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## The One and the Many: Translating Insights from Constitutional Pluralism to European Contract Law Theory

CHANTAL MAK\*

**Abstract:** While freedom of contract has generally been recognized as a leading principle of European contract law, national contract laws as well as EU measures show remarkable differences with respect to the limits they impose on contractual freedom in light of the public interest or common good. Whereas some private legal scholars aspire to relate all rules of private law to a single value (monist theories), others consider it impossible to find such a common denominator (radical pluralist theories). In this paper, it is submitted that a moderate pluralist theory offers the most convincing narrative to explain current developments in this field, since it defines a meta-level on which diverging ideas of contract law can be reconciled by the definition of coordinating principles. These meta-principles indicate which conception of the common good prevails in a specific case and on which level (European or national) final decision-making authority is allocated in that case. Through an analysis of examples from case law (the story of the CJEU's *Viking* and *Laval* judgments and the Court's recent decision in the *Aziz* case), it is argued that a moderately pluralist theory also provides the most convincing normative model for the further development of European contract law.

**Résumé:** Bien que la liberté contractuelle soit largement reconnue comme l'un des principes directeurs du droit européen des contrats, des différences remarquables existent entre les droits des contrats nationaux aussi bien qu'avec les instruments européens en ce qui concerne les limites posées à la liberté contractuelle pour la protection de l'intérêt public ou du bien commun. Alors que certains spécialistes du droit cherchent à relier toutes les règles du droit privé à une valeur unique (théories monistes), d'autres considèrent impossible de trouver un tel dénominateur commun (théories pluralistes radicales). Dans cet article, il est soutenu qu'une théorie pluraliste modérée offre le narratif le plus convaincant pour expliquer les développements actuels dans ce domaine, puisque cette théorie définit un niveau intermédiaire sur lequel des idées divergentes du droit des contrats peuvent être réconciliées par la détermination de principes coordinateurs. Ces méta-principes indiquent quelle conception du bien commun prévaut dans un cas particulier et à quel niveau (européen ou national) l'autorité de prendre la décision finale est allouée dans chaque cas. Sur la base d'une analyse de deux exemples tirés de la jurisprudence (les jugements *Viking* et *Laval* de la Cour de Justice de l'UE, et le jugement récent de la Cour dans l'affaire *Aziz*) il apparaît qu'une théorie pluraliste modérée présente le modèle normatif le plus convaincant pour le développement futur du droit européen des contrats.

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**Zusammenfassung:** Während die Vertragsfreiheit im Allgemeinen als ein wichtiges Prinzip des europäischen Vertragsrechts anerkannt sind, zeigen nationale Vertragsrechtssysteme und EU Maßnahmen bemerkenswerte Unterschiede im Bezug auf die Beschränkungen der Vertragsfreiheit zum Schutze des öffentlichen Interesses oder des Gemeinwohls. Während einige Wissenschaftler alle Regeln des Privatrechts auf einen einzigen Wert zurückzuführen (monistische Theorien), halten andere Wissenschaftler es für unmöglich einen solchen gemeinsamen Nenner zu finden (radikal pluralistische Theorien). In diesem Aufsatz wird vertreten, dass eine gemäßigte pluralistische Theorie die überzeugendste Deutung des europäischen Vertragsrechts bietet, weil sie eine Meta-Ebene definiert, auf welcher verschiedene Vorstellungen des Vertragsrechts mittels Koordinierungsgrundsätze mit einander in Einklang gebracht werden können. Diese Koordinierungsgrundsätze geben an welches Verständnis des Gemeinwohls im Einzelfall die Oberhand gewinnt und auf welcher Ebene (europäisch oder national) die endgültige Entscheidungskompetenz zugeteilt wird. Auf der Grundlage einer Analyse von Beispiele aus der Rechtsprechung (die Geschichte der *Viking* und *Laval* Entscheidungen des Gerichtshofs der Europäischen Union, und das aktuelle Urteil des Gerichtshofs im Fall *Aziz*) wird argumentiert, dass eine gemäßigte pluralistische Theorie auch das überzeugendste normative Modell für die Weiterentwicklung des europäischen Vertragsrechts ist.

## 1. Introduction

To what extent can and should contract law contribute to the shaping of a European ‘common good’? Both national laws of EU Member States<sup>1</sup> and measures of EU law concerning contractual relationships<sup>2</sup> recognize freedom of contract as a leading principle.<sup>3</sup> At the same time, they acknowledge that the public interest places limits on private parties’ freedom to arrange their interrelations as they wish. Freedom of contract is not absolute but can be restricted in light of the values upheld in a society. These values may affect private-legal relationships through specific rules that embody individual rights (e.g., rights that may be invoked by specific categories of contracting parties, such as employees or consumers) and through general clauses concerning the public interest (e.g., ‘good faith’ and ‘good morals’ in continental systems). Yet, while all

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- 1 C. VON BAR, E. CLIVE & H. SCHULTE-NÖLKE (eds), *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR)*, Sellier, Munich, *Full Edition*, 2009, comments and notes to Art. II-1:102 DCFR.
  - 2 Research Group on the Existing EC Private Law, *Principles of the Existing EC Private Law (Acquis Principles). Contract I*, Sellier, München 2007, pp. 129–130. See also recital 21 of the European Commission’s Proposal for a Regulation on a Common European Sales Law, COM(2011) 635 final, which states: ‘In any case, in business-to-business transactions, traders enjoy full freedom of contract and are encouraged to draw inspiration from the Common European Sales Law in the drafting of their contractual terms.’
  - 3 The Court of Justice has also referred to freedom of contract in this sense, in C-277/05 *Société thermale d’Eugénie-les-Bains v. Ministère de l’Économie des Finances et de l’Industrie*, CJEU 8 Jul. 2007. The status of this ‘principle of civil law’ is still unclear. See sec. 2 below.

national contract laws place limits on private autonomy, they show considerable differences with regard to *where* they draw limits to parties' freedom. Measures of EU law, moreover, are mostly drafted in such a way as to avoid any interference with national ideas of 'public policy', 'good faith', or 'good morals'.<sup>4</sup> As a consequence, it remains unclear how individual rights under European contract law relate to the different conceptions of the collective good held by rule-making authorities. Moreover, legal scholarship mostly considers there to be no common conception of morality in European contract law.<sup>5</sup>

In the following, a convincing narrative is sought to explain the ambiguity of European contract law on the collective interest it serves (section 2). The field here is understood as comprising rules of contract law, which derive from both the national and EU level, as well as the rules effectively resulting from the interplay of national and EU law. It is submitted that the perceived lack of clarity predominantly results from the fact that a public sphere for the deliberation of European contract law's goals in light of different conceptions of social justice is still underdeveloped. A pluralist theory of European contract law could provide a convincing narrative explaining this phenomenon.

