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# PRIVATE LAW, REGULATION AND JUSTICE

Martijn W. Hesselink

*Abstract: This paper critically engages with the European Regulatory Private Law thesis (ERPL). The main strength of ERPL is that it offers an entirely new perspective on European private law. However, as a complete theory of European private law, ERPL is too one-sided, both from a descriptive and from a normative point of view. With its strong focus on the private law locked up in regulatory silos for specific market sectors it obscures the reality of the consumer acquis and its transformative force. A fuller picture would include the contours of a loosely coherent system of European private law that is currently emerging. The main pillars of that pragmatic system are (for now) the withdrawal rights, unfair terms control, and remedies for non-conformity. Moreover, the contribution of European private law to access justice cannot be the only standard for its evaluation and critique; at least as important are interpersonal justice and democratic legitimacy.*

## Introduction

Since 2011, an exciting research project has been based at the European University Institute in Florence. The full title of the project is: ‘European regulatory private law: the transformation of European private law from autonomy to functionalism in competition and regulation’. Its initiator and principal investigator is Hans Micklitz, but it has involved a dozen of other researchers. Together, they have developed what we may refer to as the ‘ERPL-thesis’, or simply as ‘ERPL’. Now that the project is reaching its conclusion, it has invited external comments from colleagues. In this short paper, I will critically engage with the main objectives and central claims of ERPL.

The ERPL-project’s aim was to elaborate ‘a normative model of a self-sufficient European private legal order and its interaction with national private law systems’.<sup>1</sup> However, the research method it adopted was ‘a socio-legal methodology’, which involved in particular the collection of empirical materials and the incorporation of these into its legal and theoretical analysis.<sup>2</sup> Consequentially, I will offer two sets of observations, respectively on ERPL’s descriptive account of European private law, and on its normative model, in particular its conception of justice. As we will see, there is strong a connection between these two, both in the ERPL thesis and in the alternative account that I will propose.

I regard two texts as the principal statement (for now) of ERPL, ie *A self-sufficient European private law – a viable concept?* (2012)<sup>3</sup> and *European regulatory private law – the paradigms tested* (2014).<sup>4</sup> These are EUI ‘working papers’ but in reality each of them constitutes an edited volume with a variety of different contributions. In addition, I will also refer to some other publications by the principal investigator where this is helpful for a better understanding of specific ideas underlying ERPL.

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<sup>1</sup> ‘Project Description’, available at <https://blogs.eui.eu/erc-erpl/project-description/>.

<sup>2</sup> Ibidem.

<sup>3</sup> H.-W. Micklitz / Y. Svetiev (eds.), *A self-sufficient European private law – a viable concept?* EUI Working Papers, LAW 2012/31.

<sup>4</sup> H.-W. Micklitz, Y. Svetiev & G. Comparato (eds.), *European regulatory private law – the paradigms tested*, EUI Working papers, LAW 2014/04.

## Silos of regulatory private law or pillars of pragmatic private law?

### The failure of a grand project: chronicle of a death foretold<sup>5</sup>

The withdrawal in 2014 by the European Commission of its proposal for a regulation on a Common European Sales Law represents a watershed in the development of European private law: the Common Frame of Reference is dead, the dream of a European Civil Code is over.<sup>6</sup> That dream (and nightmare for some) had dominated the debate on the future European private law for two decades. At the heart of it was the ambition to substitute the 'piecemeal', 'impressionistic' or 'sector-specific' approach that the EU had taken so far to the Europeanisation of private law with a more systematic approach, based on general rules and more familiar doctrinal concepts of private law. This endeavour was strongly supported by a Europe-wide network of legal academics, who were organised in a variety of projects and were driven by European ideals and by a concern to preserve the systematic nature and doctrinal sophistication of private law systems that had been under constant attacks from unsystematic EU directives, by recreating a systematic private at the European level. The academic movement had gained momentum when it received political endorsement, especially when the European Commission announced in 2003 that a 'common frame of reference' was going to be elaborated by academics.<sup>7</sup> It reached its apex in 2010 when Viviane Reding, the EU Justice Commissioner and Vice-President of the European Commission, declared the preparation of a European optional instrument on contract law to be the core ambition of her mandate.<sup>8</sup> However, very soon it became clear that she had underestimated how much the political climate had changed following the defeat of the European Constitution in referendums in France and the Netherlands, and the implications the revival of nationalist sentiments would have for the political support for this other 'grand project'.

### The silos view

#### Regulatory private law

Micklitz saw the failure of the ECC/CFR/CESL project coming, well before most others.<sup>9</sup> Explicitly as an alternative to that grand project,<sup>10</sup> Micklitz and his team set out to map 'European regulatory private law', i.e. the private law resulting from the regulatory agenda of the EU. This 'visible hand of European regulatory private law' marks the transformation of private law into 'economic law'.<sup>11</sup> It is one of the greatest merits of ERPL that it makes visible the private law elements in the regulation of a broad variety of markets, in particular

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<sup>5</sup> After: H.-W. Micklitz and N. Reich, 'Crónica de una muerte anunciada: the Commission proposal for a 'Directive on consumer rights', 46 *CMLR* (2009), 471-519

<sup>6</sup> Proposal for a regulation of the European Parliament and of the Council on a Common European Sales Law, COM(2011) 635 final. The new European Commission withdrew the proposal in December 2014. See Commission Work Programme 2015 A New Start, Strasbourg, 16.12.2014 COM(2014) 910 final, Annex 2, no. 60.

