university of groningen

University Medical Center Groningen

University of Groningen

The Relationship between European and National Private Law

Cherednychenko, O.O.

Published in:
The Future of European Private Law

IMPORTANT NOTE: You are advised to consult the publisher's version (publisher's PDF) if you wish to cite from it. Please check the document version below.

Document Version
Final author's version (accepted by publisher, after peer review)

Publication date:
2023

Link to publication in University of Groningen/UMCG research database

Citation for published version (APA):
Cherednychenko, O. O. (2023). The Relationship between European and National Private Law: Lessons for EU Law-Making and Enforcement. In A. Janssen, M. Lehmann, & R. Schulze (Eds.), *The Future of European Private Law* (pp. 455-485). Nomos/Hart Publishing.

Copyright
Other than for strictly personal use, it is not permitted to download or to forward/distribute the text or part of it without the consent of the author(s) and/or copyright holder(s), unless the work is under an open content license (like Creative Commons).

The publication may also be distributed here under the terms of Article 25fa of the Dutch Copyright Act, indicated by the “Taverne” license. More information can be found on the University of Groningen website: https://www.rug.nl/library/open-access/self-archiving-pure/taverne-amendment.

Take-down policy
If you believe that this document breaches copyright please contact us providing details, and we will remove access to the work immediately and investigate your claim.

Downloaded from the University of Groningen/UMCG research database (Pure): http://www.rug.nl/research/portal. For technical reasons the number of authors shown on this cover page is limited to 10 maximum.

Download date: 18-04-2025

The Relationship between European and National Private Law: Lessons for EU Law-Making and Enforcement

Olha O. Cherednychenko[*]

In: A. Janssen, M. Lehmann and R. Schulze (eds), *The Future of European Private Law* (Hart/Nomos, 2023), pp. 455-485.

1. Introduction[1]

Between 1992 and 2008, Nationale-Nederlanden – one of the largest Dutch insurance companies – offered an investment insurance policy. This complex financial product is a type of life insurance that combines investment with insurance. Under an investment insurance contract, the policyholder pays the insurer a premium in exchange for a payout over the lifetime or upon the death of the insured. The payout can be used by the insured to pay off outstanding debts, notably mortgages, to secure additional income in retirement or to finance studies for his or her children. In contrast to traditional life insurance, the capital is being accumulated through investment of insurance premiums. The payout amount over the lifetime of the insured is therefore not fixed but is based on the investment's return. Over the years, Nationale-Nederlanden and other insurance companies have sold millions of investment insurance policies to consumers in the Netherlands. But shortly after the turn of the century the initial enthusiasm for these financial products turned into social unrest. Many policyholders were unpleasantly surprised to discover that their policies involved high costs and risks, and that the expected returns would therefore never be realised. An investment insurance policy became colloquially known as the 'exorbitant policy' ('*woekerpolis*'), leading to intense litigation.

In 2013, the Vereniging woekerpolis.nl – the association representing the interests of the aggrieved policyholders – took collective action against Nationale-Nederlanden. In particular, the association submitted that the insurance company had not sufficiently informed its clients about the costs that were deducted from the insurance premiums as well as the effects of those costs on capital accumulation, and that it had thus acted in breach of its duty of care in private law. Nationale-Nederlanden in turn invoked a broad regulatory compliance defence, arguing that it had provided all the information to policyholders required by the public law legislation implementing the EU Third Life Assurance Directive (92/96/EEC) and that it had thereby also complied with the private law rules.[2]

Vereniging woekerpolis.nl v *Nationale-Nederlanden* concerns the relationship between, on the one hand, European sector-specific information duties of life insurance companies under the repealed Third Life Assurance Directive, which are now found in the Solvency II Directive (2009/138/EC), and, on the other hand, national private law rules on the provision of information. The central question in this dispute is whether the suppliers of investment insurance policies should have provided more information about these policies to their clients under Dutch private law than they were required to provide on the basis of public law

[*] Professor of European Private Law and Comparative Law at the University of Groningen, the Netherlands.

[1] This contribution builds on O.O. Cherednychenko, 'Islands and the Ocean: Three Models of the Relationship between EU Market Regulation and National Private Law' (2021) 84 *Modern Law Review*, 1294 and O.O. Cherednychenko, 'De verhouding tussen EU-marktregulering en nationaal privaatrecht' (2022) 183 *Rechtsgeleerd Magazijn Themis*, 142.

[2] See *Vereniging woekerpolis.nl* v *Nationale-Nederlanden* Rb. Rotterdam 19 July 2017, ECLI:NL:RBROT:2017:5654, *JOR* 2017/295.

Electronic copy available at: https://ssrn.com/abstract=4502155

legislation with a European origin. The difference of opinion on this issue between the parties, which has also been reflected in scholarly work and case law,[3] led the Hague Court of Appeal to refer it to the Dutch supreme court in private law matters (*Hoge Raad*) for a preliminary ruling.[4] Yet, *Vereniging woekerpolis.nl* v *Nationale-Nederlanden* also serves as a good illustration of the broader tension between European and national private law rules relating to the same subject matter. The tension between the two is manifest not only in insurance law or financial law more generally, but also in many other areas that have been increasingly subjected to EU harmonisation, such as competition law, consumer law, and energy law. In such areas, the degree of autonomy of national private law from European private law varies, affecting not only the private interests of the individuals concerned, but also public interests, notably the establishment of the European internal market.

While the relationship between European and national private law has been explored in legal scholarship before,[5] this chapter reconceives this relationship within a new theoretical framework, focusing on how traditional *national* private law today responds and should respond to EU private law norms and related findings in administrative proceedings. In the following, I will first outline a theoretical framework within which the analysis of this relationship will be conducted (section 2). In particular, the key concepts of 'national private law' and 'European private law' as well as the values underlying them will be discussed. Subsequently, I will draw on the case of *Vereniging woekerpolis.nl* v *Nationale-Nederlanden* to present three models of the relationship between European and national private law: separation (section 3), substitution (section 4), and complementarity (section 5). These models reflect elements of the current legislative and judicial practices in a variety of jurisdictions which are or were part of the EU, including Germany, the Netherlands, and the United Kingdom, as well as the EU law itself, across a wide range of areas. The areas under investigation have been subjected to cross-sectoral and/or sector-specific EU harmonisation regimes and include product safety and liability, antitrust, unfair trading, unfair contract terms, consumer sales, and financial services (specifically, payment, investment, and life insurance). Based on the representative examples from these areas, the models also provide an analytical framework for assessing the current practices in terms of their ability to reconcile EU and national private law rules across the entire field of European private law. The chapter concludes with the summary of the main findings and some lessons for EU law-making and enforcement in the field of private law (section 6).

2. The tension between European and national private law: A theoretical framework

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

Before we can begin to examine the interplay between European and national private law, the meaning of each needs to be clarified based on their common and distinguishing features. This is not an easy task, given that in national legal systems alone controversy surrounds the concept of private law and its relationship to regulation. While some scholars regard private law as an

---

[3] For an overview see for example Conclusion Advocate General Hartlief in *Vereniging woekerpolis.nl* v *Nationale-Nederlanden* 14 October 2021, ECLI:NL:PHR:2021:973, paras 10 and 11.

[4] *Vereniging Woekerpolis.nl* v *Nationale Nederlanden* Gerechtshof Den Haag 23 February 2021, ECLI:NL:GHDHA:2021:302. On the ruling of the Dutch supreme court in this case see s. 5 below.

