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Islands and the Ocean: Three Models of the Relationship between EU Market Regulation and National Private Law

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EU regulatory measures in the field of private law have been compared to islands in the ocean of national private law. This article reconceives the relationship between the two, focusing on how national private law today responds and should respond to EU market regulation given the tension between the instrumentalist rationality of EU private law and its own relational rationality. It identifies three main models of this relationship: separation, substitution, and complementarity. These models reflect elements of the current legislative and judicial practices in a variety of jurisdictions across different areas of EU private law and provide an analytical framework for assessing such practices in terms of their ability to reconcile the competing rationalities of EU and national private law. Each model has a bearing on the ability of EU measures to achieve their regulatory objectives, and the overall shape of European integration more generally.

INTRODUCTION

Since the early days of the involvement of the European Union (EU) in private law relationships, the EU measures in the field of private law have been compared to islands in the ocean of national private law.[1] In particular, this metaphor has been used to highlight the difficulties of integrating the existing acquis of EU private law into the private law of the Member States, given the different rationalities of the two. National private law has traditionally been concerned with horizontal relationships between private parties. While this part of law may be influenced by policy objectives and have distributive

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1 See for example H. Kötz, 'Gemeineuropäisches Zivilrecht' in H. Bernstein et al (eds), *Festschrift für Konrad Zweigert zum 70. Geburtstag* (Tübingen: Mohr Siebeck, 1981) 481, 485; R. Michaels, 'Of Islands and the Ocean: The Two Rationalities of European Private Law' in R. Brownsword et al (eds), *The Foundations of European Private Law* (Oxford: Hart Publishing, 2011) 139.

implications,[2] it focuses on justice between the parties.[3] In contrast, EU private law has developed in a piecemeal and uncoordinated fashion across different sectors of the economy as a subset of market regulation to serve various policy goals, notably the establishment of the European internal market. Although many EU measures also have an interpersonal dimension,[4] this dimension typically plays a subsidiary role in the internal market project.[5] Academic and policy efforts were made to reconcile these two competing rationalities – which I will call 'relational' and 'instrumentalist', respectively[6] – 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]

In the meantime, the islands of EU private law have further spread across the ocean of national private law, covering a variety of markets for goods and services, including the old ones, such as consumer goods and financial services, as well as the new ones resulting from privatisation, such as telecommunications, energy, and transport. They have also grown larger and larger in response to the new challenges faced by the EU, such as the global financial crisis of 2007–2008, the rapid growth of the digital economy, and climate change.[9] On such islands, market regulation and private law are closely intertwined, as aptly captured

2 See for example R. Hale, 'Coercion and Distribution in a Supposedly Non-Coercive State' (1923) 38 *Political Science Quarterly* 470; H. Collins, *Regulating Contracts* (Oxford: OUP, 1999); K. Pistor, *The Code of Capital: How the Law Creates Wealth and Inequality* (Princeton, NJ: Princeton University Press, 2019).

3 See for example C.-W. Canaris, *Die Bedeutung der iustitia distributiva im deutschen Vertragsrecht* (Munich: 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* (Oslo: Joseph Beuys/Bono, 2011) 7, 21; H. Dagan, 'Between Regulatory and Autonomy-Based Private Law' (2016) 22 *European Law Journal* 644, 650.

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

5 See also 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* (Oxford: Hart Publishing, 2018) 315, 321.

6 cf Michaels, n 1 above, 142, distinguishing between the 'juridical' rationality of national private law and the 'instrumentalist' rationality of EU private law as ideal types. As will be further explained below, however, what distinguishes national private law from EU private law today is not its self-contained – 'juridical' – character being indifferent to instrumentalist considerations, but rather its focus on horizontal relations between private parties.

7 See European Commission, Communication from the Commission to the European Parliament and the Council – A More Coherent European Contract Law – An Action Plan, OJEU 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 Lord Denning in *HP Bulmer Ltd v J Bollinger SA* [1974] Ch 401, 418 and Lord Denning, 'Foreword' in G. Smith, *The European Court of Justice: Judges or Policy Makers?* (London: Bruges Group, 1990), initially characterising EU law as 'an incoming tide' and later as 'a tidal wave bringing down our sea walls and flowing inland over our fields and houses'. Arguably, however, the islands/ocean metaphor still more accurately captures the relationship between EU

by the oxymoron 'European regulatory private law'.[10] EU private law has also become increasingly complex and fragmented, particularly following the rise of public supervision and enforcement by European and national administrative agencies in the private law domain,[11] as well as the standardisation of goods and services.[12]

It is against this backdrop that we need to revisit the tale of islands and the ocean in a multi-level and heterarchical EU legal order. While the relationship between EU and national private law has been explored in legal scholarship before,[13] this article reconceives this relationship within a new theoretical framework, focusing on how traditional *national* private law today responds and should respond to EU market regulation, given the tension between the instrumentalist rationality of EU private law and its own relational rationality. The article identifies three main models of the relationship between EU market regulation and national private law in the current multifaceted regulatory and enforcement landscape, namely separation, substitution, and complementarity.[14] These models reflect elements of the current legislative and judicial practices in a variety of jurisdictions, including both civil law and common law, across a wide range of areas governed by EU private law. The areas under investigation have been subjected to cross-sectoral and/or sector-specific EU harmonisation regimes and include product safety, antitrust, unfair trading, unfair contract terms, consumer sales, and financial services (notably payment, credit, and investment). Based on the representative examples from these areas, the models also provide an analytical framework for assessing the legislative and judicial practices in terms of their ability to reconcile the competing rationalities of EU

secondary law and traditional national private law, given that the latter has so far remained largely unharmonised.

10 H.-W. Micklitz, 'The Visible Hand of European Regulatory Private Law' (2009) 28 *Yearbook of European Law* 3.

11 See for example O.O. Cherednychenko, 'Public Supervision over Private Relationships: Towards European Supervision Private Law?' (2014) 22 *European Review of Private Law* 37.

12 See for example H. Schepel, *The Constitution of Private Governance: Product Standards in the Regulation of Integrating Markets* (Oxford: Hart Publishing, 2005); R. van Gestel and H.-W. Micklitz, 'European Integration through Standardisation: How Judicial Review is Breaking Down the Club House of Private Standardization Bodies' (2013) 50 *Common Market Law Review* 145; European Commission, *Tapping the Potential of European Services Standards to Help Europe's Consumers and Businesses* SWD(2016) 186 final.

13 See for example D. Caruso, 'The Missing View of the Cathedral: The Private Law Paradigm of European Legal Integration' (1997) 3 *European Law Journal* 3; Michaels, n 1 above; H.-W. Micklitz, 'A Self-Sufficient European Private Law – A Viable Concept?' in H.-W. Micklitz and Y. Svetiev (eds), *A Self-Sufficient European Private Law – A Viable Concept?* EUI Working Papers Law 2012/31.

14 cf Micklitz, *ibid*, 6, drawing on legal theory, particularly with respect to the transformation of private law into economic law and private law beyond the state, as well as on institutional economics, to develop four normative models of the relationship between EU and national private law: 'conflict and resistance', 'intrusion and substitution', 'hybridization', and 'convergence'. For consideration of how Micklitz's models are manifest in various sectors regulated by the EU see for example A. Ottow, 'Intrusion of Public Law into Contract Law: The Case of Network Sectors' in Micklitz and Svetiev (eds), n 13 above, 89; O.O. Cherednychenko, 'Financial Consumer Protection in the EU: Towards a Self-Sufficient European Contract Law for Consumer Financial Services?' (2014) 10 *European Review of Contract Law* 476.

and national private law across the entire field of EU private law.[15] The analysis shows that each of the three scenarios involves trade-offs between the common good, legal certainty, and uniformity, on the one hand, and interpersonal justice, individual fairness, and diversity, on the other. The choice of a particular model (in a particular area) by legislators or courts in turn has a bearing on the ability of EU measures to achieve their regulatory objectives, and the overall shape of European integration more generally.

In the following, I will first outline a theoretical framework within which the analysis of the relationship between EU and national private law will be conducted. Subsequently, I will present the three models of this relationship, drawing on the experiences of several current EU Member States as well as one former EU Member State and combining the descriptive and normative dimension of each pattern. I will conclude with the summary and some final reflections on the way forward for the islands and the ocean in the EU today.

A THEORETICAL FRAMEWORK

Before we can begin to examine the interplay between EU and national private law, the meaning of each needs to be clarified. The complexity of defining these categories is reflected in the debates on the meaning of regulation,[16] and its relationship to law in general[17] and private law in particular.[18] Although these categories may have intuitive appeal, establishing criteria which differentiate between them is not straightforward. In a broader sense, the term 'regulation' can be understood as any system of rules – either produced by state- or non-state actors – that intends to govern the behaviour of its subjects with a view to achieving a certain outcome.[19] In a narrower sense, the term 'regulation' is often used to describe a set of rules promulgated by government to control the operation of markets and accompanied by mechanisms for monitoring and enforcement, usually by a specialist public agency (also known as 'public regulation').[20] Controversy also surrounds the concept of private law and its relationship to regulation.[21] While some scholars regard private law as an autonomous and non-instrumental framework for horizontal relations between

15 The proposed analytical framework has thus wider relevance than the context of the specific areas of EU private law or market sectors examined in this article.

16 See for example J. Black, 'Critical Reflections on Regulation' (2002) 27 *Australian Journal of Legal Philosophy* 1, 22.

17 See for example C. Parker et al, 'Introduction' in C. Parker et al (eds), *Regulating Law* (Oxford: OUP, 2004) 1; J. Braithwaite and C. Parker, 'Conclusion' in Parker et al (eds), *ibid*, 269.

18 See for example Collins, n 2 above; S. Grundmann, 'Privaatrecht und Regulierung' in H.C. Grigoleit and R. Petersen (eds), *Privatrechtsdogmatik im 21. Jahrhundert: Festschrift für Claus-Wilhelm Canaris zum 80. Geburtstag* (Berlin: De Gruyter, 2017) 907.

19 cf Collins, n 2 above, 7; Black, n 16 above, 20.

20 cf C. Hood et al, *Regulation inside Government: Waste-Watchers, Quality Police, and Sleazebusters* (Oxford: OUP, 2000) 8.

21 For a recent overview of a variety of private law theories see H. Dagan and B.C. Zipursky, 'Introduction: The Distinction between Private Law and Public Law' in H. Dagan and B.C. Zipursky (eds), *Research Handbook on Private Law Theory* (Cheltenham: Edward Elgar, 2020) 1.

private parties,[22] others insist that private law is laden with particular distributional implications and is therefore an instrument for governing complex economic and social relations.[23] Nevertheless, for the sake of analytical clarity, when analysing an intricate relationship between EU and national private law within the multi-level system of governance, it is helpful to distinguish between the two given the *prevailing* rationality of each.

This section, therefore, first defines these central notions and discusses their main characteristics, focussing on the theories that are most relevant for present purposes. It then proceeds to identify the competing core values at stake in the process of the Europeanisation of private law as reflected in the diverging rationalities of EU and national private law. While much of the journey in this section will pass through well-known ground, it is the synthesis of different elements of the existing theories that will provide the basis for a new and multidimensional analysis of the national private laws' responses to EU market regulation in subsequent sections.

National private law as a state-backed bastion of interpersonal justice

National private law can be understood as a horizontal legal framework designed by legislators and private law courts to allow private parties to shape their legal relationships as self-determining agents; it seeks to ensure justice between the parties through their respective rights and remedies as well as appropriate procedures, while at the same time being sensitive to the common good, and typically functions *ex post*.

