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Rediscovering the public/private divide in EU private law

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Abstract

This article explores the role of the public/private divide within EU private law. It shows that although EU private law cuts across the boundaries of public and private law, the conceptual distinction between these well-established categories does matter within it and may lead to better law-making in the EU more generally. The legal grammar of a particular EU harmonisation measure—which can be more "public" or "private"—may have important implications for the position of private parties at national level, for the CJEU's likely activism in this context, and ultimately for the measure's ability to realise its policy goals. Therefore, instead of ignoring the existing differences between public and private law, EU law should explicitly adopt the public/private law language in its discourse, without, however, introducing any sharp divide between these two areas.

1 | INTRODUCTION

This article revisits the controversy surrounding the public/private divide in EU law, with a particular focus on the inner dynamics of private law making. The aim is to demonstrate that although EU private law cuts across the boundaries of public and private law in national legal systems, the conceptual distinction between these well-established categories does matter within the EU private law itself and may lead to better law-making in the EU more generally.

The public/private divide forms, first and foremost, part of the legal traditions of the Member States. Private law has traditionally been conceived as that part of law which secures a sphere of positive freedom for private parties and is concerned with corrective justice between the parties.[2] In contrast, public law has been commonly associated with regulation of a mandatory nature adopted in the pursuit of the public interest and distributive justice. The separation of the public and private realms along these lines has also been reflected in the domain of enforcement, with

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[2]See, e.g., E.J. Weinrib, *The Idea of Private Law* (Harvard University Press, 1995); F. Bydlinki, *System und Prinzipien des Privatrechts* (Springer, 1996).

private law being traditionally enforced by the judiciary at the initiative of a private party and with public law being the province of competent public authorities. Particularly in the last 60 years or so, however, the public/private divide in this orthodox sense has been challenged by many authors[3] and has probably been most debated in the context of EU law.[4] Dorota Leczykiewicz and Stephen Weatherill, for example, aptly point to the "calculatedly ambiguous character" of EU law and explain it as follows: "It is not 'public law' in the orthodox sense(s) understood at national level, nor is it private law. It is both and it is neither. In fact, EU operates without any such anchor, which makes it fluid and which makes it at the same time unstable. EU challenges and sometimes transforms orthodox categorisations within national legal orders."[5] This is particularly true if we take a closer look at EU private law.

EU private law can be understood in a broad sense as the body of EU secondary law as interpreted by the Court of Justice of the European Union (CJEU) which affects the relationships between private parties, regardless of the nature of the law—public or private—in which it has been transposed into the national legal order of a particular Member State. EU private law thus covers many areas which, to a greater or lesser extent, have been harmonised by the EU in the pursuit of the internal market project, such as consumer law, unfair trading law, financial services law and environmental liability law, and includes various EU measures, such as the Unfair Contract Terms Directive[6] and the Unfair Commercial Practices Directive,[7] the Product Liability Directive[8] and the Environmental Liability Directive,[9] the Payment Services Directive II[10] and the Markets in Financial Instruments Directive II,[11] to name but a few.[12]

The bulk of what is known as EU private law today has developed in three major phases.[13] During the first phase, the European Economic Community had very limited possibilities to harmonise private law, but nevertheless managed to adopt some measures in this area, notably the Product Liability Directive (1957–1986). The second, much more intense, phase of harmonisation gained momentum after the adoption of the Single European Act 1986, which recognised the need for a high level of consumer protection and introduced majority voting in the Council of Ministers (1985–2000). This period saw the introduction of minimum standards of protection for consumers and other weaker parties through EU secondary law, while leaving the Member States considerable room for manoeuvre

[3]See, e.g., L. Green, 'Tort Law: Public Law in Disguise' (1959) 38 *Texas Law Review*, 1; M.J. Horwitz, 'The History of the Public/Private Distinction' (1982) 130 *University of Pennsylvania Law Review*, 1423; D. Kennedy, 'The Stages of the Decline of the Public/Private Distinction' (1982) 130 *University of Pennsylvania Law Review*, 1349; H. Collins, *Regulating Contracts* (Oxford University Press, 1999); A. Harel, 'Public and Private Law', in M. Dubber and T. Hörnle (eds.), *Handbook on Criminal Law* (Oxford University Press, 2014), 1040.

[4]See, e.g., N. Reich, 'The Public/Private Divide in European Law', in H.-W. Micklitz and F. Cafaggi (eds.), *European Private Law after the Common Frame of Reference* (Edward Elgar, 2010), 56; H.-W. Micklitz, 'Rethinking the Public/Private Divide', in M. Maduro *et al.* (eds.), *Transnational Law: Rethinking European Law and Legal Thinking* (Cambridge University Press, 2014), 271; H. Collins, 'Governance Implications for the European Union of the Changing Character of Private Law', in F. Cafaggi and H. Muir-Watt (eds.), *Making of European Private Law: Governance Design* (Edward Elgar, 2009), 269; D. Leczykiewicz and S. Weatherill, 'Private Law Relationships and EU Law', in D. Leczykiewicz and S. Weatherill (eds.), *The Involvement of EU Law in Private Law Relationships* (Hart Publishing, 2013), 1; H. Dagan, 'Between Regulatory and Autonomy-Based Private Law' (2016) 22 *European Law Journal*, 644; M.W. Hesselink, 'Private Law, Regulation, and Justice' (2016) 22 *European Law Journal*, 681.

[5]Leczykiewicz and Weatherill, above, n. 3, at 2.

[6]Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ L 95/29, 21.4.1993.

[7]Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No. 2006/2004 of the European Parliament and of the Council, OJ L149/22, 11.6.2005.

[8]Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, OJ L 210/29, 7.8.1985.

[9]Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage, OJ L 143/56, 30.4.2004.

[10]Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC, OJ L 337/35, 23.12.1015.

[11]Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU, OJ L 173/349, 12.6.2014.

[12]See the definition of "European regulatory private law" provided in H.-W. Micklitz, 'The Visible Hand of European Regulatory Private Law' (2009) 28 *Yearbook of European Law*, 3.