<sup>7</sup> A More Coherent European Contract Law, an Action Plan, Brussels, 12.2.2003, COM(2003) 68 final, 62.

<sup>8</sup> Cf. V. Reding, 'The next steps towards a European contract law for businesses and consumers, keynote speech at the conference "Towards a European contract law"', Leuven, 3 June 2011 (SPEECH/11/411).

<sup>9</sup> H.-W. Micklitz, 'Failure or ideological preconceptions? Thoughts on two grand projects: the European constitution and the European civil code', in: K. Tuori and S. Sankari (eds.), *The many constitutions of Europe* (Ashgate, 2010), 109-142.

<sup>10</sup> See H.-W. Micklitz, 'The Visible Hand of European Regulatory Private Law - The Transformation of European Private Law from Autonomy to Functionalism in Competition and Regulation', 28 *Yearbook of European Law* (2009), 3-59, 6: 'counter-project'.

<sup>11</sup> Micklitz, n 10 above.

the new markets resulting from privatisation, e.g. telecommunications, postal services, electricity, gas, transport, health care, education, and from the opening-up of already existing national markets, such as especially the market for financial services.

A key element in ERPL's descriptive account of 'the transformation of private law' is the idea of regulatory silos.<sup>12</sup> In a manner akin to systems theory, different market sectors are presented as relatively closed entities, each with its own specific rationality, of which private law rules are but one element. Micklitz and Svetiev write:<sup>13</sup>

[T]he key markets for services ... may be viewed sectorally, whereby the making of the rules, the substantive standards and the enforcement mechanisms all follow a particular rationality enshrined in that market sector, which cuts across the boundaries of public and private responsibilities as well as boundaries between the national, European and international level. These sectoral regimes could be compared with 'silos', in which networks are established, networks between agencies, networks between agencies and industry/business, to some extent public interest groups, networks in which the distinction between public and private, between national and international is withering away.'

Clearly, a private law that comes in silos looks radically different not only from what those who believed in a European civil code had in mind, but also from the national private law systems that we have been familiar with in the Member States. For such a private law does not consist of general rules, replaces right and obligations with standards and benchmarks, is made by different actors with different expertise, and is not usually the basis of (nor chiefly meant for) the resolution of individual disputes in courts. If such a private law scattered across a multitude of regulatory silos, each fragment following the regulatory rationale of its respective silo, does represent 'the full picture' of European private law<sup>14</sup> then clearly private law has indeed undergone a radical transformation. The question, however, is whether the silos view offers a complete representation of European private law. I don't think it does.

#### The full picture?

By placing regulatory silos on the foreground ERPL gives an impression of strong compartmentalisation of European private law according to specific market sectors. However, surely that is only part of the picture. For the silos view almost completely ignores the existence of the consumer acquis. European consumer law does not at all correspond to the model of vertical regulatory silos that each correspond to the specific logic of a particular market sector. Think only of the unfair terms directive, which is applicable - and has been applied - across all sectors of the European internal consumer market, including consumer credit (*Cofidis*),<sup>15</sup> the sale by instalments of encyclopaedias (*Océano*),<sup>16</sup> the sale of parking spaces in a multi-storey car park (*Freiburger Kommunalbauten*),<sup>17</sup> mobile telephone contracts (*Mostaza Claro*,<sup>18</sup> *Pannon*,<sup>19</sup> *Asturcom*),<sup>20</sup> mortgage loan agreements (*Caja de*

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<sup>12</sup> ERPL offers four parameters for the claimed transformation, but the silos element seems to be central to the account.

<sup>13</sup> H.-W. Micklitz and Y. Svetiev, 'The transformation(s) of private law', in: n 4 above, 78.

<sup>14</sup> H.-W. Micklitz, 'A self-sufficient European private law – a viable concept?', in: n 3 above, 12.

<sup>15</sup> Case C-473/00.

<sup>16</sup> Joined Cases C-240/98 to C-244/98.

<sup>17</sup> Case C-237/02.

<sup>18</sup> Case C-168/05.

Madrid,<sup>21</sup> *Aziz*,<sup>22</sup> *Sánchez Morcillo and Abril García*),<sup>23</sup> agreements for a loan to buy a car (*Pénzügyi Lízing*,<sup>24</sup> *Banco Español de Crédito*),<sup>25</sup> insurance contracts (*Van Hove*),<sup>26</sup> and contracts for legal services (*Šiba*).<sup>27</sup> These are only some examples from CJEU cases; throughout Europe national laws transposing the directive are applied by courts (and are applicable also in the absence of any dispute) to contracts in any thinkable sector of the internal market. In addition, the unfair terms directive, just like the other main European directives constituting the body of European consumer law, also lacks most of the other characteristics that are typical of the regulatory silos, in particular the mix of private law, public law, and private regulation - these directives are essentially concerned with private law -, and the replacement of legislation by standard setting. With little exaggeration we could say that ERPL places on the foreground EU regulation in those fields where the private law aspects are actually of minor importance from the very regulatory perspective ERPL adopts, while it almost completely disregards the EU legislation in which private law is core.

