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Pluralism in European Private Law

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Abstract
This article takes stock of legal pluralist thinking in European private law. In which ways have existing theories brought forward our understanding of lawmaking in European private law? Central to that debate are the competing rationalities of EU internal market law, on the one hand, and national, juridical systems of private law on the other hand. An analysis of norms, processes, and actors involved in lawmaking in European private law reveals a field that has matured, but that is now at the threshold of a re-evaluation and potentially a transformation in lawmaking from ordered to strong legal pluralism, with a greater role for private regulation.

Keywords: legal pluralism, European private law, private law theory, consumer law

I. INTRODUCTION

It has been said that European private law reflects a preference for 'ordered pluralism'.[1] That term, read against the background of broader debates on legal pluralism in EU law, characterises the field as pluralist rather than monist, yet not radically or strongly legal pluralist. It recognises that the primary position of monist, state-based legal systems as promulgators of rules has gradually been supplanted in EU law discourse by a pluralist perspective in which multiple legal systems and legal sources coexist within and beyond the state.[2] In the field of private law, increasingly relevant sources of rules are the case law of the Court of Justice of the European Union ('CJEU') and private regulation through rulemaking and standardisation in specific sectors of industry.[3] At the same time, ordered legal pluralism implies that the

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[1] R Michaels 'Why We Have No Theory of European Private Law Pluralism' in L Niglia (ed), *Pluralism and European Private Law* (Hart Publishing, 2013), pp 139, 158.

[2] That broad idea gives rise to a diverse range of further questions on which legal systems can be recognised and whether it is normatively desirable to maintain legal pluralism. For a recent overview of the field, see G Davies and M Avbelj (eds), *Research Handbook on Legal Pluralism and EU Law* (Edward Elgar, forthcoming). I thank the editors for giving me a preview of the introduction and of several chapters of the book.

[3] A trend noted by H-W Micklitz, 'The Visible Hand of European Regulatory Private Law—The Transformation of European Private Law from Autonomy to Functionalism in Competition and Regulation' (2009) 28(1) *Yearbook of European Law* 3, who sees this as part of a process of

relation between these legal systems and legal sources is not completely free, other than 'radical' or 'strong' legal pluralist theories which hold that rules can coexist without a formal hierarchy. Strong legal pluralist theories tend to be characterised by a distinction between state law and other sources of norms. The suggestion of legal pluralism is that norms created outside the framework of state lawmaking can also be regarded as 'law', or in any event as rules that have a law-like effect on societies or individuals.[4] In cases of conflicts between rules originating from different legal systems—eg national and EU constitutional laws, national and EU private laws, or national private law and private regulation—various mechanisms may result in an outcome that is imposed through a hierarchy. That however does not have to be a formal, legal hierarchy; ordering can also emerge from the normative, institutional, political, or cultural context in which a conflict plays out.[5]

Normatively, strong legal pluralism is appealing, as it promotes a framework for lawmaking in which multiple viewpoints and values can be taken into account. Other than a monist system, it therefore gives space to the realisation of public autonomy—the ability to self-legislate through democratic mechanisms—of different groups or communities. This includes lawmaking by formal, public legislators and regulatory actors, but it can also apply to informal lawmaking by private actors when rules extend beyond individual relationships and eg are meant to regulate an entire sector of industry.[6] Ordered legal pluralism goes some way towards establishing a framework within which that space for autonomy also exists and could therefore also normatively be preferred over monism. However, in comparison to strong legal pluralism, it cannot make the same case for realising public autonomy, as it imposes boundaries on that autonomy through ordering mechanisms that are based on a hierarchy between lawmakers or legal orders. Simply said, and acknowledging that a

(F'note continued)
'politicization' of European private law in which new forms of governance are emerging. See also JM Smits 'Plurality of Sources in European Private Law, or: How to Live with Legal Diversity?' in R Brownsword, H-W Micklitz, L Niglia and S Weatherill (eds), *The Foundations of European Private Law* (Hart Publishing, 2011), p 323; JM Smits, 'Het privaatrecht van de toekomst' (2015) 52(2) *Tijdschrift voor Privaatrecht* 517.

[4] See W Twining, *General Jurisprudence* (Cambridge University Press, 2009), pp 88–121, 362–75.

[5] Nico Krisch's theory of systemic legal pluralism, for example, uses 'interface norms' that determine when one systems should tolerate a rule emanating from another legal system as a mechanism to mediate legal pluralism. A loophole in this framework is that more powerful actors can impose their most favoured rules on others. See P Capps and D Machin, 'The Problem of Global Law' (2011) 74(5) *Modern Law Review* 794, 808. On ordered legal pluralism, see also M Delmas-Marty, *Ordering Pluralism. A Conceptual Framework for Understanding the Transnational Legal World* (translation N Norberg; Hart Publishing, 2009), p 14, who prefers ordered pluralism over the perceived unruliness of strong legal pluralism.

[6] Private autonomy, by contrast, is the ability to freely give shape to individual relationships between private parties. Individual autonomy can also be regulated so as to contribute to the pursuit of societal goals. See H Dagan, 'Between Regulatory and Autonomy-Based Private Law' (2016) 22 *European Law Journal* 644, 647 ff. Moreover, it can morph into public autonomy when rules adopted in individual private law relationships become a template for regulation. See Part IV below.

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full argument for strong legal pluralism requires a more comprehensive analysis,[7] strong legal pluralism normatively can be considered more appealing than ordered legal pluralism for all addressed by laws, and all involved in lawmaking.

Debates on lawmaking in European private law have not fully come to grasp with these perspectives on legal pluralism. The dominant focus of discussion in this field, in particular in its early days, has been on formal lawmaking, ie concerning the harmonisation of national private laws through EU regulations and directives. Whilst more recent studies recognise the influence of the case law of the CJEU and of the growing body of private regulation, different views exist on their relation vis-à-vis state law and EU law. In light of, in particular, the rise of private regulation[8] as a source of lawmaking beyond the state, it seems timely to take stock of legal pluralist positions in European private law. In which ways have existing theories brought forward our understanding of processes of lawmaking in European private law? And is it possible to develop a theory of strong legal pluralism in this field that takes account of formal as well as private lawmaking, or are we bound to fall back on a European preference for ordering?

This article assesses some of the leading theories of legal pluralism in European private law. It analyses how 'ordered' existing theories of pluralism in European private law are by considering what space they give to deliberation between lawmakers at different levels of regulation. The article also considers at which points the theories may need refinement in order to include all relevant lawmakers, formal and other, in a legal pluralist constellation. The task will be broken down by focusing on a number of specific points of contestation within broader private law theory discussions.[9]

II. THEORETICAL FRAMEWORK AND OUTLINE

The lens through which theories of legal pluralism will be examined is that of the diverging rationalities of European private law,[10] on the one hand, and national private laws on the other.[11] Rationalities concern frameworks of discussion and

[7] For an earlier elaboration of the normative argument, see V Mak, *Globalization, Private Law and New Legal Pluralism* (NYU, 2015) Jean Monnet Working Paper Series, JMWP 14/15, available at https://jeanmonnetprogram.org/paper/globalization-private-law-and-new-legal-pluralism. The paper discusses in some detail how one of the primary problems with private regulation—a lack of democratic legitimacy—may be addressed. Ibid, pp 20–21, with reference to the concept of 'affectedness' developed by David Held which ties any assessment of democracy to the quality by which a group has been affected by a decision. See D Held, 'Democratic Accountability and Political Effectiveness from a Cosmopolitan Perspective' (2004) 39 *Government and Opposition* 364.

[8] I use a broad definition of private regulation that includes regulation by private actors through contracting, self-regulation, and co-regulation.

[9] Another example of this approach can be seen in Michaels (see note 1 above).

[10] Here in the meaning of private law developed at the EU level. The term can also be used in reference to the entire body of rules on European private law, including national laws.

[11] The term 'rationalities' is used by R Michaels 'Of Islands and the Ocean: The Two Rationalities of European Private Law' in R Brownsword, H-W Micklitz, L Niglia and S Weatherill (eds), *The Foundations of European Private Law* (Hart Publishing, 2011), p 139, who distinguishes, as ideal types, the instrumentalism underlying European private law from the 'juridical' rationality underlying

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questions asked within those frameworks, not the answers given or the ideologies that inspire such answers.[12] For the sake of highlighting the main tensions between European private law and national private laws, and also because it is hard to capture them in all of their complexities, the rationalities used here should be seen as ideal types.

The rationality of European private law, focused as it is on the integration of the internal market, can be regarded as primarily instrumentalist. Private law in this context is used as an instrument towards achieving the policy objectives of EU law. These objectives are primarily related to the integration of the internal market,[13] and the framework within which European private law is perceived is therefore one of pragmatic, purposive rulemaking. As said, this is an ideal type. There is a competing narrative of protection of the individual through legal rights, which encompasses broader (social) values and objectives, albeit as a corollary to the internal market project.

The rationality of national private laws, by contrast, can be characterised differently, perhaps as juridical. The legal system itself, rather than the economic and political context within which rules are created and operate, sets the framework for discussion. In this framework, legal questions are answered on the basis of legal texts and legal precedents rather than extra-legal goals.[14] Private law in that perspective is also a reflection of market ordering, but the system is not *aimed* at market integration. Rather, private law systems seek to balance the interests of private parties in relation to transactions, liability and property on the basis of rights, principles, and practices that have been established over centuries. The underlying principles of private law systems that guide the balancing of interests are autonomy and fairness. In this rationality, which as an ideal type has a broader span than the instrumentalist rationality of EU law, there is room for questions of market regulation but also of corrective or redistributive justice.[15] The expression of this framework in national laws takes the form of doctrinal lawmaking based on consistency and purity of the legal system.

(F'note continued)

national private laws. See also H-W Micklitz, 'Perspektiven des europäischen Privatrechts—Ius commune praeter legem?' (1998) 6 *Zeitschrift für europäisches Privatrecht* 253; CU Schmid, 'The Instrumentalist Conception of the Acquis Communautaire in Consumer Law and its Implications on a European Contract Law Code' (2005) 1(2) *European Review of Contract Law* 211; M Bartl, 'Internal Market Rationality, Private Law and the Direction of the Union: Resuscitating the Market as the Object of the Political' (2015) 21(5) *European Law Journal* 572.

[12] Michaels, see note 11 above, p 142.

[13] Ibid, who rightly notes that the goals of EU law since its inception have been extended to goals that go beyond the internal market project. See also V Mak, *The Character of European Private Law* (inaugural lecture, Tilburg University 19 June 2015), pp 9–10.

[14] Michaels, see note 11 above, p 142.

[15] Compare Study Group on Social Justice in European Private Law, 'Social Justice in European Contract Law: A Manifesto' (2004) 10(6) *European Law Journal* 653. Cf also Micklitz, who regards private law as part of economic law. See K Purnhagen and P Rott (eds), *Varieties of European Economic Law and Regulation. Liber Amicorum for Hans Micklitz* (Springer, 2014).