Starting points are therefore proposed for facilitating a constructive institutional dialogue – or perhaps it is better to speak of a multilogue – on the European common good that is relevant to private parties (section 3). It is asserted that European contract law can learn from theories of constitutional pluralism while simultaneously adding its own flavour to the debate on the common good. While European contract law has an elusive standpoint on the collective interest, it has potential to bring more clarity on what a 'European common good' entails with respect to individual rights under contract law. These two seemingly contradictory dimensions of European contract law may be conceived of as representing different sides of the same coin.

## **2. A Pluralist Account of European Contract Law**

### **2.1. *Stories We Tell***

A narrative explaining European contract law's prevailing silence on questions concerning the values it reflects should start with a *confession de foi* regarding the narrator's view on the nature of contract law. In particular, it has to be made clear from the outset to what extent one believes in the possibility to render intelligible this field of law.

For private law in general, Stephen Smith makes a useful general distinction between two currents in legal scholarship: there are those who indeed

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4 Recital 27 of the Proposal for a CESL explicitly excludes issues concerning 'the invalidity of a contract arising from lack of capacity, illegality or immorality' from the instrument's scope.

5 Comments to Art. II-7:301 DCFR.

think it is possible to render intelligible the field of private law (the ‘believers’) and those who do not (the ‘sceptics’).<sup>6</sup> The first group comprises scholars who hold a monist view of the law, which is based on the idea that ‘the various private law rights all derive from a single goal, value, right, or principle’. It includes both those who adhere to a non-instrumentalist view of private law<sup>7</sup> and those who take an instrumentalist view.<sup>8</sup> The second group, on the contrary, holds that ‘any attempt to impose a rational order on private law, much less a monist order, is bound to fail’.<sup>9</sup> Smith submits that a third perspective may provide common ground between the two, that is, a pluralist point of view, which explains private law rights on the basis of an order of different values:

According to the pluralist, different private law rights address qualitatively different kinds of questions and thus are grounded in different values. The values underlying private law are not, therefore, in tension with one another. In the pluralist’s view, the judges’ task in a difficult case is neither to balance conflicting values, nor to search for a unifying master value; it is to identify the value that is appropriate for the specific issue at hand.<sup>10</sup>

This tripartite distinction presents a helpful starting point for further developing an account of how individual rights are handled under European contract law in relation to a European common good. In particular, it provides a framework for clarifying the different positions that scholars take on this question.

To recount the views on European contract law in monist and pluralist terms, two premises must be emphasized here. First, whereas Smith addresses the theoretical framework for handling legal plurality within a system of private law, the multilevel nature of European private law questions the boundaries of the legal order itself. How many systems of private law are there in Europe?<sup>11</sup> Can the compound of rules of private law deriving from the EU level and from national laws be conceptualized as one legal order, or should it rather be considered to comprise many different legal orders? If the latter view is taken, what is the relationship between the different orders involved? The following analysis will

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6 S.A. SMITH, ‘The Rights of Private Law’, in A. Robertson & H. Wu (eds), *The Goals of Private Law*, Hart Publishing, Oxford 2009, pp. 113, 114.

7 Most importantly, those scholars who support the corrective justice theory.

8 SMITH, *supra* n. 6, pp. 113-114, who names economic theorists as a primary example of this category.

9 *Ibid.*, n. 6, pp. 113-114.

10 *Ibid.*, n. 6, p. 114.

11 M.W. HESSELINK, ‘How Many Systems of Private Law Are There in Europe?’, in L. Niglia (ed.), *Pluralism and European Private Law*, Hart Publishing, Oxford and Portland, Oregon 2013, p. 199, at 224-234.

address the coordination of values and rights among EU law and the laws of the Member States rather than examine private law pluralism within national laws.

Second, private legal scholars are certainly not the first to have debated questions of monism and pluralism.<sup>12</sup> The analysis presented here will take inspiration from theories on European constitutionalism, in particular constitutional pluralism. Broadly speaking, views on the organization of the European constitutional order may be divided in three groups.<sup>13</sup> The first aims at translating a classical constitutional model, as it exists in many Member States, to the EU. This constitutional model in principle is based on a monist idea of the EU's legal order, according to which it is possible to define a hierarchy among different suborders and, thus, identify substantive principles that have to be followed throughout the entire legal order. The second view on the European legal order, on the contrary, assumes that it is never possible to find a common point of reference to resolve conflicts among principles endorsed in different suborders, for example, among diverging judgments of national constitutional courts or national and EU courts. This radical pluralist (or systemic pluralist) theory, thus, emphasizes heterarchy and holds that it is impossible to resolve principled conflicts in a structural manner. The third and last view is that of constitutional pluralism. Versions of this theory<sup>14</sup> develop normative criteria or meta-principles aimed at securing the values of constitutionalism in a context in which there is no ultimate authoritative source to do so. This way, they seek coherence while preserving diversity, combining features of constitutionalism and pluralism. In the following, it will be argued that the 'third way' provided by constitutional pluralism can be translated to a moderately pluralist theory of European contract law.

## 2.2. *Sceptics and Believers*

In order to explain why a moderately pluralist model provides the most convincing account of today's European contract law, the three aforementioned general views on the legal system have to be given closer consideration. What are

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12 The very old problem of the one and the many is addressed in, among other fields, Greek philosophy, Chinese philosophy, religious studies, and physics.

13 N. KRISCH, 'The Case for Pluralism in Postnational Law', in G. De Búrca & J. Weiler (eds), *The Worlds of European Constitutionalism*, Cambridge University Press, Cambridge 2012, p. 245, at 251-254. See also C. MAK, 'Europe-Building through Private Law. Lessons from Constitutional Theory', *ERCL (European Review of Contract Law)* 2012, p. 326, at 332-336.

14 E.g., N. WALKER, 'The Idea of Constitutional Pluralism', *MLR (Modern Law Review)* 2002, pp. 317-359; M. POIARES MADURO, 'Contrapunctual Law: Europe's Constitutional Pluralism in Action', in N. Walker (ed.), *Sovereignty in Action*, Hart Publishing, Oxford 2003, pp. 501-537; M. KUMM, 'Who Is the Final Arbiter of Constitutionality in Europe? Three Conceptions of the Relationship between the German Federal Constitutional Court and the European Court of Justice', *CMLR (Common Market Law Review)* 1999, pp. 351-386.

their implications for the study of individual rights and collective interests in European contract law?

