will of one nation, territorially confined and hierarchically ordered and endowed with all functions of government in fact bears little resemblance with the multi-level

[181] J. Bengoetxea, *Legal System as a Regulative Ideal*, in: Koch/Neumann (eds.), Praktische Vernunft und Rechtsanwendung, ARSP-Beiheft 53, 1994, p. 65, at 71.

[182] S. Grundmann, 'Das Thema Systembildung im Europäischen Privatrecht – Gesellschafts-, Arbeits- und Schuldvertragsrecht', in: Grundmann (ed.), *Systembildung und Systemlücken in Kerngebieten des Europäischen Privatrechts*, Tübingen, Mohr Siebeck, 2000, p. 1, p. 2.

[183] See for an overview of the questions related to these aspects A. Benz/C. Harlow/Y. Papadopoulos, 'Introduction', *European Law Journal*, No. 13, 2007, pp. 441 et seqq.

governance models embodied in the EU.[184] The defining features of the EU, such as a multiplicity of cultures and languages, in fact represents the diversity required to establish trade in the EU, the glue that holds the Member States together. In this sense, according to its institutional setting, its tools, its organisation which each focus on the establishment of an internal market, the EU is beyond the nation-state, the literal meaning of supranational.

On the other hand, the means by which the Union aims to achieve its goals become increasingly like the goals of nation-states. Traditionally, the EU and its predecessors were designed more as a tool to ensure 'world peace',[185] which is to say according to both its outer and inner dimension.[186] It achieves this purpose mainly by establishing and creating an economic union, whose aim is primarily to establish an internal market (Art. 3 (3) 1 TEU). Hence, the main ambition of the EU, including the interpretation of law in this respect, is still devoted to the integration of Member States in order to establish an internal market.

> "Internal market legislation, to be constitutionally valid, *must* satisfy a specific internal market test in the sense that the authors of the act must make a plausible case that the act either helps to remove disparities between national provisions (…) or helps to remove disparities that cause distorted conditions to competition."[187]

The EU therefore, by definition, exists more to satisfy a state purpose (*Staatszweck*) than to provide a *Verbandseinheit* in the sense of *Jellinek*. If there is anything that ties the EU together in essence, it is not the highly romantic ideal of Europe evolving as one nation, representing the spiritual internal and external life thereof in the sense in which *Jellinek* and the other *Staatsrechtslehrer* understood it. In this sense, the concept of state was separated again from the concept of 'nation'.

The initial idea of the Member States' foundation of the EU has since been the acknowledgement of the limited means of the nation state's to provide peace as a result of the Second World War. Hence, the erosion of the nation state's power was the trigger for the foundation of the EU. Nowadays, in an even more globalized world, it is not only the power to declare war and peace that is being taken out of the hands of nation states. According to the globalization of major parts of the economy, national borders do not matter as much as they used to. Goods are transferred worldwide with little respect for domestic laws, companies act regularly on an international scale. Hence, it is no wonder that the aim of the EU has transformed and its market-creating

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[184] See among the vast amount of literature *inter alia* D. Caruso, 'Private Law and State-Making in the Age of Globalization', *New York University Journal of International Law and Politics*, No. 38, 2006, p. 4.

[185] Preamble of the Treaty of the European Coal and Steel Community.

[186] See for the inner state dimension also Art. 3 (1) EU "The Union's aim is to promote peace, its values and the well-being of its peoples." On the concept of inner- and outer state dimensions D. Patterson/A. Afilalo, *The new global trading order: the evolving state and the future of trade*, Cambridge, University Press, 2010, pp. 3 et seqq.

[187] B. de Witte, 'Non-market Values in Internal Market Legislation', in: N. Shuibhne (ed.), *Regulating the Internal Market*, 2006, p. 61, at p. 75.

purpose was exceeded to a more market-governing entity that is used as a means of achieving purposes that were traditionally the preserve of the nation-state.[188]

The tasks of nation-states have been characterised by an accumulation of the tasks of former state-forms that comprise *inter alia* the promise to external security, freedom of domination and interference by foreign powers, internal stability, the expansion of material wealth, and the provision of civil and political rights to its people.[189] The nation-state then added the promise to provide economic security and public goods to its people.[190] In short, the nation-state primarily aimed at bettering the welfare of the nation. In this world, systemization aimed primarily at securing equality. If we look today into Art. 3 (1) TEU, we see that the EU's peacekeeping aim was set on an equal footing with its duty to provide for the well-being of its people. Moreover, Art. 3 (2) TEU reads like a catalogue of duties that the nation-state inherited from its predecessors.

