



Universiteit
Leiden
The Netherlands

Concurrence in European Private Law

Graaff, R. de

Citation

Graaff, R. de. (2020, September 9). *Concurrence in European Private Law*. Meijers-reeks. Eleven International Publishing. Retrieved from <https://hdl.handle.net/1887/136532>

Version: Publisher's Version

License: [Licence agreement concerning inclusion of doctoral thesis in the Institutional Repository of the University of Leiden](#)

Downloaded from: <https://hdl.handle.net/1887/136532>

Note: To cite this publication please use the final published version (if applicable).

Cover Page



Universiteit Leiden



The handle <http://hdl.handle.net/1887/136532> holds various files of this Leiden University dissertation.

Author: Graaff, R. de

Title: Concurrence in European Private Law

Issue Date: 2020-09-09

1 General Introduction

1.1 AN OLD DISCOURSE AND A NEW DEBATE

Private relationships are governed by many different rules, ranging from open-textured standards of general application to detailed rules aimed at specific situations. It is not unusual for a single set of facts to fall within the ambit of multiple rules nor is it uncommon that, on the face of it, several rights and duties arise concurrently. At first glance, a contracting party may, for instance, be entitled to demand specific performance of the obligations under the contract, to rescind the contract for pre-contractual misrepresentation, to terminate the contract for breach, and to recover the losses resulting from the breach. In some jurisdictions, moreover, the contracting party may also be entitled to claim damages for losses resulting from a violation of one or more tortious duties by the other contracting party.

Such a concurrence of rights and duties does not give rise to problems as long as the application of the underlying rules produces the same outcome. Yet the rules may vary in certain ways, both in terms of their conditions and in terms of their consequences, which may lead to different outcomes. In such situations, the question that arises is whether the law permits the interested party to elect the rule of his choice. This question can only be answered by considering the relationship between the underlying rules. Does one legal rule affect the scope of application of another legal rule? Can the rules be applied cumulatively, or must one of them be excluded in favour of the other? Does the law permit a choice between the rules?

These questions have kept scholars occupied for a long time. Early examples can be found in the works of medieval scholars who sought to systemise Roman law on the basis of the inherited *Corpus Iuris Civilis*. They wondered whether a person is permitted, after having instituted legal proceedings against another person, to abandon the *actio* he initially relied upon in favour of another, more advantageous, *actio*.¹ The same question was examined again by German scholars in the course of the 19th and early 20th century. The works of Ernst Levy (1881-1968) stand out. He wrote several books about the relationship between a wide range of *actiones*, pushing historical research in this field to its doctrinal peak.² At the time,

1 See Bezemer 2007, who submits that Azo of Bologna († ca. 1220-1230) was the first to examine this question under the header *cumulatio actionis*. The quotation referred to by Bezemer can be found in Dolezalek 1985, p. 600 (no. 338).

2 Levy 1918; Levy 1922; Levy 1962.

Roman law had already disappeared as a source of applicable law on the continent, due to the adoption of the national codifications of civil law in the course of the 19th and early 20th century. Henceforth, scholars increasingly devoted their attention to the relationships between the statutory rules collected in these codifications.

Over the past decades, their questions have acquired a new dimension as the result of the proliferation of the laws of the European Union and their increased impact upon the legal relationships between private parties. In a long line of leading cases, the Court of Justice of the European Union has established that individuals are under a duty towards other individuals to comply with certain provisions contained in the Treaty on the Functioning of the European Union and in the Charter of Fundamental Rights of the European Union, and with certain general principles of Union law. Rights and duties have also been laid down by the Union legislature in directives and regulations governing areas as diverse as social policy, consumer protection, competition law, transport, public health, and the internal market more broadly. It is not unusual for a single set of facts to fall within the ambit of multiple Union rules nor is it uncommon that, on the face of it, national laws may provide protection as well.

The concurrence of these rules is often understood and explained on the basis of several fundamental assumptions. The first is that Union laws have precedence over national laws. In its famous ruling in the case *Flaminio Costa v. ENEL*, the Court of Justice rendered it impossible for the Member States 'to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on the basis of reciprocity'.³ In subsequent cases, the Court has made it very clear that the validity of Union law cannot be challenged by relying upon national laws, regardless of their date of coming into force or their constitutional importance. In its view, any binding norm of Union law takes precedence over any provision of national law.⁴ This principle of primacy is an essential feature of the European legal order.⁵ It safeguards the consistency and uniformity in the interpretation and application of Union law through the subordination of Member State law and through the concomitant duty imposed on the national courts to apply Union law in its entirety and to protect the rights that it confers on individuals.⁶

The second assumption is that harmonising measures replace national laws. One of the core objectives of the European Union is to establish an internal market in which goods, persons, services, and capital can move

3 Case 6/64, *Flaminio Costa v. ENEL*, ECLI:EU:C:1964:66.

4 Case 11/70, *Internationale Handelsgesellschaft v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, ECLI:EU:C:1970:114; Case 106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal*, ECLI:EU:C:1978:49; Opinion 1/09 of the Court, [2011] ECR I-1137.

5 Opinion 1/91 of the Court, [1991] ECR I6079, at 21; Opinion 1/09 of the Court, [2011] ECR I-1137, at 65; Case C-399/11, *Stefano Melloni v. Ministero Fiscal*, ECLI:EU:C:2013:107, at 59.

