Overriding Mandatory Provisions in a European Context

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List of Abbreviations

Art.	Article
Dir.	Directive (of the European Union)
DL	Portuguese Law (*Decreto-Lei*)
ECJ	European Court of Justice
EU	European Union
EU HR	European Union Human Rights
MS	Member-states (of the European Union)
OMP	Overriding Mandatory Provision
PIL	Private International Law
RC	Rule of Conflicts
Reg.	(EU) Regulation
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union

I. Introduction

1. Introductory Note

OMPs[1] have been a staple of PIL theory ever since its initial conceptualization in the early XX Century. Over the years, States have been recognizing and including OMPs in their own legal orders, as well as recognizing the legitimacy of foreign OMPs. At the time of their recognition, OMPs were attractive to States, since they provided them with a tool to "defend" their own sovereignty, as well as their social and legal structures, even if as a "last resort". In a world where the seeds of globalization were being planted, OMPs were a welcome refuge from the consequences stemming therefrom; their use as a last resort was an assurance that the core values of each State would always remain safeguarded, regardless of the turbulent changes in PIL (and in the law as a whole) that would eventually happen. Truly, OMPs were considered (a rather aggressive) weapon given to the States, allowing their defense against the arbitrary application of foreign law to cases closely related to the *lex fori.*

With the advent of the EU, this paradigm was suddenly questioned; matters typically seen as belonging to the exclusive sphere of action of "true" States were gradually included in the EU's constantly growing list of competences. In the field of PIL, this phenomenon became especially striking once the Treaties recognized a generic EU competence in the field of PIL[2]; following this inclusion, the EU begun to occupy itself with enacting several instruments in the field of PIL, in a process of a so-called "europeization of PIL"[3], including OMPs. The EU legislator and the ECJ have had no qualms when appealing to the concept, but have always done so haphazardly: on one hand, the EU legislator has opted to deal with the issue in a rather fragmentary fashion. On the other hand, the ECJ has taken an inventive, yet imprecise and unclear approach to the relation between the EU and OMPs. In the midst of this confusing picture, several questions arise: what is the EU's current relationship with the concept of OMP? Is it possible to develop an autonomous category of EU OMPs? If so, how would it be configured in conceptual terms? Is this implementation advisable? This is the nature of our topic.

[1] As coined by DICEY/MORRIS (2012), p. 25.
[2] Art. 81/2, c) TFEU.
[3] See, to this effect, SOUSA (2012).

2. Structure

The starting point of our analysis will be to define an operative concept of OMP for the effects of our study. Then, we will analyze how the EU legal order treats the concept of OMP in its different legal sources. From there, we will proceed to evaluate what could be done in order to definitely implement the category of EU OMP in the EU legal order by describing what a category of EU OMP would look like in conceptual terms.

Lastly, we will attempt to elaborate on the ramifications of the implementation of a category of EU OMPs; how would the implementation of a category of EU OMPs shape the landscape of the EU legal order?

II. The Concept of "Overriding Mandatory Provision"

1. Operative Definition

The first step of our dissertation is to define an operative concept of OMP. The lack of space we have prevents us from undertaking a comprehensive historic and comparative analysis, but looking at the writings of the most prominent legal scholars[4], a few common traits can be agreed upon.

The first is their overriding effect[5], in the sense that despite being substantive rules they will force their own application beyond the *lex causae* defined by the RC, or by a competence-attribution clause. Consequently, all OMPs are, by definition, imperative rules – but not all imperative rules are OMPs; only those that pursue a certain goal whose importance justifies an autonomous PIL regulation[6]. Historically, OMPs have been considered to be purely internal rules; this idea is, however, challenged by the EU initiative in harmonizing PIL, which include OMPs. With the new European dimension of OMP, one could say that the concept of OMP has shed a significant amount of its nationalistic traits[7].

Furthermore, the *raison d'être* of OMPs is the upholding of certain interests and values dear to the State(s); what those interests and values are, concretely, is an old *vexata quaestio*. Indeed, several Authors, native to different legal orders point out different concerns and motivations for the creation of OMPs. We will address the issue below[8], but for the time being we only stress that OMPs pursue, by definition, the protection of especially important interests to the legal order where it is inserted.

We believe that the above-mentioned traits are the ones that are the most central to the very concept of OMP. Therefore, in the context of our dissertation, we can define an OMP as a substantive (i) and imperative (ii) rule that has the prerogative to override the RC or competence-attribution clause (iii) in accordance to the (especially important) goals that it pursues (iv), given that they may be explicitly classified (by the legislator), or interpreted as such (v).

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[4] See, for instance, FRANCESCAKIS (1958), pp.13, who first thought of the concept as it is today, as well as other classic influential Authors such as SPERDUTI (1976), p. 473, or WENGLER (1981), p. 86. In modern legal scholarship, see BAR (1987), p. 231, NEUHAUS (1976), p. 33, or SANTOS (1991).
[5] BONOMI, (1998), pp. 143 and the Authors therein quoted.
[6] BONOMI, (1998), p. 140.
[7] See below, IV. 2.
[8] See below, III. 3, D.

III. EU Law and Overriding Mandatory Provisions

1. Preliminary Considerations

The national conceptualization of OMP has become insufficient to properly describe the phenomenon of EU OMPs. It is clear that the original concept of OMP demanded the acceptance of a nationalistic intent, rather than a strict regulation of several areas of interest. Naturally, the concept of EU OMP cannot be included in that same rationale.

Our premise is a departure from the traditional view commonly attributed to OMPs towards a more dynamic role of the same category of norms; thus, we will examine what EU OMPs are, and what they could/should be. To this effect, we believe that it is useful, first, to examine the treatment given to OMPs in the existing sources of EU Law, along with national OMPs grounded on EU Law in general, as to determine if (and to what extent) true European OMPs exist or not, and whether they should.

2. State of the Art in EU Law

A. Primary Law

An analysis of the state of the art of EU OMPs demands an analysis as to their presence in the several sources of EU Law.

Regarding the so-called EU Primary Law[9], it may seem, at first glance, that the Treaties have little direct interest or contact with OMPs, apart from the generic PIL competence included therein[10]. As is often the case with Private Law, it would appear that Secondary Law would take a more preponderant role in this field. However, this does not mean that OMPs are impervious to the Treaties, on the contrary. First, the principle of Primacy of EU Law[11], which imposes the hierarchical superiority of EU Law over domestic law(s), is of capital importance in this context. This principle imposes upon MS the obligation to respect the limits imposed by

[9] Here, the TEU and the TFEU.
[10] See footnote 2.
[11] This principle was first articulated by Case 6/64 of the ECJ (*Costa v. ENEL*). Today, Declaration 17 on Primacy, annexed to the Lisbon Treaty, is a formal statement of the principle of primacy of EU Law. See CRAIG/DE BÚRCA (2015), pp. 274.

(both Primary and Secondary) EU Law[12] when creating national OMPs[13]. Conversely, all EU Secondary legislation must be enacted in accordance with the Treaties. Furthermore, the fact that OMPs protect and uphold special principles of the legal order in which it is inserted is evocative of the fundamental principles inserted in the Treaties. In other words, aspects of EU Primary law, such as EU fundamental rights or fundamental freedoms may justify the creation of EU OMPs in order to protect them.

This "indirect" influence that the Treaties exert over OMPs does not preclude the existence of true OMPs in those texts. An example is Art. 101/2 of the TFEU[14]. This provision considers all agreements distorting competition or trade within the internal market void. This provision is an example of a true OMP; the specific connection it establishes for its own application is the existence of an aforementioned distortion within the EU, which overrides the general RC presiding over contractual relations.

Hence, we believe that as long as a specific Treaty provision is operative enough to be directly applicable to a specific case, it is able to be considered an OMP, similarly to any other substantive provision – Art. 101 has been considered as being reflexive of a so-called "EU public order"[15], which is a strong indicator of the existence of an OMP.

In conclusion, the idea that EU Primary law is separated from OMPs is false; the Treaties influence decisively the creation of both national and EU OMPs, and may even contain OMPs themselves.

B. Secondary Law

Secondary EU legislation also has direct contact with this category of norm. There are several Directives alluding to the concept without explicitly naming it[16], but with the creation of the "Rome I" Regulation[17], which explicitly mentions OMPs in its Art. 9, as well as Art. 16 of "Rome II"[18], the term has entered the vernacular of EU legislation, finding its way to several

[12] In PIL, the most relevant limits are the economic freedoms created by the Treaties, since both fields deal directly with cross-border legal issues. However, MS must also respect the other fundamental principles of the EU.
[13] The ECJ has also stated this in the *Arblade* case (C-369/96), paragraphs 30+31, and the *Unamar* case (C-184/12), par. 46. With a similar opinion, SCHACHERREITER/THIEDE (2015), p. 601; KREBBER (2001), p. 366
[14] BONOMI (1998), p. 122, still in the context of the old EEC Treaty. With (essentially) the same opinion, LIMA PINHEIRO (2014), p. 269.
[15] See ECJ Case C-126/97 (*Eco Swiss*), par. 36 + 39.
[16] Such as Art. 3/1 of Dir. 96/71/EC, which implies the obligation of MS to create OMPs, or Art. 12/2 of Dir. 97/7/EC.
[17] Reg. 593/2008 of the EC.
[18] Reg. 864/2007 of the EC.

other EU legal instruments[19]. Art 9/1 of Rome I plays a pivotal role in the framing of the concept of OMP in the European legal order by providing a definition of that concept, which is referenced by other EU legal instruments[20] and case law[21]. Regardless of its importance, this definition is relatively vague; despite hinting vaguely at what constitutes an OMP, the definition fails to bring forth a clear set of criteria to guide that operation[22].