This EU's transformation from a peace-through-trade-Union to a state that is increasingly concerned with the traditional nation-state obligation to provide welfare to its peoples is also reflected in several judgments such as *Viking*,[191] *Laval*,[192] *Kücükdeveci*,[193] and *Test-Achats*[194] where the ECJ actively pushed the EU into forging a closer social Union.[195] The trigger for this development, however, was set much earlier when systematized EU product safety regulation was made possible by the *Dassonville* and *Cassis de Dijon* judgments.[196] One of the main objectives of EU product safety regulation, in fact, is to ensure a certain standard of social protection all over Europe, which is necessary to enable the trade needed for the establishment of the internal market. If we consult the ECJ's reasoning in *Viking* and *Laval* as the leading judgments on the social role of the EU, the parallels with the argumentation provided for the introduction of systematized EU product safety regulation in the 1970s become obvious:

> "the Community has… not only an economic but also a social purpose, the rights under the provisions of the EC Treaty on the free movement of goods, persons, services and capital must be balanced against the objectives pursued by social policy, which include … improved

[188] See to this end also L. Moreno, 'Europeanisation, Mesogovernance and 'Safety Nets'', *European Journal of Political Research*, No. 42, 2003, p. 272.

[189] P. Bobbitt, *The Shield of Achilles – War, Peace, and the Course of History*, New York, Knopf, 2002, p. 215.

[190] P. Bobbitt, *The Shield of Achilles – War, Peace, and the Course of History*, New York, Knopf, 2002, p. 215, see also for an illustration of the different tasks of statehood id., p. 347, plate IV.

[191] Case C-438/05, Judgment of 11 December 2007, *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti* [2007] ECR I-10779.

[192] Case C-341/05, Judgment of 18 December 2007, *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet and Others* [2007] ECR I-11767.

[193] Case C-555/07, Judgment of 19 January 2010, *Kücükdeveci* [2010] *ECR* I-365.

[194] Case C-236/09, Judgment of 1 March 2011, *Association belge des Consommateurs Test-Achats ASBL, Yann van Vugt, Charles Basselier v. Conseil des ministres* [2011], ECR-0000,

[195] See in this respect H.-W. Micklitz, 'Judicial Activism of the European Court of Justice and the Development of the European Social Model in Anti-Discrimination and Consumer Law', in: Neergaard/Nielsen/Roseberry (eds.), *The Role of Courts in Developing a European Social Model – Theoretical and Methodological Perspectives*, DJØF Publishing, 2010a, pp. 45 et seqq.

[196] See to this end the first chapter of this thesis.

> living and working conditions, so as to make possible their harmonisation while improvement is being maintained, proper social protection and dialogue between management and labour."[197]

The "market" the EU seeks to establish hence embraces both, economic and social purposes. So, in fact, the Union is increasingly assigned with the task of fulfilling the traditional nation-state obligation to provide welfare to its people. However, its structure, organisation and set-up are far from being similar on any level to a nation-state. What role does systematization play within an institution that was assigned tasks similar to the nation-state, but whose concept is, however, diametrically opposed to the nation-state?

The Market-Making Function of Systematization in the EU

The techniques of systematization, as the formal part of the rationalization process in the EU, are largely congruent with formal systematization in the nation-state. The material part of systematization in the EU formalizes interactions between internal market players instead of formalization of values or principles in the way *Weber* understood it. In the EU, systematization is hence not used as a means to create a nation, but an internal market in the wide sense the ECJ uses this term.[198]

Systematization, as I highlighted at the beginning of this chapter, has nowadays become an inevitable feature of Western and especially European legal thought. So it is no wonder that its role in EU law and especially in EU product safety law has increased tremendously. But why has a method that was used primarily in the nation-state to identify a nation suddenly been utilised to create an internal market in a system that expressively does not aim at furthering a nation-state as an institutional ideal?

Weber's theory on the rationalization of law (hereinafter process of rationalization) helps us to understand this exciting problem. As emphasized earlier, *Weber* elaborated the features and contextual meanings of systematization, which I will refer to as main authority in order to describe the function of systematization in EU law.

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[197] See Case C-341/05, Judgment of 18 December 2007, *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet and Others* [2007] ECR I-11767, para. 105; Case C-438/05, Judgment of 11 December 2007, *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti* [2007] ECR I-10779, para. 79.