6 Case 106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal*, ECLI:EU:C:1978:49, at 14-16.

freely between the Member States.⁷ One of the means to achieve this objective is to introduce Union legislation which removes barriers to economic integration originating from divergences in ‘the provisions laid down by law, regulation or administrative action in Member States’.⁸ Such harmonisation or approximation is aimed at creating a ‘level playing field’ on which economic actors can compete under equal conditions.⁹ For this reason, it is assumed that directives and regulations adopted by the Union legislature introduce a uniform legal regime embracing all the Member States and preempt Member State competence to maintain its own laws or introduce new provisions that might deviate from that regime.¹⁰

The third assumption is that specific rules have precedence over general rules. This maxim, well-known by the Latin phrases *lex specialis derogat legi generali* and *specialia generalibus derogant*, has become part of the established repertory used to interpret the laws of the European Union.¹¹ It is assumed, for instance, that the treaty provisions concerning the free movement of persons and services set aside the general prohibition of discrimination on grounds of nationality,¹² that provisions of primary Union law can be relied upon only in the absence of more specific harmonising measures adopted by the Union legislature,¹³ and that directives and regulations apply only in the absence of harmonising measures more specific in scope.¹⁴ Conway has even gone so far as to argue that the concurrence of Union rules is unwelcome and should best be avoided through a rational application of the *lex specialis* principle. In the interest of providing legal certainty, a specific rule should always prevail over a general rule if both relate to the same subject matter.¹⁵

Each of these fundamental assumptions has long been established. Libraries are filled with books about the relationship between Union laws

7 Art. 26 (2) TFEU.

8 This formulation is used in Art. 114 (1) TFEU, the provision which forms the basis of most directives and regulations in the area of the internal market. Such barriers can also be removed through negative integration, that is through the removal of national laws that discriminate against goods, persons, services, and capital from other Member States or render market access more difficult. In such situations, however, national laws are not replaced by Union laws. See, on negative integration, Weatherill 2017, p. 5-10.

9 Weatherill 2017, p. 10-13.

10 See e.g. Dougan 2000, p. 854, who observes that the approximation of national law by the Union ‘is often stereotyped in terms of a model of “total harmonization”’.

11 Beck 2012, p. 222-223.

12 See e.g. Böhning 1973, p. 82; Davies 2003, p. 188; Van den Bogaert 2005, p. 121; Hartkamp 2011, p. 164-165; Krenn 2012, p. 193; Veldhoen 2013, p. 370-371; McDonnell 2018, p. 438.

13 Known as the *Tedeschi* principle. In Case 5/77, *Carlo Tedeschi v. Denkavit Commerciale*, ECLI:EU:C:1977:144, the Court held that where directives provide for the harmonisation of objectives of general interest, recourse to nowadays Article 36 TFEU ‘is no longer justified’. On this basis, scholars have concluded that provisions of primary law apply only in the absence of more specific secondary legislation. See e.g. Mortelmans 2002, p. 1328; De Vries 2008, p. 575; Tobler 2013, p. 458; Koffeman & Rijpma 2014, p. 466; Cuyvers 2017, p. 299.

14 See e.g. Anagnostaras 2010, p. 153; Garde 2012, p. 137, on the scope of application of the Unfair Commercial Practices Directive.

15 Conway 2012, p. 156.

and national laws, and between general rules and specific rules. In fact, a host of examples shows that Union laws have the capacity to set aside or replace the provisions laid down by national laws, and that specific rules have the capacity to set aside general rules. However, a mode of analysis based exclusively on these fundamental assumptions will encounter certain difficulties when it seeks to understand and explain the relationship between concurrent rights and duties. For Union laws do not necessarily set aside or replace the provisions laid down by national laws, and specific rules do not necessarily trump general rules. The question as to *whether* one rule affects the scope of application of another rule, so this book aims to demonstrate, is a question of interpretation which cannot be answered on the basis of these fundamental assumptions alone.¹⁶

Inspired by the experiences gained from examining several national systems of private law, this book offers a different scheme of analysis. It starts from the premise that each applicable rule, however founded, should be realised to the greatest possible extent. In principle, then, each rule ought to have its intended legal effect once the necessary conditions have been established. Two exceptions must be made, however. An election between the available alternatives is required if cumulative application would lead to inconsistent outcomes which cannot exist concurrently. The underlying reason is that the objectives of one rule cannot be realised if the other rule is also applied. For the same reason, the law sometimes prescribes that one of the rules applies exclusively, so that no election can be made at all.

This scheme of analysis accepts and accommodates the situations in which Union laws replace or exclude national laws, and the situations in which specific rules set aside rules more general in scope. Crucially, the scheme also absorbs the many situations in which rules do apply concurrently and provides a model by which the questions which may arise as a result of their overlap can be debated and solved. By developing this scheme of analysis, the book purports to provide a complete and nuanced account of the impact of the laws of the European Union and their interaction with the national systems of legal protection.

1.2 DIFFERENT VISIONS OF THE STRUCTURE OF THE LEGAL SYSTEM

This scheme of analysis offers a host of doctrinal issues and emerging novelties, relevant to scholars and practitioners of private law and Union law alike. But they have not yet received the attention they deserve. Scholars specialised in private law, it is true, have taken some initial steps. But their

16 Cf. Schütze 2006, p. 1023, who distinguishes between the doctrine of 'pre-emption', which determines whether a conflict between two norms exists, and the doctrine of 'supremacy', which determines which norm prevails in the event of conflict.

contributions are either not written in English,¹⁷ or they use the national civil code as a point of reference and view the Union laws from this particular angle.¹⁸ Meanwhile, scholars specialised in Union law have built up a rich body of academic discourse which has flourished alongside unfolding case law and newly adopted directives and regulations. But this scholarship does not generally focus on the relationships between private parties, but on the division of competences between the Union and its Member States.

What is the reason that scholars of private law and Union law are talking at cross-purposes? One reason is that they tend to view the structure of the legal system from different angles. Many jurists specialised in private law, especially continental scholars, are thinking in terms of the so-called 'institutional' model inherited from Roman jurists. By contrast, many scholars specialised in Union law are thinking in terms of the structure of the legal order conceptualised by Hans Kelsen (1881-1973). It is important to consider how these models differ from each other before determining the perspective which should be adopted in this book.

