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# Contract theory and EU contract law

Martijn W. Hesselink

## I. Introduction

This chapter explores the relationship between contract theory and European contract law. In particular, it addresses the question: what, if anything, EU contract law can learn from contract law theory and vice versa? Not much, one might conclude from examining a recent collection of essays on the philosophical foundations of contract law.<sup>1</sup> Of the 18 contributions to that volume, which was edited and published in Europe, only one article refers to EU contract law, and it was written by an American scholar.<sup>2</sup> Does this mean that, unlike national contract law, the contract law of the EU does not have any philosophical foundations? Or, conversely, do contract theorists have a blind spot for EU contract law? Or, is the implication that, from a philosophical perspective, the existing EU contract law should be rejected? Obviously, such very general conclusions cannot be drawn from the (generally excellent) contributions to one single book. However, this particular volume is not the only example in contract law theory that almost totally ignores EU contract law or in any case seems to fit rather uneasily with it. Especially, essentialist and other monist normative contract law do not match well with EU contract law. This contribution therefore more specifically addresses the mismatch between much of the existing contract theory, on the one hand, and EU contract law on the other. In particular, it asks the questions of what might explain the mismatch, and what are its main implications, both for contract theory and for EU contract law. The focus will be primarily on normative contract law theories, ie on theories of how contract law should be, and on EU contract law, ie the contract law rules emanating from the law making institutions of the European Union.

The chapter is organised as follows: It starts by giving a brief overview of different contemporary contract theories and the main distinctions among them (II). Subsequently, it outlines the most salient characteristics of EU contract law (III). Then, it proceeds by juxtaposing contract theory and EU contract law, discerns a remarkable mismatch between the two and discusses its implications (IV). Finally, it draws some conclusions (V).

## II. Contract theory

There exists a broad variety of contract theories. Indeed, contract theories can even be distinguished along a number of different lines. The most important distinctions will be set out briefly in this section.

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<sup>1</sup> G. Klass, G. Letsas, & P. Saprai, eds, *Philosophical foundations of contract law* (Oxford: Oxford University Press, 2014).

<sup>2</sup> M.J. Radin, 'An analytical framework for legal evaluation of boilerplate', in: *Philosophical foundations of contract law* (G. Klass, G. Letsas, & P. Saprai, eds) (Oxford: Oxford University Press, 2014), ch 12.

## A. Contract theories and contract law theories

Strictly speaking, we can even distinguish contract theory from contract law theory, the former explaining or justifying contract (why do we conclude contracts? why do or should we perform them?) and the latter the law of contract (what role does or should the legal enforcement of contracts have?). Some theories regard the enforcement of contractual rights as a separate question (concerning the rule of law). According to others, however, the legal enforceability of contractual claims (as opposed to merely moral, ethical or natural rights) is the core question that contract law theory should address.<sup>3</sup> However, usually 'contract theory' is used as a shorthand for contract law theory and understood as a branch of the wider field of private law theory, within which the question of enforceability may or not have a central place, depending on the specific theory at hand (roughly: natural law or not). In the following, I too will refer to contract theory in this usual sense.

## B. Positive and normative theories

A very important distinction among contract theories is the one between positive and normative theories.<sup>4</sup>

Positive theories of contract law address contract law as it is, and try to understand or explain its existence and operation, eg in terms of its societal role.<sup>5</sup> A prominent instance are economic theories of contract law. Others include sociological, anthropological and psychological (esp behavioural) theories of contract law in general, or of a specific contract law system or of one or more of its branches or doctrines. Positive theories of contract law usually apply insights and methods from other disciplines, notably the social sciences, to contract law. In doing so, they also import familiar distinctions and controversies from those fields, eg between neoclassical and behavioural economics,<sup>6</sup> or between interpretivist and positivist sociologists.<sup>7</sup>

However, most of the best known contract theories are partly or entirely normative. Normative contract law theories focus on contract law as it should be. Usually, these theories are ideal theories: they aim to demonstrate what contract law ideally should look like. They can therefore be used as external standards for evaluating positive contract law, ie the contract law existing in a given society. However, not all normative theories are ideal theories.<sup>8</sup> For example, it is possible to evaluate contract law as more or less just in terms of its effects on human capabilities without formulating an ideal contract law (in terms of capabilities).<sup>9</sup> Similarly, Humean practice-based theories, that

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<sup>3</sup> Eg S.V. Shiffrin, 'Paternalism, unconscionability doctrine, and accommodation', 29 *Philosophy & Public Affairs* (2000) 205-250.

<sup>4</sup> Such positive (usually empirical) theories of contract law should be distinguished from doctrinal contributions by academics (and others) to the study of positive contract law and the (related) theories of legal positivism.

<sup>5</sup> An overview and critical discussion of such theories (and more) can be found in S. Grundmann, H.-W. Micklitz and M. Renner, *Privatrechtstheorie* (Mohr Siebeck, 2015).

<sup>6</sup> See eg the exchange between O. Bar-Gill, 'The behavioral economics of consumer contracts' 92 *Minnesota Law Review* (2007), 749-802 and R.A. Epstein, 'The neoclassical economics of consumer contracts', 92 *Minnesota Law Review* (2007), 803-835.

<sup>7</sup> Cf B.Z. Tamanaha, *Realistic socio-legal theory: pragmatism and a social theory of law* (Clarendon Press, 1997), ch 3.

<sup>8</sup> Against ideal theory, see A. Sen, *The idea of justice* (Penguin, 2009).

<sup>9</sup> See L. Tjon Soei Len, *The effects of contracts beyond frontiers: a capabilities perspective on externalities and contract law in Europe* (Amsterdam, 2013).

explain and justify contract law in terms of its capacity to promote the beneficial social practice of making and keeping agreements and promises, are normative but not ideal theories.<sup>10</sup>

### C. Unionist and separatist theories

#### 1. Applied political theories

Most normative contract theories are a part, aspect or application of a more general moral or political theory. Thus we find eg utilitarian, liberal, libertarian, communitarian and discourse theories of contract law.

The best-known application of utilitarian principles to contract law are the theories of 'normative law & economics' law that regard the maximisation of overall welfare in society, usually defined as the efficient allocation of resources, as the purpose of contract law.<sup>11</sup>

Liberal theories may be liberal-perfectionist, ie based on the assumption that private autonomy or individual liberty is an indispensable precondition for human flourishing. These include, for example, Razian theories which regard the idea that a life is more valuable to the extent that it is self-authored as the founding principle of contract law.<sup>12</sup> However, a liberal theory of contract law may also be a politically liberal (Rawlsian) theory that makes no such assumptions concerning the good life and, instead, requires only that contract law be in conformity with political principles of social justice, such as the difference principle that requires a society's main institutions to work for the benefit of the least well-off.<sup>13</sup>

Libertarian theories, whether Nozickian, Hayekian, ordoliberal or Chicago School, generally advocate strong binding force and freedom of contract. Transfer theories, according to which the contractual consent of one party transfers a property-like entitlement to contractual performance to the other party, are perhaps the best known libertarian contract theories.<sup>14</sup>

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<sup>10</sup> See L.B. Murphy, 'The practice of promise and contract' in: *Philosophical foundations of contract law* (G. Klass, G. Letsas, & P. Saprai, eds) (Oxford University Press, 2014), ch 9.

