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Unjust Conduct in the Internal Market

On the Role of European Private Law in the Division of Moral Responsibility between the EU, its Member States and Their Citizens*

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Abstract: This paper argues that the European Union (EU) can be held morally responsible for ensuring justice in the internal market. In particular, the EU must prevent and sanction unjust market conduct by private parties through appropriate private law rules and ensure at least minimal protection of the private rights of internal market agents. The EU's moral responsibility for maintaining justice in the internal market requires an EU discourse of civil justice going well beyond (and at times against) the European Commission's slogan of 'justice for growth'. The article first discusses and rejects three potential challenges to its main claim, all of which are based on different alleged divisions of labour, as a result of which it would seem to follow that European private law has no role to play in assuring distributive and interpersonal justice in the internal market. It then outlines how we might arrive at a conception of unjust conduct in the internal market that is compatible with the value pluralism that characterizes Europe today. Finally, it explains why the private law acquis, because of the way it is currently constituted, is unlikely already to be in compliance with such standards of civil justice in the internal market.

I. Introduction

Is the European Union (EU) morally responsible (or co-responsible) for ensuring justice in its internal market? Can it be blamed for any injustices, interpersonal or social, occurring because of the way the internal market is constructed? In particular, is the EU under a moral obligation to formulate standards

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(perhaps minimum standards) of acceptable internal market conduct? For example, should internal market law prevent businesses and consumers from committing frauds (including fraudulent non-disclosure), exploiting each another's economic distress or improvidence, or insisting on unmitigated contract performance even after a radical change of circumstances?[1] Or, on the contrary, could the EU leave the definition of the private rights of market participants and their protection to the Member States and not even require any minimum protection, without incurring any justified moral blame?

EU law does not currently assure the general protection of the private rights of businesses and consumers on which the functioning of a market is usually thought to depend at least in part. Nor does it provide any general guidance as to the conduct that is expected from agents towards each other in the internal market. Naturally, it is a matter for debate which types of fraud, exploitative conduct, etc. (if any) constitute unjust market conduct, but current EU law does not even formulate the most general minimal standards for the types of market conduct that are incompatible with the internal market. Of course, EU consumer law has made an important contribution to justice, but the scope of application of these rules remains restricted, not only to consumer contracts but also to specific market sectors, and—most importantly—these limitations are not based on—nor could they easily be explained by—considerations of *justice*.

One may have some doubt as to whether such an internal market is 'properly functioning', or whether it will be 'complete' any time soon, as it has been the objective of the European Union ever since the Single European Act was adopted in 1986. However, that is not the main question that concerns us here. The question I want to address in this paper is whether a European Union that fails to ensure the enforcement of private rights and obligations of the agents on that market and to formulate (minimum) standards of unjust market conduct, is sufficiently just. I will argue that it is not, and that the European Union, given its advanced stage of integration, in particular its internal market, is in need, as a matter of justice, of a set of principles defining basic private rights. Such a European system of basic private rights and obligations is required as part of the internal market's basic structure, that is, the institutional framework providing background justice for internal market transactions. In other words, the EU can be held morally responsible to ensure at least minimal protection of private rights and the prevention of unjust conduct

[1] These examples were taken from the Common European Sales Law (CESL) that was proposed in 2011 by the European Commission to the European Parliament and the Council (Proposal for a regulation on a Common European Sales Law, COM(2011) 635 final), which in fact contained provisions concerning fraud (Art. 49), unfair exploitation (Art. 51) and change of circumstances (Art. 89). The proposal was withdrawn by the Juncker Commission and substituted with two new proposals that have significantly narrower scope and no longer include any of these provisions. See Proposal for a Directive on Certain Aspects Concerning Contracts for the Supply of Digital Content, Brussels, 9 Dec. 2015, COM(2015) 634 final; Proposal for a Directive on Certain Aspects Concerning Contracts for the Online and Other Distance Sales of Goods, Brussels, 9 Dec. 2015, COM(2015) 635 final.

in the internal market and, for that purpose, to formulate such (minimum) European standards of civil justice. I will further argue that mere formal corrective justice will not suffice and that therefore the European legislator will have to justify its choices with regard to private law with substantive reasons.

I will develop my argument chiefly by addressing three potential challenges to my central normative claim, each of which is based on a different type of division of moral labour, as a result of which it would seem to follow that European private law has no task in ensuring justice in the internal market. The first objection refers to the distribution of competences between the EU and its Member States and claims that there is no reason in justice why the European Union, rather than its Member States, should be responsible for assuring private rights through the definition of general rules and principles of private law (Section III). The second objection excludes private law from the scope of justice because it defines justice as distributive justice for which, it claims, institutions other than private law institutions should be held responsible as a matter of institutional division of labour (Section IV). The third objection does in fact regard private law as a matter of justice, but limits it merely to corrective justice, which it defines formally, thus excluding any more substantive considerations of interpersonal justice. This objection is based on an alleged division of moral responsibility between public institutions and private persons (Section V). I will argue that all three objections fail and that the European Union is responsible (at least co-responsible) for preventing and remedying substantive injustices in the internal market, through appropriate private law rules and standards (which may be minimum standards). And I will briefly outline how we might understand and arrive at a political conception of (sufficiently) just conduct in the internal market that could contribute to a better understanding of civil justice in the EU. Although based on an autonomous, political understanding of justice, the argument is not entirely abstract. The paper starts by clarifying two premises on which the normative analysis is based, that is, first, that in addition to its regulatory dimension the internal market also has a moral dimension and, second, that there is scope for reasonable disagreement as to what this moral dimension entails (Section II). Moreover, in its final chapter the article explains why the current private law acquis, because of the way it is constituted today, is unlikely to comply already with political principles of civil justice in the internal market (Section VI). Finally, throughout, the argument will be illustrated with concrete examples from the branch of private law that is most relevant to internal market transactions, that is, the law of contract.

II. The moral constitution of the internal market

Our examination will start from two premises. The first premise is that there is a moral dimension to the law of the internal market which goes beyond (and, in

part, also contrary to) its regulatory dimension. The second one is that any justice conception, including a conception of European civil justice, has to take into account the fact of reasonable pluralism. Let me very briefly introduce each of these starting points.

A. Market functionalism and justice

All EU legislation, having one of the functional competences as its legal basis, is intrinsically instrumental to specific limited objectives. Most of the private law acquis is based on Article 114 of the Treaty on the Functioning of the EU (TFEU) and therefore has as its official purpose the establishment and proper functioning of the internal market. Thus, in any account trying to explain the EU private law acquis or to critique it, the internal market rationality underlying EU private law has to play a central role. The narrow focus on market building has had far-reaching consequences for the nature and content of European private law rules and for the political debates surrounding it. EU private law is structured primarily along the lines of different market sectors (financial services, telecom, transport, energy, etc).[2] It typically constitutes a mix of private law, public law, and self-regulation. And its market building rationale tends to remove important issues from the political agenda and to normalize a certain kind of discourse about private law that is actually quite reductive.[3] As a result, there exists an obvious tension (indeed a clash) with familiar conceptions of private law in the Member States. Although national private laws themselves also became more instrumental in the course of the twentieth century (to objectives such as improving the condition of workers, tenants, consumers, patients, and the environment), private law instrumentalism has never become nearly as predominant there as in EU law-making.[4]

The market-regulatory focus of European private law is well documented and has been duly critiqued. However, the regulatory role of EU private law could only be the whole story of European private law, morally speaking, if EU private law could not only be explained but could also be fully justified in terms of its regulatory role. In other words, if the end could justify the means, that is if 'output legitimacy' could provide a full *justification* for EU private law. This would be the case if it were true that whenever EU private law fully meets its instrumental objectives then insofar it is also (sufficiently) just and that there

[2] See H-W Micklitz, Y Svetiev, and G Comparato (eds), *European Regulatory Private Law—The paradigms tested*, EUI Working papers, LAW 2014/04.

[3] See 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*, 572–98. Obviously, the problem is not limited to the subject of our present inquiry, ie private law, but rather a general pathology of EU law-making. See most recently, G Davies, 'Democracy and legitimacy in the shadow of purposive competence', (2015) 21 *European Law Journal*, 2–22.

[4] See eg C Schmid, *Die Instrumentalisierung des Privatrechts durch die Europäische Union* (Baden-Baden: Nomos, 2010).

would remain no normative space left for its evaluation in moral terms, in particular in view of standards or principles of justice. That seems very unlikely, not only in light of the existing critique of internal market functionalism, but also because of the fact of reasonable pluralism.

B. The fact of reasonable pluralism

Any normative position in the public debate on European private law will have to take into account what Rawls called 'the fact of reasonable pluralism'.[5] This is the fact that in modern constitutional democracies a debate among reasonable persons on ultimate values will never lead to an agreement.[6] Rather, every new round of discussion is likely to further entrench each position and exacerbate the disagreement among competing worldviews. Under these circumstances (ie our circumstances), the state would not treat its citizens with equal respect if it enacted laws in the name of one of these controversial doctrines, or laws that could only be justified in terms of one single worldview. For private law this means, in particular, that it cannot be based on controversial founding principles and ultimate values, at least not in the strong sense of being capable of explanation only in terms of these particular principles or values. This excludes all essentialist theories of private law.[7] Thus, not only are theories which found private law exclusively on the value or virtue of personal autonomy, corrective justice, efficiency, or (for contract law) promise-keeping, incompatible, morally speaking, with the fact of reasonable pluralism, but so also is the theory according to which EU private law is essentially about market building and could be justified (and not merely explained) fully and exclusively in its terms.

However, the pluralist view does not lead to moral relativism. The argument that the state should refrain from endorsing a controversial ethical doctrine about what makes our lives valuable leaves open the possibility that state action could and should be guided by moral principles with regard to 'what we owe each other' (Scanlon),[8] including, in particular, principles of justice. For, it remains possible—and indeed necessary if we want to live together as equals—to develop a set of moral principles and a conception of justice, which is independent from controversial ethical principles, and which govern our main institutions and, in that respect, guide state action in a modern constitutional democracy. Different versions of such a 'self-standing' (Rawls) or 'autonomous'

[5] J Rawls, *Political liberalism* (New York: Columbia University Press, 1993/2005), 36. Similar, C Larmore, *The Morals of Modernity* (Cambridge: Cambridge University Press, 1996), 168: 'reasonable disagreement'.

[6] The reasonable pluralism of world views (or conceptions of the good or ultimate values) should not be confused with legal pluralism, ie the phenomenon that a plurality of legal systems may be applicable in the same territory.

[7] See further MW Hesselink, 'Could a fair price rule (or its absence) be unjust?', (2015) 11 *European Review of Contract Law*, 185–96, on which this sub-section draws.

[8] TM Scanlon, *What We Owe Each Other* (Cambridge, MA: Belknap Press, 1998).

(Larmore, Forst) conception of justice have been presented. Rawls proposed his two principles of 'justice as fairness' as a candidate for an 'overlapping consensus' on 'political' principles of justice.[9] Nussbaum has offered her capabilities approach as a standard for minimal justice as alternative political principles.[10] Larmore proposes a conception of justice based on the norms of rational dialogue and equal respect.[11] Habermas advocates the entirely procedural standard of what would be universally acceptable in an ideal speech situation.[12] And according to Forst we all have a fundamental right to justification with reasons that are both reciprocal and general.[13] As we will see below, we do not have to go further into the details of this 'family quarrel', as Habermas called it,[14] because for our present purposes they are sufficiently similar, while at the same time they all are markedly distinct from perfectionist and other 'comprehensive' worldviews, ranging from the main religions to political philosophies such as utilitarianism, liberal perfectionism, libertarianism, communitarianism, and (most versions of) civic republicanism, and the private law theories based on these.

Having clarified these two points concerning the factual background of our inquiry—the fact of internal market functionalism and the fact of reasonable pluralism—we can now proceed by building up the normative case for holding the EU morally responsible for preventing and sanctioning unjust interpersonal conduct and for protecting private rights in the internal market, and explore what this entails. As said, we will do so by addressing three main arguments against such a moral responsibility for the EU, which are all based on alleged divisions of labour, as a result of which institutions other than the EU institutions would be responsible for preventing and sanctioning unjust market conduct by private parties. These arguments, and their rebuttal, necessarily will have to be *moral* arguments.[15] A constitutional argument, for example, will not suffice, because it cannot, at least not on its own, underscore or refute the EU's moral responsibility. This means that we will have to address arguments derived from moral philosophy. Such arguments have not so far played a very

[9] Rawls (n 5). See also J Rawls, *Justice as Fairness: A Restatement* (ed. Erin Kelly) (Cambridge, MA: Belknap Press, 2001). Cf. T Brooks and MC Nussbaum (eds), *Rawls's Political Liberalism* (New York: Columbia University Press, 2015).

[10] MC Nussbaum, *Creating Capabilities: The Human Development Approach* (Cambridge, MA: Belknap Press, 2011), 90.

[11] Larmore (n 5), 134.

[12] J Habermas, *The Inclusion of the Other; Studies in Political Theory* (Cambridge: Polity Press, 1996), chs 1–3.