[198] D. Caruso has already made this claim with regards to private law and creation of supranational states, see D. Caruso, 'Private Law and State-Making in the Age of Globalization', *New York University Journal of International Law and Politics*, No. 38, 2006, p. 6. H.-W. Micklitz identified systematization as contributor to the development of regulatory private law in the EU, see H.-W. Micklitz, 'The Visible Hand of European Regulatory Private Law – The Transformation of European Private Law from Autonomy to Functionalism in Competition and Regulation', in: Eckehout/Trimidas (eds.), *Yearbook of European Law*, No. 28, 2009; while I. Pernice has identified that systematization might contribute to the building of regulatory administrative law, see I. Pernice, 'Soll das Recht der Regulierungsverwaltung übergreifend geregelt werden? Europarechtliche Aspekte', in: Ständige Desputation des Deutschen Juristentages (ed.), *Verhandlungen des sechsundsechzigsten Deutschen Juristentages*, München, C.H. Beck, 2006, p. O 87.

The combination of two features that *Weber* analyzed in the process of rationalization provides us with an explanatory value for these phenomena.

The formal requirement is a phenomenon that has been described as independent from the respective system; hence it is also applicable to various types of legal systems such as nation states and the EU (section "Methodologically controlled doctrine as formal rationalization of EU law"). The material requirement, in contrast, directly refers to the specific norms and poses certain qualifications on them. These qualifications, originally designed as prerequisites, were transformed first by *Napoléon*, and then by other state authorities, into political goals. As such, the application of the formal element was used to achieve the substantive requirement. In the nation-state, this method has been exercised in order to develop a nation. In the EU, the same idea works towards the end of the creation of the internal market (section "The internal-market-goal as substantive rationalization of EU law").

Methodologically Controlled Doctrine as Formal Rationalization of EU Law

With respect to systematization, the formal rationalization of EU law resembles in similar ways as in the nation-state. The formal requirements prescribe

> "the replacement of practical and value-rational elements of law by methodologically controlled, argumentatively and systematically structured doctrines."[199]

Within this line of thinking, the formal requirement of systematization emphasizes on the 'replacement' technique and is therefore of a rather technical nature and independent from questions such as whether it is applied in a nation-state or the EU. In this respect, systematization creates a "legal infrastructure"[200] that consists of

> "concepts and statements which enable(s) one to collect, test and improve opinions expressed by many generations of jurists. (…) (W)ithin such a system statements are tested in a much more efficient way than within an unsystematic *ad hoc* justification. Construction of the system results in new insights and the system makes the work of the decision-maker easier."[201]

If we apply these prerequisites to the reference area of EU product safety regulation as described in the first chapter, the numerous acts of systematization associated with 'new approach'-products and 'new governance'-products pay witness to this

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[199] C. Joerges, 'The Europeanisation of European Private Law as a Rationalisation Process and a Contest of Disciplines – an Analysis of the Directive on Unfair Terms in Consumer Contracts', *European Review of Private Law*, 1995, p. 179 et seqq.; H.-W. Micklitz, 'Some Considerations on Cassis de Dijon and the Control of Unfair Contract Terms in Consumer Contracts', in: Boele-Woelki/Grosheide (eds.), *The Future of European Contract Law: Essays in Honour of Ewoud Hondius*, 2007, New York, Wolters Kluwer Aspen Publishing, p. 387.

[200] A. v. Bogdandy, 'Founding Principles', in: v. Bogdandy/Bast (eds.), *Principles of European Constitutional Law*, Oxford/München/Baden-Baden, Hart/C.H. Beck/Nomos, 2nd ed., 2010, pp. 11, at p. 16.

[201] R. Alexy/A. Peczenik, 'The Concept of Coherence and its Significance for Discursive Rationality', *Ratio Iuris*, No. 3, 1990, p. 130.

fact. REACH, the pharmacode and foodcode as well as the numerous legislative acts associated with the 'new legislative framework' of the 'new approach' facilitate the process of systematization in EU product safety law. In this line of reasoning, systematization contributes to canalize and control decisions in EU product safety regulation. Instead of judging the safety of products on a case-to-case and value basis, the 'new approach' shall provide a procedure that provides us with an assurance that the product is safe, assuming that the procedure is applied correctly and can be argumentally controlled. Instead of really assuring the safetyness of products, this feature of systematization runs the risk of realizing what elsewhere has been described as "goal displacement" or "tunnel vision" of regulators.[202] The case AGM-COS.Met illustrated this effect very well.[203] Instead of judging on the safety of the products at issue, it controlled only the proper application of the 'new approach' system with regard to who would have been competent to "ascertain" the safety of the respective product.[204] Thereby, it refrained from providing a value-argument (safety) for the benefit of the formally correct application of the system ('new approach' and safeclause-mechanism).[205]