<sup>11</sup> See eg B.E. Hermalin, A.W. Katz & R. Craswell, 'Contract Law', in: A.M. Polinsky & S.M. Shavell (eds.), *Handbook of law and economics* (North-Holland, 2007), Vol I, 3-138; S. Shavell, *Foundations of economic analysis of law* (Belknap Press, 2004), Part III; R. Cooter and T. Ulen, *Law & economics*, 6<sup>th</sup> ed (Addison-Wesley, 2012), ch 8.; A. W. Katz, 'Economic foundations of contract law', in: *Philosophical foundations of contract law* (G. Klass, G. Letsas, & P. Saprai, eds) (Oxford University Press, 2014), ch 10.

<sup>12</sup> For two different instances of Razian contract theories, see D. Kimel, *From promise to contract: towards a liberal theory of contract* (Hart Publishing, 2005), and H. Dagan, 'Autonomy, pluralism, and contract law theory', 76 *Law and contemporary problems* (2013), 19-38. Cf. J. Raz, *The morality of freedom* (Clarendon Press, 1986).

<sup>13</sup> For such a Rawlsian approach, see J. Klijnsma, 'Contract law as fairness', 28 *Ratio Juris* (2015) 68-88. There is a controversy as to whether contract law is one of the institutions that are part of the 'basic structure of society' to which alone the principles of justice apply according to political liberalism. See eg A.T. Kronman, 'Contract Law and Distributive Justice', 89 *Yale Law Journal* (1980) 472-511; K.A. Kordana and D.H. Tabachnick, 'Rawls and Contract Law', 73 *George Washington Law Review* (2005), 598-632. There is also the further question of whether the Rawlsian theory of justice is complete and should not be supplemented with non-distributive principles. See S. Scheffler, 'Distributive justice, the basic structure and the place of private law', *Oxford Journal of Legal Studies* (2015), 1-23, 22.

<sup>14</sup> See R.E. Barnett, 'A consent theory of contract', 86 *Columbia Law Review* (1986), 269-321. Cf. R. Nozick, *Anarchy, state and utopia* (Blackwell Publishing, 2006 [1974]), 150.

Communitarian or neo-romantic theories assert the normative force of tradition, culture, and community. Neo-pandectism, that emphasises our common Roman law heritage,<sup>15</sup> and legal-culturalist theories, which in contrast underline the value of difference between legal cultures, legal traditions and legal families (eg common law and civil law),<sup>16</sup> provide good contemporary examples.

Discourse theory has been applied to contract law too. Habermas emphasises the co-originality of private and public autonomy: our system of private rights, which include contractual rights, in order to be legitimate should be capable of being understood by all citizens as given to them by themselves, ie democratically.<sup>17</sup>

What these theories have in common is that they are part of what Rawls called 'comprehensive doctrines'. They explain and justify contractual obligation on the basis of more general moral or political principles or values.

## 2. Theories of private law's autonomy

In contrast, other theories regard contract law (and more generally, private law) as being based on one or more founding principles of its own and, therefore, as autonomous from other branches of the law.<sup>18</sup> Such theories tend to emphasise the private/public law divide.

The most prominent example of theories emphasising the autonomy of private law are corrective justice theories. According to these theories, private law is essentially about correcting wrongs by restoring the status quo ante, ie before the wrong was committed. In particular, on this view private law should not be instrumentalised for such political objectives as distributive justice or social welfare. Rather, they argue, it is the task of private law (and its only task) to restore the status quo. Such theories include 'Kantian' theories that understand corrective justice entirely formally,<sup>19</sup> and others that understand the Aristotelian virtue of corrective justice much more substantively, ie as including in particular a fair price requirement.<sup>20</sup>

## D. Monist and pluralist theories

Normative theories (ideal or non-ideal) can be both monist and pluralist theories.<sup>21</sup>

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<sup>15</sup> See eg R. Zimmermann, 'Roman Law and the Harmonization of Private Law in Europe': in A.S. Hartkamp et al (eds), *Towards a European Civil Code*, 4<sup>th</sup> ed, (Alphen a/d Rijn: Kluwer Law International, 2010), 27–53.

<sup>16</sup> See eg R. Sefton-Green, 'Cultural diversity and the idea of a European civil code', in M.W. Hesselink (ed), *The Politics of a European Civil Code* (Kluwer Law International, 2006), 71–88, who argues that French and English law have different underlying ideologies, and H.-W. Micklitz, 'Social Justice and Access Justice in Private Law', *EUI Working Papers*, LAW No. 2011/02, who distinguishes 'the English model, a liberal and pragmatic design fit for commercial use', 'the French model, a forward looking political design of a (just) society', and 'the German model, an authoritarian paternalistic-ideological though market orientated design', and more generally P. Legrand, *Le droit comparé*, 5<sup>th</sup> ed (PUF, 2015).

<sup>17</sup> J. Habermas, *Between facts and norms: Contributions to a discourse theory of law and democracy* (Polity Press, 1996), 409. See also B. Lomfeld, 'Contract as deliberation', 76 *Law and Contemporary Problems* (2013), 1–18.

<sup>18</sup> E.J. Weinrib, *The idea of private law* (Harvard University Press, 1995), ch 8 and passim.

<sup>19</sup> E.J. Weinrib, *Corrective justice* (Oxford University Press, 2012). Note that certain liberal perfectionist theories, politically liberal theories and discourse theories also claim to be Kantian.

<sup>20</sup> See eg J.R. Gordley, 'Contract law in the Aristotelian tradition', Peter Benson (ed.), *The theory of contract law: new essays* (Cambridge University Press, 2001), 265–334.

<sup>21</sup> Moral pluralism should be distinguished from legal pluralism, although with regard to both types of pluralism similar distinctions can be made, in particular between radical and non-radical pluralism.

According to monist theories, contract law should express, enshrine or promote one single or ultimate value, principle or virtue. Some of the most classical contract theories are monist moral theories. Most monist contract theories claim or assume that contract law is not contingent but rather has an essential nature, eg that contract law is essentially about promise keeping,<sup>22</sup> consent,<sup>23</sup> private autonomy,<sup>24</sup> solidarity and collaboration,<sup>25</sup> or corrective justice.<sup>26</sup> Such theories we may therefore call radically monist or essentialist theories.