[13]On the historical dynamics of European integration in European private law, see H.-W. Micklitz, *The Politics of Justice in European Private Law: Social Justice, Access Justice, Societal Justice* (Cambridge University Press, 2018), 164 *et seq.*

not only with respect to standard-setting, but also in enforcement matters. The third harmonisation phase, characterised by a greater intrusion by the EU into the national legal orders, was prompted by the Lisbon Strategy launched by the European Council in 2000 with a view to making the Union the most competitive knowledge economy in the world (from 2000 onwards). In particular, this phase has been marked by a move from minimum to full harmonisation, the rise of regulation of specific markets (such as energy, telecommunications and financial services), and the increasing role of administrative agencies in the enforcement of EU private law, at both EU and national level (a process known as 'agencification').[14]

The wide definition of EU private law as formulated above reflects its regulatory and functional nature. As has been widely noted in the literature, the EU legislator has been using private law as an instrument for establishing the European internal market.[15] In this context, it has also been promoting the public enforcement of EU private law by administrative agencies and alternative dispute resolution (ADR) outside civil courts.[16] In so doing, it has not, at least not explicitly, acknowledged the relevance of the conventional public/private distinction. In particular, the EU legislator has commonly refrained from prescribing a particular mode of implementation within national legal orders, leaving it to the Member States to choose whether to transpose a particular EU directive within administrative law, private law, or both. Such a functional approach is also in line with Article 288 of the Treaty on the Functioning of the European Union (TFEU) under which a directive is binding upon Member States only as to the result to be achieved, but not as to the choice of form and methods.

The emergence of EU private law in the above sense has profoundly challenged the traditional understanding of private law as it had evolved in national legal systems. In particular, it has prompted or fostered the development of legal hybrids,[17] such as "constitutionalised private law",[18] "regulatory private law",[19] or "supervision private law".[20] But does an increasing entanglement of the public and private spheres and enforcement modes in the process of Europeanisation imply that the orthodox distinction between public and private law has not played any role whatsoever in the making of EU private law? Or does it mean that this distinction has become wholly obsolete in the context of a post-nation-state European private law laboratory and that it should therefore be simply disregarded by the EU legislature as the irrelevant legacy of the nation-state era?

My argument, in a nutshell, is that despite the blurring line between public and private law, the conceptual distinction between these two legal categories has not entirely lost its significance today, neither within national legal orders nor within the EU private law itself. A distinction reminiscent of the traditional public/private divide can be traced in EU private law. Some EU harmonisation measures not only regulate the conduct of businesses vis-à-vis private parties and/or liability for damage caused by their products or activities, but also clearly confer individual rights and remedies on such parties. By contrast, other EU measures limit themselves to the former

[14]See, e.g., M. Scholten and M. van Rijsbergen, 'The Limits of Agencification in the European Union' (2014) 15 *German Law Journal*, 1223.

[15]See, e.g., C.U. Schmid, 'The Instrumentalist Conception of the Acquis Communautaire in Consumer Law and its Implications on a European Contract Law Code' (2005) 1 *European Review of Contract Law*, 210; Micklitz, above, n. 11; 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 University Press, 2013), 148; 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* (Hart Publishing, 2018), 315.

[16]See, e.g., O.O. Cherednychenko, 'Public Supervision over Private Relationships: Towards European Supervision Private Law?' (2014) 22 *European Review of Private Law*, 37–67; O.O. Cherednychenko, 'Public and Private Enforcement of European Private Law: Perspectives and Challenges' (2015) 23 *European Review of Private Law*, 481, 485; H.-W. Micklitz, 'The Transformation of Enforcement in European Private Law: Preliminary Considerations' (2015) 23 *European Review of Private Law*, 491, 498.

[17]On this phenomenon in more detail, see Micklitz, above, n. 3, at 272 *et seq.*; Y. Svetiev, 'The EU's Private Law in the Regulated Sectors: Competitive Market Handmaiden or Institutional Platform?' (2016) 22 *European Law Journal*, 659.

[18]Micklitz, above, n. 3. On this phenomenon in more detail, see, e.g., O.O. Cherednychenko, *Fundamental Rights, Contract Law and the Protection of the Weaker Party* (Sellier, 2007); C. Mak, *Fundamental Rights in European Contract Law* (Kluwer Law International, 2008); V. Trstenjak, 'General Report: The Influence of Human Rights and Basic Rights in Private Law', in V. Trstenjak and P. Weingerl (eds.), *The Influence of Human Rights and Basic Rights in Private Law* (Springer, 2016), 3; H. Collins, 'Building European Contract Law on Charter Rights', in H. Collins (ed.), *European Contract Law and the Charter of Fundamental Rights* (Intersentia, 2017), 1.

[19]Micklitz, above, n. 11.

[20]Cherednychenko (2014), above, n. 15.

aspect, focusing primarily on the public enforcement of harmonised rules. While the more public or private law orientation of EU harmonisation measures is not the result of a systematic analysis of the relative merits of each model, once a piece of secondary law is adopted, its fate in different national legal systems will to an important degree be determined by the particular balance of public and private law elements that have emerged from the EU's legislative itinerary. The legal grammar of a particular EU Directive—which can thus be more "public" or "private"—may have important practical implications for the position of private parties in terms of their rights and remedies at national level, for the CJEU's ability and willingness to engage in judicial activism to improve this position when interpreting the Directive, and ultimately for the Directive's ability to realise its policy goals. Therefore, instead of ignoring the existing differences between the public and private law approaches, EU law should explicitly adopt the public/private law language in its discourse. Acknowledging the distinction between the "public" and "private law" grammar options in EU private law for descriptive and analytical purposes does not mean redrawing the strict line between these two areas of law. Rather, rediscovering the public/private divide along these lines would imply greater conceptual clarity, which is much needed in order to be able to choose the adequate means to pursue a particular policy goal and thus to improve the EU private law making.

