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DIALOGUE AND DEBATE: A SYMPOSIUM ON MARTIJN HESSELINK'S RECONSTITUTING THE CODE OF CAPITAL

Pathways to interpersonal justice in European private law: top-down or bottom-up?

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Abstract

Katharina Pistor's recent work has revealed a deep justice deficit in private law, raising fundamental questions about how it could be reduced. While Pistor favours piecemeal bottom-up solutions to instances of injustice, Martijn Hesselink proposes a more radical top-down strategy – the adoption of a progressive European code of private law. This article explores the top-down and bottom-up pathways to justice in private law, focussing on the role of interpersonal justice as justice between substantively free and equal persons in European private law. It shows that although concerns about a balance of the competing interests of private parties pervade many of its areas, they do not take central stage in European private law. The substantive private autonomy embodied in national private law systems, the regulated private autonomy enshrined in EU secondary private law and the unregulated private autonomy with an interstate element underpinning EU free movement law sit uneasily together. It is argued that in order to enhance the role of interpersonal justice in the internal market and develop a more coherent European private law, the current bottom-up pathway thereto could be complemented by a more top-down roadmap towards the EU principles of private law justice.

Keywords: European private law; EU free movement law; interpersonal justice; private autonomy; consumer protection; private enforcement

1. Introduction

Since the early days of European integration, the European Union (EU) has been increasingly involved in private law relationships. European private law has developed in a piecemeal and uncoordinated fashion across different sectors of the economy to serve various policy goals, notably the establishment of the European internal market. As such, this area of law has been criticised for its justice deficit. Critics have pointed to a lack of sufficient concern by the EU with social (or distributive) justice[1] and interpersonal (or corrective) justice.[2] Katharina Pistor's recent book 'The Code of Capital' has revealed that general private law, particularly English law and the law of the State of New York, as well as EU private law play a key role in the uneven distribution of wealth in society and undermine democracy across the globe.[3]

[1]See for example Study Group on Social Justice in European Private Law, 'Social Justice in European Contract Law: A Manifesto' 10 (2004) European Law Journal 653.

[2]See for example H Collins, 'The Revolutionary Trajectory of EU Contract Law Towards Post-national Law' in S Worthington et al (eds), *Revolution and Evolution in Private Law* (Hart Publishing 2018) 315, at 321.

[3]K Pistor, *The Code of Capital: How the Law Creates Wealth and Inequality* (Princeton University Press 2019).

In his paper on 'Reconstituting the Code of Capital' inspired by Pistor's analysis, Martijn Hesselink puts forward an ambitious proposal for a 'European code of private law' ('EPL-code') to be adopted by the EU legislator as a meaningful part of the solution. According to Hesselink, the scope of the EPL code should encompass – but need not be limited – to the private law of the internal market. In his view, such a code must include the core European principles of social and interpersonal justice that would prioritise justice over economic growth and have the status of EU primary law on a par with fundamental economic freedoms – the free movement of goods, persons, services and capital – as well as competition law. This binding 'EU charter of private law justice' proposed by Hesselink can be seen as a more radical top-down solution to the problem of justice deficit in the internal market compared to a more bottom-up one suggested by Pistor which she calls 'persistent incrementalism'.[4] The latter strategy does not rely on any normative principles to effectuate legal change but rather implies step-by-step solutions to instances of injustice. These include, for instance, restricting a choice of law, making purely speculative contracts unenforceable and empowering affected parties to seek compensation for damages *ex post*.[5]

In this paper, I will discuss the top-down and bottom-up pathways to justice in private law, focussing on the role of *interpersonal* justice in *European* private law. Having its origins in national private law, interpersonal justice is concerned with the question of what would be just and fair between the parties to a particular private law relationship. It thus differs from social justice that focuses on the broader issue of whether a certain distribution of wealth in society is just. Yet, as Hesselink observes, the private law rules and doctrines, including those with a European origin, affect both dimensions of justice and should therefore be assessed not only in terms of their distributive effects – which has been the focus of Pistor's analysis – but also in terms of their impact on relations between individuals. European private law is understood here in a broad sense as a set of EU primary and secondary rules that directly or indirectly affect horizontal relations between private parties, regardless of the nature of the law, public or private, in which the relevant directives have been transposed in national legal systems.

The role of interpersonal justice in European private law deserves particular attention, given that its predominantly internal market-oriented discourse sits uneasily with the traditional focus of national private law on private autonomy and a balance of individual interests.[6] Academic and policy efforts were made to reconcile these two prevailing rationalities of European and national private law – which I will call 'instrumentalist' and 'relational', respectively – in order to ensure a more systematic approach to the harmonisation of private law anchored in traditional private law.[7] However, these efforts have failed so far.[8] It is against this backdrop that Hesselink develops the idea of European *principles* of private law *justice* rather than specific private law *rules*.[9] In this context, reliance on a broad EU level framework of principles to steer European private law in the direction of interpersonal justice will be understood as a *top-down* strategy, as opposed to the current *bottom-up* approach which, in the absence of such a framework, implies piecemeal legislative and judicial responses at EU level to potentially problematic market behaviours that have a dimension of interpersonal justice.

[4]Ibid., 229.

[5]Ibid., 224 et seq.

[6]In more detail see O O Cherednychenko, 'Islands and the Ocean: Three Models of the Relationship between EU Market Regulation and National Private Law' 84 (2021) Modern Law Review 1294.