[13] R Forst, *The Right to Justification: Elements of a Constructivist Theory of Justice* (New York: Columbia University Press, 2012).

[14] Habermas (n 12), 50.

[15] Such arguments do not necessarily have to be 'moral' arguments of right and wrong in the narrow sense of the norms that apply universally to all persons by virtue of their humanity, but in order to be convincing in a pluralist society, as said, they cannot depend on (although they may be inspired by) a controversial 'ethical' conception of good and bad.

prominent role in the European (private) law debate.[16] To some people, they may even seem irrelevant, for example to those who believe that lawmakers carry no moral responsibility or that morality does not even really exist. However, as Dworkin explains, even such sceptical views still represent positions in a moral debate and therefore require a moral argument.[17]

III. The European Union and its Member States

Who should respond when someone complains that in the internal market unjust conduct is not sufficiently prevented or sanctioned by appropriate private law rules: the EU or its Member States? And is the currently existing 'constitutional' distribution of competences between the European Union and its Member States decisive in determining the moral responsibility for the protection of private rights and the prevention of unjust conduct in the internal market?

These questions bring us to the first objection against a role for European private law in ensuring justice in the internal market. This is the claim that there is no reason in justice why it should be the task of the European Union, rather than its Member States, to assure private rights and to determine basic rules and principles of private law. Private law may be a matter of justice, and justice a matter of private law, the argument goes, but ensuring a just system of private law for the internal market it not something that the European Union should be held responsible for; that is the proper task of the Member States. The EU has a limited number of tasks and responsibilities that are formulated in the Treaties, the argument proceeds, but ensuring justice in internal market transactions is not one of them. However, that argument would not necessarily be convincing if it turned out that the current distribution of competences was itself unjust. This raises the question of whether the distribution of competences between the EU and its Member States is (also) a matter of justice.

Before we embark upon that question, a point of clarification: when we speak of, the 'moral responsibility of the EU', of course, we ultimately refer to the joint responsibility of European citizens, as co-authors—as Habermas would put it—of EU law, for its justice, just like the 'responsibility of the Member States' refers to our corresponding responsibility in our capacity as national citizens of the respective countries.[18]

[16] As far as regards the European legislator, this lacuna constitutes, of course, the main concern of this essay.

[17] See R Dworkin, *Justice for Hedgehogs* (Cambridge, MA: Belknap Press, 2011), 43.

[18] On the different capacities (and related communities) in which a person may have to respond to justice claims, and the possible moral conflicts among these, see R Forst, *Contexts of Justice*; *Political*

A. Boundaries, distribution of competences, and justice

Do we have a moral right to a European civil code? Or, on the contrary, does justice require that private law remain entirely national? Can a moral argument be made for or against a general EU competence to enact private law? Clearly, there are important stakes in the distribution of law-making competences between the EU and its Member States, for private law as well as for other areas. And people hold quite divergent views on the question of who should do what in Europe, that is, the question of the vertical division of labour within the EU. But is it a matter of justice?

That could be the case, for example, if, in a communitarian fashion, the law (and in particular private law) were to be understood as an expression of our identity or culture that must be respected as a matter of justice. However, if we accept the fact of reasonable pluralism for transnational matters as well, then identity and senses of belonging, whether individual or collective, cannot decide these questions, simply because different persons are committed (often quite strongly) to different identities and it would be unjust for public institutions (be they national, European, or international) to impose laws on individuals in the name of (or that can only be justified in terms of) nationalist, Europeanist, or cosmopolitan values.[19]

So, is there a more neutral, but still moral way of approaching the matter? From a moral perspective, the question of the vertical distribution of private-law-making competences in Europe seems closely related to the question of the justice of borders. Both have to do with claims to sovereignty. Is there a self-standing theory or standard for ideally or sufficiently just boundaries, that is, one that does not depend on controversial identity claims? Rawls' 'The law of peoples' offers such a self-standing theory of international justice, but has been criticized for its two-stage approach, which gives a central place to 'peoples', rather than individuals, and for taking existing boundaries for granted, thus legitimating the status quo.[20] Theories of global justice that start from a hypothetical social contract on the global scale and then apply principles of justice directly to individuals, have been proposed as alternatives.[21] However, it is a well-known difficulty with these alternative theories that they cannot justify existing national borders, or indeed any boundaries.[22] This is problematic because, assuming that a world government would be neither practically feasible

Philosophy beyond Liberalism and Communitarianism (Berkeley: University of California Press, 2002).

[19] See further MW Hesselink, 'How many systems of private law are there in Europe? On plural legal sources, multiple identities and the unity of law', in: L. Niglia (ed.), *Pluralism and European Private Law* (Oxford: Hart Publishing, 2013), 199–247.

[20] See eg CR Beitz, 'Rawls's law of peoples', (2000) 110 *Ethics*, 669–96; TW Pogge, 'The incoherence between Rawls's theories of justice', (2004) 72 *Fordham Law Review*, 1739–59.

[21] Ibidem.

[22] MC Nussbaum, *Frontiers of Justice* (Cambridge, MA: Belknap Press, 2006), 266.

nor morally desirable, a world without any borders clearly would be an unjust world. For it is possible for people to leave the state of nature, and enter a civil state, only if there is a specific 'we the people' that gives itself laws that will be enforced by the state within a specific territory. Legal rules and rights have to be part of a specific legal order in order to be enforceable.[23] A system of rights that is entirely open and unenforceable, is not a system of rights at all. Therefore, as Rawls put it, 'there *must* be boundaries of some kind'.[24] But how would people behind a veil of ignorance trace just borders, or what principles would they formulate for determining the justice of boundaries? And, assuming that such principles could be found and applied with confidence to the world we actually live in, how could we bring our real world borders more in line with these principles for ideal borders without risking a new world war?

The borders that currently exist between the countries in Europe (and elsewhere) have little more to say for themselves than that they have been there for some time and that most people seem to accept them. Although some existing borders are newer than others and some (not necessarily the newest ones) are contested and resented more than others, to accept all secessionist or irredentist claims would not solve the problem. Not only are these claims often mutually incompatible but this would also only create new minority groups of people defining themselves by different identities who would, in their turn, be upset by the new borders.[25] At the end of the day we would end up with the solution of 'everyone his or her own borders', which would mean effectively that we would be back again to the state of nature.[26] Therefore, although the existing boundaries cannot be justified in a morally satisfactory way, we may have to accept the status quo, as a starting point for deliberations and negotiations concerning the rights of minority groups etc, simply because the alternative would ultimately be the war of each against all, that is, the state of nature.[27]

What does this mean for European integration and for the distribution of competences between the EU and its Member States? It means that if a number of European countries decided today to give up their sovereignty entirely and become a federal state that situation would, in principle, be neither more nor less just than if all EU Member States decided totally to unwind the EU. A treaty establishing the United States of Europe or one terminating the European Union would not per se raise any issues of justice. As a consequence, in

[23] Obviously, there will always be borderline issues. The problem of cross-border civil cases is addressed by the rules of private international law, but never entirely resolved by these, because conflict rules—be they national, regional, or international—may in their turn lead to divergent outcomes.

[24] J Rawls, *The Law of Peoples* (Cambridge, MA: Harvard University Press, 1999), 39 (emphasis in original).

[25] See Dworkin (n 17), 382.

[26] Enthusiasts of 'global law' sometimes seem to overlook this moral problem.

[27] The situation is not dissimilar to the one following from the property law rule that it is up to the plaintiff to demonstrate that she has a stronger title than the possessor.

principle, the same can said of any intermediate position: one degree of consensual European integration with its specific distribution of law-making competences, is not, in itself, more or less just than a different degree of Europeanization. For private law this means that we do not have a moral right to a European civil code, or to a general private law-making competence for the EU, nor does justice require that private law be renationalized or that private law be entirely removed from the scope of the EU's law-making competences. Put differently, there is no general, abstract answer in justice to the question of a more or less European private law.

B. The fact of advanced European integration

However, the relationship between the European Union and justice cannot be reduced to a question of more or less Europe. If we cannot derive the justice of European private law from the justice *of* the European Union, this still leaves open a possible role for private law in ensuring justice *in* the European Union. Given the fact of advanced European integration, the question arises whether the EU institutions as they currently exist are sufficiently just. And one more specific question we may ask in this regard is whether the EU, given the way it is currently constituted and given, in particular, its existing internal market and its objective to further complete it, sufficiently protects the private rights of European citizens and of other internal market agents. In other words, does the EU suffer from a civil justice deficit?

(i) The basic structure of the EU's internal market

The institutions, laws, and policies of the EU undeniably exercise a profound and enduring impact on the distribution of welfare and opportunities of the citizens of Europe. Therefore, arguably, the EU has a basic structure of its own which is responsible for the fair division of the advantages of social cooperation in the European Union.[28] This would mean, among other things, at least from the liberal-egalitarian perspective of Rawlsian 'justice as fairness', that the distribution of competences between the EU and the Member States would be directly subject to (European) political principles of social justice including, in particular, the difference principle. Thus, the answer to the questions of which parts of private law should be European and what European private law should look like, would come to depend to an important degree on what would be best for the poorest Europeans. This perspective is quite different, not only from

[28] A similar argument was made by Van Parijs, in an exchange of letters he had with Rawls in 1998, in his reply to the latter's suggestion that much would be lost if the European Union became a federal union like the United States. J Rawls and P Van Parijs, 'Three letters on The Law of Peoples and the European Union', (2003) 7 *Revue de philosophie économique*, 7–20. A Buchanan, 'Rawls's Law of Peoples: Rules for a vanished Westphalian world', (2000) 110 *Ethics*, 697–721, 704, regards 'various European Union treaties' as part of the 'global basic structure'.

that of the European Commission, with its reductive view of the EU's market-building competence,[29] but also, for example, from the one adopted by the European consumer organization, BEUC, which has consistently tried to preserve the acquired rights of those Europeans who already enjoy the highest level of consumer protection and economic prosperity, and has refused to accept any trade-offs that could improve the condition of those European consumers who are least well-off.[30] Instead, it would shift the attention of European private lawmakers to the interests of the consumers at the periphery of Europe, many of whom are also amongst those most hard hit by the EU's response to the economic crisis.[31] Indeed, it would even require us to abandon our limited focus on different levels of consumer protection, and instead to also consider the impact that consumer protection may have on the Europeans who are the least well-off. It may well be, for example, that the introduction of the country-of-origin principle would benefit sellers in poorer Member States to the detriment of consumers in the richer Member States. If poor sellers as a group belong to the least well-off Europeans then it could be justified, for example, from the perspective of the Rawlsian difference principle to introduce the country-of-origin principle in consumer contract law, for example through the limitation or complete abolition of Article 6 of the Rome I regulation.[32]

(ii) Private rights, interpersonal justice, and the economic constitution

Therefore, the present advanced degree of integration of the EU, its apparent irreversibility, and in particular the fact that the European Union has a basic structure, make it become subject to political principles of distributive justice which may well be Rawls' principles of justice as fairness. These principles of distributive justice would then have to be applied to the EU's main institutions, which arguably include (part of) the European private law acquis as well.[33] However, the analysis should not be limited to distributive justice and the

[29] Unlike the Commission seems to believe, it does not follow from the requirement that measures for the approximation of laws should have as their object the establishment and functioning of the internal market (Art. 114 TFEU), that these measures must maximize economic growth; they could also aim at preventing injustice as an important aspect of the proper functioning of the internal market. See further below, Section VI.C.iv.

[30] See in particular BEUC's intransigent position on Art. 6 of the Rome I regulation. Cf. M Goyens, 'Why the optional instrument is the wrong way for consumers ', *European Voice* 16 June 2011; U Pachl, 'The Common European Sales Law—Have the right choices been made? A consumer policy perspective', *Maastricht Faculty of Law Working Paper*, 2012/6.

[31] See D Caruso, 'Qu'ils mangent des contrats: rethinking justice in EU contract law', in D Kochenov, Gráinne de Búrca, and A Williams (eds), *Europe's Justice Deficit?* (Oxford: Hart Publishing, 2014).

[32] This was an option considered by the European Commission in its communication 'A digital single market strategy for Europe' COM(2015) 192 final, 5. Cf R Mańko, 'Contract law and the digital single market: towards a new EU online consumer sales law?', European Parliamentary Research Service (September 2015—PE 568.322), 24.

[33] On the question of whether contract law is part of the basic structure of society in the Rawlsian sense, see further below, Section IV.B.

difference principle.[34] Justice in private law means also—perhaps even primarily—interpersonal justice.[35] This raises the question of whether the European Union's current basic structure should be supplemented with a just set of general rules and principles of private law which would define and determine the basic private rights and obligations of private agents in the internal market.