In the light of the foregoing, the article proceeds in three stages. It first maps the public and private law discourses as they have developed in the legal systems of the Member States (Section 2). It subsequently turns to EU private law and examines the relevance of the public/private divide at EU level by using three sets of contrasting examples. These examples are culled from different areas of EU private law—unfair contract terms and unfair commercial practices, product liability and environmental liability, payment services and investment services—and span the three phases of European harmonisation identified above (Section 3). The article concludes with some reflections and an outlook on the role of the public/private divide in EU private law, on its implications for the broader narrative on European integration in this domain, and on directions for further research (Section 4).

2 | THE PUBLIC/PRIVATE DIVIDE IN NATIONAL LEGAL SYSTEMS

To understand the role of the public/private divide within EU private law, we need first to examine the rationale for this distinction, which has shaped the development of national legal systems in the past hundred years or more and which is reflected in European legal scholarship where public and private law are still largely studied separately. While the conceptual distinction between public and private law has primarily evolved in continental legal systems, it is not entirely unknown to common law countries either. In particular, the conventional assumptions about private law as a distinct conceptual category have been tacitly reflected in the English private common law discourse.[21] Over the years, many theories have developed to justify the partition of the law into public and private realms, focusing, in particular, on the subjects involved in a legal relationship, the protected interests, the kind of justice pursued, and the initiative for enforcement.[22] While no theory has escaped criticism and would justify a strict separation between public and private law today, each theory provides insights into certain differences between the two domains. Although these differences are not absolute ones but rather only matters of emphasis, they do shed light on the key features of public and private law which allow one to distinguish between these two categories. In the following, therefore, the public and private law discourses will be outlined as two "ideal" types of legal grammar, using four closely interrelated criteria which are particularly relevant in the present context—that is, subjects, interests, justice and enforcement.

[21]Cf. Collins, above, n. 2, at 31 *et seq*.

[22]For an overview, see, e.g., Cherednychenko, above, n. 17, at 24 *et seq*.

2.1 | Public law

Public law generally governs the relationships between public authorities and citizens and between the public authorities themselves. A public authority is typically empowered to act on the basis of a specific competence. With the modern regulatory state increasingly entrusting public tasks to a plethora of semi-independent public and private actors, nowadays public authority no longer exclusively lies in the hands of "obvious" state bodies. Instead, it is scattered across a variety of public and private organisations, signifying a shift from centralised government to network governance in national administrative law.[23] The unique position of public authorities (including private organisations acting in this capacity) vis-à-vis citizens and other public authorities in terms of their legitimacy is the primary focus of public law, in particular constitutional and administrative law.

Public authorities are expected to protect the general interest of the society as a whole ("public interest") rather than private interests of its individual members. In line with this, public law has been considered to be the domain of distributive justice concerned with the fair allocation of goods to the members of the society.[24] Distributive justice, and thence public law, would secure a fair share of wealth for each person given his or her personal circumstances. When a private organisation acts as a public authority when performing activities in the public domain, such as the provision of subsidies, it is governed by public law.

Public law employs a wide range of techniques to enforce its standards, including licensing of businesses, inspections, punitive fines and even imprisonment. What these techniques share in common is the leading role of the state and its agencies in monitoring compliance and enforcing the standards, using collective resources. The growing role of administrative agencies entrusted with supervising particular markets (such as energy, telecommunications or financial services) deserves particular mention here. The enforcement techniques employed by such agencies are supposed to secure *ex ante* compliance with and deter breaches of legal standards. As a rule, they do not provide remedies to the aggrieved parties, in particular in individual cases.

2.2 | Private law

In contrast to public law, private law is concerned with the relationships between private parties—that is natural and legal persons. These include, for example, traders and consumers, investment firms and investors, gas and oil companies and environmental organisations. A public authority may also act as a private person, for example, when buying goods or services, in which case it will be subject to private law.

Traditionally, private law has been associated with corrective justice between the parties as formally free and equal persons, with their personal differences, in terms of bargaining power, for example, being completely irrelevant when determining what would be fair between them.[25] Corrective justice, and thence private law, would preserve the share that belongs to each. The conventional view has been challenged by developments within private law itself in the second half of the twentieth century, such as the "materialisation of law"[26] and the increasing importance of policy considerations in private law discourse,[27] and, more recently, by the growing

[23]On this development, see, e.g., J. Black, 'Critical Reflections on Regulation' (2002) 27 *Australian Journal of Legal Philosophy*, 1, *6 et seq*.; M. Ruffert, 'The Transformation of Administrative Law as a Transnational Methodological Project', in M. Ruffert (ed.), *The Transformation of Administrative Law in Europe* (Sellier, 2006), 3; G. Jurgens and F. van Ommeren, 'The Public-Private Divide in English and Dutch Law: A Multifunctional and Context-dependent Divide' (2012) 71 *Cambridge Law Journal*, 172; L. van den Berge, 'Rethinking the Public-Private Law Divide in the Age of Governmentality and Network Governance: A Comparative Analysis of French, English and Dutch Law' (2018) 5 *European Journal of Comparative Law and Governance*, 119.

[24]See, e.g., E.J. Weinrib, *The Idea of Private Law* (Oxford University Press, 2012).

[25]See, e.g., J. Rawls, *Political Liberalism* (Columbia University Press, 1993); R. Dworkin, *Law's Empire* (Harvard University Press, 1986); E.J. Weinrib, *Corrective Justice* (Foundation Press, 2012).

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

[27]See, e.g., Collins, above, n. 2.

public interest litigation.[28] At the same time, however, the basic ethical-societal conception of private law as the law which primarily focuses on relational justice between the parties has remained present to date.[29] First and foremost, modern private law rules determine interpersonal rights and duties in the relationship between the individuals as self-determining agents rather than as subjects of public authorities or citizens. The individual rights of the parties under private law, in turn, are complemented by remedies. Modern contract law, for example, safeguards the parties' substantive freedom from imposed contracts, taking into account their bargaining power, and protects the parties' expectations of performance from disappointment by providing them with remedies. Tort law, in turn, protects individual entitlements to be free from wrongful injury, thus safeguarding personal responsibility.[30]

Private law does not use state resources to police compliance, only to secure enforcement of the compensatory remedy for the individual. The latter has to finance the enforcement of his or her rights except to the extent that the state provides some financial aid towards the costs of legal representation. In order to obtain relief, the individual who has suffered from the breach of a private law norm will normally have to take action before a civil court or an ADR body against the one who has wronged him or her by using the characteristic private law enforcement tools, such as a claim for performance, a claim for damages, or a claim for the termination of the legal relationship. Private law thus typically functions *ex post*, that is, only after a breach of the standard, relying on claims brought by individuals for compensation or a court order that the defendant should refrain from breaching the standard. Unlike public law, which uses deterrent remedies, such as fines, that exceed the actual losses to the claimant, private law generally provides for a system of corrective remedies. The latter balance the competing interests of the parties so that the claimant is merely not worse off financially as a result of the wrong committed by the defendant.