Pluralist normative theories may be either radically or non-radically pluralist. Radical (or foundational) moral or value pluralism is based on the idea of incommensurability of different values and principles. When two claims are incommensurable their respective validity cannot be ranked, ie none of them can be said to be more valid than the other nor are they equally valid. For contract law this would mean that one single coherent normative account of contract law is not available.<sup>27</sup>

According to non-radically pluralist theories, in contrast, contract law is based on two or more values or principles among which however harmony can be found or established. Non-radically pluralist normative theories may be substantive or procedural. A good example of the former is Dworkin's moral theory, which can be applied to contract law as well and which holds that there exist single right answers to all questions of value.<sup>28</sup> An obvious example of a procedural non-radically pluralist theory is a democratic theory of contract law.<sup>29</sup> Theories may also be pluralist in a different respect, i.e. proposing different contract law regimes for different contract types each based on its own distinct set of values.<sup>30</sup>

There exists no correlation between private law separatism and private law monism. Not only can monist private law theories be based on more general political theories - think only of the theories that regard contract law as founded on the value of personal autonomy, thus expressing a certain broader ideal (usually Kantian or Millian) of the moral person -,<sup>31</sup> so too can separatist contract law theories be based on a plurality of private law values or principles (autonomous pluralism).<sup>32</sup>

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<sup>22</sup> C. Fried, *Contract as promise; a theory of contractual obligation* (Harvard University Press, 1981).

<sup>23</sup> Barnett, n 13 above.

<sup>24</sup> W. Flume, *Allgemeiner Teil des Bürgerlichen Rechts; Vol II Das Rechtsgeschäft*, 4<sup>th</sup> ed (Springer, 1992), 1.

<sup>25</sup> B. Lurger, *Vertragliche Solidarität, Entwicklungschancen für das allgemeine Vertragsrecht in Österreich und in der Europäischen Union* (Nomos, 1998), C. Jamin, 'Plaidoyer pour le solidarisme contractuel', in: G. Goubeaux et al (eds), *Études offertes à Jacques Ghestin; Le contrat au début du XXI<sup>e</sup> siècle* (LGDJ, 2001); Daniel Markovits, *Contract and Collaboration*, 113 *Yale Law Journal* (2004), 1417-1518, 1421.

<sup>26</sup> Weinrib, n 17 and 19 above, Gordley n 19 above.

<sup>27</sup> The same applies for radical or foundational legal pluralism, according to which more than one competing legal claim (eg contract claims) may be incompatible but nevertheless valid, each on its own terms. Cf N. MacCormick, *Questioning Sovereignty: law, state and practical reason* (Oxford University Press, 1999), 119: 'the same human beings or corporations are said to have and not have a certain right'. For a radically pluralist account of the EU and international law, see See N. Krisch, *Beyond constitutionalism: the pluralist structure of postnational law* (Oxford University Press, 2010); N Krisch, 'Who is afraid of radical pluralism? Legal order and political stability in the postnational space' (2011) 24 *Ratio Juris* 386.

<sup>28</sup> R. Dworkin, *Justice for hedgehogs* (Belknap Press, 2011).

<sup>29</sup> M.W. Hesselink, 'Democratic contract law', 11 *European Review of Contract Law* (2015), 81-126.

<sup>30</sup> H. Dagan and M.A. Heller, 'Freedom of Contracts', *Columbia Law and Economics Working Paper No. 458*, available at <http://ssrn.com/abstract=2325254>.

<sup>31</sup> I. Kant, *The metaphysics of moral* (M. Gregor, ed) [1797], 30 [6:238] (Cambridge University Press, 1996); J.S. Mill, *On liberty* [1859] (Penguin Books, 1974).

<sup>32</sup> See eg Nieuwenhuis's three principles of contract law, autonomy, reliance and exchange (causa), that should be balanced. See J.H. Nieuwenhuis, *Drie beginselen van contractenrecht* (Kluwer, 1979).



## E. Hybrid and ambiguous theories

Not all theories fit neatly into the positive/normative distinction. Theories may explicitly turn their empirical claim into the foundation for a normative claim (eg claiming that the common law of contract is in fact efficient as indeed it should be)<sup>33</sup> or be more ambiguous or hybrids. Culturalist theories, for example, which regard contract law as being deeply imbedded in a national or wider (or narrower) legal culture or tradition, on the one hand make controversial descriptive and comparative claims, but on the other may be normative too (ie holding that contract law should be culturally and historically rooted rather than eg decided upon democratically), in a neo-romantic or communitarian fashion, and even essentialist (ie regarding contract law as an essentially cultural phenomenon).<sup>34</sup>

Functional theories assume that contract law performs a comparable function across different times and places. Although these theories are not normative strictly speaking, because they do not claim that contract law *should* perform a given function, in practice they may come very close in that they at least normalise the function that they put on the foreground, thus marginalising other possible functions or non-functional characteristics.<sup>35</sup> Moreover, functional theories naturally lead to the comparison of contract law systems existing in different countries,<sup>36</sup> and to conclusions concerning how well they are performing the particular function (eg its welfare maximising function), which at least suggests that it is good for them to perform the function well.

System theories of law, in principle, are descriptive sociological theories.<sup>37</sup> However, especially with regard to the globalisation of law, they frequently also make normative or at least normalising claims with regard to the role of the state that are hardly distinguishable from familiar libertarian laissez-faire discourses.<sup>38</sup>

Reconstructive theories do not start from an ideal but try to make the best possible sense of the contract law we have.<sup>39</sup> For example, it is possible to reconstruct a given system of contract law (one's own system) in terms of a certain paradigm, eg liberal, welfare state or procedural.<sup>40</sup> Although not ideal theories, such reconstructive theories still have an idealising element, albeit not as an external standard.<sup>41</sup>

Interpretative contract theories try to answer questions of contract law, from the internal perspective (this is the main difference with reconstructive theories), by

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<sup>33</sup> For the empirical claim, contrast R. La Porta, F. Lopez-de-Silanes and A. Shleifer, 'The economic consequences of legal origins', *Journal of Economic Literature* 46 (2008), 285–332 with N. Garoupa and C. Gómez Ligüerre, 'The syndrome of the efficiency of the common law', *29 Boston University International Law Journal* (2011) 287-335.

<sup>34</sup> See section C 1 above.

<sup>35</sup> See G. Frankenberg, 'Critical comparisons: re-thinking comparative law', *26 Harvard International Law Journal* (1985), 411-455.

<sup>36</sup> See K. Zweigert and H. Kötz, *Introduction to Comparative Law*, 3<sup>rd</sup> ed (Oxford University Press, 1998), 34.

<sup>37</sup> See eg N Luhmann, *Das Recht der Gesellschaft* (Frankfurt, Suhrkamp, 1993); N Luhmann, 'Law as a social system', *83 Northwestern University Law Review* (1989) 136-150.

<sup>38</sup> See eg G. Teubner, "'Global Bukowina": legal pluralism in the world society', in: G. Teubner (ed), *Global law without a state* (Dartmouth, 1997) 3; G.-P. Callies and P Zumbansen, *Rough consensus and running code: a theory of transnational private law* (Hart Publishing, 2010).

<sup>39</sup> D.G. Baird, *Reconstructing contracts* (Harvard University Press, 2013).

<sup>40</sup> See Habermas, n 16 above. See also C. Schmid, *Die Instrumentalisierung des Privatrechts durch die Europäische Union* (Baden-Baden: Nomos, 2010), ch 2.