The EU's current basic structure is roughly equivalent to what the ordoliberals would call its 'economic constitution', as laid down in the founding Treaties, that is, chiefly the market freedoms and competition law, and probably also the charter of fundamental rights. The concept of an economic constitution, although historically closely linked to the specifically German version of neo-liberalism,[36] can also be understood, as Collins has shown, more neutrally as the commitment to a particular kind of social and economic order that a society has inscribed in its basic laws.[37] From this more neutral perspective, the current European economic constitution looks remarkably one-sided and incomplete. In particular, it ignores almost entirely the constitutive role that private law has to play for civil society.[38] This is not to say that the EU should establish a 'private law society', in neo-liberal fashion, in which there exist no or very few rights beyond formal private rights.[39] The point is rather that the EU should *also* be concerned with interpersonal justice and the protection of private rights and that the EU's economic constitution should express what constitutes unjust conduct in the internal market. The focus on the economic role of private law may even be too narrow. Arguably, what the European Union needs, as a supplement to its current constitutional framework, is a 'civil constitution'

[34] Cf. S Douglas-Scott, 'The problem of justice in the European Union values, pluralism, and critical legal justice', in J Dickson and P Eleftheriadis (eds), *The Philosophical Foundations of European Union Law* (Oxford: Oxford University Press, 2012), 412–48, 426: 'Rawls's theory raises problems of distributive justice in the EU context, but problems of corrective justice in the context of the AFSJ [area of freedom, security and justice] are equally salient.' I would add that problems of corrective justice may be equally salient also in the context of the internal market.

[35] See below, Section IV.B.iii.

[36] Cf. M Foucault, *Naissance de la biopolitique: Cours au Collège de France (1978–1979)* (Paris: Gallimard, Seuil, 2004), 81–184; C Joerges, 'What is left of the European economic constitution? A melancholic eulogy', (2005) 30 *European Law Review*, 461–89; and M Poiares Maduro, *We the Court: The European Court of Justice & the European Economic Constitution* (Oxford: Hart Publishing, 1998), 126 ff.

[37] H Collins, 'The European economic constitution and the constitutional dimension of private law', (2009) 5 *European Review of Contract Law*, 71–94, 73. See also ME Streit and W Mussler: 'The Economic constitution of the European Community: From "Rome" to "Maastricht"', 1 (1995) *European Law Journal*, 84–5, 6; S Cassese, *La nuova costituzione economica* (Rome: Editori Laterza, 2012), although he adopts a broad understanding of the economic constitution does not include private law in his discussion; the same applies for T Prosser, *The Economic Constitution* (Oxford: Oxford University Press, 2014).

[38] Collins (n 37), 82.

[39] S Grundmann, 'The concept of the private law society: After 50 years of European and European business law', 16 (2008) *European Review of Private Law*, 553–81.

which should become part of the same European legal order,[40] with (at least for the main principles) the same (constitutional) status.[41]

(iii) Background justice for market integration

There is another point to be noted, specifically relating to harmonization. Market integration (negative and positive) has to take place against the background of a sufficiently just, stable and coherent system of legally enforceable private rights and obligations that are based on a coherent set of principles of fair market conduct. Legal harmonization measures will inevitably affect previously existing private rights and obligations, either directly or vicariously (direct and indirect horizontal effect). These measures can be evaluated in terms of their effectiveness in achieving market integration (with a view to the EU's limited, functional competences), but they will also have to be evaluated in terms of their justice effects. The construction of the internal market through legal integration has taken place at an ever growing pace, especially since the entrance into force of the Single European Act in 1987, on the basis of a plausible assumption of a rough similarity between the existing national private law systems. It was rightly assumed that all Member States protected property, enforced contracts, and provided for tort (or delictual) liability in roughly similar ways. However, the more pervasively the negative and positive market integration affects the national private law systems of the Member States the more it becomes problematic (even from an effectiveness point of view, but certainly in terms of justice) that it takes place without a more articulate background understanding of private rights, obligations, and interpersonal justice. Is it justifiable to read into the Charter a fundamental right for employers to the protection of their freedom of contract against their employees, without assuring at the same time that exploitative contracts are not enforceable in the internal market? Are Europe-wide measures to fight the financial and economic crisis generally acceptable even if the impact of radical changes of circumstances on contracts are so different

[40] J Carbonnier, 'Le Code civil', in Pierre Nora (ed.), *Les lieux de mémoire* (Paris: Gallimard, 1986), vol. II, 293–315, 309, famously wrote with reference to the French civil code: 'Mais, matériellement, sociologiquement, si l'on préfère, il a bien le sens d'une constitution, car en lui sont récapitulées les idées autour desquelles la société française s'est constituée au sortir de la Révolution et continue de se constituer de nos jours encore'. See also J Carbonnier, *Droit civil: introduction* (25th edn, Paris: Presses Universitaires de France, 1997), 82: 'la constitution civile—la véritable'.

[41] The reason would be constitutional balance, as required by justice, given the already existing constitutional framework; not a desire for grand projects, that are doomed to fail, as Hans Micklitz suggests (see his 'Failure or ideological preconceptions—Thoughts on two grand projects: The European constitution and the European civil code', *EUI Working Papers*, LAW No. 2010/04, 9). The argument should not be misunderstood as one in favour of further constitutionalization; it merely constitutes a call, on justice grounds, for a more balanced European constitutional framework. See further MW Hesselink, 'The justice dimensions of the relationship between fundamental rights and private law', (2016) 24 *European Review of Private Law*, 425–56. For a powerful recent general critique of over-constitutionalization by the EU, see D Grimm, 'The democratic costs of constitutionalisation: The European case', (2015) 21 *European Law Journal*, 460–73.

from one Member State to another? Call it a 'system of rights',[42] an 'economic constitution',[43] a 'civil constitution',[44] a 'constitution of everyday life',[45] a 'common frame of reference',[46] 'rules of just conduct',[47] 'parameters of permissible conduct in the market-place',[48] or indeed the moral constitution of the internal market:[49] when formulating and balancing market freedoms, fundamental rights (with direct or indirect horizontal effects) and market integration objectives, one needs to have a more precise sense of the private rights and obligations that market operators already have, and—crucially—*should* have as a matter of justice, and that should not be adversely affected by market integration measures.

In conclusion, then, although private law cannot be said to be more or less just for the mere reason that it is national or European, given the advanced stage of European integration, in particular its internal market project, arguably it would constitute an injustice if Europe did not assure the protection of (minimal) private rights. And in order to be in a position to assess the distributive and interpersonal justice of the current European private law acquis—that is, in order to be able to determine whether the EU suffers from a civil justice deficit—we need a European understanding of (minimal) civil justice. To put it more concretely, if someone claims to be unjustly treated in the internal market, for example because with her small business she ended up in an unbalanced contract as a result of the unfair exploitation of her economic distress by a large and powerful business, the EU must be able to respond and justify, with appropriate reasons, the current state of internal market law—in this case the absence of EU rules preventing and sanctioning unfair exploitations and the limitation of weaker party protection to consumers.

This means that we need to examine what justice in private law means and what would amount to a civil justice conception for the EU: what if anything do principles of justice in the internal market require with regard to private law? Are not the principles of justice that the EU should respond to in the first place principles of *social* justice? And is not the administration of social justice the proper task of the tax and social security system rather than of private law? This

[42] I Kant, *The Metaphysics of Morals* (ed. M. Gregor) (Cambridge: Cambridge University Press, 1996), 29 [6:237]; J Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Cambridge: Polity Press, 1996), ch 3.

[43] See the authors cited at n 36 and n 37 above.

[44] Carbonnier (n 40).

[45] H Collins, *The European Civil Code: The Way Forward* (Cambridge: Cambridge University Press, 2008), 4.

[46] European Commission, *A more coherent European contract law, an action plan*, Brussels, 12 Feb. 2003, COM(2003) 68 final 2003.

[47] See FA Hayek, *Law, Legislation and Liberty; A New Statement of the Liberal Principles of Justice and Political Economy* (Abingdon: Routledge 2003).

[48] PS Atiyah, *Essays on Contract* (Oxford: Clarendon Press, 1986), Essay 2, 53.

[49] Principles of justice, even if they are political (as they must be in a pluralist society), are still moral principles.

brings us to the second objection: that private law has no role to play in ensuring justice in the internal market because justice should be understood as distributive justice for which institutions other than private law should be held responsible.

IV. Private law and other institutions

The rules of private law have important distributive consequences in the sense that they codetermine how much people have, be it in terms of wealth, welfare, primary goods, or capabilities. Moreover, different private laws lead to different distributions. For example, it makes a difference whether contract law grants expectation remedies for breach of contract (specific performance, damages for loss of profit) rather than mere reliance protection, whether (and when) good faith possessors of goods can become owners, or whether tort liability is mostly fault-based or more often strict. Similarly, it makes an important difference whether sellers and service providers in relation to their clients (or shareholders electing board members) are allowed to discriminate on such grounds as gender, ethnic origin, religion, or age. Depending on such rule choices, identifiable groups of people are likely to be made better- or worse-off. However, although the distributive consequences of private law are undeniable, this does not mean that it is undisputed whether private law should have a task in advancing distributive justice. On the contrary, there exist articulate objections against the application of distributive justice principles to private law, including European private law. These objections have in common that they refer to a division of labour between private law and other institutions. I will first discuss objections from welfare economics, then from Rawlsian liberal-egalitarianism.

A. Private law versus tax and transfer

(i) Wasteful redistribution

Legal economists tend to be highly critical of redistribution through private law because, they argue, it leads to a lower overall amount of welfare available for distribution than there would be if redistribution (assuming that this is what a society wants) was arranged entirely through the tax and transfer system, in particular income tax and social security. Redistribution through private law, they argue, is inefficient in a number of respects.[50] First, there is the problem of

[50] See eg R Cooter and T Ulen, *Law & Economics* (6th edn, Boston, MA: Addison-Wesley, 2012), 7–8, 106–8; L. Kaplow and S Shavell, *Fairness versus Welfare* (Cambridge, MA: Harvard University Press, 2002), 33–4; H Eidenmüller, 'Party autonomy, distributive justice and the conclusion of contracts in the DCFR', (2009) 5 *ERCL*, 109–31. See also, from a different angle, D Kennedy, 'Distributive and paternalist motives in contract and tort law, with special reference to compulsory terms and unequal bargaining power', (1982) 41 *Maryland Law Review*, 563.

imprecise targeting. The distributive effects of private law rules are often hard to predict. And redistribution through private law rules is sometimes even foreseeably over-inclusive, for example when rich consumers are protected, or under-inclusive, for example when poor sellers are not protected. Moreover, if private law rules are formulated with distributive aims in mind they are likely to produce distortive incentive effects on the parties, for instance with regard to the level of precaution the parties should take in preventing harm. Of course, these are empirical claims that need to be tested, but they seem plausible enough. Therefore, legal economists argue, when redistribution takes place, even if only in part, through private law then the poorest in society (ie the target group eg for Rawlsian distributive justice—see below) will receive *less* than they might have if redistribution had been entrusted exclusively to a well-targeted tax and transfer system.

(ii) What money can't distribute

At first sight, this may seem to be a compelling argument, and a troubling one for those who advocate the pursuit of justice through European private law. However, on closer examination, it fatally relies on the identification of welfare with wealth.[51] Only those aspects of human welfare that can be monetized can be 'redistributed' through the tax and transfer system. In contrast, the loss of dignity that a person suffers from exploitation, for example, cannot be undone by a tax break; the only solution to that problem is actually to prevent the unfair distribution of the reasons for self-respect from occurring at all. This is best done by protecting vulnerable contracting parties against unfair market conduct by providing them with the remedy of annulment of certain contract types or contract clauses concluded in certain contexts of unequal bargaining. Take the *Aziz* case, as a striking example.[52] There, it made a crucial difference for Mr Aziz and his family whether eviction from their home could be *prevented*, by declaring the contract term on which the bank's right to initiate mortgage enforcement proceedings was based to be 'unfair' in the sense of the Unfair Terms Directive 1993 (Art. 3), and therefore not binding on the consumer (Art. 6), rather than merely receiving some financial support from the government once they were out on the street in the midst of the economic crisis.[53] How could the injustice done to Mr Aziz and his family through the eviction possibly be redistributed (and efficiently at that) by the tax and transfer system?

It is true that it would be highly inefficient for a society to try to achieve its distributive justice objectives solely through private law. And a society that nevertheless pursued this route probably would indeed do an injustice to its

[51] See D Lewinsohn-Zamir, 'In defense of redistribution through private law', (2006)91 *Minnesota Law Review*, 326–97.

[52] CJEU, Case C-415/11, *Mohamed Aziz v Catalunyacaixa* [2013].

[53] See ibidem, 61, where the Court rejects mere monetary compensation as insufficient because it 'does not make it possible to prevent the definitive and irreversible loss of [the family home]'.

poorest members.[54] However, it does not follow that private law's contribution to distributive justice is dispensable: in certain situations receiving a money hand-out as compensation is simply not the same thing—not even in welfare terms[55]—as preventing the injustice. In those situations, the private act which would cause the unjust distribution has to be prevented in order to avoid social injustice.