3 | THE PUBLIC/PRIVATE DIVIDE IN EU PRIVATE LAW

The preceding analysis has shown that the conceptual distinction between public and private law in national legal systems serves both descriptive and normative purposes, and, in essence, manifests itself today in differences of focus and enforcement tools. Public law focuses on the vertical relationship between public authorities and private parties and equips public authorities with the necessary powers and enforcement instruments to enable them to act in the public interest. In contrast, private law constructs a horizontal legal framework which allows private parties to shape their legal relationships as self-determining agents and which primarily seeks to ensure the balance between the interests of the parties through their respective rights and remedies, while at the same time being not insensitive to the common good.

The EU profoundly challenges the public/private divide along these lines, and, in particular, the notion of private law as it had developed in national legal systems. As noted above, the *acquis communautaire* affecting the relationships between private parties is primarily concerned with creating the internal market and is therefore regulatory and functional in nature. The main question posed by the European legislator has been not how to ensure justice

[28]A well-known example of this is the *Urgenda* case in which the Dutch State was ordered by the court to cut its greenhouse emissions by 25% in 2020 compared to its emissions levels in 1990 (see the Hague Court of Appeal, 9 October 2018, ECLI:NL:GHDHA:2018:2591). Some authors refer in this context to "judge-made risk regulation" as an instrument to redress alleged failures of public regulation, in particular in stopping climate change. See, e.g., E. R. de Jong, M.G. Faure, I. Giesen and P. Mascini, 'Judge-made Risk Regulation and Tort Law: An Introduction' (2018) 9 *European Journal of Risk Regulation*, 6.

[29]Cf. 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* (Joseph Beuys/Bono, 2011), 7, at 21, who speaks about the weak version of corrective justice in modern private law. According to it, if one were to hypothetically ignore the regulatory dimension of a particular private law norm beyond the relationship between the parties, the application of the norm should lead to the outcome which respects the minimum requirements of justice between the parties. See also, e.g., C.-W. Canaris, *Die Bedeutung der iustitia distributiva im deutschen Vertragsrecht* (C.H. Beck, 1997), 35 et *seq.*; Dagan, above, n. 3, at 650 *et seq.*; Hesselink, above, n. 3, at 691 *et seq.*

[30]Even though a court decision in an individual tort case may have implications far beyond the litigating parties, it primarily addresses the traditional issue of whether the claimant is entitled to the specific relief sought against the defendant. Cf. D.A. Kysar, 'The Public Life of Private Law: Tort Law as a Risk Regulation Mechanism' (2018) 9 *European Journal of Risk Regulation*, 48.

between market participants, but rather how to make the internal market function better. In this context, private law has been viewed as an instrument for achieving market integration. It does not therefore come as a surprise that, as a product of this regulatory philosophy, EU private law, in particular contract law, differs considerably from the national private law in the above sense.

Hugh Collins, for instance, describes EU contract law as "techno-law", given its narrow instrumentalism, incompleteness and focus on representative entities instead of persons.[31] As he puts it:

> Unlike private law in national legal systems, techno-law is not concerned with people and their interests as ends in themselves, but rather with functioning economic entities in the market and the market itself. Its laws are not addressed to persons, but at traders, consumers, financial intermediaries, commercial agents, employers, undertakings and workers. EU contract law regards parties to contracts not as people or natural persons with independent interests, but rather as market functionaries—we only exist in EU contract law to play our roles in the internal market.[32]

Insofar as justice considerations influence EU private law, they are mainly concerned with what Hans Micklitz has called "access justice" beyond the nation-state.[33] In his words:

> Access justice materialises the *theoretical chance* of EU citizens to participate in the market so as to make it a realistic opportunity. Access justice lays down *procedural* requirements for proper enforcement of EU private law. Access justice provides for an *institutional* design that allows for the participation of EU citizens in civil society.[34]

Access justice in this sense, however, cannot be equated with relational justice between the parties pursued by national systems of private law. Insofar as EU private law is concerned with the balancing of the interests of the parties, this interpersonal dimension typically plays a subsidiary role.[35] Furthermore, while enforcement of national private law has traditionally been considered to be the exclusive domain of the nation-state whose authority is premised on its capacity to secure justice, for the enforcement of its standards, EU private law relies on multiple avenues which do not necessarily fit into this conventional conception. In this context, it has been argued that the enforcement of EU private law has become a regulated market for dispute resolution where providing justice to consumers is a service.[36] Although the ultimate enforcement authority remains vested in state institutions, different actors, such as courts, ADR bodies and administrative agencies, compete with each other in such a market. Against this background, it can be argued that the conventional distinction between public and private law is foreign to EU private law and that it also tends to break down in national legal systems in the process of their Europeanisation.[37]

While these arguments have merit, it is nevertheless a fact that the EU measures that comprise the bulk of EU private law display some of the signs of the traditional distinction between public and private law, which in turn resonates in the harmonised areas at national level. This section shows that when pursuing similar policy goals, some EU Directives are more oriented towards public law, whereas others have been written from a more private law

[31]Collins, above, n. 14, at 318 *et seq*. See also, e.g., M.W. Hesselink, 'European Contract Law: A Matter of Consumer Protection, Citizenship, or Justice?' (2007) 15 *European Review of Private Law*, 323; G. Davies, 'The Consumer, the Citizen, and the Human Being', in D. Leczykiewitz and S. Weatherill (eds.), *The Images of the Consumer in EU Law* (Hart Publishing, 2016), 325; 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.