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These two rationalities rub against each other when rules developed at the EU level are introduced into national laws. Sometimes they fit, but other times the pragmatic, internal market focused nature of the rules upsets the juridical rationality of national private laws. There is space within the legal framework of the EU, however, to balance the two rationalities. To begin with, the interaction between EU law and national laws is fluid in places, for example because their relation is mediated through the principles of subsidiarity and proportionality. Lawmaking will therefore always occur through an interplay between the EU and the member states. Further, since many rules of private law are introduced through EU directives, the member states often have some leeway in the implementation process to adapt rules to their national systems. Finally, cutting across EU law and national private laws, private lawmakers create their own rules through contracting, self-regulation, and co-regulation, thereby potentially influencing the substance of new rules of private law. The idea of legal pluralism in European private law therefore can be maintained. The question is however, bearing in mind the competing rationalities of European private law and national private laws, how much *space* there is for deliberation between lawmaking actors at each level. In that respect, this article adopts the perspective of sociological accounts of legal pluralism in which the focus is on the evolution of social norms and 'spaces' of governance and regulation, rather than on the state as the authoritative locus for lawmaking.[16] The answer to the question of space can give some leads as to whether we are looking at a strong legal pluralist constellation, or an ordered one.

To answer the question about space for deliberation, I will assess existing theories of legal pluralism in European private law in a discussion of three specific points of contestation. These points roughly correspond to three ways in which legal orders can be unpacked so as to get a better perspective on legal pluralism: who makes rules, what substance do these rules have, and how does lawmaking take place? In other words, which actors, norms, and processes are at play?[17] Some overlap between these categories is inevitable in an analysis of the theories. I will tackle them in the following order: substance (or 'norms'); approaches to lawmaking ('processes', with some overlap with 'norms'); and the role of private parties in lawmaking vis-à-vis the role of the state and the EU ('actors').

Starting with norms, I will analyse the types of justice underlying private law rules at the national and EU level. Considerations of justice, be it corrective, redistributive, or otherwise, are fundamental to all private law systems in the world. An analysis of the notions of justice underlying EU and national private laws can clarify the relation between them, and the extent to which systems can be coordinated towards

[16] See eg Saskia Sassen, *A Sociology of Globalization* (WW Norton, 2007).

[17] This three-pronged framework is developed by Zumbansen as a methodology for studying the transnational legal sphere and makes it possible to consider norms from a perspective that is neutral on whether norms are part of an official legal system, and also independent from the territorial grounding of law in a particular jurisdiction. See P Zumbansen, *Defining the Space of Transnational Law: Legal Theory, Global Governance and Legal Pluralism* (Comparative Research in Law & Political Economy) Research Paper No 21/2011, p 7, available at http://digitalcommons.osgoode.yorku.ca/clpe/59.

safeguarding similar values and objectives without losing the space for deliberation and contestation of norms that is essential for maintaining legal pluralism.

Second, I will consider the tension between doctrinal approaches to private law and pragmatism. Can existing private laws be responsive to new developments in society, or are other regulatory responses required even if they cut across established doctrines? This question may come across as one that lawyers would ask if their frame of reference is the (national) legal system that they are familiar with and, so to speak, 'grew up in'.[18] However, the doctrinal question is relevant beyond that framework. In a legal pluralist perspective, the responsiveness of doctrinal approaches (or: of legal systems) is a measure of the available space for deliberation and contestation of norms. If legal systems can accommodate new norms within existing doctrines, norm conflicts between legal orders are avoided and pluralism is essentially nipped in the bud. If not, then the boundaries of autonomy and toleration within a legal pluralist constellation are touched upon,[19] and some mechanism of managing pluralism will have to kick in. In European private law, an example of responsiveness can be seen in the way that EU law and national laws have dealt with the integration of consumer protection rules into private laws. I group this discussion of responsiveness under 'processes' but note that examples given will of course relate to substance and therefore also provide further content for the 'norms' aspect of legal pluralist theories.

Thirdly, and finally, I will discuss the role of private parties in lawmaking in relation to the role of states and of the EU. In particular within the framework of contract law, which in Europe is based on autonomy and freedom of contract, businesses and consumers have much leeway to determine the terms on which they wish to enter into transactions. That means that through individual choice, they can determine which rules they wish to be applicable to their contracts. In theory, the contractual choices of many businesses and consumers in Europe could reveal preferences for specific rules, which legislators and regulators may then copy into rules of private law. Yet, in European private law as in national laws, limitations to that freedom exist in the form of mandatory rules that cannot be contracted out of. Examples are rules of consumer or employee protection. A relevant question is therefore to what extent the individual choice of private actors can influence lawmaking in European private law or, in other words, to what extent private actors can be considered lawmaking actors.

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[18] Compare P Legrand, 'Against a European Civil Code' (1997) 60(1) *Modern Law Review* 44.

[19] This conception of legal pluralism draws on studies of cosmopolitan and postnational pluralism, which hold that the legal framework should create or maintain a space for deliberation between different communities. It should do that first, by giving voice to *public autonomy*. Second, the interaction between different communities should be based on *toleration* of other values or viewpoints. See N Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (Oxford University Press, 2010), pp 99, 100–101, 103. For a 'restatement' based on the theory put forward in his book on *Global Legal Pluralism*, see P Schiff Berman 'Non-State Lawmaking through the Lens of Global Legal Pluralism' in MA Helfand (ed), *Negotiating State and Non-State Law. The Challenge of Global and Local Legal Pluralism* (Cambridge University Press, 2015), pp 15, 27.

These three points of contestation can be connected to three major streams of thought in the legal theory of pluralism in European private law. In this article, I group them around the work of three scholars: Hans Micklitz, Martijn Hesselink, and Jan Smits.[20] While they are not the only authors who have written in this field, they have put forward positions that are distinct and that highlight relevant tensions between the EU internal market rationality and national laws' juridical rationality. Their work can therefore form a useful starting position for determining the state of play in the field of European private law, and a fulcrum for examining contrasting positions taken by other authors. Notably, all three authors have their intellectual roots in the legal traditions of continental European civil law systems. Theoretical work on legal pluralism in European private law seems to have attracted fewer authors from the common law.[21] The importance of the authors' background should however not be overplayed, as the theoretical, and political economy oriented nature of their selected works transcends the common law-civil law distinction.

I will deal with each area of contestation by providing a brief description, followed by a critical analysis. Some of the lines emerging from the analysis will be drawn together in a separate section on strong legal pluralism. The article concludes with a short recapitulation and reflection on the relevance of strong legal pluralism for future research in European private law.

III. JUSTICE AND THE RATIONALITIES OF PRIVATE LAW

One of the leading visions on legal pluralism in European private law was proposed by Hans Micklitz, who earlier than others reached the conclusion that the obstacles to harmonisation in the field—such as insurmountable differences in legal culture and legal norms, but also a lack of political will—would prevent the adoption of a full-fledged European Civil Code or even of a (smaller) Common European Sales Law.[22] He developed an alternative perspective on lawmaking in the field, in which the emphasis comes to lie on the interaction between legal orders, in particular the EU and the national laws of the member states, and the question regarding which degrees

[20] Michaels in an earlier study selected the theories of Wilhelmsson, Smits, and Legrand as 'three of [legal pluralism's] most prominent proponents'. See Michaels, note 1 above, p 140. I have chosen Micklitz's work as the primary representative of a theory engaging with justice in European private law. It is of course not the only theory and the discussion will also take into account the work of Wilhelmsson and others on social justice. From Hesselink's work, which also deals with justice issues, I take up the discussion on pragmatism in European private law as a separate issue. Further, while Legrand's position is interesting because of his strong outcry *against* harmonisation of European private law, his view seems to have lost some momentum, in part because growing political divides between the EU member states in recent years have resulted in a more nationalist approach to lawmaking in European private law.

[21] Indicative can be the list of authors, exclusively with a civil law background although some have worked in common law systems, included in L Niglia (ed), *Pluralism and European Private Law* (Hart Publishing, 2013).

[22] See H-W Micklitz, 'Failure or Ideological Preconceptions? Thoughts on Two Grand Projects: the European Constitution and the European Civil Code' in K Tuori and S Sankari (eds), *The Many Constitutions of Europe* (Ashgate, 2010), p 109, and sources there cited.

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of integration can be observed between them.[23] In this framework, the rules and principles of European private law developed by the EU legislator and the European Court of Justice are conceived of as the potential seeds from which a 'self-sufficient legal order' of European private law may grow.[24]

Regardless of the analytical and normative merits of this perspective, one important contribution of this theory is that it exposes the underlying rationales of private law rules developed in EU law in comparison to national private laws. The former are thought to be narrower and primarily related to creating access to the internal market for businesses and consumers, whereas national private laws combine market regulation with considerations of redistributive justice. The term 'access justice' or *Zugangsgerechtigkeit*, coined by Micklitz, embodies this idea that the rules of European private law developed by the European legislator and the Court are meant only to empower actors to pass the threshold to taking part in the internal market. This premise is reflected in the justifications for harmonising legislation put forward by the European Commission over the past decades, which almost without failure cite that businesses should not be deterred from entering foreign markets by difference in national legislation, whereas consumers should have the confidence that they enjoy similar buyer protection in other member states as they do in their own country.[25] European private law, therefore, according to Micklitz should be named European Regulatory Private Law ('ERPL'), as it is the reflection of EU internal market policy applied to private law relationships. ERPL, other than national private laws, is infused with regulatory aims tied to the internal market and pays no—or in any case less explicit—heed to questions of distributive justice. It may even restrict the space for national policymaking rooted in social or uniquely local policy concerns.[26]

[23] Micklitz's project works with four models: (1) conflict and resistance; (2) intrusion and substitution; (3) hybridisation; and (4) convergence. Conflict and resistance explores the possible ways in which national systems may try to resist the influence of European private law and seeks to clarify boundaries as to where EU law begins and national private law ends. Intrusion and substitution focuses on the introduction by the EU legislator of regulatory rules in private law, in a 'self-sufficient' manner, ie where the creation and enforcement of rules are all encompassed in the EU legal order. Hybridisation is concerned with the enforcement of rights arising from EU law through national remedies, and therefore aims for a merging of the two levels. Convergence, finally, looks at ways in which the two levels can be brought closer together without actually merging them. It focuses not just on mandatory or default rules, but also includes new modes of governance, co-regulation, and self-regulation.

[24] H-W Micklitz and Y Svetiev (eds), *A Self-Sufficient European Private Law – A Viable Concept?* (EUI Working Papers, 2012) LAW 2012/31, p 6, available at http://blogs.eui.eu/erc-erpl/working-papers-2.