The 'institutional' model forms the foundation of the continental codifications of civil law. Its basic structure originates from the works of the 2nd century jurist Gaius, who was the first to subdivide Roman law into the law of persons, things, and actions.¹⁹ His structure was later adopted by the writers of the *Institutiones*, the textbook which served as an introduction to the codification ordered by the 6th century emperor Justinian I.²⁰ Book Four of the *Institutiones* dealt with different types of actions, such as the *actiones in rem*, which could be used to assert a property right, and the *actiones in personam*, which could be used to enforce a personal obligation. This *summa divisio*, between the laws of obligations and things, is a core feature still to be found in every modern codification of civil law, including the French *Code Civil* (1804), the German *Bürgerliches Gesetzbuch* (1900), and the Dutch *Burgerlijk Wetboek* (1992). The distinction between personal rights and real rights has even found its way to the common law, through Hale's *The History and Analysis of the Common Law of England* (1713) and Blackstone's *Commentaries on the Laws of England* (1765-69).²¹

What is important to understand, for present purposes, is that these works share a common objective. Contemporary codifications of civil law and the accompanying scholarship – but also certain commentaries on

17 E.g. Baldus 1999; Huber 2001; Gruber 2004, p. 229-258; Lerche 2007; Goldie-Genicon 2009; Sieburgh 2009; Bachmann 2010; Hartkamp 2011; Veldhoen 2013; Castermans & De Graaff 2013; De Graaff 2014b; Laroche 2014; Castermans & Krans 2019.

18 E.g. Baldus 1999 (who also examines Roman law); Huber 2001; Lerche 2007; Goldie-Genicon 2009; Bachmann 2010; Hartkamp 2011; Castermans & De Graaff 2013; Veldhoen 2013; De Graaff 2014a; Castermans & De Graaff 2014; Laroche 2014; Castermans & Krans 2019.

19 Watson 1994, p. 5; Zimmermann 1996, p. 25-26.

20 Watson 1994, p. 8; Zimmermann 1996, p. 27.

21 Hale 1713; Blackstone 1765. The influence of the Justinianian model on the works of Hale and Blackstone is examined by Simpson 1981, p. 640-641; Watson 1988, p. 799-812.

the common law²² – aim at covering the rules and institutions relevant to private relationships in a comprehensive and systemic way. They use a conceptual model to describe and classify the world of persons and things and define the relations between them. The precise contents of the resulting models may differ over time and across jurisdictions, but their common objective is to cover the relevant aspects of the factual reality, so as to enable the resolution of any legal dispute between private parties arising in the real world. Such institutional systems, Samuel summarises, aim ‘to create a legal image of social reality in such a way that legal rules – legal norms – can be meaningfully applied’.²³

Hans Kelsen did not seek to provide a comprehensive theory which can be used to understand the world of persons and things. In fact, he wanted to emancipate his *Pure Theory of Law* from ‘alien elements’ such as theology and the natural sciences. To that end, he developed a model which can be used to assess whether a norm – that is ‘an act by which a certain behavior is commanded, permitted, or authorized’²⁴ – is ‘valid’ in the sense that a person ought to behave in a certain way.²⁵ How to determine whether an act produces such legal consequences? The answer to this question is straightforward: a norm can be valid only if it rests upon another norm which, ultimately, must be validated by the ‘basic norm’ or *Grundnorm*, the validity of which is presupposed.²⁶ It is clear that institutional models cannot be used in order to understand this vertical structure. Nor is the distinction between private and public law relevant as such. What matters is whether a norm – such as a rule contained in a civil code – can be validated, ultimately, by the basic norm. It flows from this reasoning that any inconsistency between a higher norm and a lower norm will render the latter invalid.²⁷

Union law can be viewed from this perspective. At the top of the pyramid, we encounter the constituent treaties: the Treaty on the European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU).²⁸ Since the entry into force of the Lisbon Treaty in 2009, the same rank has been awarded to the Charter of Fundamental Rights of the EU.²⁹ The second tier is formed by the general principles of Union law, such as proportionality, legal certainty, and equality.³⁰ The third tier is formed by the legislative acts adopted by the Union legislature pursuant to the relevant procedures.³¹ At the bottom of the pyramid, we find the delegated

22 E.g. Burrows 2013.

23 Samuel 2014, p. 101.

24 Kelsen 1967, p. 5.

25 Kelsen 1967, p. 10.

26 Kelsen 1967, p. 193-195.

27 Kelsen 1967, p. 208 and 267-268.

28 Art. 1 TEU.

29 Art. 6 (1) TEU.

30 Craig & De Búrca 2015, p. 111-113.

31 Art. 289 TFEU.

and implemented acts adopted on the basis of Articles 290 and 291 TFEU.³² In fact, the very principle of primacy of Union law over national law can be considered a straightforward application of the monist theory developed by Kelsen, who regarded national and international law ‘as a unity’ and argued that the latter is superior to the former.³³

Useful as the Kelsen model may be to understand the hierarchical structure (or *Stufenbau*) of the Union legal order and its primacy over national laws, it tells us nothing about the legal effects of these rules. This is unfortunate, for there is much more to Union law than knowing whether a rule is ‘valid’ or ‘invalid’.³⁴ Union law also confers rights and duties, not only on public bodies but also on private parties. This becomes clear if we take a brief look at the doctrinal debate about the direct effect of Union law in the national legal orders. Although scholars quarrel about the exact definition,³⁵ it is widely accepted that Union law may not only be applied as a standard to review the legality of national law, but may also serve as a source of rights and duties (often called obligations).³⁶ The meaning of these terms changes accordingly. On the one hand, the term ‘right’ is used, not least by the Court of Justice itself,³⁷ to refer to a general right to ‘rely on’ Union law, which corresponds to a duty on the courts to apply Union law and, if need be, to set aside conflicting national laws in the cases arising before them.³⁸ On the other hand, the term ‘right’ is used to indicate a more specific entitlement of an individual against one or more others, such as restitution, specific performance or compensation.³⁹

If the Kelsen model cannot provide us with an adequate picture of the rights and duties Union law confers upon individuals, should we then resort to the ‘institutional’ model? The question that immediately arises is which institutional model. As mentioned, all modern civil codes aim to provide a comprehensive and systemic overview of private law. But they do not necessarily adopt the same style or structure. In fact, comparative lawyers are used to dividing the world’s legal systems into legal families; two of which are of French and German origin.⁴⁰ One important reason for distinguishing between these two systems lies in the differences between

32 Craig & De Búrca 2015, p. 114-120.

33 Kelsen 1967, p. 328-344.

34 This point has also been stressed by scholars specialised in private law, such as Hartkamp (e.g. in Hartkamp 2013, p. 194) and Sieburgh (e.g. in Sieburgh 2013, p. 1172-1173).