[32]Collins, above, n. 14, at 321.

[33]Micklitz, above, n. 12, 2 *et seq*.

[34]*Ibid*., 2.

[35]Cf. Collins, above, n. 14, at 321.

[36]A. Wechsler and B. Tripković, 'Conclusions: Enforcement in Europe as a Market of Justice', in H.-W. Micklitz and A. Wechsler (eds.), *The Transformation of Enforcement: European Economic Law in Global Perspective* (Hart Publishing 2016), 377.

[37]See, e.g., Micklitz, above, n. 3.

perspective, and that the legal grammar in this sense does matter in practice, especially in terms of the parties' rights and remedies at national level and the CJEU's likely activism in this context.

The following paragraphs provide three sets of examples that illustrate the contrast I seek to draw between public and private law within EU private law. These examples span the three phases of its harmonisation as outlined in Section 1 above. The first one juxtaposes the Unfair Contract Terms Directive (UCTD) and the Unfair Commercial Practices Directive (UCPD)—two major EU horizontal measures with relevance to contract and tort law adopted, respectively, in the second and third phase of the EU harmonisation of private law, which are closely interconnected in practice, but have nevertheless been drafted differently. The second set of examples concerns the instrumental use of tort law by the EU legislator, albeit not in the same way, in the Product Liability Directive (PLD) and the Environmental Liability Directive (ELD) relating, respectively, to the first and third phase of harmonisation. The third juxtaposition explores EU private law in the field of financial services and reveals striking differences between the two sector-specific EU measures both of which stem from the third phase of harmonisation—Payment Services Directive II (PSD II) and the Markets in Financial Instruments Directive (MiFID II). While an in-depth discussion of the legislative history of these harmonisation measures is beyond the scope of this article, special attention will be given to the factors that may explain the particular legal grammar of each measure and, more generally, the lack of a consistent approach to such grammar within the EU private law as a whole. Apart from the overall regulatory bias of the EU integration paradigm, these factors include, for example, the historical dynamics of the EU harmonisation of private law, its path dependency, as well as the political constraints surrounding the EU law-making process.[38]

3.1 | Unfair Contract Terms Directive (UCTD) vs. Unfair Commercial Practices Directive (UCPD)

UCTD is one of the major pieces of EU legislation which lies at the root of EU private law. The purpose of this Directive, adopted during the second harmonisation phase, is to ensure a minimum harmonisation of national laws relating to unfair terms in contracts concluded between a seller or supplier and a consumer with a view to protecting the consumer against the abuse of power by the seller or supplier.[39] Even though, like other EU measures in this field, UCTD fits into the general objective of completing the EU internal market, this Directive builds upon the pre-existing national private law rules on unfair contract terms control[40] and has a strong interpersonal dimension.

In particular, UCTD is clearly concerned with ensuring the balance between the interests of the seller or supplier and the consumer, in line with the traditional private law approach. According to Article 3(1) of UCTD, "[a] contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer."[41] The combined use of the concepts of "good faith" and "significant imbalance" as criteria for determining the unfairness of a pre-formulated contract term is reportedly the result of a compromise between France and Germany arguing in favour of the former and the UK pleading for the latter, which was supposed to allow Member States to choose the concept that would fit into their national private law.[42] In its judgement

[38]On such factors in more detail, see, e.g., N. Jabko, *Playing the Market: A Political Strategy for Uniting Europe, 1985–2005* (Cornell University Press, 2006); Micklitz, above, n. 12; Bartl, above, n. 14.

[39]UCTD, art. 1(1) and recitals 8–10.

[40]In particular, the Unfair Contract Terms Directive is based on the German Act on General Terms and Conditions of Trade (*Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen* (*AGBG*)) 1976. See 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* (Routledge, 2016), 173, at 174.

[41]See also UCTD, art. 4(1) which lays down a number of factors to be taken into account when assessing the unfairness of a contractual term. According to art. 4(2) of the UCTD, the main subject matter of the contract and the adequacy of the price and remuneration are excluded from such an assessment, in so far as these terms are in plain intelligible language.

[42]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, at 785.

in *Aziz*,[43] however, the CJEU clearly embarked upon developing an autonomous EU concept of "good faith", which requires national courts to balance the interests of the parties in an individual case when assessing whether a particular pre-formulated term causes a "significant imbalance" in the contract to the detriment of the consumer.[44] According to the CJEU, the national court must determine "whether the seller or supplier, dealing fairly and equitably with the consumer, could reasonably assume that the consumer would have agreed to such a term in individual contract negotiations."[45]

Furthermore, although the Member States are obliged to ensure public enforcement of UCTD[46] and to enable collective action before the courts or administrative bodies to prevent the continued use of unfair contract terms,[47] this Directive is primarily concerned with individual consumer redress. Notably, Article 6(1) of UCTD states that unfair contract terms shall "not be binding on the consumer". In the words of the CJEU, this provision "aims to replace the formal balance which the contract establishes between the rights and obligations of the parties with an effective balance which re-establishes equality between them."[48] While Article 6(1) of UCTD leaves it to the Member States to determine the legal consequences of unfairness in their national legal orders (absolute or relative nullity), it does explicitly confer an individual right on consumers under EU law not to be bound by such terms and requires Member States to provide for an effective remedy against businesses that use them. In order to ensure the effectiveness of the consumer protection intended by the Directive, the CJEU gradually strengthened the procedural position of consumers in the enforcement domain. In particular, it introduced the *ex officio* obligation of the national courts to apply UCTD in civil proceedings and developed increasingly sophisticated criteria for this procedural remedy.[49] In a similar vein, the CJEU established a link between declaratory and enforcement mortgage proceedings, pointing to the need for the national court—which has jurisdiction to assess the fairness of a contract term on which the creditor's right to seek enforcement against the consumer debtor is based—to grant interim relief capable of staying the enforcement proceedings.[50] This new procedural remedy, deduced from the principle of effectiveness, is designed to protect the rights of the overindebted consumers against the disastrous effects of the separation of declaratory and enforcement proceedings, such as the irreversible loss of a home. The Court's case-law under UCTD thus underlines a close interrelationship between individual rights under EU law, private law remedies and civil procedures.