The 'scientification' of European product safety law, where the manageable, hard facts of scientific evidence provided by European agencies and standardisation bodies, rather than value-arguments, are used as a basis for regulatory intervention forms another proof for the formal rationalization process.[206] The ongoing and seemingly never-ending debate on the prohibition of animal cloning illustrates the impact of such a formal systematization process. While the EFSA argues on the basis of scientific data that there is no significant risk in cloning and hence regulatory intervention would not be necessary, the European Group on Ethics, the Eurobarometer on animal cloning, and the Parliament emphasize solely value-arguments in order to trigger regulatory intervention for the prohibition of animal cloning.[207] The systematized prerequisites of regulation, which are strictly applied by the EFSA, in fact illustrate how highly formal rationalization can influence the importance of value-arguments.

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[202] C. Hood/H. Rothstein/R. Baldwin, *The Government of Risk*, Oxford, University Press, 2001, pp. 26–27 with further references.

[203] See for detail the third chapter of this piece.

[204] C-470/03, Judgment of the Court of 17 April 2007, *AGM-COS.Met v Suomen valito v. Tanno Lehtinen* [2007], ECR I-2749; comment N. Reich, 'AGM-COS.Met or: Who is Protected by Safety Regulation?', *European Law Review,* No. 33, 2008, p. 85.

[205] See for a general critique on such rationalizing arguments in risk regulation G. Majone, 'Foundations of Risk Regulation: Science, Decision-Making, Policy Learning and Institutional Reform', *European Journal of Risk Regulation*, No. 1, 2010, p. 5, at pp. 8 et seqq.

[206] Critical in this respect C. Joerges/J. Neyer, 'Politics, risk management, World Trade Organisation governance and the limits of legalisation', *Science and Public Policy*, No. 30, 2003, pp. 220 et seqq.

[207] See for an overview of the debate on animal cloning and the respective arguments M. Weimer, 'The Regulatory Challenge of Animal Cloning for Food', *European Journal of Risk Regulation*, No. 1, 2010, pp. 34 et seqq.

The Internal-Market-Goal as Substantive Rationalization of EU Law

The substantive requirement of systematization is fundamentally different from the nation-state in the EU. The principle that guides systematization in EU law is not the identification of common features or values of a nation, but the establishment of an internal market. To this end, traditional EU law aims at providing the efficiency gains from comparative advantage of international trade. However, the EU has meanwhile developed beyond this mere efficiency rationale by providing also a social Union. If we look closer into EU product safety law, however, the social dimension of EU law is far from the understanding of the social dimension we know from the nation-state. Instead of really protecting individual's health and safety, EU law increasingly develops structures of governance at a European level through the formalization of interactions between the players on the internal market such as Member States, EU institutions and individuals[208] and not via a formalization of common values such as in the nation state. The more convergent or systematized these interactions are, the more we may speak of a 'Europeanization'.[209] In addition, market players themselves are recognised in a systematized way, forming groups on the market that express desires.

In order to be fit for systematization, legal material has to meet substantive criteria.[210] This means that legal material needs to be designed in the form of objective norms that allow for a certain level of abstraction.[211] However, the decisive criterion is whether this legal material allows for the investigation of a certain structure that may ultimately lead to guiding principles of law.[212] In *Weber's* view, such principles are legal duties that govern the legal system and are accepted by the people as binding because of their internal logic.[213] *Weber* characterised this process as the substantive rationalization of law.[214] So, what, if any, of such principles guide EU law to meet these requirements? Is the requirement of such 'principles' or the like desirable in EU law?

This idea of 'unification through legal doctrine' as a tool for internal market creation has been prominently rejected in the past. Besides general reservations against this method,[215] it was seen as unable to cope with the social differences in Europe as evident, for example, in the different traditions, cultures, economies, and

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[208] L. Moreno, 'Europeanisation, Mesogovernance and 'Safety Nets'', *European Journal of Political Research*, No. 42, 2003, p. 272.

[209] L. Moreno, 'Europeanisation, Mesogovernance and 'Safety Nets'', *European Journal of Political Research*, No. 42, 2003, p. 272.

[210] W. Schluchter, *Die Entwicklung des Okzidetalen Rationalismus*, Tübingen, Mohr Siebeck, 1979, p. 143.