[7]See European Commission, Communication from the Commission to the European Parliament and the Council – A More Coherent European Contract Law – An Action Plan, OJ, 2004 C 76E/95; Study Group on a European Civil Code & Research Group on EC Private Law (Acquis Group), 'Principles, Definitions and Model Rules of European Private Law Draft Common Frame of Reference (DCFR)' (Munich: Sellier 2009); European Commission, 'Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law' COM (2011) 635 final.

[8]The European Commission ultimately abandoned its plans for the adoption of a Common Frame of Reference (CFR) and a Common European Sales Law (CESL).

[9]cf H Collins, *The European Civil Code: The Way Forward* (Cambridge University Press 2008).

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In the following, these top-down and bottom-up pathways to interpersonal justice in European private law will be explored, taking into account various concepts of private autonomy that have shaped the development of private law at EU and national level. First, I will examine the role of interpersonal justice in national private law in the context of a major shift away from formal private autonomy towards substantive private autonomy (Section 2). I will then turn to EU secondary law to demonstrate how, in the pursuit of regulated private autonomy, the EU causes interpersonal justice deficit and discuss how it could be reduced (Section 3). A similar line of inquiry will subsequently follow with respect to the EU free movement law dominated by unregulated private autonomy with an interstate element (Section 4). I will conclude with the summary and some final reflections on the way forward, stressing the need for both top-down and bottom-up approaches to ensure interpersonal justice in the internal market (Section 5).

2. National private law: from formal to substantive private autonomy

To understand an uneasy relationship between European and national private law and the justice deficit discourse in EU legal scholarship, we first need to examine a major transformation of the concept of private autonomy in the second half of the 20th century, particularly in continental Europe – the shift from form to substance. Private law was traditionally associated with justice between the parties as formally free and equal persons, each pursuing his or her own interests. Personal differences, in terms of bargaining power, for example, were completely irrelevant when determining what would be just and fair in a private law relationship.[10] Private autonomy, including freedom of contract, was thus understood in a purely formal sense.

This conventional view has been challenged not only in scholarly work,[11] but also by the 'materialisation' of private law itself.[12] It has been increasingly recognised that where there is a significant imbalance of bargaining power between the parties, real autonomy on the part of the weaker party to a transaction, such as an employee, a tenant or a consumer, is absent. Sector-specific areas of law, such as employment law, landlord and tenant law, or consumer law, have emerged that deformalised freedom of contract by placing mandatory constraints on bargaining processes and outcomes in terms of contract. Furthermore, the move away from form towards substance also took place within general private law, with national private law courts resorting to the general clauses of private law, such as good faith or good morals, in order to restore a balance between the parties in individual cases. To some extent, this shift was prompted by the presence of social justice-oriented public regulation of markets[13] and the impact of fundamental rights.[14] In many cases, however, it was the materialisation of freedom of contract within the general contract itself that led to the adoption of protective regulation. In Germany, for example, the Standard Terms of Business Act 1976 (*Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen* (*AGBG*)) – which was included in the reformed Civil Code (*Bürgerliches Gesetzbuch* (*BGB*) in

[10]See for example E J Weinrib, *Corrective Justice* (Oxford University Press 2012).

[11]See for example R L Hale, 'Coercion and Distribution in a Supposedly Non-Coercive State' 38 (1923) Political Science Quarterly 470; D Kennedy, 'Distributive and Paternalist Motives in Contract and Tort Law, with Special References to Compulsory Terms and Unequal Bargaining Power' 41 (1982) Maryland Law Review 563; W M Landes and R A Posner, *The Economic Structure of Tort Law* (Harvard University Press 1987); H Collins, *Regulating Contracts* (Oxford University Press 1999).

[12]M Weber, *Economy and Society* (University of California Press 1992) 886.

[13]Collins (n 11) 49.

[14]See, for example, BVerfG 19 October 1993, BVerfGE 89, 214 (Bürgschaft). In more detail see O O Cherednychenko, *Fundamental Rights, Contract Law and the Protection of the Weaker Party: A Comparative Analysis of the Constitutionalisation of Contract Law, with Emphasis on Risky Financial Transactions* (Sellier 2007).

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2002 – codified and amplified the private law courts' case law under general contract law, in particular § 242 BGB on good faith, extending protection beyond consumer contracts.[15]

These developments have led many scholars to question to what extent the principle of private autonomy still remains the starting point in modern private law and what it actually means. Some have argued that contract law today is no longer exclusively based on the principle of freedom of contract but also on the principle of the protection of the weaker party or the 'principle of regard and fairness'.[16] However, we could equally argue that it is not so much the principle of freedom of contract as the starting point in contract law that has been challenged, but rather its formal understanding. What is at issue in modern contract law is where the autonomy of one party ends and the autonomy of the other party begins or, more specifically, to what extent the weaker party must be protected in order to be able to enjoy real freedom of contract. In the words of Stefan Grundmann, '[s]ome loss of (formal) freedom of contract on the one side has to be accepted for the overall gain, ie for the much higher gain of material freedom of contract on the other side.'[17] In contrast to formal private autonomy, therefore, substantive private autonomy is concerned with the existence of actual autonomy for *both* parties.