[5] See for example D. Caruso, 'The Missing View of the Cathedral: The Private Law Paradigm of European Legal Integration' (1997) 3 *European Law Journal*, 3; R. Michaels, 'Of Islands and the Ocean: The Two Rationalities of European Private Law' in R. Brownsword et al (eds), *The Foundations of European Private Law* (Oxford: Hart Publishing, 2011), 139; H.-W. Micklitz, 'A Self-Sufficient European Private Law – A Viable Concept?' in H.-W. Micklitz and Y. Svetiev (eds), *A Self-Sufficient European Private Law – A Viable Concept?* EUI Working Papers Law 2012/31.

Electronic copy available at: https://ssrn.com/abstract=4502155

autonomous and non-instrumental framework for horizontal relations between private parties,[6] others insist that private law is laden with particular distributional implications and is therefore an instrument for governing complex economic and social relations.[7]

Although national private law may be influenced by policy objectives and have distributive implications, our point of departure for the sake of analytical clarity is the prevailing rationality of this area of law – which I will call relational rationality. Traditional national private law is primarily concerned with horizontal relationships between private individuals as self-determining agents who may pursue their own interests. This unique legal ecosystem created and backed by a state, notably the legislator and private law courts, is underpinned by the idea of interpersonal justice. It seeks first and foremost to ensure the balance between the competing interests of the parties through their respective rights and remedies.[8] A party whose private law right has been infringed typically has to institute proceedings in a private law court or before an alternative dispute resolution body (ADR) to vindicate it, using the characteristic private law remedies, such as a claim for damages. Private law thus typically operates *ex post* – that is, after a breach of the standard when harm has already occurred – in the circumstances of an individual case.

National private law can thus be understood as a horizontal legal framework designed by legislators and private law courts that seeks to ensure interpersonal justice, while at the same time being sensitive to the common good, and that typically functions *ex post*.

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

Like national private law, European private law also governs relations between private parties. And yet, the latter is profoundly different from the former. What distinguishes European private law from national private law is not only the supranational level at which it is adopted by the European legislator and interpreted by the Court of Justice of the EU (CJEU), but also its predominantly instrumentalist rationality. The main question posed by the EU legislator has been not how to ensure interpersonal justice, but rather how to make the internal market function better.[9] The 'effectiveness' and 'efficiency' of the instruments used to achieve desired policy outcomes are key in this pragmatic setting.[10] Private law has been viewed as an instrument for achieving various policy objectives.[11] Apart from the overarching goal of

---

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

[7] See for example D. Kennedy, 'Distributive and Paternalist Motives in Contract and Tort Law, with Special References to Compulsory Terms and Unequal Bargaining Power' (1982) 41 *Maryland Law Review*, 563; W.M. Landes and R.A. Posner, *The Economic Structure of Tort Law* (Cambridge, MA: Harvard University Press, 1987); H. Collins, *Regulating Contracts* (Oxford: OUP, 1999); K. Pistor, *The Code of Capital: How the Law Creates Wealth and Inequality* (Princeton, NJ: Princeton University Press, 2019).

[8] cf for example C.-W. Canaris, *Die Bedeutung der iustitia distributiva im deutschen Vertragsrecht* (Munich: C.H. Beck, 1997), 35; C.U. Schmid, 'The Thesis of the Instrumentalisation of Private Law by the EU in a Nutshell' in C. Joerges and T. Ralli (eds), *European Constitutionalism without Private Law. Private Law without Democracy*, Oslo: Joseph Beuys/Bono, 2011), 7, 21; H. Dagan, 'Between Regulatory and Autonomy-Based Private Law' (2016) 22 *European Law Journal*, 644, 650.

[9] See for example M.W. Hesselink,'European Contract Law: A Matter of Consumer Protection, Citizenship, or Justice?' (2007) 15 *European Review of Private Law*, 323; M. Bartl, 'Internal Market Rationality, Private Law and the Direction of the Union: Resuscitating the Market as the Object of the Political' (2015) 21 *European Law Journal*, 572; H. Collins, 'The Revolutionary Trajectory of EU Contract Law Towards Post-national Law' in S. Worthington et al (eds), *Revolution and Evolution in Private Law* (Oxford: Hart Publishing, 2018), 315.

[10] See European Commission, *Better Regulation Guidelines*, SWD(2021) 305 final, 23.

[11] See for example H.-W. Micklitz, 'The Visible Hand of European Regulatory Private Law' (2009) 28 *Yearbook of European Law*, 3.

Electronic copy available at: https://ssrn.com/abstract=4502155

establishing the internal market, these include, for instance, sustainable development, consumer protection, and financial stability.

Unlike national private law, therefore, European private law tends to take a form of *ex ante* regulation which seeks to regulate an activity before a problem occurs. The principle-based rules adopted by the European Parliament and the Council for this purpose are often further elaborated by the European Commission in its delegated acts and complemented by even more detailed and prescriptive non-binding sets of rules produced by various public and private actors. Examples include the standards adopted by the European Securities and Markets Authority (ESMA) and other European supervisory authorities (ESAs) on how financial firms should approach their engagement with retail financial markets[12] and the product safety standards set by the European standardisation organisations, such as the European Committee for Standardization (CEN).[13] The *ex ante* regulatory norms produced in this way cover a large number of individual cases based on the normative typifications of market participants, such as the 'average consumer'.[14]

EU law does not, at least not explicitly, recognise the distinction between public and private law as it had evolved in national legal systems. In line with its functional approach, the European legislator has commonly refrained from prescribing a particular mode of implementation within the legal orders of the Member States. Importantly, EU private law norms regulating the conduct of businesses vis-à-vis other private parties and/or liability for damage caused by their products or activities have been transposed not only in national private law, but also in national public law, or in both, leading to the development of legal hybrids, such as 'supervision private law'.[15] At the same time, however, the public/private divide is not completely irrelevant to European private law. In fact, a distinction reminiscent of the traditional public/private dichotomy is manifest in the varying extent to which EU measures of legislative harmonisation in this area engage with private law relationships when pursuing similar policy goals.[16] Some EU measures, such as the Unfair Contract Terms Directive (93/13/EEC) and the Payment Services Directive 2 (PSD2 (EU) 2015/2326), explicitly confer private law rights and even remedies on private parties. In contrast, other EU measures, such as the Markets in Financial Instruments Directive II (MiFID II 2014/65/EU) and the Solvency II Directive as well as its predecessor Third Life Assurance Directive, focus instead on the relationship between regulators and regulatees and the role of administrative agencies in securing business compliance with the conduct of business rules, even though the latter regulate relations between private parties. The legal grammar of EU harmonisation measures (or their particular components) can thus be more public or private. As the analysis below will reveal, the choice of a particular legal grammar at EU level shapes the relationship between European and national private law at Member State level.

European private law can thus be understood in a broad sense as a set of norms adopted by the EU legislator or other actors – both public and private – within a formal legislative framework

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

[13] In more detail see for example H. Schepel, *The Constitution of Private Governance* (Oxford: Hart Publishing, 2005).

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

[15] O.O. Cherednychenko, 'Public Supervision over Private Relationships: Towards European Supervision Private Law?' (2014) 22 *European Review of Private Law*, 37.

[16] In more detail see O.O. Cherednychenko, 'Rediscovering the Public/Private Divide in EU Private Law' (2020) 26 *European Law Journal*, 27.

Electronic copy available at: https://ssrn.com/abstract=4502155

to regulate the activities of different categories of market participants, predominantly *ex ante*, with a view to achieving certain public goals in the context of the European internal market project; it includes rules that affect relations between individuals, regardless of the nature of the law – public or private – in which they have been transposed in the national legal order of a particular Member State.