[211] W. Schluchter, *Die Entwicklung des Okzidetalen Rationalismus*, Tübingen, Mohr Siebeck, 1979, p. 143.

[212] W. Schluchter, *Die Entwicklung des Okzidetalen Rationalismus*, Tübingen, Mohr Siebeck, 1979, p. 143.

[213] W. Schluchter, *Die Entwicklung des Okzidetalen Rationalismus*, Tübingen, Mohr Siebeck, 1979, p. 146.

[214] W. Schluchter, *Die Entwicklung des Okzidetalen Rationalismus*, Tübingen, Mohr Siebeck, 1979, p. 146.

[215] See O. Kahn-Freund, 'Common Law and Civil Law: Imaginary and Real Obstacles to Assimilation', in: Cappelletti (ed.), *New Perspectives for a Common Law of Europe/Nouvelles Perspecitives d'un droit commun de l'Eruope*, Leyden/Brussels/Stuttgart/Florence, Sijthoff/Bruylant/Klett-Cotta/Le Monnier, 1978, p. 141.

languages of the European Member States.[216] These scholars have an important point by highlighting the tensions that arise between the need for diversity in the EU and possible horizontal effects of harmonization. However, we can see on the example of EU product safety regulation that systematization still is highly successful in EU law. The reason for this success in EU product safety law lies in the fact that systematization in this area relies on market-features instead of common values. The criticism of systematization in EU law is in its sweeping generality wrong, as they tie the substantive rationalization to the provision of formalized values only. The market-oriented approach that the EU takes in product safety law, however, addresses not so much common values, but the formalization of interactions between internal market players. In this way, systematization in EU law does not aim at advancing one single truth.[217] To conclude, however, that one may reduce systematization in EU law to a sole organisational feature which is detached from the logics of integration of the treaties[218] runs the risks of creating a shield to hide exactly the purpose of systematization in EU law.

Both, the EU constitutions and the rationale of EU law support this argument. Functional economic considerations are at the heart of the European integration process.[219] Discussion such as the ones over human and fundamental rights, as well as principles[220] in the EU and on the social integration of Europe cannot divert us from the reality that the functional establishment of the internal market, drawing on the benefits acquired by efficiency, is the core of the European integration process.[221] It cannot be overemphasized that the adhesive which binds nation-states in Europe is trade, and that therefore the main purpose of the EU is to foster, protect and govern trade by the establishment of an internal market. Markets have since the beginning of written history always been the "cultural centers not only for the exchange of economic goods but also of social services".[222] It is the market where people meet and interact, not only despite but also because of their different cultural

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[216] L. Friedman/G. Teubner, 'Legal Education and Legal Integration', in: Cappelletti/Seccombe/Weiler (eds.), *Integration Through Law – Europe an the Federal Experience*, Vol. 1, Book 3, Berlin/New York, Walter de Gruyter, 1986, p. 377.

[217] A. v. Bogdandy, 'Founding Principles', in: v. Bogdandy/Bast (eds.), *Principles of European Constitutional Law*, Oxford/München/Baden-Baden, Hart/C.H. Beck/Nomos, 2nd ed., 2010, pp. 11, at p. 16.

[218] A. v. Bogdandy, 'Founding Principles', in: v. Bogdandy/Bast (eds.), *Principles of European Constitutional Law*, Oxford/München/Baden-Baden, Hart/C.H. Beck/Nomos, 2nd ed., 2010, pp. 11, at p. 16.

[219] See W. Molle, *The Economics of European Integration*, 5th ed., Farnham, Ashgate 2006, esp. pp. 35–36 and 67.

[220] T. Trimidas, *The General Principles of EU Law*, Oxford, University Press, 2nd ed., 2006.

[221] J.-U. Franck/K. Purnhagen, 'Homo Economicus, Behavioural Sciences, and Economic Regulation: On the Concept of Man in Internal Market Regulation and its Normative Basis', in: Mathis (ed.), *Law and Economics in Europe: Foundations and Applications*, Dordrecht, Springer 2013 (forthcoming).