## The pillars view

### The consumer *acquis*

A very different descriptive account of European private law can be given, one where European consumer law does not fall off the picture but is in fact at its centre and where consumer law is presented as private law in the more traditional sense of the law determining the rights and obligations of private parties towards one another. Central to this account are the directives that have indeed transformed private law in Europe, i.e. the unfair terms directive 1993,<sup>28</sup> the consumer sales directive 1999,<sup>29</sup> the consumer rights directive 2011,<sup>30</sup> and the 2015 proposals for two new directives on the online sale of goods and of digital content.<sup>31</sup> These directives have in common that they are concerned with the rights and obligations of consumers towards their professional sellers and service providers, and that their substantive scope is not limited to any specific market (or to one that is meant to overshadow all others, i.e. the online market). Part of the same transformation are also the consumer credit directive 2008,<sup>32</sup> the timeshare directive 2009,<sup>33</sup> and the package travel directive 2015,<sup>34</sup> which although more sector-specific in scope, share the same horizontal characteristics (notably the private law remedies) while having hardly anything in common with the vertical and closed regulatory silos.

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<sup>19</sup> Case C-243/08.

<sup>20</sup> Case C-40/08.

<sup>21</sup> Case C-484/08.

<sup>22</sup> Case C-415/11.

<sup>23</sup> Case C-169/14.

<sup>24</sup> Case C-137/08.

<sup>25</sup> Case C-618/10.

<sup>26</sup> Case C-96/14.

<sup>27</sup> Case C-537/13.

<sup>28</sup> Directive 93/13/EEC.

<sup>29</sup> Directive 1999/44/EC.

<sup>30</sup> Directive 2011/83/EU, replacing Directives 85/577/EEC (doorstep selling) and 97/7/EC (distance selling)

<sup>31</sup> Proposal for a directive on certain aspects concerning contracts for the supply of digital content, Brussels, 9.12.2015, COM(2015) 634 final; proposal for a directive on certain aspects concerning contracts for the online and other distance sales of goods Brussels, 9.12.2015, COM(2015) 635 final.

<sup>32</sup> Directive 2008/48/EC, replacing 87/102/EEC.

<sup>33</sup> Directive 2008/122/EC, replacing Directive 94/47/EC.

<sup>34</sup> Directive 2015/2302/EU, replacing Directive 90/314/EEC.

## Pillars of European private law

The replacement in 2015 of the CESL-proposal by two proposals for directives for consumer contract law for the digital single market was a moment of rupture not only because it gave the final blow to the dream of a European civil code,<sup>35</sup> but also because it displayed the contours of the developing system of EU private law. What we see emerging today is a loosely coherent system built around three main pillars, i.e. withdrawal rights, unfair terms control, and non-conformity. These are three main categories through which the bulk of disputes between sellers on internal market and their customers are going to be resolved. (There is a fourth characteristic element, but its role is more ornamental: the pre-contractual information duties that are pervasively present but do not do much work in deciding cases as they mostly lack any clear remedies.)<sup>36</sup>

These pillars of European private law do not formally replace the traditional doctrinal categories of general contract law existing in the Member States, but in practical terms they make them become much less relevant. Withdrawal rights are much easier to handle than the intricate rules on offer and acceptance and the various 'defects of consent', each with their nuanced conditions and exceptions. Similarly, the replacement of a good that does not correspond to the contract (either because it does not match the description or it is unfit for its ordinary use) seems more straight-forward than the highly refined and nuanced - and sometimes truly baroque - rules in the Member States concerning the legal consequences of the non-performance of a contractual obligation. And the category of unfair terms, which are simply not binding on consumers, is already overshadowing the operation of classical doctrines like good faith, illicit cause, and (again) the formation rules. In practice, the familiar categories of contract law - sometimes referred to as being based of the life cycle of a contract -, such as formation, validity, interpretation, contents and effects, performance, and non-performance and remedies - that were still the basic categories in the Principles of European contract law, the frontrunner of the European civil code movement -, will be pushed to the background increasingly by withdrawal rights, unfair terms control, and remedies for non-conformity.

It is important to realise that these key doctrines soon will apply to most internal market transactions with consumers. Withdrawal rights were introduced by the European legislator for doorstep-selling but were then extended to timesharing, distance selling and consumer credit (and were further synchronised through revisions), and, finally, to all online and off-premise contracts through the consumer rights directive. The control of unfair terms has been applicable in all economic sectors already for more than two decades. As to non-conformity, its scope – already wide under the consumer sales directive – will be further extended, by the proposed new directive, from goods to digital content, i.e. from the retail market to much of the modern economy. In other words, withdrawal rights, unfair terms control, and remedies for non-conformity are where the action is.

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<sup>35</sup> In theory, the CFR could still become the object of an inter-institutional agreement, as was originally considered to be one of its possible roles. However, at present there does not seem to exist any political support for this idea. Moreover, the academic movement that was the main driver of the CFR seems to have dissolved almost entirely, with perhaps the European Law Institute in Vienna as its last remaining stronghold.

<sup>36</sup> The exception are the pre-contractual duties to inform consumers about their withdrawal rights. Violation of that duty has the important legal consequence of extending the term for withdrawal. However, for that reason this may also be regarded simply as one of the situations where a withdrawal right exists.