[25] These justifications of course also follow from Article 114 of the Treaty on the Functioning of the European Union (TFEU), which is the main legal basis for harmonisation of private law in the EU. Nevertheless, the EU Treaties contain objectives and values that go beyond the internal market rhetoric.

[26] H-W Micklitz, 'Introduction – Social Justice and Access Justice in Private Law' in H-W Micklitz (ed), *The Many Concepts of Social Justice in European Private Law* (Edward Elgar, 2011), p 3; H-W Micklitz 'Monistic Ideology versus Pluralistic Reality – Towards a Normative Design for European Private Law' in L Niglia (ed), *Pluralism and European Private Law* (Hart Publishing, 2013) pp 29, 38; H-W Micklitz 'The Forgotten Dimension of European Private Law' in L Azoulai, *The Question of Competence in the European Union* (Oxford University Press, 2014), p 125. See also Y Svetiev, 'The EU's Private Law in the Regulated Sectors: Competitive Market Handmaiden or Institutional

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The problem could also be framed broader, not only as one of different rationales underlying legislation but as one of different rationalities, in which the rationality of European private law is instrumentalist whilst that of national private laws can be characterised as juridical.[27] The contrast between the rationalities of European private law and of national private laws is particularly stark when it is studied, as Micklitz and his research team did, in the context of so-called regulatory 'silos'. These silos, or sectors, refer to the specific sectors of industry in which the EU has intervened in private law relationships as part of a broader regulatory strategy to liberalise markets and open them up to competition. Examples are the telecommunications and energy sectors,[28] the financial services sector,[29] insurance, tourism, and health care.[30] The descriptive account of the ERPL project holds that these different market sectors functioning as relatively closed entities, each with its own rationality[31]—although all are embedded in the EU's internal market project and share also that overarching rationality—which influences the making of rules, the substantive standards, and the enforcement mechanisms in that particular sector.[32] Moreover, the presence of sector-specific lawmaking actors—in particular representatives of the industry who take part in standardisation processes—is presented as a factor of such prominence that it prevents, or hinders, the introduction of rules developed by external lawmakers. The substance of rules may therefore come out in favour of the established interests of the more powerful market players.[33] While EU law may intervene to at least safeguard 'access justice' in such markets, as other actors will be bound by rules emanating from the EU legislator, the relatively closed lawmaking process makes it unlikely that distributive policies are pursued by lawmakers in each of these sectors.

Although the ERPL project has provided a stimulating and necessary alternative perspective to the harmonisation debate, it is vulnerable to criticism,[34] as other legal

(F'note continued)
Platform?' (2016) 22(5) *European Law Journal* 659, 660, who states that negative integration is so deeply entrenched in the CJEU's case law that it makes EU law unable to accommodate national regulatory autonomy.

[27] See page 205 above.

[28] Discussed by Svetiev (see note 26 above). See also M Cantero Gamito 'The Transformation in the Making of Private Law via Telecommunications Regulation' in Micklitz and Svetiev, note 24 above, p 89.

[29] See eg I Domurath, *Consumer Vulnerability and Welfare in Mortgage Contracts* (Hart Publishing, 2017); G Comparato, *The Financialization of the Citizen. Social and Financial Inclusion through European Private Law* (Hart Publishing, 2018).

[30] B van Leeuwen, *European Standardisation of Services and Its Impact on Private Law. Paradoxes of Convergence* (Hart Publishing, 2017).

[31] Cf MW Hesselink, 'Private Law, Regulation, and Justice' (2016) 22(5) *European Law Journal* 681, 683.

[32] See note 24 above, p 78.

[33] This finding resonates the concerns put forward by Bartl (see note 11 above).

[34] For reflections on the project by Hesselink, Bartl, Dagan, and Mulder, see the special issue of the *European Law Journal* (2016) 22(5).

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pluralist accounts may be more complete, from an analytical or descriptive standpoint as well as in relation to the scope that they see for normative considerations of justice. I will discuss two points of contention in relation to the project's theoretical basis. The points of contention relating to the ERPL project stem from: (1) its analysis of the process of lawmaking in regulated sectors, or silos; and (2) the perception that European (regulatory) private law is subservient to the goal of achieving access to the internal market for all businesses and consumers but has no role in social policy.

The first aspect, the analysis of silos as part of the ERPL project, appears to underestimate the relevance of cross-sector lawmaking in European private law. The existent rules of private law, in particular consumer law, contain a number of instruments that apply to all contracts between businesses and consumers in the EU, without distinction between sectors of industry. Examples are the Consumer Rights Directive,[35] the Unfair Contract Terms Directive,[36] and the Consumer Sales Directive.[37] Considering that these directives lay down minimum rules for consumer protection in business-to-consumer ('B2C') contractual relations, the rationality of lawmaking in different sectors at least in some part overlaps. While it may be true that the specific rationality of a given sector—eg telecom or energy—can influence which other rules are developed in relation to B2C contracts, all lawmaking actors in the sector are obliged to abide by the rules laid down by EU law. Therefore, it may be that some of these rules have relatively more importance in one sector than another, depending on their relation to standards, national legislation or other rules applicable in the sector; but they can never be left out or diverged from to the detriment of the consumer. That cross-sectoral effect of EU law on private law relationships in the different market sectors needs to be taken into account in any theory that wishes to give a full account of lawmaking in European private law.

The previous point leads to a second consideration. Substantively, the directives that apply across sectors lay down a number of consumer rights that are quintessentially European, and yet go beyond what would be needed to achieve access justice for consumers. The right of withdrawal, the control of unfair terms, and the harmonised remedies for non-conformity are the main examples of such rights.[38] Withdrawal, which means the possibility for consumers to rescind a contract within fourteen days after either the conclusion of a contract or the delivery of goods,[39] has become a well-known and often exercised right in European consumer contracts. It

[35] Directive 2011/83/EU on consumer rights [2011] OJ L304/64 (Consumer Rights Directive).

[36] Council Directive 1993/13/EEC on unfair terms in consumer contracts [1993] OJ L95/25 (Unfair Contract Terms Directive).

[37] Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees [1999] OJ L171/12 (Consumer Sales Directive).

[38] Some even regard them as pillars of a pragmatic system that could develop into a loosely coherent European private law. See Hesselink, note 31 above, pp 685–87 for a further development of this argument.

[39] The Consumer Rights Directive, Article 9 harmonises the right of withdrawal for all consumer contracts concluded through distance communication.

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enables consumers to buy goods through online or other distance media—eg clothes—and try them at home before deciding whether to keep them.[40] The second example, the control of unfair terms, aims to eliminate terms laid down in general terms and conditions used by traders that in some way infringe upon consumer rights or that upset the balance of fairness between the contracting parties.[41] The third category, remedies for non-conformity, has ensured that consumers in Europe can count on having a set of remedies available if goods that a trader delivers to them do not live up to the contract. These include repair, replacement, price reduction, and termination.[42] Although some national variation exists,[43] the Directive has succeeded in its aim to guarantee these remedies for consumer sales contracts in the EU.[44] It is envisaged that similar remedies will in the near future be introduced for digital content contracts.[45]

It is striking that these rights, in particular through their interpretation by the European Court of Justice, have gone beyond what is required from an access justice perspective. In particular, the Unfair Terms Directive has given a major impulse to consumer protection, not just in relation to the economic position of consumers but also in relation to social inclusion. National courts have discovered the Directive as a route through which to attack unfair mortgage credit contracts, and thereby indirectly to prevent the eviction of debtors and their families from their homes.[46] The remedies for non-conformity and the right of withdrawal intervene perhaps to a lesser extent in consumers lives—having their direct impact in economic rather than social terms—but also lean towards consumers' interests rather than those of traders. Consumers are given not just any remedy for non-conformity, but the ones that are thought to empower them most; and the right of withdrawal is a highly consumer-

[40] Statistics on consumer sales in the EU reveal a steady increase of the percentage of online sales as part of all consumer sales in Europe, which is linked to a growing trust of consumers in online shopping and a better knowledge of their rights. See European Commission, 'EU Consumer Conditions Scoreboard 2017', p 10, available at http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=117250.

[41] Unfair Contract Terms Directive, note 36 above, Arts 3, 6.

[42] Consumer Sales Directive, note 37 above, Art 3.

[43] Notably in the UK, albeit that Brexit will perhaps diminish the relevance of that deviation. For an explanation on the continued prominence of damages as a remedy over specific performance, see P Giliker, 'The Consumer Rights Act 2015 – A Bastion of European Consumer Rights?' (2016) 37(1) *Legal Studies* 78. See also V Mak 'Specific Performance in English Consumer Sales Law' in JM Smits, D Haas and G Hesen (eds), *Specific Performance in Contract Law: National and Other Perspectives* (Intersentia, 2008), p 121.

[44] The recent 'Fitness Check' of European consumer and marketing law confirms that the key directives introduced in the 1990s and 2000s, when effectively applied, tackle the most important problems encountered by consumers in the EU, also in online markets. The results of the Fitness Check and of this assessment, as well as the supporting studies, can be accessed online at ec.europa.eu/newsroom/just/item-detail.cfm?item_id = 59332.

[45] COM(2015) 634 final, *Proposal for a Directive of the European Parliament and of the Council on Certain Aspects Concerning Contracts for the Supply of Digital Content*.

[46] This example refers to *Mohamed Aziz v Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)* C-415/11, EU:C:2013:164.

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friendly way in which goods can be ordered and assessed, and returned if the consumer wishes, all at the trader's expense.[47]

The fact that these rights go beyond what is needed to help actors pass the threshold for participation in the internal market signifies that ERPL is not fully informed by access justice as a benchmark for its substance.[48] European private law appears to engage with social justice or interpersonal justice too,[49] albeit that it is unclear to what extent, and under what conditions, the European legislator and the Court are driven to recognise rules that go beyond the basic standards required for the integration of the internal market through law. Interestingly, Micklitz's theory of ERPL may actually, even if it is not presented as such, give an opening to the further development of a framework within which social interests are taken into account in the making of European private law. His work on the constitutionalisation of European private law acknowledges the influence of non-economic rights, in particular fundamental rights, on private law relationships through EU law. Nevertheless, the pursuit of market access is regarded as a precondition for the engagement of the EU Court and legislator with such rights.[50] The addition suggested by other perspectives on justice is that, while it may be descriptively valid to see the connection to market access as a prerequisite for judicial review or legislative action, there also is a normative side to the inclusion of non-economic rights in European private law. Besides access justice (focused on providing market access to all, including weaker actors, in the EU market), the extension of ERPL to non-economic interests requires that justifications are found for choices made with regard to interpersonal justice.[51] For example, while it may be conceded that minimum rules on unfair contract terms in consumer contracts can encourage more actors to take part in the internal market, there is still the question whether the consequences attached to unfairness are balanced, taking into account both the interests of the consumer as well as those of the trader. Therefore, Micklitz's access justice framework can be construed so as also to include normative choices relating to social justice, interpersonal justice, and redistribution.