B. Contract law and the basic structure of society

(i) Institutional division of labour

The idea of an institutional division of labour between private law and other institutions gained prominence—and became controversial—when Rawls, in an essay explaining that it is the task of the institutions belonging to the 'basic structure of society' to assure distributive justice, referred to the rules of contract law in a way that gave reason to believe that he thought that contract law should not in fact have such a distributive task.[56] In the essay, Rawls made four points concerning the importance of background justice.[57] First, we cannot tell merely from the interaction of the contracting parties whether, from a social point of view, their contract is just and fair, because the fairness depends on the underlying social conditions. Secondly, even if everybody acts fairly and complies with the rules of contract law, then background justice will still be gradually undermined. Thirdly, it is impossible to draft private law rules that individuals can reasonably be expected to follow, in such a way that background justice will be preserved, because private rules cannot be too complex or require too much information to be applied. Then, as a fourth point, Rawls introduces the institutional division of labour. He writes:

> To conclude: we start with the basic structure and try to see how this structure itself should make the adjustments necessary to preserve background justice. What we look for, in effect, is an institutional division of labor between the basic structure and the rules directly applying to individuals and associations and to be followed by them in particular transactions. If this division of labor can be established, individuals and associations are then left free to advance their ends more effectively within the framework of the basic structure, secure in the knowledge that elsewhere in the social system the necessary corrections to preserve background justice are being made.[58]

[54] Indeed, I am not denying, of course, the important task for the social security system in ensuring that nobody remains homeless after eviction; nor am I arguing that the austerity measures as they were adopted in response to the economic crisis are easily defensible in terms of justice.

[55] Cf. Lewinsohn-Zamir (n 51).

[56] J Rawls, 'The basic structure as subject', in Rawls (n 5), lecture VII. An earlier version of the essay was published in the *American Philosophical Quarterly* 14 (April 1977).

[57] Ibid 266–9.

[58] Ibid 268.

From Rawls' discussion of background justice, and in particular this passage, many observers have drawn the conclusion that Rawls rejected a distributive justice role for contract law.[59]

(ii) Background distributive justice through contract law

Contract law determines the rights and obligations of contracting parties. If no other institutions, such as the tax and transfer system, were available to assure distributive justice, then in a society that wants to achieve distributive justice, and the rules determining contractual rights and obligations, should indeed take into account all the distributive implications of each transaction. For, there would be no *re*distribution; only *initial* distribution through contracts. Such contract law rules would indeed be highly complex because they would have to contain many different variables. Not only would contract law thus be overburdened. Also, society would almost certainly fail to achieve distributive justice, because the aim of social justice cannot be attained through the *exclusive* means of contract law.[60] In other words, if it fell upon contract law alone to provide background justice, then clearly a (sufficiently) just distribution would most probably not be achieved.[61]

What Rawls did not seem to realize, however, is that certain private law rules and doctrines that can prevent distributive injustice do in fact satisfy the requirements of simplicity and practicality no less than other familiar rules and doctrines of private law, while moreover also being very effective in directly preventing social injustices from occurring. Rawls writes with regard to the undesirable distributive consequences of market transactions:

> There are no feasible rules that it is practicable to require economic agents to follow in their day-to-day transactions that can prevent these undesirable consequences. These consequences are often so far in the future, or so indirect, that the attempt to forestall them by restrictive rules that apply to individuals would be an excessive if not an impossible burden.[62]

This is certainly true most of the time. And that is why we need a fair tax and transfer system to take care of a fair distribution of income. However, sometimes the consequences are immediate and direct, as in the cases of unfair exploitation

[59] See eg AT Kronman, 'Contract law and distributive justice', (1980) 89 *Yale Law Journal*, 472–511; KA Kordana and DH Tabachnick, 'Rawls and contract law', (2005) 73 *George Washington Law Review*, 598–632; T Gutmann, 'Some preliminary remarks on a liberal theory of contract', (2013) 76 *Law and Contemporary Problems*, 39–55.

[60] This would be something like an Nozickean state where justice would follow exclusively from the (repeated) application of the 'principle of justice in acquisition' and the 'principle of justice in transfer', but where (in radical opposition to Nozick's theory) the 'principle of justice in transfer' alone would be assigned the task of implementing the (separate) principles of distributive justice (say the two Rawlsian principles of justice as fairness).

[61] See S Scheffler, 'Egalitarian liberalism as moral pluralism', (2005) 79 *Proceedings of the Aristotelian Society, Supplementary Volumes*, 229–53, 240.

[62] Rawls (n 5), 266.

(or unconscionability), unfair standard contract terms, or a radical change of circumstances (imprévision or hardship). There, the only burden that would be imposed on a contracting party is that she would be prevented, respectively, from exploiting the other party, from invoking the unfair term, or from enforcing the contract under radically altered circumstances. In those cases, surely the attempt to forestall the social injustice by restrictive rules that apply to individuals would be neither an impossible nor an excessive burden.[63]

Therefore, Rawls's suggestion that an institutional division of labour must be established between the basic structure of society and the rules applying directly to particular transactions seems flawed. From the fact that private law cannot maintain background justice on its own it does not follow that it should therefore make no contribution at all. Rather, those doctrines and rules of private law that can make such a contribution in a way that it is fair, reasonable, and practicable to impose on individuals (and their associations, eg firms), should be regarded as part of the basic structure of society.[64] Especially those rules that have a direct impact on the 'essential primary good of self-respect',[65] such as rules banning exploitative contracts (eg Art. 51 Common European Sales Law (CESL)-proposal), seem to be among the ones whose presence in most societies would be required by principles of social justice, simply because it seems difficult to imagine how other institutions, notably tax and transfer, could adequately (let alone more efficiently) compensate for the loss of self-respect, as was illustrated by the *Aziz* case above. Rather than a division of labour, a collaboration seems to be warranted among all those institutions that are best placed to maintain background justice. The basic structure of society should be such that each of these institutions make the co-ordinated contribution that it is most fair, reasonable, and practicable to expect from them in light of the ways in which these institutions tend to affect the freedom of individuals to organize their day-to-day transactions.

(iii) Justice beyond the division of advantages

There is another, even more important point to be made concerning the institutional division of labour, with regard to achieving justice, between different kinds of institutions: there is more to justice—even to social justice—than mere distributive justice, namely also interpersonal justice.

Distributive justice is concerned with the question of how much it is just for different individuals or groups of people to have. This question is distinct from the question of what belongs to whom (what is rightly mine and what yours), that is, who is entitled to a particular thing. These questions are distinct because

[63] For examples of such rules, see the articles from the CESL cited n 1 above.

[64] In the same sense, albeit on somewhat different grounds, J Klijnsma, *Contract Law as Fairness: A Rawlsian Perspective on the Position of SMEs in European Contract Law* (Amsterdam, 2014), 34 ff.

[65] Rawls (n 5), 284.

it may well be that somebody who is starving is nevertheless not entitled to the sports car that someone else owns. Still, this latter type of question—of what belongs to whom—are also questions of justice. Following Aristotle, these questions are usually called questions of corrective or rectificatory justice,[66] but I will refer to them as matters of interpersonal justice. One reason why interpersonal justice tends to be overlooked is that it is often assumed that interpersonal justice necessarily should be understood formally, indeed as merely 'corrective' or rectificatory, that is, as correcting wrongs by restoring the originally just state of affairs. In this formal understanding, all the substantive work is done by the principles of distributive justice; the role of corrective justice is limited to restoring or preserving the original, just distribution. However, as we will see below, interpersonal or relational justice is not necessarily merely about formal corrective justice, about correcting wrongs understood narrowly, but more broadly about sanctioning unjust conduct, that is, conduct contrary to applicable principles of justice.[67]

Rawls understood social justice primarily as being concerned with the fair division of the advantages deriving from social cooperation.[68] However, justice in social cooperation is not limited to the fair distribution of its proceeds, even if these are understood very broadly, as 'primary goods', and even if justice is regarded as a matter of institutions, not outcomes. A society is also unjust when interpersonal justice is not assured, because private rights and obligations are not secured, for example when a breach of a valid contract is not sanctioned or, conversely, when an unfair contract is legally enforced. In justice as fairness, the 'right to hold personal property' figures as one of the 'equal basic liberties' (mentioned together with freedom from arbitrary arrest),[69] which are relevant, in particular, for 'political justice', that is, the justice of the constitution.[70] However, there is an important difference between the right of citizens to hold personal property and the right of an owner of a particular thing to reclaim that thing from non-owners.

In a civil state (as opposed to the state where there is nothing more than natural law), not only distributive justice but also interpersonal justice—the justice in determining what belongs to you and what belongs to me—is a matter of social justice, since both depend on public institutions for their implementation.[71] Therefore, we cannot reduce the justice of private law to, for example, Rawls' 'justice as fairness'. In fact, Rawls himself conceded that other principles may be needed to determine contractual justice.[72] And when it comes

[66] Aristotle, *The Nicomachean Ethics* (Cambridge, MA: Harvard University Press, 1994), V, 12.
[67] See below, Section V.B.iv.
[68] J Rawls, *A Theory of Justice* (rev edn, Cambridge,MA: Belknap Press, 1999), 6.
[69] Ibidem, 53.
[70] Ibidem, 194.
[71] Kant, (n 41), 44 [6:256].
[72] See Rawls, (n 67), 7. Cf recently S Scheffler, 'Distributive justice, the basic structure and the place of private law', (2015) *Oxford Journal of Legal Studies*, 1–23, 22: '[W]e must ask ourselves

to interpersonal justice, clearly in any conceivable institutional division of labour, private law is likely to constitute a prominent part of the basic structure of society.

In conclusion, therefore, private law is among the public institutions responsible for ensuring justice in our society, both in preventing certain types of distributive injustice and in ensuring interpersonal justice. This means—most relevant here—that injustice in the EU's internal market is also a private law concern.

However, does this also mean that the EU has to develop a *substantive* understanding of private law justice in order to be able to respond to claims of substantive unfairness, for example of unfair exploitations, unfair terms, or excessive onerosity as a result of a change of circumstances? Or can (and even should) the European Union perhaps limit itself to a merely formal notion of civil justice? This brings us to the third and last objection, which relies on an asserted division of moral labour between public institutions, including private law, on the one hand, and private individuals, on the other.

V. Public institutions and private individuals

A. Private and public responsibilities

According to certain theorists, there exists a division of moral responsibility between private individuals and public institutions.[73] The idea is that if society takes care of distributive justice, through just institutions, then individuals are not responsible for justice in their private dealings, for example in the internal market. In other words, their responsibility for justice is exhausted by their political responsibility, as citizens, to support just institutions. The question of what other (moral or ethical) principles, if any, the private dealings of individuals would then still be subject to is a controversial one. Indeed, this is one of the reasons why the idea of a moral division of labour is itself controversial.

Some philosophers reject the division of moral labour (or 'dualism'), arguing that it would give individuals a licence to selfishness. And if people are taught that they are allowed to be selfish in their private dealings, then it is very unlikely that they will support redistributive institutions and policies in their public capacity as citizens, as a result of which egalitarian principles will never gain enough support to be successfully implemented.[74] Moreover, such a strong

whether a theory of justice can be complete if its principles are explicitly cast exclusively in distributive terms. . . . [T]he topic of distributive justice has so dominated the agenda of contemporary political philosophy that it has led many of us to neglect questions about the possible role of non-distributive principles.'

[73] For a critical discussion see, S Scheffler and V Munoz-Dardé, 'The division of moral labour', (2005) 79 *Proceedings of the Aristotelian Society, Supplementary Volumes*, 229–53, 255–84.

[74] GA Cohen, 'Where the action is: on the site of distributive justice', (1997) 26 *Philosophy and Public Affairs*, 3–30.

discontinuity between private and public responsibilities, and between the principles that apply to private and public actions, are too schizophrenic for people to cope with psychologically.[75] Others, however, argue that these worries are based on a mistaken understanding of the division of moral labour, because such a division does not at all mean that the private dealings of individuals will not be subject to any moral principles. On the contrary, the interaction between individuals would be subject merely to *different* principles. In other words, the division of moral labour enables moral pluralism.[76] We need common principles of justice if we want to live together as free and equal citizens, but beyond justice it is up to individuals to live their lives by their own lights, that is, in accordance with the principles of their own faith or worldview. And there is no reason to think that the result would be nihilism or egoism; these personal moral or 'ethical' principles may well be very demanding.

It is clear that the question of a moral division of labour is of crucial importance for whether I should feel guilty to be rich while others are starving, or whether I should give more money to charities or even give up my current job and go out to help the poor. However, what bearing, if any, does it have on European private law, in particular its relationship to justice? The reason why a division of moral labour is potentially relevant for European private law is that it has been associated with the institutional division of labour. Some authors have argued (or suggested) that the division of moral labour justifies a division of institutional labour under which private law should not be responsible for distributive justice and should only play a (crucial) role in publicly ensuring private rights, which should, however, be defined in a specific way, that is, formally. Note that this argument differs from the one that we just saw according to which an institutional division of labour is required chiefly as a matter of practicability.