A sceptic will explain the elusive state of this field of law on the basis of the plurality of values underpinning different rights. According to this view, it is impossible to find some order among the multitude of values reflected in contracting parties' rights under national laws and EU measures. The European Commission's decision not to include any provision on the morality of contracts in its proposal for a Common European Sales Law (CESL), for instance, would make perfect sense to the sceptic. Including such a provision would give the impression of there being a common value underlying the idea of contractual immorality in the instrument, which would unavoidably lead to conflicts between the CESL and certain national systems of contract law. Among these national systems, different opinions are held on many questions of immorality of contracts, for example, in the context of family relations in case of surrogate motherhood, or regarding possibilities to enter into certain types of employment contracts or medical treatment contracts. The CESL's hypothetical conception of morality could never be completely reconciled with all of them.

This conclusion will not be shared by one who believes that it is possible to make sense of European contract law in a monist sense, that is, to relate all rules of contract law to one common value, which inspires a hierarchy of legal sources. Amongst believers, a variety of views are held on how to conceive of contract law. These views may be distinguished according to their instrumentalist or non-instrumentalist nature.

The prevailing non-instrumentalist theory of contract law is one of corrective justice, which is based on the idea that a person who has been wrongfully injured by another must be made whole by the injurer.<sup>15</sup> Accordingly, rules of contract law can be justified insofar as they rectify wrongs or impose duties not to commit wrongs. Certain rules of EU contract law may undoubtedly be explained on the basis of the corrective justice theory, for example, the standard terms under the Unfair Terms Directive not having binding legal force, and the remedies for non-performance included in the Consumer Sales Directive and in the proposal for a CESL. These rules seek to rectify wrongs suffered by the consumer in respect of the conclusion and performance of the contract. Given the EU's functional nature, nevertheless, it has been broadly accepted that measures of Union law are instrumentalist to the goals of the European internal market.<sup>16</sup>

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15 E.J. WEINRIB, *The Idea of Private Law*, Harvard University Press, Cambridge, Massachusetts 1995, and *Corrective Justice*, Oxford University Press, Oxford 2012.

16 A.S. HARTKAMP, *European Law and National Private Law*, Kluwer Law International, Deventer 2012, no. 22.



This is also valid for measures in the field of contract law.<sup>17</sup> For these rules, a non-instrumentalist justification does, therefore, not seem normatively satisfactory; it would ignore the specific context from which they originate: the project of creating an internal market. As a consequence, a believer in a non-instrumentalist account of national contract law faces the problem of how to reconcile the nature of rules of contract law deriving from the EU with those originating at the national level.

A believer adopting an instrumentalist theory of contract law does not have an easier task. She has to elaborate on the goals that are pursued through contract law and how they relate to each other. In a monist account, it is possible to relate various private law rights to one common goal or value. In line with Ronald Dworkin's assertion that value is indivisible,<sup>18</sup> such a monist perspective is based on the idea that the opinions one holds in different fields of morality, politics, and the law should be coherent and justifiable.<sup>19</sup>

One of the most important instrumentalist theories of contract law in US law is economic theory, which justifies contractual rights and duties on the basis of their utility and, thus, makes an instrumental claim for wealth maximization.<sup>20</sup> On the other side of the Atlantic, rules of contract law deriving from the EU may be explained equally well in economic terms. EU contract law is meant to facilitate the conclusion of transactions on the internal market and as such serves the EU's objective of economic integration through law. For that reason, for instance, rights of withdrawal deriving from Consumer Directives may be considered to have to comply with the principle of efficiency.<sup>21</sup> Similarly, consumer protection rules laid down in the CESL can be assessed on their capacity to effectively improve the position of consumers in their contractual relationships to businesses.<sup>22</sup> More generally, attention for the CESL's potential to increase cross-border trade and thus serve the internal market can be

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17 C.U. SCHMID, 'The Instrumentalist Conception of the Acquis Communautaire in Consumer Law and Its Implications on a European Contract Law Code', *ERCL* 2005, pp. 211-227.

18 R.M. DWORKIN, *Justice for Hedgehogs*, Belknap Press, Cambridge, Massachusetts 2011.

19 *Ibid.*, p. 10.

20 E.g., R.A. POSNER, *Economic Analysis of Law*, Little, Brown, Boston 1972.

21 O. BEN-SHAHAR & E.A. POSNER, 'The Right to Withdraw in Contract Law', *The Journal of Legal Studies* 2011, pp. 115-148; J.A. LUZAK, 'To Withdraw or Not to Withdraw. Evaluation of the Mandatory Right of withdrawal in Consumer Distance Selling Contracts Taking into Account Its Behavioural Effects on Consumers', CSECL Working Paper Series 2013-04, available on <http://ssrn.com/abstract=2243645> (last consulted on 18 Apr. 2013).

22 O. BAR-GILL & O. BEN-SHAHAR, 'Regulatory Techniques in Consumer Protection: A Critique of European Consumer Contract Law', *CMLR* 2013, pp. 109-126.



accounted for in light of cost/benefit analyses and theories on regulatory competition.<sup>23</sup>

A monist-instrumentalist economic theory of European contract law, however, is not an unproblematic one. First, doubts may be raised regarding the nature of economic theory's goal: is wealth – a value or component of a value – worth pursuing in contract law? Dworkin has convincingly highlighted the weaknesses of instrumentalist claims that either endorse social wealth as a value in itself or hold that wealth maximization should be the principal test applied by judges in order to increase an independent value underlying a just society.<sup>24</sup> Why would a society that has more wealth by definition be better off than one that has less? Second, reservations may be made regarding the theory's capacity to explain a variety of rules of EU contract law in a coherent manner. What is the scope of the theory, and is its application likely to yield consistent results? Third, the question arises once again: can rules of contract law in the Member States ultimately be explained on the basis of one and the same economic rationale? How can wealth maximization be conceived of in a multilevel legal order? An exclusively legal-economic perspective on European contract law is arguably too limited.<sup>25</sup>

To the extent that contract law is recognized as being instrumental to the pursuit of a certain goal, an alternative view that can be taken is a legal-political one. What is at stake is the conception of social justice reflected in European contract law. Although contract law might not offer the most efficient or effective framework for redistributing wealth in society, a convincing case may be made for the point of view that contract law is, but should not be, indifferent to goals of social justice.<sup>26</sup> Every rule of contract law can be considered to reflect a certain

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23 S. GRUNDMANN, 'Costs and Benefits of an Optional European Sales Law', *CMLR* 2013, pp. 225-242; H. EIDENMÜLLER, 'What Can Be Wrong with an Option? An Optional Common European Sales Law as a Regulatory Tool', *CMLR* 2013, pp. 69-84; J.J. GANUZA & F. GOMEZ, 'Optional Law for Firms and Consumers: An Economic Analysis of Opting into the Common European Sales Law', *CMLR* 2013, pp. 29-50; G. RÜHL, 'The Choice of Law Framework for Efficient Regulatory Competition in Contract Law', in H. Eidenmüller (ed.), *Regulatory Competition in Contract Law and Dispute Resolution*, Beck, München 2013, also available on <http://ssrn.com/abstract=2119767> (last consulted 2 Apr. 2013); S. VOGENAUER, 'Regulatory Competition through Choice of Contract Law and Choice of Forum in Europe. Theory and Evidence', *ERPL* 2013, pp. 13-78.