2.3 Conflicting values at stake

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

The first dichotomy is the one between the pursuit of the *common good* and *interpersonal justice*. In many cases, the two are compatible with each other. The Unfair Contract Terms Directive, which lays down standards of consumer protection in order to redress the imbalance of power between businesses and consumers, is a case in point. Even though this EU measure fits into the general objective of completing the internal market, it determines the rights and obligations of one party vis-à-vis another and thus respects the minimum requirements of interpersonal justice.[17] However, the instrumentalist conception of European private law and the relational conception of national private law may also clash.[18] In the context of the European Banking Union, for instance, retail investor holders of complex bank securities, such as contingent convertible bonds (*CoCos*), tend to be regarded as 'responsible financial citizens', capable of bearing losses following bank resolution.[19] Financial stability concerns can thus trump financial consumer protection, revealing the vulnerable position of interpersonal justice in the areas subjected to EU harmonisation.[20]

The second dichotomy that informs the relationship between European and national private law is the one between *legal certainty* and *individual fairness*.[21] The use of *ex ante* standards by the European legislator to regulate the behaviour of the 'average consumer' and other fictional categories of market participants reduces legal complexity and thus increases legal certainty. But such generalised EU norms may fail to respond to the real-life problems arising in specific private law relationships, and hence to ensure individual fairness. All the more so, given that market regulation generally faces difficulties in capturing the complexity and unpredictability of the markets.[22] The ingenuity of the financial industry in circumventing pre-crisis regulatory restrictions through private law is particularly well documented.[23] Open-ended norms of national private law, such as the principle of good faith or a duty of care, generally

[17] cf M.W. Hesselink, 'Private Law, Regulation, and Justice' (2016) 22 *European Law Journal*, 681, 688.

[18] cf Schmid, n 8 above, 25; O.O. Cherednychenko, 'Private Law Discourse and Scholarship in the Wake of the Europeanisation of Private Law' in J. Devenney and M.B. Kenny (eds), *The Transformation of European Private Law: Harmonisation, Consolidation, Codification or Chaos?* (Cambridge: Cambridge University Press, 2013), 148, 150; Hesselink, n 17 above, 689; Collins, n 9 above, 320.

[19] Moloney, n 12 above, 287.

[20] In more detail see O.O. Cherednychenko, 'EU Financial Regulation, Contract Law and Sustainable Consumer Finance' in E. van Schagen and S. Weatherill (eds), *Better Regulation in EU Contract Law: The Fitness Check and the New Deal for Consumers* (Oxford: Hart Publishing, 2019), 61.

[21] This dichotomy is well established in national legal systems. See for example R. von Jhering, *Der Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung (Deel 2(1)* (Leipzig: Breitkopf und Härtel, 1854).

[22] See for example J. Black, 'Paradoxes and Failures: "New Governance" Techniques and the Financial Crisis' (2012) 75 *Modern Law Review*, 1037, 1039.

[23] See Pistor, n 7 above.

Electronic copy available at: https://ssrn.com/abstract=4502155

allow private adjudicators to tailor their application to an individual case and thus realise individual fairness. At the same time, a high degree of responsiveness to the particular circumstances of each case may undermine legal certainty, increasing the complexity of a legal system. While the rise of Big Data analytics could potentially lead to a more personalised European private law without reducing legal certainty,[24] the normative typifications used in *ex ante* standard-setting to simplify the reality of human interactions are unlikely to be completely erased from the legal landscape.[25]

The third dichotomy that underpins the interface between European and national private law is the one between *uniformity* and *diversity*.[26] The more harmonisation of private law relationships is pursued by the EU, the less room for manoeuvre is left for the Member States to tailor the application of harmonised rules to local circumstances and to experiment with different solutions to market problems. Initially, the European legislator predominantly sought minimum harmonisation of private law. However, since 2000, when the Lisbon Strategy was launched, there has been a shift towards maximum harmonisation and thus more uniformity in the private law domain.[27] This development has been accompanied by the increasing role of administrative agencies in standard-setting and enforcement and, in some areas, such as financial services, even the centralisation of supervisory powers at the EU level. Yet, as will be discussed below, room for diversity has always remained, albeit to varying degrees.

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

3. Separation

3.1 Characteristics

On one side of the spectrum, we find the separation model of the relationship between European and national private law. It is primarily manifest in the context of the public law-oriented EU measures of legislative harmonisation, but is not limited thereto. Under this model, traditional national private law rules and regulatory private law rules with a European origin relating to the same subject matter exist parallel to each other at Member State level, both formally and practically. Being transposed exclusively in a public law framework, EU private law norms do not become part of a national private law order. Private law courts are not bound by such norms

[24] See for example C. Busch, 'Implementing Personalized Law: Personalized Disclosures in Consumer Law and Data Privacy Law' (2019) 86 *The University of Chicago Law Review*, 309.
[25] cf G. Howells, 'Protecting Consumer Protection Values in the Fourth Industrial Revolution' (2020) 43 *Journal of Consumer Policy*, 145, 167.
[26] This dichotomy has probably been most debated in the context of EU private law making. See for example J.M. Smits, 'Plurality of Sources in European Private Law, or: How to Live with Legal Diversity' in R. Brownsword et al (eds), *The Foundations of European Private Law* (Oxford: Hart Publishing, 2011), 333; N. Reich, 'From Minimal to Full to 'Half' Harmonisation' in J. Devenney and M. Kenny (eds), *European Consumer Protection Theory and Practice* (Cambridge: Cambridge University Press, 2012), 3; S. Weatherill, 'The Fundamental Question of Minimum or Maximum Harmonisation' in S. Garben and I. Govaere (eds), *The Internal Market 2.0* (Oxford: Hart Publishing, 2020), 261.
[27] In more detail see H.-W. Micklitz, *The Politics of Justice in European Private Law: Social Justice, Access Justice, Societal Justice* (Cambridge: Cambridge University Press, 2018), 164.

Electronic copy available at: https://ssrn.com/abstract=4502155

or by prior decisions of administrative agencies enforcing them. Nor are they willing to consider EU private law norms or related administrative decisions in private adjudication. Accordingly, European private law does not have any effect in national private law.

3.2 Manifestations

One of the areas where we can trace this model is retail investment services. The major EU investor protection measures – MiFID II and its predecessor Markets in Financial Instruments Directive I (MiFID I 2004/39/EC) – can be regarded as part of European private law insofar as they seek maximum harmonisation of the conduct of business rules for investment firms in their dealings with investors, such as a duty to know one's client, a duty to inform him or her about a particular financial instrument, and a duty to recommend a suitable one. In fact, many of these duties initially developed within the national private laws of the Member States.[28] And yet, being dominated by the public law-oriented approach to investor protection,[29] neither MiFID I nor MiFID II confers individual rights or remedies on investors. In its decision in *Genil* v *Bankinter*,[30] the CJEU did not take the opportunity to unequivocally clarify its stance on the issue of the relationship between MiFID I and national private law.[31] Although the public law grammar of MiFID I and MiFID II in itself does not preclude national private law courts from giving effect to the regulatory conduct of business rules contained therein within traditional private law, the courts' actual willingness to do so varies considerably across the EU.[32]

A notable example of un uneasy relationship between these EU measures and national private law is the decision of the Scottish supreme court in private law matters, the Court of Session, in *Grant Estates Ltd* v *The Royal Bank of Scotland Plc*.[33] The case concerned the alleged mis-selling of interest rate swaps to a small property developer, Grant Estates Limited (GEL), by the Royal Bank of Scotland (RBS). Under MiFID I, which was in force at the time, GEL would fall under the broad concept of 'retail investor' that covered not only natural persons but also small and medium-sized companies. This would allow the company to enjoy the highest level of regulatory protection. In particular, the investment adviser would be obliged to recommend only suitable financial instruments to it. In the UK, the MiFID I conduct of business regime was transposed in a financial supervision framework, notably the Financial Services and Markets Act (FSMA) 2000 and the Conduct of Business Sourcebook (COBS) made by the UK Financial Conduct Authority (FCA). Under FSMA, a 'private person' who has suffered loss as a result of breach of the COBS rules has a direct right of action against a financial firm.[34] Yet, as a corporate person, GEL could not rely on this statutory remedy to claim damages for negligent advice. To benefit from regulatory protection as a retail investor under MiFID I in civil litigation, GEL submitted that, in substance, RBS gave it financial advice in breach of the

---

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

[29] It is noteworthy that the 'principle of civil liability' previously included in the initial consultation document of the European Commission ultimately did not make it into the text of MiFID II. See European Commission, *Public Consultation. Review of the Markets in Financial Instruments Directive (MiFID) (MiFID Review)*, 63, s 7.2.6 (Liability of firms providing services).