<sup>41</sup> Habermas, n 16 above, ch 9.

determining the best fit between the legal materials and principles of public morality prevailing in a given society.<sup>42</sup>

Critical contract law theories are often motivated by a (radical) agenda for reform but are usually not strictly speaking normative in that they do not propose a standard for evaluation or improvement of the law or for a morally or otherwise more attractive reading of the legal materials. Critique (or: scepticism) may be external or internal and local or global. External critique points to the fact that what we refer to as 'contract law' is in fact the result or a construct (superstructure) of a power struggle or of what the judge had for breakfast. Internal critique points to immanent contradictions, gaps ambiguities in the dominant interpretative narrative. Global critique (or radical scepticism) claims that the whole project of (in our case) a system of contract law is doomed because it is incoherent while local critique points to specific instances. Again, these distinctions should not be reified. For example, the claim that even the most technical rules of contract law, which itself is usually regarded as one of the most technical and apolitical branches of the law, is in fact political, although it represents merely local internal critique, has a radically subversive potential because it undermines the entire law/politics divide.<sup>43</sup>

Constitutionalism is the theory according to which contract law can be justified and evaluated in terms of 'constitutional values', ie the values expressed in constitutional rights and principles. We may refer to totalitarian constitutionalism as the view according to which contract law is based exclusively on constitutional values.<sup>44</sup> Constitutionalism is an eminently (non-foundational) pluralist theory as it claims that a variety of values are enshrined in the constitution, which must be balanced against each other.<sup>45</sup> However, although based on values (ie constitutional values), upon further examination perhaps this view is better seen as a positive view rather than a normative one, since the underlying values of contract law, although external to contract law, are not extra-legal (ie not external to the law) since they derive from the constitution. Indeed, constitutionalism usually makes claims concerning the effect of constitutional provisions (or principles) on relationships governed by (in this case) contract law, which may be direct or indirect, but in either case the asserted effect is legal.

Finally, of course, not all normative views and arguments on contract law are theory-based. We may refer to intuitionism as the practice of expressing normative arguments and views on contract law without any underlying general or specific theory.<sup>46</sup>

These various theories partly embody or claim different types of knowledge or understanding (for example, in the case of a normative versus a positive theory). In part, however, they may also be competing with one another (eg two different normative theories) or challenging each other (eg a sceptical theory and a normative theory or a monist and pluralist theory). In other words, there is also an epistemological dimension to contract theory and its taxonomy.

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<sup>42</sup> S.A. Smith, *Contract theory* (OUP, 2004), who explicitly associates his approach (see p 5) with R. Dworkin, *Law's empire* (Harvard University Press, 1986).

<sup>43</sup> See D. Kennedy, 'The political stakes in "merely technical" issues of contract law', 10 *European Review of Private Law* (2002), 7-28.

<sup>44</sup> Cf M. Kumm, 'Who is afraid of the total constitution? constitutional rights and principles and the constitutionalization of private law', 7 *German Law Journal* (2006), 341-369.

<sup>45</sup> See R. Alexy, *A theory of constitutional rights* (OUP, 2002).

<sup>46</sup> Cf. J. Rawls, *A theory of justice* [1971] (Belknap Press 1999), 30.



In the following, I will concentrate chiefly on normative contract theory, ie on theories that address the question of how contract law should be and that thus offer a standard for evaluation and for improving the existing law of contract. This includes purely normative theories of all kinds (monist and pluralist, unionist and separatist) and the normative aspects of mixed and hybrid theories.

### III. EU contract law

The contract law of the EU can be understood in at least two different ways. A first, broad definition (equivalent to the expression 'US contract law') includes all the contract law rules, of whatever origin, that are applicable *in* the EU, comprising not only the contract law emanating from EU law making institutions, but also from the Member States (and their regions), and international conventions to which EU Member States are parties (eg the CISG). In a narrower and much more recurrent definition, that will be adopted here, EU contract law is understood as limited to the contract law *of* the EU, ie the contract law contained in (written and unwritten) primary and secondary EU law. This then includes all the contract law rules present in directives, regulations, the Treaties, and in general principles recognised by the CJEU. EU contract law in this narrow sense has a number of distinct characteristics.

#### A. Fragmented

##### 1. Sector-specific

In the first place, European contract law is fragmented. It does not contain any general rules that are applicable, in principle, to all types of contracts (sales, services, lease, mandate etc) and all types of contracting parties (consumers, businesses), and that address the main issues that may arise in the life cycle of a contract: formation, invalidity, interpretation, performance, non-performance and remedies. Instead, EU contract law is 'sector-specific',<sup>47</sup> addressing specific problems in specific sectors of the internal market, such as commercial agency, timeshare, package travel, late payment in commercial transactions, and consumer credit.

##### 2. No European civil code or common frame of reference

There have been sustained attempts at formulating and adopting a set of more general contract law rules, but these have failed resoundingly. The failure of the European Civil Code project and the fact that the scope for the set of general contract law rules that had been formulated by academics (in PECL and DCFR), was narrowed down by the European Commission to sales (CESL), and is expected to be limited even further to contract rules for e-commerce in the Digital Single Market,<sup>48</sup> further underscores the fact that fragmentation is a typical characteristic of EU contract law.

##### 3. Silos

As a matter of fact, there is more to EU contract law rules than merely their being fragmented in accordance with economic sectors. Very often these contract law rules represent merely one element of the more comprehensive regulation of these specific

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<sup>47</sup> For the expression, see the Commission communication 'A more coherent European contract law: an action plan', Brussels, 12.2.2003, COM(2003) 68 final.

<sup>48</sup> See the Commission communication 'A Digital Single Market Strategy for Europe', Brussels, 6.5.2015 COM(2015) 192 final, 5.

sectors, the other constituting parts consisting of public law rules and self-regulation, on the national, European and sometimes even global levels. Indeed, such sector-specific regulation, of which the 'regulatory private law' rules are but one element, have been referred to as 'silos', each with their own set of rules and standards (being a mix of private law, public law, and private regulation), transnational community of experts, and dispute resolution mechanisms.<sup>49</sup> Each of these silos has a higher degree of normative coherence, at least in the eyes of the relevant professional community, and looks less fragmented, than 'European contract law' of which only a small section of each silo is also a part.

## **B. Instrumental**

### **1. Internal market**

As a second main characteristic, the vast majority of European contract law rules and doctrines are instrumental to the objective of improving the functioning of the internal market. This holds true not only for all the consumer contract law directives, but also, for example, for the late payment directive and the commercial agency directive that both belong exclusively to commercial contract law. These directives are all based, sometimes partially but usually exclusively, on Art 114 TFEU or one of its predecessors. The air passengers regulation, which gives passengers a right to compensation in case of cancellation of their flight or delay, is not based on the internal market provision, but is nevertheless instrumental, ie to the common transport policy.<sup>50</sup>

Perhaps the main exception is Art 101(2) TFEU, which declares a certain type of agreements, namely chiefly cartels, void. That provision, depending on its interpretation, is part of the economic constitution of the EU, which arguably (and not only in the ordoliberal view) is non-instrumental.<sup>51</sup>

### **2. Justice for growth**

Although the improvement of the functioning of the EU's internal market is already quite a narrow objective for contract law rules, in recent years this has been narrowed down even further by the European legislator which has come to identify a functioning market chiefly with a growing market. Therefore, the consumer rights directive,<sup>52</sup> the original proposal for a common European sales law,<sup>53</sup> and in all likelihood the forthcoming revised version of the latter, with contract law rules for the digital single market,<sup>54</sup>

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<sup>49</sup> H-W. Micklitz and Y. Svetiev, 'The transformation(s) of private law', in: *European regulatory private law – The paradigms tested* (H-W. Micklitz, Y. Svetiev & G. Comparato, eds), EUI Working papers, LAW 2014/04, 69-97, 78.