35 As will be discussed in section 4.2, scholars have constructed a narrow and a broad definition of direct effect.

36 See e.g. Prechal 2005, p. 241; Dougan 2007, p. 933-934, 937-938; De Witte 2011, p. 331; McDonnell 2018, p. 430-431.

37 E.g. in Case C-414/16, *Vera Egenberger v. Evangelisches Werk für Diakonie und Entwicklung*, ECLI:EU:C:2018:257, at 76 and 78; Case C-68/17, *IR v. JQ*, ECLI:EU:C:2018:696, at 69.

38 Prechal 2005, p. 100.

39 Van Gerven 2000, p. 507; Prechal 2005, p. 97; Craig & De Búrca 2015, p. 186.

40 Esmein 1900, p. 495; Arminjon, Nolde & Wolff 1951, p. 47; Schnitzer 1961, p. 189-248; Zweigert & Kötz 1992, p. 69-75; Van Hoecke 2015, p. 24-26. See also the overview of legal family classifications across time provided by Siems 2014, p. 76.

the *Code Civil* and the *Bürgerliches Gesetzbuch*. The *Code Civil* is modelled on the system of Gaius,⁴¹ although it must be noted that its third book is not dedicated to actions but contains residual rules on a range of different subjects. The *Bürgerliches Gesetzbuch* is more abstract and technical in nature. It consists of five books: a general part containing the rules common to the whole of private law, and separate books about obligations, things, family law, and succession. This system, also known as the *Pandektensystem*, uses a 'formal legal technique with extremely clear-cut concepts which, far from forming the basis of a thorough codification in France, whose traditions look more to the political and forensic spheres, had hardly any effect there at all'.⁴²

Choosing one of these institutional models requires us to recast the other applicable laws in its terms. This surely is a task that is too complex and time-consuming to undertake. We would, moreover, immediately encounter a problem of comparative law methodology. For we risk imposing upon the other systems of private law and Union law a model which is not actually used to envisage the structure of the law in these systems.⁴³ We face the same problem if we rely upon the *Draft Common Frame of Reference* (DCFR) in order to understand the structure of the law. This is a comprehensive collection of principles, definitions, and model rules of European private law, compiled by a great number of jurists from far and wide over the course of several years.⁴⁴ But it is a compromise text which does not reflect the state of the law in any system of private law currently in force, has not been adopted by the Union legislature, relies upon categories and concepts which arguably lack flexibility,⁴⁵ and does not fully embrace the Union laws relevant to private parties,⁴⁶ because its underlying purpose is to build a new institutional system of private law in its own right.⁴⁷ Using the DCFR as a model may have the effect of causing us to lose sight of the very legal materials we wish to understand.

How to break this deadlock? How to understand the relationship between concurrent rights and duties without getting bogged down in a regression which ultimately leads back to the 'basic norm' or attempting to press the whole of the law into the moulds of yet another institutional

41 Watson 1994, p. 17.

42 Zweigert & Kötz 1992, p. 70.

43 See, generally, Samuel 2014, p. 6, 9, 63, 78, 130, and 147, who warns against 'legal imperialism'.

44 For an overview of the history of the project and its contributors and funders, see Von Bar, Clive & Schulte-Nölke 2009, p. 47-56.

45 Consider the criticism voiced by Marchetti 2012, p. 1274.

46 The DCFR only includes provisions contained in certain directives existing at the time of drafting, such as Council Directive 93/13/EEC on unfair terms in consumer contracts (II. – 9:401-410 DCFR).

47 Consider the criticism voiced by Ackermann 2018, p. 745-749, of the various collections of model rules and principles which have been produced by private-law scholars over the course of the past decades.

structure? The answer lies in the question this book aims to answer. If we wish to understand the relationship between concurrent rights and duties, our focus should be on the legal relations between persons and not on the institutional or hierarchical structure of the legal system. In other words, we should view the law from the perspective of the individuals involved.

1.3 THIS BOOK'S FOCUS ON LEGAL RELATIONS

The theory developed by the American jurist Wesley Newcomb Hohfeld (1879-1918) can be helpful in order to express the questions we aim to answer and select the relevant cases and materials. Troubled as he was by the indiscriminate use of the words 'rights' and 'duties',⁴⁸ Hohfeld proposed a structure of eight 'correlative' concepts which can be arranged in two groups.⁴⁹ We will briefly explain these two groups by reference to their core concepts: *claims* and *powers*.

In its narrowest sense, Hohfeld argued, the term *right* (or *claim*) is used as the correlative of the term *duty*. If someone has a claim, another person is under a duty to behave in a certain way.⁵⁰ Examples are the claim for specific performance, the claim arising from undue payment, and the claim for compensation. From an analytical perspective, such a claim must be distinguished from a *power*, that is the capacity of a person to unilaterally create, modify or extinguish a legal position or relationship, and so to create, modify or extinguish claims and powers.⁵¹ Examples are the termination of a contract for breach, the rescission of a contract for pre-contractual misrepresentation, and the possibility to extinguish a claim by setoff. The distinction between these core concepts – claims and powers – becomes apparent if we adopt the perspective of the person affected. Hohfeld demonstrated that this person is not under a duty to behave in a certain way, but is subjected to the liability that the power will be exercised. Hence, the correlative of a power is not a duty but a liability.⁵²

Hohfeld's correlatives have been put to lots of different uses. Indeed, his model has become famous because it can be used to analyse the concepts existing in any legal system in terms of legal relations.⁵³ It does not come as a surprise, therefore, that the model has also been used by scholars specialised in Union law. They have relied upon Hohfeld's model in order to better apprehend the different claims and powers conferred upon individuals and the corresponding duties and liabilities imposed on other individuals and

48 Hohfeld 1913b, p. 28.

49 Lawson 1977, p. 2.

50 Hohfeld 1913b, p. 30-32; Hohfeld 1917, p. 717.

51 Hohfeld 1913b, p. 44-54.

52 As this is 'a well-known legal term with long-settled meanings', Pound 1959, p. 81, has suggested to use the term 'risk' instead.