This definition highlights those characteristics of private law that distinguish it from public law. It reflects the public/private divide that has shaped the development of national legal systems in the past two hundred years or more without drawing a strict line between these two legal categories. Many theories have been put forward to justify the partition of the law into public and private realms in nation-states, focusing, in particular, on the subjects involved in a legal relationship, the protected interests, the kind of justice pursued, and the enforcement mode.[24] While no theory has escaped criticism and would justify a strict separation between public and private law today, each of them provides insights into the distinguishing features of national private law as a conceptual category with its own – relational – rationality. Although the public/private divide has mainly evolved in continental legal systems, these features

22 See for example E. Weinrib, *The Idea of Private Law* (Cambridge, MA: Harvard University Press, 1995); F. Bydlinki, *System und Prinzipien des Privatrechts* (Vienna: Springer, 1996); P. Benson, *Justice in Transactions: A Theory of Contract Law* (Cambridge, MA: Harvard University Press, 2019).

23 See for example Hale, n 2 above; D. Kennedy, 'Distributive and Paternalist Motives in Contract and Tort Law, with Special References to Compulsory Terms and Unequal Bargaining Power' (1982) 41 *Maryland Law Review* 563; W.M. Landes and R.A. Posner, *The Economic Structure of Tort Law* (Cambridge, MA: Harvard University Press, 1987); Collins, n 2 above; Pistor, n 2 above.

24 For an overview, see for example 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* (Munich: Sellier, 2007) 24.

have also been tacitly reflected in the English private common law discourse.[25] The following key characteristics of national private law should be noted here.

First, in contrast to public law which focuses on the vertical relationship between public authorities and citizens and empowers public authorities to act in the public interest, private law is primarily concerned with horizontal relationships between private individuals as self-determining agents. As such, natural and legal persons may pursue their private interests within a special legal framework created and backed by a state, notably the primary legislator and private law courts, and made up of substantive and remedial rules.

Second, this unique legal ecosystem is underpinned by its own idea of justice. While public law has been considered to be the domain of distributive justice concerned with the fair allocation of goods to citizens with due regard to their personal circumstances, private law was traditionally associated with corrective justice between the parties as formally free and equal persons. Personal differences, in terms of bargaining power, for example, were thus completely irrelevant when determining what would be fair and just in a private law relationship.[26] This conventional view has been challenged not only in scholarly work,[27] but also by the developments within private law itself in the second half of the twentieth century, such as the 'materialisation of law'[28] and the increasing importance of policy considerations in private law discourse,[29] and, more recently, by growing public interest litigation.[30] At the same time, however, we could insist that national private law remains focused on interpersonal justice, which includes but is not limited to corrective justice and which is not reducible to instrumental goals such as distributive justice or efficiency.[31] Although modern private law is also concerned with the broader issue of what would be in the public interest, 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.[32]

25 cf Collins, n 2 above, 31.

26 See for example J. Rawls, *Political Liberalism* (New York, NY: Columbia University Press, 1993); R. Dworkin, *Law's Empire* (Cambridge, MA: Harvard University Press, 1986); E.J. Weinrib, *Corrective Justice* (Oxford: OUP, 2012).

27 See n 23 above.

28 M. Weber, *Economy and Society* (Berkeley, CA: University of California Press, 1992) 886.

29 For more detail, see for example Collins, n 2 above.

30 A well-known example of this is *De Staat der Nederlanden* v *Stichting Urgenda* HR 20 December 2019, ECLI:NL:HR:2019:2006 in which the Dutch State was ordered by the Dutch supreme court in private law matters (*Hoge Raad*) to cut its greenhouse emissions by 25 per cent in 2020 compared to its emissions levels in 1990. For more detail see for example E.R. de Jong et al, 'Judge-made Risk Regulation and Tort Law: An Introduction' (2018) 9 *European Journal of Risk Regulation* 6; L. Burgers, 'Should Judges Make Climate Change Law?' (2020) 9 *Transnational Environmental Law* 55.

31 cf for example Canaris, n 3 above; Schmid, n 3 above; Dagan, n 3 above.

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

Third, in order to obtain relief, the individual who has suffered from the breach of a private law norm will normally have to take action before a private law court or an alternative dispute resolution (ADR) body against the one who has wronged him or her by using the characteristic private law enforcement tools, such as a claim for performance, a claim for damages, or a claim for the termination of the legal relationship. Private law thus typically operates *ex post*, that is, only after a breach of the standard when harm has already occurred. When considering whether a victim is entitled to relief in contract or tort, the private law court will commonly apply a generalised objective standard, such as that of a 'reasonable person'. At the same time, open-ended private law norms, such as the principle of good faith or a duty of care, generally leave room for a subjective assessment which enables private adjudicators to tailor such norms to the particular circumstances of an individual case. In this respect, private law is also different from administrative law which relies on public authorities to secure compliance with *ex ante* standards through the use of deterrent sanctions, such as fines, and which is traditionally far less responsive to the individual circumstances of each case.

EU private law as a subset of market regulation beyond the nation-state

EU private law in turn can be understood in a broad sense as a set of norms adopted by the EU legislator or other actors – both public and private – within a formal legislative framework to regulate the activities of different categories of market participants, predominantly *ex ante*, with a view to achieving certain public goals in the context of the European internal market project; it includes substantive and remedial rules that affect relations between individuals, regardless of the nature of the law – public or private – in which they have been transposed in the national legal order of a particular Member State. This definition highlights the instrumentalist rationality of EU private law as a subset of market regulation that operates beyond the nation-state, profoundly challenging national private law in at least three major respects.

First, in contrast to national private law, EU private law is not primarily concerned with private individuals and their independent interests as ends in themselves, but rather with the creation of the European internal market and individuals' roles in this process as market participants.[33] EU measures are not addressed to persons, but to traders, consumers, financial institutions, investors, and other 'functioning economic entities in the market'.[34] The main question posed by the EU legislator has been not how to ensure interpersonal justice between individual market participants, but rather how to make the internal

33 Collins, n 5 above, 318. See also for example M.W. Hesselink, 'European Contract Law: A Matter of Consumer Protection, Citizenship, or Justice?' (2007) 15 *European Review of Private Law* 323; G. Davies, 'The Consumer, the Citizen, and the Human Being' in D. Leczykiewitz and S. Weatherill (eds), *The Images of the Consumer in EU Law* (Oxford: Hart Publishing, 2016) 325; M. Bartl, 'Internal Market Rationality, Private Law and the Direction of the Union: Resuscitating the Market as the Object of the Political' (2015) 21 *European Law Journal* 572.

34 Collins, *ibid*, 321.

market function better. The 'effectiveness' and 'efficiency' of the instruments used to achieve desired policy outcomes are key in this pragmatic setting.[35] Insofar as justice considerations influence EU 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.[36] In this context, private law has been viewed as an instrument for achieving various policy objectives. Apart from the overarching goal of establishing the internal market, these include, for instance, sustainable development, consumer protection, and financial stability. There has been general agreement, therefore, that EU private law sets regulatory norms and is thus instrumentalist in nature. Yet it has been disputed whether this rapidly evolving legal field is informed solely by the internal market considerations centred on competition and 'access justice'.[37] In particular, building on the experimentalist governance literature,[38] Yane Svetiev has argued that EU regulatory private law does not support a shallow version of the internal market, but rather policy diversification as a way of coping with uncertainty about the best means to advance policy ends.[39] As such, it provides an institutional platform for transnational market-building through a process of error-detection and correction that promotes various normative and policy commitments in response to concrete problems at EU and national level. In this way, EU private law reassembles autonomy, competition, and regulation as sources of market discipline, fostering legal and policy hybridisation across different levels of governance and leaving the Member States with substantial responsibility for detecting local problems and devising innovative solutions.

Second, EU law does not, at least not explicitly, recognise the distinction between public and private law as it had evolved in national legal systems. In line with its functional approach, the EU legislator has commonly refrained from prescribing a particular mode of implementation within national legal orders, leaving it to the Member States to choose how to transpose a particular EU directive. EU private law norms regulating the conduct of businesses vis-à-vis other private parties and/or liability for damage caused by their products or activities have been implemented not only in national private law, but also in national administrative law, or in both. EU private law has thus prompted or

35 See European Commission, *Better Regulation Guidelines* SWD(2017) 350 final; European Commission, *Regulatory Fitness and Performance Programme (REFIT)* at https://ec.europa.eu/info/law/law-making-process/evaluating-and-improving-existing-laws/refit-making-eu-law-simpler-less-costly-and-future-proof_en.

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

37 See for example M.W. Hesselink, 'Private Law, Regulation, and Justice' (2016) 22 *European Law Journal* 681; Y. Svetiev, 'The EU's Private Law in the Regulated Sectors: Competitive Market Handmaiden or Institutional Platform?' (2016) 22 *European Law Journal* 659; V. Mak, 'Pluralism in European Private Law' (2018) 20 *Cambridge Yearbook of European Legal Studies* 202; O.O. Cherednychenko, n 4 above.

38 See for example C. Sabel and J. Zeitlin, 'Learning from Difference: The New Architecture of Experimentalist Governance in the EU' (2008) 14 *European Law Journal* 271.

39 Svetiev, n 37 above, 679.

fostered the development of legal hybrids,[40] such as 'regulatory private law'[41] or 'supervision private law'.[42] At the same time, however, the public/private divide is not completely irrelevant to EU private law. In fact, a distinction reminiscent of the traditional public/private dichotomy is manifest in the varying extent to which EU measures of legislative harmonisation in this area engage with private law relationships when pursuing similar policy goals.[43] Some EU measures, such as the Unfair Contract Terms Directive,[44] the Product Liability Directive,[45] and the Payment Services Directive 2 (PSD2),[46] explicitly confer rights and remedies on private parties. In contrast, other EU measures, such as the Unfair Commercial Practices Directive,[47] the General Product Safety Directive (GPSD),[48] and the Markets in Financial Instruments Directive II (MiFID II),[49] do not have a strong interpersonal dimension, focusing instead on the relationship between regulators and regulatees 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, national private law is commonly perceived to be outside the material scope of the 'public law'-coloured ones. Importantly, 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, the ability and willingness of the Court of Justice of the European Union (CJEU) to improve this position through the doctrine of implied rights, and ultimately the effectiveness of those measures.[50] In particular, as the analysis below will reveal, the choice of a particular legal grammar at EU level shapes

40 In more detail see for example H.-W. Micklitz, 'Rethinking the Public/Private Divide' in M. Maduro et al (eds), *Transnational Law: Rethinking European Law and Legal Thinking* (Cambridge: Cambridge University Press, 2014) 271.

41 Micklitz, n 10 above.

42 Cherednychenko, n 11 above.

43 For more detail, see Cherednychenko, n 37 above.

44 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJEC 1993 L 95/29.

45 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, OJEC 1985 L 210/29.

46 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, OJEU 2015 L 337/35.

47 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, OJEU 2005 L 149/22.

48 Directive 2001/95/EC on general product safety, OJEU 2002 L 11/4.

49 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, OJEU 2014 L 173/349.

50 Cherednychenko, n 37 above, 3; 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* (Cheltenham: Edward Elgar, 2020) 2, 33.

the relationship between EU and national private law at Member State level, prompting national legislators and private law courts to adopt one of the three models identified above.