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

[31] cf for example T. Tridimas, 'Financial Regulation and Private Law Remedies: An EU Law Perspective' in O.O. Cherednychenko and M. Andenas, *Financial Regulation and Civil Liability in European Law* (Cheltenham: Edward Elgar, 2020), 47, 68.

[32] In more detail see for example O.O. Cherednychenko, 'Two Sides of the Same Coin: EU Financial Regulation and Private Law' (2021) 22 *European Business Organization Law Review*, 147, 163; M.W. Wallinga, *EU Investor Protection Regulation and Liability for Investment Losses* (Vienna: Springer, 2020). See also s. 5 below.

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

[34] FSMA, s. 138D (formerly s. 150).

Electronic copy available at: https://ssrn.com/abstract=4502155

MiFID I conduct of business rules and thus violated its common law duty of care. In so doing, GEL effectively relied on the regulatory duties of the bank emanating from EU law to bring into existence the bank's common law duty of care in the provision of investment advice. However, this argument failed to convince Lord Hodge (now deputy president of the UK Supreme Court) who rejected it on the following grounds:

> … I do not think that GEL can rely on the COBS rules to create a common law duty of care in relation to the provision of advice. A common law duty can arise from the existence of a statutory duty as part of the background circumstances; and the existence of a statutory duty may show that a particular risk should have been foreseen. When the court assesses the effect of the statutory duty on the question whether it is just and equitable to impose a duty of care the primary consideration is, in my view, the policy of the statute. Looking to the policy of the FSMA one discovers that it provides protection to consumers of financial services through a self-contained regulatory code and statutory remedies for breach of its rules. As I have said, it needs no fortification by the parallel creation of common law duties and remedies. Further, the existence of a duty in negligence for failure to comply with the COBS rules would circumvent the statutory restriction on the direct right of action …[35]

In reaching this conclusion, Lord Hodge effectively adopted the separation model of the relationship between European and national private law, precluding the 'upgrade' of common law in the light of the bank's regulatory duties under EU investor protection regulation.[36]

A similarly dismissive stance towards the effect of the MiFID I/MiFID II conduct of business regime in private law has also been taken by the German federal supreme court in private law matters (*Bundesgerichtshof*). Germany has also implemented these directives in the financial supervision legislation, notably the Securities Trading Act (*Wertpapierhandelsgesetz* (*WpHG*)) 1994. Even though the MiFID I/MiFID II conduct of business rules aim to protect investors, the German court has effectively cut off the two main routes for aggrieved investors to claim damages for breach of these rules under the German Civil Code (*Bürgerliches Gesetzbuch* (*BGB*)). Not only has it denied the investors a more direct possibility to do so on the basis of liability in tort for breach of a statutory duty under § 823 II BGB,[37] the German court has also consistently precluded the investors from benefitting from the indirect effect (*Ausstrahlungswirkung*) of the conduct of business rules on the standard of care in contract.[38] This approach is clearly in line with the separation model of the relationship between European and national private law.

The signs of this model can also be traced, for example, in the field of unfair trading. The Unfair Commercial Practices Directive (2005/29/EC) seeks to protect consumers against misleading, aggressive or otherwise unfair commercial practices. Until its amendment by the Modernisation Directive ((EU) 2019/2161), however, this EU measure of maximum harmonisation did not confer individual rights or remedies on consumers who have become their victims, reflecting the traditional understanding of unfair commercial practices in many

[35] *Grant Estates Ltd* v *The Royal Bank of Scotland Plc* [2012] CSOH 133, at [79].
[36] A similar approach has also been adopted by the courts of England and Wales in cases involving the mis-selling of interest rate hedging products to corporate retail investors. See for example *Thornbridge Ltd* v *Barclays Bank Plc* [2015] EWHC 3430 (QB); *Crestsign Ltd* v *(1) National Westminster Bank Plc; (2) The Royal Bank of Scotland Plc* [2014] EWHC 3034 (Ch), [2015] 2 All ER (Comm) 133. In more detail see D. Bugeja, *Reforming Corporate Retail Investor Protection: Regulating to Avert Mis-Selling* (Oxford: Hart Publishing, 2019), 140.
[37] See for example BGH 19 February 2008, XI ZR 170/07, *NJW* 2008, 1734; BGH 22 June 2010, VI ZR 212/09, *NJW* 2010, 3651.
[38] See for example BGH 27 September 2011, XI ZR 178/10, *NJW-RR* 2012, 43; BGH 17 September 2013, XI ZR 332/12, *WM* 2013, 1983; BGH 3 June 2014, XI ZR 147/12, no. 35, *NJW* 2014, 2947.

Electronic copy available at: https://ssrn.com/abstract=4502155

Member States as public law regulating the behaviour of market participants.[39] The ability of aggrieved consumers to obtain redress, therefore, largely depended on national private law. In theory, the regulatory standards laid down in the directive could inform the national general contract law doctrines, such as mistake, fraud, or duress, thus allowing consumers to rescind a contract concluded as a result of an unfair commercial practice. And yet, there is little national case law pointing to a clear link between these doctrines and unfair commercial practices.[40] This suggests that in many Member States, regulatory unfair trading law and traditional national private law have so far operated separately from each other. To break this pattern, the revised Unfair Commercial Practices Directive envisages a minimum harmonisation of both contractual and non-contractual remedies and obliges Member States to provide consumers with the right to contract termination and the right to compensation for damages, at the least,[41] thus strengthening the link between EU unfair trading regulation and national private law.

Furthermore, the separation model is also manifest in the separation between judicial and administrative proceedings in which the EU private law rules are applied. Irrespective of whether the public or private law grammar has been used in the relevant EU measures, private law courts are generally not bound by prior decisions of administrative authorities or courts, or even willing to consider such decisions in practice.[42] Private law courts will typically make their own assessment of whether the applicable rules have been violated. Accordingly, private litigants are commonly unable to rely on a decision of an administrative agency or a reviewing administrative court finding an infringement of an EU regulatory standard in civil proceedings.

3.3 Implications

As these examples illustrate, the separation model of the relationship between European and national private law leads to the creation of two independent systems of legal rules concerning one and the same subject matter, such as the banks' duties of care towards their clients or the traders' information obligations towards consumers. While one system is being primarily maintained by private law courts, the other one is being operated by administrative agencies and courts. If this model were to be applied in the case of *Vereniging woekerpolis.nl* v *Nationale-Nederlanden*, discussed above, the information duties of insurance companies with a European origin enshrined in Dutch financial supervision law would not have any effect on the open-ended private law norms that also govern the provision of information. The clients would not therefore be able to use private law remedies for breach of the public law information obligations by Nationale-Nederlanden, unless these obligations also have their counterparts in private law.

Such a two-tier system of rules does not increase legal certainty or allow the EU to approximate national laws to any significant extent. A high degree of legal certainty and uniformity can only be achieved in the regulatory domain subjected to EU level harmonisation, particularly when maximum harmonisation is sought. National private law in that domain, however, remains autonomous from European private law. The separation model thus strongly promotes diversity

[39] H.-W. Micklitz, 'A Common Approach to the Enforcement of Unfair Commercial Practices and Unfair Contract Terms' in W. van Boom et al (eds), *The European Unfair Commercial Practices Directive: Impact, Enforcement Strategies and National Legal Systems* (London: Routledge, 2016), 173, 191.