<sup>50</sup> Art 80(2) EC, now Art 100(2) TFEU.

<sup>51</sup> For a non-ordoliberal reading of the economic constitution, see H. Collins, 'The European economic constitution and the constitutional dimension of private law', 5 *European Review of Contract Law* (2009) 71-94.

<sup>52</sup> See Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, recital 5.

<sup>53</sup> Proposal for a regulation of the European Parliament and of the Council on a Common European Sales Law, Brussels, 11.10.2011 COM(2011) 635 final.

<sup>54</sup> See the Commission's communication on the DSM, n 45 above.

explicitly aim at economic growth.<sup>55</sup> This narrow instrumentalism is well illustrated by the European commission's slogan: justice for growth'.<sup>56</sup>

## C. No direct effect

### 1. Transposition

It is noteworthy that if we regard contract law as a core part of private law and understand the latter as the law that applies horizontally, between private parties, defining their rights and obligations (as opposed to public law that applies vertically, ie between a private party and the state, or between state entities), then most of what is familiarly regarded today as EU contract law is not in fact private law. The reason is that the bulk of EU contract law consists of directives. And directives address the Member States, not private parties. They are not (directly) applicable in civil disputes, between private parties (ie businesses and consumers). Strictly speaking, therefore, they belong to European public law. On this view, there remains very little EU private law.<sup>57</sup> So, depending on the definition that is adopted there exists more or less EU contract law, or indeed almost none at all. This is an important point because, as we will see, the question of how well contract theories fit EU contract law depends to a large extent on how we define contract law. Still, also under a looser definition, the fact that most of EU contract law consists of directives remains one of its most striking and practically significant characteristics.

### 2. No subjective rights

Another aspect of the fact that the bulk of EU contract law is not directly applicable to civil disputes and does not have any direct effects on contractual relationships, is that contracting parties do not derive any subjective rights from EU contract law. The rights and obligations of contracting parties are determined by national law (except in the rare occasions where EU law has direct horizontal effects upon a contractual relationship), albeit that the Member States are under an obligation to transpose the directives, which may require them to introduce certain rights and obligations for certain contracting parties in certain situations, where they do not yet exist. Even the consumer rights directive 2011, in spite of its name, does not lay down any subjective rights for consumers. At least not in the usual sense that by virtue of a right someone is entitled to something against someone else. It grants 'rights of withdrawal', but these are best understood as the faculty for one party in certain contexts unilaterally to effectuate to extinction of the contractual rights and obligations of both parties to a consumer contract. Art 3, consumer sales directive 1993, entitled 'rights of the consumer', formulates a number of 'remedies' in case of breach of contract (which include the secondary right to damages). The Court of Justice has referred to these as 'the rights conferred on consumers by Article 3 of the Directive',<sup>58</sup> but in reality if these rights are

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<sup>55</sup> See the 'Inception impact assessment' concerning a 'proposal on contract rules for online purchase of digital content and tangible goods' published by the European Commission in July 2015, p 3.

<sup>56</sup> See the Commission's communication 'The EU justice agenda for 2020: strengthening trust, mobility and growth within the Union' (Strasbourg, 11.3.2014 COM(2014) 144 final, esp 2, 7.

<sup>57</sup> The most prominent example of EU contract law under this definition would be Art 101 TFEU, which declares certain contracts (ie cartel agreements) as void, and the air passenger regulation, which obliges airlines to compensate their passengers for delays and cancellations, that we both saw above.

<sup>58</sup> Joined cases C-65/09 and C-87/09 *Gebr. Weber GmbH v Jürgen Wittmer and Ingrid Putz v Medianess Electronics GmbH* [2011] ECR I-05257, 60.

indeed 'conferred on consumers',<sup>59</sup> this is done by the national laws of the Member States as required by the directive. For, otherwise the directive would in fact have direct effects.

### 3. Indirect effects

Directives may have indirect effects of contractual relationships.<sup>60</sup> If a directive has not been duly transposed into national law then national courts are under a duty to interpret national law in conformity with the directive. The harmonious interpretation of national contract law, eg in conformity with a consumer protection directive, may modify the rights and obligations of contracting parties. And in practical terms, such indirect effects may well be just as strong as direct effects would be.

### 4. Multi-layered system

EU contract law and national contract law are deeply intertwined; it is impossible to distinguish an EU system of contract law, separate from the national contract law systems of the Member States, that can be interpreted and applied in isolation.<sup>61</sup> This is true not only because EU law is part of the national legal orders of the Member States, but also because EU contract law does not constitute a self-standing system: it presupposes the existence of national contract law (even the silos do). The rights and obligations of contracting parties cannot be determined with certainty referring exclusively to either national or EU contract law. This state of affairs is usually referred to as the multi-layered character of EU private law.

## D. Consumer protection

### 1. From contract to status

The bulk of EU contract law is consumer law and consequentially the bulk of the CJEU's contract law cases are consumer cases. This is another way in which EU contract law is not generally applicable: not only the substantive scope but also the personal scope of most EU contract law rules is limited, in this case to either business-to-consumer (B2C, or consumer contracts) or business-to-business (B2B, or commercial contracts). Hardly ever do they include both, although there seems to be a recent trend from consumer protection towards customer protection (eg with regard to transport (passengers) and financial services). Contracts in which neither of the parties is a professional (C2C, or 'civil' contracts), that are the normal case on which general contract law is based, have remained virtually unaffected in spite of their increasing relevance to the 'peer-to-peer' (P2P) sharing economy. This means that EU contract law almost never addresses contracting parties simply as persons, as private law normally does, but always as members of a certain category, in particular consumers and professionals.

### 2. A high level of consumer protection

Consumer contract law is predominantly consumer protection law. And given that most of EU contract law is consumer law, this means that most of EU contract law has a

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<sup>59</sup> This is contested not only by corrective justice theories but also by other justice theories that regard at least certain private rights (or the core of these) as pre-positive entitlements of persons, not merely in their capacity of consumers.

<sup>60</sup> See eg A. Hartkamp, *European law and national private law* (Kluwer, 2012), ch 4.