24 R.M. DWORKIN, *A Matter of Principle*, Oxford University Press, Oxford 1986, pp. 249-263.

25 C. MAK, 'Unweaving the CESL: Legal-Economic Reason and Institutional Imagination in European Contract Law', *CMLR* 2013, pp. 277-296.

26 See, for instance, L.K.L. TJON SOEI LEN, 'European Contract Law and the Capabilities Approach: On Distributive Responsibility for Contract Law', in Weidtmann, Hölzchen & Hawa (eds), *The Capability Approach on Social Order*, LIT Verlag, Münster 2012, pp. 132-148; J. KLIJNSMA, 'SMEs in European Contract Law: A Rawlsian Perspective', Centre for the Study of European Contract Law Working Paper 2010/05, <<http://ssrn.com/abstract=1678622>> (last

idea on the manner in which wealth should be distributed in society. Restrictions on freedom of contract can be understood as indicating instances in which society, through the legal system, affects an existing distribution. In particular, an idea of solidarity among contracting parties underlies such limitations on parties' autonomy.<sup>27</sup> However, once more, the restrictions imposed in national laws mostly do not fully correspond to those implied by EU measures and may thus lead to friction between national and EU values and principles.<sup>28</sup>

### 2.3. *The Pluralist Third Way*

Given the difficulties that purely monist theories of contract law face when being applied to the European legal order, Smith's third alternative comes into view: the pluralist account. Several arguments may be brought forward to support the elaboration of a moderately pluralist account of European contract law.

First of all, as opposed to a sceptical or radically pluralist perspective, a moderately pluralist view does presume that it is possible to provide a coherent account of this field. Therefore, it may not only explain the development of European contract law, but it could also give normative guidance for its further development. Since a pluralist narrative recognizes and explains the relationships between different legal (sub)orders, it can be assessed from a normative perspective and, where necessary, be adjusted to more closely correspond to the idea of contract law that is pursued.

Second, unlike a believer in a monist theory – either of an instrumental or non-instrumental nature – a pluralist of this type does not seek one ultimate value to which all rules of contract law can be related. She rather seeks to find the appropriate value for a specific case. A moderately pluralist theory of European contract law, thus, will identify certain meta-principles that point to the relevant value or principle applying to a specific case. In this way, it may for instance be possible to guarantee an optional instrument's consistency with EU law, while ensuring its peaceful coexistence with national regimes of contract law.<sup>29</sup>

Third, and importantly, in defining meta-principles that indicate the relevant value, the moderate pluralist seeks coherence on a higher level than that

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consulted 16 Aug. 2012); K.A. KORDANA & D.H. TABACHNICK, 'Rawls and Contract Law', 73. *The George Washington Law Review* 2005, pp. 598-632.

27 B. LURGER, 'The "Social" Side of Contract Law and the New Principle of Regard and Fairness', in A.S. Hartkamp, M.W. Hesselink, E.H. Hondius, C. Mak & C.E. du Perron (eds), *Towards a European Civil Code*, Ars Aequi Libri/Kluwer Law International, Nijmegen/Alphen aan den Rijn, 4th ed., 2011, pp. 353-386.

28 *Ibid.*, n. 27, pp. 360-361; G. TEUBNER, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Differences', *MLR* 1998, pp. 11-32.

29 On this topic, see B. FAUVARQUE-COSSON, 'European Contract Law Through and Beyond Pluralism: The Case of an Optional Instrument', in L. Niglia (ed.), *Pluralism and European Private Law*, Hart Publishing, Oxford and Portland, Oregon 2013, pp. 95-107, at 102-104.

of individual rights. While she accepts that specific rights may be grounded in different values,<sup>30</sup> unlike a monist she does not believe that all these values should be reconciled. Rather, the different values may relate to specific legal questions that are not as such related to each other, and accordingly, there would be no conflict of values. Such a conflict might occur on a higher level, that is, that of the meta-principles that indicate which value (and contractual right) takes precedence in the specific case. These meta-principles should be in harmony in order to give a coherent descriptive and, possibly, normative account of European contract law.

Fourth, therefore, the expectation arises that on this meta-level a meaningful interpretation of a ‘common good’ in European contract law can be found or elaborated. This conception of the European common good would relate to consensus on the manner in which an answer to a ‘hard case’ is found, that is, through meta-principles indicating the prevailing value. With monism the moderately pluralist model thus shares the idea that a coherent view on contract law can be developed. Unlike monism, and in respect of pluralism, however, coherence is not sought in comprehensive substantive principles permeating European contract law as a whole. Rather, meta-principles are articulated that indicate the final authority to decide a specific case. As such, a moderately pluralist view on European contract law presents a procedural theory of justice, similar to theories of constitutional pluralism, which are mainly focused on questions of governance and coordination of legal (sub)orders.

The analysis of questions of legal pluralism in European contract law, however, cannot escape a study of the substantive law. It has to consider not only procedures or principles that indicate who has decision-making authority in a specific case (e.g., the CJEU or a national court), but also what will be the outcome of the judicial process (e.g., whether a contract is enforced in light of ‘good morals’, reflecting a certain idea of social justice). Moreover, contract law is characterized by private autonomy: Contracting parties in principle are free to conclude transactions with whom they desire and on the terms they choose themselves. Not only public autonomy (as expressed in democratic legislation and in constitutional documents) but also private autonomy may provide legitimacy to rule-solutions, and there may be conflicts between rules established on the basis of public and of private autonomy. Addressing both the procedural and the substantive dimension, a moderately pluralist theory of European contract law can provide guidance for reconciling different conceptions of social justice (reflected in contractual good morals and public policy) on the meta-level where agreement on procedural principles is sought.

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30 Cf. SMITH, *supra* n. 6, p. 114.

This moderately pluralist thesis, which places the ‘common good’ on an intermediary level among different conceptions of the collective interest in Europe, will be explored further in the remainder of this paper. I will argue that a pluralist account of this type offers the most convincing model to discuss the current state of the European Union’s multi-level legal order insofar as it regards the validity of contracts in light of public policy and good morals.<sup>31</sup> However, the particular details of a pluralist model for European contract law require a more in-depth engagement with the underlying tension between sceptical (or radically pluralist) views and monist theories of contract law. While Smith’s analysis offers insights into the issues to be addressed when developing a pluralist theory of contract law that is internal to a legal system, it is submitted that a meaningful discussion of a pluralist model for European contract law needs to start one phase earlier. A specific feature of the law governing contracts in the European internal market is that its rules can be found on different levels (national and EU, sometimes even international law, e.g., the Vienna Sales Convention). It has to be determined how different actors understand the boundaries between these spheres, or in other words how many legal systems they consider there to be in Europe, in order to find common ground among them.