[40] European Commission, *Report of the Fitness Check on Directive 2005/29/EC, Directive 93/13/EEC, Directive 98/6/EC, Directive 1999/44/EC, Directive 2009/22/EC, Directive 2006/114/EC*, SWD(2017) 208 final, 93. See also for example F.P. Patti, '"Fraud" and "Misleading Commercial Practices": Modernising the Law of Defects in Consent' (2016) 12 *European Review of Contract Law*, 307, 312.

[41] Modernisation Directive, Art. 3(5).

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

Electronic copy available at: https://ssrn.com/abstract=4502155

and allows private adjudicators, at least in theory, to realise interpersonal justice and fairness in individual cases, being unconstrained by instrumentalist considerations underlying EU harmonisation measures. But as markets are becoming more and more complex in a globalised world, judges and other adjudicators increasingly face difficulties in appreciating this complexity in private litigation beyond the nation-state. Although EU market regulation is not perfect either, it typically accumulates a considerable body of expert knowledge concerning products or services, trading practices, consumer/investor behaviour, as well as the effects of individual transactions on market functioning as a whole and other public values. In the absence of any flow of knowledge from European private law to national private law, therefore, a private law court may not only fail to adequately assess the wider societal impact of its decisions in individual cases, but also to ensure individual fairness through traditional private law norms. For example, one may question whether Lord Hodge was right in rejecting the existence of the bank's common law duty of care towards a small property developer. After all, the regulatory system of investor protection under MiFID II implies that this company's knowledge and experience in relation to interest rate swaps is similar to that of a consumer. In addition, strict separation between judicial and administrative proceedings may pose an obstacle to private enforcement of European private law, since weaker market participants often face difficulties in establishing a violation of a regulatory standard, as discussed further below.

4. Substitution

4.1 Characteristics

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

4.2 Manifestations

The substitution of national private law by European private law along these lines is particularly noticeable in the area subjected to the Unfair Contract Terms Directive. This minimum harmonisation directive aims to protect consumers against unfair contract terms that have not been individually negotiated. It builds upon the pre-existing national private law rules on unfair contract terms control, such as the German Standard Terms of Business Act 1976 (*Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen* (*AGBG*)),[43] and has a strong interpersonal dimension. A term is unfair if, contrary to the requirement of good faith, it causes a significant contractual imbalance, to the detriment of the consumer. Unfair contract terms are not binding on consumers. Over the years, the CJEU has further strengthened the

[43] See Micklitz, n 39 above, 174.

Electronic copy available at: https://ssrn.com/abstract=4502155

interpersonal dimension of the directive in the contract law domain and even extended it to civil procedural law, stepping beyond what the EU legislator was able to deliver.[44] According to the CJEU's case law, for instance, a national court must assess of its own motion whether a term in a consumer contract is unfair.[45]

The Unfair Contract Terms Directive can therefore be properly regarded as, to use the words of Stephen Weatherill, 'the first incursion of EU law into the heartland of national contract law thinking'.[46] In some legal systems, such as Germany and the Netherlands, the Unfair Contract Terms Directive was integrated into a civil code. To avoid conflicts with the directive, Germany modified some of the provisions of the AGBG on consumer contracts.[47] Since 2002, the AGBG as a whole has been part of the reformed BGB. The Netherlands did not initially make any changes to the existing rules on unfair contract terms in the Dutch Civil Code (*Burgerlijk wetboek* (*BW*)). Following the ruling of the CJEU in *Commisison* v *Netherlands*,[48] however, it included new provisions in the Civil Code, such as the *contra proferentem* rule.[49] In contrast, other legal systems, such as the UK, transposed the Unfair Contract Terms Directive in self-standing statutory instruments that exist alongside general private law. The UK included the provisions implementing the directive in the Consumer Rights Act (CRA) 2015, which incorporates the rules relating to unfair contract terms previously found in the Unfair Contract Terms Act 1977 and the Unfair Terms in Consumer Contracts Regulations 1999.[50] The CRA operates alongside the common law as *lex specialis*. In cases of conflict, however, the statutory rules emanating from EU law will override the common law rules. For example, the CRA obliges the UK courts to consider whether a term of a consumer contract is unfair even if none of the parties to the proceedings has raised that issue,[51] thus codifying the case law of the CJEU on the *ex officio* application of the Unfair Contract Terms Directive.[52] In essence, this procedural rule substitutes the otherwise applicable common law model of civil procedure under which the parties themselves present legal arguments in their favour to a neutral judge. In the end, therefore, European private law on unfair terms control gains the upper hand over national private law in this area not only when regulatory law is integrated into the fabric of general private law, as in Germany and the Netherlands, but also when the two coexist side by side within the domestic system of private law, as in the UK.[53]

Similar implementation strategies have been adopted by the Member States with respect to another private law-oriented EU measure – the Consumer Sales Directive 2019 ((EU) 2019/771) and its predecessor (1999/44/EC). These EU directives aim to approximate not only the requirements for conformity of goods delivered by the seller, but also the buyer's contractual remedies in the case of non-conforming goods, such as the right to repair or replacement of a defective good. In national legal systems, these specific remedies exist alongside general rules applicable to all (sales) contracts, such as the right to performance in

---

[44] In more detail see for example H.-W. Micklitz and N. Reich, 'The Court and Sleeping Beauty: The Revival of the Unfair Contract Terms Directive (UCTD)' (2014) 51 *Common Market Law Review*, 771; O. Gerstenberg, 'Constitutional Reasoning in Private Law: The Role of the CJEU in Adjudicating Unfair Terms in Consumer Contracts' (2015) 21 *European Law Journal*, 599.
[45] See for example Case C-168/05 *Mostaza Claro* v *Centro Movil Milenium SL* ECLI:EU:C:2006:675, para. 38.
[46] S. Weatherill, *EU Consumer Law and Policy* (Cheltenham: Edward Elgar, 2013), 145.
[47] This was done by adding a specific provision to this effect – § 24a AGBG (now § 310(3) BGB).
[48] Case C-144/99 *Commission* v *Netherlands* ECLI:EU:C:2001:257.
[49] Art. 6:238 (2) BW.
[50] For a critical assessment see for example P. Giliker, 'The Consumer Rights Act 2015 – A Bastion of European Consumer Rights?' (2017) 37 *Legal Studies*, 78, 89.
[51] CRA, s. 71(2).
[52] For example Case C-168/05 *Mostaza Claro* v *Centro Movil Milenium SL* ECLI:EU:C:2006:675, para. 38.
[53] It remains to be seen what impact the Unfair Contract Terms Directive as interpreted by the CJEU will have post-Brexit. See also Giliker, n 50 above, 100.

Electronic copy available at: https://ssrn.com/abstract=4502155

the continental legal systems or the buyer's right to reject non-conforming goods in English common law. Although private law remedies for breach of consumer sales contracts are only partially harmonised, the role of national private law in relation to the harmonised aspects is rather limited. According to the maximum harmonisation Consumer Sales Directive 2019, for example, the buyer may choose between repair and replacement, 'unless the remedy chosen would be impossible or, compared to the other remedy, would impose costs on the seller that would be disproportionate'.[54] The integration of this EU private law rule into a national private law system – into either a civil code or a separate consumer protection act – profoundly restricts the ability of that system to shape the relationship between repair and replacement. National private law, for example, may not prioritise repair over replacement so as to foster sustainable consumption.[55] Such a hierarchy of remedies would be incompatible with EU law.