<sup>61</sup> M.W. Hesselink, 'How many systems of private law are there in Europe? On plural legal sources, multiple identities and the unity of law', in: L. Niglia (ed.), *Pluralism and European private law* (Hart Publishing, 2013), 199-247. Contrast J. Dickson, 'Directives in EU legal systems: whose norms are they anyway?', 17 *European Law Journal* (2011), 190-212.

protective aim. In other words, consumer protection is also another way in which EU contract law is instrumental. The attainment of a high level of consumer protection is a distinct EU objective,<sup>62</sup> which could clash, in principle, with other EU objectives including the objective to complete the internal market, especially when the latter is interpreted narrowly as stimulating economic growth, and given the fact that consumer protection has a price. However, the EU legislator in recent years has set out to resolve this tension by making consumer protection itself become instrumental to economic growth, through the concept of the confident cross-border shopper. Whether the CJEU will accept this instrumental reading of consumer protection remains to be seen.<sup>63</sup>

In any case, the 'constitutional' notion of a high level of consumer protection remains an elusive concept: high in comparison to what? Is it a maximising objective? Probably not, because then it would inevitably overshadow the EU's many other objectives. But if not, how should it be balanced against other concerns, values, principles and perhaps even rights?

### **E. Fundamental rights**

It is widely expected that the Charter of fundamental rights of the EU will serve as a deontological counter-balance against the EU's instrumentalism, also within the field of private law. What exactly the impact of EU fundamental rights on EU contract law will be is still very much an open question. It is possible that EU fundamental rights will occasionally have a direct horizontal effect on a contractual relationship governed by EU law. However, as the first cases already seem to suggest, their most important role will probably be in the context of the interpretation of directives. Thus, the EU fundamental rights probably will increasingly 'colour' EU contract law. However, given the diversity of rights contained in the Charter, ranging from the freedom to conduct a business to a high level of consumer protection,<sup>64</sup> it is difficult to foresee which colour(s) will become dominant.

### **F. Information duties and withdrawal rights**

Finally, in addition to formal and external features, EU contract law also has some specific substantive characteristics at the level of doctrine. In particular, two stand out, ie information duties and rights of withdrawal.

Pre-contractual information duties have been a key element in EU consumer (and sometimes more extensive: customer) protection since roughly a decade. Professional sellers and service providers are required to provide their customers spontaneously with extensive and detailed sets of information, sometimes through a standardised form, prior to the conclusion of certain types of contracts (such as consumer credit) or in certain contracting situations (contracting at a distance, notably online, or off-premise). In most Member States, for this subject legal harmonisation meant in fact the introduction of duties where none existed before, at least not at this level of detail.

A second characteristic EU contract law doctrine are the withdrawal rights. These rights strongly reduce the binding force of contract for one party in a business-to-consumer

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<sup>62</sup> See Art. 169 TFEU. See also Art 12 TFEU.

<sup>63</sup> The Court tends to adopt a non-instrumental, fairness-oriented reading of consumer protection as aiming at weaker party protection. See Case C-168/05 *Mostaza Claro* [2006] ECR I-10421, 35 ff, repeated in a string of cases.

<sup>64</sup> See Arts. 16 and 38 CFREU respectively.

contracts, and consequentially the practical relevance of doctrines like invalidity for defects of consent (mistake, fraud) and termination for breach of contract (non-conformity, duties to inspect, right to cure, remedies) since it suffices for a consumer who realises that she does not like what she bought on line or finds it too expensive after all, to just send the goods back to the seller within two weeks, without having to give any explanation. With the growth of the online market, this rule - revolutionary from the perspective of contract doctrine and theory - will soon apply to a very large part (perhaps even the majority) of contracts concluded in Europe.

## IV. Contract theory and EU contract law

It is impossible to provide here anything like a near complete matrix of the main contract theories (even if limited to normative theories), on the one hand, and the main characteristics of EU contract law, on the other. So, we will have to proceed differently. In the following, I will present what I regard as a striking mismatch between EU contract law and the leading contract theories and discuss the possible explanations and implications of this disconnect.

### A. Mismatch

There exists a remarkable mismatch between certain contract law theories and the reality of EU contract law. This is particularly true for some of the leading normative theories of contract law, especially the monist ones. On the basis of theories like contract as promise, contract as consent, contract as corrective justice, contract as practice, one would not expect an EU contract with the characteristic features we just saw. And vice versa: when observing the contract law of the EU one would expect theories of contract law for its justification that are markedly different from the main ones that dominate the contract theory debate. Perhaps the lack of fit is already immediately obvious, but let me briefly highlight a few of the most salient discrepancies.

Corrective justice theories are not compatible with any of the main characteristics of EU contract law that we just saw, ie the absence of general rules and subjective rights, its instrumental nature, consumer protection, the horizontal effects of fundamental rights and freedoms, and the typical and very present doctrines of information duties and withdrawal rights. Each of these characteristics is in stark contrast with the idea of a private law that aims at correcting wrongs through general rules establishing subjective rights and obligations.

Much the same goes for libertarian theories, such as contract as promise and formal transfer theories. Libertarian contract law requires strong protection of contractual rights and has no place for rights of withdrawal, disclosure duties, consumer protection. Although libertarians would not necessary have difficulty with the constitutionalisation of private law (indeed this has been the positive project of the ordo-liberals), they would accept only a very limited understanding of fundamental rights, limited strictly to the classical liberties.

Many of the key characteristics of EU contract law seem to be compatible at first sights with certain utilitarian theories, especially those that define social welfare narrowly as economic growth. Especially the EU's market instrumentalism would seem to fit it particularly well. However, being consequentialist theories economic theories will judge EU contract law exclusively on the basis of empirical data (or hypotheses) concerning its



net overall welfare consequences. On exactly this ground EU contract law has been criticised severely as being inefficient, both in terms of regulatory technique and compared to the alternative of regulatory competition among the contract laws of the Member States.<sup>65</sup>

Communitarian theories generally reject contract law design, on a clean slate, since they regard private law as something that develops organically and is intertwined with (and expressive of) the broader culture of a given community. This is not per se incompatible with instrumentalism as long as the law will remain instrumental to the common good as defined by tradition. However, the idea that directives should upset the well-established and sophisticated conceptual structures of the *ius commune* and common law traditions, by introducing alien and blunt instruments such as rights of withdrawal, for the purpose of removing obstacles to the proper functioning of the internal market, just seems revolting from a neo-pandectist or any other legal-culturalist perspective.<sup>66</sup>

## B. Meaning

Of course, it is entirely natural that different contract theories explain, emphasise, normalise, endorse or critique only certain aspects and characteristics of contract law and have less time for other features. Theories, especially the monist ones, always present but one view of the cathedral.<sup>67</sup> However, here something more radical, more categorical seems to be the case. Several of the most prominent and familiar contract theories do not even seem to offer any view at all of the EU contract law cathedral. EU contract law seems to out of their sight, off their horizon.

What should we make of this mismatch? If contract theories cannot explain and justify the main characteristics of EU contract law, this can mean at least three different things. First, there may be something wrong with EU contract law. Alternatively, there is nothing wrong with EU contract law; it is just something entirely different from ordinary contract law. A third possibility is that there is something wrong with the leading contract law theories. Of course, a combination of these three types of explanations is possible too.

### 1. EU contract law must be rejected

Perhaps the EU contract law *acquis* is fundamentally flawed and should be amended or abolished. Given that EU contract law consists almost entirely of (secondary) legislation and that the Treaties only permit - and do not require - legislative action, this would mean that the European legislator (Commission, Council and Parliament jointly) has had it wrong all along, in a string of directives and regulations for over two decades.