Third, unlike national private law which typically intervenes *ex post* to restore the balance between the parties' rights and obligations, EU private law tends to take a form of *ex ante* regulation which seeks to regulate an activity before a problem occurs and to deter potential violations, particularly through administrative law means. The principle-based rules adopted by the European Parliament and the Council for these purposes are often further elaborated by the European Commission in its delegated acts and complemented by even more detailed and prescriptive non-binding sets of rules produced by various public and private actors. For instance, since the adoption of the so-called 'New Approach' in the mid-1980s,[51] the general requirements for product safety in EU directives have been further specified in the technical standards set by three European standardisation organisations (European Committee for Standardization (CEN), European Committee for Electrotechnical Standardization (CENELEC), and European Telecommunications Standards Institute). These private standards, which are adopted within a special legal framework,[52] form part of EU law and are subject to the CJEU's interpretation.[53] Similarly, in the wake of the latest financial crisis, the EU rules for the financial sector have been increasingly made by European financial regulators (including three European Supervisory Authorities – the European Banking Authority, the European Securities and Markets Authority (ESMA), and the European Insurance and Occupational Pensions Authority, as well as the European Central Bank). The growing standardisation of financial services is particularly evident in the emergence of immensely detailed standards adopted by ESMA on how firms should approach their engagement with retail financial markets.[54] The *ex ante* regulatory norms produced in this way cover a large number of individual cases based on the normative typifications of market participants. While EU private law was initially dominated by the fictional model of the 'average consumer' who was considered to be 'reasonably well-informed and reasonably observant and circumspect',[55] the image of the individual used for regulatory purposes today has become more diverse. In the investment services field, for instance, a differentiated system of investor protection has been adopted which allows tailoring of the level of protection to one of the three categories of investors: professional clients, retail clients, and eligible counterparties.[56] Similarly, the categories of responsible,

51 Council Resolution of 7 May 1985 on a new approach to technical harmonization and standards, OJEC 1985 C 136/1. See also European Commission, *'The Blue Guide' on the implementation of EU products rules 2016* OJEU 2006 L 272/1.

52 See Regulation 1025/2012 of the European Parliament and of the Council of 25 October 2012 on European Standardisation, OJEU 2012 L 316/12.

53 Case C-613/14 *James Elliott Construction Limited* v *Irish Asphalt Limited* ECLI:EU:C:2016:821 (*James Elliott*).

54 For more detail, see N. Moloney, 'EU Financial Market Governance and the Retail Investor: Reflections at an Inflection Point' (2018) 37 *Yearbook of European Law* 251, 283.

55 Case C-210/96 *Gut Springenheide and Tusky* v *Oberkreisdirektor des Kreises Steinfurt* ECLI:EU:C:1998:369, at [31].

56 See M. Kruithof, 'A Differentiated Approach to Client Protection: The Example of MiFID' in S. Grundmann and Y.M. Atamer (eds), *Financial Services, Financial Crisis and General European Contract Law* (Alphen aan den Rijn: Kluwer Law International, 2011) 105.

confident, and vulnerable consumer increasingly guide EU law making across different consumer markets.[57] The use of these categories implies, for example, that the EU information requirements do not take into consideration the heterogenous information needs of individual consumers or investors that may arise in the specific circumstances of a concrete case. Instead, they reflect the homogenous needs of a particular fictional category of market participants.

Conflicting values at stake

These accounts of national and EU private law reveal conflicts between the core values that underpin these legal orders. Three such dichotomies are particularly relevant for the discussion here because they highlight major tensions between the relational rationality of national private law and the instrumentalist rationality of EU private law, reflecting intense academic and policy debates.

The first dichotomy is the one between the pursuit of the *common good* and *interpersonal justice*. Being regulatory in nature, EU private law goes beyond individual interests and interactions, focusing on policy goals rather than justice between the parties. Even though EU and national private laws are informed by different rationalities, the policy objectives of many harmonisation measures in the field of private law 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.[58] Yet, sometimes the instrumentalist conception of EU private law and the relational conception of national private law may clash.[59] 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 MiFID II and the Markets in Financial Instruments Regulation (MiFIR),[60] are generally more paternalistic and interventionist than those adopted pre-crisis, revealing the EU legislator's distrust in the retail investors' and markets' ability to support optimal choices and the attempt to construct 'safe spaces' within which retail investors can operate.[61] On the other hand, however, the EU legislator appears to have a different image of the retail

57 See H.-W. Micklitz, 'The Consumer: Marketised, Fragmentised, Constitutionalised' in D. Leczykiewicz and S. Weatherill (eds), *The Images of the Consumer in EU Law: Legislation, Free Movement and Competition* (Oxford: Hart Publishing, 2016) 21.

58 cf Hesselink, n 4 above, 688.

59 cf Schmid, n 3 above, 25; O.O. Cherednychenko, 'Private Law Discourse and Scholarship in the Wake of the Europeanisation of Private Law' in J. Devenney and M.B. Kenny (eds), *The Transformation of European Private Law: Harmonisation, Consolidation, Codification or Chaos?* (Cambridge: Cambridge University Press, 2013) 148, 150; Hesselink, n 4 above, 689; Collins, n 33 above, 320.

60 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, OJEU 2014 L 173/84.

61 Moloney, n 54 above, 258.

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 concerned with bank resolvability.[62] 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.[63] Financial stability concerns can thus trump financial consumer protection, revealing the vulnerable position of interpersonal justice in the areas subjected to EU harmonisation.[64]

The second dichotomy that informs the relationship between EU and national private law is the one between *legal certainty* and *individual fairness*. While not unknown in EU private law, this dichotomy was explored in the national legal context as early as in 1854 by Rudolph von Jhering who saw it as a conflict between the 'formal' and 'substantive realisability' (*formaller und materieller Realizierbarkeit*) of the law.[65] The former entails an easy and predictable application of a legal norm in a concrete case; in contrast, the latter embodies the norm's responsiveness to the particular circumstances of an individual case. The use of objective standards as normative models increases legal certainty. Yet, the application of such 'formally realisable' norms may fail to respond to the real-life problems arising in specific private law relationships, and hence to ensure individual fairness. All the more so given that market regulation generally faces difficulties in capturing the complexity and unpredictability of the markets. As Julia Black points out, regardless of the regulatory techniques adopted, '[p]aradoxes abound in the performance of regulation, leading to failures in that regulation not only fails to change behaviour, manage risks or achieve any other stated goals, but actually produces the opposite effects from those intended'.[66] The ingenuity of the financial industry in circumventing pre-crisis regulatory restrictions through private law is particularly well documented.[67] Conversely, the norms that require a subjective assessment of the particular circumstances of a case enable private adjudicators to realise individual fairness. In addition, they also facilitate the development of private law by trial and error on a case-by-case basis. The more a legal norm responds to the particular facts of a case, the more 'substantively realisable' it is. At the same time, a high degree of responsiveness may undermine legal certainty, increasing the complexity of a legal system. The

62 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, OJEU 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, OJEU 2013 L 287/63 (SSM Regulation).

63 Moloney, n 54 above, 287.

64 See also 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 New Deal for Consumers* (Oxford: Hart Publishing, 2019) 61, 68.

65 R. von Jhering, *Der Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung* (Leipzig: Breitkopf und Härtel, Part 2, Vol 1, 1854).

66 J. Black, 'Paradoxes and Failures: "New Governance" Techniques and the Financial Crisis' (2012) 75 MLR 1037, 1039.

67 See Pistor, n 2 above.

quest for the right balance between legal certainty and individual fairness has shaped the development of national private law.[68] As noted above, open-ended private law norms generally allow private adjudicators to tailor their application to an individual case. In EU regulatory private law, however, the balance has currently tilted towards legal certainty as a result of its heavy reliance on the normative typifications of market participants. Arguably, the rise of Big Data analytics could lead to a more personalised national and EU private law without reducing legal certainty.[69] The increasing availability of accurate data about the personal characteristics of individuals could allow national courts, for instance, to abandon the 'reasonable person' test and further personalise the standard of care *ex post*.[70] The EU legislator in turn could set more 'granular legal norms' that would require businesses that use such data to provide consumers, for example, with more personalised information about their products or services.[71] While it remains to be seen to what extent EU regulatory private law will become more individualised,[72] the normative typifications used in *ex ante* standard-setting to simplify the reality of human interactions are unlikely to be completely erased from the legal landscape, not least given the limits to the personalisation of law posed by privacy concerns and the principle of equality, as well as the high complexity and cost involved in this exercise.

Finally, the third dichotomy that underpins the interface between EU and national private law is the one between *uniformity* and *diversity*.[73] The more harmonisation of private law relationships is sought by the EU legislator in the name of the internal market, the less room for manoeuvre is left for the Member States to tailor the application of EU rules to local circumstances and to experiment with different solutions to market problems. Throughout the history of EU private law making,[74] the EU has increasingly pushed for greater uniformity, but room for diversity has always remained, albeit to varying degrees. During the first harmonisation phase, the European Economic Community had very limited possibilities to harmonise private law, but nevertheless managed to adopt some important measures in this area, notably the Product Liability Directive

68 Von Jhering, n 65 above. For a critical analysis, see for example D. Kennedy, 'Form and Substance in Private Law Adjudication' (1976) 89 *Harvard Law Review* 1685; M. Auer, *Materialisierung, Flexibilisierung, Richterfreiheit* (Tübingen: Mohr Siebeck, 2005) 46.

69 C. Busch and A. de Franceschi, 'Granular Legal Norms: Big Data and the Personalization of Private Law' in V. Mak et al (eds), *Research Handbook on Data Science and Law* (Cheltenham: Edward Elgar, 2018) 408.

70 O. Ben-Shahar and A. Porat, 'Personalizing Negligence Law' (2016) 91 *New York University Law Review* 627.

71 C. Busch, 'Implementing Personalized Law: Personalized Disclosures in Consumer Law and Data Privacy Law' (2019) 86 *The University of Chicago Law Review* 309.

72 For a skeptical view, see for example G. Howells, 'Protecting Consumer Protection Values in the Fourth Industrial Revolution' (2020) 43 *Journal of Consumer Policy* 145, 167.

73 This dichotomy has probably been most debated in the context of EU private law making. See for example M. Reimann and D. Halberstam, 'Top-down or Bottom-Up? A Look at the Unification of Private Law in Federal Systems' in Brownsword et al (eds), n 1 above, 363; J.M. Smits, 'Plurality of Sources in European Private Law, or: How to Live with Legal Diversity' in Brownsword et al (eds), *ibid*, 333; N. Reich, 'From Minimal to Full to 'Half' Harmonisation' in J. Devenney and M. Kenny, *European Consumer Protection Theory and Practice* (Cambridge: Cambridge University Press, 2012) 3; S. Weatherill, 'The Fundamental Question of Minimum or Maximum Harmonisation' in S. Garben and I. Govaere (eds), *The Internal Market 2.0* (Oxford: Hart Publishing, 2020) 261.

74 For more detail, see Micklitz, n 36 above, 164.

(1957-1986). Although this directive was interpreted by the CJEU as a measure of maximum harmonisation,[75] it serves as a good illustration of the limits of this type of harmonisation in the private law sphere. After all, the directive did not affect the rights that consumers had as a matter of contractual or non-contractual liability or under any 'special liability system' existing when the directive was notified. The harmonised strict liability regime for damage caused by defective goods thus did not overrule the pre-existing national civil liability regimes, but added an extra protective layer instead. The second, much more intense, phase of harmonisation gained momentum after the adoption of the Single European Act 1986, which recognised the need for a high level of consumer protection and introduced majority voting in the Council of Ministers (1985-2000). This period saw the introduction of minimum standards of protection for consumers and other weaker parties through EU secondary law, while leaving the Member States considerable room for manoeuvre not only with respect to standard-setting, but also in enforcement matters. The third harmonisation phase, characterised by a greater intrusion by the EU into the national legal orders, 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 (from 2000 onwards). This phase has been marked by a move from minimum to maximum harmonisation and the increasing role of EU and national administrative agencies in standard-setting and enforcement, particularly in the financial sector, with a greater centralisation of powers at EU level as a result. Yet, as will be shown below, the 'public law' grammar harnessed by many measures adopted throughout this period effectively keeps national private law outside the reach of their maximum harmonisation regimes, thus making room for diversity.