Allusions to OMPs as a category (besides providing a definition) are mostly used to confer legitimacy, recognition, and effectiveness to domestic OMPs[23], but there is also a significant number of European provisions *imposing* the obligation to create OMPs upon the MS. An example of this imposition can be found in Art. 12/2 of Dir. 97/7/EC: This provision dictates that MS curb the parties' freedom of choice of law whenever the contract has a close connection with that MS' legal order; the definition of OMP. Another example can be found in Art. 68/8 of Dir. 2014/59/EU, which explicitly names these provisions as being OMPs[24]. This leads us to believe that the European legislator uses the concept of OMP sparingly; this does not mean, however, that its relevance is insignificant. It seems to be the case that the EU legislator has opted for a rather polarized use of the concept of OMP; it either imposes the respect for this category of norm, or forces the MS to adopt OMPs. The areas in which the legislator alludes to the concept are also noteworthy, since they are mostly related either to financial-related areas, or to the protection of weaker parties, such as the consumer or worker.

C. Case Law

Regarding ECJ case law, the Court has not only defined the category of OMPs[25], but has also decided several matters directly related to OMPs[26]. The first case that dealt with OMPs, albeit tangentially, is *Arblade*[27]. In this case, Arblade and Leloup, French companies, deployed workers to perform their functions in Belgium. Thus arose the problem of knowing whether the French companies had to comply with Belgian labor laws; these laws constituted so-called «public-order laws»[28] under Belgian law. The Belgian courts stood proceedings and asked the

[19] Such as Art 68/6 of Dir. 2014/59/EU, Art 15 of Reg. 655/2014, or Art 30 of Reg. 2016/1104.
[20] Such as the aforementioned Art 68/6 of Dir. 2014/59/EU; Art. 30/2 of Reg. 2016/1104, providing a similar definition.
[21] *Arblade*, par. 30, or *Unamar,* par. 48.
[22] Agreeing, ARIF (2011), p. 260.
[23] See Art. 16 of Rome II, Art. 30/2 of Reg. 2016/1104, or Art 15 of Reg. 655/2014. In a way, Art. 9/2 + 3 of Rome I also has the intent of respecting domestic OMPs.
[24] Another example is Art. 3 of Dir. 96/71. Art 3/7 follows a methodology similar to Art. 38 of DL 178/86.
[25] C-396/96 of the ECJ (*Arblade*), par. 30.
[26] See, for example, C-135/15 (*Nikiforidis*), C-184/12 (*Unamar*) or C-381/98 (*Ingmar*).
[27] C-396/96 of the ECJ
[28] OMPs are sometimes referred to as being "public order laws" – see *Arblade*, paragraph 30.

ECJ whether the freedom of movement of workers, given by the Treaties, could override the general public order clause existing under Belgian law[29]. The ECJ is peremptory when saying that *even* domestic OMPs are subject to the limits imposed by EU Law[30]. Throughout the rest of the decision, the ECJ resorts to a methodology aimed towards evaluating the lawfulness of restrictions on fundamental EU freedoms[31]. At this point, the ECJ steered clear from tackling OMPs, preferring to steer the discussion towards a more Treaty-based problem – and rightfully so, in our opinion. Indeed, the problem at hand is related to purely national OMPs, and not to European-based ones. In this sense, it was adequate to handle it according to EU Law canons, since the problem at hand was related to the conformity of *national* OMPs with EU Law, rather than a strict EU OMP problem. Nonetheless, the way in which the ECJ appeals to PIL concepts seems to be rather rudimentary and even anachronistic[32].

More significant is the *Ingmar* case[33], in which the ECJ is asked whether certain provisions contained in a Directive can be directly applied to a specific case, even when a choice-of-law clause determines the law of a non-MS as the *lex causae*[34]. In this case, the ECJ has shifted from a more EU-oriented approach towards a true PIL methodology[35]. The first point stressed by the ECJ is that the freedom of contracting parties to choose the applicable law is a basic principle of PIL[36]. From there, the Court goes on to introduce the general category of OMPs[37] before concluding that the provisions in the Directive are OMPs, and, therefore, directly applicable to the case at hand[38]. The reasoning of the Court is rather curious – it asserts the purpose of the Directive[39] in order to justify its imperative nature[40], but does little in the way of explaining whether and why it should be *internationally* imperative, making the conclusion of the case surprising: the ECJ declares that the norms in question are directly applicable to the case at hand[41], after appealing to the close link with the EU of the legal relationship in question[42].

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[29] Par. 27.
[30] Par. 31.
[31] Notably, par. 35 and following. The ECJ frames the question as being merely an issue of fundamental freedoms, and proceeds to analyze the issue at hand under that frame of thought.
[32] PISSARRA/CHABERT (2004), p. 65
[33] C-381/98 of the ECJ
[34] Par. 14.
[35] In this sense, see RAYNARD (2001), p. 17.
[36] Par. 15.
[37] Pars. 16+17.
[38] Par. 26.
[39] Pars. 21, 23, 24
[40] Par. 22.
[41] Par. 26.
[42] Par. 25.

This line of argumentation leads us to believe that in *Ingmar,* the ECJ took a pragmatic approach, preferring to achieve a certain result to being technically rigorous[43]. Regardless of the positive result, the lack of a more in-depth reasoning is a blight on an otherwise groundbreaking decision; because of this, it has garnered several criticisms. Among those is the fact that the ECJ has ignored the principle of freedom of choice of law without a clear reason[44], as well as the fact that it should be the MS' task to interpret the *transposed* norms as being OMPs (or not)[45]. Despite the obscure (and widely criticized)[46] methodology employed by the ECJ, the *Ingmar* case is quite relevant: for the first time, the ECJ had decided to merge EU Law and OMPs, even if in a technically inadequate way, in order to further the reach of EU Law.

The latest ECJ case to deal with this problem is the *Unamar* case[47]. The issue raised in this case is different; the ECJ evaluated whether the transposition of a Directive which goes beyond its imposed minimum standards can be considered as an OMP by the MS, *even* vis-à-vis *another MS, which transposed the Directive correctly.* The argumentation of the ECJ's decision can be traced back to *Ingmar* in many aspects; the explanation of the goals of the Directive[48], the definition of OMP[49], the Primacy of EU Law even over OMPs[50], and the freedom of choice of law as a basic principle of EU PIL[51]. However, *Unamar* takes a different path: for one, it seems to take a more cautious approach, since it claims that it should be the MS' Courts to interpret and decide whether the transposed norms of the Directive are OMPs or not[52], hinting only vaguely at what should guide the national judge's decision[53]. In this line of thought, the ECJ has established limits to the interpretation of these transposed norms[54]. Despite taking a different direction, *Unamar* is in many regards similar to *Ingmar*, in the sense that it favors a certain result, but lacks a coherent and comprehensive legal argumentation. Despite the innovation of this decision, it has been criticized by legal scholarship for going beyond the "traditional" concept of OMP[55], as well raising problems without being able to effectively solve

[43] See KÜHNE (2015), p. 455, BERNARDEAU (2001)
[44] Despite the fact that in the same decision, the ECJ refers to the freedom of choice-of-law as a basic principle of PIL (Par. 15).
[45] See VENEZIA (2001), p. 321.
[46] FREITAG/LEIBLE (2001), in general, p. 290; MICHAELS/KAMANN (2001), regarding specific points throughout the text.
[47] Case C-184/12.
[48] Par. 37.
[49] Par. 47.
[50] Par. 46.
[51] Par. 49.
[52] Par. 50.
[53] Par. 50. The ECJ seems to avoid taking an explicit position in the matter. See also, RÜHL (2016), p. 217.
[54] Pars. 43, 49 and 50. For an analysis of these limits, see RÜHL (2016), pp. 217/220.
[55] SCHACHERREITER/THIEDE (2015), p. 600/601

them[56]. The lack of a comprehensive and technically sound argumentation raises more questions than it solves, especially regarding the future development and impact of EU OMPs[57].

Overall, ECJ case law regarding OMPs has been ambiguous. On one hand, its practical results have greatly contributed to the development of an autonomous category of OMP; on the other hand, these decisions lack the foundation of a solid legal reasoning, which could be the bedrock for future development. Nonetheless, these decisions have the merit of sparking the discussion regarding EU OMPs.

D. EU-influenced OMPs in National Law(s)

The influence of the European legal order regarding OMPs spreads beyond the strict field of EU Law sources. Given that EU Law generally influences the several national legal orders, this same influence can also be felt in the field of (national) OMPs.

As we have seen above, instruments of EU Law can impose the creation of OMPs upon the MS; in that regard, it is clear that these domestic OMPs have a European source and inspiration, and pursue goals related to European values or goals. A more complex and relevant question is to ascertain whether it is possible to interpret domestic rules, transposed from a Directive, as being OMPs, in the cases in which the Directive does not impose or even mention the overriding capability of the transposed norm.