The most striking novelty of the developing three pillar systems is that it is much less sophisticated, nuanced and doctrinal, and much more pragmatic and user-friendly than the familiar private law categories traditionally covering approximately the same legal questions. Thus, they seem to fit much better in a time where states have come to regard their monopolies on the administration of justice (connected with the state monopoly on the legitimate use of force) as a financial burden and, therefore, are massively engaging in the privatisation of dispute resolution by encouraging (or even requiring) sellers (understood in the broad sense of including 'sellers' of services) and their customers to resort to ADR and ODR. In these contexts, where sellers and their clients often are not represented by trained lawyers, the niceties of the traditional private law system become a burden, and a more simplified system with a limited set of key doctrines and remedies capable of resolving most disputes becomes more attractive. From the perspective of corrective justice (i.e. the proper determination of the exact borderline between mine and thine, and the correction of illegitimate boundary crossing) and the cultural value of a sophisticated system of private law, this shift undoubtedly represents a major loss. However, from the distributive perspective of the state's concern to ensure continued equal access to justice (not to be confused with access justice, on which below) this may actually be an acceptable price to pay.<sup>37</sup>

The personal scope of the three pillar system is limited (formally and for now) to business-to-consumer contracts. For that reason, it may seem improper to speak so generally of pillars of European private law. However, an important 'radiating' effect (or even a degree of imperialism) of the developing system of European private law is to be expected for a number of reasons. First, the practical advantage of user-friendliness applies equally to most other than consumer disputes. This is only different in cases where the (financial) stakes are so high that the parties feel they need - in advance of any dispute, when drafting individually the terms of their contract with the assistance of specialised lawyers - the detailed legal certainty than the familiar nuanced system of contract law provides. In all other cases (i.e. the bulk of business-to-business disputes and certainly in the increasingly important peer-to-peer market), dispute resolution costs often represent a decisive factor. Thus, a simplified system of rules for the resolution of disputes concerning market transactions could become an attractive model for lawmakers also outside B2C. Therefore, a certain spill-over effect is to be expected. Moreover, the three pillar system has a very wide territorial scope: it is applicable (indirectly, through transposition and where necessary harmonious interpretation) throughout the entire EU, while the more detailed and nuanced classical contract law doctrines differ from country to country. As a result, while the familiarity of market operators and their legal advisors with the three pillar system will gradually increase they may increasingly regard the deviation from the European private law system for B2B by national legal systems as annoying, thus reversing the grounds of what is experienced as the norm and the exception. Finally, there is the crucial role of the CJEU which represents a strong normalising force of its own. Not only does the CJEU generally ensure the uniform application and interpretation of the European private law system throughout the EU and, crucially, across silos,<sup>38</sup> there are three additional reasons why the CJEU is likely to increase public attention for – and hence familiarity with – the emerging

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<sup>37</sup> On the normative implications of the transformation of private law, see below.

<sup>38</sup> In other words, the silos view overlooks the fact that all regulatory silos are connected at the top by the strongly convergent force of the CJEU.



main pillars of European private law. First, as a result of the CJEU's specific task in giving preliminary rulings, cases involving claims of relatively modest economic interest litigated before lower courts, nevertheless reach the Court of Justice. Secondly, the Court has been remarkably activist, and attracting a lot of attention, exactly with regard to these three pillars. Think only of *Heininger*<sup>39</sup> and *Messner*<sup>40</sup> for the withdrawal rights, the long line of cases on unfair terms ranging from *Océano* to *Aziz* and beyond, and *Quelle*<sup>41</sup> and *Weber and Putz*<sup>42</sup> for non-conformity. Thirdly, the general style of reasoning of the Court is pragmatic rather than formal-doctrinal. So, the active role of the CJEU in developing the European private law system is likely to further reinforce its pragmatic imprinting and strengthen its divergence from classical private law.

The idea of a three pillar system that I am proposing here is not meant as an essentialist theory. Nor should the pillars be reified. In other words, I am not claiming that EU private law is essentially based on three pillars. On the contrary, it is very well possible (indeed quite likely) that in the near future new pillars will be added, with the extension of the substantive scope of EU private law beyond what we traditionally refer to as contract law, or even that such pillars are already emerging, e.g. within the traditional field of tort law (think e.g. of product liability, unfair commercial practices, public procurement, and the private enforcement of competition law).<sup>43</sup> However, I would expect that these other pillars would have a similarly pragmatic, undoctinal nature. In particular, the pillars system does not seem to be based on one single underlying principle (or a limited set of these) that can provide secure guidance in its interpretation and further elaboration.<sup>44</sup>

A final characteristic – perhaps the most troubling one for those who are committed to preserving the coherence of the national legal system – is that the three pillar system is a competing system of *private law*. In spite of its instrumental genesis (i.e. internal market building), the right of withdrawal, the non-bindingness of unfair terms, and the remedies in case of non-conformity, are private law doctrines in that they determine the rights and obligations of one private party vis-à-vis another. They may have been enacted with a view to creating a level playing field for sellers and encouraging consumers to shop more often abroad, but they still determine private rights and obligations. However, they do so in a way that is markedly different from the traditional national private law systems, with new concepts (e.g. 'not binding' instead of absolute and relative nullity) and remedies (e.g. the withdrawal rights). And as said, for the reasons given, the new system of private law will engage in the competition with the old national ones having a series of comparative advantages.

In an influential recent paper, Micklitz compared the German BGB and consumer law, respectively, to a heavy tanker and a sailing boat and argued that '[t]he heavy tanker BGB

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<sup>39</sup> Case C-481/99.