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<sup>65</sup> See eg O. Bar-Gill and O. Ben-Shahar, 'Regulatory techniques in consumer protection: a critique of European consumer contract law', 50 *Common Market Law Review* (2013), 109-125 and eg R. Van den Bergh, 'Forced harmonization of contract law in Europe: not to be continued', in: S. Grundmann and J. Stuyck (eds.), *An academic green paper on European contract law* (The Hague: Kluwer Law International, 2002), 249-268.

<sup>66</sup> See eg R. Zimmermann, 'The present state of European private law' 57 *American Journal of Comparative Law* (2009), 479-512, G. Cornu, 'Un code civil n'est pas un instrument communautaire', *Dalloz* (2002) 351-352; P. Legrand, 'A Diabolical Idea', in: A.S. Hartkamp et al (eds), *Towards a European Civil Code* (The Hague, London, New York: Kluwer Law International, 2004), 245-272.

<sup>67</sup> E. Zamir, 'Contract law and theory: three views of the cathedral', 81 *University of Chicago Law Review* (2014) 2077-2123. Cf. G. Calabresi & A.D. Melamed, 'Property rules, liability rules, and inalienability: one view of the cathedral' 85 *Harvard Law Review* (1972), 1089-1128.



From this perspective, some of the leading normative contract theories in fact represent agendas for radical reform (or restoration). This would be true for all non- or anti-instrumentalist theories which include in particular the libertarian contract theories, such as contract as promise and contract as consent. It might also include liberal perfectionist theories according to which contract law is instrumental exclusively to promoting the good of human flourish through private autonomy.

As said, some discrepancy with positive law is of course not surprising for any normative theory. One of the most important practical implications of normative theories, ie theories of how - in this case - contract law should be, is that they provide an articulate external standard for critical and principled evaluation of the existing law. Still, in this case the reform would be very radical. Indeed, some theories would require a contract law for which there probably would not even exist a legal basis in the treaties. Absent treaty reform this would mean that contract law should best be national. Thus, under the current constitutional framework these theories would effectively constitute an argument against EU contract law, and for its renationalisation.

There is also an epistemological dimension to this matter, which we may refer to, with Habermas (with reference to Hegel), as the 'impotence of the ought'.<sup>68</sup> If a normative theory criticises next to all the main traits of its object then it may become so detached from that object that we may ask ourselves what exactly it is a theory of. So, if the EU contract law rules and doctrines do in fact constitute genuine contract law (on this question, see below) and they are a permanent and still growing element (by some estimations already its largest part) of the contract law laws in the legal orders of all EU Member States then is a theory that cannot account for any of its main traits properly be called a theory of contract law? Can it still claim to represent (theoretical) knowledge concerning our contemporary contract law?

## 2. EU contract law is not contract law

Or, perhaps EU contract is fine as it is, broadly speaking, but it is just something entirely different from ordinary contract law and, therefore, contract theories simply do not apply to it. On this view, what I have referred to as EU contract law requires in fact a separate, complementary theory.<sup>69</sup>

There exists a parallel here with the way in which law and regulation are sometimes contrasted and considered to be different entities. However, that juxtaposition itself is in fact misleading because ordinary general contract law also 'regulates' contracts, just as much as eg financial law does.<sup>70</sup> Moreover, many of the EU contract law directives deal with core subjects of contract law, such as non-conformity and remedies in consumer sales or late payment and interest in commercial contracts. Not surprisingly, therefore, these directives have been transposed into national law by several Member States simply into their civil codes. Also otherwise 'autochthonous' national contract law and the contract law of EU origin are so much intertwined (think only of the CJEU's 'general

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<sup>68</sup> Habermas, n 16 above, 78.

<sup>69</sup> See eg R. Michaels, 'Of islands and the ocean: the two rationalities of European private law', *The foundations of European private law* (R. Brownsword, H.-W. Micklitz, L. Niglia, S. Weatherill, eds) (Hart Publishing, 2011).

<sup>70</sup> See H. Collins, *Regulating contracts* (Oxford University Press, 1999).

principles of civil law')<sup>71</sup> that this idea of perfect duality and complementarity seems untenable.

Another parallel exists, ie with the claim that global private law is entirely different from domestic private law and requires totally different answers and theories.<sup>72</sup> However, also in a globalised world and with regard to contracts between parties from entirely different jurisdictions familiar questions will arise concerning what amounts to a breach of contract, what would be appropriate remedies et cetera. Both with an EU and a global contract law the enforceability of contracts, ultimately with state force, will still have to be assured somewhere. Indeed, the opposite claim has also been made, ie that there is nothing new under the sun and that general principles of contract law have a quasi universal, natural-law-like nature.<sup>73</sup> Moreover, quite often the seemingly descriptive or analytical difference thesis is actually normative: then 'lex mercatoria', 'rough consensus' and the idea that 'the Westphalian model is obsolete', are merely new labels for a familiar libertarian (or neoliberal) laissez-faire and anti-statist agenda.

### 3. Contract theories are deficient

A third possibility is that there is something wrong with the leading contract law theories. A theory that does not account for what by all accounts seems to be an important part of the reality of contemporary contract law seems to be incomplete, to say the least, and perhaps even wrongly focused or out-dated. Rather than keeping contract law theories 'pure' and elegant we may have to accept that they will inevitably have to become more 'messy' in the light of Europeanisation. Paraphrasing Curtin, perhaps the EU should be in search of a new contract theory.<sup>74</sup>

Micklitz has argued as much. In his view, Europeanisation calls for a new theory of private law justice, not a separate theory to explain merely EU private law, but a more general theory of contemporary private law. That new understanding of private law justice Micklitz calls 'access justice'.<sup>75</sup> By access justice, Micklitz means social justice through access to the 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.

The theory was originally presented by Micklitz as descriptive of the new EU model of justice.<sup>76</sup> It should therefore not come as a surprise that the theory fits very well with the main characteristics of European contract law presented above. Access justice is

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<sup>71</sup> Cf. M.W. Hesselink, 'The general principles of civil law: their nature, roles and legitimacy', in: D. Leczykiewicz & S. Weatherill (eds), *The involvement of EU law in private law relationships* (Hart Publishing, 2013), 131-180, with further references.

<sup>72</sup> See eg Teubner, n 35 above, Callies and Zumbansen, n 35 above. More nuanced R. Michaels and Nils Jansen, 'Private law beyond the state? Europeanisation, globalisation, privatisation', 54 *American Journal of Comparative Law* (2006) 843-890.

<sup>73</sup> MJ Bonell, 'The CISG, European contract law and the development of a world contract law', 56 *American Journal of Comparative Law* (2008) 1-28. See also H. Collins, 'Cosmopolitanism and Transnational Private Law', 8 *European Review of Contract Law* (2012), 311-325, who however argues for a more demanding cosmopolitan conception of private law justice.

<sup>74</sup> Cf. Deirdre Curtin, *Postnational democracy: the European Union in search of a political philosophy* (The Hague, London, Boston: Kluwer Law International, 1997).