In the following, first, the descriptive potential of the moderate pluralist narrative will be addressed, illustrating the specific substantive debate in European contract law on the basis of examples from case law. Subsequently, its normative implications will be discussed.

### **3. Tracing the Common Good in European Contract Law**

#### ***3.1. Moderate Pluralism as a Descriptive Model***

A descriptive moderately pluralist<sup>32</sup> narrative of European contract law has to accommodate both non-instrumentalist and instrumentalist views. While rules of contract law that derive from the EU level are aimed at the facilitation of market transactions and therefore have been recognized to be of an instrumental nature, the same cannot necessarily be said of national rules. Rules of contract law in the Member States may be explained on the basis of either non-instrumental (e.g., corrective justice) theories or in light of instrumental (e.g., economic or social justice) theories. Furthermore, all of these theoretical models can be presented in slightly different versions. The present analysis does not aim to give a full overview of all possible visions. It rather seeks to provide an outline of a plausible

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31 See also C. MAK, *European Review of Contract Law* 2012, p. 326 at 341.

32 As opposed to radically pluralist theories.

descriptive pluralist theory of European contract law, which will be assessed from a normative point of view in section 3.2 in order to establish its validity.<sup>33</sup>

This pluralist account of European contract law starts from the idea that different legal (sub)orders within the EU may hold different conceptions of the common good and that there is no ultimate authority that decides which conception prevails. Rather, a coherent approach is sought to establish which value applies in a specific case. An example may clarify the credibility of such a theoretical approach and identify requirements for its further development.

The reference is to the CJEU's judgments in the well-known cases of *Viking* and *Laval*. In *Viking*,<sup>34</sup> Finnish and international trade unions sought to take collective action against ferry operator Viking Line's intention to reflag its vessel *Rosella*, which was running at a loss due to competition from Estonian companies operating on the same route (Tallinn (Estonia)-Helsinki (Finland)) with lower wage costs. The trade union's actions were aimed at inducing Viking Line to enter into a collective agreement, which determined that Finnish law would remain applicable to the *Rosella*'s crew, thus effectively making reflagging pointless. According to the CJEU, the right to freedom of establishment (ex Art. 43 EC; now Art. 49 TFEU) could be relied upon by private undertakings against trade unions. In this case, the Court found that the collective actions at issue constituted a restriction on Viking Line's freedom of establishment. This restriction may in principle be justified by an overriding reason of public interest, such as the protection of workers, provided that the principle of proportionality is respected. *Laval*<sup>35</sup> concerned a Latvian company of that name, which had posted workers to Sweden in order to work on building sites there. Swedish trade unions initiated collective actions when negotiations to have Laval sign the collective agreement for the building sector failed. The CJEU considered these actions to set unjustified restrictions to the freedom to provide services (ex Art. 49 EC; Art. 56 TFEU).

What followed after *Viking* and *Laval* underscores the pluralist nature of the European legal order. The judgments received strong criticism because of their deviation from national laws concerning the fundamental right to strike. EU economic freedoms for businesses were given precedence over the social rights of workers. Consequently, different regimes would apply to workers staying within a Member State and those operating in a cross-border context, entailing a risk of 'social dumping' by companies moving their business to countries with lower wage requirements. An attempt by the European Commission to provide clarity by

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33 Reminiscent of K.R. POPPER, *Conjectures and Refutations: The Growth of Scientific Knowledge*, 1963, republished Routledge Classics, London 2002, pp. 43-48.

34 CJEU 11 Dec. 2007, C-438/05, *ITF and Finnish Seamen's Unit v. Viking Line*.

35 CJEU 18 Dec. 2007, C-341/05, *Laval*.

enacting a regulation<sup>36</sup> that codified the CJEU's case law was unsuccessful. National governments complained about the Commission overstepping its competences and thus breaching the principle of subsidiarity.<sup>37</sup> Pursuant to these objections, the proposal received a 'yellow card' and was withdrawn.

In the present analysis, retelling the story of *Viking* and *Laval* does not serve the aim of assessing the application of free movement to horizontal legal relationships.<sup>38</sup> Rather, consideration of these cases demonstrates the existence of a plurality of values and rights in the European legal order and the dilemmas related to integrating these into a theory of pluralism.<sup>39</sup>

A plurality of values is reflected in the pronounced difference between EU law and national law concerning the right of workers to take collective action, including the right to strike. In many national legal systems, this right is firmly established as a fundamental social right that, in principle, may not be restricted. On the EU level, on the other hand, economic freedoms aimed at the development of the internal market are balanced against this fundamental right and may prevail over it.

In a pluralist account, these different positions as such do not pose problems. It is accepted that different rights may be promoted at the national level (a social fundamental right to strike) and at the EU level (economic freedoms).<sup>40</sup> In this view, the existence of either non-instrumentalist or instrumentalist national rules of law alongside instrumentalist EU rules is not necessarily problematic either: A corrective justice-based theory of national law, or one promoting social goals, may go along with an economic theory of EU law. What needs to be clarified, however, is on what basis EU objectives in individual cases may prevail over national goals.

In accordance with a constitutional pluralist account of EU law, the predominance of economic objectives in *Viking* and *Laval* can be explained on the basis of the idea that 'the rules on freedom of movement apply directly to any private action that is capable of effectively restricting others from exercising their

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36 Proposal for a Council Regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services, COM(2012) 130.

37 <http://www.ipex.eu/IPEXL-WEB/dossier/document/COM20120130.do> (last consulted on 3 Apr. 2013).

38 For a critical view on the CJEU's case law on this topic, see H. SCHEPEL, 'Constitutionalising the Market, Marketising the Constitution, and to Tell the Difference: On the Horizontal Application of the Free Movement Provisions in EU Law', *ELJ (European Law Journal)* 2012, pp. 177-200. See also N. REICH, 'Free Movement v. Social Rights in an Enlarged Union - the *Laval* and *Viking* Cases before the ECJ', *German Law Journal* 2008, pp. 125-161.

39 Cf. G. ITZCOVICH, 'Legal Order, Legal Pluralism, Fundamental Principles. Europe and Its Law in Three Concepts', *ELJ* 2012, pp. 358-384, at 370, who uses the term 'legal pluralism' for a theory reflecting on genuine normative contradictions among legal (sub)orders.

40 Compare Smith's definition given above, in sec. 2.1.

right to freedom of movement'.<sup>41</sup> The question whether national social rights or EU economic freedoms have prevalence in a specific case is thus answered on the basis of an assessment of the capacity of a private actor to effectively limit others from exercising their rights under EU law.