Another area where the substitution pattern can be observed is payment services. The creation of the Single Euro Payments Area (SEPA) has led to an exponential growth of EU legislation on payment services, notably PSD2. This maximum harmonisation directive was adopted with a view to fostering competition and innovation in the payments sector, while at the same time ensuring a high level of consumer protection. Apart from more public law-oriented provisions governing the authorisation and supervision of payment service providers, PSD2 also includes a strong private law component composed of the providers' pre-contractual and contractual obligations towards payment service users, including information duties, as well as detailed liability rules. Given the entanglement between public and private law in the area of payment services, some Member States have experimented with novel transposition techniques to link these two domains. In the Netherlands, for instance, the directive's private law component was for the most part transposed in the Dutch Civil Code.[56] Detailed information requirements, however, were incorporated in the Financial Supervision Act (*Wet op het financieel toezicht* (*Wft*)) 2006[57] and thus translated into substantive financial supervision standards. Yet, cross-references to these public law standards were included in the Civil Code to ensure that they would also govern the private law relationship between payment service providers and users and could be enforced through the private law means.[58] A marked orientation of the parts of PSD1 and PSD2 towards private law appears to have prompted the Dutch legislator to adopt this solution.[59]

While in the examples considered above the substitution model of the relationship between European and national private law is dictated by the private law grammar of the relevant EU measures, this pattern may also arise in the context of the public law-oriented EU measures. Such an outcome can be achieved if private law courts, when applying traditional private law norms in individual cases, unconditionally rely on regulatory standards of a public law nature or decisions of administrative agencies or courts establishing their violation. While, as noted above, the instances where such an approach has been adopted are still rare, a telling illustration is offered by EU competition law. The latter is enforced by the European Commission, national competition authorities, and national courts (including private law courts). According to the Antitrust Damages Directive (2014/104/EU), 'Member States shall ensure that an infringement of competition law found by a final decision of a national competition authority or by a review court is deemed to be irrefutably established for the purposes of an action for damages brought

[54] Consumer Sales Directive 2019, Art. 13(2).
[55] cf V. Mak & E. Terryn, 'Circular Economy and Consumer Protection: The Consumer as a Citizen and the Limits of Empowerment through Consumer Law' (2020) 43 *Journal of Consumer Policy*, 227, 235.
[56] Title 7a, Book 7 BW.
[57] Art. 4:22 Wft.
[58] Arts 516, 517, and 526 BW.
[59] Implementatiewet herziene richtlijn betaaldiensten: Memorie van Toelichting, *Kamerstukken* 34813, n. 3, 14–15.

Electronic copy available at: https://ssrn.com/abstract=4502155

before their national courts under Articles 101 or 102 TFEU or under national competition law'.[60] Thus, when deciding whether an undertaking is liable for breach of EU competition law in an individual case, the private law court is legally bound by the administrative decision or the judgment of the reviewing administrative court in which this breach has been established. By linking civil and administrative proceedings in this way, the Antitrust Damages Directive is designed to promote private enforcement of EU competition law.[61] Indeed, in the absence of a decision of an administrative agency or a court establishing its violation, it is generally impossible for consumers to hold the infringers liable for the damages suffered due to lack of evidence.

4.3 Implications

Under the substitution model, therefore, European private law is being absorbed into the fabric of national private law, effectively supplanting the latter's pre-existing norms. National private law no longer has the upper hand over individual rights and obligations in a relationship regulated by the EU. This is particularly evident in the case of private law-oriented maximum harmonisation standards which preclude national private law from imposing stricter standards, both *ex ante* and *ex post*. As *Vereniging woekerpolis.nl* v *Nationale-Nederlanden* shows, however, the rules contained in the public law-coloured minimum harmonisation directives, such as the Third Life Assurance Directive, can potentially also replace traditional private law rules. After all, if the regulatory compliance defence invoked by Nationale-Nederlanden is accepted, the Dutch private law courts would not be able to rule that this insurance company should have provided additional information on the costs of investment insurance policies to the aggrieved policyholders based on the open-ended private law norms.

By securing the dominance of European private law over national private law, the substitution model fosters the development of a single set of rules in the regulated areas. It thus enables the EU to achieve a high level of harmonisation and legal certainty in the national private law domain, particularly in the case of maximum harmonisation. This model also facilitates private enforcement of European private law and allows national private law to pursue interpersonal justice based on the individual rights and remedies with a European origin, while at the same time contributing to the realisation of EU policy goals. At the same time, a heavy reliance on European private law and its administrative enforcement may undermine the development of national private law by trial and error on a case-by-case basis and leave little room for diversity. In particular, when applying the *ex ante* EU standards informed by the normative typifications of market participants, private law courts may not always be able to respond to the particular circumstances of a concrete case *ex post* and realise individual fairness. The substitution model could preclude the courts, for instance, from imposing additional information duties on insurance companies in private law. Furthermore, national legislators and private law courts may not be able to strike a different balance between the public and private interests in the areas subjected to EU harmonisation. For example, they may not promote sustainable consumption by giving priority to repair over replacement in the case of non-conforming consumer goods. The inability of national private law to address non-typical problems faced by real individuals as well as important public concerns may in turn come at a heavy price in terms of the development of the European private law itself. After all, the substitution pattern implies a one-way learning process: only national private law learns from EU market regulation, but not the other way around. However, if there is no space for flexibility and

[60] Antitrust Damages Directive, Art. 9(1).

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

Electronic copy available at: https://ssrn.com/abstract=4502155

recalibration of private law rules at national level, European private law could lose an important source of practical wisdom.

5. Complementarity

5.1 Characteristics

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

5.2 Manifestations

The interplay between product safety and product liability provides one of the oldest examples of the complementarity model. Product safety law for non-food products is almost entirely harmonised by the public law-oriented General Product Safety Directive (2001/95/EC) and sector-specific measures which are specified in great detail by European standardisation organisations through technical standards. Product liability law is partly harmonised by, among others, the Product Liability Directive (85/374/EEC). Despite their public law character, product safety regulations, as elaborated in private technical standards, influence national tort law. Private law courts tend to regard them as minimum standards when applying open-ended private law norms with a national or European origin, such as negligence or defectiveness.[62] While the degree of such influence varies, compliance with regulatory product safety standards does not automatically displace the producer's tort liability. Private law courts can make an independent assessment of their appropriateness to specify private law norms in an individual case.[63] This allows the courts to scrutinise the quality of private technical standards given the recent developments in science and technology as well as the procedure that has led to their creation, and to impose additional obligations on producers if the particular circumstances of a concrete case so require.

A similar approach has also been advocated by the Principles of European Tort Law (PETL).[64] These principles are intended to serve as a common framework for the further development of national tort law and the adoption of EU legislation in this field. According to Article 4:102(3) of PETL, rules that prescribe or forbid certain conduct should be considered when establishing

---

[62] See for example G. Spindler, 'Interaction between Product Liability and Regulation at the European Level' in F. Cafaggi and H. Muir Watt (eds), *The Regulatory Function of European Private Law* (Cheltenham: Edward Elgar, 2009), 243, 248; M. Lee, 'Safety, Regulation and Tort: Fault in Context' (2011) 74 *Modern Law Review*, 555, 562.
[63] See also Case C-613/14 *James Elliott Construction Limited* v *Irish Asphalt Limited* ECLI:EU:C:2016:821, paras 53 and 61.
[64] European Group on Tort Law, *Principles of European Tort Law* (Vienna: Springer, 2005).

Electronic copy available at: https://ssrn.com/abstract=4502155

the required standard of conduct in tort. In addition, Article 7:101(1) of PETL provides that liability can be excluded if and to the extent that the actor acted legitimately by virtue of lawful authority, such as a licence. At the same time, Article 7:101(2) of PETL makes it clear that whether liability is excluded ultimately depends upon the weight of this justification, on the one hand, and the conditions of liability, on the other. Under PETL, therefore, tort law remains decisive in determining the standard of care in the particular circumstances of a case.