<sup>75</sup> H.-W. Micklitz, 'Social Justice and Access Justice in Private Law', *EUI Working Papers*, LAW No. 2011/02.

<sup>76</sup> Ibidem. In H.-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, the argument becomes more normative.

targeted. Therefore, fragmentation of contract law is to be expected.<sup>77</sup> Having market access as its core objective market instrumentalism is its natural corollary. Similarly, from the perspective of access justice, which is a consequentialist approach to justice with market access as the state of affairs (measurable in principle) that private law should strive for,<sup>78</sup> the absence of general rules and subjective rights (which are of central importance in any deontological theory) are of no direct concern. And finally consumer protection, with its own doctrines of pre-contractual disclosure duties and withdrawal rights, are emblematic of access justice, which aims at making market access become less risky for the more vulnerable market actors.

Access justice could also be regarded as an implementation through private law of opportunity-egalitarian principles, notably the Rawlsian difference principle.<sup>79</sup> However, caution is required here because access justice inspired policies, also in contract law, may in practice turn out to be regressively redistributive.<sup>80</sup> This is the case eg when in practice the least well-off in society fail to use their access rights while, through higher prices, they end up cross-subsidising the use that the more sophisticated and better-off consumers do make of these general rights. Moreover, it is doubtful whether even from an opportunity-egalitarian perspective mere market access suffices. A society that gives equal access to a jungle is not necessarily a sufficiently just society.<sup>81</sup> What is needed too is a fair treatment of market agents (and not necessarily only or even primarily consumers - think of certain sole traders) once they have acceded the market. And this is where contract law has a role to play with its familiar doctrines of defects on consent, good faith and fair dealing, remedies for breach et cetera.<sup>82</sup> So, perhaps access justice is only a partial theory of private law justice, just like for example the capabilities theory of contract law is an avowedly partial theory,<sup>83</sup> to be supplemented by principles for determining contractual rights and obligations.

This brings us to the possibility that a contemporary contract theory that properly takes account of the fact that contract law today is developed on various levels of law making (national, European and global)<sup>84</sup> inevitably will have to be a composite or pluralist theory. An additional normative argument against monist (and especially essentialist) theories is that they rely on ultimate values or virtues (private autonomy, promise keeping, corrective justice) that in a society characterised by a plurality of worldviews, like our own in Europe, cannot reasonable be expected to be shared by everyone, and therefore cannot provide, on its own, a justification for contract law. A system of contract law built entirely on a controversial ultimate value or principle would not treat

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<sup>77</sup> See also Micklitz's critique of 'grand' projects, H.-W. Micklitz 'Failure or Ideological Preconceptions – Thoughts on Two Grand Projects: The European Constitution and the European Civil Code', *EUI Working Papers LAW No. 2010/04*.

<sup>78</sup> For a different, deontological reading see below.

<sup>79</sup> See J. Klijnsma, *Contract law as fairness* (Amsterdam, 2014), 76.

<sup>80</sup> O. Ben-Shahar, 'The Uneasy Case for Equal Access Law', *University of Chicago Institute for Law & Economics Olin Research Paper No. 628* (available at SSRN: <http://ssrn.com/abstract=2197013>).

<sup>81</sup> See M.W. Hesselink, 'Post-Private Law?', in: *Varieties of European Economic Law and Regulation: Liber Amicorum for Hans Micklitz* (K.P. Purnhagen & P. Rott, eds), Springer, 2014), 31-43.

<sup>82</sup> M.W. Hesselink, 'Unjust Conduct in the Internal Market. On the Role of European Private Law in the Division of Moral Responsibility between the EU, Its Member States and Their Citizens', *Centre for the Study of European Contract Law Working Paper Series No. 2014-14* (available at <http://ssrn.com/abstract=2532375>). In theory all the rules assuring justice between contracting parties could be covered the concept of access justice, but then the theory would loose is its distinctiveness.

<sup>83</sup> See Tjon Soei Len, n 9 above.

<sup>84</sup> As to the latter, think only of the CISG.

the citizens who do not adhere to that particular value, or do not regard it as a value trumping all other values that could come into play when determining contract law rules, with equal respect.

It could be argued, in response to the pluralist view, that a theory that is not based on one single ultimate value or principle is not a theory at all because it will require constant balancing of competing values, principles and concerns, and is therefore inherently instable. However, this is not necessarily the case. A political conception of justice relies on the justification of the law, including contract law, through public reasoning.<sup>85</sup> Public reasons are reasons that cannot reasonably be rejected by anyone.<sup>86</sup> In particular, they must be general and reciprocal reasons (ie not claiming a privilege). Public reasoning is distinct from arbitrary choice and leads to stability 'for the right reasons', as Rawls would put it, and - in this case - to a contract law that is sufficiently justified. Political principles of justice, including private law justice, that can be accepted by citizens adhering to different faiths, philosophies, values and principles, if they can be found at all, will inevitably be of a much higher level of abstraction and generality than familiar contract law rules and doctrines. In other words, political principles of contractual justice will always significantly underdetermine private law rules and doctrines and, consequentially, will leave much room for interpretation and concretisation through legitimate political institutions. This means, in practical terms, that such a theory will be predominantly a democratic theory of contract law.<sup>87</sup>

## V. Conclusion

Contract theory and European contract law do not match well. In particular, monist normative contract theories are largely irreconcilable with the contract law of the EU. It seems that something has got to give. Given that there exist also cogent independent, normative reasons against monist contract theories - chiefly their incompatibility with a pluralist society - it is the essentialist and other monist theories that seem untenable, at least for societies like our own that are characterised by a reasonable pluralism of worldviews. For, essentialist and other monist normative theories are very unlikely to be acceptable as a political conception of contract law justice, be it through an overlapping consensus or as reasons that non one could reasonably reject.

To conclude that monist contract theories are untenable, at least for societies like the EU, does not mean that contract law theorists will have to surrender to some form of EU contract law positivism. Contract theory may very well be critical, reconstructive, normative and evaluative. But lest it be too detached from reality to count as a theory of contemporary contract law, it must do at least some justice to two undeniable facts, ie the fact of Europeanisation and the fact of a pluralism of reasonable worldviews.

Although a post-essentialist theory of contract law will inevitably be more procedural and 'thinner' than most of the familiar contract law theories there is no reason to assume that a contemporary normative theory of contract law justice inevitably has to

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<sup>85</sup> See J. Rawls, 'The idea of public reason revisited', in J. Rawls, *Political liberalism* (Columbia University Press, 2005), 440-490; T. Brooks and M.C. Nussbaum (eds), *Rawls's Political Liberalism* (Columbia University Press, 2015).

<sup>86</sup> R. Forst, *The Right to justification: elements of a constructivist theory of justice* (New York: Columbia University Press, 2012).

<sup>87</sup> M.W. Hesselink, 'Democratic contract law', 11 *European Review of Contract Law* (2015), 81-126.

be entirely procedural. Rather, the challenge is to develop a sufficiently political conception of contract law justice in the EU, ie one that is acceptable to citizens adhering to a variety of ultimate values and belonging to a plurality of interdependent polities.