By giving space to access justice and redistributive justice, the theory could moreover transcend the perceived dichotomy between the instrumental rationality of EU internal market law and the juridical rationality of national private laws.

[47] With one exception, namely that the consumer will have to pay the costs for returning the goods, through the medium that he desires; see *Handelsgesellschaft Heinrich Heine GmbH v Verbraucherzentrale Nordrhein-Westfalen eV* C-511/08, EU:C:2010:189, and now Consumer Rights Directive, note 35 above, Art 13. The consumer will however obtain a refund of the price of the goods as well as the delivery costs that he paid when ordering them. Moreover, in practice many traders provide consumers with the means to return goods at no additional cost.

[48] Cf Hesselink, note 31 above.

[49] On interpersonal justice, see ibid, pp 691–92. Interpersonal justice concerns the effects of private law on individuals and includes, but is not limited to, the correction of wrongs.

[50] See eg H-W Micklitz and C Sieburgh 'Primary EU Law and Private Law Concepts' in H-W Micklitz and C Sieburgh (eds), *Primary EU Law and Private Law Concepts* (Intersentia, 2017), pp 1, 42–43; H-W Micklitz and N Reich, 'The Court and Sleeping Beauty: The Revival of the Unfair Contract Terms Directive (UCTD)' (2014) 51(3) *Common Market Law Review* 771.

[51] Hesselink, note 31 above, p 691.

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Redistributive justice, as has been said,[52] is still often perceived as falling within the realm of national private law systems. That notion may have to be reconsidered in light of the finding that European private law includes considerations of social justice. More generally, this finding in relation to Micklitz's theory of access justice seems to be corroborated by examples from the case law of the Court of Justice of the EU,[53] and by a broader reconceptualisation of social justice in EU law that may result in greater attention for the vulnerable in Europe.[54] In some areas of European (regulatory) private law, such as in consumer law, a call for greater attention for the redistributive effects of EU law has already been made. It has been said that 'risk-distribution is already a feature of EU consumer law' and that EU law should be more explicit in recognising that it has a social welfare function in this respect.[55]

Taking stock, a strong legal pluralist perspective can open up a space for normative deliberation of concepts of justice in European private law. The ERPL framework provides a basis on which such a theory could be developed. The above analysis lays bare some ways in which the theory might already be able to accommodate a space for deliberation between the differing rationalities of European and national private laws. There are some additional responses conceivable from a strong legal pluralist perspective, which I will return to in section V, after the discussion of 'processes' and 'actors'.

IV. DOCTRINAL AND PRAGMATIC APPROACHES

Moving from norms to processes, another aspect of legal pluralism in European private law concerns the approaches to lawmaking that are chosen. On the one hand, there are doctrinal approaches to private law, which build on the idea of private law as an evolved system of rules, principles and practices;[56] on the other side stand pragmatic approaches that aim to resolve societal problems in an efficient and user-friendly manner as they arise in practice. These approaches are reflected in the dichotomy between the juridical rationality associated with national private laws, of which doctrinal approaches are part, and the instrumental rationality of EU law, in

[52] See page 205 above.

[53] In particular the Court's references to the EU Charter of Fundamental Rights in private law cases appear to boost social justice in European private law. See eg H Collins, 'Building European Contract Law on Charter Rights' in H Collins (ed), *European Contract Law and the Charter of Fundamental Rights* (Intersentia, 2017), p 1.

[54] For a recent analysis, in which a comparison is made with the national context in the UK, see C O'Brien, *Unity in Adversity: EU Citizenship, Social Justice and the Cautionary Tale of the UK* (Hart Publishing, 2017).

[55] G Howells, C Twigg-Flesner and T Wilhelmsson, *Rethinking EU Consumer Law* (Routledge, 2018), p 332. See also the earlier analyses of a social welfare model in European (consumer) contract law in T Wilhelmsson, *Social Contract Law and European Integration* (Dartmouth, 1995) and—as part of a more general overview of different approaches—T Wilhelmsson, 'Varieties of Welfarism in European Contract Law' (2004) 10(6) *European Law Journal* 712, and N Reich, *General Principles of EU Civil Law* (Intersentia, 2014), pp 82–83.

[56] See MW Hesselink 'How Many Systems of Private Law are there in Europe?' in L Niglia (ed), *Pluralism and European Private Law* (Hart Publishing, 2013), p 199.

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which pragmatic solutions can be found beyond the internal, juridical framework.[57] They are nonetheless more specifically focused, in that they are concerned with the *ways in which* law can tackle societal problems (in other words: processes), rather than on a more abstract level with the broader framework of discussion within which questions are asked. As Hesselink observes: 'the main difference between the classical national systems of private law in the member states and European private law is not its regulatory nature but its more pragmatic style. European private law is far less doctrinal and, consequentially, much more user-friendly (for unsophisticated users) and more future-proof than the [German Civil Code] BGB and other national civil codes, even after their recent reforms'.[58]

The dichotomy between doctrinal and pragmatic approaches in European private law is most acutely observed in the relation between general private law and specific rules of consumer law. The introduction of consumer law rules can, as a deviation from general contract law, be seen as a pragmatic response driven by the European legislator's legal harmonisation agenda for the integration of the internal market. As such, it is a relevant case study for determining the space for deliberation, and hence for legal pluralism, between the European and national legal orders. The greater the resistance to pragmatic solutions, and conversely the greater the desire to integrate new rules into existing doctrinal systems, the less space there seems to be for the coexistence of norms in a strong legal pluralist constellation.[59]

The distinction between doctrinal and pragmatic aspects of European private law is highlighted by Hesselink, who argues that the pragmatic nature of European private law can give it an advantage over classical, doctrinal private law for parties that require efficient and user-friendly solutions in conflicts of low complexity and value.[60] Indeed, European private law stands out from national laws as virtually all instruments in this field have been directed towards the regulation of business-to-consumer (or: B2C) relationships.[61] Notably, one explanation for that focus is that the EU's legislative competences are restrained by the principles of subsidiarity and proportionality. While a case can be made for the harmonisation of consumer contract laws with the aim of pursuing the integration of the internal market and, through

[57] See page 205 above.

[58] Hesselink, note 31 above, p 688.

[59] See also above, Section I.

[60] Hesselink, note 31 above, pp 686–87.

[61] Two projects that proposed regulation of B2B relationships failed. The Common European Sales Law (CESL) intended to include not only B2C contracts within its scope, but also B2B contracts in which one of the parties was a small or medium-sized enterprise. See COM(2011) 635 final, *Proposal for a Regulation of the European Parliament and of the Council for a Common European Sales Law*, Art 7. An enquiry into the need for regulation of unfair commercial practices in B2B relations never led to legislative proposals. On this topic, see A Renda et al, 'Study on the Legal Framework Covering Business-to-Business Unfair Trading Practices in the Retail Supply Chain. Final Report' (European Union, 2014), available at http://ec.europa.eu/internal_market/retail/docs/140711-study-utp-legal-framework_en.pdf. Recently, a new proposal was published concerning transparency of online platforms. See COM(2018) 238 final, *Proposal for a Regulation of the European Parliament and of the Council on Promoting Fairness and Transparency for Business Users of Online Intermediation Services*.

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mandatory rules, ensuring a high level of consumer protection, that case is harder to make for business-to-business ('B2B') transactions. Most of those transactions are, due to the freedom of contract, governed by rules determined by the parties themselves, rather than mandatory rules. The parties can also choose which (national) law governs the contract, within the boundaries set by private international law. Besides that, the EU however does not seem to have competence to harmonise facilitative or 'default' rules of contract law.[62] Nevertheless, as a consequence of this B2C focus of European private law the substance of rules may diverge from general private law. Characteristics associated with B2C transactions are that they mostly reflect low value transactions, that most disputes between parties do not reach the courts because of this low value as well as other barriers,[63] and that consumers benefit from more user-friendly mechanisms for dispute resolution such as mediation or arbitration.[64] These characteristics are pragmatic in nature and to some extent make consumer contract law drift away from classical, doctrinal private law, as found at the national level in the EU member states.[65]

Going beyond this description of the status quo, a broader analysis of the interplay between doctrinal and pragmatic approaches in European private law can give insight into the space for deliberation between the two approaches. In other words: it can indicate whether there is room for legal pluralism, for example by allowing pragmatic approaches to coexist besides doctrinal national laws, or whether legislators seek to knead pragmatic solutions into the mould of doctrinal systems. Also vice versa, the question can be asked whether doctrinal laws should transform in response to pragmatic solutions introduced in one area of private law. In both cases, practice shows doctrinal laws to be resistant to the integration of pragmatic solutions, thereby (perhaps inadvertently) supporting legal pluralism. The first situation, the adaptation of pragmatic solutions to fit existing doctrinal legal frameworks, is an evergreen of harmonisation projects in European private law. In most cases where the European legislator proposed harmonising rules, these were laid down in EU directives, thus leaving space for the national legislator to implement rules in a manner befitting their existing legal system. Some member states made an effort to adapt their existing legislation in specific places to integrate B2C rules into general private law, whilst others preferred the verbatim copying of EU legislation into self-standing statutory instruments without addressing their relation to general

[62] Norbert Reich, 'A European Contract Law, or an EU Contract Law Regulation for Consumers?' (2005) 28 *Journal of Consumer Policy* 383, 391 ff. According to Reich, an exception may be made for B2B contracts involving a small or medium-sized enterprise (p 393). See page 218 ff below.

[63] Studies show that many consumers avoid court proceedings because of their high costs, long duration, and uncertain outcomes. See eg I Ramsay 'Consumer Redress and Access to Justice' in CEF Rickett and TGW Telfer (eds), *International Perspectives on Consumers' Access to Justice* (Cambridge University Press, 2003), p 17, who highlights that for many low-income consumers complaint mechanisms will not be as effective as they are for middle-income consumers.

[64] Hesselink, note 31 above, p 686. See also Calliess' analysis of online dispute resolution (ODR) mechanisms. G-P Calliess, 'Online Dispute Resolution: Consumer Redress in a Global Market Place' (2006) 7(8) *German Law Journal* 647.

[65] Hesselink, note 31 above, pp 687–88.