Building on the theoretical framework outlined in this section, I will now proceed to discuss three main models of the relationship between EU and national private law through the lens of the latter's response to the former – separation, substitution, and complementarity – focusing on their key characteristics, manifestations, and implications. These patterns occupy different positions on a broad spectrum of the EU's involvement in national private law, ranging from almost none to fairly extensive. It will be shown that each of them strikes a balance between the competing considerations differently, putting more or less weight on the pursuit of the pan-European common good or interpersonal justice, legal certainty or individual fairness, and uniformity or diversity.

SEPARATION

Characteristics

On one side of the spectrum, we find the separation model of the relationship between EU market regulation and national private law. It is primarily manifest

75 Case C-52/00 *Commission* v *France* ECLI:EU:C:2002:252; Case C-154/00 *Commission* v *Greece* ECLI:EU:C:2002:254; Case C-183/00 *González Sánchez* v *Medicina Asturiana* ECLI:EU:C:2002:255.

in the context of the public law-oriented EU measures of legislative harmonisation in the field of private law, but is not limited thereto. In this scenario, traditional private law rules and regulatory private law rules with a European origin relating to the same subject matter exist parallel to each other at the national level, both formally and practically. Being transposed exclusively in a public law framework, EU private law norms do not become part of a national private law order. Private law courts are not bound by such norms or by prior decisions of administrative agencies enforcing them. Nor are they willing to consider EU private law norms or related administrative decisions in private adjudication, thus resisting the harmonisation of private law.[76] Accordingly, EU regulatory private law rules do not have any effect in traditional private law.

Manifestations

One of the areas where we can trace this pattern is retail investment services. The major EU investor protection measures – MiFID II and its predecessor Markets in Financial Instruments Directive I (MiFID I)[77] – lay down maximum harmonisation conduct of business rules for investment firms in their dealings with investors, such as a duty to know one's client, a duty to inform him or her about a particular financial instrument, and a duty to recommend a suitable one. In fact, many of these duties initially developed within the national private laws of the Member States.[78] And yet, being dominated by the public law-oriented approach to investor protection,[79] neither MiFID I nor MiFID II confers individual rights or remedies on investors. In its decision in *Genil* v *Bankinter*,[80] the CJEU did not take the opportunity to unequivocally clarify its stance on the issue of the relationship between MiFID I and national private law.[81] Although the 'public law' grammar of MiFID I and MiFID II in itself

76 cf Micklitz's 'conflict and resistance' model in Micklitz, n 13 above, 7. For discussion of the reasons for national (judicial) resistance to EU private law, see for example Caruso, n 13 above; H. Muir Watt, 'Conflict and Resistance – The National Private Law Response' in Micklitz and Svetiev (eds), n 13 above, 115.

77 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, OJEU 2004 L 145/1.

78 See O.O. Cherednychenko, 'The Regulation of Investment Services in the EU: Towards the Improvement of Investor Rights?' (2010) 33 *Journal of Consumer Policy* 403, 418.

79 It is noteworthy that the 'principle of civil liability' previously included in the initial consultation document of the European Commission ultimately did not make it into the text of MiFID II. 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). In more detail see O.O. Cherednychenko, 'Two Sides of the Same Coin: EU Financial Regulation and Private Law' (2020) 22 *European Business Organization Law Review* 147, 162.

80 Case C-604/11 *Genil* v *Bankinter* ECLI:EU:C:2013:344.

81 In particular, the CJEU did not recognise an implied right of action in this case, even though the conduct of business rules at issue did aim to protect investors. cf S. Grundmann, 'The Bankinter Case on MiFID Regulation and Contract Law' (2013) 9 *European Review of Contract Law* 267; T. Tridimas, 'Financial Regulation and Private Law Remedies: An EU Law Perspective' in Cherednychenko and Andenas, n 50 above, 47, 68; M.W. Wallinga, 'MiFID I & MiFID II and

does not preclude national private law courts from giving effect to the regulatory conduct of business rules contained therein within traditional private law, the courts' actual willingness to do so varies considerably across the EU.

A notable example of an uneasy relationship between these EU measures and national private law is the decision of the Scottish supreme court in private law matters, the Court of Session, in *Grant Estates Ltd* v *The Royal Bank of Scotland Plc*.[82] The case concerned the alleged mis-selling of interest rate swaps to a small property developer, Grant Estates Limited (GEL), by the Royal Bank of Scotland (RBS). Under MiFID I, which was in force at the time, GEL would fall under the broad concept of 'retail investor' that covered not only natural persons but also small and medium-sized companies. This would allow the company to enjoy the highest level of regulatory protection based on the fact that its knowledge, expertise, and experience in relation to interest rate swaps was similar to that of a consumer. In the UK, the MiFID I conduct of business regime, including the investment advisor's duty to recommend only suitable financial instruments to its retail clients, was transposed in a financial supervision framework, notably the Financial Services and Markets Act (FSMA) 2000 and the Conduct of Business Sourcebook (COBS) made by the UK Financial Conduct Authority. Under section 138D (formerly section 150) of the FSMA, a 'private person' who has suffered loss as a result of breach of the COBS rules has a direct right of action against a financial firm. Yet, as a corporate person, GEL could not rely on this statutory remedy to claim damages for negligent advice. To benefit from regulatory protection as a retail investor under MiFID I in civil litigation, GEL submitted that, in substance, RBS gave it financial advice which breached the MiFID I conduct of business rules, and that GEL relied on that advice, thereby giving rise to the bank's duty of care in common law. It argued that no reasonably competent adviser would have acted in a manner inconsistent with the COBS rules. In so doing, GEL effectively relied on the regulatory duties of the bank emanating from EU law to bring into existence the bank's common law duty of care in the provision of investment advice. However, this argument failed to convince Lord Hodge (now deputy president of the UK Supreme Court) who rejected it on the following grounds:

> … I do not think that GEL can rely on the COBS rules to create a common law duty of care in relation to the provision of advice. A common law duty can arise from the existence of a statutory duty as part of the background circumstances; and the existence of a statutory duty may show that a particular risk should have been foreseen. When the court assesses the effect of the statutory duty on the question whether it is just and equitable to impose a duty of care the primary consideration is, in my view, the policy of the statute. Looking to the policy of the FSMA one discovers that it provides protection to consumers of financial services through a self-contained regulatory code and statutory remedies for breach of its rules. As I have said, it needs no fortification by the parallel creation of common law duties and remedies. Further, the existence of a duty in negligence for failure to comply

Private Law: Towards a European Principle of Civil Liability?' in Cherednychenko and Andenas, *ibid*, 221, 225.

82 *Grant Estates Ltd* v *The Royal Bank of Scotland Plc* [2012] CSOH 133.

> with the COBS rules would circumvent the statutory restriction on the direct right of action …[83]

In reaching this conclusion, Lord Hodge effectively adopted the separation model of the relationship between EU and national private law, precluding the 'upgrade' of common law in the light of the bank's regulatory duties in an advisory relationship with retail clients under EU investor protection regulation.[84] The inclusion of these duties within, in the words of Lord Hodge, a 'self-contained regulatory code' provided the main argument in favour of this approach.

A similarly dismissive stance towards the effect of the MiFID I/MiFID II conduct of business regime in private law has also been taken by the German federal supreme court in private law matters (*Bundesgerichtshof*). Germany has implemented these directives in the financial supervision legislation, notably the Securities Trading Act (*Wertpapierhandelsgesetz* (WpHG)) 1994. Even though the MiFID I/MiFID II regulatory conduct of business rules aim to protect investors, the German court has effectively cut off the two main routes for aggrieved investors to claim damages for breach of these rules under the German Civil Code (*Bürgerliches Gesetzbuch* (BGB)). Not only has it denied the investors a more direct possibility to do so on the basis of liability in tort for breach of a statutory duty under § 823 II BGB, reasoning that such a claim would not fit into the private law system of liability,[85] the German court has also consistently precluded the investors from benefitting from the indirect effect (*Ausstrahlungswirkung*) of the conduct of business rules on the standard of care in contract.[86] In one of the cases decided by it, for instance, the investor claimed damages from the bank on the basis of § 280 BGB for breach of its regulatory duty under § 31d WpHG to disclose information about profit margins on the Lehman Brothers Treasure certificates sold to him in an advisory relationship.[87] According to the German court, however, the supervision conduct of business rules, such as the provision in question, are exclusively of a public law nature and, as such, do not influence the private law duties under § 280 BGB from which (pre-)contractual duties arise.[88] Therefore, the former cannot modify the meaning of the latter, limiting or expanding the contractual

83 *ibid* at [79]; see also *ibid* at [63]-[67] where the Scottish court refused to categorise the relationship between the parties as an advisory one in the light of MiFID I, given that the contractual terms explicitly disclaimed any responsibility of the bank for the provision of advice.

84 A similar approach has also been adopted by the courts of England and Wales in cases involving the mis-selling of interest rate hedging products to corporate retail investors. See for example *Thornbridge Ltd* v *Barclays Bank Plc* [2015] EWHC 3430 (QB); *Crestsign Ltd* v *(1) National Westminster Bank Plc; (2) The Royal Bank of Scotland Plc* [2014] EWHC 3034 (Ch), [2015] 2 All ER (Comm) 133. In more detail see D. Bugeja, *Reforming Corporate Retail Investor Protection: Regulating to Avert Mis-Selling* (Oxford: Hart Publishing, 2019) 140.

85 See for example BGH 19 February 2008, XI ZR 170/07, NJW 2008, 1734; BGH 22 June 2010, VI ZR 212/09, NJW 2010, 3651.

86 See for example BGH 27 September 2011, XI ZR 178/10, NJW-RR 2012, 43; BGH 17 September 2013, XI ZR 332/12, WM 2013, 1983; BGH 3 June 2014, XI ZR 147/12, no 35, NJW 2014, 2947.

87 BGH 17 September 2013, XI ZR 332/12, WM 2013, 1983.

88 *ibid*, nos 15-16, 20.

liability of investment advisers in private law.[89] This approach is clearly in line with the separation pattern of the relationship between EU and national private law.

While the investment services field provides probably the most striking illustrations of how courts in some jurisdictions shield traditional national private law from its regulatory counterpart with a European origin, it is not the only one where such responses can be observed. The signs of the separation model can also be traced, for example, in the field of unfair trading. Seeking to protect consumers against the traders' unfair conduct, the Unfair Commercial Practices Directive is generally considered to be an instance of EU private law. Yet, this EU measure of maximum harmonisation significantly diverges from the conventional, nation-state, pattern of private law, reflecting the traditional understanding of unfair commercial practices in many Member States as public law regulating the behaviour of market participants.[90] The directive specifies which trading practices can be considered misleading, aggressive, or otherwise unfair, but it does not confer individual rights or remedies on consumers who have become their victims. According to Article 3(2) of the directive, 'it is without prejudice to contract law and, in particular, to the rules on the validity, formation or effect of a contract'. The ability of aggrieved consumers to obtain redress, therefore, largely depends on national private law.