53 Schlag 2015, p. 217-219.

on the Member States.⁵⁴ His model has also been valued by practitioners such as Advocate General Wahl, who used Hohfeld's idea that claims and duties correspond in order to support his conclusion that Union law – and not national law – determines the persons liable to pay compensation for losses resulting from an infringement of EU competition law.⁵⁵

Another virtue of Hohfeld's scheme is that it allows us to examine the differences and similarities between legal systems without having to resort to the formal legal concepts used in those systems.⁵⁶ Hence, it enables us to perform the task we have in mind: namely to compare the national systems of private law and to value these insights as a source of understanding of the laws of the European Union. The question may be raised, however, whether we are not at risk of imposing yet another model which is not actually used to envisage the structure of the law in the systems under consideration.⁵⁷ Prechal, for one, has submitted that Hohfeld's analytical approach 'is *only one* school of thought, by origin Anglo-American'. In her view, his scheme 'does not necessarily link up with the way matters are conceived on the continent and in legal practice'.⁵⁸

The fact that Hohfeld was an American jurist, who used examples from the common law and from equity and whose concepts still attract significant attention in the English-speaking world, should not lead us to believe that his theory is of Anglo-American origin. His guiding thesis – legal problems can only be understood in terms of legal relations – can be traced back to Friedrich Carl von Savigny (1779-1861)⁵⁹ and has also been embraced by Marcel Planiol (1853-1931).⁶⁰ When carving out his fundamental legal conceptions, moreover, Hohfeld built on the works of John William Salmond (1862-1924),⁶¹ who adopted the distinction, made by Bernhard Windscheid (1817-1892),⁶² between claims and powers.⁶³ The first

54 Coppel 1994; Hilson & Downes 1999; Gilliams 2000; Prechal 2000, p. 1057-1058; Eilmansberger 2004; Bengoetxea & Jääskinen 2010; Aalto 2011, p. 162-176; Bengoetxea 2012, p. 738-746; Lock 2019.

55 Opinion A-G Wahl, Case C-724/17, *Vantaan kaupunki v. Skanska Industrial Solutions and Others*, ECLI:EU:C:2019:100, at 61. The reference to Hohfeld 1913b can be found in footnote 28. The Court followed the Opinion on this point, see Case C-724/17, *Vantaan kaupunki v. Skanska Industrial Solutions and Others*, ECLI:EU:C:2019:204, at 28.

56 Van Hoecke 1996, p. 194-197; Brouwer & Hage 2007, p. 5; Samuel 2014, p. 102-105; Van Hoecke 2015, p. 13-15.

57 Samuel 2014, p. 107.

58 Prechal 2000, p. 1058.

59 Von Savigny 1840b, p. 1: 'Jedes Rechtsverhältniß besteht in der Beziehung einer Person zu einer andern Person.' See also Von Savigny 1840a, p. 7.

60 Planiol 1928, p. 702: 'Par définition, tout droit est un rapport entre les personnes.'

61 Salmond 1902, p. 217-238.

62 Windscheid 1862, p. 81.

63 We should not conclude, therefore, that 'pandectist concepts are completely alien to England', as Vaquer 2009, p. 489 does. See, about the roots of Hohfeld's scheme, Kocourek 1920, p. 25; Pound 1959, p. 76-77; Frydrych 2018, p. 329-331.

concept has been developed by Windscheid himself⁶⁴ and still forms the backbone of the German Civil Code, which defines the claim – the *Anspruch* – as ‘Das Recht, von einem anderen ein Tun oder Unterlassen zu verlangen (...)’.⁶⁵ The power of an individual to unilaterally create, modify or extinguish a legal position or relationship has been recognised as a separate legal concept ever since the contributions of Emil Seckel (1864-1924), who coined the term *Gestaltungsrecht*.⁶⁶ This concept is not as established in other continental jurisdictions, although it is not unusual for a Dutch writer to refer to *wilsrechten*⁶⁷ or for a French writer to refer to *droits potestatifs*.⁶⁸

The basic components of Hohfeld’s scheme, so it appears, are familiar to scholars across Europe.⁶⁹ Still, Prechal rightly observes that some matters are conceived differently on the continent. Importantly, views may differ as to the role of the courts. Do they enforce rights or do they award remedies? The traditional common law position is that a remedy is a ‘cure’ provided by a court of law. The court order reframes the right or even originally confers it: the remedy is said to precede the right (*ubi remedium ibi ius*). By contrast, civil lawyers assume that a judicial decision does not create a new right, but rather confirms its existence: the right is said to precede the remedy (*ubi ius ibi remedium*).⁷⁰ This does not mean that English law always requires recourse to the courts, nor that continental systems never require the courts to step in. In fact, English law does recognise the concept of ‘self-help’ remedies,⁷¹ while some continental systems do attach more importance to judicial intervention than others.⁷² But the reader should be aware that even though Hohfeld himself remained neutral as to whether or not rights exist outside the courts, views may differ in practice.⁷³ A common lawyer is used to the idea that the courts develop the law, whereas a civil lawyer traditionally assumes that the courts discover the law as it stands.⁷⁴

64 Windscheid 1856, p. 3-7.

65 § 194 (1) BGB.

66 Seckel 1903. See about this development Hattenhauer 2011, p. 197 et seq., and about the distinction between *Ansprüche* and *Gestaltungsrechte* Neuner 2012, p. 219-223.