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private law.[66] The variety of approaches chosen, and the resulting continued divergence of rules despite attempts at harmonisation, has led some authors to conclude that the harmonisation of European private law 'seems to have reached a dead-end'.[67] As a consequence, pragmatic rules of European consumer law coexist with doctrinal rules of general contract law. This situation may be characterised as legal pluralist, albeit of an ordered variety, since rules emanating from EU law will trump those of national laws in cases where conflicts arise and may then cut across the doctrinal system of those national laws. One area in which this has happened is unfair terms regulation in consumer contracts.[68]

The second situation, ie the transformation of doctrinal laws in response to pragmatic solutions, also emphasises the resistance of doctrinal laws to change. One test case confirming this is the question whether the rules on withdrawal, unfair terms and remedies for non-conformity that have been developed for B2C contracts can be extended to general contract law, in particular to B2B contracts, which resonates with some of the questions that were raised in relation to ERPL's silos approach.[69] The rationality underlying these rules, as explained above, reflects a pragmatic approach to the needs of consumers, in particular in cases where disputes arise. That moment—ie the occurrence of a dispute—is indeed pivotal to the relevance of private law rules in practice, as it puts to the test which rights can actually be given effect by parties.[70] The clearer those rights are, the lower the costs of dispute resolution, and the more likely that the consumer will get a satisfactory outcome.[71] This argument therefore supports a pragmatic approach to private law, in which rights are introduced that are unambiguous and easily enforced, such as the right of withdrawal or the right to avoid unfair contract terms.

Until now, however, national private laws have remained fairly resistant to the expansion of pragmatic solutions beyond B2C relations to also include B2B relationships.[72] One explanation is that the term 'B2B relationships' is broad and

[66] The latter is the approach chosen in UK law, whilst eg Germany and the Netherlands have integrated most European private law directives into their civil codes.

[67] H Schulte-Nölke, 'The Brave New World of EU Consumer Law – Without Consumers, or Even Without Law?' (2015) 4(4) *Journal of European Consumer and Market Law* 135.

[68] The case law of the Court of Justice of the EU in relation to the *ex officio* assessment of unfair terms by national courts has cut across national rules of procedural law and has also, primarily in the *Aziz* judgment, influenced the assessment of unfairness in the light of the open norm of 'good faith' in contract law. See eg C Mak, 'The One and the Many: Translating Insights from Constitutional Pluralism to European Contract Law Theory' (2013) 21(5/6) *European Review of Private Law* 1189, 1207–08; OO Cherednychenko 'The Impact of Fundamental Rights' in C Twigg-Flesner (ed), *Research Handbook on EU Contract Law and Consumer Law* (Edward Elgar, 2016), pp 109, 131–33.

[69] See above, section II.

[70] On the importance of remedies in contract law, see earlier V Mak, *Performance-Oriented Remedies in European Sale of Goods Law* (Hart Publishing, 2009), pp 1–2.

[71] Cf Hesselink, note 31 above, p 686.

[72] European private law has also remained focused on B2C transactions, although B2B transactions have on occasion been considered, but eventually not been subjected to legislative action. See eg Renda et al, note 61 above.

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undifferentiated. It places all business-to-business transactions into one category, whereas in practice significant differences may exist between large and small, or even micro-sized businesses run by one person. Some smaller companies will be equally vulnerable as consumers when it comes to assessing their legal position at the time of entering into a contract or being able to put pressure on the other party or to obtain a remedy if the performance of the contract is unsatisfactory. For those types of cases, it could be argued that consumer protection rules should be extended to other categories of weaker parties.[73] Some support may be garnered therefore for the idea that B2B contracts in which one of the parties is a small or medium-sized enterprise ('SME') should be treated in a similar way to consumer contracts, as there is a similar economic or power imbalance between the two contracting parties.[74] Examples already exist of cases in which consumer protection is extended to transactions between businesses in which one is an SME. In Germany and the Netherlands, for example, SMEs may in certain circumstances benefit from an extension of consumer protection against unfair terms in contract law. The mechanism by which this is done is called *Reflexwirkung* or *reflexwerking*, meaning that courts can mirror the application of these rules onto B2B contracts in which one of the parties is a small business.[75]

Nonetheless, the extension of consumer laws to B2B transactions is not common practice. One important reason for being hesitant in this respect is that the treatment of SMEs (in some instances) as consumers makes the legal framework doctrinally more complex. Whilst it can lead to just outcomes in individual cases, overall the effect would be a blurring of categories. Besides the distinction between consumers and businesses—which is already obscure in some aspects[76]—it would introduce a third category of 'small businesses who are treated as consumers'. As a result, the sometimes difficult questions of demarcation between consumers and businesses would not disappear; they would simply arise at a different point, namely in identifying which businesses qualify as 'small' enough to benefit from consumer protection. The difficulties of differentiating between different types of actors within categories, moreover, can already be observed on the other side of the equation, in relation to the consumer definition. EU consumer law has introduced its own

[73] The debate could be extended also to other types of weaker parties, such as employees or those who are at risk of harm caused by environmental factors and climate change ('green victims').

[74] This idea inspired the choice for the proposed CESL to be applicable to B2C contracts and to B2B contracts in which one of the parties is an SME. See note 61 above. A small enterprise is defined in EU law as a company with fewer than 50 staff and a turnover or balance sheet total of less than 10 million EUR. A medium enterprise is defined as a company with fewer than 250 staff and a turnover of less than 50 million EUR or a balance sheet total of less than 43 million EUR. See Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises [2003] OJ L124/36.

[75] See eg MBM Loos and I Samoy 'Introduction' in MBM Loos and I Samoy (eds), *The Position of Small and Medium-Sized Enterprises in European Contract Law* (Intersentia, 2014), pp 1, 3; E Hondius, 'The Notion of Consumer: European Union versus Member States' (2006) 28(1) *Sydney Law Review* 89, 96.

[76] See in Dutch, M Schaub, 'Wie is consument?' (2017) *Tijdschrift voor Consumentenrecht* 30.

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definitions of the 'average consumer' and the 'vulnerable consumer', which differ sufficiently from the definitions in national laws to cause doctrinal upheaval.[77] One reason to keep working with traditional, doctrinal categories of consumers and businesses is therefore in itself also pragmatic, albeit from the perspective of the legal system rather than the parties affected by it: complexity is minimised.[78] It is not surprising therefore that laws are, doctrinally, resistant to the instrumental nature of European private law.[79]

Overall, a number of factors can work against the integration of pragmatic solutions into a broader framework of doctrinal private law. The coexistence of pragmatic solutions besides doctrinal laws is however also a confirmation that a space exists for legal pluralism in European private law, in terms of process (pragmatic vs. doctrinal solutions) as well as norms (the substance of B2C rules vs. general contract law, on which see section II, above). In terms of process, moreover, the observation that the pragmatic approach of European consumer law has until now not been integrated into general contract law does not mean that it cannot still have transformative effects in the future. I will consider that question in relation to the rise of the platform economy and the emergence of an intermediate category of 'prosumers' in the section on strong legal pluralism.

V. PRIVATE ACTORS AS LAWMAKERS

The third point, which goes to the heart of legal pluralism, is the role private actors have in lawmaking in European private law. In a juridical rationality their place would be seen as subordinate to democratically chosen, state legislatures. In a legal pluralist constellation, however, that role changes. Strong pluralist theories downplay the role of the state by taking the sociological perspective in which multiple legal orders coexist, at local and global levels but also within the territory of the state. In that perspective, private actors are included as norm-creating actors besides or within the state. In other words, formal and informal lawmaking[80] can be regarded as equally important for private law practice. That perspective coincides (at least in part) with the instrumentalist rationality of European private law, since private actors can be regarded as active contributors to the integration of the internal market through law.

[77] For an analysis of English, Dutch, and German cases on financial services for consumers, see V Mak 'The "Average Consumer" of EU Law in Domestic and European Litigation' in D Leczykiewicz and S Weatherill (eds), *The Involvement of EU Law in Private Law Relationships* (Hart Publishing, 2013), p 33.

[78] Hesselink's view that the pragmatic pillars of European contract law can be influential because they have a wide territorial scope, with harmonised rules applying in all EU member states whereas national doctrinal laws diverge—see Hesselink, note 31 above, p 687—therefore only seems superficially true. It is important also to consider how the rules of European contract law integrate with those national doctrinal laws.

[79] On resistance in European private law, see also G Comparato, *Nationalism and Private Law in Europe* (Hart Publishing, 2014), ch 3.

[80] Here used as synonyms for public regulation promulgated by the State or other government actors or by the EU, and private regulation in the form of rules made by private actors through contracting practice, self-regulation or co-regulation.

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One particular proponent of this approach is Jan Smits, who has advocated a choice-of-law based theory of radical legal pluralism in European contract law. What makes his theory a 'radical' form of pluralism is that, besides adopting a sociological perspective of coexisting legal orders, it takes a second step: focusing on individual choice, the theory suggests that private actors are not necessarily governed by the law of one state or the norms of one societal group, but instead are allowed to 'opt out' of the law of their state and to 'opt in' to another norm set. That enables private actors to choose the rules that they find most favourable to their purposes or situation.[81]

Smits' conception of radical legal pluralism in European private law at first glance adheres to the premises of strong legal pluralism. It relies on the (both public and private) autonomy of private actors to choose the rules that apply to them and that enable them to reach their objectives. Also, other actors are presumed to recognise the choices made by private actors, that is: they regard the rules chosen by private actors as valid even if they themselves do not agree with those rules. The framework therefore presumes toleration by other actors. An additional feature of the theory holds that the freedom of private actors to choose the rules applicable to their transactions creates a 'law market',[82] and that in this market a competition of rules will result in the emergence of the 'best' rule for contracting in the market.[83] The notion of regulatory competition, as this process is called, is based on the economic theory of jurisdictional competition, which goes back to Charles Tiebout.[84] Fitting the economic model of a market, it assumes that law can be viewed as a product created by states—the supply side—and chosen by private actors—the demand side. The theory of regulatory competition, therefore predicts that under the right conditions a 'law market' can operate in which lawmakers compete for their law to be chosen by private actors.

This perspective on legal pluralism has however also attracted criticism, in particular because it relies on the capacity of private parties (including weaker ones) to make suitable choices.[85] In many cases private parties will not be able to properly assess the best suitable law for the purposes of their transaction. For example, consumers or small businesses will not carry out a full regulatory enquiry before entering into a cross-border transaction, whereas larger businesses may well hire (in-house) counsel to advise on legal aspects before marketing their products in various

[81] J Smits 'A Radical View of Legal Pluralism' in L Niglia, *Pluralism and European Private Law* (Hart Publishing, 2013), pp 161, 162.

[82] EA O'Hara and LE Ribstein, *The Law Market* (Oxford University Press, 2009).

[83] JM Smits, *The Making of European Private Law* (Intersentia, 2002), p 64, who however expresses a preference for a permanent free movement of rules rather than fixation of the most favourable rule through codification; N Reich, 'Competition Between Legal Orders: A New Paradigm of EC Law?' (1992) 29(5) *Common Market Law Review* 861.

[84] C Tiebout, 'A Pure Theory of Local Expenditure' (1956) 64(5) *Journal of Political Economy* 416; and see G Rühl, 'Regulatory Competition in Contract Law: Empirical Evidence and Normative Implications' (2013) 9(1) *European Review of Contract Law* 61, 64, and sources there cited.