On the whole, UCTD has become an integral part of what can be referred to as private law in the Member States, and has profoundly shaped the development of national contract laws with respect to the control of unfair contract terms. The CJEU has played a remarkable role in this development, effectively regulating not only contracts, but also national procedural autonomy, and thus stepping beyond what the EU legislator was able to deliver.[51] Particularly in the wake of the global financial crisis, the Court's judicial activism allowed it to act as a "court of last resort" for the individuals who fell victim to unfair contract terms, but could not obtain justice in their national legal systems.[52]

The distinctly "private law" grammar of UCTD becomes especially clear when we compare this EU measure with the UCPD adopted at the beginning of the third harmonisation phase. The latter aims "to contribute to the proper functioning of the internal market and achieve a high level of consumer protection" by harmonising national laws on

[43]Case C-415/11, *Mohamed Aziz v. Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)*, ECLI:EU:C:2013:164.
[44]Cf. Micklitz and Reich, above, n. 41, at 790.
[45]*Aziz*, above, n. 42, para. 69, with reference to recital 16 in the preamble to the UCTD.
[46]See Regulation (EU) 2017/2394 of the European Parliament and of the Council of 12 December 2017 on cooperation between national authorities responsible for the enforcement of consumer protection laws and repealing Regulation (EC) No. 2006/2004, OJ L 345/1, 27.12.2017.
[47]UCTD, art. 7.
[48]Case C-453/10, *Jana Pereničová, Vladislav Perenič v. SOS finance, spol. s r.o.*, ECLI:EU:C:2012:144, para. 28.
[49]See, e.g., Case C-243/08, *Pannon GSM Zrt. v. Erzsébet Sustikné Győrfi*, ECLI:EU:C:2009:350; Case C-137/08, *VB Pénzügyi Lízing Zrt. v. Ferenc Schneider*, ECLI:EU:C:2010:659; Case C-76/10, *Pohotovosť s. r. o. v. Iveta Korčkovská*, ECLI:EU:C:2010:685; Case C-472/10, *Nemzeti Fogyasztóvédelmi Hatóság v. Invitel Távközlési Zrt*, ECLI:EU:C:2012:242; Case C-472/11, *Banif Plus Bank Zrt v. Csaba Csipai, Viktória Csipai*, ECLI:EU:C:2013:88.
[50]*Aziz*, above, n. 42.
[51]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.
[52]On this in more detail, see Micklitz and Reich, above, n. 41.

unfair commercial practices.[53] This maximum harmonisation directive forbids certain kinds of business-to-consumer marketing practices that may be described as misleading or aggressive and could harm consumers' economic interests, discouraging them from purchasing goods and services.[54]

While UCPD is generally considered to be an instance of EU private law, it significantly diverges from the conventional, nation-state, pattern of private law. Rather, it reflects the traditional understanding of unfair commercial practices at national level as public law regulating the behaviour of market participants.[55] Although the Directive effectively sets the outer limits of marketing practices that can be used by traders towards consumers, it confers no individual rights on consumers who have become victims of unfair conduct. According to Article 3(2) of UCPD, "it is without prejudice to contract law and, in particular, to the rules on the validity, formation or effect of a contract". The national general contract law doctrines of mistake, fraud and duress, therefore, are formally unaffected by the directive. In practical terms, this means that the individual consumer who has been induced into a contract by a misleading or an aggressive practice has no remedy under EU law to get out of it. Nor does the Directive provide for non-contractual remedies, in particular the extracontractual right to compensation for damages. Instead, the Directive's enforcement requirements specifically focus on the public and collective dimensions of enforcement, obliging Member States to create a regulatory apparatus that uses injunctions and fines in order to prevent and deter unfair commercial practices.[56] Thus, the UCPD currently in force is concerned with cleansing the internal market from unfair commercial practices, but not with protecting the interests of those who have been damaged by such practices and individual redress.[57]

In the absence of EU individual rights and remedies for the victims of unfair commercial practices, the ability of aggrieved consumers to obtain redress depends largely on national private law. However, according to the European Commission's recent report on the fitness check of EU consumer and marketing law,[58] the solutions currently adopted tend to vary greatly and do not always enable those who have suffered detriment at the hands of rogue traders to obtain adequate redress.[59] Although the victims of unfair commercial practices should in theory be able to rely on the national general contract law doctrines,[60] there is little national case-law pointing to a clear link between such doctrines and unfair commercial practices.[61] It is notable that the CJEU did establish a link between contract law and unfair commercial practices law, ruling that an unfair commercial practice is one of the elements on which the national court, pursuant to Article 4(1) of UCTD, may base its assessment of the unfairness of contractual

[53]UCPD, art. 1.

[54]UCPD, art. 5.

[55]Cf. Micklitz, above, n. 39, at 191.

[56]UCPD, arts. 11 and 13. Cf. H. Collins, 'The Unfair Commercial Practices Directive' (2005) 1 *European Review of Contract Law*, 417, at 424; T. Wilhelmsson, 'Scope of the Directive', in G. Howells, H.-W. Micklitz and T. Wilhelmsson (eds.), *European Fair Trading Law: The Unfair Commercial Practices Directive* (Ashgate, 2006), 49, at 51; Micklitz, above, n. 39, at 191–192.

[57]See, e.g., Micklitz, above, n. 39, at 191–192; Collins, above, n. 14, at 319.

[58]European Commission, Report of the Fitness Check on Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No. 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive'); Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts; Directive 98/6/EC of the European Parliament and of the Council of 16 February 1998 on consumer protection in the indication of the prices of products offered to consumers; Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees; Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests; Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising, SWD(2017) 208 final.

[59]See European Commission, above, n. 57, at 77 *et seq*. See also, e.g., D. Poelzig, 'Private and Public Enforcement of the UCP Directive? Sanctions and Remedies to Prevent Unfair Commercial Practices', in W. van Boom *et al*. (eds.), *The European Unfair Commercial Practices Directive: Impact, Enforcement Strategies and National Legal Systems* (Routledge, 2016), 235, at 248; F.P. Patti, '"Fraud" and "Misleading Commercial Practices": Modernising the Law of Defects in Consent' (2016) 12 *European Review of Contract Law*, 307, at 312.