<sup>40</sup> C-489/07.

<sup>41</sup> C-404/06.

<sup>42</sup> Joined Cases C-65/09 and C-87/09.

<sup>43</sup> The 'Acquis principles' consisted of 7 chapters (in addition to the introductory provisions), on pre-contractual duties, non-discrimination, formation, withdrawal, non-negotiated terms, performance of obligations and remedies. See the *Principles of the Existing EC Contract Law (Acquis) Contract I and Contract II*, prepared by the Research Group on the Existing EC Private Law (Acquis Group) (Sellier, 2007, 2009).

<sup>44</sup> On the normative implications of this, see below.



cannot keep up with the dynamics of the agile consumer law.’<sup>45</sup> A heavy tanker ship, Micklitz explains, ‘can change its direction in only a limited way and needs time for every change of direction’ while sailing boats ‘can change their direction quickly and easily, but are exposed to wind and weather—that is to say political current—in a far stronger way.’<sup>46</sup> This metaphor was inspired, it seems, by the same regulatory perspective as ERPL, where changes in regulatory agendas or techniques are on the foreground. In contrast, from the perspective that I am proposing here the main difference between the classical national systems of private law in the Member States and European private law is not its regulatory nature, but its more pragmatic style. European private law is far less doctrinal and, consequentially, much more user-friendly (for unsophisticated users) and more future-proof than the BGB and other national civil codes, even after their recent reforms.

## Justice beyond market access

### Access justice

Although the comprehensive mapping of the private law elements in the regulation of different market sectors undoubtedly has been one of its the most important achievements, the ERPL-project’s main objective nevertheless was normative rather than descriptive. The normative model that ERPL proposes is that of ‘access justice’, by which it means justice through market access.<sup>47</sup> It is not entirely clear how we are supposed to understand ‘normative’ here. Is ‘access justice’ meant to describe the justice conception of European private law, i.e. the justice understanding immanent to European private law (perhaps as part of its *Geist*)? Or should we understand ‘access justice’ as an external normative standard by which we can evaluate European private law? The Project Description seems to suggest the former, i.e. access justice as a hypothesis about the normative foundation of European private law, to be verified empirically.<sup>48</sup> However, Micklitz has also assimilated access justice to Rawls’ justice as fairness,<sup>49</sup> which is meant as an external standard for evaluating whether a society’s main political, social, and economic institutions are sufficiently just.<sup>50</sup> Therefore, and also because the normative question of what standards of justice European private law ought to comply with seems to me to be the more important one, in the following I will treat access justice as a theory of justice. From that perspective, I will address three main points with regard to access justice: its ambiguity resulting from its dual normative basis; its disregard for interpersonal justice; and its apparent indifference towards legitimacy.

### Ensuring market access for the right reasons

The European Commission has justified its recent proposals for a consumer contract law for the digital single market by a dual objective, i.e. 1) to boost economic growth in the EU, and 2) to ensure a high level of consumer protection.<sup>51</sup> These two objectives are rather different

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<sup>45</sup> Hans-W. Micklitz, ‘Do Consumers and Businesses Need a New Architecture of Consumer Law? A Thought Provoking Impulse’, *Yearbook of European Law*, Vol. 32, No. 1 (2013), 266–367, 281.

<sup>46</sup> P. 269.

<sup>47</sup> See the Project Description, n 1 above.

<sup>48</sup> *Ibidem*, 2: ‘The research, particularly in its empirical dimension, aims to verify some initial hypotheses: (...) 3) ERPL yields its own order of values, enshrined in the concept of access justice.’ See also *ibidem*, 7-8.

<sup>49</sup> Micklitz, n 10 above, 13.

<sup>50</sup> J. Rawls, *Political liberalism* (Columbia University Press, 2005), 11.

<sup>51</sup> See Proposal for a directive on certain aspects concerning contracts for the supply of digital content, Brussels, 9.12.2015, COM(2015) 634 final, recitals 1 and 2.

in nature. They may go hand in hand when a high level of consumer protection raises consumer confidence and encourages them to reap the full benefits of the internal market. However, they may also conflict, for example when the level or type of consumer protection risks to endanger economic growth, as may happen e.g. when it comes to the protection of particularly vulnerable consumers. The theory of access justice is similarly structured and suffers from the same ambivalence.

Access justice means justice through access to markets, in particular through private law rules that make sure that weaker parties obtain and maintain market access. The two key elements are access rights and non-discrimination.<sup>52</sup> In this way, one might think, the theory could secure support both from utilitarians and from liberal-egalitarians, albeit for different reasons.