B. Social justice and private right

(i) Civil disputes as windfall opportunities for distributive justice

Ripstein combines Kant's theory of right with Rawls' theory of justice in an argument against distributive justice through private law and in favour of a formal understanding of private rights. He argues that there exists a division of moral responsibility, between the (public) responsibility of society as a whole for justice and the (private) responsibility of individuals for their own lives, and that this division implies a further division of responsibility among individuals: people are not individually responsible for how well the lives of other individuals

[75] LB Murphy, 'Institutions and the demands of justice', (1998) 27 *Philosophy and Public Affairs*, 251–91.
[76] Scheffler (n 61), 248.

go.[77] Individuals have no obligation, except when voluntarily undertaken, to assist others in achieving their objectives. In particular, people have no direct claim to the resources of other people. For this reason, private disputes between individuals concerning entitlements (ie about what belongs to whom) should not be instrumentalized as a sort of 'windfall opportunity' for achieving the essentially public aim of distributive justice: 'Under the division of responsibility, insofar as such social aims are legitimate public purposes, they can be pursued by society as a whole. Private disputes must be resolved between the parties in ways that preserve each party's special responsibility for his or her own life.'[78] That is why in Ripstein's view private law should be formal and not take into account the material conditions of the parties to a civil dispute, for example their respective economic power, vulnerability, skills, experience, etc.[79] Although this formal understanding of private law is compatible with the formal understanding of liberty that libertarians advocate, Ripstein's view differs crucially from that of libertarians such as Nozick in that it does not claim that it is unjust for the state to redistribute. Ripstein merely argues that horizontal, private relationships should not be the locus for redistribution. Private law should be about what is rightfully mine and what yours, not about how much it is just for you and for me to have. It is an argument for a division of moral responsibility, not one against a fair distribution of opportunities along liberal-egalitarian lines.

(ii) Non-redistributive private law

Ripstein is right that private disputes should not be used as windfall occasions to reach a somewhat more just distribution, for the simple reason that if this were permitted it is not clear why we would still apply ordinary private law doctrines to such disputes. For, if it were a legitimate aim of private law to improve the distribution of wealth in a society, then if a very poor person sells an ordinary good, say a pair of sneakers, to a very rich person for a normal price, then why should the poor person ever be forced to hand over the sneakers after the buyer has paid the price? Or, conversely, if the poor person is the buyer, why should she even be obliged to pay the price? Why not use the windfall occasion for maximal redistribution? From the distributive perspective, for the state to force poor people to pay money to rich people just seems perverse. Indeed, from that same perspective it should be the rich that should be obliged to give money

[77] A Ripstein, 'Private order and public justice: Kant and Rawls', (2006) 92 *Virginia Law Review*, 1391–438, 1393. Ripstein invokes J Rawls, 'Social unity and primary goods', in A. Sen and B. Williams (eds), *Utilitarianism and Beyond* (Cambridge: Cambridge University Press, 1982), 159–85, who wrote that justice as fairness includes 'a social division of responsibility' between society and the individual.

[78] Ripstein, ibidem, 1398.

[79] A. Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy* (Cambridge, MA: Harvard University Press, 2009), ch 2 and passim. In the same sense, EJ Weinrib, *The Idea of private law* (Cambridge, MA: Harvard University Press, 1995). Similarly, Gutmann (n 58).

directly to the poor, and the windfall occasion of a dispute over a contract would become wholly dispensable.[80]

However, if this is true—that contract law should not be redistributive—then contract enforcement should also not structurally make matters worse. In other words, contract law should not be perversely redistributive either. In particular, contract enforcement should not unjustly reproduce or magnify existing unjust distributions of wealth and power. We have no right to the state's support of all our projects.[81] Nor can we claim a pre-institutional entitlement to expectation remedies for breach of contract;[82] contract law systems that protect the expectation interest change the pre-existing distribution of resources and make it the case that the promisee comes to have something that she did not have before.[83] And there does not seem to be any reason (in justice or other) why society would place contract enforcement at the service of perverse redistribution.[84] This seems true especially since, as we saw when discussing the *Aziz* case, sometimes the best or even the only way to prevent an unjust redistribution from occurring is by refusing to enforce a certain contract or contract clause.[85]

(iii) Distributive, interpersonal, and social justice

Weinrib argues that in civil disputes the reason why one party has to pay, give, or do something must also be the reason why the other is entitled to receive the money, thing, or service. This principle of what he calls 'correlativity' is indeed an important principle of civil justice.[86] However, from this principle it does not follows that there is no place for distributive justice in contract law, nor that contract law necessarily has to be formal. What does follow is that whatever

[80] In other words, while Nozick's famous example of the basketball star Wilt Chamberlain fails to demonstrate that redistributive tax is theft, it could still in fact underscore the idea of a division of moral responsibility between the state and individuals to the effect that the state is responsible for setting up an institutional framework that assures (background) distributive justice, while individuals do not have any moral responsibility in their private dealings to achieve the difference principle. For the example, see Robert Nozick, *Anarchy, State and Utopia* (Oxford: Blackwell Publishing, 1974/2006), 161.

[81] SV Shiffrin, 'Paternalism, unconscionability doctrine, and accommodation', (2000) 29 *Philosophy & Public Affairs*, 205–50.

[82] LB Murphy, 'The practice of promise and contract', in G Klass, G Letsas, and P Saprai (eds), *Philosophical Foundations of Contract Law* (Oxford: Oxford University Press, 2014).

[83] LL Fuller and WR Perdue Jr., 'The reliance interest in contract damages', (1936–1937) 46 *Yale Law Journal*, 52–96, 373–420; PS Atiyah (n 47), 90, 134.

[84] In the same sense A Bagchi, 'Distributive justice and contract', in . G Klass, G Letsas, and P Saprai (eds), *Philosophical Foundations of Contract Law* (Oxford: Oxford University Press, 2014), 193–212, 199, who argues that 'we should interpret interpersonal entitlements in such a way that they do not exacerbate distributive injustice'.

[85] Shiffrin (n 80), 235, observes with regard to the American doctrine of 'unconscionability', which is roughly similar to the doctrine of unfair exploitation in the CESL-proposal, that it 'works directly to staunch the flow of resources from the disadvantaged to those who are better off, both by voiding exploitative contracts and by deterring their formation. These are some of the very effects that the redistributive transfers brought about by the tax system would aim in part to reverse.'

[86] E. Weinrib, *Corrective Justice* (Oxford: Oxford University Press, 2012), ch 1.

distributive justice requires in contract law must at the same time also be just between the parties to the dispute. But that is exactly what happens in those cases where distributive justice through contract law is appropriate. For these are the cases where an unjust redistribution among the parties can be prevented from occurring, that is, where without the intervention one party would be unjustifiably enriched at the expense of the other.[87] The example of unfair exploitation (or unconscionability) illustrates this correlativity very well.[88] Pursuant to Article 51 CESL, as it was proposed by the European Commission,[89] for example, 'A party may avoid a contract if, at the time of the conclusion of the contract: (a) that party was dependent on, or had a relationship of trust with, the other party, was in economic distress or had urgent needs, was improvident, ignorant, or inexperienced; and (b) the other party knew or could be expected to have known this and, in the light of the circumstances and purpose of the contract, exploited the first party's situation by taking an excessive benefit or unfair advantage.' It is unjust for one contracting party to exploit the other's predicament (interpersonal justice), but a society is also unjust to the extent that it accepts different distributive shares in terms of wealth, happiness, preference satisfaction, reasons for self-respect, other primary goods, or capabilities for human flourishing, resulting from unfair exploitations (distributive justice). We could also combine these two elements of justice into a third by stating that a society is unjust (social justice) to the extent that it supports exploitative practices by rendering exploitative contracts legally enforceable that unjustifiably make certain parties worse off to the benefit of others.[90]

(iv) An innate right to a formal private law?

Invoking the division of moral responsibility, Ripstein argues not only against distributive justice through private law but also for a formal understanding of interpersonal justice and of private law. For present purposes this would mean that substantive considerations should not be part of a European conception of civil justice, and—in radical opposition to the acquis as it stands today—that European private law should be a system of formal rights. However, is it really

[87] Gordley regards such cases as instances exclusively of corrective justice, on a very substantive understanding of corrective justice which includes, in particular, a fair price requirement. See eg J Gordley, 'Contract law in the Aristotelian tradition', P Benson (ed.), *The Theory of Contract Law: New Essays* (Cambridge: Cambridge University Press, 2001), 265–334.

[88] Pursuant to Art. 51 CESL, as it was proposed by the European Commission (see n 1), for example, 'A party may avoid a contract if, at the time of the conclusion of the contract: (a) that party was dependent on, or had a relationship of trust with, the other party, was in economic distress or had urgent needs, was improvident, ignorant, or inexperienced; and (b) the other party knew or could be expected to have known this and, in the light of the circumstances and purpose of the contract, exploited the first party's situation by taking an excessive benefit or unfair advantage.'

[89] See n 1.

[90] A different way of putting this is that considerations of distributive justice inform the determination of interpersonal duties. See Bagchi (n 82), 201.

true that the special responsibility of individuals for their own lives and the related division of responsibility between society and individuals requires a formal private law? After all, it is not an easy task to take responsibility for your own life while you are being exploited.

It is submitted that a more substantive (or 'material') system of private law does not fundamentally change the division of moral labour. It does not introduce a general duty to promote the good of other people. Contracts still merely create enforceable private rights and obligations between private parties and contract law still only consists of rules of conduct between the parties to a contract. Sure enough, the rights and obligations are different under a more material than under a more formal private law, but they remain correlative rights and obligations. Especially, the spheres of freedom and free choice may be smaller (or within equally large spheres the freedom may be less comprehensive—more conceivable options are unavailable), but my entitlement still stops where yours starts and at no moment is it the case that you have a right to my performance while I am not under an obligation towards you to perform. If you invoke an unfair term, or a contract that we concluded as a result of your unfair exploitation of my dire situation, then, once I have annulled the clause or the contract respectively, you simply are not entitled to any right stipulated in that clause or contract and, correspondingly or 'correlatively', I am under no obligation to do or give whatever was stipulated in the invalid clause or contract.

Moreover, it is not clear that in a society like ours, which is characterized by reasonable pluralism,[91] contract law should necessarily be formal. On the contrary, a postulate of formal private law rather seems to be something that citizens could reasonably reject. As Ripstein explicitly points out, his formal view of private law gives expression to 'a distinctive way of thinking about human freedom and independence'.[92] However, this distinctive, Kantian way of thinking about human freedom as 'the innate right of humanity'[93] is not the only reasonable way we can think about freedom. Therefore, a society characterized by the fact of reasonable pluralism, such as the European Union, cannot enact an entirely formal contract law, or reject a contrary view—for example a substantive interpretation of the unconscionability doctrine—in the name of such a controversial idea.

There are two possibilities here. Either, as one would expect on the face of it, the 'innate right to freedom' is a metaphysical, 'natural' right, which is too closely related to particular ethical principles, or at least too thick a conception of the person and of the value of freedom to be acceptable to all citizens holding divergent, but sufficiently reasonable conceptions of the good.[94] Or it is in fact, as Ripstein suggests, a self-standing political right to equal freedom akin to the

[91] See above, Section II.B.
[92] Ripstein (n 76), 1398.
[93] Ripstein (n 78), ch 2.
[94] In this sense, Scheffler (n 71), 19.

two moral powers (a capacity to develop one's own conception of the good and a sense of justice) which are part of the 'political' conception of the person in Rawls' 'political' conception of justice as fairness, but then it cannot be so thick as to have such radically controversial implications as to require an entirely formal private law.[95] Either way, a revival of formal Kantian private law, in a neo-Savignian fashion, would not be sufficiently respectful of all EU citizens, given the fact of the reasonable pluralism of worldviews.

C. Materialisierung and comprehensive liberalism

According to a more substantive understanding of private law, private rights should arise only in the presence of sufficient substantive equality and freedom of both parties. If one party was free in a merely formal sense, then the act (eg her assent to a contract) was not an autonomous act but a heteronomous one, that is, one effectively determined by the other party (*Fremdbestimmung*). Such a more substantive understanding of party autonomy has been endorsed explicitly by the German constitutional court. It was articulated clearly in the famous *Bürgschaft* case, where a young woman without a job or an education had signed a personal guarantee to a bank for the benefit of her father's business for an amount that she could not realistically expect ever to pay back during her life. The court held: 'Today there exists broad agreement about the fact that freedom of contract is suitable as a means for arriving at an appropriate balancing of interests only in case the contracting partners are of approximately equal force, and that the compensation of disturbed contractual parity is one of the main tasks of the applicable civil law.'[96] The Court of Justice of the European Union, in the *Mostaza Claro* case, on the validity of an arbitration clause in a consumer contract, similarly rejected a formal notion of equality when, explaining the aim of the Unfair Terms Directive 1993, Art. 6(1), it held: 'This is a mandatory provision which, taking into account the weaker position of one of the parties to the contract, aims to replace the formal balance which the latter establishes between the rights and obligations of the parties with an effective balance which re-establishes equality between them.'[97]

This idea of re-establishing substantive equality between the parties as an aim of contract law can easily be explained by a substantive understanding of private autonomy as the moral basis of contractual obligation, which, in turn, is typical

[95] Ripstein's project in *Force and Freedom* is to demonstrate that Kant's *Rechtslehre*, his theory of law and justice (or 'doctrine of right', as it is usually referred to in the English literature) is self-standing in that it does not depend on his ethics. See, in particular, the 'Appendix "A Postulate Incapable of Further Proof"' (pp. 355–88). See also TW Pogge, 'Is Kant's *Rechtslehre* comprehensive?', (1997) XXXVI *The Southern Journal of Philosophy*, , Supplement, 161–87, 162–3.