It is this materialised conception of private autonomy that lies at the heart of Hesselink's vision of a EPL code. But it is also key to our understanding of the purport of interpersonal justice in national general private law today. Although this part of law is concerned with the broader issue of what would be in the public interest and has distributive implications, it seeks first and foremost to ensure the balance between the interests of the parties through their respective rights and remedies. Contract law, for example, safeguards the parties' substantive freedom from imposed contracts, taking into account their bargaining power, and protects the parties' expectations of performance from disappointment by providing them with remedies. Tort law in turn protects individual entitlements to be free from wrongful injury.[18] We could insist, therefore, that national general private law remains focussed on interpersonal justice, which is not reducible to instrumental goals such as distributive justice or efficiency.[19]

Furthermore, while Pistor's book demonstrates how general private law can support the needs of capital holders, the shift away from formal private autonomy towards substantive private autonomy within this area of law shows the latter's ability to respond to the needs of the weaker parties. For instance, the extensive case law of the Dutch supreme court in private law matters (*Hoge Raad*) on the banks' duties of care towards their (potential) clients provides evidence that private law may not only enable the conclusion of speculative contracts but also protect retail investors who may be adversely affected by them, including both natural persons and SMEs.[20]

[15]In more detail see R Zimmermann, 'Consumer Contract Law and General Contract Law: The German Experience' 58 (2005) Current Legal Problems 415. On the French experience see M Fabre-Magnan, 'The Paths to a Progressive European Code of Private Law' 1 (2) (2022) European Law Open 436–445.

[16]See for example B Lurger, 'The "Social" Side of Contract Law and the New Principle of Regard and Fairness' in A S Hartkamp et al., (eds), *Towards a European Civil Code* (Kluwer Law International 2011) 353.

[17]S Grundmann, 'The Future of Contract Law' 7 (2011) European Review of Contract Law 490, at 506. See also M W Hesselink, *Justifying Contract in Europe: Political Philosophies of European Contract Law* (Oxford University Press 2021) 311 et seq.

[18]cf D A Kysar, 'The Public Life of Private Law: Tort Law as a Risk Regulation Mechanism' 9 (2018) European Journal of Risk Regulation 48.

[19]cf for example C-W Canaris, *Die Bedeutung der iustitia distributiva im deutschen Vertragsrecht (The significance of distributive justice in German contract law)* (C.H. Beck 1997) 35; C U Schmid, 'The Thesis of the Instrumentalisation of Private Law by the EU in a Nutshell' in C Joerges and T Ralli (eds), *European Constitutionalism without Private Law. Private Law without Democracy* (J Beuys/Bono 2011) 7, at 21; H Dagan, 'Between Regulatory and Autonomy-Based Private Law' 22 (2016) European Law Journal 644, at 650; H Collins, 'Interpersonal Justice as Partial Justice' 1 (2) (2022) European Law Open 413–422.

[20]See for example *Rabobank* v *Everaars* HR 23 May 1997, ECLI:NL:HR:1997:AG7238; *Levob* v *B, De Treek* v *Dexia and Stichting Gedupeerden Spaarconstructie* v *Aegon* HR 5 June 2009, ECLI:NL:HR:2009:BH2811, ECLI:NL:HR:2009:BH2815 and ECLI:NL:HR:2009:BH2822; *Immobile* v *Promontoria* HR 10 July 2020, ECLI:NL:HR:2020:1276.

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Similarly, the decisions of the English courts in the family surety cases illustrate the potential of the well-established common law doctrines to safeguard not only the interests of creditors but also those of potential debtors.[21] Under the doctrine of constructive notice, for example, a bank may lose the benefit of the surety contract entered into by a family member of the principal debtor, if it ought to have known that the consent of the surety had been procured by the misconduct of the principal debtor, such as misrepresentation or undue influence. By reinterpreting the existing private law doctrines, therefore, private law courts may initiate change from within, in line with Pistor's idea of 'persistent incrementalism' in general private law.[22] This is true for both continental and common law legal systems, even though the extent of the private law courts' willingness to protect weaker parties may vary.

3. EU secondary private law: regulated private autonomy

This understanding of private law as a bastion of interpersonal justice between substantively free and equal persons has been challenged by EU secondary private law. The latter encompasses both cross-sectoral and sector-specific EU harmonisation measures in a variety of areas, including, for example, product safety and liability, antitrust, unfair trading, unfair contract terms, consumer sales, services of general economic interest, as well as financial services. The main question posed by the European legislator when making EU secondary private law has been not how to ensure justice between individuals but rather how to make the internal market function better. Insofar as justice considerations influence European private law making, they are mainly concerned with what Hans Micklitz has called 'access justice' which only secures access to the internal market for EU citizens.[23] In this context, market regulation and private law are closely intertwined, and the latter is viewed as an instrument for achieving various policy objectives.[24] Apart from the overarching goal of establishing the internal market, these include, for instance, sustainable development, consumer protection and financial stability.

The regulatory nature of European private law has major implications for the conception of private autonomy enshrined in EU secondary legislation. Private autonomy in the EU is regulated in the name of the internal market.[25] EU secondary private law enables the private autonomy of weaker market participants by promoting their access to the internal market and protecting them against potential abuses in the marketplace. In the area of services of general economic interest, such as energy, for example, it seeks to ensure that these services remain accessible to everyone, including vulnerable consumers, following the replacement of public monopolies with a broad variety of private suppliers.[26] In consumer law, for instance, mandatory rules with a European origin govern withdrawal rights, information requirements, unfair contract terms controls, and remedies in the case of non-conforming goods.

By enabling the autonomy of weaker market participants, EU private law reaches far beyond formal private autonomy. Yet, access justice through regulated private autonomy cannot be

[21]See for example *Barclays' Bank plc v O'Brien* [1994] 1 AC 180; *Royal Bank of Scotland v Etridge (No. 2)* [2001] 4 ALL ER 449.