Utilitarians will approve of an overall increase in market access because this is likely to bring a rise in social welfare through enhanced preference satisfaction: consumers will be able to buy more goods and services than before (access to more markets) and/or against lower prices (more people have access to the same markets), while sellers will be selling more, which makes them (or their shareholders) happy too. Thus, there is likely to be a net surplus, not only in the narrow sense of GDP growth but probably also in terms of broader notions like preference satisfaction or even happiness.<sup>53</sup>

The anti-discrimination and anti-exclusion rationale will appeal to liberal-egalitarians.<sup>54</sup> If individuals that previously had no access to markets now gain access and, in particular, if these people (or at least some of them) belong to the least well-off groups in society then, for example, from the perspective of the Rawlsian difference principle, which requires from a society making institutional choices with different outcomes for different groups, that these choices work at least also to the benefit of the least well off, insofar the society becomes more just.<sup>55</sup> Thus, access justice could be regarded as an implementation through private law of opportunity-egalitarian principles, notably the Rawlsian difference principle.<sup>56</sup>

At first sight, the capacity to gain support from both welfarists and liberals seems an important advantage of the theory. Indeed, one might think that liberal-egalitarians and utilitarians could reach an overlapping consensus on the principles access justice.<sup>57</sup> The idea of an overlapping consensus on political principles of justice was introduced by Rawls in order to address the problem of how to achieve justice in a pluralist society, where people have divergent worldviews and adhere to different ultimate values.<sup>58</sup> According to Rawls

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<sup>52</sup> H.-W. Micklitz, 'Social justice and access justice in private law', in H.-W. Micklitz (ed.), *The many faces of social justice in private law* (Elgar, 2011), 3-60.

<sup>53</sup> This would be different only in the case of externalities, which may exist e.g. when more goods bought online are transported over longer distances and the costs of pollution are not internalised through appropriate taxes, but these do not seem to be so pervasive and structural that they provide a general argument against access justice.

<sup>54</sup> For some caveats see below.

<sup>55</sup> Here I leave to one side the question of whether EU private law rules is part to the basic structure of society to which alone the Rawlsian principles of justice are applicable. On this question, see most recently S. Scheffler, 'Distributive justice, the basic structure and the place of private law', *Oxford Journal of Legal Studies* (2015), 1-23.

<sup>56</sup> In this sense, J. Klijnsma, *Contract law as fairness* (Amsterdam, 2014), 76.

<sup>57</sup> In addition, access justice might also appeal to communitarians to the extent that it expresses convincingly (in their eyes) the justice conception immanent to European private law (see above).

<sup>58</sup> Rawls, n 50 above.

citizens who are willing to live together with mutual respect for each other's values, should be able to find some common principles of justice that are acceptable from the perspective of their respective worldviews, and could be included by each citizen in her or his 'comprehensive doctrines' as a 'module'. Arguably, access justice would be a good candidate for becoming such a module.

However, the notion of an overlapping consensus is problematic. If the principles of justice are to do any useful work they will have to be interpreted. However, different citizens and officials will interpret the principles differently, because, when interpreting, they will seek coherence with the other elements of their respective comprehensive doctrines lying beyond the module. These different worldviews, and their core values, will point in divergent directions. Doing your best to remain neutral does not help since there is no neutral direction.<sup>59</sup> Rawls himself underlined that a mere *modus vivendi* is not sufficient and that the principles will have to be accepted 'for the right reasons'.<sup>60</sup> However, it seems impossible to find an overlapping consensus also with regard to the reasons for adopting the principles of justice.

Similar interpretative problems are bound to occur when we try to apply the theory of access justice in practice. The objective of increasing the total amount of market accesses (by opening up more markets to more people) and that of ensuring market access for the least well off (by protecting particularly vulnerable consumers and by combating discrimination) may run parallel up to some point, but when questions arise of whose access should be ensured to which markets and against what price, there is bound to be divergence between the two strands of support for access justice. When that happens – i.e. in hard cases – access justice seems to lack an internal mechanism for answering the question of whether trade-offs are permitted, and if so which. It does not, therefore, seem to represent a stable standard for evaluating – and criticising – the justice of rule choices for European private law that the European legislator has already made in the past or is proposing for the future.

### Civil justice

EU private law offers consumers (and sometimes also other customers)<sup>61</sup> certain remedies in certain cases.<sup>62</sup> Consumers have these remedies not against the EU, but against the seller or service provider they contracted with. So, as a descriptive matter, even if we understand European private law as regulatory and as aiming at ensuring market access, then still these private law rules at least play a role also in the relationship between a specific buyer and a specific seller. In other words, the interpersonal effects of EU private law are undeniable. If withdrawal rights did not exist, if unfair terms were binding upon consumers, and if no or different remedies were available in the case of non-conformity in consumer sales contracts, then that would matter for the relationships between consumer buyers and

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<sup>59</sup> For criticism along these lines, J. Waldron, 'Isolating public reasons', T. Brooks and M.C. Nussbaum (eds.), *Rawls's Political Liberalism* (Columbia University Press, 2015), 113-137.

<sup>60</sup> Rawls, n 50 above, xlv.

<sup>61</sup> E.g. Regulation (EC) No 261/2004 on air passenger right.

<sup>62</sup> To be more precise, EU directives require Member States to attach certain legal consequences, including, in particular, making certain remedies available in certain cases, sometimes as a minimum and sometimes without leaving the Member States any choice to provide consumers with better remedies (and if a Member State fails to do so its private law must be interpreted, as much as possible, as if it did comply with the directive).

professional sellers in the EU. Therefore, a theory of justice in European private law that does not address the interpersonal dimension at all would seem to be either a reductive theory or a merely partial one. It is not clear what the theory of access justice is, the former or the latter.