[222] E. Petersmann, 'Constitutional Economics, Human Rights and the WTO' *Aussenwirtschaft,* No. 58, 2003, p. 49, at p. 56.

backgrounds, languages and habits.[223] It is hence the market that is a good fit to turn the obstacles of European integration such as diversity into advantages.[224] That is also what separates the EU from markets such as the US. While the post-war US has increasingly driven for 'nationalization' and 'unification' by e.g. employing uniform standards, a uniform language and alike, the EU takes advantage of its diversity on the market.[225] To be sure, maintaining diversity does not mean maintaining national borders as diversity can also grow beyond nationality. To this end, the ECJ has rightfully concluded that non-market arguments resulting from fundamental rights will only be taken into account in a balancing test against the market-rational aim of the fundamental freedoms.[226] Hence, arguments from market-rationality always have the potential to trump welfare-state ideas such as those resulting from fundamental rights.[227]

The rationalization of EU law via systematization can indeed contribute to the establishment of the internal market. No matter if we assume that the EU "can be considered as an operationally closed system in those areas where the Community [now: Union, addendum KP] has been given or has assumed competence"[228] or if we define it right from the start as an "open system",[229] the point of departure is that the EU multi-level legal system may lack a clear hierarchical structure but it does not lack goals and aims.[230] Both of which, the non-hierarchical structure and the internal-market goal can work likewise as a basis for a system[231] as "an institutional ideal of

[223] K. Purnhagen, 'The Architecture of Post-National European Contract Law from a Phenomenological Perspective – A Question of Institutions', *Rabels Zeitschrift für ausländisches und internationales Privatrecht – The Rabel Journal of Comparative and International Private Law*, forthcoming 2013b.

[224] K. Purnhagen, 'The Architecture of Post-National European Contract Law from a Phenomenological Perspective – A Question of Institutions', *Rabels Zeitschrift für ausländisches und internationales Privatrecht – The Rabel Journal of Comparative and International Private Law*, forthcoming 2013b.

[225] It is therefore no surprise that US importers demand further standardisation of EU product safety law, see D. Hanson, *CE Marking, Product Standards and World Trade*, Cheltenham, Northampton (MA), Edward Elgar, 2005, pp. 3.

[226] Case C-112/00, Judgment of the Court of 12 June 2003, *Eugen Schmidberger, Internationale Transporte und Planzüge v. Republik Österreich* [2003] ECR I-5659, para. 81.

[227] I have written elsewhere on the justification of this argument, see K. Purnhagen, 'The MRIC Working Paper No. 15 Law and Economics of the Precautionary Principle in Artegodan and Its Impact on EU Internal Market Regulation', fn. 30.

[228] J. Bengoetxea, *Legal System as a Regulative Ideal*, in: Koch/ Neumann (eds.), Praktische Vernunft und Rechtsanwendung, ARSP-Beiheft 53, 1994, p. 65, at 71.

[229] M. Adenas/D. Fairgrierve, 'There is a World Out Elsewhere' – Lord Bingham and Comparative Law', in: Adenas/Fairgrieve (eds.), *Tom Bingham and the Transformation of the Law: A Liber Amicorum*, Oxford, University Press, 2009, 856.

[230] M. Dyson, 'Divide and Conquer: Setting the Boundaries of Comparative Law', in: Helleringer/ Purnhagen (eds.), *Towards a European Legal Culture*, München/Oxford/Baden-Baden, Beck/ Hart/Nomos, forthcoming 2013, describes them as 'Legal Domains'.

[231] M. Adenas/D. Fairgrierve, 'There is a World Out Elsewhere' – Lord Bingham and Comparative Law', in: Adenas/Fairgrieve (eds.), *Tom Bingham and the Transformation of the Law: A Liber Amicorum*, Oxford, University Press, 2009, 856.

law",[232] working towards establishing the internal market as an institution by ensuring efficiency[233] and formalizing those interactions on the internal market as metrics that are best fit for the creation economic dependence on each other and maintenance of the status so acquired. As hence EU law is in most cases market regulation, it is important to see whether it may achieve its regulatory goal efficiently and in a similar way in comparable situations.[234] As such, systematization in EU law creates a "meta level",[235] comparable to the "ius commune americanum".[236] However, in order to effectively govern the challenges EU law faces resulting especially from the functional internal market goal, systematization shall not so much base on *les grand idées* or logical coherence,[237] but on problem-oriented law-making, responding to the challenges of our time within the limits imposed by the EU legal system.[238] In this respect, EU law may also decide in which areas systematization contributes to market establishment and where not.[239] In EU product safety law, Holmes' statement that "(t)he life of the law has not been logic; it has been experience"[240] is even truer than in national law, as the various experimentations with regulatory techniques have shown. In this respect, experience has shown that it is not only command-and-control mechanisms that integrate supranational law into Member State systems. Often it is the persuasion of national actors of the benefits of supranational regulation, perceiving national actors more as partners than as regulative addressees.[241] However, as a result from the increase of mass-phenomena on the market and from the need to effective and efficient intervention, EU law also

[232] J. Bengoetxea, 'Legal System as a Regulative Ideal', in: Koch/ Neumann (eds.), *Praktische Vernunft und Rechtsanwendung*, ARSP-Beiheft 53, 1994, p. 65, at 69.