However, according to the European Commission's recent report on the fitness check of EU consumer and marketing law, the solutions currently adopted by the Member States vary greatly and do not always enable those who have suffered a detriment at the hands of rogue traders to obtain adequate redress.[91] In theory, the regulatory standards laid down in the Unfair Commercial Practices Directive could inform the national general contract law doctrines, such as mistake, fraud, or duress, thus allowing consumers to rescind a contact concluded as a result of an unfair commercial practice.[92] And yet, there is little national case law pointing to a clear link between these doctrines and unfair commercial practices.[93] This suggests that in many Member States, regulatory

89 cf G. Spindler, 'Grundlagen' in K. Langenbucher et al (eds), *Bankrechts-Kommentar* (Munich: C.H. Beck, 2016) no 28b; P. Buck-Heeb, 'Anlageberatung nach der MiFID II' (2014) *Zeitschrift für Bankrecht und Bankwirtschaft* 221, 223.

90 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* (London: Routledge, 2016) 173, 191.

91 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 D. Poelzig, 'Private and Public Enforcement of the UCP Directive? Sanctions and Remedies to Prevent Unfair Commercial Practices' in van Boom et al (eds), *ibid*, 235, 248; F.P. Patti, '"Fraud" and "Misleading Commercial Practices": Modernising the Law of Defects in Consent' (2016) 12 *European Review of Contract Law* 307, 312.

92 cf S. Whittaker, 'The Relationship of the Unfair Commercial Practices Directive to European and National Contract Laws' in S. Weatherill and U. Bernitz (eds), *The Regulation of Unfair Commercial Practices under EC Directive 2005/29: New Rules and New Techniques* (Oxford: Hart Publishing, 2007) 139; M. Durovic, *European Law on Unfair Commercial Practices and Contract Law* (Oxford: Hart Publishing, 2016); Patti, n 91 above.

93 European Commission, n 91 above, 93.

unfair trading law and traditional national private law have so far operated separately from each other. However, a profound shift in this relationship is underway, now that the Modernisation Directive,[94] which revises, among others, the Unfair Commercial Practices Directive, has been adopted. It envisages a minimum harmonisation of both contractual and non-contractual remedies and obliges Member States to provide consumers with the right to contract termination and the right to compensation for damages, at the least, thus strengthening the link between EU unfair trading regulation and national private law.

Mortgage credit is yet another area where the separation pattern can be observed in some jurisdictions, at least with respect to certain provisions of the Mortgage Credit Directive.[95] Apart from extensive information requirements, this EU measure lays down minimum harmonisation rules on responsible lending, but is silent on private law remedies in cases of breach. In particular, Article 18(5)(a) of the directive prohibits lenders from granting mortgage credit to consumers who are not creditworthy. In Dutch law, for instance, this rule can be found in Article 4:34(2) of the Financial Supervision Act (*Wet op het financieel toezicht*) 2006. Although this regulatory duty has existed in public law for some time even before the adoption of the Mortgage Credit Directive, it has so far not been accepted by the Dutch courts in private law. According to the well-established case law, the bank's duty of care to the prospective consumer borrower is limited to informing him or her about the outcome of the creditworthiness assessment and warning him or her about the risk involved in taking out a mortgage loan if the result is negative.[96] The Dutch supreme court in private law matters (*Hoge Raad*) explicitly refused to depart from this approach in *SNS* v *Stichting W&P*, the facts of which pre-dated the entry into force of the regulatory duty at issue.[97] This may be a sign of the Dutch court's reluctance to bring private law in line with more protective public law on the issue of what should be the legal consequences of the negative outcome of the creditworthiness test. While it remains to be seen how the Dutch court will rule if the regulatory duty to deny credit in such a case is in force at the time of conclusion of a contested credit agreement, the current separation between public and private law may have a peculiar effect in the remedial domain: the bank that has granted a mortgage loan to an uncreditworthy consumer may receive an administrative fine for non-compliance with public law, but may not be held liable in private law.

Furthermore, the separation model is not only manifest in national private law being unreceptive to EU regulatory private law norms as such, but also in

94 Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules, OJEU 2019 L 328/7.

95 Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010, OJEU 2014 L 60/34.

96 See for example *SNS* v *Stichting W&P* HR 16 June 2017, ECLI:NL:HR:2017:1107 at [4.2.9].

97 *ibid*.

the separation between judicial and administrative proceedings in which these norms are applied. In most fields of EU private law, irrespective of whether or not the 'public law' or 'private law' grammar has been used in the relevant EU measures, private law courts are not bound by prior decisions of administrative authorities or administrative courts, or even willing to consider such decisions in practice.[98] Accordingly, private litigants are commonly unable to rely on a decision of an administrative agency or a reviewing administrative court finding an infringement of an EU regulatory standard in order to establish a breach of a national private law norm for the purposes of an action for damages. Importantly, this is the case not only when the private law courts do not consider regulatory private law rules when interpreting and applying traditional private law, discussed above. Similar observations can also be made in relation to a more receptive stance of national legal systems towards EU private law, which will be considered below. After all, even when regulatory private law rules do have effect in traditional private law, the private law courts will typically make their own assessment of whether they have been violated.

Implications

As these examples illustrate, the separation model of the relationship between EU and national private law leads to the creation of two independent systems of legal rules concerning one and the same subject matter, such as the banks' duties of care towards customers or the traders' information obligations towards consumers. While one system is being maintained through private adjudication by private law courts (and possibly also ADR bodies that rely on the courts' case law), the other one is being operated by administrative agencies, such as financial regulators, consumer protection authorities or competition authorities, and administrative courts. This implies, for instance, that investment advisers may be required to ask their clients about their non-financial objectives, such as the impact of investment on sustainable development, under EU financial law,[99] but not under national private law. In the absence of a traditional private law duty to this effect, clients may not be able to hold the advisers liable for failure to integrate their sustainability preferences in the suitability assessment. Similarly, 'green claims' by traders creating the impression that their products or services are 'environmentally friendly', 'ecological' or 'sustainable' may be considered to be misleading under EU unfair trading law,[100] but not under national private

98 cf F. Cafaggi and P. Iamiceli, 'The Principles of Effectiveness, Proportionality and Dissuasiveness in the Enforcement of EU Consumer Law: The Impact of a Triad on the Choice of Civil Remedies and Administrative Sanctions' (2017) 25 *European Review of Private Law* 575, 611.

99 The European Commission has proposed to include a regulatory duty to this effect in MiFID II. See Proposal for Commission Delegated Regulation (EU) …/… of XXX amending Delegated Regulation (EU) 2017/565 as regards the integration of sustainability factors, risks and preferences into certain organisational requirements and operating conditions for investment firms.

100 To enhance the effectiveness of the Unfair Commercial Practices Directive in combatting such claims, the European Commission updated the guidance on the Directive' application in 2016.

law. Consequently, consumers may not always avoid the respective contracts for mistake or misrepresentation. Moreover, where a particular EU measure prohibits a certain transaction, such as the provision of a mortgage loan to an uncreditworthy consumer, this prohibition may not have any effect in national private law.

Obviously, such a two-tier system of rules does not increase legal certainty or allow the EU to approximate national laws to any significant extent. A high degree of legal certainty and uniformity can only be achieved in the regulatory domain subjected to maximum harmonisation at EU level. National private law in that domain, however, continues to develop wholly independently from the harmonised regulatory regime. In substance, therefore, the separation model ensures the absolute autonomy of traditional private law from EU market regulation, strongly promoting diversity and allowing private adjudicators, at least in theory, to realise interpersonal justice and fairness in individual cases, being unconstrained by instrumentalist considerations underlying EU harmonisation measures.

At the same time, as markets are becoming more and more complex in a globalised world, judges and other adjudicators increasingly face difficulties in appreciating this complexity in private litigation beyond the nation-state. Although EU market regulation is not perfect either, it typically accumulates a considerable body of expert knowledge concerning the peculiarities of particular products or services, trading practices, consumer/investor behaviour, as well as the effects of individual transactions on market functioning as a whole and other public values. The separation pattern, however, does not enable national private law to accommodate this regulatory expertise within its ambit and contribute to the pursuit of policy objectives. Ignoring the regulatory dimension altogether may result in the court's failure to appreciate the individual client's knowledge and experience with respect to a particular service or product, or the seriousness of the risks involved therein, and thus to ensure individual fairness in a concrete case. For example, in the light of the EU regulatory system of investor protection, one may question whether Lord Hodge was right in rejecting the existence of the bank's common law duty of care towards a small property developer. Similarly, strict separation between judicial and administrative proceedings may not allow weaker market participants, who often face evidential difficulties in private litigation, to effectively exercise their civil liability rights, and hence complement the public enforcement of EU private law. Furthermore, in the absence of any flow of knowledge from EU market regulation to traditional private law, a private law court may fail to adequately assess the effects of its decision in an individual case on the functioning of a specific market, notably in the financial sector.[101]

See European Commission, *Guidance on the implementation/application of Directive 2005/29/EC on Unfair Commercial Practices* SWD(2016) 163 final, s 5.1.

101 cf J.B. Golden, 'The Courts, the Financial Crisis and Systemic Risk' (2009) 4 *Capital Markets Law Journal* 141.

SUBSTITUTION

Characteristics

On the opposite side of the spectrum, there is the substitution model of the relationship between EU market regulation and national private law. At its core lies the shift in the governance of private law relationships from national level to EU level whereby European regulatory private law rules on a particular subject matter effectively replace the pre-existing national private law rules. Private law courts are bound by regulatory private law norms with a European origin, and in some instances also by the decisions of administrative agencies enforcing these norms. As discussed below, this model manifests itself in different forms in the context of both public and private law-oriented EU measures. To bring domestic law in conformity with EU private law, national legislators and courts may be required to repeal or modify the existing private law. In a case of maximum harmonisation, national private law may not impose stricter rules on regulated entities above the harmonised EU private law norms. Insofar as the pre-existing national private law norms remain in force, regulatory private law norms emanating from EU law will trump them in cases of conflict. Compliance with regulatory standards will normally pre-empt the breach of traditional private law norms. In this scenario, therefore, EU private law has a direct bearing on national private law.[102]

Manifestations

The substitution of national private law by EU private law along these lines is particularly noticeable in those areas where the EU has sought harmonisation through private law-oriented measures, such as the Unfair Contract Terms Directive. This directive adopted in 1993 aims to ensure the minimum harmonisation of national laws relating to unfair terms in consumer contracts so as to protect the consumer against the abuse of power by the seller or supplier. Even though, like other EU measures in this field, the Unfair Contract Terms Directive fits into the general objective of completing the internal market, it has a strong interpersonal dimension. Particularly in the aftermath of the financial crisis, this dimension has been further strengthened by the CJEU, which has effectively regulated not only consumer contracts, but also national procedural autonomy, stepping beyond what the EU legislator was able to deliver.[103] In

102 cf Micklitz's 'intrusion and substitution' model in Micklitz, n 13 above, 7, linking it to the idea of the EU regulatory private law principles and rules for each specific sector – notably telecommunications, energy, financial services, and transport – being a 'self-sufficient order', which is largely distinct and independent from a national private legal order and which 'overrules' the latter in practice. In contrast, my account tends to emphasise continued interdependence between EU and national private law within and across specific sectors, focusing on the traditional national private law's response to EU market regulation.