[60]Cf., e.g., S. Whittaker, 'The Relationship of the Unfair Commercial Practices Directive to European and National Contract Laws', in S. Weatherill and U. Bernitz (eds.), *The Regulation of Unfair Commercial Practices under EC Directive 2005/29: New Rules and New Techniques* (Hart Publishing, 2007), 139; M. Durovic, *European Law on Unfair Commercial Practices and Contract Law* (Hart Publishing, 2016); Patti, above, n. 58.

[61]European Commission, above, n. 57, at 93.

terms.[62] This reasoning has opened up the way for consumers harmed by unfair commercial practices to benefit from the individual remedy envisaged by Article 6(1) of UCTD. At the same time, this option remains restricted to situations involving both unfair pre-formulated contract terms and unfair commercial practices and leaves large room for manoeuvre to national courts, showing the limits of what the CJEU can do through the interpretation of a public law-oriented EU measure to improve the position of individual consumers. Moreover, the contractual remedies alone for breaches of this Directive may not suffice, as has been shown by the recent 'Dieselgate' scandal over car manufacturers falsifying emissions data, which may constitute a misleading commercial practice. After all, contractual remedies only allow consumers to sue the consumers' contractual counterparts for damages, which in this case are usually the car sellers, but not the car manufacturers who had installed the emissions-test-cheating devices in the cars.

It is notable that in 2018, more than a decade since the adoption of UCPD, the European Commission proposed to amend this Directive to include individual consumer remedies with a view to improving its effectiveness.[63] The proposal, which makes part of the Commission's recent initiative, called, somewhat ambitiously, "New Deal for Consumers",[64] 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.[65] Thus, the proposed revision of UCPD would provide an opportunity to calibrate its "public law" grammar to allow for clear EU-wide individual remedies for the consumers who have suffered detriment as a result of misleading or aggressive commercial practices. Such an upgrade of the Directive in turn would strengthen the link between unfair trading law and private law at national level and foster greater interaction between these two areas. At the same time, this new initiative by the European Commission constitutes acknowledgement of the limitations of the "public law" grammar in protecting consumers against unfair commercial practices and casts doubt on the appropriateness of the initial choice for this approach in the context of UCPD.

3.2 | Product Liability Directive (PLD) vs. Environmental Liability Directive (ELD)

A further, even more striking, contrast between the legal techniques used by the European legislator when making EU private law emerges when we consider the PLD and ELD, both of which use tort law as an instrument of market integration. The adoption of PLD in 1985—during the very first phase of the EU harmonisation of private law—was prompted by the thalidomide disaster in the 1960s. Thalidomide, a drug which was marketed as a mild sleeping pill safe even for pregnant women, caused thousands of babies worldwide to be born with malformed limbs. At the time, many Member States were already responding to this disaster, with the national legislatures or courts providing varying solutions to product liability issues.[66] From a European perspective, the sporadic state-by-state development of liability for defective products—resulting in different levels of protection depending upon where a product's consumer happened to be located—was undesirable.[67] Therefore, PLD sought to harmonise national laws concerning the producers' liability for defective products, such as thalidomide, covering a wide range of movables.[68] In so doing,

[62] *Pereničová*, above, n. 47, paras. 43–44. On the possible implications of this case for the relationship between UCTD and UCPD, see, e.g., B. Keirsbilck, 'The Interaction between Consumer Protection Rules on Unfair Contract Terms and Unfair Commercial Practices: Perenicová and Prenic' (2013) 50 *Common Market Law Review*, 247; Micklitz, above, n. 39.

[63] European Commission, Proposal for a Directive of the European Parliament and of the Council amending Council Directive 93/13/EEC of 5 April 1993, Directive 98/6/EC of the European Parliament and of the Council, Directive 2005/29/EC of the European Parliament and of the Council and Directive 2011/83/EU of the European Parliament and of the Council as regards better enforcement and modernisation of EU consumer protection rules, COM (2018) 185 final.

[64] European Commission, Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee 'A New Deal for Consumers', COM(2018) 183 final.

[65] *Ibid.*, at 31–32.

[66] On this in more detail, see G. Howells and M. Pilgerstorfer, 'Product Liability', in C. Twigg-Flesner (ed.), *The Cambridge Companion to European Union Private Law* (Cambridge University Press, 2010), 257, at 258–259.

[67] PLD, recital 1.

[68] *Ibid.*, art. 2.

this Directive was one of the first pieces of EU legislation that explicitly aimed to protect consumers, while ensuring competition in the single market,[69] and that required substantial adaptations of the Member States' private laws.

The "private law" grammar of PLD becomes apparent from the basic scheme of the Directive which is clearly concerned with ensuring the balance between injured persons' and producers' interests and with individual consumer redress. It imposes liability without fault, or strict liability, upon producers for damage caused by a defect in that producer's product.[70] A producer is liable where a product is "defective"—that is where it "does not provide the safety which a person is entitled to expect, taking all circumstances into account".[71] The latter include the presentation of the product, its reasonably expected use, and the time when the product was put into circulation.[72] Reasonable consumer expectations play a key role in the defectiveness assessment. Once it has been established that a product is defective, it is open to the defendant producer to seek to establish one of the defences set out in the Directive.[73] In particular, the producer will not be liable if he proves that the defect is due to compliance with mandatory regulations issued by public authorities (the regulatory compliance defence).[74] Producers may not contractually limit or exclude their liability for defective products.[75] The damages covered by the Directive include those to compensate for death or personal injury as well as the destruction of any item of property other than the defective product itself, with a lower threshold of €500.[76]