[96] *Bundesverfassungsgericht*, 19 October 1993, *BVerfGE* 89, 214 (my translation).

[97] Case C-168/05 *Mostaza Claro* [2006] ECR I-10421, par.a 36. The French language version speaks of 'l'équilibre formel' and 'l'équilibre réel', the German version of 'formale Ausgewogenheit' and 'materielle Ausgewogenheit'.

of certain liberal perfectionist and comprehensive liberal views. If personal autonomy and individual liberty are understood as the equal opportunity for each of us to make our own choices and to live our lives by our own lights, then clearly the degree to which we really are able to live such an autonomous and self-authored life depends crucially on the range of potentially valuable alternatives that are actually available to us. Actual freedom, therefore, requires more than not being hindered when choosing; it requires the presence of valuable options to choose from.[98]

However, liberal perfectionist principles, like the ultimate values and principles of any other comprehensive doctrine, also cannot be reasonably expected to be acceptable to all citizens as the foundations of our laws, in this case European private law.[99] Liberal perfectionism and comprehensive liberalism (if that is a different doctrine), as comprehensive ethical doctrines, although they are widely shared in western democracies, nevertheless do not enjoy general acceptance.[100] This raises the question—troubling for those of us who tend to look favourably upon the transformation, during the course of the twentieth century, of private law from formal to more substantive[101]—whether the 'materialization' (*Materialisierung*) of private law fatally depends for its justification on liberal perfectionist principles, in particular the ideal of the autonomous person and the idea that a human life is more valuable to the extent that it is self-authored. I do not think it does. The rejection of private law formalism does not depend on the endorsement of liberal perfectionism, as we just saw. Nor is it impossible to arrive at neutral and self-standing ('political') principles of private law justice (as will be illustrated below).[102]

Dworkin introduced the metaphor of swimming in your own lane to illustrate the idea of a division of public and private responsibilities: you are not allowed to cross borders and to start swimming in someone else's lane, but as long as you remain inside your own lane you are free to live your life according to your own conception of the good, or, as Dworkin puts it, of how to live

[98] J Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986). For private law, see H Dagan, 'Pluralism and perfectionism in private law', (2012) 112 *Columbia Law Review*, 1409–46.

[99] On the 'fact of reasonable pluralism', see above, Section II.B.

[100] See Larmore (n 5), 131, who points out that in a pluralist society the ideals of autonomy and individuality to which Kant and Mill appealed 'have themselves become simply another part of the problem.' See also MC Nussbaum, 'Perfectionist liberalism and political liberalism', (2011) 39 *Philosophy & Public Affairs*, 3–45.

[101] Wieacker famously referred to the gradual transformation of private law by the courts and the legislator in the course of the twentieth century in Germany and other European countries as its 'Materialisierung'. See F Wieacker, 'Das Sozialmodell der klassischen Privatrechtsgesetzbücher und die Entwicklung der modernen Gesellschaft' [1953], in idem, *Industriegesellschaft und Privatrechtsordnung* (Frankfurt: Fischer, 1974) , 9–35, on 23–4. He borrowed the concept from Weber, who however identified legal formalism with rationality and was rather critical of a 'material' (ie substantive) concept of law. Specifically with regard to contractual fairness, see M Weber, *Wirtschaft und Gesellschaft* (5th ed, Tübingen, Mohr Siebeck, 1972), 507.

[102] See below, Section VI.B.

well.[103] The metaphor may be interpreted (and be meant by Dworkin) as implying a non-distributive and formal understanding of private law.[104] However, although it is true that it is for a legitimate private law to determine the borders between the lanes, it is not intrinsic to a division of moral responsibility that the borderlines should be sharper rather than vaguer, that is, that private law should be formal rather than substantive. Therefore, a rule like Article 4 Unfair Terms Directive, pursuant to which the unfairness of a contractual term must be assessed by referring, among other things 'to all the circumstances attending the conclusion of the contract', or Article 51 CESL-proposal that, as we saw, explicitly requires taking into account a contracting party's dependence, economic distress, urgent needs, improvidence, ignorance, and inexperience, is entirely compatible with the moral responsibility of every person for her or his own life, because such rules on unfair exploitation and unfair terms respectively do nothing more than prevent and sanction illegitimate boundary-crossing.

This concludes our discussion of the division of moral responsibility between public institutions and private individuals. As we saw, it does not follow from such a division that European private law should be a matter merely of formal corrective justice. On the contrary, there is every reason to expect that political principles of civil justice of the kind the European legislators develop and rely on, would include not only a distributive justice role for private law but also a more substantive understanding of interpersonal justice. In other words, the determination of what constitutes unjust conduct in the European internal market will require substantive considerations.

VI. Civil justice in the European Union

A. Substantive justice in European private law

What does this mean in practice? It means that if someone claims that they are unfairly treated because of the way the internal market is constructed, including the presence or absence of certain private law rules, for the EU, in order to discharge its moral responsibility, it is not enough (because it is beside the point) to reply that the legal framework of the internal market has a solid legal basis and/or that the existing European private law rules make an important contribution to economic growth in the EU. Rather, the EU will have to be able to respond to such an objection by giving reasons of justice. It must be able to

[103] Dworkin (n 17), 287.

[104] See also Dworkin's observation in *Law's Empire* (Cambridge, MA: Harvard University Press, 1986), 308–9, that 'it seems unjust that compensation to a victim should depend on the relative wealth of the actor'. On this view, Art. 6:109 Dutch Civil Code probably should be regarded as unjust.

explain why the way the internal market is currently constructed is not in fact unjust (in terms of distributive justice and interpersonal justice) towards the person raising the objection or towards anyone else.

Coming back to the questions raised in the introduction, and adding a few others, the European legislator will have to able to justify, for example:

—why only in certain parts of the internal market—ie only under the laws of certain Member States—does there exist a general pre-contractual duty to inform (ie one is required to speak when noting that one's business partner is making a mistake),[105] breaking off advanced negotiations may lead to liability,[106] contract performance is subject to a general duty of good faith and fair dealing,[107] contracts may be annulled for the mere reason that they are substantively unbalanced,[108] a contract may be adapted after a radical change of circumstances,[109] there exists a right to specific performance in the case of breach by the other party,[110] penalty clauses are unenforceable;[111]

—why small and inexperienced businesses are not protected against unfair terms in their contracts with large and powerful businesses when doing business in all Member States;[112]

—why customers in the sharing economy are not protected against their peers just like consumers are protected against businesses;[113]

[105] Contrast eg *Smith v Hughes* (1871) LR 6 QB 596 with Art. 1112–1 of the French civil code (following the reform).

[106] Contrast eg HR 18 June 1982, NJ 1983, 723 (Plas/Valburg) (liability for expectation interest for breaking off in a manner contrary to good faith) with *Walford v Miles* [1992] 2 AC 128 (rejection of pre-contractual good faith duty).

[107] Contrast eg §242 BGB and Art. 1134 para. 3 Code civil with *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] QB 433 (Bingham LJ) (but see *Yam Seng Pte Limited v International Trade Corporation Limited* [2013] EWHC 111 (QB)).

[108] Contrast eg Section 36 Nordic Contracts Act with eg Art. 1448 Italian codice civile (state of need required). See also Art. 3.2.7 (gross disparity) Unidroit principles of international commercial contracts 2010 the personal scope of which remarkably is limited to B2B.

[109] Contrast eg §313 BGB with Cass civ, 6 March 1876, D 1876 I 93 (Canal de Craponne) (but see Art. 1196 draft contract law reform).

[110] Specific performance is the primary remedy in civil law jurisdiction but available only, as a secondary remedy, ie when damages are inadequate, in common law jurisdictions. The CJEU has acknowledged a strong right to specific performance (repair and replacement) for consumers in sales contracts. See CJEU, Joined Cases C-65/09 and C-87/09, *Weber and Putz* [2011].

[111] Penalty clauses have been generally unenforceable in common law jurisdictions (but see now *Cavendish Square Holding BV v Talal El Makdessi* [2015] and *ParkingEye Ltd v Beavis* UKSC 67) and generally enforceable in civil law systems, albeit in the latter sometimes subject to a moderating power for courts (eg §1336 (2) ABGB).

[112] For an overview, see H Schulte-Nölke, C Twigg-Flesner, and M Ebers (eds), *Consumer Law Compendium; Consumer Acquis and its Transposition in the Member States* (Munich: Sellier, 2008), 376.

[113] In most Member States, the ordinary rules of general private law apply to consumer-to-consumer (C2C) or peer-to-peer (P2P) transactions. However, some Member States are currently considering specific legislation.

—why the unfair commercial practices directive labels aggressive commercial practices, harassment, coercion, and undue influence as 'unfair',[114] but stipulates nevertheless that, as far as the directive is concerned, this does not affect the validity of the contractual relationships following from such practices;[115]

—why the rejection of the country-of-origin principle in consumer protection law is also fair towards sellers from poorer Members States who, on average, may be worse off than consumers in the richer Member States;[116]

—why contracts for the sale of certain goods or the provision of certain services are not banned from—or, on the contrary, are not permitted throughout—the internal market (think, eg, of contracts for the sale of guns, soft and hard drugs, alcohol, *Mein Kampf*, pornography, organs, or the provision of services such as laser games, dwarf tossing, prostitution, or surrogacy and the different responses given in the laws of the Member States under such doctrines as illegality and immorality, public policy, and causa).[117]

These are some questions relating chiefly to contract law which, although of central importance to any market, is by no means the only field of private law the essentials of which are part of the basic structure of the EU and its internal market. Tort, property, and especially company law raise very similar justice questions.

We cannot possibly attempt to answer all these normative questions here, certainly not as a matter of theory. Nor do we need to. For, the point is rather that it is the EU, especially the EU law-makers, that should be a able to respond to such questions because of the responsibility the EU has for ensuring substantive justice in its internal market. The appropriate standard for civil justice in the internal market may well be a minimum standard, but the EU must be able to respond to claims raised by agents in the internal market (consumers, peers in the sharing economy, businesses) that the presence or absence of certain private law rules, rights, or remedies is unjust towards them. Because of the EU's moral responsibility for substantive civil justice in the internal market, it cannot shift the responsibility for answering these questions (at least not entirely) to the Member States.

[114] Arts 8 and 9 Directive 2005/29/EC of 11 May 2005.
[115] Art. 3(2).
[116] See Section III.B.i above.
[117] Rules on invalidity for immorality and illegality differ from country to country. The subject was deliberately excluded from the substantive scope of the CESL proposal (see preliminary recital 27); the same applies for the two recent contract law proposals for the Digital Single Market, n 1 above (see Art. 3(9) and recital 10 of the proposed directive on digital content and Art. 1(4) of the one on tangible goods). For attempts at stating European principles, see Arts 15.102 PECL and II.-7:302 DCFR.

For the same reason, when justifying the current state of European private law—or proposals for its further harmonization—the European legislator cannot limit itself to pointing to its (expected) success in creating a level playing field for businesses or its contribution to confident cross-border shopping by consumers, as the Commission has done again in its latest two contract law proposals for the Digital Single Market.[118] The EU will have to change its discourse and also address the justice dimensions of its proposal. What is needed is a broadening of the EU's justificatory horizon from mere 'justice for growth' towards 'justice for justice'. And in order to be able to address (and perhaps rebut) charges of injustice in the internal market of the kind raised here, the European Union will need to develop a European conception of civil justice. For, as European citizens we do an injustice to victims of unfair exploitations and similar unjust conduct when we fail to ensure—by developing and applying and appropriate conception of justice—that such unjust market conduct is banned from the internal market.

B. Ensuring justice in the internal market

What would a European conception or principles of civil justice, in particular of unjust conduct in the internal market, look like? Given the fact of reasonable pluralism, private law principles cannot be based on controversial comprehensive doctrines and ultimate values. Therefore, when trying to determine a (sufficiently) just system of private law, it is not helpful to refer to private law's asserted essential nature. The problem with the many essentialist and other monist normative theories of private law, that explain, justify, and critique private law exclusively in terms of, for example, private autonomy or economic efficiency, is that each of these provides merely one view of the cathedral.[119] Or rather, they provide the foundations for a cathedral whose full splendour exists only in the eyes of the members of its parish. Given, however, that in the internal market each of us regularly has to resolve disputes concerning transactions with people adhering to faiths, ultimate values, and principles that differ from our own, the rules and doctrines of private law that we adopt together, or their rejection, will also have to be defensible in terms that do not necessarily have to rely on controversial ultimate values and principles. Therefore, in a pluralist society a just system of private rights will have to be based on more self-standing or 'political' principles of private law justice.[120]

[118] See n 1 above. The only reference to exploitation is in the first sentence of the first recital: 'The growth potential of e-commerce has not yet been fully exploited.'