103 O. Gerstenberg, 'Constitutional Reasoning in Private Law: The Role of the CJEU in Adjudicating Unfair Terms in Consumer Contracts' (2015) 21 *European Law Journal* 599.

its judgement in *Aziz*,[104] for instance, the Court embarked upon developing an autonomous EU concept of 'good faith', which requires national courts to balance the interests of the parties in an individual case when assessing whether a particular pre-formulated term causes a 'significant imbalance' in the contract to the detriment of the consumer.[105] Further, to protect consumers against the irreversible loss of a home, the CJEU established a link between declaratory and enforcement mortgage proceedings, pointing to the need for the national court – which has jurisdiction to assess the fairness of a contract term on which the creditor's right to seek enforcement against the consumer debtor is based – to grant interim relief capable of staying the enforcement proceedings.[106]

The Unfair Contract Terms Directive can therefore be properly regarded as, to use the words of Stephen Weatherill, 'the first incursion of EU law into the heartland of national contract law thinking'.[107] The regulatory regime established by this directive has become an integral part of national private law, profoundly shaping the development of the latter with respect to the control of unfair terms. In some legal systems, such as Germany, the Unfair Contract Terms Directive, along with many other 'private law'-coloured EU measures, was integrated into a civil code. The transposition of the directive did not bring about a radical change in German contract law. After all, this EU measure builds upon the pre-existing national private law rules on unfair contract terms control, notably the German Standard Terms of Business Act 1976 (*Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen* (AGBG)),[108] which was included in the BGB in 2002.[109] This special statute in turn 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. Yet, to avoid conflicts with the newly adopted EU regime, Germany modified some of its provisions on consumer contracts, which was done by adding a specific provision to this effect – § 24a AGBGB (now § 310(3) BGB). Further, with this implementation, domestic private law applicable to such contracts came within the ambit of EU law as interpreted by the CJEU, thus opening up the way for further changes at national level, both in substantive and procedural law, in response to the developments at the EU level.

In contrast, other legal systems transposed the Unfair Contract Terms Directive in self-standing statutory instruments that exist alongside general private law. For instance, the UK included the provisions implementing the directive in the Consumer Rights Act 2015 (CRA 2015) which incorporates the rules

104 Case C-415/11 *Mohamed Aziz* v *Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)* ECLI:EU:C:2013:164.

105 *Aziz ibid* at [69], with reference to Recital 16 in the preamble to the Unfair Contract Terms Directive. cf 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, 790.

106 *Aziz ibid* at [64].

107 S. Weatherill, *EU Consumer Law and Policy* (Cheltenham: Edward Elgar, 2013) 145.

108 See Micklitz, n 90 above, 174.

109 This was the result of the sweeping reform of the BGB under the Modernisation of the Law of Obligations Act (*Gesetz zur Modernisierung des Schuldrechts*) 2001, which led, in particular, to the integration of a number of special statutes implementing the EU measures in the field of private law. See R. Zimmermann, 'Consumer Contract Law and General Contract Law: The German Experience' (2005) 58 *Current Legal Problems* 415.

relating to unfair contract terms previously found in the Unfair Contract Terms Act 1977 and the Unfair Terms in Consumer Contracts Regulations 1999.[110] The CRA 2015 does not formally replace the protection offered by the common law, but operates alongside it as *lex specialis*, providing an additional layer of rules on unfair terms control in consumer contracts. In cases of conflict, however, the statutory rules emanating from EU law will override the common law rules. For example, section 71(2) of the CRA 2015 obliges the UK courts to consider whether a term of a consumer contract is unfair even if none of the parties to the proceedings has raised that issue, thus codifying the case law of the CJEU on the *ex officio* application of the Unfair Contract Terms Directive.[111] In essence, this procedural rule substitutes the otherwise applicable common law model of civil procedure under which the parties themselves present legal arguments in their favour to a neutral judge. In the end, therefore, EU private law on unfair terms control gains the upper hand over national private law in this area not only when regulatory law is integrated into the fabric of general private law, as in Germany, but also when the two coexist side by side within the domestic system of private law, as in the UK.[112]

Similar implementation strategies have been adopted by the Member States with respect to another private law-oriented EU measure – the Consumer Sales Directive 1999.[113] This minimum harmonisation directive – which will be replaced by the maximum harmonisation Consumer Sales Directive 2019[114] – aims to approximate not only the requirements for conformity of goods delivered by the seller, but also the buyer's contractual remedies in the case of non-conforming goods. In particular, the Consumer Sales Directive 1999 provides the buyer with the right to repair or replacement of a defective good. The latter has become an integral part of national private law systems, equipping consumers with specific remedies for non-conformity in relation to the general contract law right to (specific) performance. It is true that these European remedies do not always fit well with traditional private law remedies, such as the consumer's right to reject the good under English law, and that as long as the two continue to exist alongside each other, only partial harmonisation of national systems of remedies may be realised.[115] Yet, the nature and level of consumer protection in that part of national private law which falls within the scope of this directive is determined by EU law. This is the case, for instance, with the relationship between repair and replacement. According to the Consumer Sales Directive 1999, the buyer may choose between these two remedies, but the seller may refuse either of them if it would be impossible

110 For a critical assessment see for example P. Giliker, 'The Consumer Rights Act 2015 – A Bastion of European Consumer Rights?' (2017) 37 *Legal Studies* 78, 89.

111 For example Case C-168/05 *Mostaza Claro* v *Centro Movil Milenium SL* ECLI:EU:C:2006:675 at [38].

112 It remains to be seen what impact the Unfair Contract Terms Directive as interpreted by the CJEU will have post-Brexit. See also Giliker, n 110 above, 100.

113 Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, OJEC 1999 L 171/12.

114 Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC, OJEU 2019 L 136/28.

115 cf Giliker, n 110 above, 87.

or disproportionate; repair or replacement is considered to be disproportionate if it imposes 'unreasonable costs' on the seller.[116] A similar standard aimed at striking a balance between the seller's and the buyer's interests has also been included in the Consumer Sales Directive 2019.[117] The integration of this EU private law rule into a national private law system – into either a civil code or a separate consumer protection act – has major practical implications for the ability of that system to shape the relationship between repair and replacement. National private law, for example, may not prioritise repair over replacement so as to protect the interests of the buyer while at the same time fostering sustainable consumption.[118] Such a hierarchy of remedies would be incompatible with EU law, even though the recitals to the Consumer Sales Directive 2019 mention that '[e]nabling consumers to require repair should encourage sustainable consumption and could contribute to greater durability of products'.[119]

Another area where the substitution pattern can be observed is payment services. Initially, payment services were predominantly governed by the general contract and consumer law of the Member States, being subject to a patchwork of various rules. The creation of the Single Euro Payments Area, however, has led to an exponential growth of EU legislation on payment services, notably PSD2. This directive was adopted in 2015 as a measure of maximum harmonisation to replace its predecessor, PSD1,[120] with a view to fostering competition and innovation in the payments sector, while at the same time ensuring a high level of consumer protection. Apart from more public law-oriented provisions governing the authorisation and supervision of payment service providers, PSD2 also includes a strong private law component composed of the providers' pre-contractual and contractual obligations towards payment service users, as well as detailed liability rules governing the allocation of losses resulting from fraud, forgery, and error between providers and users, and between the providers themselves.

These 'private law'-coloured substantive and remedial rules have made their way to national private law, even though PSD2 also requires Member States to ensure their administrative enforcement and, like all EU measures in the field of private law, is underpinned by the instrumentalist rationality. Given the entanglement between public and private law in the area of payment services, some Member States have experimented with novel transposition techniques to link these two domains. The way in which PSD2 was implemented in the Netherlands, for instance, illustrates this point. While the directive's private law component was for the most part transposed in Title 7a of Book 7 of the Dutch Civil Code (*Burgelijk Wetboek*), detailed information requirements were incorporated in Article 4:22 of the Financial Supervision Act (*Wet op het financieel toezicht*)

116 Consumer Sales Directive 1999, Art 3(3).
117 Consumer Sales Directive 2019, Art 13(2).
118 cf V. Mak and E. Terryn, 'Circular Economy and Consumer Protection: The Consumer as a Citizen and the Limits of Empowerment through Consumer Law' (2020) 43 *Journal of Consumer Policy* 227, 235.
119 Consumer Sales Directive 2019, Recital 48.
120 Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and repealing Directive 97/5/EC, OJEU 2007 L 319/1.

2006[121] and thus translated into substantive financial supervision standards of a public law nature. At the same time, by making cross-references to these standards in Articles 516, 517, and 526 of the Civil Code, the Dutch legislator also ensured that the information rules of PSD2 would not only be relevant from a supervisory perspective, but that they would also govern the private law relationship between payment service providers and users and could be enforced through the private law means.[122] A marked orientation of the parts of PSD1 and PSD2 towards private law appears to have prompted the Dutch legislator to adopt this solution.[123]

While in the examples considered above the substitution model of the relationship between EU and national private law is dictated by the 'private law' grammar of the relevant EU measures, this pattern may also arise in the context of the public law-oriented EU measures. Such an outcome can be achieved if private law courts or ADR bodies, when applying traditional private law norms in individual cases, unconditionally rely on regulatory standards of a public law nature. In particular, this is the case when the courts are obliged to adhere to decisions of administrative agencies or courts establishing a violation of regulatory standards. While, as noted above, the instances where such an approach has been adopted are still rare, a telling illustration is offered by EU competition law. The latter is enforced by the European Commission, national competition authorities, and national courts (including private law courts). According to the Antitrust Damages Directive,[124] 'Member States shall ensure that an infringement of competition law found by a final decision of a national competition authority or by a review court is deemed to be irrefutably established for the purposes of an action for damages brought before their national courts under Articles 101 or 102 TFEU or under national competition law'.[125] Thus, when deciding whether an undertaking is liable for breach of EU competition law to consumers, other undertakings or public authorities, the private law courts are legally bound by the final decisions of the European Commission, national competition authorities, and reviewing administrative courts. By linking civil and administrative proceedings in this way, the Antitrust Damages Directive is designed to promote private enforcement, and thus strengthen the enforcement of EU competition law more generally.[126]

121 This provision is further elaborated in the Business Conduct Supervision (Financial Enterprises) Decree 2006 (*Besluit Gedragstoezicht financiële ondernemingen Wft*), Arts 59b-59g.

122 Conversely, those provisions of PSD II that were implemented in the Dutch Civil Code can be enforced through administrative law means. This outcome has been achieved through the inclusion of a special provision – Article 4:25d – into the Financial Supervision Act 2006, according to which a payment service provider must comply with Title 7B of Book 7 of the Civil Code.

123 Implementatiewet herziene richtlijn betaaldiensten: Memorie van Toelichting, *Kamerstukken* 34813, n 3, 14-15.

124 Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJEU 2014 L 349/1.

125 Antitrust Damages Directive, Art 9(1).

126 See for example J. Drexl, 'The Interaction between Private and Public Enforcement in European Competition Law' in H.-W. Micklitz and A. Wechsler (eds), *The Transformation of Enforcement: European Economic Law in a Global Perspective* (Oxford: Hart Publishing, 2016) 136.

Implications

Accordingly, the substitution model entails that EU private law is being absorbed into the fabric of national private law, even though the ways of such absorption and the degree of harmonisation achieved through it vary across different legal systems and areas. EU market regulation on a particular subject matter comes to determine the normative content of national private law relating thereto, effectively supplanting the latter's pre-existing norms and restricting the latter's ability to further develop according to its own logic. Thus, national private law no longer has the upper hand over individual rights and obligations in a relationship regulated by EU private law. This is particularly evident in the case of 'maximum' regulatory standards which preclude national private law from imposing stricter standards, both *ex ante* and *ex post*. However, minimum harmonisation, notably in the remedial domain, may sometimes equally leave national legislators and courts with little room for manoeuvre. Furthermore, the substitution pattern is reinforced, irrespective of the harmonisation degree of the relevant EU measure, where private law courts are bound by the decisions of administrative authorities and courts finding an infringement of a regulatory private law standard.