In some legal systems, the complementarity model can also be observed in the area of investment services which has been harmonised by MiFID II. This is the case, for example, in the Netherlands where this directive, including the conduct of business rules for investment firms, has been transposed in financial supervision law. Nonetheless, the Dutch private law courts generally consider these rules when assessing whether a firm has observed its private law duties towards a particular client. This does not preclude the courts, however, from imposing stricter duties on investment firms in contract or tort. The Dutch supreme court in private law matters has made this clear in *Levob* v *B*, *De Treek* v *Dexia* and *Stichting Gedupeerden Spaarconstructie* v *Aegon*.[65] In these cases, the facts of which pre-date the MiFID I's entry into force, the banks submitted that at the time the investment service contract at issue had been concluded, the financial supervision legislation then in force did not contain the duty to know their clients. According to the banks, therefore, they could expect that by complying with the financial supervision rules, they had also acted in conformity with their duty of care towards the clients in private law. In all three cases, however, this line of reasoning, which is echoed by Nationale-Nederlanden in the case at issue, was unequivocally rejected by the Dutch court. The latter held that the private law duties of care can go further than the public law duties of care contained in the financial supervision legislation. In so doing, it followed the opinion of the Deputy Procurator General who pointed to the existence of a two-tier system of duties of care for financial firms in Dutch law – public and private law duties.[66] In her view, while the public law duties influence the private law duties, the former do not determine the latter. The Dutch court has confirmed this stance in its more recent case law on the liability of banks when providing credit.[67]

A similar, albeit more nuanced, approach is also reflected in the recent preliminary ruling of the Dutch supreme court in the case of *Vereniging Woekerpolis.nl* v *Nationale-Nederlanden*.[68] According to it, the relationship between insurers and investment insurance policy holders is governed by private law. It is therefore for the private law courts to assess whether, and if so, which information duties rest on the insurer in private law in addition to the specific obligations under the applicable financial supervision law. The Dutch court thus rejected Nationale-Nederlanden's regulatory compliance defense, pointing to the autonomy of national private law. However, this autonomy is not unlimited. In the opinion of the court, private law obligations to provide additional information can be imposed on the insurer only if they (i) concern information that is clear and accurate, (ii) are necessary for a proper understanding of the essential characteristics of the investment insurance, and (iii) ensure sufficient legal certainty. This ruling is in line with the requirements for the provision of information additional to that listed in the Third Life Assurance Directive which were formulated by the CJEU in

[65] *Levob* v *B*, *De Treek* v *Dexia* and *Stichting Gedupeerden Spaarconstructie* v *Aegon* HR 5 June 2009, ECLI:NL:HR:2009:BH2811, ECLI:NL:HR:2009:BH2815 and ECLI:NL:HR:2009:BH2822. See also Wallinga, n 32 above, 223.

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

[67] HR 14 December 2018, ECLI:NL:HR:2018:2298, para. 3.4.2; HR 16 June 2017, ECLI:NL:HR:2017:1107, para. 4.2.5.

[68] *Vereniging Woekerpolis.nl* v *Nationale Nederlanden* HR 11 February 2022, ECLI:NL:HR:2022:166.

Electronic copy available at: https://ssrn.com/abstract=4502155

Nationale-Nederlanden v *Van Leeuwen*.[69] The Dutch supreme court makes it clear that these European requirements apply not only to national administrative law, in which this directive was implemented in the Netherlands, but also to national private law.

Furthermore, the complementarity model is manifest in the emerging links between civil and administrative proceedings. Like in the substitution model, such links are designed to ease the burden of proving a regulatory violation and thus facilitate private enforcement of European private law. In contrast to the substitution model, however, the complementarity between European and national private law in the remedial domain does not preclude private law courts from making their own assessment of whether a regulatory standard has been breached, but merely assists the parties in establishing such breach. This model has been adopted, for example, by the Representative Actions Directive ((EU) 2020/1828) which provides for an EU collective redress mechanism for consumers. This directive obliges Member States to ensure that the final decision of an administrative authority of any Member State concerning the existence of an infringement harming collective consumer interests can be used by all parties as evidence in the context of any other action before their national courts to seek redress measures against the same trader for the same practice.[70] The directive also clarifies that '[i]n line with the independence of the judiciary and the free evaluation of evidence, this should be without prejudice to national law on evaluation of evidence.'[71]

5.3 Implications

The above discussion shows that the complementarity model preserves the autonomy of national private law from European private law. Unlike in the separation model, however, this autonomy is not absolute. First, the complementarity model opens up space for the effect in national private law of EU private law rules implemented in national public law, as well as the related findings in administrative proceedings. This effect typically ensures the baseline level of regulatory protection in private law and fosters private enforcement. In the case of *Vereniging Woekerpolis.nl* v *Nationale-Nederlanden*, therefore, the aggrieved clients could invoke the insurance company's information duties emanating from EU law in support of their claim. Furthermore, national private law can be constrained by the EU level requirements for the imposition of additional obligations on regulated entities based on the open-ended private law norms.

The complementarity model allows national private law to modernise itself by accommodating the regulatory expertise within its ambit and thus contribute to the realisation of EU policy goals. In the light of the MiFID II client classification and conduct of business rules, for instance, private law courts could extend the protection commonly enjoyed in private law by natural persons investing their savings to small- and medium-sized enterprises, such as a property developer in the case of *Grant Estates Ltd* v *The Royal Bank of Scotland Plc*, discussed above. Similarly, the courts could accommodate the investment advisers' regulatory duty to inquire about their clients' non-financial objectives into the traditional private law standard of care, thus assisting in the EU's effort to achieve sustainable development. In promoting the private adjudicators' reliance on EU private law rules, the complementarity model fosters the harmonisation of national private law and serves legal certainty, albeit not to the same extent as the substitution model. After all, national private law retains its ability to raise the standard of protection *ex post* in response to the particular circumstances of a concrete case and realise interpersonal justice and individual fairness where the *ex ante* regulation has failed, irrespective

[69] Case C-51/13 *Nationale-Nederlanden* v *Van Leeuwen* ECLI:EU:C:2015:286.
[70] Representative Actions Directive, Art. 15.
[71] *ibid*, recital 64.

Electronic copy available at: https://ssrn.com/abstract=4502155

of whether minimum or maximum harmonisation is pursued by the EU. Now that the Dutch supreme court has reiterated this position in its preliminary ruling in *Vereniging Woekerpolis.nl* v *Nationale-Nederlanden*, the Hague Court of Appeal may impose additional information obligations on Nationale-Nederlanden regarding the costs of investment insurance policies, provided that these obligations meet the requirements under EU law. The ability of private law to develop by trial and error in turn leaves room for diversity and facilitates a mutual learning process between European and national private law.

6. The way forward

This chapter has explored the relationship between European and national private law. It has identified three models of this relationship, each involving trade-offs between the pan-European common good and interpersonal justice, between legal certainty and individual fairness, and between uniformity and diversity.

First, EU and national private law rules may exist separately from each other. Under the separation model, regulatory rules with a European origin do not affect traditional national private law rules relating to the same subject matter. This model, therefore, does not serve well in advancing the common good, increasing legal certainty or attaining a meaningful level of harmonisation of laws in the EU. Instead, it focuses on interpersonal justice and strongly promotes diversity. However, in the absence of any effect of EU market regulation in national private law, the latter may ultimately not only jeopardise the pursuit of EU policy goals, but also fail to realise individual fairness.

Second, EU private law rules may substitute pre-existing national private law norms. The substitution model thus seeks to combine interpersonal justice with public concerns, serving legal certainty and allowing the EU to approximate national laws to a significant degree. At the same time, individual fairness and learning from the difference risk to be sacrificed on the altar of EU harmonisation activity in the name of market integration, particularly when maximum harmonisation is sought.