67 Rupke 1914; Drielsma 1940; Drielsma 1946; Meijers 1948, p. 266; Suijling 1948, p. 102-107; Drielsma 1975; Mellema-Kranenburg 1988, p. 8; Snijders 1999; Nieuwenhuis 2007a, p. 52-53; Biemans 2011, p. 193-195; Bartels & Van Mierlo 2013, no. 2; Spierings 2016; Verheul 2017; Van Nispen 2018, p. 52-54, 59-61; Verheul 2018.

68 Najjar 1967, p. 100 et seq.; Bénac-Schmidt 1983, p. 114 et seq.; Pomart-Nomdedeo 2010; Lefer 2016. See also Vaquer 2009, p. 496-497, with references to Italian and Spanish law.

69 Van Gerven 1973, p. 90-94; Graziadei 2008, p. 84.

70 Dedek 2010 discusses the differences between these approaches from a historical and comparative perspective.

71 E.g. rescission for misrepresentation can be effected without a court order.

72 Hattenhauer 2011, p. 205 et seq.; Ebers 2016, p. 58-60. Until recently, for instance, the *Code civil* required the assistance of a court to nullify a contract because of mistake, fraud or duress (Art. 1117 CC). This requirement has been abolished by *Ordonnance n° 2016-131 du 10 février 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligations* (hereinafter: *Ordonnance n° 2016-131*).

73 Barker 2018, p. 25-28.

74 Dedek 2010, p. 29-30.

One more point should be mentioned before we consider the questions and outline of this book. In line with Hohfeld's guiding thesis, we will not only pay attention to the active side of legal relations, but also to their passive side – that is, to the persons affected by the enforcement of a claim or the exercise of a power. These persons may contest the assertion that a claim exists or that a power has been lawfully exercised. In Hohfeld's words, they would argue that they are either entitled to a *privilege* or to *immunity*.⁷⁵ In this book, the term *defence* will be used to cover both situations, because this term is tailored to the dynamics of legal dispute. After all, it is a well-established rule in all jurisdictions that if a matter is taken to court, it is up to the claimant to allege the elements of the relevant rule of law in order to obtain the result sought.⁷⁶ He may not be required to mention the rule by its name, but he is required to demonstrate – by reference to the relevant standards of proof – that the facts that are necessary for a certain rule to become operative have occurred and that the court must, therefore, conclude that a claim exists or that a power has been lawfully exercised.⁷⁷ In turn, the defendant may be able to rely upon a defence. And just as a single set of facts can, on the face of it, give rise to multiple claims or powers, so too may several defences arise in a given case.⁷⁸ Their relationship should be considered in this book.

1.4 QUESTIONS AND OUTLINE

The previous sections have explained why this book focuses on legal relations and have informed the reader about the kinds of rules – claims, powers, defences – which will be examined. However, this is only one part of our enquiry. Although Hohfeld's scheme may help us towards defining the basic categories, it does not tell us whether a right exists, let alone whether rights may exist concurrently. Such questions of interpretation cannot be answered by using his conceptual model.⁷⁹ Hohfeld was well aware of this: 'Whether there should be such concomitant rights (or claims)', he wrote, 'is ultimately a question of justice and policy; and it should be

⁷⁵ Hohfeld 1913b, p. 36.

⁷⁶ As noted by e.g. MacCormick 1978, p. 41-52. In most continental legal systems, this rule is laid down in statutory provisions (e.g. in France in Art. 1353 CC; in the Netherlands in Art. 150 Rv). In Germany, the rule goes by the name of the *Normentheorie* (Rosenberg 1956, p. 153).

⁷⁷ Unless the claimant requests a declaratory decision that he is *not* under a legal duty towards the defendant, or that the exercise of a power by the defendant was *not* valid.

⁷⁸ Already observed by Von Tuhr 1923, p. 18. The defence stage has received more scholarly attention in recent years: Nieuwenhuis 1997, p. 15-16; Bakels 2009a, p. 337; Neuner 2012, p. 242-245; Goudkamp 2013, p. 19-20, 202; Smith 2016; Martín-Casals 2019a, p. 769-776.

⁷⁹ Van Gerven 1961, p. 2041 and 2051. See also the distinction made by Frydrych 2017, p. 125-131, between models and theories of rights.

considered, as such, on its merits.⁸⁰ For this reason, this book does not only rely upon conceptual categories, but will also devote much attention to features of legal argumentation.

The principal question which this book aims to answer is whether the scheme of analysis conceived and fostered in the context of the national systems of private law can be valued as a source of understanding of the laws of the European Union. In the first part of the book, several national legal systems are examined and compared. What are the themes running through the various solutions to individual issues of concurrence? Our findings will equip us with the necessary tools to analyse the laws of the European Union. Can we see the same principles at work if we examine the statements of the Union legislature and the Court of Justice?

The outline of the book is as follows. Building on the current chapter, Chapter 2 identifies three categories of legal rules – claims, powers, and defences – which play a central role when resolving legal disputes between individuals in modern systems of private law. The chapter then considers the situation where these rules overlap. How to determine whether, and to what extent, one rule affects the scope of application of another rule? When, if at all, do specific rules have priority over general rules? The chapter examines and compares the approaches adopted in Dutch, English, French, and German law. Can we see the same principles at work in these legal systems?

Chapter 3 considers in greater detail the reasons underlying the decision to permit or restrict the availability of one legal rule because of the availability of another legal rule. It focuses on the issue which has been at the heart of the debate about concurrence in contemporary private law: the relationship between the laws of contract and tort. The question to consider is whether, and to what extent, the law permits a choice between finding liability in contract and in tort. The chapter examines how this question is answered in terms of Dutch, English, French, and German law. It traces the historical development of these approaches and explains their differences by looking at the underlying structure of these systems of private law. How to explain that only French law generally excludes the possibility to claim in tort if the damage is caused by or related to the performance, or non-performance, of a contractual obligation?