By securing the dominance of EU private law in the national private law domain, the substitution model fosters the development of a single set of rules in the areas subjected to harmonisation. It thus enables the EU to approximate legal norms pertaining to a particular private law relationship across the Union to a greater or lesser degree. This in turn serves legal certainty. Further, the substitution pattern allows national private law to pursue interpersonal justice in the areas regulated by the EU, while at the same time contributing to the realisation of EU policy goals. After all, when deciding individual cases based on the individual rights and remedies emanating from EU private law, private law courts accommodate the body of regulatory knowledge in national private law discourse. This knowledge may concern, for example, the risks involved in a certain product or service as well as the ability of a certain type of consumer or investor to cope with them. In addition, the substitution of the private law court's assessment of whether there has been a breach of a particular regulatory standard by that of an administrative agency or court generally improves the procedural position of weaker litigants in civil proceedings, thus facilitating the private enforcement of EU private law.

At the same time, the exclusive reliance of traditional private law on regulatory private law and its administrative enforcement may come at a price. In particular, when applying the *ex ante* regulatory private law standards 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 the bank to provide a warning in a *standardised* format.[127] A high degree of dependence on the EU regulatory system of protection, however imperfect and inflexible it may prove to be, may also preclude national private law from striking a different balance between the public and private interests involved in a particular private law relationship. In the case of consumer sales, for example, national legislators and courts may not adjust the private law system of remedies for non-conforming goods subjected to – initially minimum and now maximum – EU harmonisation in response to growing concerns about sustainability. The inability of national private law to address non-typical problems faced by real individuals as well as important public concerns in turn may come at a heavy price in terms of the development of both national and EU private law. After all, in the absence of any space for diversity in standard-setting, the substitution pattern implies a one-way learning process: only national private law learns from EU regulatory private law, but not the other way around. If private law is no longer able to develop by trial and error and unveil new instances of injustice, an important source of practical wisdom for the development of EU private law – and for identifying the common good in the process of European integration – could be lost.

COMPLEMENTARITY

Characteristics

Somewhere between the two extremes – the separation between EU and national private law and the substitution of the latter by the former – we find the complementarity model. Like the separation model, this pattern can typically be observed in those areas where the EU has adopted the 'public law'-coloured harmonisation measures, which in turn have been implemented in the public law frameworks by the Member States. Regulatory private law and traditional private law rules relating to the same subject matter thus formally exist alongside each other. Unlike the separation model, however, the complementarity between EU market regulation and national private law implies that the former influences the latter in practice. Even though private adjudicators are formally not bound by the public law rules implementing EU private law or the related findings in administrative proceedings, they take them into account when deciding individual cases. In this way, EU regulatory private law complements the normative content of national private law, typically setting a minimum standard of protection for private individuals. At the same time, the traditional private law discourse remains autonomous from the regulatory discourse. The well-established concepts of private law, such as good faith, mistake, or duties of care in contract and tort, are not hollowed out, but rather function as mediators between these two discourses. When deciding individual cases, therefore, private

127 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].

law courts do not simply copy and paste regulatory norms emanating from EU law or the findings of their infringement in administrative proceedings into national private law.

Manifestations

The interplay between product safety and product liability provides one of the oldest examples of the complementarity pattern in the field of EU private law. The EU product safety standards are laid down in GPSD, which establishes a horizontal legal framework for the safety of consumer products, as well as in sectoral EU measures for specific products.[128] These measures are public law-oriented, relying on administrative agencies to ensure product safety and equipping them with a broad range of market surveillance powers.[129] As mentioned above, the general requirements of product safety contained in the EU measures are further elaborated by European standardisation organisations which set technical standards. These harmonised European standards are transposed in national standards by national standardisation organisations, such as the British Standards Institute, the French Association for Standardisation (*Association Française de Normalisation*), or the German Institute for Standardisation (*Deutsches Institut für Normung*). GPSD distinguishes between conformity with specific rules of national law, in which case the product is 'deemed to be safe', and conformity with voluntary national standards transposing harmonised European standards, in which case the product 'shall be presumed safe'.[130]

In contrast, the Product Liability Directive is private law-oriented. As we have already noted, this EU measure provides for the producer's strict liability for damage caused by defective goods, adding another layer of protection to the pre-existing national civil liability regimes. Even though the harmonised product safety and product liability regimes both essentially aim to protect consumers against unsafe products, there has hardly been any coordination between the two at the EU level so far.[131] In particular, the concept of defectiveness under the Product Liability Directive is not attuned to the concept of safety under GPSD. Importantly, however, one can observe a closer relationship between product safety regulation and tort law at national level. Private law courts across Europe commonly consider product safety regulations and technical standards when deciding cases under national tort law.[132] In particular, the product safety

128 For an overview see for example G. Howells, 'Product Safety – a Model for EU Legislation and Reform' in K. Purnhagen and P. Rott (eds), *Varieties of European Economic Law and Regulation* (Vienna: Springer, 2014) 525.

129 See for example GPSD, Art 8. See also Regulation (EC) No 765/2008 of the European Parliament and of the Council of 9 July 2008 setting out the requirements for accreditation and market surveillance relating to the marketing of products and repealing Regulation (EEC) No 339/93, ch 3.

130 GPSD, Art 3(2). See also GPSD, Art 3(3).

131 cf F. Cafaggi, 'A Coordinated Approach to Regulation and Civil Liability in European Law: Rethinking Institutional Complementarities' in F. Cafaggi (ed), *The Institutional Framework of European Private Law* (Oxford: OUP, 2006) 191.

132 See for example G. Spindler, 'Interaction between Product Liability and Regulation at the European Level' in F. Cafaggi and H. Muir Watt (eds), *The Regulatory Function of European Private*

standards enshrined in national public laws and specified by private technical standards are typically qualified as minimum standards in tort law the violation of which constitutes negligence. Further, when assessing whether a product is defective under the strict liability regime with a European origin, private law courts tend to make use of private standards in order to determine the level of safety that the consumer may expect.[133]

At the same time, however, private law courts are not bound by product safety regulations and private technical standards. This is also in line with the decision of the CJEU in *James Elliott* where the Court has made it clear that harmonised technical standards aim to ensure unimpeded market access and as such are not binding on a national court seized of a dispute concerning a contract governed by national private law.[134] What the private law courts tend to do in practice is to make an independent assessment of the appropriateness of privately set technical standards to specify the minimum standards in private law.[135] This allows the courts to scrutinise the quality of technical standards given the recent developments in science and technology as well as the procedure that has led to their creation, and to impose additional obligations on producers in the circumstances of an individual case. In particular, the judge may do so if consumer organisations have not been sufficiently involved in standardisation. Therefore, even if the producer proves that its product complies with technical standards, it may still be held liable in private law. The narrowly formulated regulatory compliance defence under Article 7(d) of the Product Liability Directive does not create obstacles thereto, exonerating the producer from strict liability only when mandatory regulations issued by a public authority have required the product to be designed defectively. The interaction between product safety regulation and civil liability at national level can thus be summarised as follows. General product safety standards of a public law nature denote the minimum level of product safety, private standards specify them, and private law fine-tunes the producers' obligations to the circumstances of each individual case.

A similar approach has also been advocated by the Principles of European Tort Law (PETL).[136] The latter are intended to serve as a common framework for the further development of national tort law and the adoption of EU legislation in this field. According to Article 4:102(3) of PETL, rules that prescribe or forbid certain conduct should be considered when establishing the required standard of conduct in tort. In addition, Article 7:101(1) of PETL provides that liability can be excluded if and to the extent that the actor acted legitimately by virtue of lawful authority, such as a licence. At the same time, Article 7:101(2) of PETL makes it clear that whether liability is excluded ultimately depends upon the weight of this justification, on the one hand, and the conditions of liability, on the other. Under PETL, therefore, tort law remains

Law (Cheltenham: Edward Elgar, 2009) 243, 248; M. Lee, 'Safety, Regulation and Tort: Fault in Context' (2011) 74 MLR 555, 562.

133 Spindler, *ibid*, 250.

134 *James Elliott* n 53 above at [53] and [61].

135 See for example Spindler, n 132 above, 250; Lee, n 132 above, 572.

136 European Group on Tort Law, *Principles of European Tort Law* (Vienna: Springer, 2005).

decisive in determining the standard of care in the particular circumstances of a case.

Investment services are another area subjected to EU harmonisation where the complementarity between EU and national private law can be observed in some legal systems. This is the case, for example, in the Netherlands where private law courts generally consider the regulatory conduct of business rules for investment firms transposed in Dutch financial supervision law when assessing whether a firm has observed its private law duties towards a particular client. This does not preclude the private law courts, however, from imposing stricter duties on investment firms in contract or tort.[137] The Dutch supreme court in private law matters has made this clear in *Levob* v *B*, *De Treek* v *Dexia* and *Stichting Gedupeerden Spaarconstructie* v *Aegon*.[138] In these cases, the facts of which pre-date the MiFID I's entry into force, the banks submitted that at the time the investment service contract at issue had been concluded, the financial supervision legislation then in force did not contain the duty to know their clients. According to the banks, therefore, they could expect that by complying with the financial supervision rules, they had also acted in conformity with their duty of care towards the clients in private law. In all three cases, however, this line of reasoning was unequivocally rejected by the Dutch court. The latter held that the private law duties of care can go further than the public law duties of care contained in the financial supervision legislation. In so doing, it followed the opinion of the Deputy Procurator General who pointed to the existence of a two-tier system of duties of care for financial firms in Dutch law – public and private law duties.[139] In her view, while the public law duties influence the private law duties, the former do not determine the latter. The Dutch court has confirmed this stance in its more recent case law on the liability of banks when providing credit.[140] Under Dutch law, therefore, an aggrieved client may invoke regulatory conduct of business rules in support of his or her private law claim. But the defendant financial firm cannot successfully contend that it has discharged its duty of care in private law for the sole reason that it has complied with the corresponding regulatory duty.[141]

137 This idea of complementarity between the public law-oriented EU financial regulation and private law thus does not support the view expressed by some authors that because MiFID I and MiFID II provide for the maximum harmonisation of regulatory conduct of business rules for investment firms, Member States are not allowed to maintain or introduce stricter duties for such firms in national private law. See for example P.O. Mülbert, 'The Eclipse of Contract Law in the Investment Firm-Client-Relationship' in G. Ferrarini and E. Wymeersch (eds), *Investor Protection in Europe: Corporate Law Making, the MiFID and Beyond* (Oxford: OUP, 2006) 299, 318.

138 *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.

139 Conclusion Deputy Procurator General De Vries Lentsch-Kostense in *Levob* v *B*, *De Treek* v *Dexia* and *Stichting Gedupeerden Spaarconstructie* v *Aegon* 13 February 2009, ECLI:NL:PHR:2009:BH2822 at [3.21].

140 HR 14 December 2018, ECLI:NL:HR:2018:2298 at [3.4.2]; HR 16 June 2017, ECLI:NL:HR:2017:1107 at [4.2.5]. See also M.W. Wallinga, *EU Investor Protection Regulation and Liability for Investment Losses* (Vienna: Springer, 2020) 214.