We think that this is possible. To this effect, we stress that many domestic OMPs are classified as such by means of interpretation, rather than by an explicit indication of its overriding trait[58]. Therefore, it is plausible to support the idea that this operation is also possible when interpreting provisions stemming from a Directive. However, it is clear that the criteria presiding over this interpretation cannot be exactly the same as the ones presiding over the interpretation of domestic OMPs. The principles and goals of both legal orders are different, and only coincident to a certain degree. Whereas national OMPs are inspired by so-called nationalistic goals and intentions, European (-inspired) OMPs cannot, evidently, follow the same *ratio*. The foundation of the enactment of an EU OMP does not have a "nationalistic" intent, but rather, the special protection of a certain category of interests. Regardless of the fact that OMPs continue to exhibit a certain degree of "protectionism", it is no longer founded on purely nationalistic ideals. Therefore, it should be possible to interpret a (domestic) OMP as

[56] Cfr. RÜHL (2016), p. 223; SCHILLING (2014), p. 851
[57] RÜHL (2016), p. 217; KÜHNE (2015), p. 457
[58] PINHEIRO (2014), p. 268; BONOMI (1999), p. 166; implicitly, FRANCESCAKIS (1966), p. 10

being such according to these European principles, worthy of special protection. In this regard, there is an important distinction to be made: if the EU-inspired OMP stems directly from a Directive or not – in other words, whether there is an EU source of law directly grounding the overriding trait of an OMP.

In cases where a provision is transposed from a Directive, we believe that an adequate methodology for interpreting an OMP as such would be to analyze the goals and intents contained in the Directive *itself,* evaluate their relation to the general goal of European integration, and then extrapolate to a conclusion regarding the overriding power of the norm[59]. Of course, since we are examining a national provision based on EU Law, the enactment of a national OMP must be done in conformity with the principle of subsidiarity[60]. This implies that this interpretation is to be made on a case-by-case basis, rather than adopting a general and abstract criterion, and that the general goal of European integration alone does not justify interpreting a transposed norm as being an OMP[61]. Indeed, if a general goal of integration were to be accepted as a reason to interpret a norm as being an OMP, this would allow an excessive number of norms to be interpreted as such, which would not be desirable. However, if a certain goal pursued by the EU and by the Directive in question justifies the creation of an OMP[62], we believe that the MS should have enough leeway to decide whether to transpose the norm of the Directive as being an OMP or not. The determining principle is that there must be a reason *specific* to the goals pursued by EU Law, *other* than a general intent to promote further integration.

The other set of cases relates to the interpretation of a domestic OMP as such, based on the same EU Law-based reasons, *without* being founded on a specific EU Law source of law. Is it possible to undergo this interpretive process?

Conceptually, there are no obstacles preventing MS from doing so. In theory, it should be possible to create a wholly national OMP grounded on EU-based motivations and goals – as we mentioned above, what is determining is the fact that there are important principles inspiring an OMP, given that the pursuit of that goal is more adequately done by an MS, rather than the EU. It is conceivable that a MS can consider certain EU-based goals or principles as being paramount to the upholding of the so-called "political, economic and social order of the state".

[59] In accordance with the principle of harmonious interpretation of national law according to EU Law. See: Case 14/83 (*Von Colson*), C-106/89 (*Marleasing*) and C-397-403/01 (*Pfeiffer*).
[60] See below, III. 3, B.
[61] Agreeing, BRÖDERMANN/IVERSEN (1994), p. 342.
[62] Always in conformity with the principle of subsidiarity. See *infra*, III., 3, C.

This statement begs the question, however, if the MS *should* undertake this enactment. However, if the EU is tasked with pursuing its own policies, why should the MS be able to pursue them as well? Would it not be more effective to leave the enactment of these OMPs to the EU? We believe that there is no downside to it. To this effect, we highlight the fact that fundamental EU principles are also applicable to national legal orders; to suggest the existence of a separation between these two legal systems would be to create an artificial obstacle. Thus, the MS should be able to enact OMPs protecting EU principles; they are also relevant in a purely national scale. Furthermore, this possibility would also aid the development of these EU policies. They would be an additional instrument when improving the protection of these important principles/values, alongside other EU OMPs.

It is clear, at this point, that EU Law recognizes national OMPs and their effectiveness[63]. However, EU Law also sets limits to that same interpretation. This idea is affirmed explicitly in the mentioned ECJ decisions[64], but the ECJ did not develop on what these limits are concretely. In turn, legal scholarship has attempted to elaborate on what these limits are specifically. For one, the economic fundamental freedoms of the EU are a limit to the efficacy of national OMPs[65]; since these economic freedoms are the cornerstone of the Treaties, it makes sense that they would be considered imperative limits to the operation of the MS. In the same vein, EU fundamental rights are also a limit to national OMPs[66]. Another commonly mentioned limit is the existence of Directives adopting a full harmonization approach[67]. Given that the goal of these Directives is to fully harmonize the legal orders of the several MS, it is reasonable that the MS are not given any leeway to stray from these imposed standards. Finally, objections were raised in the sense that the very definition of OMP provided by the several sources of EU Law implies that the MS' OMPs must conform to that definition[68], and that the principle of freedom of choice in EU PIL must also be taken into account[69].

This being said, we believe that it is important to briefly describe the way how purely domestic OMPs and EU-based OMPs interact[70].

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[63] See also PISSARRA/CHABERT, p. 70
[64] *Unamar,* par. 46; *Arblade*, par. 31
[65] PISSARRA/CHABERT, p. 68; SCHACHERREITER/THIEDE, p. 601; LÜTTRINGHAUS, p. 149
[66] SCHACHERREITER/THIEDE, p. 602; LÜTTRINGHAUS, p. 149
[67] SCHACHERREITER/THIEDE, p. 603; LÜTTRINGHAUS, p. 150, see below, p.xx
[68] LÜTTRINGHAUS, p. 149
[69] SCHACHERREITER/THIEDE, p. 603
[70] Assuming that the application of both is impossible.

We believe that in these cases, the EU-based OMP must prevail over the purely domestic one. The reason for this statement is clear: since the principle of Primacy of EU Law is fully applicable to PIL[71], the same principle applies to this case. If an OMP is inspired/dictated by EU Law and its goals, it must, by the principle of Primacy, overcome the overriding effect of any purely domestic norm. In other words, the primacy of EU Law over national orders imposes the supremacy of EU rules and principles over national ones. Consequently, the goals pursued by the EU override, in this context, national interests and goals. In this regard, however, it is important to take the quoted ECJ decisions into account[72]. In these cases, the ECJ has decided – in accordance with the "spirit" of OMPs – to prioritize the protection of these special goals over a mere pursuit of further European integration. This goes in the same direction of our claim that a mere integrationist intent does not warrant, on its own, special overriding prerogatives. Instead, a *specific and concrete* interest/goal (even if traced back to a more general goal of European integration) must be considered to that effect.

Another issue arises when it comes to the conflict between two different EU-based OMPs in two different MS. What criteria should be used to solve this specific kind of conflict? In *Unamar*, in which the ECJ deals with the way a certain Directive was (differently) transposed in the two legal orders at hand, the ECJ fails to provide adequate guidance in this regard; it opted for a pragmatic result, instead of setting abstract criteria to solve the question[73]. First, we think it is important to stress the fact that we are assuming that the Directive from which the OMP stems from was correctly transposed in both MS; in cases in which this does not happen, the correctly transposed OMP should prevail over the incorrectly transposed one[74].

It is still unclear, however, what should happen in cases similar to *Unamar*: did the ECJ decide correctly?

Here, we do not agree with the ECJ's decision in *Unamar*. If the provision contained in the Directive does not allow the MS any sort of leeway, then the MS should be allowed to consider it as an OMP. In these cases, the OMP status of the provision is irrelevant in conflicts of laws within the EU (because the Directive is applicable to all MS anyway), and in conflicts of laws with non-MS, the EU could have an interest in the coercive application of the provision[75]. However, whenever the provision at hand allows the MS some leeway when

[71] The ECJ affirmed this idea explicitly in *Unamar*; see *supra*, III., 2, C.
[72] See *supra*, III., 2, C.
[73] Cfr. RÜHL (2016), p. 220.
[74] In accordance with general principles of EU Law.
[75] See below, IV., 5.

transposing Directives, we believe that this should not be a possibility. If the EU legislator opted to provide the MS with an imperative minimum, the goal is to achieve a compromise between the freedom of the MS and the goals pursued by the EU. If the MS can coercively impose their derogation of that limit upon other MS, then that compromise is frustrated, since it will result in a *de facto* imposition of a new minimum within the EU, *set by a MS,* thus undermining the determination made by EU Law to harmonize minimum standards, by setting a new minimum. Therefore, we believe that whenever the Directive allows the MS a certain degree of leeway, the MS cannot make the transposed provision an OMP *vis-à-vis* other MS. However, when a non-MS is involved, we believe that this restriction does not apply, since the curbing of EU harmonization is no longer an issue – therefore, general OMP tenets are applicable.

E. Preliminary Conclusion

Looking at the way that EU Law has dealt with OMPs, we can draw a few conclusions. First, it is clear that both Primary and Secondary sources of EU Law avoid being too explicit when dealing with the category. They will only provide the classic, well-known definition of OMP, or impose its creation upon the MS[76]. This can be explained by the fact that the European legislator would want to avoid taking a position in a matter so dear to the MS; attempting to enter that realm would stir controversy, since the implementation of EU OMPs could raise issues regarding the excessive interference of the EU in a typically "national" area of competence. Instead, the legislator opted for a cautious approach, using the concept of OMP only in operative and pragmatic means. On the other hand, the ECJ has taken the exact opposite approach, as can be seen from the *Ingmar* case, in which the ECJ has had no qualms qualifying certain norms of a Directive as being OMPs without any legal basis; the ECJ has been relatively liberal and "imaginative" when dealing with the issue. The result of these contradictory approaches to the concept of OMP is a haphazard, fragmentary approach to this field. OMPs are vaguely present in the European PIL discourse, but in a vague and imprecise way; they are mentioned routinely in EU Law instruments, but never directly handled by the EU legislator. Consequently, the ECJ has been forced to make decisions related to OMPs with little to no

[76] See footnotes 16/19/20.

normative guidance. The state of the art of EU OMPs is one of an incomplete painting – promising, but showing flaws in its configuration.