[22]cf A Beckers, 'A Societal Private Law – A Comment on Hesselink's Proposal for a Progressive EU Code' 1 (2) (2022) European Law Open 380–389.

[23]H-W Micklitz, *The Politics of Justice in European Private Law: Social Justice, Access Justice, Societal Justice* (Cambridge University Press 2018) 2.

[24]See for example H-W Micklitz, 'The Visible Hand of European Regulatory Private Law' 28 (2009) Yearbook of European Law 3.

[25]cf H-W Micklitz, 'On the Intellectual History of Freedom of Contract and Regulation' 4 (2015) Penn State Journal of Law & International Affairs 1.

[26]See, for example, Directive 2009/72 of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC, OJ, 2009 L 211/55.

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entirely equated with interpersonal justice between the parties as substantively free and equal persons. Although many EU measures in the field of private law have an interpersonal dimension,[27] this dimension typically plays a subsidiary role in the internal market project.[28] The interpersonal justice deficit in EU secondary private law as a subset of market regulation is manifest in at least three major respects.

First, EU secondary private law does not reflect a comprehensive and coherent vision of the role of consumer protection. It is true that many harmonisation measures in the field of private law are concerned with consumer protection and are often compatible with the idea of interpersonal justice. The Unfair Contract Terms Directive, which lays down minimum standards of consumer protection in order to redress the imbalance of power between businesses and consumers, is a case in point. Even though this EU measure fits into the general objective of completing the EU internal market, it determines the rights and obligations of one party vis-à-vis another and thus respects the minimum requirements of interpersonal justice.[29] However, the instrumentalist conception of EU private law and the relational conception of national private law may also clash.[30] The tensions between consumer protection and other EU policy objectives become clear, for example, in the current EU retail financial market policy space. On the one hand, the post-crisis EU regulatory measures, notably the Markets in Financial Instruments Directive II (MiFID II)[31] and the Markets in Financial Instruments Regulation (MiFIR),[32] are generally more paternalistic and interventionist than those adopted pre-crisis, revealing the EU legislator's distrust to the retail investors' and markets ability to support optimal choices and the attempt to construct 'safe spaces' within which retail investors can operate.[33] A notable example is the product intervention powers of financial regulators that allow them, among others, to ban financial products, in line with Pistor's suggestion to reign in speculative contracts. On the other hand, however, the EU legislator appears to have a different image of the retail investor in mind in the context of the Banking Union – the post-crisis regulatory and supervisory reform package to reinforce financial stability in the EU – and particularly within the Single Supervisory Mechanism (SSM) concerned with bank resolvability.[34] When it comes to retail investment in complex bank securities, retail investor holders of such securities tend to be regarded as 'responsible financial citizens', capable of bearing losses following bank resolution.[35] Financial stability concerns can thus trump financial consumer protection, revealing the vulnerable position of interpersonal justice in the areas subjected to EU harmonisation.[36]

[27]See, for example, M W Hesselink, 'Private Law, Regulation, and Justice' 22 (2016) European Law Journal 681; O O Cherednychenko, 'Rediscovering the Public/Private Divide in EU Private Law' 26 (2020) European Law Journal 27.

[28]cf Collins (n 2) 321.

[29]cf. Hesselink (n 27) 688.

[30]cf. Schmid (n 19) 25; O O Cherednychenko, 'Private Law Discourse and Scholarship in the Wake of the Europeanisation of Private Law' in J Devenney and M Kenny (eds), *The Transformation of European Private Law: Harmonisation, Consolidation, Codification or Chaos?* (Cambridge University Press 2013) 148, at 150; Hesselink, Private Law, Regulation, and Justice (n 27), at 689; Collins (n 2) 320.

[31]Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU, OJ, 2014 L 173/349.

[32]Regulation (EU) No 600/2014 of the European Parliament and of the Council on markets in financial instruments and amending Regulation (EU) No 648/2012, OJ, 2014 L 173/84.

[33]N Moloney, 'EU Financial Market Governance and the Retail Investor: Reflections at an Inflection Point' 37 (2018) Yearbook of European Law 251, at 258.

[34]See for example Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC, OJ, 2013 L 176/338 (CRD IV) and Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, OJ, 2013 L 287/63 (SSM Regulation).

[35]Moloney (n 33) 287.

[36]In more detail see O O Cherednychenko, 'EU Financial Regulation, Contract Law and Sustainable Consumer Finance' in E van Schagen and S Weatherill (eds), *Better Regulation in EU Contract Law: The Fitness Check and the*

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Second, it is questionable to what extent the maximum harmonisation of consumer protection standards in the EU is compatible with interpersonal justice and individual fairness. A move away from minimum harmonisation towards maximum harmonisation was prompted by the Lisbon Strategy launched by the European Council in 2000 with a view to making the Union the most competitive knowledge economy in the world.[37] While minimum harmonisation measures allow Member States to maintain or adopt stricter rules than those contained therein, maximum harmonisation ones generally preclude Member States from so doing and thus overemphasise market integration over consumer protection and interpersonal justice. After all, national legislators and regulators may no longer be allowed to tailor the harmonised standards of protection to the specific economic, social or cultural needs of consumers in their Member States. Furthermore, when applying the *ex ante* maximum harmonisation rules informed by the normative typifications of market participants, private law courts may not always be able to respond to the particular circumstances of a concrete case *ex post* and realise individual fairness through traditional private law norms. For instance, the need to adjust a private law standard of care to a regulatory standard of investor protection under the MiFID II maximum harmonisation regime could result in a situation where the court would not be able to hold the bank liable for its failure to *personally* warn a vulnerable non-professional investor about the risks involved in purchasing a particular extremely risky investment product. This outcome would be predetermined by Article 24(5) of MiFID II which only requires to provide a warning in a *standardised* format.[38]