[85] B Lurger 'A Radical View of Pluralism? Comments on Jan Smits' in L Niglia, *Pluralism and European Private Law* (Hart Publishing, 2013), pp 173–74.

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foreign markets. Furthermore, even if private parties do have a preference for a particular choice-of-law, they may not be in a position to enforce it. If the other party to the contract has a stronger bargaining position, in all likelihood the preferences of that party will prevail.[86] Here is not the place to go into a full discussion of the limitations of the theory.[87] Nonetheless, these particular criticisms do point to a broader question relating to the political economy of individual-choice based theories of radical legal pluralism.

The idea of individual choice nevertheless seems attractive as a means to do justice to the autonomy of contracting parties. Autonomy, however, is not the only value that deserves to be supported through the governance framework of European private law. Equally, if not more important, are the protection of weaker parties or issues of social justice, as was seen in section II. Questions that arise are whether a law market based on individual choice can guarantee that the welfare of all members of society, including weaker parties who are less able to exercise a choice to their own benefit, is being pursued. Can sufficient safeguards for the protection of fundamental values and objectives, such as legal certainty, consumer protection, and environmental protection,[88] be provided if private actors are considered as actors with (at least a shared) responsibility for lawmaking?

The answer to these questions is complex, because the theory on individual choice in European contract law at some points is underdeveloped. Yet, it is exactly in relation to these broader goals—concerning the protection of fundamental values and objectives of the EU private law order—that the theory of radical legal pluralism in European private law may be improved. I will elaborate this idea by first analysing three aspects of criticism of Smits' theory of radical legal pluralism. In the next section, on strong legal pluralism, I will come back to these and elaborate some responses as to how these aspects could still provide the groundwork for a strong legal pluralist theory for European private law.

First, despite its name, Smits' theory in the end is anything but 'radical'.[89] The theory only engages with facilitative rules, not with mandatory rules. Its assertion that private actors should be allowed to choose the contract law that best fits their interests, in that light, does not add much to our general understanding of private law. The facilitative character of contract law seen in Western legal systems already places the emphasis on the autonomy of private parties. Where the real limitations of that autonomy arise, is in relation to mandatory rules. Businesses cannot contract out of mandatory consumer protection, as is reflected in conflict-of-laws rules.[90] Free

[86] S Vogenauer, 'Regulatory Competition through Choice of Law and Choice of Forum in Europe: Theory and Evidence' (2013) 21(1) *European Review of Private Law* 13, 19 states that a party will only be able to impose contractual terms if it has superior bargaining power.

[87] Ibid, for an in-depth analysis. See also Lurger, note 85 above.

[88] These objectives correspond to those laid down in Article 3(3) TEU for the European social market.

[89] Michaels, note 1 above, p 151.

[90] For Europe, see Article 6(2) of Regulation 593/2008 on the law applicable to contractual obligations [2008] OJ L177/6 (Rome I), which stipulates that businesses cannot by contract derogate from the minimum protection that consumers have under the law of their country of residence.

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choice of rules would only seem to be available for business-to-business contracts, and even in those cases it may be that limitations arise if one of the parties involved is a small or medium-sized enterprise.[91] The theory, therefore, can only provide an incomplete governance strategy for European contract law.

Second, in its final stage, the theory does not actually choose a 'strong' legal pluralist perspective. In its application to questions of lawmaking, it reverts back to formal lawmaking by the state. The 'best' or 'most favoured' rules that are assumed to come up through choice-of-law in contracts between private parties are supposed to provide material for law reform. Such reform assumes the adoption of new legislation by the state.[92] Not only from a theoretical perspective, but also empirically, that is a problematic point. It cannot be established that legislators in the EU have adapted their contract laws in response to competition between contract laws in practice. It is true that many contract laws in Europe have seen reform in the last 20 years. Examples are Germany, the Netherlands, and a number of the EU's newer Member States (Estonia, Hungary, Lithuania, Poland, and Romania).[93] Whether these adaptations were in response to choices of law in practice, or whether they incorporated rules or approaches that had been favoured in practice, can however not be deduced from the available data.[94]

Third, a substantive problem related to the 'law market' idea is that it often overlooks power relations. The suggestion seems to be that of a market for law in which ideas can be freely traded, without intervention from special interests ('*herrschaftsfrei*').[95] In reality, the likelihood is that businesses with stronger market power will be able to impose their preferred rules on weaker parties, or that the solution preferred by the more numerous will prevail.[96] A moderating solution is found in conflict-of-laws rules, which place policy constraints on the market, for example in the form of consumer protection rules.[97] That however brings us back to

[91] The proposal for CESL was tailored specifically to contracts in which one of the parties is perceived as weaker, either as a consumer or as an SME. Compare COM(2011) 635 final, *Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law*, Art 7.

[92] Vogenauer, note 86 above; see also F Chirico and P Larouche 'Conceptual Divergence, Functionalism and the Economics of Convergence' in S Prechal and B van Roermund (eds), *The Coherence of EU Law: The Search for Unity in Divergent Concepts* (Oxford University Press, 2008), pp 463, 487 ff.

[93] Rühl, note 84 above, p 77.

[94] While the reform of the German law of obligations according to parliamentary documents was inspired by a desire to be at the forefront of lawmaking in Europe, the substance of the reforms does not reflect the adoption of rules copied from practice in Europe. See in more detail V Mak 'Private Actors as Norm-Setters through Choice-of-Law': The Limits of Regulatory Competition' in C Cauffman and JM Smits (eds), *The Citizen in European Private Law: Norm-Setting, Enforcement and Choice* (Intersentia, 2016), pp 99, 106; Deutscher Bundestag 11 October 2001, Plenarprotokoll 14/192, 18758; H Däubler-Gmelin, 'Die Entscheidung für die so genannte Große Lösung bei der Schuldrechtsreform – Zum Entwurf Eines Gesetzes zur Modernisierung des Schuldrechts' (2001) *NJW* 2281.

[95] Michaels, note 1 above, p 152.

[96] Ibid.

[97] Compare Horst Eidenmüller, 'Recht als Produkt' (2009) 64 *JuristenZeitung* 641.

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the other two criticisms, namely that the theory thus reverts back to one of 'weak' or 'juridical' legal pluralism rather than strong legal pluralism, and that it does not explain how mandatory rules fit with the idea of individual choice by private actors.[98]

By itself, therefore, individual choice theory appears insufficiently equipped to support a strong legal pluralist perspective on European private law. Nonetheless, the arguments put forward by Smits could form the basis of defining private actors as lawmakers in a strong legal pluralist theory; they only require refinement. The same is true for the other points of contestation, concepts of justice ('norms') and approaches to lawmaking ('processes'). I will now on the basis of the analysis set out in the previous sections come to some conclusions as to how a theory of strong legal pluralism in European private law may be further developed.

VI. THE STRONG LEGAL PLURALIST RESPONSE

This article started with the question whether legal pluralism in European private law can be construed as a strong, rather than an ordered, legal pluralism. The idea underlying that inquiry is that strong legal pluralism is normatively appealing because it does justice to the public autonomy of all lawmaking actors, formal and private. It recognises the power to self-legislate for these actors and it allows norms to coexist outside a formal, legal hierarchy.

To determine the viability of a strong legal pluralist theory in European private law, the article has examined three aspects that can serve as a methodological lens through which to regard pluralism: norms, processes, and actors. Existing theoretical positions engaging with these aspects, notably the ones of Micklitz, Hesselink, and Smits, have been found to go some way towards laying the groundwork for a strong legal pluralist framework in European private law. Yet, none is able to completely shrug off the ordering imposed by state-based perspectives on lawmaking. While one might conclude from this that the state is, and will remain, the primary locus for lawmaking, that conclusion would in some respects be too rash. The state is likely to continue to be the central actor in lawmaking processes—as legal pluralists will also agree—but that does not rule out the possibility that a space for legal pluralism can exist for issues that are of a transnational nature, as is the case for European private law. This section sets out a brief response as to how points of contestation arising from the examined theories could be refined from a strong legal pluralist perspective.

A. Justice and the Rationalities of Private Law

Returning to 'norms' first, the analysis of ERPL presented above confirms that the theory as it stands, and as it is further developed in scholarship, is extremely relevant for our understanding of the rationalities of European private law. At the same time, the theory seems open to further development in some respects. The question whether European private law serves goals of access justice or also social justice reveals a contested area in the theory that is of fundamental importance for how we perceive

[98] Michaels, note 1 above, pp 152–53.

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the coordination of lawmaking between different actors. That question reverberates in the corollary question how the interplay between regulated sectors and the broader, cross-sectoral approach to European private law functions. A theory of strong legal pluralism may be refined by mirroring it against these dilemmas, with which it is also concerned. The responses could then be as follows.

The first point, concerning the role of European private law in regulated markets, raises a deeper question on the effects that rules have once they are put in practice, or the distinction between 'law in the books' and 'law in action'. While it can be established that there are rules that apply across sectors—namely the rights of withdrawal, unfair terms control, and remedies for non-conformity in consumer contracts—that does not yet tell us whether these rules apply in the same way in each context. If it is true, as the ERPL project posits, that regulation in each sector operates along the lines of a sector-specific rationality, it may well be that some of that rationality rubs off on these general rules of European private law. Looking at remedies for non-conformity, it could for example be the case that repair is the most used remedy in one market, perhaps because it is considered to contribute to environmental sustainability,[99] while replacement prevails in another market. One may wonder whether the consequence for an individual consumer in the first market would be that his or her right of replacement—after all, the consumer may choose between repair or replacement[100]—is effectively diminished. Such questions would require further, empirical research in order to determine how remedies operate in practice in different sectors, whether their practical application diminishes consumer protection, and whether action is required to re-establish a general approach to remedies for non-conformity across sectors.

Second, the finding that access justice is not the only benchmark for the substance of European private law but that it is in some ways complemented by social justice is of relevance for the elaboration of the normative substance of rules. What is interesting for this particular field is that European private law, in comparison to global, transnational private law, is created in an institutional setting that already contains mechanisms for managing pluralism that go some way towards the recognition of common social values and goals. Coordination of lawmaking may for example be more readily achieved within the EU's institutional context, in which legislators and policy makers at national and EU level coordinate their lawmaking and in which also often note is taken of comparative legal solutions adopted by other Member States, than in legal orders with a lesser degree of regional cooperation between states or other lawmakers.[101] In this regard it is relevant also that the EU legal order is based on a number of common values and objectives, notably the ones laid down in

[99] The European legislator has made the connection between repair and sustainability in its 2015 proposal for new legislation for online sales; see COM(2015) 635 final, *Proposal for a Directive of the European Parliament and of the Council on Certain Aspects Concerning Contracts for the Online and Other Distance Sales of Goods*, recital 26.