Insofar as the extension of the free movement provisions to effectively restrictive private action is considered to be based on a meta-principle of constitutional pluralism,<sup>42</sup> the controversy surrounding *Viking* and *Laval* exposes a possible weakness of pluralist theory. The fact that the judgments and legislative proposal raised as much discussion as they did affirms that there is disagreement as to which view should have the upper hand in disputes situated on the interface of EU law and national law.<sup>43</sup> Such disputes concern situations where a risk occurs of workers within one Member State, or even within one company, falling under different legal regimes because some of them are employed by foreign companies while others are not. Moreover, it is not immediately clear how to establish which authority decides who has the ultimate say on this question. While the European Commission was of the opinion that its proposal respected the principle of subsidiarity, many Member States claimed that it overstepped its competences.

On the other hand, the debate on *Viking* and *Laval* does not completely discredit the pluralist theory's ability to explain the CJEU's ruling that economic freedoms could outweigh the social rights of workers. A theory of European contract law pluralism that accepts a meta-principle according to which EU economic freedoms may be weighed against national social rights provides a descriptive account in which the two judgments fit well. More recent case law of the CJEU seems to support this theoretical view, insofar as the Court includes freedom of contract in the protective scope of the EU Charter of Fundamental Rights.<sup>44</sup>

The reason that some scholars doubt the credibility of this type of descriptive moderately pluralist account seems to lie in the substantive outcomes of the application of the aforementioned meta-principle. Recognition of a principle that allows the extension of free movement law to private actors entails

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41 Advocate General Maduro's Opinion in the *Viking* case, C-438/05, para. 43.

42 SCHEPEL, *supra* n. 38, p. 187.

43 It should be noted that the EU's approach to the balancing of social rights against economic freedoms is also a topic of debate on the international level, where a committee of the UN's International Labour Organization recently voiced strong criticism on the Swedish amendment of the law in the wake of *Laval*. See <http://www.europeanvoice.com/article/imported/disrespect-for-social-rights-is-a-worrying-european-trend-/76868.aspx> (consulted on 5 Apr. 2013). A further analysis of the relation between EU law and international law, however, falls outside of the scope of this paper.

44 E.g., CJEU 6 Sep. 2012, C-544/10, *Deutsches Weintor v. Land Rheinland-Pfalz*; CJEU 22 Jan. 2013, Case C-283/11, *Sky Österreich GmbH v. Österreichischer Rundfunk*.



a risk of ‘marketizing’ constitutional principles and, thus, obscuring the method of judicial reasoning and undermining the effectiveness of EU law. In this context, Schepel observes:

The implication is that *any* private action capable of effectively restricting the exercise of *whatever* rights free movement law confers is now, in principle, prohibited. With the personal scope of free movement law wholly collapsed into their material scope, relationships between private parties are now structured by the Janus-like character of the ‘fundamental freedoms’ which elevates both collective values and market ordering to constitutional status. In the ‘constitutionalised market’ private law is subjected to the constitutional protection of the weaker party through the fundamental right of equal treatment. In the ‘marketised constitution’ hard-fought economic constitutional settlements are dismantled through the elevation of the entitlement to market outcomes.<sup>45</sup>

Leaving aside the consequences of *Viking* and *Laval* for the effectiveness of EU law, Schepel’s criticism on the approach taken in these cases underlines the importance of considering the implications of legitimizing the strong emphasis on economic freedoms in EU law on the basis of a moderately pluralist theory of European contract law. A descriptive account might explain the dynamics resulting in the outcome but may have difficulty in normatively defending it.<sup>46</sup> A distinction between constitutional and contractual theories of the EU legal order can explain why this is the case. Theories of constitutional pluralism legitimizing judgments such as *Viking* and *Laval* focus on the recognition of the fundamental or constitutional nature of certain values, for example, social rights in national laws and economic freedoms on the EU level. They do not challenge the acknowledgement of constitutionality, but rather seek to coordinate the application of conflicting constitutional rights. When elements of private law (and private autonomy) enter the picture, the outcomes of this type of reasoning might, however, be less convincing. How can the constitutionalization of market freedoms in EU law be reconciled with national laws that give prevalence to the social rights of workers? From a contract law point of view, it is not the extension of the applicability of free movement law to private legal relationships as such that is surprising. Insofar as economic freedoms correspond to the principle of freedom of contract, it does not seem illogical that they extend to horizontal relationships. What is problematic is the recognition of the constitutional nature

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45 SCHEPEL, *supra* n. 38, p. 200.

46 On the normative credibility of a moderately pluralist theory of European contract law, see sec. 3.2 below.

of economic freedoms, which changes their relationship to social rights, such as the right to strike. Where such social rights under national laws will usually pose justified restrictions to freedom of contract, they may be subordinated to an equally fundamental economic right on the EU level. Criticism of a moderately pluralist descriptive theory supporting *Viking* and *Laval*, thus, is effectively aimed not at the principle of EU law that extends economic freedoms to private legal relationships but at the lack of identification of a meta-principle that can reconcile the constitutional status of such economic freedoms in EU law with stronger limits posed by national (contract) laws. In other words, what is at stake is the question of how to reconcile different views on the common good or the idea of social justice reflected in rules governing private legal relationships.

At this point, the question of the location of a European idea of the common good requires closer scrutiny. In EU law, the public interest may justify restrictions on the exercise of free movement rights by businesses. The public interest may, for instance, refer to the protection of workers. Now, the *Viking* and *Laval* saga suggests that this collective interest is framed differently in EU law than in the laws of the Member States. On the one hand, this is due to substantive differences: EU law tends to emphasize economic objectives, whereas national law protects workers' social rights. On the other hand, procedural factors play a role. Democratically established rules of law may differ depending on the *demos* they relate to (public autonomy), while private parties, such as businesses and workers' associations, may to some extent substitute legislative schemes by their own agreements (private autonomy). A sceptical theorist will see no way to reconcile the different conceptions of the common good. A monist will have difficulty determining a single value to which these different conceptions may be traced. A pluralist, finally, may overcome the impasse by raising the question to a higher level: instead of giving up hope of ever establishing a 'European common good' or of seeking to harmonize its conception by imposing a single view, a pluralist account provides criteria for determining which conception of the common good applies in a specific case. To the extent that a descriptive account does not identify a convincing meta-principle that reconciles diverging EU and national balances struck between social and economic interests, the descriptive account needs to be refined by establishing whether another meta-principle can offer a better account. This principle needs to engage both with the coordination of constitutional legal orders and private legal orders in Europe.

In summary, while this revision of two prominent cases related to European contract law illustrates the difficulties posed to the elaboration of a moderate pluralist theory, it also underlines the advantages of this approach. The search for meta-principles that offer a credible descriptive account of developments in case law highlights tensions among the different (sub)orders within the field of European contract law. Therefore, it urges scholarship to explicitly engage with the goals of this area of law.