Having defined and examined our subject more accurately, we will shift our attention to the laws of the European Union. Chapter 4 first takes a step back and substantiates two underlying propositions. The first proposition is that Union law contains rules which are comparable to the rules we have examined in the previous chapters. In order to test this proposition, the chapter outlines the sources of Union law and their effects in the national legal orders. The chapter then investigates whether Union law equips individuals with claims, powers, and defences. The second proposition is that the objectives of each rule, regardless of its source, should be realised to the

80 Hohfeld 1913b, p. 36.

greatest possible extent. The chapter shows that this principle is not peculiar to the national systems of private law, but also enjoys support within the Union legal order.

In Chapters 5 and 6, we will venture on a more detailed examination of the laws of the European Union. Chapter 5 focuses on the relationships between three sets of provisions contained in the Treaty on the Functioning of the European Union (TFEU). Firstly, the chapter will analyse the relationship between claims and defences based on Article 101 TFEU, which deals with collusion between undertakings, and on Article 102 TFEU, which deals with the market conduct of dominant undertakings. Secondly, the chapter will investigate the relationship between claims and defences based on Article 18 TFEU, which prohibits any discrimination on grounds of nationality, on the one hand, and on the treaty provisions pertaining to the free movement of persons and services on the other hand. Thirdly, the chapter will examine the relationship between these free movement rules and the competition rules laid down in Articles 101 and 102 TFEU. The question to consider, in each case, is whether an individual is permitted to elect the rule which appears to him to be the most advantageous.

Chapter 6 examines the rules belonging to the body of secondary Union law. It focuses on the directives and regulations by which the Union legislature seeks to regulate the internal market. By their very nature, these directives and regulations are not wholly autonomous and self-contained. They will overlap with other directives and regulations, and they will be complemented by national laws. A single set of facts may, therefore, fall within the scope of multiple rules, belonging to the body of secondary Union law and to other sources of law. The question that arises is whether Union law permits an individual to elect the rule of his choice. The chapter examines how Union law answers this question by looking closely at the statements made by the Union legislature and by the Court of Justice.

Chapter 7 returns to the original research question and presents the final conclusions. An overview of the subsequent chapters is also presented.

1.5 SCOPE AND METHODOLOGY

The previous section has demonstrated that questions of concurrence arise within the law, as a result of overlaps between rules that are part of the law. They are not primarily policy issues that require an assessment of the relationship between legal rules and the broader socio-economic and cultural context in which these rules operate. This book is not, therefore, interdisciplinary in its approach. As a product of legal doctrinal research, the book analyses formal legal materials with the objective of revealing statements relevant to understand the legal questions raised.⁸¹ Its immediate task will be to consult texts of treaties, codes and statutes, reports of

81 See, on the doctrinal method, e.g. Hutchison 2015, p. 131-132.

court decisions, and evidence of argumentation and reflections contained in scholarly publications. The book describes, defines, and compares these features and explains why they are fundamental. At the outset, the reader should, therefore, be informed as to the materials which have been examined and the materials which will not be discussed.

It is important to bear in mind that this book focuses on private parties and not on public bodies. To include public bodies would render the scope of the research too large and the materials too varied to properly formulate well-founded answers to the questions raised. We would be required to address the relationship between private law and administrative law, and the division of competences between civil courts and administrative courts, in each jurisdiction under consideration. This is a complex undertaking, not least because legal relationships with public bodies are principally governed by administrative law in some jurisdictions, but are also governed by private law in other jurisdictions. It might be interesting to examine whether the same principles apply when disputes between public bodies and private parties must be resolved, but this research seeks to remain neutral on this point and will focus only on the legal relationships between private parties.

It must be admitted at once that Union law itself does not distinguish clearly between the realms of private and administrative law. This does not mean, however, that the distinction between private parties and public bodies is unfamiliar. In fact, this distinction plays an important role when it comes to determining whether Union laws can be applied directly. In this context, a distinction is made between so-called 'vertical' and 'horizontal' direct effect. The question of whether a rule of primary or secondary Union law is directly effective may be answered differently, depending on whether the rule is relied upon against an individual or against an organ of the state.⁸² As explained above, this book adopts the same distinction and focuses only on 'horizontal' relationships, not on 'vertical' relationships.

As a consequence, not all the rules of Union law are relevant in the context of this research. When examining the body of primary Union law, we will focus on certain directly effective treaty provisions in the area of competition law, free movement law, and non-discrimination law.⁸³ When examining the body of secondary Union law, regard will be had to the directives and regulations by which the Union legislature seeks to regulate the internal market.⁸⁴ The question may be raised as to whether we should examine directives at all. Directives cannot, in principle, create rights and impose duties on individuals, without national law serving as an intermediary.⁸⁵ However, many directives do spell out these rights and duties in great

82 Craig & De Búrca 2015, p. 184-224.

83 See further section 4.3.

84 See further section 4.4.

85 Exceptionally, directives may be relied upon to set aside national laws, but the threshold for such 'incidental' horizontal effect is high. See further section 4.2.

detail. Such directives can tell us much about the way Union law deals with issues of concurrence in relationships between private parties. They deserve to be examined in this book.

Even though the book focuses on the rules which are relevant in ‘horizontal’ relationships between private parties, the reader should be aware that these rules may also apply in the context of ‘vertical’ relationships. This is especially the case with certain treaty provisions pertaining to free movement law and non-discrimination law. In fact, these rules were traditionally held to apply only to measures adopted by Member States, and not to private conduct. Likewise, the competition rules, which were traditionally held to apply only to private undertakings, may – under certain circumstances – apply to Member States’ behaviour. This means that a number of important judgments about the relationship between these treaty provisions have been rendered in proceedings involving public bodies, including judgments delivered in first instance proceedings before the General Court and in appeal proceedings before the Court of Justice.⁸⁶ These judgments will be discussed if they are necessary in order to find the appropriate answers in ‘horizontal’ relationships between individuals.