[233] S. Grundmann, 'Das Thema Systembildung im Europäischen Privatrecht – Gesellschafts-, Arbeits- und Schuldvertragsrecht', in: Grundmann (ed.), *Systembildung und Systemlücken in Kerngebieten des Europäischen Privatrechts*, Tübingen, Mohr Siebeck, 2000, p. 1, p. 3.

[234] S. Grundmann, 'Das Thema Systembildung im Europäischen Privatrecht – Gesellschafts-, Arbeits- und Schuldvertragsrecht', in: Grundmann (ed.), *Systembildung und Systemlücken in Kerngebieten des Europäischen Privatrechts*, Tübingen, Mohr Siebeck, 2000, p. 1, p. 10.

[235] T. Tröger, 'Zum Systemdenken im europäischen Schuldvertragsrecht – Probleme der Rechtsangleichung durch Richtlinien am Beispiel der Verbrauchsgüterkaufrichtlinie', *Zeitschrift für Europäisches Privatrecht*, No. 11, 2003, 525, at p. 539; N. Walker talks about a "meta language", see N. Walker, 'The Idea of Constitutional Pluralism', *Modern Law Review*, No. 65, 2002, pp. 317–359.

[236] S. Grundmann, 'Europäisches Schuldvertragsrecht', *Zeitschrift für Unternehmens- und Gesellschaftsrecht* 1999, Einleitung, para 4.

[237] Rightly so A. v. Bogdandy, 'Founding Principles', in: v. Bogdandy/Bast (eds.), *Principles of European Constitutional Law*, Oxford/München/Baden-Baden, Hart/C.H. Beck/Nomos, 2nd ed., 2010, pp. 11, at p. 16.

[238] In this sense correctly also T. Tröger, 'Zum Systemdenken im europäischen Schuldvertragsrecht – Probleme der Rechtsangleichung durch Richtlinien am Beispiel der Verbrauchsgüterkaufrichtlinie', *Zeitschrift für Europäisches Privatrecht*, No. 11, 2003, 525, at p. 539.

[239] S. Grundmann, 'Das Thema Systembildung im Europäischen Privatrecht – Gesellschafts-, Arbeits- und Schuldvertragsrecht', in: Grundmann (ed.), *Systembildung und Systemlücken in Kerngebieten des Europäischen Privatrechts*, Tübingen, Mohr Siebeck, 2000, p. 1, p. 10.

[240] O. Holmes, 'Book Notice', *American Law Review*, No. 14, 1880, 233, at p. 234.

[241] M. Dawson, *New Governance and the Transformation of European Law*, Cambridge, University Press, 2011, p. 89.

addresses these market players in a systematized way as groups, which express their desires, believes and values as a group.[242] The law itself is also the right place for such systematization. Ever since the seminal *Costa v. Enel* judgment, law rather than political process has been the essential means that has worked towards the establishment of an internal market.[243] With regards to EU product safety law, the *Cassis de Dijon* judgment indeed provided such a catalyst for the area of EU product safety regulation. In addition, the 'new governance', 'better regulation' and in particular the Lisbon agenda, which were outlined in the first chapter bear witness to the fact that the rationalization of legal EU activity in order to 'make the EU the most competitive economy in the world' is nowadays more prominent than ever. So, the guiding principle of EU law, and hence the substantive requirement for its systematization, is the construction of a competitive internal market.

2.3 Conclusions: Systematization in the EU – A Mutation of Nation-State Systematization

New phenomena such as new governance carry the danger of over-stylization[244]; of celebrating as 'new' what has been long established but comes in a different guise.[245] The features of the EU such as its multi-level governance structure, its multi-lingual and multi-cultural setting should not induce us to dismiss the idea of systematization in EU law. Quite the contrary: it challenges it.[246] Also in areas where legal scholarship goes beyond the development within law *de lege lata* by formulating critique or other proposing new laws *de lege ferenda* one may not easily dismiss the need of law to be systematically coherent and consistent.[247] Especially in a fragmented legal order

[242] See on the need to group individuals for the purpose of efficient regulation on the example of the determination of the "duty of care" S. Shavell, *Economic Analysis of Accident Law*, Cambridge (MA), Harvard University Press, 1987, p. 74.