3. European OMPs in Specific. Analysis and normative approach

A. Introduction

After looking at the current state of EU OMPs, in this section we will address our next question: how should an autonomous future category of EU OMPs be configured?

A European category of OMP would be modeled after many existing traits developed by national categories of OMPs. Thus, we believe that the operative definition we provided above[77] adequately describes the essential structure of European OMPs. Regardless, there are specific aspects that set European OMPs apart from the rest of the general category, which need to be discussed.

B. EU OMP Competence and the Principle of Subsidiarity

The first problem that the creation of OMPs pose is the issue of competence, as well as the application of the principle of subsidiarity. More than knowing whether the EU *should* enact OMPs, we need to evaluate whether it *can*.

As said above[78], the EU has a general competence for regulating PIL, including OMPs. However, since (EU) OMPs are substantive norms, they are subject to a general scrutiny of conformity with the principle of subsidiarity, similarly to any other EU provision.

Regarding exclusive competences of the EU[79], it should be able to enact EU OMPs – safeguarding their *exceptionality*, of course. Here there is no problem of interference in the MS' spheres of competence, since the exclusive areas of EU competence belong to the EU alone.

[77] See above, II., 1.
[78] See footnote 2.
[79] Art. 3 TFEU

The true issue arises in the fields of shared[80] and coordinated[81] competences. To what extent can the EU enact OMPs in these fields? A first remark relates to the principle of pre-emption[82]: if the EU has already exercised its competence in a field of shared competence, it should be able to enact OMPs *for the future*, e.g., when revoking or building upon previously enacted legislation. In these cases, there is, once again, no interference in the sphere of influence of the MS, since the EU will already have summoned that competence upon itself.

This leaves us to consider what happens in shared and coordinated competences that have not been explored by the EU. Can it enact OMPs in these fields? We stress, again, that a general goal of integration is not enough to justify the creation of an EU OMP itself[83].

We have emphasized the fact that OMPs are *exceptional*; in the context of the EU, this exceptionality must be articulated with the principle of subsidiarity[84]. Indeed, we believe that the exceptionality typical to OMPs in general is safeguarded by the principle of subsidiarity present in the EU; if the EU fulfills the principle of subsidiarity in its action whenever enacting OMPs, then this should be enough to satisfy the demands of exceptionality than an OMP bears.

Concretely, there is one more distinction to be made. If the interest from which the OMP obtains its legitimacy is purely EU-related[85], then there should not be a problem with the principle of subsidiarity. The fact that the interest is purely EU-based hinders an interference in the MS' sphere of competences. However, regarding other, more general interests, we believe that to fulfill the principle of subsidiarity, the EU must resort to the use of OMPs even more sparingly than it would when enacting "general" legislation; the use of EU OMPs is even more subsidiary than a general intervention by the EU. Of course, whenever the EU chooses to enact an OMP, it should always provide a detailed and reasonable explanation as to why the enactment of that OMP is in conformity with the principle of subsidiarity, in accordance with the protocols determined to that effect[86]. If the EU legislator chooses to enact an OMP, it should mean that the application of general RCs (or PIL tenets) is not enough in itself, and this additional tool is required to achieve the intended goals.

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[80] Art. 4 TFEU
[81] Art. 6 TFEU
[82] Art. 2/2 TFEU, by which the MS can only exercise their "share" of the competence if and to the extent that the EU has not.
[83] Cfr. *supra*, III., 2, D.
[84] Art. 5/3 + 4 TEU
[85] The most striking examples would be fundamental freedoms or EU fundamental rights.
[86] Protocols No 1 and No 2 to the Lisbon Treaty. See also CRAIG/DE BÚRCA (2015), pp. 96/97.

Specifically, an intervention through EU OMPs would be adequate whenever necessary to curb the negative effects stemming from the EU model of regulatory competition[87]. In these cases, subsidiarity is assured; regulatory competition is the norm, but there are certain principles/values which must nonetheless be safeguarded. Given that these principles are, by definition, very few in number[88], an intervention brought on by OMPs would therefore be exceptional.

C. Sources of Law

Having defined the general terms under which the EU may enact OMPs, the question now bears: how should, concretely, the several sources of EU Law regulate an autonomous theory of OMPs?

Starting with Primary Law, if an OMP derives its special overriding effect from the protection of special interests, we believe that the Treaties can (should) provide important orientation as to what these interests are. Given that the Treaties establish the groundwork for all other sources of EU Law, it's only legitimate that they should determine which interests are especially worthy of protection[89]. Of course, knowing which Treaty-based interests *concretely* fit within this category of importance is a different issue[90]. Secondary EU law is enacted in accordance to the principles inserted in the Treaties, so it is only natural that the OMPs that these instruments may contain are in conformity with these same Treaties. In the same train of thought, ECJ case law also refers to the principles of the Treaty several times. In *Ingmar*, the ECJ explicitly spells out the goals of the Directive at hand[91], and bases its decision on these same principles, by implying that the closeness of the legal relationship with the European legal order justifies the upholding of these very important EU-related principles[92]. Similarly, *Unamar* also makes a clear referral to the principles contained in the Treaties as a cornerstone of the argumentation employed and of the decision itself[93]. In short, Primary EU Law influences OMPs by containing a set of principles and values from which the EU legislator/ECJ can choose

[87] See below, IV., 4.
[88] For example, when fostering the freedom of movement of workers, one could consider that the principle prohibiting employee dismissal without a justified reason one of these "narrow" principles.
[89] Public interests and goals are inherently related to the idea of a "constitutional order", since one could say that they share the same auspices. See RAMOS (1994), p. 122, where the Author hints at an opening of PIL towards public interests and goals, partly because of the existence of OMPs.
[90] See below, III., 3, D.
[91] Par. 24.
[92] Pars. 25 + 26.
[93] Par. 31 + 46, where the closeness of the situation to EU Law is once again highlighted.

to be the foundation for the creation/interpretation of OMPs. Of course, as seen above[94], OMPs may be present in the Treaties. Granted, the occurrence of these "Treaty-OMPs" is relatively slim, given the nature of most Treaty provisions[95], but it is, in theory, a possibility.

With this, it is clear that Secondary EU Law can also develop EU OMPs further. There is already a significant number of these instruments dealing with PIL, which means that future endeavors in this field are able to further the implementation of this category of European OMPs. Regarding Regulations, we believe that they have the potential to greatly undertake this development. Since their provisions are directly applicable in MS' legal orders[96], they have the potential to contain true OMPs themselves. Currently, only a small number of Regulations mention OMPs, which means that the impact of the existence of an OMP inserted in a Regulation cannot be measured yet[97]. We believe, nonetheless, that including OMPs in Regulations has many advantages. Beyond the development and implementation of European OMPs that such measures can bring, an OMP inserted in a Regulation contributes decisively towards legal certainty. Indeed, a Regulation-bound OMP would avoid interpretive problems, by avoiding transposition, thus curbing a hypothetical resistance on the behalf of the MS, and contribute towards their fluid implementation. Furthermore, their insertion in a Regulation, which regulates certain issues directly, would contribute towards larger clarity regarding the extent that the EU wants to pursue its goals in a specific area. Thus, we believe that Regulations should indeed create European OMPs[98].

Directives can contribute towards the creation of European OMPs as well. In this section we will only discuss whether the dispositions contained in a Directive can, *themselves*, be OMPs[99]. In other words, whether the ECJ's decision in *Ingmar*[100] can be replicated and implemented in the context of other Directives. We believe that it is, indeed, possible to have European OMPs inserted directly in a Directive[101], directly applicable to a specific case with overriding strength. A possible counterargument is that Directives are more suited to provide

[94] See above, III., 2, A.
[95] Usually concerned with matters related to EU fundamental principles and to the institutional structure of the EU.
[96] Art. 288 of the TFEU. See also CRAIG/DE BÚRCA (2015), p. 107.
[97] An example could be Art. 3 of Reg. 1103/97, establishing the continuity of previously existing contracts after the introduction of the Euro.
[98] Of course, since Regulations provide for comprehensive harmonization, the option for enacting OMPs should be carefully evaluated, since the creation of an OMP within a Regulation would be an (even more) aggressive way to further harmonization.
[99] About transposed Directive norms, see above, III., 2, D.
[100] To consider norms of a Directive directly applicable to a specific case as being OMPs, that is.
[101] Agreeing, BONOMI (2001), p. 122.

merely open guidelines to the MS rather than extensively regulate a certain issue; hence the difference between Directives and Regulations. However, we must stress the fact that the leeway given by a Directive to the MS may differ among its provisions; the same Directive can include provisions which are more, or less, strict regarding their transposition in the different national legal orders. In this sense, it is perfectly conceivable that in the event that the EU Legislator wants to regulate a certain issue through a Directive, it may contain vaguer, as well as more specific provisions – including OMPs.