Another question arises as to the scope of our enquiry. Are we dealing only with bilateral or also with multilateral relationships? It is not unusual to jointly discuss both situations, as Lord Nicholls of Birkenhead does:

‘The law frequently affords an injured person more than one remedy for the wrong he has suffered. (...) Cumulative remedies may lie against one person. A person fraudulently induced to enter into a contract may have the contract set aside and also sue for damages. Or there may be cumulative remedies against more than one person. A plaintiff may have a cause of action in negligence against two persons in respect of the same loss.’⁸⁷

Laroche adopts a similar approach. She distinguishes *le concours matériel* from *le concours intellectuel*, depending on whether the damage has been caused by multiple persons or by just one person:

‘Que plusieurs responsabilités soient envisageables car plusieurs personnes ont concouru à causer le dommage, et l’on parlera de concours matériel. Que plusieurs responsabilités convergent vers la réparation d’un même dommage, causé par un seul responsable, et l’on évoquera l’existence d’un concours intellectuel.’⁸⁸

86 Formerly known as the Court of First Instance, the General Court hears actions brought by individuals and Member States against acts or omissions of the institutions, bodies, offices or agencies of the EU (Art. 256 TFEU). Its decisions may be subject to an appeal before the Court of Justice. This book refers to the General Court when discussing cases decided by the Court of First Instance.

87 *Tang Man Sit (Deceased) v. Capacious Investments Ltd* [1996] A.C. 514 (PC); see also *United Australia Ltd v. Barclays Bank Ltd* [1941] A.C. 1 (HL). Weir 1984; Stevens 1996; Watterson 2003, and Cartwright 2017, p. 9-21, jointly discuss both situations too.

88 Laroche 2014, p. 13, referring to Leduc 2000.

However, most German scholars⁸⁹ have limited themselves to bilateral relationships.⁹⁰ Many Dutch writers,⁹¹ and some English⁹² and French⁹³ colleagues, have left multilateral relationships out of their accounts too. This restriction is to be preferred. Issues of joint and several liability have their own peculiarities and are typically governed by a specific statutory regime.⁹⁴ By contrast, it has largely been entrusted to the judiciary and to legal scholarship to solve issues of concurrence in bilateral relationships.⁹⁵ For these reasons, this book only focuses on such relationships.

Comparative studies about the general subject of concurrence in private law do not exist. Writers tend to focus on the rules belonging to their respective national legal systems and adjust their terminology accordingly. So an English lawyer writes about *remedies*,⁹⁶ a French lawyer about *actions en justice*,⁹⁷ and a German lawyer about *Ansprüche*.⁹⁸ Comparative studies on the relationship between the laws of contract and tort do exist, but they are either not written in English,⁹⁹ are somewhat outdated,¹⁰⁰ or they provide a comprehensive assessment of the law as it stands rather than an explanation of its development.¹⁰¹ It is the aim of this book to add a current comparative account to these sources. French, German and English law have been selected because these are the most important private law systems in contemporary Europe, and because they represent both the civil and the common law traditions. Reference is also made to Dutch law given that this system has been influenced by the French Code Civil but has increasingly come under the influence of German law and legal doctrine.

Materials which have been published after 30 November 2019 have not been examined. This should not, however, lead the reader to believe that all the materials which have been published before that date will be expressly

-
- 89 Leaving aside writers who dealt with, or were heavily influenced by, Roman law, e.g. Von Savigny 1841, p. 204 et seq.; Windscheid & Kipp 1906, p. 608; Last 1908; Levy 1918; Liebs 1972.
- 90 E.g. Eisele 1892, p. 330-331; Lent 1912; Schmidt 1915; Dietz 1934; Georgiades 1968; Arens 1970; Schlechtriem 1972; Schlosser 1982; Larenz 1992, p. 154-158; Huber 2001; Gsell 2003; Neuner 2012, p. 238-242.
- 91 Boukema 1966; Snijders 1973; Nieuwenhuis 1982; Brunner 1984; Boukema 1992; Bakels 2009a; Castermans & Krans 2019, p. 6. Star Busmann 1972, p. 133, also discusses multilateral relationships.
- 92 Stevens 2007, p. 199.
- 93 Bussy-Dunaud 1988; Serinet 1996; Goldie-Genicon 2009; Borghetti 2010, p. 14-15.
- 94 Art. 1310 CC; § 420 et seq. BGB; Art. 6:6-6:15 BW; Civil Liability (Contribution) Act 1978.
- 95 As observed by Georgiades 1968, p. 64.
- 96 Cartwright 1991, p. 141-148; Stevens 1996; Edelman 2002; Watterson 2003; Cartwright 2017, p. 11-21.
- 97 Bussy-Dunaud 1988; Tournafond 1989; Pollaud-Dulian 1997; Jobard-Bachellier & Brémond 1999; Tricoire 2009.
- 98 Last 1908; Dietz 1934; Berger 1936; Dietz 1962; Georgiades 1968; Arens 1970; Bruns 1971; Gsell 2003; Schmidt 2006; Medicus & Lorenz 2015, § 33.
- 99 Schlechtriem 1972; Von Amsberg 1994; Kegel 2002; De Graaff & Moron-Puech 2017.
- 100 Weir 1984; Van Rossum 1995.
- 101 Von Bar & Drobnig 2004, p. 26-315; Martín-Casals 2019b.

mentioned. It is not the aim of this book to give an exhaustive description of every possible element in legal reasoning as concretely pursued in legislative texts, court decisions, and scholarly writing. It is, quite simply, impossible to examine all the legal materials dealing, in one way or another, with the concurrence of legal rules in private law and still discuss the topic with tolerable ease and sufficient clarity. Hence we will focus on the most relevant materials. This means, for instance, that most attention will be devoted to the decisions of the highest courts in the respective legal systems. As far as the interpretation of the laws of the European Union is concerned, we will focus on the judgments delivered by the Court of Justice and will not discuss the judgments delivered by national courts, even though these courts do play an important role within the judicial system of the European Union.¹⁰²

102 As observed e.g. by Rosas 2012, p. 105.