[119] G Calabresi and AD Melamed, 'Property rules, liability rules, and inalienability: one view of the cathedral', (1972) 85 *Harvard Law Review*, 1089–128.

[120] It does not seem necessarily, for present purposes, to determine the exact nature of such principles and the kind of truth claims (if any) we can make with regard to them. The principles of private law justice may be understood as either 'political' principles that can provide a sufficiently neutral (ie non-partisan) external standard for evaluating the fairness and justice of a given (or proposed) private

Thus, the challenge is to arrive at a political set of rights and principles of European private law justice, as an important part of the institutional background for internal market transactions. As we just saw, these rights and principles will have to be both interpersonally and distributively sufficiently just. And they will have to relate not only to substance, but also to enforcement.[121] Indeed, the term 'civil justice' is often used, especially in EU discourse, specifically to refer to dispute resolution. Such a set of political principles does not necessarily have to constitute or yield a complete and fully just system of European private law. On the contrary, a political European conception of civil justice, as a background understanding for the internal market, may very well be (indeed is likely to be) a conception of minimum justice.

How exactly such European principles of private law justice and just private rights should be determined and implemented in practice is a question that cannot be answered in any detail here. The short answer is: not by experts as a matter of moral or legal theory, but through an inclusive process of democratic deliberation within the European polity where everyone's point of view is duly taken into account.[122] Briefly put, this is because of what Habermas calls the co-originality of private and public autonomy: individual and collective self-determination mutually presuppose and shape each other.[123] And theorists have no privileged access to the truth of justice.[124] This, incidentally, also explains why the analysis in Sections IV and V had to remain relatively abstract, addressing and rejecting in general terms the objections against distributive and substantive corrective justice in private law, and could not make any positive claims as to the specific European private law rules that justice would require. This more procedural understanding of civil justice is, of course, in sharp contrast to the essentialist and other monist theories that, with the help of expert theorists, are able to offer very concrete answers to law-making questions, or even a complete blueprint for an ideal European private law in all its details. On the positive side, of course, the lack of detailed concrete answers to questions concerning justice in European private law is compensated by the fact that, the present account, if convincing, should be compatible with all reasonable worldviews held in our pluralist society. Put differently, the main argument made in this article concerning the need for the institutional framework of the internal market, including, in particular, its

law system (Larmore, Rawls), or as a contribution to the inclusive democratic deliberation concerning such a system and its future (Habermas), or indeed as an attempt to formulate reciprocal and general reasons for private law that no one could reasonably reject (Forst).

[121] As MJ Radin, points out in 'Boilerplate: a threat to the rule of law?', in LM Austin and D Klimchuk (eds), *Private Law and the Rule of Law* (Oxford: Oxford University Press, 2014), 'background rules of the institutions of private law, including contract, property, and tort, must be maintained and properly enforced by government, if these institutions are to be said properly to exist'.

[122] See further MW Hesselink, 'Democratic contract law', (2015) 11 *European Review of Contract Law*, 81–126.

[123] Habermas (n 41), 409.

[124] Rawls (n 5), 427.

private law, to meet the standards of distributive justice and substantive interpersonal justice, is not offered as a 'preference' or as a proposal for the European common good, or indeed as required by 'common European common values', but as reasons that could not be sensibly rejected by anyone in our society characterized as it is by reasonable pluralism.

The objection that a European polity does not exist gets things backward.[125] If Europe's internal market has a basic structure that exercises an important distributive role (in terms of wealth, welfare, primary goods, or capabilities), which, as said, seems undeniable today, then a European civil society, a European demos (not an ethnos) by necessity has to exist too. In Europe, citizens belong to (at least) two gradually integrating polities, the national and European Union ones.[126] Currently, European citizenship is characterized, in particular, by market freedoms and fundamental rights, and not as much (if at all) by private rights and a background understanding of interpersonal justice. As a result, as European citizens today we learn that in the internal market it is permitted to unfairly exploit each other or to breach our contracts unless this is forbidden by national law. Under these circumstances, it is not surprising that, in order to fill the normative gap, the CJEU, in a series of cases, has started formulating 'principles of civil law', such as the principles of binding force of contract, good faith, and unjustified enrichment.[127] If the 'lords of the treaties', for primary EU law, and the ordinary legislator (Commission, Council, and European Parliament), for secondary EU law, fail to take their responsibilities then some other institution will have to step in. For a European internal market requires European principles of civil justice.[128]

The internal market cannot be complete and function properly in a justice vacuum. In particular, it cannot protect and entrench market freedoms and the freedom to conduct a business without also protecting vulnerable market agents (eg small businesses) against unfair exploitations and other unfair conduct. Whether this means that the internal market should be subject to a general standard of conduct 'characterised by honesty, openness and consideration for

[125] For the view that the EU has no *Volk*, see famously the *Bundesverfassungsgericht*, in its Maastricht ruling, and its defence by D Grimm, 'Does Europe need a constitution?' (1995) 1 *ELJ*, 282–302 (contrast JHH Weiler, 'Does Europe need a constitution? Demos, telos and the German Maastricht decision', (1995) 1 *ELJ*, 219–58), and most recently in *BVerfGE* 123, 267 (*Lissabon*). The most prominent critic of this view has been Habermas; see most recently in J Habermas, 'Drei Gründe für "mehr Europa"', in J. Habermas, *Im Sog der Technokratie* (Berlin: Suhrkamp, 2013), 132–7, 136.

[126] See J Habermas, *Zur Verfassung Europas: Ein Essay* (Berlin: Suhrkamp, 2011).

[127] See eg Case C-489/07 *Pia Messner v Firma Stefan Krüger* [2009] ECR I-07315. Cf. MW Hesselink, 'The general principles of civil law: their nature, roles and legitimacy', in D Leczykiewicz and S Weatherill (eds), *The Involvement of EU Law in Private Law Relationships* (Oxford: Hart Publishing, 2013), 131–80.

[128] N Reich, *General Principles of EU Civil Law* (Cambridge, Antwerpen: Intersentia, 2013), distinguishes seven principles of EU civil law: the principles of 'framed' autonomy; protection of the weaker party; non-discrimination; effectiveness; balancing; proportionality; and good faith and of a prohibition of abuse of rights. Some of these principles of EU civil law (esp effectiveness and proportionality) probably are not also EU principles of (civil) justice.

the interests of the other party to the transaction'[129] or to more specific rules and principles is an open question (probably we need both). However, there is little doubt that a European Union that builds an internal market that does not properly define (minimum) private rights and obligations of market agents and fails to ban unjust conduct from its market, does an injustice, as a polity, to its citizens. First, because in leaving this matter to the discretion of the national private law-makers, it fails to prevent, for example, that exploitative internal market transactions could be enforced against European citizens. Secondly, because in this way it conveys a message to those citizens that, in the eyes of the European polity, exploitative internal market transactions are not unjust, at least not sufficiently unjust to be incompatible with its internal market. This latter failure, as said, is problematic also in terms of polity building: 'If am allowed to exploit my business partner then perhaps we are also allowed to exploit the Greeks'.

C. The acquis communautaire and civil justice

The central claim of this article has been that the EU can be held responsible for any existing internal market civil justice deficit. The big question is of course: does it exist? Does the EU's internal market presently suffer from a civil justice deficit and, if so, what private law rules would be needed to remedy it? It follows from the political nature of these questions that they must be addressed in political discourses, chiefly by the European legislator, starting with the European Commission's communications, proposals, and initiatives, where it announces legislative action (or inaction) with regard to the private law of the internal market, typically a specific 'sector' of the market, such as, most recently the contract law initiative for the 'digital single market'.[130] The EU's moral responsibility requires that the EU justify its proposals (and their limits, eg concerning their substantive and personal scope) with reasons that are compatible with distributive and (substantive) interpersonal justice. For that purpose, the Commission will have to develop a coherent conception of civil justice. The absence of a political conception and discourses on civil justice does in itself constitute a justice deficit.

Whether beyond appropriate justificatory discourses the internal market suffers from a justice deficit today and, if so, how the deficit can best be remedied, in particular whether this would require treaty change (it might not), and what would be the proper level of generality (rights, rules, principles) are questions that cannot be fully addressed—and certainly not finally answered—in this essay. As we saw, the reason for this is that principles of justice in European private law that aim to be compatible with the broad variety of different

[129] This is the way Art. 2, CSECL-proposal defined the duty of good faith and fair dealing.
[130] N 1 above.

reasonable worldviews prevailing in our society, as opposed to essentialist and other monist theories, do not tend to yield very specific normative answers to law-making questions. This may be frustrating (although much less so than a perfectionist state is likely to be for all others than those committed to its official supreme values) but it is inevitable if one takes the fact of reasonable pluralism seriously. (Obviously, such principles of justice do not have to be any less demanding, nor do they make the need to address the internal market in terms of justice any less urgent, than, eg, perfectionist principles would do.)

Nor can this article discuss in any detail the question of how centralized the system should be and what degree and kinds of legal pluralism should be permitted or sought. Still, it is important to underline that the argument presented in this article does not constitute a plea for a European civil code replacing national private laws. In theory, even a European system of private rights could be achieved entirely by way of harmonization through one or more directives, even mere minimum harmonization, provided that the harmonization is geared (also) towards (minimum) justice.[131]

Nevertheless, a few comments with regard to the acquis communautaire should be made, in order to prevent a possible misunderstanding. Of course, this paper does not mean to deny or obscure the contribution that the acquis has already made to civil justice in the EU. That would be an outrageous endeavour. My claim is rather that (1) we cannot know whether this contribution meets the (minimum) requirements of a European conception of civil justice unless we articulate such a conception in political discourses, and (2) that EU consumer protection, fundamental rights, and conflict rules are unlikely to be the whole story of European civil justice. In other words, I am raising a possible deficit in civil justice in the EU, not claiming its total absence. Let me briefly clarify this with regard to some of the main characteristics of the private law acquis: consumer rights, fundamental rights, private international law, and the limited attributed competences.

(i) Consumer rights

In spite of the fact that European consumer protection law is officially motivated by market integration objectives (sometimes defined as encouraging consumers to shop across borders with a view to contributing to an increase in economic growth),[132] and generally quite limited in scope,[133] there exist nevertheless

[131] For a plea for a European civil code of principles as a directive see Collins (n 44), 132, 189.

[132] All consumer protection directives are based on Art 114 TFEU and its predecessors.

[133] For example, in Directive 93/13/EEC on unfair terms, which requires the Member States to ensure that unfair contract terms are not binding on consumers, unfair core terms, such as price terms and other terms defining the main subject of the contract, are excluded from the unfairness control, while the personal scope of the directive is limited to consumers (excluding commercial (B2B), civil (C2C), and mixed purpose contracts). Similarly, the scope, both personal and substantive, of Directive 1999/44/EC, which requires the Member States to ensure certain rights to consumer buyers of goods is quite limited. In particular, it does not cover: breaches other than non-conformity,

important parallels between consumer protection and civil justice, not only in outcomes but also in reasons (which matters from a moral perspective).

First, as we saw with regard to the *Aziz* case, consumer protection law may sometimes play a role in assuring distributive justice. In such cases, the rule ensuring that the unfair term is not binding on the consumer (Art. 6 Unfair Terms Directive) may be the best or even the only way to prevent a distributive injustice. It is true that, for example from the perspective of the difference principle, the limitation of weaker party protection only to consumers may be questioned, since the improvement of the position of the least well-off in society may also require the inclusion of small businesses into the personal scope of protective rules.[134] However, it would be going too far to reject consumer protection law entirely as unjust for the reason of its under-inclusiveness. The inevitable over-inclusiveness of the categorical protection of consumers, in contrast, is not even necessarily a problem from the perspective of distributive justice, for example the Rawlsian difference principle.[135]

Secondly, the objective of 'a high level of consumer protection' (Arts 114 (3) and 169 (1) TFEU) could be regarded as a proxy for substantive interpersonal ('corrective') justice. In an ideal world without dispute resolution costs, substantive interpersonal justice probably would be best served exclusively by more contextualized rules, but in times where governments try to limit the costs of civil justice (eg through the privatisation of justice via ADR)—a policy that may be based on the distributive objective of increasing access to justice—the operation of such rules would perhaps be just too costly and we may have to settle for a more standardized and categorical approach, even if this comes at the cost (in terms of justice) of over-inclusiveness (also protecting consumers with relevant expertise, experience, or power) and under-inclusiveness (failing to provide adequate protection to particularly vulnerable consumers).

However, even if it could thus be made plausible that today we do in fact already have 'consumer rights' in the strong sense of moral rights to consumer protection, then surely our private rights cannot be limited or reduced to mere consumer rights? Breach of contract, unfair exploitation, or fraudulent non-disclosure may constitute unjust conduct in the internal market, not merely against consumers, but also against professionals and peers (in the sharing

the consumer sales of intangibles and immovables; buyers' breach; B2B and C2C sales; or any other contracts than sales (eg service). The unfair commercial practices directive (2005/29/EC), unlike its title suggests, does not provide general guidance as to the conduct that is expected from agents towards each other in the internal market, since its scope is limited to business-to-consumer commercial practices and the directive is 'without prejudice to contract law and, in particular, to the rules on the validity, formation or effect of a contract' (Art. 3). Finally, the only right mentioned in the consumer rights directive (2011/83/EU), in spite of its very broad title, is the right of withdrawal (plus, arguably, a right to timely delivery).