### 3.2. *Moderate Pluralism as a Normative Model*

Does a pluralist account of European contract law also provide a convincing normative model for the further development of the field? It is submitted that a positive answer may be given on the condition of certain criteria being met. In particular, attention needs to be paid to, first of all, the (re)consideration of the goals or rationales underlying the area of European contract law and, in the second place, to the specific features of contract law pluralism with respect to theories of constitutional pluralism.

The first point concerns European contract law's bearing on questions of social justice, in particular the tension among economic and social goals that was at issue in, for instance, the aforementioned *Viking* and *Laval* cases. The ongoing economic crisis has exposed the lack of civic solidarity underlying the European project. Economic and philosophical responses to the crisis stress the need for an analysis of the policy mistakes that caused the problems<sup>47</sup> and call for 'more Europe' to enhance solidarity and strengthen the European Union's position in the world.<sup>48</sup> These economic and philosophical perspectives are closely linked to the legal dimension of the debate that is discussed in this paper: Given the predominant role of the law in the shaping of the integration project,<sup>49</sup> proposals for reform regularly address the institutional framework and even propose a 'Union through the law',<sup>50</sup> in line with the old maxim of 'integration through law'.<sup>51</sup>

In the field of European contract law, moreover, the possible introduction of an optional instrument for sales contracts, the CESL, has raised the hope that parties' choice for uniform rules may serve to overcome problems related to legal pluralism.<sup>52</sup> The development of a theoretical framework for the reconciliation of different conceptions of the common good in European contract law is of importance for the institutions involved in the development and application of such measures of contract law, most importantly the legislature and judiciary. In particular, the debate on social justice in European contract law may benefit from

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47 A. SEN, 'Austerity Is Undermining Europe's Grand Vision. Economic Policy Is Triggering Disaffection among Nations - the Very Thing the Pioneers of Unity Hoped to Erase', *The Guardian*, 3 Jul. 2012.

48 J. HABERMAS, *Zur Verfassung Europas*, Suhrkamp Verlag, Berlin 2011.

49 L. VAN MIDDELAAR, *Le passage à l'Europe: Histoire d'un commencement*, Gallimard, Paris 2012.

50 A. VAUCHEZ, *L'Union par le droit. L'invention d'un programme institutionnel pour l'Europe*, Presses de Sciences Po, Paris 2013.

51 M. CAPPELLETTI, M. SECCOMBE & J. WEILER (eds), *Integration through Law*, vol. 1, Book 1, Walter de Gruyter, Berlin/New York 1986.

52 B. FAUVARQUE-COSSON, *supra* n. 29, p. 106.

a conceptualization of the field in constructive terms.<sup>53</sup> The definition of a principled framework indicating which conception of the common good prevails in which case has to take into account both European instrumentalist views on the economic goals of contract law and national ideas on contract law's social dimension.

The second point relates to contract law's specific role in the European legal order. More specifically, it addresses a dilemma that European constitutional theory has to tackle as well, that is, how to translate well-known national legal concepts to the multilevel European context.<sup>54</sup> Contract law and, for that matter, private law in general are often considered to be part of the organization of a nation-state. As such, it conforms to the idea of nationalism, understood as the political principle according to which the political and the national unit should be congruent.<sup>55</sup> On the one hand, this nationalist dimension of contract law may hamper European integration, insofar as it inspires resistance against EU influence on national contract laws.<sup>56</sup> On the other hand, awareness of nationalist tendencies in European contract law discourse may allow for the development of methods to overcome the nationalist bias. Given contract law's substantive engagement with the tension among economic and social goals pursued in the European legal order, it may play an important role in promoting further integration.<sup>57</sup>

Elsewhere,<sup>58</sup> I suggested two ways in which this can be done, namely by (a) transposing the nationalist model to the EU level, thus aiming at creating a Euro-nation that coincides with a political union, of which European contract law is a (constitutive) component (Euronationalism) or (b) loosening the link between the nation and the polity, thus making space for a European contract law that is not based on having nation-states, but that rather contributes to the strengthening of solidarity among European citizens through the development of a legal framework that allows for democratic input in the substance of European contract

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53 D. CARUSO, 'The "Justice Deficit" Debate in EU Private Law: New Directions', *Boston University School of Law Working Paper* No. 12-42, available on <http://ssrn.com/abstract=2135111> (last consulted on 13 Mar. 2013).

54 See also C. MAK, *European Review of Contract Law* 2012, 326ff.

55 E. GELLNER, *Nations and Nationalism*, Blackwell Publishing, Oxford 1983, p. 1; J. LEERSSEN, *National Thought in Europe. A Cultural History*, Amsterdam University Press, Amsterdam 2006; B. ANDERSON, *Imagined Communities. Reflections on the Origin and Spread of Nationalism*, Verso, London, rev. ed., 2006, who defines a 'nation' as an 'imagined political community'; G. COMPARATO, *Nationalism and Private Law in Europe* (forthcoming) Ch. I.2.

56 G. COMPARATO, 'The Long Shadow of the Volksgeist or: The Nationalist Dimension in European Private Law Discourse', *ERCL* 2012, pp. 245-259.

57 G. COMPARATO, *Nationalism and Private Law in Europe* (PhD thesis, University of Amsterdam, on file with the author).

58 C. MAK, *European Review of Contract Law* 2012, 326ff.

law (constitutional patriotism or cosmopolitanism). Both strategies require that the field of European contract law is ‘constitutionalized’ to some extent in order to resolve the tension among principles of contract law deriving from different legal (sub)orders within the EU. Placing contract law within a theory of constitutional pluralism would partly serve to reach this goal: it would aim at resolving conflicts between suborders of contract law in the EU on the basis of principles situated on a meta-level, which could secure respect for these suborders, while at the same time trying to find coherence beyond the nation-state level.<sup>59</sup>

While European contract law may, thus, adhere to principles of public law, concerning the coordination of different legal (sub)orders, the elaboration of a pluralist theory for this field of law necessitates a further step. The specific nature of contract law implies that rules of contract law should comply with constitutional principles insofar as they are enacted rules in a legal system. Yet, given parties’ considerable freedom to design their contractual relationships according to their own wishes, the determination of which value governs a dispute under European contract law requires that principles of private law be defined.<sup>60</sup> The diversity of views on contractual morality in Europe, for instance, makes clear that a complete unification of the conception of the ‘common good’ is not a very realistic or desirable option. Constitutional principles may indicate which court in a specific case has the final authority to decide a dispute, drawing the boundaries that public policy and good morals set on the freedom of contract in the individual case. For substantive guidance, however, the competent court not only will depend on the conception of morality prevailing in its own jurisdiction but will to some extent have to take into account a European conception of the common good. This is the case when EU measures of contract law affect the dispute.