141 A similar stance on the relationship between financial supervision rules and private law duties of care has also been adopted in England and Wales. See for example *Gorham & Others* v *British Telecommunications Limited plc* [2000] EWCA Civ 234, which has strong resonances with the

Furthermore, the complementarity model is manifest in the emerging links between civil and administrative proceedings designed to facilitate private enforcement in certain areas regulated by the EU. In contrast to the substitution of national private law by EU market regulation in this context, discussed above, the complementarity between the two in the remedial domain does not preclude private law courts from making their own assessment of whether a regulatory standard has been breached, but merely assists the parties in establishing such breach. This model has been adopted, for example, by the Representative Actions Directive[142] which provides for an EU collective redress mechanism for consumers. In particular, this directive obliges Member States to ensure that the final decision of an administrative authority of any Member State concerning the existence of an infringement harming collective consumers interests can be used by all parties as evidence in the context of any other action before their national courts to seek redress measures against the same trader for the same practice.[143] The directive also clarifies that '[i]n line with the independence of the judiciary and the free evaluation of evidence, this should be without prejudice to national law on evaluation of evidence'.[144]

Examples of the complementarity between administrative and judicial proceedings along similar lines can also be found in national legal systems. For instance, following the conventional division of labour between public and private enforcement, the French financial watchdog, *Autorité des marchés financiers* (*AMF*), is typically not involved in awarding compensation or otherwise resolving problems arising out of private law relationships between financial institutions and their clients.[145] Therefore, if the clients have suffered losses, they need to turn to private adjudication to obtain compensation. At the same time, French law allows the financial regulator to transmit the files of its administrative investigation to the private law court at the request of the judge hearing a civil lawsuit if these documents are relevant for resolving it.[146] Accordingly, aggrieved litigants may benefit from the information obtained in the course of public supervision.

so-called 'hybrid model' of the relationship between regulatory duties and common law duties outlined by the Law Commission of England and Wales. See Law Commission, *Fiduciary Duties and Regulatory Rule* LawCom No 236 (December 1995) s 5.4.23; see also J. Black, 'Law and Regulation: The Case of Finance' in Parker et al (eds), n 17 above, 33, 45. However, in cases where the contract disclaims any responsibility of the investment firm for the provision of investment advice, the doctrine of contractual estoppel may stand in the way of developing complementarity between financial regulation and common law. See references at n 84 above.

142 Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC, OJEU 2020 L 409/1.

143 Representative Actions Directive, Art 15. Interestingly, the initial proposal for this directive contained a provision similar the Antitrust Damages Directive, Art 9(1), making the private law courts legally bound by the decisions of administrative authorities, in line with the substitution model discussed above. See European Commission, Proposal for a Directive of the European Parliament and of the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC, COM (2018) 184 final, Art 10(1).

144 Representative Actions Directive, Recital 64.

145 Y. Svetiev and A. Ottow, 'Financial Supervision in the Interstices between Private and Public Law' (2014) 10 *European Review of Contract Law* 496, 527.

146 Loi n° 2014-344 du 17 mars 2014 relative à law consummation, art L 621-12-1.

Implications

The above discussion shows that while the complementarity model preserves the autonomy of national private law from EU regulatory private law, this autonomy is not absolute, unlike in the case of the separation model. Even though traditional and regulatory private law rules on a particular subject matter formally continue to exist alongside each other, they actually have a dialogue with each other which transcends the public/private divide. In fostering this dialogue, the complementarity model opens up space for the effect in national private law of substantive regulatory standards with a European origin *prescribing* certain conduct, such as product safety standards, information requirements, or duties to investigate, as well as the related findings in administrative proceedings. While this effect ensures the baseline level of regulatory protection in private law and fosters private enforcement, it does not preclude private law courts from imposing stricter standards on regulated entities in contract or tort, even where the relevant EU measure lays down a maximum harmonisation regime. At the same time, however, there is hardly any room for complementarity in those cases where EU market regulation *prohibits* certain conduct, as exemplified by the EU ban on the provision of mortgage loans to uncreditworthy consumers. In essence, such regulatory norms, irrespective of the degree of their harmonisation by the EU, impose the highest standard of protection, ruling out space for diversity in national private law. The effect of regulatory prohibitions in private law relationships, therefore, would rather amount to the substitution of national private law – which often resorts to less intrusive techniques to ensure the informed consent of the weaker party – by EU private law.

Nonetheless, in the case of prescriptive regulatory standards where the complementarity model is feasible, this model has considerable potential to reconcile the competing values involved in the Europeanisation of national private law systems. The complementarity model enables national private law not only to realise interpersonal justice, but also to accommodate the regulatory expertise within its ambit and thus contribute to the realisation of EU policy goals. A complementary relationship between EU investor protection regulation and national private law, for instance, could prompt judge-made modernisation of traditional private law concepts,[147] and thus strengthen investor protection in private law. In particular, in the light of the MiFID II client classification and conduct of business rules, private law courts could extend the protection commonly enjoyed in private law by natural persons investing their savings to small- and medium-sized enterprises, such as a property developer in the case of *Grant Estates Ltd* v *The Royal Bank of Scotland Plc*, discussed above. Similarly, the courts could accommodate the investment advisers' regulatory duty to inquire about their clients' non-financial objectives into the traditional private law standard of care, thus assisting in the EU's effort to achieve sustainable development. Furthermore, in promoting the private adjudicators' reliance on EU regulatory private law rules, the complementarity model serves legal certainty, albeit not to

147 cf M. Andenas, 'Commercial Law, Investor Protection, EU and Domestic Law' in M. Heidemann and J. Lee (eds), *The Future of the Commercial Contract in Scholarship and Law Reform: European and Comparative Perspective* (Vienna: Springer, 2018) 437, 467.

the same extent as the substitution model, and fosters the minimum harmonisation of substantive private law rules in addition to the minimum or maximum harmonisation of their public law counterparts.

Yet, in contrast to the substitution model, national private law firmly retains its ability to raise the standard of protection *ex post* in response to the particular circumstances of a concrete case and realise individual fairness where the *ex ante* regulation based on the normative typifications of market participants has failed. This implies, for example, that if the fully automated vehicle that has been manufactured in full compliance with the applicable public and private product safety standards nonetheless causes an accident, the manufacturer can potentially still be held liable for negligence in tort.[148] Similarly, the investment firm that has provided the retail investor with all information about the particular 'green' bonds required by applicable regulatory standards may nonetheless face civil liability for breach of its private law duty of care. In this way, the complementarity model reduces the risk of unfair *ex post* outcomes of private adjudication, exacerbated in certain regulated markets by a push towards maximum harmonisation and centralisation at EU level. The ability of private law to address individual instances of injustice in turn allows it to develop by trial and error and to facilitate a mutual learning process between EU and national private law – a process of error-detection and correction in response to concrete problems at the national level, in line with the experimentalist perspective on EU private law making. In terms of the balance between uniformity and diversity, therefore, the complementarity model supports what can be called 'ordered legal pluralism' in the absence of a formal hierarchy between public law rules implementing EU private law and traditional national private law rules.[149]

CONCLUDING REMARKS

This article has revisited the tale of islands and the ocean in a multi-level and heterarchical EU legal order, focusing on how the ocean of relational national private law today responds and should respond to the growing islands of instrumentalist EU market regulation. It has identified three ways in which the relationship between EU and national private law relating to the same subject matter could be conceived, each involving trade-offs between the pan-European common good and interpersonal justice, between legal certainty and individual fairness, and between uniformity and diversity.

First, traditional national private law rules and regulatory private law rules with a European origin may exist separately from each other. In this scenario,

148 On the liability issues relating to automated cars more generally, see for example Howells, n 72 above, 160.

149 The meaning in which the term 'ordered legal pluralism' is used here thus differs from the one in which it has been typically used in the literature, that is, to refer to ordering mechanisms that are based on a formal hierarchy between law makers or legal orders in the context of European private law making. See for example R. Michaels 'Why We Have No Theory of European Private Law Pluralism' in L. Niglia (ed), *Pluralism and European Private Law* (Oxford: Hart Publishing, 2013) 139, 158. See also Mak, n 37 above, 202.

the ocean waters are cut off from the island water sources. With the water cycle between the two being disrupted, the separation model does not serve well in advancing the common good, increasing legal certainty or attaining a meaningful level of harmonisation of laws in the EU. Instead, this model focuses on interpersonal justice and individual fairness and strongly promotes diversity. However, in the absence of any flow of water from the islands into the ocean, the latter may ultimately not only jeopardise the pursuit of EU policy goals, but also fail to realise individual fairness.

Second, EU regulatory private law rules, in the form of 'minimum' or 'maximum' standards, may substitute national private law norms. Here the islands effectively reclaim land from the ocean. The substitution model thus seeks to combine interpersonal justice with public concerns, serving legal certainty and allowing the EU to approximate national laws to a significant degree. At the same time, as the land reclamation expands farther and farther into the ocean, individual fairness and learning from the difference risk to be sacrificed on the altar of EU harmonisation activity in the name of market integration.

Third, somewhere between these two extremes, one can find the complementarity model. In this scenario, even though regulatory private law and traditional private law rules formally exist alongside each other, in practice the former complement the latter. By allowing island streams to flow into the ocean while protecting the marine environment, the complementarity model tends to accommodate a balance between policy considerations and interpersonal justice, between legal certainty and individual fairness, and between uniformity and diversity. But in so doing, this model cannot achieve the same level of legal certainty and harmonisation as the substitution model, leaving more room for individual fairness and diversity.

These three models of the relationship between EU and national private law can be traced in different national legal systems across a variety of areas that have been subjected to EU level harmonisation, permeating both substantive and remedial domains of private law. They transcend the boundaries of specific sectors of the economy, such as consumer goods or financial services, providing an analytical framework for assessing the relationship between EU market regulation and private law across the entire field of EU private law. It is striking that within the financial services sector alone, for example, one can observe all three models across its different segments (payment, credit, and investment) at the national level. However, Member States are not entirely free to choose between the three models. In addition to the general EU principles of effectiveness and equivalence, space for national choices is in the first place constrained by the material scope of the relevant EU harmonisation regime as reflected in its legal grammar. The 'private law' grammar, such as the one of the Unfair Contract Terms Directive or the Consumer Sales Directive, typically leaves Member States little choice but to ensure, in line with the substitution model, that the relevant (component of) EU measure becomes part of their private law systems. In contrast, the 'public law' grammar, which is manifest, for instance, in GPSD or in MiFID II, leaves room for each of the three models to guide the interface between EU market regulation and national private law, at least as far as prescriptive regulatory standards are concerned. Member States may choose

to implement such standards in the private law framework, in which case the substitution pattern will dominate the relationship between the two. Alternatively, they may be transposed in the public law framework, allowing national private law courts to adopt either the separation model or the complementarity one. Further, legislative or judge-made EU or national rules on the relationship between civil and administrative proceedings add another dimension to the interface between EU and national private law, shaping it along the lines of one of the three models. For instance, while the Antitrust Damages Directive reflects the substitution model, the Representative Actions Directive has strong resonances with the complementarity model.

The substitution and complementarity models have the potential to reconcile the instrumentalist rationality of EU private law with the relational rationality of national private law. The substitution model, however, can only realise this potential provided that national private law systems have some room for manoeuvre in accommodating EU regulatory private law within their own fabric. Where such room is absent, as in the case of maximum harmonisation, the balance is decisively tilted in favour of the EU's instrumentalist discourse. Finally, the separation model is least well-suited for accommodating both rationalities, clearly favouring the logic of traditional national private law over that of EU regulatory private law.

These findings are of immense practical significance not only for the implementation and application of EU private law in national legal orders, but also for EU private law making. The foregoing analysis has revealed that the choice of the 'public' or 'private law' grammar at EU level is reflected in the models of the relationship between EU and national private law at Member State level. Each model in turn has a bearing on the ability of EU measures to achieve their regulatory objectives, and the overall shape of European integration more generally. It is important to realise that the maximum harmonisation effects of a particular EU measure in national private law can be neutralised by its 'public law' grammar where such grammar leads to the separation or complementarity between EU and national private law rules. This shows the delicacy involved in balancing not only the contributions of the EU and Member States, but also that of public and private law instruments to the development of the regulatory framework for private law relationships that underpins the process of market integration. Wider still, this narrative illuminates the conflicting values of EU and national private law, seeking to strike the right balance between them in the pursuit of the internal market project. Perhaps the most important lesson to be learned is that the move towards a greater centralisation of powers at the EU level could and should be recalibrated in favour of more flexibility and diversity.