Third, a subsidiary role of interpersonal justice in EU secondary private law is evidenced by the lack of a coherent private enforcement strategy. As Pistor rightly observes, 'leaving the monitoring and supervision of capital to state regulators is not sufficient'; there is a need to 'give voice to the ones who have the most to lose in a crisis.'[39] But is the EU doing enough to empower affected parties to seek compensation for damages? In particular, EU law does not, at least not explicitly, recognise the distinction between public and private law as it had evolved in national legal systems. At the same time, however, a distinction reminiscent of the traditional public/private dichotomy is manifested in the varying extent to which EU measures of legislative harmonisation that affect private law relationships engage with private enforcement when pursuing similar policy goals.[40] Some EU measures, such as the Unfair Contract Terms Directive,[41] the Product Liability Directive,[42] and the Payment Services Directive 2 (PSD2),[43] explicitly confer rights and remedies on private parties. In contrast, other EU measures, such as the Environmental Liability Directive[44] and MiFID II – as well as its predecessor, MiFID I[45] – do not have a strong interpersonal dimension, focussing instead on the relationship between regulators and regulatees

New Deal for Consumers (Oxford: Hart Publishing 2019) 61; Olha O Cherednychenko, 'Two Sides of the Same Coin: EU Financial Regulation and Private Law' 22 (2020) European Business Organization Law Review 147.

[37]In more detail see for example Norbert Reich, 'From Minimal to Full to 'Half' Harmonisation' in J Devenney and M Kenny (eds), *European Consumer Protection: Theory and Practice* (Cambridge University Press 2012) 3.

[38]See for example the decision of the Dutch supreme court in private law matters in *Fortis* v *Bourgonje* HR 24 December 2010, ECLI:NL:HR:2010:BO1799 at [3.4].

[39]Pistor (n 3) 227.

[40]In more detail see Cherednychenko (n 27).

[41]Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ, 1993 L 95/29.

[42]Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, OJ, 1985 L 210/29.

[43]Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC, OJ, 2015 L 337/35.

[44]Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage, OJ, 2004 L 143/56.

[45]Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC, OJ, 2004 L 145/1 (MiFID I).

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and the role of administrative agencies in securing business compliance with regulatory requirements. While the relevance of the private law-coloured EU measures for national private law is undisputed, the latter is often perceived to be outside the material scope of the public law-oriented harmonisation measures. Until the recent revision of the initially public law-coloured Unfair Commercial Practices Directive,[46] for example, in many Member States victims of unfair commercial practices did not have the right to contract termination and/or the right to compensation for damages.[47] Similarly, in the absence of European remedies to this effect, in some former and current Member States private parties may still not be able to claim compensation for breaches of the MiFID II conduct of business rules, such as the investment firm's duty to know its client, which in fact originated in the private laws of the Member States.[48] Accordingly, the legal grammar of EU harmonisation measures (or their particular components) – which can thus be more public or private – matters in practice, determining the position of private parties under national law in cases of breach of European regulatory standards and, as will be shown below, the ability and willingness of the Court of Justice of the European Union (CJEU) to improve this position.[49]

European private law looks therefore like a patchwork quilt that consists of pieces of public and private law fabric sewn together to form a novel design. Overall, the more public or private law grammar of EU harmonisation measures in the field of EU private law is not the result of a systematic analysis of the relative merits of each pattern in terms of their appropriateness for achieving policy objectives, particularly consumer protection. Rather, the type of legal grammar is primarily dictated by the internal market paradigm, the path dependency of harmonisation in a given area (notably pre-existence of the national or EU legal framework of a particular type), and/or the political constraints surrounding the EU law-making process (notably resistance of the industry and/or (some) Member States to the harmonisation of private law remedies).

The patches of interpersonal justice considerations in the quilt are often path-dependent. The Unfair Contract Terms Directive, for example, builds upon the pre-existing national private law rules on unfair contract terms control, particularly the above-mentioned German AGBG, which embody the idea of substantive private autonomy.[50] As the extensive case law of the CJEU on the interpretation of this directive shows,[51] the Court seeks to strengthen the interpersonal dimension of private law-oriented EU measures, profoundly shaping national private law in both substantive and procedural domain. In order to justify its activist approach, the CJEU increasingly resorts to the fundamental rights of the consumer as laid down in the Charter of Fundamental Rights of the EU (EUCFR), such as the right to home (Article 7 EUCFR) or the right to an effective remedy

[46]Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council, OJ, 2005 L 149/22.

[47]European Commission, *Report of the Fitness Check on Directive 2005/29/EC, Directive 93/13/EEC, Directive 98/6/EC, Directive 1999/44/EC, Directive 2009/22/EC, Directive 2006/114/EC*, SWD(2017) 208 final, 77. See also for example Dörte Poelzig, 'Private and Public Enforcement of the UCP Directive? Sanctions and Remedies to Prevent Unfair Commercial Practices' in W van Boom et al (eds), *The European Unfair Commercial Practices Directive: Impact, Enforcement Strategies and National Legal Systems* (Routledge 2016) 235, at 248; F P Patti, '"Fraud" and "Misleading Commercial Practices": Modernising the Law of Defects in Consent' 12 (2016) European Review of Contract Law 307, at 312.