A recent Spanish case that was referred to the CJEU for a preliminary ruling may serve as an example. *Aziz v. Catalunyaacaixa* concerned the enforcement of a mortgage contract.<sup>61</sup> According to the standard terms of the contract, which reflected common practice in Spain, the bank was allowed to evict the Aziz family from their home upon the failure to continue paying the monthly instalments of the mortgage loan. The national judge handling the case referred a preliminary question to the CJEU concerning the compliance of the Spanish law that made possible the eviction with the EU Directive on Unfair Terms in Consumer Contracts. In its judgment of 14 March 2013, the Court held that Spanish law infringed the Unfair Terms Directive, in particular because it precluded the court that had jurisdiction to declare unfair a term of a loan

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59 *Ibid.*, pp. 332-336.

60 In a similar sense, see HESSELINK, in L. Niglia (ed.), *Pluralism and European Private Law*, Oxford and Portland, Oregon: Hart Publishing, 2013, p.199 at pp. 240-241.

61 CJEU 14 Mar. 2013, C-514/11, *Aziz v. Catalunyaacaixa*.

agreement relating to immovable property from staying the mortgage enforcement proceedings initiated separately. In addition, following Advocate General Kokott's Opinion in the case,<sup>62</sup> the CJEU gave detailed guidelines concerning the interpretation of the notion of 'unfairness' when applied to specific terms of mortgage contracts. Thus, the Court intervened substantively in Spanish national contract law.

The *Aziz* case illustrates once more the pertinence of pluralist theory for understanding and developing European contract law. A sceptic might emphasize the difference in approach in this judgment when compared to *Freiburger Kommunalbauten*, in which the CJEU allocated most of the responsibility to interpret the Unfair Terms Directive to national judges.<sup>63</sup> The two judgments would be difficult to reconcile, since they implied different views on the constitutional relations between EU and Member States, as well as different views on the extent to which the application of the open norms of 'good faith' and 'unfairness' had to be harmonized. A monist, on the other hand, might welcome *Aziz* as a confirmation of the supremacy of EU law and the CJEU's interpretative authority. The judgment would bring European contract law closer to a single-valued, unitary legal order. A (moderate) pluralist, finally, could find middle ground between these views by considering the meta-principles governing the law on unfair terms review. She would recognize that determining which court has the final say, the CJEU or the national one, depends on the issues at stake and the related view on freedom of contract's limits.

*Freiburger Kommunalbauten* concerned the interpretation of a standard term concerning advance payment of the full price of a parking space in a multi-storey car park that still had to be built. The CJEU, in the act of referring the interpretation of 'unfairness' to the national court in Germany, may be explained by the fact that the subject matter as such is not covered by measures of EU law and that, accordingly, the national court is in a better position to assess the (un)fairness of the term – both in terms of democratic legitimacy (having the national court decide on the scope of freedom of contract in German law in light of prevailing public opinion) and in terms of defining substantive outcomes (concerning what public opinion is held in German society).

*Aziz*, on the other hand, concerned a topic that is closely related to a Member State's position under EU policy, in particular the EU's monetary system incorporated in the Eurozone. The crisis on the Spanish housing market is in part a consequence of the economic pressure on European cooperation. Although it is not mentioned in so many words, the principle of primacy of EU law could serve

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62 Opinion of Advocate General Kokott in C-514/11, *Aziz v. Catalunyaacaixa*, 8 Nov. 2012.

63 CJEU 1 Apr. 2004, C-237/02 *Freiburger Kommunalbauten GmbH Baugesellschaft & Co KG v. Hofstetter*.

to justify the CJEU's far-reaching intervention in national law in this case.<sup>64</sup> A European interpretation of what consumer protection entails (the public interest) is posed opposite the economic hardship resulting from the strict application of national contract law (possibly conceived of in terms of corrective justice, rather than in instrumentalist ones) in times of European crisis.

Comparing the three perspectives on European contract law that were discussed here – a sceptical, a monist, and a moderately pluralist vision – the pluralist model seems to provide the most convincing normative framework for constructive theoretical work on the interpretation of the common good in relation to contractual rights. While a sceptical view serves to sharpen the analysis of developments in the field, it cannot offer much guidance as to how to proceed. A monist view, on the other hand, may provide such guidance, but only at the cost of diminishing legal diversity in Europe, which is a high price that many will not be willing to pay. ‘Contract law pluralism’, if we may name it such, may not be able to account for all tensions among diverging conceptions of collective interests or manage to resolve them – the continuing debate on workers’ social rights that was instigated by *Viking* and *Laval* serves as an illustration. A pluralist theory of European contract law can, however, theoretically explain and possibly further guide the deliberation of questions of social justice (including consumer protection) on the interface of EU and national law.

#### 4. Conclusion

Storytellers often choose different manners to structure their accounts of an event or highlight the defining episodes in the story. In order to improve the understanding of diverging views on the restrictions that the common good places on individual rights in European contract law, therefore, it is helpful to try to understand the theoretical perspectives underpinning these different perspectives.

In the preceding sections, the debate on European contract law and the common good was approached from three such views: a sceptical, a monist, and a pluralist one. A moderate version of the latter, pluralist theory seems to offer the most convincing narrative for a contract law developing on the interface of EU and national law. It shares some common ground with both of the other views and creates space for consideration of the substantive outcomes of the application of rules of European contract law.

The main lines were set out of a pluralist theory that can provide a descriptive and normative framework for a meaningful deliberation of what the common good entails in individual cases under European contract law. In line

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64 For a similar analysis of the public law dimension of EU law, see M. KUMM, ‘How Does European Union Law Fit into the World of Public Law? Costa, Kadi and Three Conceptions of Public Law’, New York University School of Law, Public Law & Legal Theory Research Paper Series, Working Paper No. 11-16, pp. 27-28.



with scepticism, it acknowledges that different values may underlie different rights in contract law. In accordance with monism, however, it seeks coherence among the spheres in which values define contractual rights and the limits to their validity and enforcement. European contract law pluralism reconciles the two by placing the search for coherence not on the level of the contradictory values themselves but on a meta-level on which coordinating principles are defined. These principles comprise both public law, constitutional principles (concerning the coordination of different (sub)orders of contract law), and private law principles (concerning the limits to freedom of contract in light of substantive outcomes of disputes).

Further elaboration of this plan of the theoretical framework is called for. It includes the analysis of measures such as the proposed CESL, which seek to go through and beyond pluralism. Moreover, references to social rights in the case law of the CJEU deserve attention and might become more prominent in light of the increasing amount of references to the now binding EU Charter of Fundamental Rights. Discussing these developments in pluralist terms can serve the facilitation of an inclusive debate, in which sceptics and monists may also have a say.