Of course, not *every* provision included in a Directive can be interpreted as being an OMP - not all norms of a Directive are directly applicable to a certain case, only those which fulfill the necessary conditions to have vertical *direct effect*[102]. Some Authors disagree, with the basis that in order to create an OMP in a Directive, it would be necessary for the provision to have horizontal direct effect; given that the ECJ is reluctant to recognize "horizontal" direct effect[103] to Directives (since, the Authors assume, the problem would only arise in the context of a purely private legal relationship), this would be a merely theoretical exercise[104]. Despite the ECJ's reluctance in admitting horizontal direct effect[105], we believe that it is enough if the provision at hand has *vertical* direct effect. The conditions necessary for there to be vertical direct effect are operative conditions – without clarity, preciseness and unconditionality it would be impossible to have a true operative legal rule. Thus, these operative requirements should be enough to justify the existence of an OMP; since they create an operative rule. Furthermore, if the rule safeguards a certain interest of paramount importance to the legal order at hand, which justifies its overriding power, is that importance not enough to justify its direct application? The relevance of the norm justifies its direct application without transposition. The transposed OMP would override any choice-of-law clause or RC, regardless of the actions and choices of the parties; the same would happen to the OMP if not transposed, assuming it has the operability provided by the existence of vertical direct effect.

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[102] The ECJ recognized, in principle, direct effect in Directives in Case 41/74 (*Van Duyn*) and Case 148/78 (*Ratti*). The basic requirements for that direct effect – the norm must be clear, precise and unconditional – were set by the ECJ in Case 26/62 (*Van Gend en Loos*), and apply generically to the direct effect in Directives (cfr. CRAIG/DE BÚRCA (2015), p. 202.)

[103] Which would allow the application of norms of a Directive directly in a certain case between two private entities, as opposed to the so-called "vertical" direct effect, which only allows the application of these norms *vis-à-vis* the State or other public entities.

[104] BONOMI (2001), p. 122.

[105] The problem of horizontal direct effect of Directives is a widely discussed topic in legal scholarship. See, for instance, PRECHAL (2015), pp. 255. The ECJ, however, continues to be reluctant to admit this horizontal direct effect; see cases C-152/84 (*Marshall*) and C-91/92 (*Dori*).

The intuitive counter-argument to this idea would be the fact that there would be no legal certainty in this solution, since private parties would have no way of knowing that the OMP existed and was inserted in the Directive, and thus could not prepare adequately. However, besides the general counter-arguments given by advocates of horizontal direct effect of Directives[106], we believe that this argument does not hold up in this concrete situation. Even if the OMP were transposed (and therefore theoretically accessible to the average private party), we find that it is hard to describe a situation in which it would be possible to evade the application of the OMP. For instance, in a situation similar to the one which gave origin to *Ingmar*, how would the American company evade the application of the rules applicable to the commercial agent? The ECJ found that they were OMPs because of the strong link between the agent and the EU legal order because it performed the contract in the EU; hence, every commercial agent performing their respective contracts in the EU would also be subject to the same OMP. In this scenario, there is no escape from the application of that same OMP, regardless of transposition[107]. Therefore, we believe that since transposition is, in this case, irrelevant, it should not be a necessary requirement for the existence of an OMP inserted in a Directive[108].

We can conclude that given the ECJ's resistance towards the existence of horizontal direct effect in Directives[109], it is unlikely that our ideas will come to fruition for the time being. Yet, we believe that in conceptual terms, the horizontal direct effect of Directive-OMPs is adequate.

Finally, we will look at how ECJ case law can influence EU OMPs. This analysis, will, however, fundamentally depend on how the EU legislator has opted to regulate the issue. If the EU legislator continues to opt for a vague and fragmentary approach to the concept of OMP, then the ECJ will continue to have significant leeway to develop the concept on its own – similarly to what happened in *Ingmar* or *Unamar*. Conversely, if the EU legislator opts to

[106] To this effect, PRECHAL (2015), p. 255-258.
[107] See Art. 3/4 of Reg. Rome I. This provision safeguards the application of imperative EU Law provisions to all contracts with relevant contact with an MS, even if the parties chose the law of a non-MS to be applicable to the contract. The specific Directive provisions would have to establish what that necessary link is, in their respective context.
[108] It is important to stress that in general, the process of transposition within a certain deadline is provided in the benefit of the State, when the Directive allows the MS some leeway. When the norm of the Directive is already clear, precise and unconditional, there is no need to give the MS a certain amount of time to transpose it, since the full extension and content of the rule are already clear. About the argument of legal certainty, see PRECHAL (2015), p. 257/258.
[109] Nonetheless, a large portion of legal scholarship criticizes this resistance; see, for example, PRECHAL (2015), p. 255-258, CRAIG/DE BÚRCA (2015), p. 205.

regulate EU OMPs more extensively, the ECJ will have less freedom to develop EU OMPs, since that room will have been taken by other sources of law. Regardless, one task will continue to belong to the ECJ: to aid in the determination of the principles at the root of an OMP. This happens for two reasons: for one, it is quite difficult, if not impossible, to list extensively all principles and values worthy of being protected by an OMP. Any list will never be complete; therefore, the ECJ should have the prerogative to identify important principles or values left out by the legislator. Additionally, given the diversity of interests and values included in the *acquis communautaire*, as well as the fact that the (EU) law is in constant evolution, it is fair to say that the future may reveal new interests, increase or decrease the importance of existing ones. This means that the ECJ will have the task of constantly evaluating which interests and values should be protected by OMPs, as well as identifying which legal rules should be OMPs. In a constantly shifting legal system, the ECJ has the responsibility of interpreting EU Law rules, as well as EU Principles in a contemporary perspective, in order to adequately create (or dispose of) OMPs.

D. Theoretical Configuration. Certain Aspects

Having described how a hypothetical category of EU OMPs would formally be established by the different sources of EU Law, we will now elaborate on how that same category would be materially configured.

Given that these European OMPs come from EU sources of law, being intrinsically connected to the EU and its goals, we believe that the «public interests, such as its political, social or economic organization»[110] that should be safeguarded must be *specifically* European. For instance, fundamental economic freedoms, EU fundamental rights, or other goals related to the internal market, such as consumer protection or the protection of workers[111].There are several reasons to support this claim. First, if the OMP stems from a European source of law, it is only fitting that the goals protected are European; the interests of the individual MS should be safeguarded by those same MS. To this end, we believe that our original discussion of the articulation between EU OMPs and the principle of subsidiarity[112]fully encompasses this issue. What is truly determining is that the pursued interests in the concrete scenario are of paramount importance, as to justify the creation of an OMP.

[110] See above, III., 2, B.
[111]ARIF (2011), p. 261, enunciates several criteria that can point towards concrete goals protected by the OMP.
[112] See above, III., 3, B.

Legal scholarship debates the question of knowing whether "special" private interests (such as consumer protection or workers' rights) justify the creation of OMPs[113]. The problem is related to the (traditional) definition of OMP, adopted by several sources of EU Law[114]. This definition is anchored on the protection of «public interests», which provided the inspiration for the creation of this category of rule; to protect special interests of the State. Hence the question: are there special categories of persons who, given their weaker position, deserve the protection given by an OMP? The ECJ has never tackled this issue directly, but in *Unamar* it sent a clear sign that these interests are to be protected[115] in the context of EU PIL, by deciding that the MS could have the freedom to decide if and to what extent these interests could be protected – including the creation of OMPs[116].

The *Unamar* decision has been criticized[117] for its lack of clarity and coherence; in general, we agree with these voices in legal scholarship who criticize *Unamar*. However, we feel that the option taken by the ECJ when extending the reach of OMPs to the protection of specific categories of persons is correct. We cannot lose sight of the fact that the common market is, to this day, the guiding principle behind many of the EU's harmonization initiatives – in this context, the harmonization of these branches of law implies a regulation which interferes with these especially vulnerable persons, hence the special necessity of their protection. Admitting the existence and relevance of European-based OMPs, they will necessarily have to include the protection of special private interests, because a significant amount of European legislation regulates (and, to some extent, protects) these interests. Conversely, restricting EU OMPs to the protection of so-called "European public interests" would be limiting the potential of this category of norms. It is not impossible to conceive EU OMPs that protect these so-called "European public interests"[118]. Given, however, the predominance of the common market (and the fields of law it encompasses) as a foundation for continuous European integration, EU OMPs can be a valuable tool not only to aid in that integration, but to protect the categories of persons[119] involved in that same integration.

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[113] Cfr. KÜHNE (2015), p. 457; RÜHL (2016), p. 215; ROTH (2014), p. 425
[114] See above, III., 2, B.
[115] Cfr. SCHACHERREITER/THIEDE(2015), p. 600/601.; RÜHL (2016), p. 216; ROTH (2014), p. 435; LÜTTRINGHAUS (2014), p. 147; KÜHNE (2015), p. 457. See also *Unamar*, par. 50.
[116] ROTH (2014), p. 435
[117] See above, III., 2, D.
[118] They would be founded on the economic fundamental freedoms of the EU, or EU HR; any values or interests pertaining to the EU's "public order".
[119] Mostly, economic agents, since the EU vastly protects economic freedoms; workers, commercial agents, or consumers. Other persons in fragile positions may also be protected, such as adoptees.

Another issue frequently brought up among legal scholarship is the possibility/imposition of a differentiation in the application of EU(-based) OMPs between legal relations connected purely within MS and legal relations connected to (a) non-EU MS. Some Authors claim that the coercive application inherent to (EU) OMPs should not be the same in cases connected or related to a non-MS. In the context of *Ingmar* and *Unamar* the ECJ has not sought to clarify how this question should be solved[120], thus paving the way for discussion.