[48]For Germany, cf., e.g., BGH 6 July 1993, BGHZ 123, 126 = NJW 1993, 2433 (*Bond*). In more detail, see Cherednychenko, Islands and the Ocean (n 6) 1315 et seq.

[49]Cherednychenko (n 27); O O Cherednychenko, 'Financial Regulation and Civil Liability in European Law: Towards a More Coordinated Approach?' in O O Cherednychenko and M Andenas (eds), *Financial Regulation and Civil Liability in European Law* (Edward Elgar 2020) 2, at 12 et seq.

[50]See H-W Micklitz, 'A Common Approach to the Enforcement of Unfair Commercial Practices and Unfair Contract Terms' in W van Boom et al (eds), *The European Unfair Commercial Practices Directive: Impact, Enforcement Strategies and National Legal Systems* (Routledge 2016) 173, at 174.

[51]In more detail see H-W Micklitz and N Reich, 'The Court and Sleeping Beauty: The Revival of the Unfair Contract Terms Directive (UCTD)' (2014) 51 Common Market Law Review 771.

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(Article 47 EUCFR).[52] In contrast, the CJEU appears to be reluctant to do so in the context of the public law-oriented EU measures. For example, the Court has not taken the opportunity to unequivocally clarify its stance on the issue of private law remedies for violations of the MiFID I and MiFID II conduct of business rules.[53] While MiFID II contains extensive rules on administrative sanctions for breaches of such rules, the 'principle of civil liability', which was included in the initial consultation document of the European Commission,[54] ultimately did not make it into the text of the directive, in particular as a result of the resistance of the financial industry, coupled with the disagreement among Member States.[55] Curiously, the maximum harmonisation effects of such measures in national private law can be neutralised by their public law grammar. As the measures of this kind are often implemented only in national public laws, private law courts may regard them as minimum standards of protection or even refuse to give any effect to them in private law.[56]

The current internal market paradigm of European private law thus leaves room for accommodating interpersonal justice considerations within a regulatory discourse along the bottom-up pathway, echoing Pistor's vision of incremental change in the context of national private law systems. Such an approach allows the EU legislator to experiment with different public and private law tools in the pursuit of regulated private autonomy and may sometimes secure outcomes that balance the interests of the private parties concerned and can be justified in terms of substantive private autonomy. At the same time, however, it stops short of ensuring substantive private autonomy in all cases of the EU's involvement in private law relationships and generates a great deal of legal fragmentation in standard setting and enforcement.

In order to develop a more holistic perspective on law-making in EU secondary private law, the current piecemeal bottom-up approach to accommodating interpersonal justice concerns within a regulatory discourse could be combined with a EPL code-based top-down strategy proposed by Hesselink. While he envisages this code as a binding instrument of EU primary law, such an EU charter of private law justice might (first) be adopted as a non-binding catalogue of fundamental private law principles in the EU legal order. This scenario is not unthinkable in the light of the history of the EUCFR. The Charter remained non-binding for almost a decade (2000–2009), but was nevertheless referred to by the national constitutional courts as well as the CJEU already during this period. The inclusion of substantive private autonomy in the EPL code would imply that this principle underpins the EU legal order, raising the awareness of the EU institutions about the importance of the interpersonal dimension for EU private law making. This normative principle could prompt or – if it is binding – even require the EU legislator to take this dimension more seriously when setting policy objectives and balancing them against each other, determining the degree of legal harmonisation or designing appropriate enforcement mechanisms. In addition, the principle of substantive private autonomy could also guide the interpretation of EU secondary private law by the CJEU, enabling it to upgrade the interpersonal components of EU directives and regulations beyond what the EU legislator could deliver and what the Court itself could achieve by invoking EU fundamental rights.

[52]Collins (n 2) 327 et seq.

[53]Case C-604/11, *Genil v. Bankinter*, ECLI:EU:C:2013:344. In more detail see for example T Tridimas, 'Financial Regulation and Private Law Remedies: An EU Law Perspective' in O O Cherednychenko and M Andenas (eds), *Financial Regulation and Civil Liability in European Law* (Edward Elgar 2020) 47, at 68; M W Wallinga, 'MiFID I & MiFID II and Private Law: Towards a European Principle of Civil Liability?' in O O Cherednychenko and M Andenas (eds), *Financial Regulation and Civil Liability in European Law* (Edward Elgar 2020) 221, at 225.

[54]See European Commission, *Public Consultation. Review of the Markets in Financial Instruments Directive (MiFID) (MiFID Review)*, 63, s 7.2.6 (Liability of firms providing services).

[55]cf N Moloney, 'Liability of Asset Managers: A Comment' 7 (2012) Capital Markets Law Journal 414, at 421.

[56]In more detail see Cherednychenko (n 6) 1315 et seq.

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4. EU free movement law: unregulated private autonomy with an interstate element

Apart from EU secondary legislation, the sphere of private autonomy is also affected by EU primary law, notably free movement law. It is undisputed today that fundamental economic freedoms can have far-reaching implications for relations between private parties, including legal persons.[57] Pistor points to the case law of the CJEU dismantling the real seat theory, which was followed in Danish and German company law, for example, as contrary to the principles of the free movement of capital and persons.[58] But the impact of economic freedoms extends much further. In particular, the CJEU has progressively expanded the reach of direct horizontal effect with respect to economic freedoms. While such effect was initially limited to the free movement of persons,[59] the freedom to provide services[60] and the freedom of establishment,[61] in the *Fra.bo* case,[62] it was extended to the free movement of goods.[63] The direct horizontal effect of fundamental economic freedoms implies that private parties are bound by such freedoms in the same way as the Member States and can therefore directly invoke them in disputes between each other. In private law terms, this implies that a contract which is contrary to a fundamental freedom can be declared void and/or an obligation to pay damages can arise.