Third, even when EU and national private law rules formally exist alongside each other, in practice the former may still complement the latter. In fostering a dialogue between the two, the complementarity model tends to accommodate a balance between policy considerations and interpersonal justice, between legal certainty and individual fairness, and between uniformity and diversity. But in so doing, this model cannot achieve the same level of legal certainty and harmonisation as the substitution model, leaving more room for individual fairness and diversity.

These three models of the relationship between European and national private law reflect the current legislative and judicial practices in different legal systems across a variety of areas that have been subjected to EU level harmonisation. They also provide an analytical framework for assessing each pattern in terms of its ability to reconcile the relational rationality of national private law and the instrumentalist rationality of European private law. The substitution and complementarity models have the potential to reconcile these two rationalities. The substitution model, however, can only realise this potential provided that national private law systems have some room for manoeuvre in accommodating EU market regulation within their own fabric. Where such room is absent, as in the case of maximum harmonisation, the balance is decisively tilted in favour of the EU's instrumentalist discourse. Finally, the separation model is least well-suited for accommodating both rationalities, clearly favouring the logic of traditional national private law over that of European private law.

Electronic copy available at: https://ssrn.com/abstract=4502155

Theory building is important because it advances our understanding of how national private law systems respond to EU market regulation and how these responses in turn affect the competing values at stake in the Europeanisation process. But what should the actors involved in law-making and enforcement in a multi-level and heterarchical EU legal order do as a result? In particular, how should national legislators and courts treat EU regulatory rules prescribing certain private conduct, such as information duties? And what could be done at EU level to improve the effectiveness of harmonisation measures in the field of European private law? We need therefore to draw out some of the key practical implications of the foregoing analysis for legal practice, though these are not exhaustive.

With respect to the implementation and application of European private law at national level, it should be emphasised that national legislators are not entirely free to choose between the three models outlined above. In addition to the general EU principles of effectiveness and equivalence, space for national choices is in the first place constrained by the material scope of the relevant EU harmonisation regime as reflected in its legal grammar. The private law grammar, such as the one of the Unfair Contract Terms Directive, typically leaves national legislators little choice but to ensure, in line with the substitution model, that the relevant (component of) EU measure becomes part of the private law system. In contrast, the public law grammar, which is manifest, for instance, in MiFID II, leaves room for each of the three models to guide the interface between European and national private law. After all, the public law-oriented harmonisation measures may be implemented in the private law framework, in which case the substitution pattern will dominate the relationship between the two. Alternatively, they may be transposed in the public law framework, which will allow national private law courts to adopt either the separation model or the complementarity one. Given the limitations of the separation model in reconciling EU market regulation and national private law, however, the adoption of the complementarity model by the courts is the preferred option.

Further, in some areas, the EU has adopted rules that link civil and administrative proceedings, thus restricting the national procedural autonomy of the Member States to a greater or lesser degree. For instance, while the Antitrust Damages Directive reflects the substitution model, the Representative Actions Directive has strong resonances with the complementarity model. But in other areas, national legislators and private law courts remain free to develop such links in order to facilitate private enforcement of European private law. The complementarity model, which does not tie judges' hands by requiring them to adhere to administrative decisions, appears to be particularly appropriate for this purpose.

With respect to the private-law making at EU level, it is important to realise that the choice of the public or private law grammar by the European legislator in a particular harmonisation measure shapes the relationship between European and national private law at Member State level. This relationship in turn has a bearing on the ability of EU measures to achieve their regulatory objectives, and the overall shape of European integration more generally. In particular, the maximum harmonisation effects of a particular EU measure in national private law can be neutralised by its public law grammar where such grammar leads to the separation or complementarity between EU and national private law rules. This shows the delicacy involved in balancing not only the contributions of the EU and Member States, but also that of public and private law instruments to the development of the regulatory framework for private law relationships that underpins the process of market integration.

When making European private law, therefore, the EU legislator should be more sensitive to the type of legal grammar – public or private – that it intends to use, thus building a stronger connection with national legal systems. Rediscovering the public/private law divide in this sense does not mean redrawing the strict line between public and private law. As this chapter

Electronic copy available at: https://ssrn.com/abstract=4502155

has shown, the dividing line between public and private law has indeed blurred, with the EU legislator experimenting with both instruments in constructing the internal market. But in order to be able to experiment, one had better understand what one is actually experimenting with. As Armin von Bogdandy once remarked when exploring the idea of contemporary European public law, 'any observation of hybridity requires an understanding of the individual components that render something hybrid; a hybrid car is a car that uses combustion engine and an electric motor, and a mule is a cross between a horse and a donkey'.[72] In my view, the acknowledgement of the public/private distinction for descriptive and analytical purposes in European private law could lead to more evidence-based law-making that would enable the EU legislator to assess the relative merits of each approach (or a combination of the two) more accurately, and to ultimately choose the one most suited to pursue a particular policy goal.

In this context, the role of interpersonal justice in European private law deserves particular attention, given that its predominantly internal market-oriented discourse sits uneasily with the traditional focus of national private law on private autonomy and balancing the competing interests of private parties. Academic and policy efforts, notably the creation of the Draft Common Frame of Reference (DCFR), were made to reconcile the two in order to ensure a more systematic approach to the harmonisation of private law anchored in traditional private law.[73] However, these efforts have failed so far to change the current path of European private law development, characterised by piecemeal and often uncoordinated EU level responses to potentially problematic market behaviours. Although concerns about the balancing of individual interests pervade many of its areas, they do not take central stage in European private law. In order to enhance the role of interpersonal justice in the internal market and develop a more coherent European private law, the current bottom-up pathway thereto could be complemented by a more top-down roadmap that builds on the EU *principles* of private law justice rather than specific private law *rules*.[74] Such a charter could include, for instance, the principle of substantive private autonomy,[75] echoing the 'materialisation' of private law in national legal systems.[76] This in turn would enable the EU institutions to embrace justice between substantively free and equal persons as a distinct value when pursuing their regulatory objectives.

The adoption of the European charter of private law justice would not imply 'more Europe' in the sense of maximum harmonisation of private law. Perhaps the most important lesson to be learned from this narrative is that the move towards more uniformity in European private law could and should be recalibrated in favour of more flexibility and diversity in and through national private law. The Dutch *woekerpolis*-saga highlights the practical significance of this finding.

---

[72] A. von Bogdandy, 'The Idea of European Public Law Today' in A. von Bogdandy et al (eds), *The Max Planck Handbooks in European Public Law* (Vol. 1, Oxford: OUP, 2017), 1, 13.

[73] See European Commission, Communication from the Commission to the European Parliament and the Council – A More Coherent European Contract Law – An Action Plan, *OJEU* 2004 C 76E/95; Study Group on a European Civil Code & Research Group on EC Private Law (Acquis Group), *Principles, Definitions and Model Rules of European Private Law Draft Common Frame of Reference (DCFR)* (Munich: Sellier, 2009); European Commission, *Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law*, COM(2011) 635 final.

[74] For a recent proposal to this effect see M.W. Hesselink, 'Reconstituting the Code of Capital: Could a Progressive European Code of Private Law Help Us Reduce Inequality and Regain Democratic Control?' (2022) 1 *European Law Open*, 316. See also O.O. Cherednychenko, 'Pathways to Interpersonal Justice in European Private Law: Bottom-up or Top-down?' (2022) *European Law Open*, 423.

[75] Cherednychenko, n 74 above.

[76] M. Weber, *Economy and Society* (Berkeley: University of California Press, 1992), 886.

Electronic copy available at: https://ssrn.com/abstract=4502155