[100] Currently following from Consumer Sales Directive, note 37 above, Art 3(3); in the proposed Directive Arts 9(1), 11.

[101] For an elaboration of this argument, see Mak, note 7 above.

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Article 3(3) of the Treaty on European Union ('TEU'). The rich debate on the rationalities of European private law, which revolves around the perceived dichotomy between internal market objectives and social policies, signifies that the precise content of the values and objectives set out in the EU Treaties continues to be in flux. Nonetheless, the presence of shared values and objectives in the Treaties provides a basis for mutual trust between the member states, and therefore for toleration of norms created by others,[102] as well as an explicit basis for taking account of social justice goals. That realisation may be a stepping stone towards identifying a space for deliberation between lawmakers in which norms can coexist.

B. Doctrinal and Pragmatic Approaches

The second point of contestation, 'processes', raises other challenges. It has been seen that the introduction of new rules in European private law often leads to a clash between, on the on hand, pragmatic solutions proposed as part of EU harmonisation —eg in consumer law—and, on the other hand, the established doctrinal systems of national private laws. On a more fundamental level this can be considered a clash between the instrumentalist rationality of European private law and the juridical rationality of national private laws. The resistance of doctrinal laws often results in a lack of integration of the two approaches, and thereby effectively in the continuance of a legal pluralist constellation. Where doctrinal laws remain unresponsive to fundamental change, but accept the existence of pragmatic solutions, the two rationalities can coexist side by side. That may however only be a temporarily sustainable position, as societal changes can require that changes are made that will affect the doctrinal structures of private laws in a more fundamental way. One aspect of 'processes' of lawmaking in a legal pluralist constellation, therefore, is to conceive of ways in which a space for deliberation between doctrinal and pragmatic lawmaking can be given shape. This problem is hard to discuss on an abstract level and I will therefore use an example for analysis. Staying with the business and consumer categories from section III, the next challenge to doctrinal classifications comes from the emergence of new types of actors, 'prosumers', in the platform economy.

This is a more complex problem than the question of whether B2C protection should be extended to general contract law, as it overturns the idea that consumers are purchasers and therefore on the demand side of the market. The platform economy enables individuals to take part in the market by offering goods and services to consumers worldwide even if they are not professional traders. It has blurred the lines between the concepts of 'consumer' and 'business'. In the legal definition used in most jurisdictions, a natural person not acting in the course of a business, trade, or profession would be regarded as a consumer, vis-à-vis a business as a natural or legal person who is operating in one of those ways. In the new economy, a natural person with the same characteristics, but now on the other side of a transaction, namely as a seller or service provider rather than a buyer, all of a sudden is transformed into a

[102] Toleration, it should be recalled, is one element required in a legal pluralist theory of lawmaking in European private law. See page 207 above.

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'prosumer', ie a consumer who produces goods and services.[103] The question is whether the law should respond by treating this 'prosumer' as a new category, or whether existing doctrinal approaches can be applied in ways that meet the needs of consumers, businesses, and others who are active in the platform economy.

Saliently, this problem has elements that lift it beyond the juridical rationality of (national) private laws. Prosumers have emerged in particular as participants in the so-called 'platform economy', ie the market for goods and services that has been created by online platforms, which allows individuals to offer products to consumers around the world. Technology, in the form of online platforms, has enabled such peer-to-peer or consumer-to-consumer transactions, and has thereby provoked a significant shift of power balances in the market for consumer goods and services.[104] Individual sellers or suppliers who would normally have very limited resources for the sale and marketing of their goods or services can make use of online platforms to provide them with a space where they can place their products on the market.[105] That is true not only within their own national markets, but also much broader, as online platforms operate across state borders. Prosumers who make use of online platforms, therefore, are excellently placed to offer their goods and services outside their own country and, in the EU, to contribute to the integration of the EU internal market. From that perspective, facilitating peer-to-peer transactions becomes relevant for the EU legislature. Therefore, the discussion on whether the 'prosumer' should be recognised as a separate legal category takes on significance also within the instrumentalist rationality of EU law.

What is required in terms of facilitating transactions between prosumers and other actors, such as consumers? Some lessons may be taken from the development of consumer law until now.[106] While many existing laws would treat prosumers as professional traders under certain circumstances—eg whether their aim is to make a profit, what the organisational structure of their operation is, and with what frequency they sell goods or services—only a few systems limit the legal responsibilities of prosumers in comparison to other, more experienced professional traders.[107] At

[103] The term 'prosumer' was first coined by A Toffler, *The Third Wave* (Bantam Books, 1980). An alternative term, the 'hybrid consumer' is used by C Riefa, 'The Reform of Electronic Consumer Contracts in Europe: Towards an Effective Legal Framework?' (2009) 14 *Lex Electron* 17.

[104] Not only prosumers have benefited from this shift; the gains from the platform economy also go in a large part to the major platforms themselves, such as Airbnb, Google, Facebook, and Amazon.

[105] For an exploration of the rise of the platform economy, see A Sundararajan, *The Sharing Economy* (MIT Press, 2016), pp 69 ff.

[106] For an assessment of the consumer notion in e-commerce law over time, see EM Weitzenboeck, 'Looking Back to See Ahead: The Changing Face of Users in European E-Commerce Law' (2015) 23(3) *Artificial Intelligence Law* 201, who makes a case for maintaining consumer protection and letting general contract law deal with the emergence of new users, such as prosumers.

[107] See MBM Loos et al, *Digital Content Contracts for Consumers. Analysis of the Applicable Legal Frameworks and Suggestions for the Contours of a Model System of Consumer Protection in Relation to Digital Content Contracts, Final Report: Comparative Analysis, Law & Economics Analysis, Assessment and Development of Recommendations for Possible Future Rules on Digital Content Contracts. With an Executive Summary of the Main Points* (study performed for the European

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the same time, regulatory scholarship has recognised for some time now that the emergence of prosumers in various sectors might require new approaches to regulation. Findings to this effect have been made in relation to the internet, eg with regard to privacy, copyright, censorship, social networks, and net neutrality;[108] the energy and telecommunication markets;[109] and, most recently, digital content.[110] This 'regulatory disconnection' between rules and practice is perceived as problematic, since regulation sometimes overshoots its goal and sometimes falls short in protection. Prosumers that are placed within the category of consumers enjoy a protection that they may not need (over-inclusion), whilst they are under-included in the category of professionals and therefore not subject to legal duties that would otherwise apply to traders.[111] On the other hand, where prosumers are treated as professional traders, their responsibilities towards consumers may be unduly strict considering the small(er) size of their enterprise. In order for the legal framework to support the active participation of consumers-as-producers in the market, and thereby to contribute to innovation and higher quality of goods and services,[112] it is thought therefore that regulation should be tailored more specifically to prosumers. This means that regulation at all levels—national and EU, but also self-regulation for example through standardisation—should address the question whether rules take account of prosumers, and if not, what changes are needed to achieve that.[113]

Even with that realisation, the doctrinal challenge will not be easily overcome. The objections to the introduction of a 'third category' that were raised above,[114] equally apply to the introduction of a prosumer category for the platform economy. One

(F'note continued)

Commission, 2011), pp 42–44, available at ec.europa.eu/justice/consumer-marketing/files/legal_report_final_30_august_2011.pdf. The trio 'profit-organisation-frequency' in practice allows courts some useful tools to distinguish between professional and non-professional traders. Germany and the Netherlands attach particular importance to the appearance of the prosumer, ie whether they present themselves as a consumer or a trader.

[108] I Brown and CT Marsden, *Regulating Code: Good Governance and Better Regulation in the Information Age* (MIT Press, 2013).

[109] A Butenko and K Cseres, *The Regulatory Consumer: Prosumer-Driven Local Energy Production Initiatives* (Amsterdam Law School, 2015) Research Paper No 2015-31, (Amsterdam Centre for European Law and Governance) Research Paper No 2015-03, available at https://ssrn.com/abstract=2631990.

[110] Loos et al, note 107 above.

[111] Butenko and Cseres, note 109 above, p 30.

[112] In the energy market, for example, the emergence of prosumers is likely to have far-reaching consequences. They impact upon sustainability (prosumers use solar panels to generate electricity), competition in the energy market, contractual relations between the prosumer and the operator of a grid, and potentially also international relations between countries concerning energy trade. For an overview and a research agenda, see R Leal-Arcas, F Lesniewska and F Proedrou, *Prosumers: New Actors in EU Energy Security* (Queen Mary School of Law Legal Studies) Research Paper No 257/2017, pp 33–34, available at https://ssrn.com/abstract=3010714.

[113] Brown and Marsden also correctly point out the need to include prosumers in policy-making processes, eg through civil society representation. See Brown and Marsden, note 108 above, p 202.

[114] See page 218 above.

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solution for resolving such problems might be to revert to monism and see the EU legislator as the lawmaker who has ultimate authority.[115] Perhaps, however, a space for the gradual development of rules that provide a better fit with societal developments can be provided in a pluralist framework, eg through pragmatic solutions developed in soft law and through the influence of civil society. It has been observed that private regulation tends to respond more rapidly to new societal and technological developments,[116] which is of course not surprising seeing that the introduction of formal regulation requires many more steps to be taken through democratic legislative processes. The role of private actors in lawmaking should therefore in any event receive greater attention in discourses on European private law. Still, existing theories of legal pluralism in European private law have not reached an understanding as to how private actors are, or should be, involved in that process. One concern is whether the involvement of private actors can guarantee that fundamental objectives and values of EU law, such as consumer protection, are guaranteed. That brings us to the third point of contestation: the role of private actors as lawmakers.

C. Private Actors as Lawmakers

The discussion of Smits' theory of radical legal pluralism revealed a number of weak points in the reliance on individual choice theory as a basis for a strong legal pluralist perspective, in which private actors are regarded as lawmakers. Even if there is substance in these criticisms, they should not lead to the conclusion that a conclusive theory of strong legal pluralism in European private law cannot be conceived. Taking each point in turn, the responses to the criticisms raised may be as follows:

First, the problem of facilitative and mandatory rules. Although it is true that mandatory rules place restrictions on private actors' individual choice, in practice such restrictions mean very little if parties do not enforce them. Consumers may have legal protection against unfair terms in contract law as laid down in Directive 93/13/EEC, but how many of them actually benefit from that protection? Whilst cases do make it to court, often at the application of traders who seek to obtain payment from a consumer,[117] research suggests that many terms that would qualify as 'unfair' are present in traders' terms and conditions but remain unchallenged.[118] The focus that Smits' theory of radical legal pluralism places on facilitative rules, therefore, is not actually unfounded. It appears to reflect the reality of contracting in the European market, as well as in other market incidentally, in which the autonomy of contracting parties prevails. Even if, say, 20% of consumers factually enjoy the protection laid down in legislation, 80% do not because legal protection does not assert itself, or because a transaction is concluded to the satisfaction of both parties

[115] A plea for monism is made by Hesselink, note 56 above, pp 244–47.