As a complete and exhaustive theory of justice in European private law the access justice theory seems seriously flawed, because it totally disregards the interpersonal justice dimension of private law, which includes (but is not limited to) the important corrective (or restorative) justice of correcting or preventing wrongs. The main reason why contract terms should not be binding upon consumers when they cause 'a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer',<sup>63</sup> is that the enforcement of such terms, except if they have been individually negotiated or are core terms according to the directive,<sup>64</sup> would be unjustifiable between the parties. Obviously, the availability of the same minimum level of consumer protection against unfair term throughout Europe is likely also to increase market access. This may contribute to economic growth, which many people regard as a good, and to improving equality of opportunity, which is right from the perspective of opportunity-egalitarian justice. However, it would be absurd to reduce the justice dimension of unfair terms law to mere access justice. The same applies to the strong right to specific performance (repair or replacement) that the consumer sales directive grants consumers in the case of non-conformity: when repair is not possible then the consumer is entitled to full replacement for free even if the costs of replacement are disproportionate to the value of the goods (absolute disproportionality).<sup>65</sup> If we want to determine whether that rule, as interpreted by the CJEU, is justifiable then we will also have to address the question whether it is justifiable between the parties (e.g. for the reason that the remedy corrects a wrong; the disproportionate cost could have been avoided by the seller by delivering goods in conformity with the contract); we cannot limit our justification to the - probably correct - observation that the presence of strong remedies for non-conformity is likely to convince more consumers to access the market, especially markets (such as foreign markets) where they think they cannot trust the sellers. The same applies also with regard to the third pillar of European private law that I distinguished above. Undeniably, withdrawal rights play an important instrumental role in increasing consumer confidence in cross-border shopping and they probably contribute to access justice also by encouraging those who would otherwise not dare to shop online. However, this remedy would still lead to an injustice if their exercise by consumers could not be justified towards sellers. As a matter of fact, the justification of withdrawal rights in terms of interpersonal justice is not entirely self-evident. For their striking characteristic is that they allow consumers to walk away from a contract without giving any reasons, which seems to leave open the possibility that they can be exercised also when there are no good reasons.<sup>66</sup> One possible justification is that in the type of contracting situations where the law provides for withdrawal rights, the binding force of contract should be understood as in fact postponed until the end of the cooling-off period (which itself can be justified by the concern to prevent a defect of consent resulting

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<sup>63</sup> Art. 3 Para 1, Directive 93/13/EEC.

<sup>64</sup> Arts. 3 Para 1 and 4 Para 2. However, this is a minimum harmonisation directive; the Member States are allowed to provide consumers with more protection.

<sup>65</sup> *Weber and Putz*, n 42 above.

<sup>66</sup> That possibility is limited by the CJEU's subjection of their exercise to the principles of civil law, such as those of good faith or unjust enrichment. See *Messner*, n 40 above.

from a high-pressure situation or from buying on the Internet where one cannot properly see, touch and try the goods). Another one, suggested above, is that given the limited resources that society has for determining the exact private right that parties have, it has opted for a lower (but still acceptable) degree of corrective justice by pragmatically offering more approximate rules and remedies (i.e. withdrawal rights) than the classical nuanced rules on offer/acceptance and defects of consent did – in other words, as a justifiable trade-off in a non-deal world between acceptable degrees of distributive and corrective justice. We do not have to sort out here which justification is more convincing; what matters here is that the mere fact that withdrawal rights boost market access does not suffice as a reason for a seller not to feel wronged by the unilateral and unmotivated withdrawal from the contract by a consumer buyer.

In other words, the pillars that I suggested are currently emerging as central to the edifice of European private law will have to be justified also in terms of interpersonal (or civil) justice, as I think they can. The same applies to the more scattered bits and pieces of regulatory private law that ERPL has mapped. As said, it is not clear (to me) whether the access justice theory is meant as a full theory of justice in European private law. If it is not, then it can perhaps still be supplemented by the ERPL-project with an appropriate theory of interpersonal (or civil) justice.

### Legitimacy

As we saw, ERPL makes an empirical case for understanding European private law as disintegrating rapidly into functionally distinct regulatory units (silos) on financial services, transport, energy, telecom and similar, where private law is merely one part, together with public law and self-regulation, of the regulatory compound that is being elaborated across borders by a relatively closed community of highly specialised experts. Above, I questioned, from a descriptive-analytical point of view, whether the silos view represent the full story (or even the most important part of the story) of European private law, and offered an alternative narrative, i.e. the story of a developing pragmatic system of European private law. Now it is time to come back to the silos account and to adopt a normative perspective on this perceived trend towards the fragmentation of private law, and in particular on question of the legitimacy of a private law that comes in regulatory silos.

Again, it is not entirely clear whether ERPL is agnostic on the question of legitimacy, limiting itself to a descriptive account, or whether it is in fact also suggesting that it is right that private law making should take place in this way. At times, ERPL seems to endorse the essentially libertarian justification of 'law beyond the state' coming from a normative version of systems theory.<sup>67</sup> On this view, democratic legislation belongs to a hopelessly old-fashioned way of looking at the world; what suffices in the globalising world is 'rough consensus'.<sup>68</sup> Similarly, ERPL seems to suggest or imply that the regulatory silo law making practices are not only a reality, but also justified.<sup>69</sup>

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<sup>67</sup> G. Teubner, "'Global Bukowina': legal pluralism in the world society", in: G. Teubner (ed.), *Global law without a state* (Dartmouth, 1997).

<sup>68</sup> See G.-P. Callies and P. Zumbansen, *Rough consensus and running code: a theory of transnational private law* (Hart Publishing, 2010).