The CJEU has applied economic freedoms to horizontal relations based on the principle of effectiveness ('*effet utile*') of EU law. The (in)famous judgement of the CJEU in *Laval* provides a striking illustration of the Court's conceptualisation of private autonomy in the context of the free movement of services. Laval was a Latvian company that posted Latvian workers to Sweden to work on building sites operated by a Swedish construction company. The Latvian workers earned 40 per cent less than their Swedish counterparts. Swedish trade unions undertook collective action in order to force Laval to sign a collective agreement guaranteeing certain levels of pay to the posted workers but it refused. Having reiterated the *Viking* principles, the CJEU held that this restriction on the freedom to provide services could not be justified because it went far beyond what was allowed by Directive 96/71 on the employment of posted workers. According to the Court:

> [C]ompliance with Article 49 EC [now Article 56 TFEU; OOC] is also required in the case of rules which are not public in nature but which are designed to regulate, collectively, the provision of services. The abolition, as between Member States, of obstacles to the freedom to provide services would be compromised if the abolition of State barriers could be neutralised by obstacles resulting from the exercise of their legal autonomy by associations or organisations not governed by public law [...] In the case in the main proceedings, it must be pointed out that the right of trade unions of a Member State to take collective action by which undertakings established in other Member States may be forced to sign the collective agreement for the building sector — certain terms of which depart from the legislative provisions and establish more favourable terms and conditions of employment as regards the matters referred to in Article 3(1), first subparagraph, (a) to (g) of Directive 96/71 and others relate to matters not referred to in that provision — is liable to make it less attractive, or more

[57]In more detail see for example H Schepel, 'Constitutionalising the Market, Marketising the Constitution, and Tell the Difference: On the Horizontal Application of the Free Movement Provisions in EU Law' 18 (2012) European Law Journal 177; G Davies, 'Freedom of Contract and the Horizontal Effect of Free Movement Law' in D Leczykiewicz and S Weatherill (eds), *The Involvement of EU Law in Private Law Relationships* (Hart Publishing 2013) 53.

[58]Pistor (n 3), 70, referring, in particular, to Case C-212/97 *Centros*, ECLI:EU:C:1999:126.

[59]For example Case C-415/93 *Bosman*, ECLI:EU:C:1995:463; Case C-281/98 *Angonese*, ECLI:EU:C:2000:296.

[60]For example Case 36/74 *Walrave*, ECLI:EU:C:1974:140; Case C 341/05 *Laval*, ECLI:EU:C:2007:809.

[61]For example Case C-309/99 *Wouters*, ECLI:EU:C:2001:390; Case C-438/05 *Viking*, ECLI:EU:C:2007:772.

[62]Case C-171/11 *Fra.bo*, ECLI:EU:C:2012:453.

[63]cf A S Hartkamp, *European Law and National Law* (Kluwer 2012) 64; H Schepel, 'Freedom of Contract in EU Free Movement Law: Balancing Rights and Principles in European Public and Private Law' 21 (2013) European Review of Private Law 1211, at 1214.

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> difficult, for such undertakings to carry out construction work in Sweden, and therefore constitutes a restriction on the freedom to provide services within the meaning of Article 49 EC.[64]

The CJEU's reasoning makes it clear that the freedom to provide services fosters unregulated private autonomy in the cross-border context.[65] As such, this economic freedom may not only preclude national private laws that protect the weaker parties to transactions but also private arrangements to this effect. After all, the direct horizontal effect of the free movement of services enables private parties to conclude interstate service contracts in the internal market without being hindered by other private parties exercising their legal autonomy under the national law of a particular Member State. The concept of unregulated private autonomy with an interstate element that underpins the direct application of the freedom to provide services to the acts of private parties is thus in fundamental conflict with the concept of substantive freedom of contract grounded in national private law. Furthermore, this conception of private autonomy in EU free movement law may also be out of touch with the conception of private autonomy enshrined in EU secondary legislation which regulates private autonomy in both cross-border and purely domestic situations.

Recourse to traditional justification grounds for limiting free movement rights, such as public policy, public security or public health, alone may not be enough to prompt a move away from the strong market rationale in free movement law. This is particularly evident in the case of the direct application of economic freedoms to the acts of private parties. Despite the CJEU's famous pronouncement in *Bosman* that 'there is nothing to preclude individuals from relying on justifications on grounds of public policy, public security or public health',[66] it is highly doubtful that individuals will be able to do so with some degree of success.

While resort to the EUCFR, particularly the freedom to conduct a business (Article 16 EUCFR) and the principle of consumer protection (Article 38 EUCFR), has some potential to recalibrate a profoundly functional understanding of private autonomy in free movement law,[67] it remains unclear so far whether this potential can be realised. As the CJEU's judgement in *Laval* shows, EU fundamental rights may not always outweigh the EU freedom to provide services under the justification regime. In that case, the Court ruled that this freedom precludes a trade union acting in the exercise of its fundamental right to take collective action to force a provider of services established in another Member State to sign a collective agreement. The insertion of fundamental rights in the category of 'legitimate interests' capable of justifying restrictions on the fundamental freedom to provide services thus does not guarantee its prevalence in each case. Promoting unregulated private autonomy with an interstate element in free movement law may therefore come at a heavy price in terms of the materialisation of private autonomy and interpersonal justice.