We believe that as a rule there should not be a difference regarding the international "imperativity" of EU OMPs in purely EU-connected situations and situations connected with non-MS. An OMP has the intent to apply itself coercively because of the special interests it wants to protect. That intent – as well as the protected interests – are not different because of their specific spatial location. These interests are so important that it seems counter-intuitive to limit their effectiveness whenever the laws of non-MS are implied. Furthermore, one must highlight the fact that if a regular EU substantive provision, applicable under the general principles of EU Law, was not enough to achieve a certain result, the legislator would not have the need to enact an EU OMP. If the EU legislator felt that need to create an OMP, it felt that the general conflictual criterion provided by the RC did not always safeguard a specific interest or goal – hence the creation of the OMP. This leads us to believe that it is precisely in relations with non-MS that EU OMPs can play a vital role; in addition to the reasons stated above, their conflictual role has an added practical application in these cases. Indeed, in the context of a purely EU-connected situation, the overriding trait inherent to (EU) OMPs will be less relevant, since they will, in principle, already be applicable within the MS' legal orders, under the general terms of EU Law. In a purely "EU internal" situation, an EU OMP will not have as many opportunities to exert its overriding powers as it can in situations connected to a non-MS. This happens, logically, because that EU OMP will not be applicable to the non-MS under EU Law[121]. Thus, an EU OMP has the potential to be an important tool when defending the especially important interests and goals of the EU, precisely because it will be able to impose the protection of those interests and values in a stronger way.

In light of the foregoing considerations, some have criticized the ECJ's decisions because of the fact that they do not enunciate any criteria (other than a "generic" significant closeness to the EU) that determine the application of that EU OMP to a specific case[122]. The

[120] SCHILLING (2014), p. 853
[121] But may, however, be applicable precisely because of their overriding traits.
[122] *Ingmar*, par. 25. Criticizing this idea, MICHAELS/KAMANN (2001), p. 305-307; FREITAG/LEIBLE (2001), p. 291

idea that any connection to the EU as a whole can trigger the applicability of an EU OMP has come severely under fire; hence the call for a limitation of the application of EU OMPs[123]. We agree with the idea that the ECJ could (and should) have elaborated on the way that EU OMPs are combined with the applicability of a law of a non-MS. However, we also believe that restricting the coercive force of an EU OMP in a drastic way may be going too far, because the applicability of any OMP, European or not, will depend on a special kind of connection. In other words, the OMP will not be applicable whenever there is *any* kind of link to the EU, but only when there is a *specific* link with the EU. What this link is, concretely, will depend on the provision at hand – it will, however, be one that will be justified according to the nature of the interests protected, as well as according to the provision itself. For instance, when dealing with contract-related EU OMPs, such as Art. 101 TFEU[124] or the aforementioned Art. 17 of Dir. 86/653/EEC, that special connection would be, for instance, the jurisdiction in which the contract is mostly performed. In this sense, we already have a limitation of the applicability of EU OMPs that is derived from the legal nature of OMPs themselves. Therefore, the limitation to the unbridled application of the EU OMP stems from the provision itself – there is no need for the ECJ to explicitly affirm this.

Apart from specific objections raised in the context of the protection of the commercial agent[125], other objections have been raised against the universal strength of application of OMPs towards non-MS. More significantly, the fact that the existence of these EU OMPs will severely affect the freedom of individuals to plan their businesses according to a general criterion of convenience, which will hamper the development of these businesses themselves. Furthermore, the fact that these EU OMPs impose certain "protective" measures does not account for the fact that there can be other provisions compensating the lack of protection in a specific field, making the enactment of OMPs unnecessary[126]. In response to this argument, we stress the fact that OMPs are, by nature, exceptional, which means that only a reduced number of provisions can/should be elevated to that nature. Hence, there will not be a significant stray from the general guidelines and principles governing EU Private Law; only in a few select aspects.

[123] MICHAELS/KAMANN (2001), p. 305/306
[124] In its *Wood Pulp I* decision (Cases 89, 104, 114, 116, 117 and 125-129/85, *A. Ahlström Oy v. Commission*) the ECJ has decided that whenever the *implementation* (rather than the effects) of a certain undertaking were to be felt in the common market, Art. 101 of the TFEU would be applicable. See also JONES/SUFRIN (2016), pp. 1222 and above, footnote 15.
[125] See FREITAG/LEIBLE (2001), pp. 291/292; MICHAELS/KAMANN (2001), p. 302-305.
[126] FREITAG/LEIBLE (2001), p. 292.

Furthermore, the point we raise about the legislator's necessity to enact OMPs because of the insufficiency of general PIL rules is fully applicable in this regard[127].

E. Preliminary Conclusion / Potential EU OMPs

Considering the above ideas, a few conclusions can be drawn. For one, the current state of EU OMPs is a fragmented and incomplete system of regulation. On the other hand, it is possible to develop this category further, in the terms we described. We are, however, still far from a true and autonomous category of EU OMP. In this sense, we believe that our proposal manages to adequately combine the principles of both "traditional" PIL and of EU Law, as to achieve a necessary balance in the development of EU OMPs. In strictly legal terms, EU OMPs must be based upon the traditional traits of OMPs, but combined with the basic principles and construction inherent to the EU. Our proposal is thus based on the traditional tenets of PIL, but with the necessary adaptations to further the development of EU OMPs. Other challenges may arise along this process of implementation, but for the time being we believe that our proposal represents a reasonable option in the sense of implementing EU OMPs, without ignoring the challenges and specific aspects of EU Law.

The implementation of future EU OMPs will always depend on the EU legislator's priorities and options in a given moment. However, we will list a few examples of hypothetical EU OMPs.

One example could be an EU OMP protecting the commercial agent. For instance, an OMP pertaining to the termination of contract, or, specifically, to client indemnity. This OMP would override all other RC whenever the contact would mostly be performed within EU territory. Given the protection of weaker parties and economic agents that the EU has been pursuing, along with the specific protection given to the commercial agent[128], the creation of an OMP like this would be in line with the EU's latest actions on the matter.

In this line of thought, specific provisions related to consumer protection could also be elevated to OMP status; for instance, provisions related to the cooling-off period given to the consumer, or to the duties to inform imposed upon businesses. These OMPs would be applicable whenever the consumer is based in the EU, thus furthering its protection. This OMP

[127] See above, III., 3, C
[128] For example, in the *Ingmar* case, or in the several pieces of EU legislation on commercial agency contracts.

would also meet the goals of protecting weaker parties and economic agents in the internal market, as pursued by the EU.

An example of a "pure" EU OMP could be one founded on an EU fundamental right. For instance, an EU OMP imposing certain requirements for child adoption, based on Art. 24 of the EU CFR. This OMP would be applicable whenever the residence or nationality of the child is within the EU. Although the EU has thus far steered clear from these issues, this would, in theory, be an EU OMP directly pertaining to an EU fundamental right.

IV. Consequences of the Existence of European-based OMPs

1. Introduction

Up to this point, our analysis focused mainly on the legal conceptualization of EU OMPs. We will now attempt to elaborate on the consequences and effects that the creation of EU OMPs may have on the EU – only then can there be a full picture of the effects of that category in the EU landscape, legal and otherwise.

2. Impact on the General Theory of OMPs

The premise of our dissertation is the addition of a new kind of OMP to this previously existing category of legal norm. This means that in a way, the definition and theoretical frame of the very concept of OMP bears a redefinition in order to encompass the new category of EU OMPs. In this section, we will examine what this implies. Of course, since we are discussing a mere possibility, and not (yet) a reality, our train of thought is not a failsafe prediction, but rather, an interpretation as to what the implementation of EU OMPs might bring.

For one, the implementation of a new category of OMP will bring about a change in the original foundation of OMPs. When OMPs were first conceptualized, it was clear that they had a significant nationalist influence[129]. Therefore, OMPs were described as closely related to an idea of nationalism and protection of a certain conception of State. We believe that the implementation of EU OMPs has the potential to overturn this trend; the idea of OMP will shed some of its nationalist background in order to be geared towards a more general idea of *interest protection*. The (ultimate) focus of an OMP is no longer to protect or safeguard a specific national conception of State, but rather, to protect a certain set of interests and goals, *regardless of their nationality or link to a specific State*. This shift in goals can be traced back to several factors: for one, the fact that two "layers" of OMPs would have to coexist would loosen the link between a specific State and the OMP. It would no longer be a question of supremacy and imposition of the values of one legal system, (since the EU is involved) over the other, but rather a question of articulating and combining the application of two separate layers of OMPs; there is a shift from an adversarial view to a more compromising one. The creation of an EU OMP requires a specific European interest as a foundation for its creation; however, many of these European interests overlap with "national" interests. For example, consumer or worker

[129] See above, II., 1.

protection could be traced back both to the EU, as well as to a MS. In this sense, the protection of these interests takes a more predominant role *in lieu* of the link to a specific legal order.

The creation of EU OMPs also influences the interests typically understood as being "legitimate" reasons to create an OMP. Since the EU has a large variety of areas of intervention, it is predictable that the EU legislator may adapt its policies to the implementation of EU OMPs. Given the *sui generis* nature of the EU, as well as its necessity to take into account the values of all EU MS, it is likely that this implementation will bring forth a breach with the traditional set of protected values, shifting the scope of typically OMP-protected interests; what that change would concretely be would be speculation. Given the nuances of the EU's action, many different fields – even those not typically considered to be relevant enough for OMPs – might benefit from the addition of OMPs. The vast gamut of areas open to EU intervention implies an added universe of possibilities regarding the creation of OMPs; in this sense, it is sensible to support the theory that there will be more OMPs in different fields of law.