<sup>69</sup> See Micklitz and Svetiev, n 12 above, 95.

Thus, ERPL seems apologetic or even supportive of practices that from legitimacy point of view, and therefore from the perspective of justice,<sup>70</sup> are in fact highly problematic. For the proposition that regulatory silos, where closed communities of technocrats make rules and set standards that will become binding upon others, are also legitimate, is in direct collision with the very basic principle that the addressees of laws, including private laws, should be able to regard themselves also as their authors.<sup>71</sup> That principle requires a democratic basis for private law, just as much as for any other legal rule.<sup>72</sup> Nor is 'regulatory private law' excluded from this legitimacy demand. The determination of both the ends and the means of regulation require a strong democratic basis. From the normative perspective of legitimacy through democracy, therefore, Micklitz's metaphor of the visible hand is not much more reassuring than Adam Smith's classic of the invisible hand. First, because 'hand' remains in the singular, while market regulation should take place emphatically in the plural, i.e. by all those affected by it together. Secondly, because, while visible hands (in the plural) would at best refer to voting, we should understand the shaping of European private law as a discursive, reason-giving process. In other words, the most adapted anthropomorphic metaphor would seem to be a multitude of speaking mouths.

As said, access justice lacks an internal standard for resolving conflicts among its two underlying objectives (i.e. to maximise overall access and to improve access for the least well-off). In addition, as we saw access justice cannot be - and may not be intended as - a full theory of justice. This means that, access justice concerns will have to be reconciled with other justice concerns, including in particular considerations of interpersonal justice. Moreover, although private law has to meet the requirements of justice this does not exclude that other considerations (e.g. of value) may also play a role (to the extent that this is compatible with justice). Further, people differ – sometimes quite strongly - on questions of justice, value and expediency, while we lack direct access to the truth in these matters, if it exists at all (as moral realists believe). Under these circumstances, the question of the proper procedure for arriving at private laws becomes all the more acute.

In France, recently citizens were told by presidential decree ('Le Président de la République ordonne ...') what their contractual rights and obligations will be as of 1 October 2016.<sup>73</sup> Remarkably, there are important differences between the draft ordonnance that was published a year earlier and the final one, but these are not the result of any parliamentary - or otherwise public - debate; they were decided upon behind closed doors at the ministry of justice. In contrast, the bulk of European private law, constituted by the consumer acquis, has a democratic basis. All consumer law directives and regulations have been adopted by the European Parliament, usually after extensive public debates in the Committees for Internal Market and Consumer Affairs and for Legal Affairs and often preceded by public consultations. As a matter of fact, also the Common European Sales Law proposal was adopted, in first reading, by the European Parliament in 2014, after an intense political

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<sup>70</sup> Normative legitimacy is a dependent concept, i.e. depending on a conception of justice. See R. Forst, *Normativität und Macht* (Suhrkamp, 2016), 186-197.

<sup>71</sup> J. Habermas, *Between facts and norms: contributions to a discourse theory of law and democracy* (Polity Press, 1996), 408; R. Forst, *The right to justification: elements of a constructivist theory of justice* (Columbia University Press, 2012), 135.

<sup>72</sup> See Habermas, n 71 above. See further M.W. Hesselink, 'Democratic contract law', 11 *ERCL* (2015), 81-126.

<sup>73</sup> Ordonnance no 2016-131 du 10 février 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligations.

debate, with several public hearings, culminating in a plenary debate and vote where it carried an overwhelming majority.<sup>74</sup> However, it was withdrawn a few months later by the non-elected European Commission following a letter (that was never published) from the Ministers of Justice of five Member States (in none of which the content of the proposed contract law rules had been properly debate in their national parliaments). Of course, I am not suggesting that the democratic basis for the CESL proposal represents an ideal model - much remains to be improved -, but there was a meaningful public (and politicised) debate, not just a vote, while, in contrast, the decision to reject the proposal was taken by technocrats behind closed doors after non-public pressure from national governments. In light of this fact of a democratic European private law (at least to some degree), it seems difficult for a normative theory of European private law to remain agnostic about the need for a democratic basis and, more specifically, the kind of institutions and processes that are needed for European private law to be legitimate.

## Conclusion

The ERPL-project was set up explicitly as a counter-project to the European civil code and common frame of reference project to create a coherent European system of general private law rules. The main strength of ERPL is that it offers an entirely new perspective on European private law (which takes courage) and that it started do so already when everyone else (i.e. politicians and academic) was still concerned mainly with the CFR and the CESL. However, now that the latter project has failed, ERPL looks too one-sided, both from a descriptive and from a normative point of view. With its strong focus on the private law locked up in regulatory silos for specific market sectors and on access justice, it risks to obscure the reality, in particular, of the consumer acquis and its transformative force. A fuller picture, I argued, would include the contours of a developing pragmatic and loosely coherent system of European private law which has the withdrawal rights, unfair terms control, and remedies for non-conformity as its main pillars (for now). That developing system of European private law will have to justified – and can be questioned - in terms not only of its contribution to achieving access justice, but also of its interpersonal justice and democratic legitimacy credentials.

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<sup>74</sup> European Parliament legislative resolution of 26 February 2014 on the proposal for a regulation of the European Parliament and of the Council on a Common European Sales Law (COM(2011)0635 – C7-0329/2011 – 2011/0284(COD)).