The adoption of a binding EPL code suggested by Hesselink could provide a more robust solution to the problem of excessive functionalism in free movement law in according the status of EU primary law to the normative principles of private law justice. If such principles are put on a par with economic freedoms, the CJEU would not be able to prioritise the latter at the expense of the former. The Court would be required, for example, to strike a delicate balance between the freedom to provide services and the principle of substantive private autonomy. In such cases, a more comprehensive 'double' proportionality test could offer a better solution than a simple 'balancing test'. Such a test has been developed, for example, by a former Advocate General of the CJEU Verica Trstenjak in her opinion in *Commission* v. *Germany* in the context of a potential conflict

[64]Case C 341/05 *Laval,* ECLI:EU:C:2007:809, paras 98 and 99. See also Case 36/74 *Walrave*, ECLI:EU:C:1974:140, paras 17 and 18; Case C-415/93 *Bosman*, ECLI:EU:C:1995:463, paras 83 and 84; Case C-309/99 *Wouters*, ECLI:EU:C:2001:390, para. 120.

[65]In more detail see O O Cherednychenko, 'Fundamental Freedoms, Fundamental Rights, and the Many Faces of Freedom of Contract in the EU' in M Andenas et al (eds), *The Reach of Free Movement* (T.M.C. Asse Press 2015) 273.

[66]Case C-415/93 *Bosman*, ECLI:EU:C:1995:463, para. 85.

[67]See Cherednychenko (n 65) 286 et seq.

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between EU fundamental rights and EU economic freedoms.[68] The essence of the 'double' proportionality is that the restriction of free movement rights *and* the restriction of fundamental rights are legitimate as long as they pass the proportionality test. In the present context, a fair balance between the freedom to provide services and the principle of substantive private autonomy would imply that the restriction by the latter on the former may not go beyond what is appropriate, necessary and reasonable to realise that principle of private law justice. Conversely, however, the restriction on the principle of substantive private autonomy by the freedom to provide services may not go beyond what is appropriate, necessary and reasonable to realise that economic freedom. The top-down strategy based on the EU charter of private law justice could thus potentially result in a fundamental shift away from market functionalism in free movement law – a shift that is unlikely to occur from the bottom-up in this area of EU primary law.

5. Concluding remarks

This assessment of the role of interpersonal justice in European private law has suggested a number of tentative conclusions. In the first place, it has become apparent that while concerns about a balance of the competing interests of private parties pervade many of its areas, they do not take central stage in European private law. The substantive private autonomy embodied in national private law systems, the regulated private autonomy enshrined in EU secondary private law and the unregulated private autonomy with an interstate element underpinning EU free movement law sit uneasily together.

The interpersonal justice deficit in EU secondary private law is manifest in the lack of a comprehensive and coherent vision of the role of consumer protection therein, the move away from minimum harmonisation towards maximum harmonisation post-Lisbon and the absence of a coherent private enforcement strategy. Where the EU harmonisation measures do balance the interests of the parties, this is often the result of path dependence, along the bottom-up pathway to interpersonal justice, rather than that of a systematic analysis of the relative merits of interpersonal justice in the pursuit of policy goals, notably consumer protection.

In EU free movement law, fundamental economic freedoms may not only preclude national private laws that seek to protect the weaker parties to transactions but also private arrangements that have such effects. This overly functional conception of private autonomy pursued by the CJEU in relation to economic freedoms with a view to maximising their *effect utile* may be out of touch not only with the conception of substantive private autonomy in national private law systems but also with the conception of regulated private autonomy in EU secondary private law.

In order to enhance the role of interpersonal justice in the internal market and develop a more coherent European private law, the current bottom-up pathway thereto could be complemented by a more top-down roadmap that builds on the idea of a EPL code. The inclusion of the principle of substantive private autonomy in the European charter of private law justice could recalibrate a functional understanding of EU primary and secondary law. This in turn would enable the EU institutions to embrace justice between substantively free and equal persons as a distinct value when pursuing their regulatory objectives or determining the reach of economic freedoms.

Some will object that the European private law as transnational law concerned with ensuring market access cannot be based on any national conceptions of justice and private autonomy. Interpersonal justice issues should therefore be left to the Member States. Even though European private law can certainly not be equated with national private law, in my view, the former cannot be entirely detached from the latter either. European private law builds on national private law to develop new principles and norms for governing relations between individuals, which in turn profoundly affect national private law discourse. Conversely, the ability of European private law to achieve its policy objectives depends to a significant degree on the responsiveness of national private law systems thereto.

[68]Advocate General Trstenjak, Opinion of 14 April 2010 in Case C-271/08 *Commission v. Germany*, ECLI:EU:C:2010:183.

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The bottom-up route to interpersonal justice in EU secondary private law enables a meaningful dialogue between European and national private law but the tension between the two remains high. A top-down strategy could ease the tension between the relational rationality of national private law and the instrumentalist, internal market-oriented, rationality of European private law. Innovative ways of reconciling the common good with interpersonal justice concerns could emerge as the result of interactions between these two pathways, top to bottom and bottom to top, rather than just by one-way processes along the bottom-up pathway.

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