Of course, the addition of an additional layer of OMP to its general conceptualization will have consequences on the national conception(s) of OMP. Similarly to what happens with the set of (constantly growing) EU competences, it is predictable that the EU might consider a growing number of interests, native to a wide variety of fields of law, as possible grounds for the creation of EU OMPs. Thus, it is foreseeable that if EU OMPs are implemented, the EU will take a significant portion of OMP production upon itself – in parallel to what happens with its growing legislative competences. Consequently, this will lower the MS' leeway when enacting their own OMPs; it is also predictable that the relevance and even application of national OMPs might lower when compared to the new category of EU OMPs[130]. With the spread of EU OMPs – logically in fields inserted within its competence, and assuming that the EU's competence tends to encompass a large portion of the law – national OMPs will be pushed towards a narrower field of application. Regardless of this restriction, it is foreseeable that this restriction of national OMPs will take on a different role. Due to their exceptional nature, national OMPs would be much more geared towards upholding and defending *strictly national* interests[131], rather than merely important – yet common to most MS – goals. Despite the fact that these national OMPs still succumb to the EU OMPs' superior hierarchical value, a "migration" of national OMPs towards purely national interests will assure their survival and

[130] Especially since, as we have described above (p. 22), EU(-based) OMPs take precedence over purely national OMPs, besides the national limitation brought on by EU Law.
[131] These purely national interests will depend on the specific State. They cannot, however, go against the principles and laws of EU Law.

relevance when faced with EU OMPs. Even if less relevant in general terms, national OMPs can still serve as guardians for very specific national interests.

Finally, we believe that besides the innovation that the addition of a category of European OMPs will bring about, challenges will also arise from this implementation. Up until this point, the only "conflict" among OMPs was one of a "horizontal" nature – whenever two different national OMPs clashed, we would have a conflict of OMPs. By implementing EU(-based) OMPs, which are hierarchically superior to purely national ones, we witness the appearance of true "vertical" conflicts between OMPs. Because of this, problems can still arise. Since OMPs are substantive norms, it is conceivable that both the national and EU OMP are applicable at the same time, if possible. Alternatively, it may be questionable whether these fields of application overlap or whether they are compatible. Given the myriad of possibilities, it is hard to elaborate on the concrete problems that may arise. However, it is quite likely that the implementation of EU OMPs will bring about conflicts between these two normative layers.

3. Impact on National and European powers and policies

A. European Legislative/Judicial Powers and Policies

In a general sense, it is believable that the implementation of European OMPs will bring a larger margin of maneuver to the EU legislator; the availability of an additional tool provides the legislator with more possibilities to pursue its policies. Whenever an especially important interest arises, the EU legislator can resort to EU OMPs to help protect it.

In the field of (traditional) private law, the EU legislator has taken a rather fragmented approach, opting for regulating specific aspects of private law rather than enacting a wider, more general regulation[132]. In this context, the EU legislator has resorted to full harmonization in very narrow fields, generally opting for a minimum harmonization approach, when targeting more general areas of law[133]. The justification for this strategy is discernible, yet questionable: despite the greater appeal that minimum harmonization might have among MS, it is dubious whether this approach manages to truly harmonize their legal systems. Given that minimum harmonization only establishes a set of basic guidelines in a specific issue, and that the MS are

[132] ZIMMERMANN (2006), p. 544.
[133] Particularly in the context of consumer law, see LOOS (2010), p. 6/7, and the Directives therein quoted. See also REICH/MICKLITZ/ROTT/TONNER (2014), p. 40/41.

able to elaborate on that groundwork in the manner that they see fit, it is predictable that in the end, there will be differences between MS. However, the advantages of full harmonization are also questionable, for several reasons; namely, the fact that there can only be to fully harmonize very specific fields will lead to the existence of differences between the MS' legal orders in areas not included in that harmonization process, as well as high implementing costs, and a questionable efficiency when it comes to harmonizing laws within the EU[134].

The implementation of true EU OMPs can provide the EU legislator with the adequate tools to add greater flexibility to the harmonization process. Resorting to these EU OMPs, the legislator can opt for a minimum harmonization approach, taking advantage of the easier political consensus that this approach brings forth. In order to counter the lesser degree of harmonization that this strategy entails, the EU legislator can opt for the enactment of EU OMPs, in the specific areas that the EU considers crucial to harmonize[135]. The existence of EU OMPs would allow the adoption of a "hybrid" strategy, by which the EU can strategically pinpoint the aspects in which harmonization is needed the most by enacting OMPs in these areas. The remainder of these (lesser important) areas can follow a general idea of minimum harmonization, by which the MS are allowed to build upon EU guidelines as they see fit. We have thus the advantages of minimum harmonization (wider regulation/larger political consensus), combined with the strengths of full harmonization (incisive harmonization).

As to the role of the ECJ in this context, it can be analyzed in two different perspectives. While EU Law restricts national OMPs[136]; it is the ECJ's task to evaluate whether the national legislator has overstepped the bounds imposed by EU Law when creating national OMPs, similarly to what happens with all other national legislation[137]. In this regard, national OMPs are no different when compared to other national provisions. However, we have already mentioned that the MS may consider a norm transposed from a Directive as being an OMP in cases where the Directive is not explicit in that regard[138]. In these cases, this scrutiny should be allowed, since it could be possible that the interests protected do not justify the creation of an OMP, even if in that specific context. It is questionable whether the ECJ will strike down a

[134] LOOS (2010), pp. 9-12, and the authors quoted therein.
[135] This does not mean that harmonization *itself* can be a reasonable foundation for the creation of an OMP (see above, p. 20).
[136] See above, III., 2, D.
[137] HAUSER (2012), p.21, in the context of the Rome I Regulation.
[138] See above, II., 1.

domestic initiative of this sort, since it would be interested in the expansive role that EU OMPs bring to EU Law. Nonetheless, the possibility should, in theory, exist.

Assuming, however, that EU OMPs are properly implemented, the ECJ will have a much more significant task. Namely, to aid in the interpretation and enunciation of potential "implicit" OMPs. Since OMPs do not need to be explicitly defined as such by the legislator; and if EU OMPs stem from the need to protect or uphold especially important interests and goals[139] (of the EU), the only court that should have jurisdiction to interpret the existence of that necessity is precisely the ECJ. Indeed, since it is possible that EU substantive provisions contain "hidden" OMPs, the ECJ has the task – and the responsibility – to evaluate which are OMPs and which are not. When performing this task, the ECJ must obey a few guidelines. First, it must consider the fact that OMPs, EU or not, are *exceptional* by nature, which means that classifying a substantive provision as being an OMP must undergo a strict process of scrutiny. In order to justify this classification, the ECJ must bear in mind several factors, such as the nature of the protected interests and the protection given to those interests in the context of the EU, as well as the consequences that the creation of the OMP has for the future, both positive and negative. This evaluation process must be comprehensive and clearly present in the ECJ's decision; only then can that same decision be properly implemented and replicated in the future.

One could summarize the functions of the ECJ in this context in two distinct categories. Regarding domestic OMPs, the ECJ has the task to control whether they comply with the limits set by EU Law or not, as well as scrutinizing the MS' use of EU Law as a foundation for the creation of national OMPs. On the other hand, in the context of "pure" EU OMPs, the ECJ has the task to evaluate which substantive norms are worthy of being considered true and proper OMPs, given that that same choice must be properly justified.

B. National Legislative/Judicial Powers and Policies

If EU OMPs are properly implemented as a self-standing category, the national legislator will be limited in its freedom of action, as seen above[140].

Regarding national courts, they would have to bear in mind the existence of EU OMPs when deciding their cases. There is a factual limitation stemming from the fact that the creation

[139] See above, II., 1.
[140] See above, III., 2, D.

of an additional layer of EU OMPs will impose upon the national judge the duty to know and apply this new layer of OMPs. As to other limitations, they are quite similar to the ones imposed upon the national legislator. National courts would, on one hand, be restricted by EU Law when interpreting national provisions as being OMPs, but would be able, conversely, to interpret a transposed provision as being an OMP according to EU principles and goals. The national courts, however, would have to carefully explain their reasoning for the attribution of the overriding trait to the substantive norm, similarly to what is imposed to the ECJ.

4. Economic Analysis – Regulatory Competition in the EU and OMPs

In the context of the EU, it is relevant to analyze the phenomenon of regulatory competition and how the idea of EU OMPs may (or not) influence that same phenomenon.

The concept of regulatory competition has its origins in the model proposed by THIEBOUT. In his paper, the Author theorizes a market-based model of distribution of public goods in order to distribute them efficiently[141]. His model assumes that it is harder to adequately satisfy the preferences of the people by central (federal) regulation, and that individual States have a larger leeway when determining their legal orders. Therefore, when certain requirements are met[142], the so-called "consumer-voter" will be able to express his preferences by "voting with his feet"[143], by moving to the legal order which best suits their preferences. This, in turn, will lead the individual States to adapt their legislation as to attract (or at least maintain) citizens. Therein lies the idea of regulatory competition[144] [145].