[134] See Klijnsma (n 63).

[135] Ibidem.

economy), and indeed also when committed *by* consumers (although the definitions and modalities may have to be differentiated).

It would, therefore, be naive to think that consumer protection on its own could assure civil justice in the internal market. Even the most extensive set of consumer rights, for example in the shape of a European consumer code, and proper guarantees for their enforcement, could not on its own prevent or sanction the violation of private rights and other unjust conduct in the internal market. Consumer law has always been formulated as a complement or exception, as the case may be, to general private law. It has never been completely self-standing and is unlikely ever to be. Rather, consumer protection law builds on the general protection of private rights through the rules of property, contract, and tort. We are not entitled to our personal property or to contract performance, or be prevented from harming others in the market, *as* consumers. Also, there exists no such thing as consumer property or a consumer tort. And the more pervasive and detailed consumer protection rules become, the more it will be important to have a clear sense of what should be our more general private rights in the internal market to which these specific rules should constitute a complement or an exception.

(ii) Fundamental rights

Similarly, the horizontal effects of fundamental rights, as contained in the CFREU, and of general principles of EU law derived allegedly from the 'common' constitutional traditions of the Member States (if these will continue to play an autonomous role alongside the CFREU), to the extent that these rights represent genuine moral rights,[136] may be of great significance from the perspective of justice between private parties.[137] But, again, the protection of private rights in the internal market cannot be limited merely to fundamental rights. Or, formulated the other way around, it seems difficult for the CJEU (and it may go well beyond its legitimate task)[138] to found a genuine system of private rights—even if limited merely to the broadest outline of the private rights that should be minimally protected in the internal market—on the provisions of the Charter alone, especially since these rights apply only within the

[136] This seems doubtful with regard to the freedom to conduct a business (Art. 16 of the Charter of Fundamental Rights of the European Union) which is interpreted by the CJEU as including, as an essential element, employers' freedom of contract. See CJEU, Case C-426/11 *Alemo-Herron* [2013]. Cf the critical comment by S Weatherill, 'Use and abuse of the EU's Charter of Fundamental Rights: on the improper veneration of "freedom of contract", 10 *ERCL* (2014), 167–182. See further Hesselink (n 40).

[137] See eg G Comparato, 'Private autonomy and regulation in the EU case-law', in H-W Micklitz, Y Svetiev and G Comparato (eds), *European Regulatory Private Law—The Paradigms Tested*, EUI Working Papers, LAW 2014/04, 4–18.

[138] Cf. Hesselink (n 40).

scope of already existing EU law.[139] Even if the Court of Justice decided to treat the Charter as 'total constitution' potentially affecting every corner of EU private law,[140] then there would still remain important justice dimensions to private law that cannot plausibly be reduced to aspects of fundamental rights. Not every violation of a principle of justice also constitutes a violation of a fundamental right. This is especially true for conduct contrary to principles of interpersonal justice.

On the other hand, EU private law may sometimes have to defer to national understandings of justice as expressed in the constitutions of one or more Member States. However, the idea in particular of national conceptions of justice embedded in national legal cultures can easily lead to the kind of neo-romantic or communitarian ideas of the common good and identity politics that are incompatible with a society characterized by reasonable pluralism. If I am allowed to treat you in a certain way because that is 'the way we treat each other here' (ie in this particular corner of the internal market) then I am imposing my conception of the common good on you with the help (in our case) of the public rules of private law. Community or culture (national or other) should not provide an opt-out from justice.[141]

(iii) Private international law

Alternatively, it could be maintained that the EU has already fully complied with its moral responsibility for ensuring the protection of private rights and the prevention of unjust conduct in the internal market by having adopted sets of private international law rules, in particular with regard to conflicts of law (eg Rome I and II) and jurisdiction and enforcement (eg Brussels I).[142] This would especially be the case, following this argument, since the relevant regulations were not adopted on the basis of the internal market competence (Art. 114 TFEU), but with a view to establishing a European area of freedom, security, and *justice* (Arts 61 and 65 EC, now 81 TFEU). Furthermore, it could be added, the system of conflict rules and recognition of judgments is

[139] Art. 51 (1), CFREU. See Case C-617/10 *Åkerberg Fransson* [2013] ECR I-0000, 19.

[140] M Kumm, 'Who is afraid of the total constitution? Constitutional rights and principles and the constitutionalization of private law', (2006) 7 *German Law Journal*, 341–69.

[141] CF Sabel and O Gerstenberg, 'Constitutionalising an overlapping consensus: the ECJ and the emergence of a coordinate constitutional order', (2010) 16 *ELJ*, 511–50, argue that the *Solange* doctrine can be assimilated to the idea of an overlapping consensus in the Rawlsian sense. However, their argument in favour of occasional deference to national traditions in cases such as *Omega* displays a nationalist bias, just like the doctrine of the *BVerfG* to which it refers, and confuses the right with the good. Political principles of justice in the Rawlsian sense are not an expression of a national conception of the common good or national (constitutional) values; they are principles of right.

[142] Regulations 593/2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I), 864/2007 of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), and 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (Brussels I).

a very appropriate way of dealing with the fact of reasonable pluralism in the EU because the private laws of the Member States reflect different conceptions of civil justice; these conceptions may be rather diverse but they are generally quite reasonable and, in most cases, have been articulated in legitimate (usually democratic) national law-making processes. Then, why should national civil law principles be replaced by a European conception of civil justice which, given the still persistent democratic deficit of the EU, is unlikely to be more legitimate?

However, the EU cannot fully discharge its moral responsibility for ensuring that the internal market that it is building is sufficiently just, by deferring to the national conceptions of justice prevailing in the Member States. Just as internal market law cannot simply assume that Member State laws will never interfere with market freedoms, so too should we not take for granted that the national private laws will always protect private rights and prevent unjust conduct in the internal market in a way that is required by the (minimum) standards of civil justice that it is the responsibility of the EU to ensure, given its responsibility and power to establish and complete the internal market. It may very well be that the current arrangement under Rome I, with free choice of law subject to certain limits (weaker party protection, public policy exception), generally leads to outcomes that are indeed sufficiently just, both distributively and interpersonally. However, this is not enough. Accidental justice is not justice at all.[143] What is necessary is that the EU make sure that not only its substantive private law, but also its conflict rules (and indeed its policies concerning ADR and ODR)[144] meet (minimal) justice requirements. The point is, as said, that this will have to be established through discourses of justice (also) within the EU law-making institutions (starting with the Commission proposals), by offering justifications that refer to convincing principles of justice.

The argument from private international law is nevertheless an important one because it points our attention to the fact that the EU does not necessarily hold exclusive moral responsibility for preventing injustice in the internal market, but may have only a shared responsibility, together with the Member States. To be clear, the point that this paper is trying to make is that the EU cannot deny having any moral responsibility at all for the internal market's justice, not that it is exclusively responsible for preventing unjust conduct in the internal market. The moral responsibility of the EU for justice in the internal market, just like its

[143] Quite similar to the way in which freedom from interference is not real freedom if the non-interference depends on the arbitrary power eg of a benign tyrant. See P Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford: Oxford University Press, 1997). Not having a conception of civil justice could also be regarded as at least risking to exercise arbitrary power and is therefore also not justifiable in terms of the right to justification, as formulated by Forst (n 13).

[144] Prima facie, ADR and ODR raise serious justice concerns because in settlements especially the most vulnerable individuals risk waiving important private rights without even being aware of having them.

law-making competence,[145] is not necessarily exclusive, but can also be a shared one, together with the Member States.

(iv) Limited competence

Finally, it could be objected that the limited competence of the EU in the area of private law, following from the constitutional principle of conferral (Art. 5 TEU), effectively limits EU private law-making competences to little more than market integration measures, which seriously constrains the EU's moral agency. Indeed, it would be illegitimate and perhaps even unjust for EU institutions to disregard or unduly stretch their limited law-making competences. Thus, on the basis of the (Kantian) moral principle of 'ought implies can', the EU cannot be held morally responsible for failing to ensure (minimal) civil justice in the internal market.

However, the reverse argument seems more plausible. Perhaps, from a justice point of view, the way the competences are currently limited (if indeed they are—see below) is part of the problem, that is, it is part of the justice deficit. Maybe it is unjust for the EU to have such limited competences. In this case, it would of course not be the principle of limited and attributed competences itself that would be unjust,[146] but rather the limited competence with regard to justice, given the other competences (especially market integration) that the EU already has and the way these are currently interpreted.[147] Just as the EU cannot justify what it has done to the Greeks by invoking its lack of competence to treat them more fairly, so too is the absence of a more general private law-making competence not an excuse for having an internal market without guaranteeing that it is also sufficiently just. What happened to the Greeks was not a natural disaster but a direct consequence the way the euro and its governance were set up by the EU (and of cheating by their government). Similarly, unjust conduct in the internal market (eg unfair exploitation) is not inevitable but can be prevented and sanctioned (at least to some extent) by appropriate rule choices including, if necessary, choices concerning the law-making competences of the EU. So, perhaps the Member States and the citizens of the EU, to whom together the EU belongs not only but who arguably *are* the EU (morally speaking), ought to give the EU broader competences in order to comply with its moral responsibility to have a sufficiently just internal market.[148]

[145] See Art. 4 (2) (a) TFEU.
[146] See Section III.A above.
[147] See Section III.B above.
[148] Perhaps such broader competences are already required to exist as a matter of positive constitutional law, in particular principles common to the constitutional laws of the Member States, which authorize market integration but are subject to certain limits which arguably include principles of justice.

Moreover, it is not even certain that the competence of the EU is in fact limited in this way. It is true that the dominant view today seems to be that a properly functioning market is a *growing* market and that therefore the existence of a solid legal basis needs to be demonstrated with the help of 'impact assessments',[149] which must show, in particular, how much the proposed harmonization measure can contribute to economic growth ('justice for growth').[150] One of the most grotesque exponents of this view and practice in the field of private law, so far, was the impact assessment accompanying the CESL-proposal, that virtually promised that the CESL on its own would solve the economic crisis.[151] However, a different and morally more attractive interpretation of Art. 114 TFEU also seems available, that is, that a market is functioning properly only if institutions are in place which define, prevent, and sanction violations of private rights and obligations, and other unjust market conduct.[152] After all, if the protection of seals can be safely based on the internal market provisions,[153] then would it not be cynical to claim that Art. 114 TFEU does not allow the EU to protect human agents in the internal market from unfair exploitations, fraud, breaches of contract, and similar, through a set of rules or principles ensuring (minimum) private rights and (minimum) standards of just conduct?

VII. Conclusion

In conclusion, then, the EU can be held morally responsible for assuring (minimum) justice in its internal market. This means, in particular that it must be able to respond, with convincing reasons, to claims made by people who regard the law of the internal market as insufficiently just towards them because of the absence or presence of certain private rights and obligations. The EU cannot

[149] The requirement of impact assessments are the European equivalent of the cost–benefit analyses that were made compulsory by the American president Ronald Reagan in the 1980s as an important part of his deregulatory agenda. See MD Adler and E Posner, *New Foundations of Cost–Benefit Analysis* (Cambridge, MA: Harvard University Press, 2006), 3.

[150] See, generally, the European Commission's communication 'The EU justice agenda for 2020: strengthening trust, mobility and growth within the Union' (Strasbourg, 11 Mar. 2014 COM(2014) 144 final, esp 2, 7. The Explanatory Memorandum to the most recent contract law proposals announces quite candidly (n 1, 2): 'The general objective of the proposals is to contribute to faster growth of the Digital Single Market, to the benefit of both consumers and businesses.'

[151] See the 'Commission staff working paper, impact assessment, accompanying the document Proposal for a regulation of the European Parliament and of the Council on a Common European Sales Law on a Common European Sales Law', Brussels, 11 Oct. 2011, SEC(2011) 1165 final, 7.

[152] On the EU's competence to deliver social justice, with specific reference to private law, see S Weatherill, 'The constitutional competence of the EU to deliver social justice', (2006) 2 *ERCL*, 136–58.

[153] An almost complete ban on seal products was introduced by Regulation 1007/2009 of 16 September 2009. The Regulation was based on Art. 95 EC the predecessor of Art. 114 TFEU.

decline responsibility merely by referring to the Member States, or to other market institutions than private law, or indeed to the citizens themselves. Nor is justice optional: the EU has to meet the demands of justice, including civil justice in the internal market. The only way the EU can satisfactorily respond to injustice claims is by offering convincing substantive reasons why in fact the current state of the internal market is sufficiently just. For that purpose, the EU will have to develop a conception of civil justice. This will allow it to justify its current and future acquis with reasons that go beyond the contribution that EU private law can make to economic growth, and, where this proves impossible—because such justifying reasons (ie reasons that no one could reasonably reject) do not exist—to modify European private law with a view to making it become more just. More than justice for growth we need justice for justice.