[243] See to this end the most influential study led by M. Cappelletti/M. Seccombe/J. Weiler (eds.), *Integration Through Law – Europe and the Federal Experience*, Berlin/New York, Walter de Gruyter, 1986.

[244] N. Walker, 'Constitutionalism and New Governance in the European Union: Rethinking the Boundaries', in: de Búrca/Scott (eds.), *Law and New Governance in the EU and US*, Oxford, Hart, 2006.

[245] M. Dawson, *New Governance and the Transformation of European Law*, Cambridge, University Press, 2011, p. 83.

[246] G. Sydow, *Verwaltungskooperation in der Europäischen Union*, Tübingen, Mohr Siebeck, 2004, p. 118: "Die Vorwürfe der Unübersichtlichkeit und inhaltlichen Disparität, wenn nicht des rechtlichen Chaos, die gegen das europäische Unionsrecht im Hinblick auf seine Rechtsquellen, Handlungsformen oder die bloße Anzahl der Sekundärrechtsakte immer wieder erhoben wird, zwingen nicht zu einer vorschnellen Aufgabe des Systemgedankens, sondern fordern ihn heraus."

[247] T. Ackermann, *Der Schutz des negativen Interesses*, Tübingen, Mohr Siebeck, 2007, p. 11; K. Schmidt, 'Zivilistische Rechtsfiguren zwischen Rechtsdogmatik und Rechtspolitik. Exemplarisches zum Programm der Ringvorlesung, in: K. Schmidt (ed.), *Rechtsdogmatik und Rechtspolitik: Hamburger Ringvorlesung*, Berlin, 1990, S. 9, 15. ff.; A. v. Bogdandy, 'Founding Principles', in: v. Bogdandy/Bast (eds.), *Principles of European Constitutional Law*, Oxford/München/Baden-Baden, Hart/C.H. Beck/Nomos, 2nd ed., 2010, pp. 11, at p. 18.

such as the EU law, a "maintenance and development of a 'legal infrastructure'"[248] is required to safeguard legal transparency.[249] What is more important is to disclose the values, the politics that lie behind the respective systematization[250] and, consequently, be able to not loose sight of these regulatory goals by looking at the system only. Systematization of EU law follows, with regard to its formal feature, the same line as systematization in the nation-state. The different casuistic used for systematization in the nation-state hence also applies at EU level, although not showing the same intensity in its drive towards codification.[251] However, the substantive requirement differs. While systematization in the nation-state aimed at identifying a nation, systematization in the EU is based on the establishment of an internal market. Instead of building on *les grand idées*, EU law formalizes the interaction of market players and finds problem-oriented solutions from challenges arising specifically from the establishment of the internal market. Understood in this way, legal systematization in the EU forms a somewhat different, typically European idea of systematization,[252] which may hence not be viewed as a new species, but moreover as a mutation of the same species.[253]

[248] A. v. Bogdandy, 'Founding Principles', in: v. Bogdandy/Bast (eds.), *Principles of European Constitutional Law*, Oxford/München/Baden-Baden, Hart/C.H. Beck/Nomos, 2nd ed., 2010, pp. 11, at p. 17.

[249] G. Schuppert, G./C. Bumke, *Die Konstitutionalisierung der Rechtsordnung*, Baden-Baden, Nomos, 2000, p. 40.

[250] T. Ackermann correctly calls this an "imperative of scientific honesty"(translation KP), see T. Ackermann, *Der Schutz des negative Interesses*, Tübingen, Mohr Siebeck, 2007, p. 9.

[251] T. Tröger, 'Zum Systemdenken im europäischen Schuldvertragsrecht – Probleme der Rechtsangleichung durch Richtlinien am Beispiel der Verbrauchsgüterkaufrichtlinie', *Zeitschrift für Europäisches Privatrecht*, No. 11, 2003, 525, at p. 539.

[252] See to this end also R. Zimmermann, 'Savigny's Legacy, Comparative Law, and the Emergence of a European Legal Science', *Law Quarterly Review*, No. 112, 1996, pp. 567 et seqq.

[253] J. Weiler/J. Trachtman, 'European Constitutionalism and its Discontents', *Northwestern Journal of International Law & Business*, No. 17, 1997, p. 354 describe EU law as being "not a different species of law, but is a mutation of the same species".

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