OMPs play a relevant role in the context of this regulatory competition. Some Authors claim that the existence of (national) OMPs constitutes a "barrier" against the effects of regulatory competition, in the sense that they are an *exception* to the normal competition between States[146]. They are stalwarts against the usual convergence brought on by the existence of a regulatory competition, since their rigidity is not compatible with flexible adaptation of the correspondent legal order to the constantly changing preferences of the population. This bears the question: are (EU) OMPs an obstacle to the process of regulatory competition among EU MS?

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[141] THIEBOUT (1956), p. 417, explaining the problem, and p. 418, describing the solution.
[142] THIEBOUT (1956), p. 419/420.
[143] Expression used by SOUSA (2012), p. 545
[144] SOUSA (2012), p. 574
[145] This model only works when certain conditions are met. Elaborating on the basic ideas of THIEBOUT (1956), p. 419/420, SOUSA (2012) (pp. 575-579) describes how those conditions are found in the EU.
[146] O'HARA/RIBSTEIN (2009), p. 81. SOUSA (2012) also hints at this problem (p. 578).

First, we stress that the above-mentioned remarks are made in the context of *national* OMPs, and not "federal" (European) OMPs. Of course, the rigidness of OMPs is an obstacle to a natural competition between legal orders, regardless of its source. Nonetheless, we believe that an EU OMP will not have the same hindering effect as a national one. For one, the introduction of an EU OMP will count as a "central" intervention, which restricts the MS' leeway when enacting their own laws and policies; since this intervention is central, it will restrict all MS equally, which means that the distortion brought by the aforementioned national OMPs will not happen. In fact, the effect may be the opposite, in the sense that the setting of EU OMPs will naturally limit the possibility of the existence of national OMPs. In that sense, one could argue that EU OMPs actually benefit the so-called "law market" by restricting the possibilities for discrepancy among MS[147]. This would happen because the setting of centralized OMPs would determine the freedom of the individual MS equally for all of them. Furthermore, it is important to stress the differences between the USA and the EU, in the sense that US federal states are much more cohesive, in legal and cultural terms when compared to the EU. Thus, the discrepancies between the federal States are much less significant than the ones existing between the MS; the necessity for "federal" OMPs is much lower in the USA than the necessity for EU OMPs. There is a bigger need to harmonize and create a uniform body of (important) values and goals to be pursued by the EU, much more so than in the USA[148]. For the purposes of the problem of regulatory competition, we stress the fact that the intervention by the EU does not harm this "competition" between MS.

Furthermore, we assume that an efficient system of regulatory competition needs to provide their citizens a strong choice-of-law system, one which allows them not only to freely choose the applicable law, but to see that choice effectively enforced in all the MS in question[149]. The existence of EU OMPs does not hinder that effectiveness, since, as said, the restrictions on that choice-of-law are universally imposed upon all MS, meaning that there will be no disparities among the imposed restrictions. Of course, one could argue that even if uniform, restrictions to this regulatory competition are to be avoided, lest the effectiveness of the system be affected. However, we agree with O'HARA/RIBSTEIN when they claim that OMPs are also important to the system, in the sense that the restrictions they impose are necessary to assure a balance between a rampant choice-of-law system (which could lead to an abusive form

[147] In fact, O'HARA/RIBSTEIN (2009), p. 201, propose the creation of a federal statute regulating conflicts of laws, and a special provision on OMPs, similarly to what we propose.
[148] See, below, IV., 5.
[149] O'HARA/RIBSTEIN (2009), p. 81.

of *forum shopping*) and considerations of overall policy/values transcending mere economic efficiency[150]. The objective should be to assure a high possibility for choice of law, while taking into account policy-related considerations, which is even more crucial, taking into account the necessity that the EU has to impose its policies, as we will see in the section below.

5. Implications Regarding the European Integration Process

Having described these ramifications of the existence of EU OMPs, one question remains: how does the implementation of EU OMPs affect EU policies?

First, the EU legislator will have an additional tool at his will to pursue its policies[151]. There are principles and values dear to the EU, but not all of them *exclusive* to the EU. As seen above, whenever the EU takes concern in a specific policy area, it is less likely that an MS will have the possibility to intervene in that same area[152]. Conversely, only the EU has the adequate knowledge to pursue its policies – the MS cannot be relied on to perform that task. In this sense, EU OMPs present themselves as a good opportunity to define which policies are a priority for the EU, and to what extent. By protecting certain values with the use of OMPs, the EU is clearly identifying which values it considers the most important. This clear identification would, in turn, contribute towards clarifying what the general direction of the EU *acquis* of Private (International) Law is, or what the intended direction of that *acquis* is; the definition of EU OMPs would be a clear indication as to what the EU considers a priority and what it does not. In this line of thought, the use of EU OMPs would contribute towards the unification of EU Private Law[153]; even if with the aid of a normative category belonging to PIL. The EU has undertaken great effort in harmonizing PIL among MS; the introduction of EU OMPs would be another step towards that effort, given the conflictual dimension that these provisions have; their overriding force alongside their application under EU Law would contribute towards the overall harmonization of the MS' legal orders[154]. Another relevant aspect that the introduction of EU OMPs could bring is the fact that legal relations with non-MS would be subject to the

[150] O'HARA/RIBSTEIN (2009), p. 200/201.
[151] See above, IV., 3, A.
[152] See above, III., 3, B
[153] Even if in "only" very specific fields.
[154] Knowing whether the EU has the competence to harmonize private law within the EU is a contentious issue; the Treaties do not explicitly confer this competence to the EU. Legal scholarship has, however, attempted to find adequate provisions in which to anchor this competence. For instance, Art. 114 TFEU (see SCHMID (2012), p. 273, and BASEDOW *et al.* (2011), p. 393, reluctantly), or Art. 352 TFEU (see SCHMID (2012), p. 274, and BASEDOW *et al.* (2011), p. 394, with even more reluctance.

application of two separate layers of OMPs: national, and EU-based. Nonetheless, it remains unclear whether this phenomenon would be positive or negative. On one hand, two layers of OMPs would assure a higher protection of certain interests/values, especially since, as we have seen, there could not be a contradiction between national and EU OMPs. This is important, since these EU OMPs will now protect the aforementioned "specific" EU interests and values, which did not happen before; the existence of EU OMPs assures an added layer of protection of important principles/values. On the other hand, it is questionable whether this additional protection will lead to an excessive barrier in international legal relations as a whole. The imposition brought on by OMPs represents an important hindrance to the fluidity of transnational legal relations. If the parties choose a specific legal order to regulate over their businesses, the overriding effects of an OMP represent an obstacle to that same choice. Nonetheless, since we are speaking in merely hypothetical terms, it is hard to accurately evaluate the consequences of EU OMPs on the flow of international trade; the overall results could be positive or negative, depending on how the implementation of these EU OMPs would be concretely done.

It could be argued that the same goals achieved by EU OMPs could also be reached by the creation/implementation of a so-called "European public policy" (*ordre public*), which would function in a similar way to how the international public policy exception functions in national legal orders. Several decisions issued by the ECJ have hinted at the development of this concept[155], and some Authors have endorsed this very development[156]. Despite the similarity of both concepts, the implications that each of them bring forth are quite different. As hinted by MEIDIANIS[157], the public policy approach would favor a case-by-case evaluation as to ascertain its application, as opposed to EU OMPs, which would always exert their overriding effect, assuming their special element of connection allows their application. Of course, both EU OMPs and this EU public policy are both still conceptually underdeveloped. Personally, we tend to favor the development of EU OMPs. The strength mentioned by MEIDIANIS is, in our view, the biggest handicap that the concept of EU public policy has. Its fluid/uncertain nature is unfavorable to a deepened, comprehensive development; it would be necessary to define clearer limits to what this EU public policy is. Given that it is unlikely that

[155] See cases C-7/98 (*Krombach*), C-38/98 (*Renault*), par. 31/32, and the above mentioned *Eco Swiss* in which the ECJ determines that despite the fact that the MS are still allowed to determine the contents of their international public policy, they may resort to EU principles to do so. See also MEIDIANIS (2005), p. 99-103.
[156] MEIDIANIS (2005), p. 103, in which the Author seems to favor the public policy approach over the OMP approach.
[157] MEIDIANIS (2005), p. 103

the MS would agree to develop these limits, for political reasons, the implementation of an EU public policy may prove to be more cumbersome than the development of EU OMPs, which would not only be determined with more clarity, but would also bear a lower political significance.

V. Conclusion

At the end of our dissertation, a few conclusions are to be drawn. It is clear that the EU's legislative impulse in the field of OMPs has brought great challenges to the classic theory of OMP. Because of this, the EU legislator has only sporadically attempted to resort to OMPs when pursuing its policies, opting for a fragmented and haphazard approach when doing so. The solution for this conundrum is, we believe, to develop an autonomous category of EU OMP, which would describe in a more suitable way the EU dimension of OMP. The theoretical foundation we provided above is in line with current EU policy trends, providing a bridge between the classic theory of OMPs and modern EU legislative concerns. Despite the suspicion and uncertainty that this implementation of OMP might bring alone, we believe that it would be a useful step not only to PIL as a whole, but also to the EU legislator as well, who would have an additional way to promote integration and development in the EU. Aside from the conceptual legal advantages that this additional category may bring forth, we believe that in terms of policy and EU integration, EU OMPs would work towards a more cohesive EU legal order. It is unpredictable when and how the EU legislator might work towards this implementation, but in the light of the EU's venture in PIL, we believe that it is a matter of time until EU OMPs gain an added predominance in the context of the EU legal order.

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