[116] See eg Brown and Marsden, note 108 above, p 202.

[117] In which case judges are obliged under EU law to *ex officio* assess the unfairness of terms in the contract. See *Océano Grupo Editorial SA v Roció Murciano Quintero* C–240/98 to 244/98, EU:C:2000:346.

[118] C Riefa, *Consumer Protection and Online Auction Platforms. Towards a Safer Legal Framework* (Ashgate, 2015), pp 125 ff.

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despite the presence of potentially unfair terms in the contract. Obviously the first situation—the lack of enforcement of rules—should not be encouraged; it is important that adequate mechanisms are maintained for those situations where consumers do encounter problems and wish to obtain remedies from traders.

In this respect, it is important to find ways to ensure that consumer protection is guaranteed. As said earlier, rather than portraying the relationship between mandatory and facilitative rules as a stark conflict, legal pluralist theories may look for ways to mediate between those types of rules. Again, starting from a practical perspective: choice-of-law by private actors can be steered through instruments that are not mandatory in nature but that do—like mandatory rules—channel parties' choices towards consumer protection. Examples are standardisation in contract law, or the use of optional instruments. The effect of such instruments can potentially be significant even if only a minority of contracting parties makes use of them. Economic theories have held that change can be realised in markets if a small, but sophisticated group of users actively compares alternatives and, on that basis, adopts a preferred solution.[119] In this case, the adoption of standards or optional instruments in contracting by a small group of users might provide an impetus for establishing consumer protection rules of European private law as the main substantive benchmark in the EU consumer market.[120]

The response that the first point of criticism could be more theoretical than real, however, does not hold up in relation to the second aspect. Radical legal pluralism's fallback on the state as the ultimate lawmaking actor cannot be seen as anything other than a concession to weak legal pluralism. To portray the theory as strong legal pluralism is in that light not sustainable. It is important to note, nonetheless, that a legal pluralist theory that seeks to conceptualise the process of lawmaking in private law in all its facets—from inception to usage to acceptance as 'law' to (perhaps) formal legislation to enforcement—cannot adopt a state-centred focus. As an explanatory and as a normative theory, it must include norms created by non-state actors in its conception of all stages of lawmaking. Even if norms created by private actors do not go through a process of acceptance by formal legal institutions, they may still be regarded as, and used by norm-addressees, as if they were binding law.[121]

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[119] It has been suggested in other contexts that competition—with an eye to innovation—can sufficiently take place if a small number of top players in the market engage in choice. This is the 'informed minority' argument attributed to Alan Schwartz and Louis L. Wilde. See A Schwartz and LL Wilde, 'Imperfect Information in Markets for Contract Terms: The Examples of Warranties and Securities Interests' (1983) 69 *Virginia Law Review* 1387; A Schwartz and LL Wilde, 'Product Quality and Imperfect Information' (1985) 52 *The Review of Economic Studies* 251.

[120] Giesela Rühl has relied on this mechanism as part of an argument in favour of regulatory competition between national legal systems. See Rühl, note 84 above, p 68. In that context, however, the effect of the use of rules by a sophisticated minority is also dependent on the subsequent adoption of such rules by legislators.

[121] Of course, questions of legitimacy arise in relation to private regulation. An in-depth discussion is beyond the scope of this article. For an overview of the debate in this field, see G-P Calliess and P Zumbansen, *Rough Consensus and Running Code* (Hart Publishing, 2010), pp 130 ff, referring in particular to the concept of 'affectedness' developed by David Held which ties any assessment of

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In particular, in instances where rules created by non-state actors are not tested against regulation or legislation emanating from the state or another democratically chosen legislator, it is important to have other means through which the substance of these rules can be monitored, eg through court proceedings, alternative dispute resolution mechanisms, or monitoring by (government or independent) supervisory bodies. Private actors can then be held accountable for upholding certain minimum standards, such as in relation to consumer or employee protection, health and safety, and environmental protection.

Third, the substantive problem that power relations influence the outcome of norm-creating processes is indeed of great importance. A theory of legal pluralism in European private law should engage with this question. Private actors engaged in standard-setting in a regulated sector, for example, are thought to reinforce extant interests of producers.[122] This is a difficult point to tackle, in part because many aspects remain unclear. On the one hand, there seems sufficient evidence that the participants in lawmaking through standardisation are indeed often, and mostly businesses, whereas consumer interests are represented by a minority of representatives.[123] The risk of collusion, deception, and strategic behaviour of producers in standardisation processes has been recognised.[124] Yet, it has not been proven that the outcome of standardisation processes is to the detriment of consumers. Moreover, no clear picture exists of the influence of European or national rules of consumer law, or contract or tort law, in the different sectors. Those issues require further consideration, especially now that standardisation as a lawmaking tool is steadily gaining importance.[125] The European Commission's annual standardisation work package for 2017 proposes the development of horizontal standards for services, whilst the annual package for 2016 already contained a number of standardisation projects that could affect consumer services, such as parcel delivery, smart

(F'note continued)

democracy to the quality by which a group has been affected by a decision. See D Held, 'Democratic Accountability and Political Effectiveness from a Cosmopolitan Perspective' (2004) 39(2) *Government and Opposition* 364.

[122] See eg N Gandal and P Régibeau 'Standard-Setting Organisations. Current Policy Issues and Empirical Evidence' in P Delimatsis (ed), *The Law, Economics and Politics of International Standardisation* (Cambridge University Press, 2015), pp 394, 402, who state: 'Not surprisingly, the more expertise a given member [of an SSO; VM] has and the more human capital that member is willing to invest into the process, the greater the influence on the design of the standard. Accordingly, large intellectual property holders and large potential users will generally have significantly more weight within the SSO than smaller firms or than final consumers'.

[123] In Europe, the European Association for the Co-ordination of Consumer Representation in Standardisation AISBL (ANEC) represents consumer interests in standardisation processes.

[124] See eg OECD Competition Committee, *Standard Setting* (Policy Roundtables, 2010), available at https://www.oecd.org/daf/competition/47381304.pdf.

[125] Van Leeuwen's conclusion that the tool is underdeveloped, despite the European Commission's rhetoric, therefore appears to be rapidly overtaken by the emergence of projects concerning the standardisation of services and service contracts in national systems as well as at EU level.

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metering, healthcare services, accessibility of services for persons with disabilities, eLearning courses, and online dispute resolution for e-commerce.[126]

In sum, a theory of strong legal pluralism can serve to sharpen the vision set out in Smits' radical legal pluralist theory of European private law. It shares the notion that norms created at all levels of regulation—formal and informal—should be included. Its improvements exist in elucidating that the limitation of individual choice by mandatory rules is empirically not as prevalent as it might seem; that, when law-making shifts towards private regulation, alternative mechanisms might be found to ensure that the (consumer) protection laid down in mandatory rules is nonetheless ensured; and that further empirical work is required to assess the impact of power relations on the substance of rules.

VII. CONCLUSIONS

Various aspects considered, Michael's observation that many theories of legal pluralism in European private law are not theories of strong legal pluralism, but of ordered legal pluralism,[127] seems to hold up. Although nuances can be discerned, the existing theories largely confirm that EU law's internal market rationality stands apart from and can override the juridical rationality of national private law systems. In relation to justice—the first dichotomy—the pursuit of access justice through EU law can result in rules that are aimed at empowering consumers and businesses to pass the threshold for taking part in the internal market, without having specific regard to questions of social justice. As a corollary, however, social justice can be a factor in determining the substance of rules, eg of fairness in consumer transactions. The analysis of the second dichotomy, between doctrinal and pragmatic approaches, shows that pragmatic rules aimed for example at consumer protection can cut across the doctrinal approaches of national private law systems. Nonetheless, doctrinal systems can be resistant to changes that would increase the complexity of the law. For the third dichotomy, between formal and private regulation, existing theories have not come up with a conclusive answer on how to construe the role of private actors as lawmakers in a true legal pluralist manner. The rules created by private actors ultimately require the assumption of rules into formal law.

At the same time, the analysis has revealed several instances in which inroads are made on the 'ordered' conception of legal pluralism. It may be that these provide the premises for the development of a strong legal pluralist theory for European private law after all. The primary observation that I make is that each of the existing theories in some way confirms that the conception of 'who makes law' is in flux. The rise of private actors as lawmakers has been noted and has, for example for Smits, been a ground for developing a bottom-up perspective on lawmaking. Further, the emergence of 'prosumers' as a potential new category of legal subjects, but also as

[126] COM(2016) 357 final, pp 3–4, and COM(2014) 500 final, p 3. See also Schulte-Nölke, note 67 above, p 137; C Busch, 'DIN-Normen für Dienstleistungen – Das Europäische Normungskomitee produziert Musterverträge' (2010) *NJW* 3061.

[127] Michaels, note 1 above, p 158.

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lawmakers, raises new doctrinal questions. The ERPL project, finally, has paid particular attention to the emergence of standardisation and co-regulation in law-making processes.

Second, while national legal systems may doctrinally resist change, there may be other ways through which laws can be responsive to societal developments. In lawmaking processes, greater heed could be paid to the role of soft law or civil society, through which transformations often take place much sooner than through formal laws. In relation the justice objectives of European private law, it is interesting to observe that the integration of social justice into lawmaking processes at EU level seems to be gaining ground on the pursuit of 'access justice'. The framework of EU law provides a space for deliberation of values and objectives in European private law, eg through the values and objectives laid down in Article 3(3) TEU and through the Charter of Fundamental Rights, yet that space has not been used often in legislation and case law. If the trend to include social justice considerations continues, for example in the case law of the CJEU, EU law may become instrumental in pursuing social goals through private law, and thereby enter into the domain that is often perceived to fall within the member states' responsibility. In a pluralist perspective, this means that rules developed at EU level may diverge from member states' laws, and that therefore norm conflicts may arise that will require mediation. Which mechanisms can be invoked to 'manage' pluralism—eg judicial dialogues, co-regulatory lawmaking processes—acquires new importance in this context.

Taking stock, therefore, the analysis of actors, norms, and processes involved in lawmaking in European private law reveals a field that has matured, but that is now at the threshold of a re-evaluation and perhaps a new transformation in lawmaking. The increasing importance of private regulation combined with a sensitivity to social justice issues almost inevitably leads to the question: which mechanisms can be maintained or created for ensuring that the values and objectives of EU law and of national private laws are safeguarded? That question goes beyond the frameworks provided by existing theories of ordered legal pluralism. It demands a new attempt at the development of a strong legal pluralist theory for European private law. This article hopes, through its review of the openings left by existing theories, to be a step in that direction.

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