Although PLD has been interpreted by the CJEU as a full harmonisation measure,[77] this Directive does not affect the rights that consumers have as a matter of contractual or non-contractual liability.[78] Nor does it affect rights under any "special liability system" existing when this Directive was notified.[79] The strict liability regime for damage caused by defective goods introduced by PLD can thus be seen as an extra protective layer over pre-existing national civil liability regimes which allows the injured persons to hold producers liable for the above mentioned categories of losses without having to establish a duty of care or failure to take reasonable care to comply with relevant legislation.[80] What the injured person needs to prove is that the product was defective, that he or she has suffered damage, and that the two are causally connected. Notably, given the major difficulties faced by consumers in establishing a causal link between the product defect and the damage, the CJEU has repeatedly found national rules that make it easier for the injured person to do so compatible with PLD, insofar as they do not undermine the allocation of the burden of proof envisaged by the Directive.[81] Following the recent evaluation of PLD, the European Commission has concluded that while the Directive is

[69] *Ibid*., recital 5.
[70] *Ibid*., art. 1 and recital 2.
[71] *Ibid*., art. 6.
[72] *Ibid*.
[73] *Ibid*., art. 7.
[74] *Ibid*., art. 7 (d).
[75] *Ibid*., art. 12.
[76] *Ibid*., art. 9.
[77] See Case 52/00, *Commission v. France*, ECLI:EU:C:2002:252; Case 154/00, *Commission v. Greece*, ECLI:EU:C:2002:254; Case 183/00, *González Sanchez v. Medicina Asturiana* SA, ECLI:EU:C:2002:255. See also, e.g., V. Mak, 'Review of the Consumer Acquis: Towards Maximum Harmonization?' (2009) 17 *European Review of Private Law*, 55, at 60; M. Faure, 'Product Liability and Product Safety in Europe: Harmonization or Differentiation?' (2000) 53 *Kyklos*, 467.
[78] PLD, art. 13.
[79] *Ibid*.
[80] Where the development risks defence has been introduced, however, it can be argued that the civil liability regime for defective products more closely resembles fault liability based on the producer's negligence rather than strict liability. After all, the producer can escape liability if he has used all reasonable care by manufacturing the product given the most advanced state of scientific and technological knowledge available at that time. See, e.g., F. Cafaggi, 'A Coordinated Approach to Regulation and Civil Liability in European Law: Rethinking Institutional Complementarities', in F. Cafaggi (ed.), *The Institutional Framework of European Private Law* (Oxford University Press, 2006), 191, at 210; J. Stapleton, 'Products Liability in the United Kingdom: The Myths of Reform' (1999) 34 *Texas International Law Journal*, 50, at 53; R. Goldberg, *Medicinal Product Liability and Regulation* (Hart Publishing, 2013), 202.
[81] See, e.g., Case C-310/13, *Novo Nordisk Pharma GmbH v. S*, ECLI:EU:C:2014:2385 (the consumer's right to require the manufacturer of a medicinal product to provide him with information on the adverse effects of that product); Case C-621/15, *N.W., L.W., C.W. v. Sanofi Pasteur MSD SNC, Caisse primaire d'assurance maladie des Hauts-de-Seine, Carpimko*, ECLI:EU:C:2017:484 (evidentiary rules under which certain factual evidence can be considered to constitute evidence of a defect in the medicinal product and the causal link with the damage, even if there is no conclusive scientific evidence on this).

generally fit for purpose in today's digital age, there is a need to clarify the legal understanding of certain key concepts, such as "product", "damage" and the burden of proof.[82]

The PLD's strong orientation towards private law also becomes clear when we consider its relationship to product safety regulation, typically viewed as public law at national level. The above-mentioned regulatory compliance defence provided by Article 7 (d) of PLD is very narrowly formulated to allow national civil courts in most cases to make an independent assessment under national tort law of whether the product that has caused damage is defective. The producer will only be able to escape liability if the product had been manufactured in compliance with *mandatory* regulations and that such regulations had actually *required* the product to be designed defectively. This approach is in line with the common practice in the Member States where product safety regulations denote the minimum level of product safety, private technical standards specify them, and tort law fine-tunes the producers' obligations in the circumstances of each individual case.[83] This is also the case with harmonised product safety regulations and private technical standards, which, as has been confirmed by the CJEU in *James Elliot Construction*,[84] are not binding on national courts in disputes under national private law.[85]

As the analysis below will demonstrate, the legal technique used by the EU legislator in the field of product liability stands in sharp contrast to the one harnessed by it in the area of environmental liability. The 2004 ELD, adopted as a minimum harmonisation directive in the third phase of the EU harmonisation of private law, aims to establish a common framework for preventing and remedying certain forms of environmental damage based on the "polluter pays" principle.[86] According to the EU legislator, this principle implies that "an operator whose activity has caused the environmental damage or the imminent threat of such damage is to be held financially liable, in order to induce operators to adopt measures and develop practices to minimise the risks of environmental damage so that their exposure to financial liabilities is reduced".[87] "Operator" is defined by ELD as any natural or legal, private or public person, who operates or controls an occupational activity or, where this is provided for in national law, to whom decisive economic power over the technical functioning of such an activity has been delegated, including the holder of a permit.[88]

One of the main characteristics of ELD is that it imposes either a strict or fault-based liability on operators of occupational activities.[89,90] Operators of activities perceived to be dangerous, which are covered by any of the EU Directives or Regulations listed in Annex III of ELD, can be held strictly liable for damage to protected species and natural habitats, contamination of land, and damage to waters. These activities include, for example, waste management operations, certain discharges into the inland surface water, and transport of dangerous or polluting goods.[91] Fault-based liability is imposed on operators of non-listed occupational activities who can be held liable only for damage to protected species and natural habitats and not for other types of harm. Damage to covered natural resources can be recovered under ELD only where it is significant, which is to be determined on the basis of threshold criteria.[92] In addition, there must be a causal link between the damage and the activity of an individual

[82]European Commission, Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the Application of the Council Directive on the approximation of the laws, regulations, and administrative provisions of the Member States concerning liability for defective products (85/374/EEC), COM/2018/246 final.

[83]See, e.g., 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* (Edward Elgar, 2009), 243, at 248 *et seq.*

[84]Case C-613/14, *James Eliot Construction Limited v. Irish Asphalt Limited*, ECLI:EU:C:2016:821, in particular paras. 53 and 61.

[85]On the relationship between product safety regulation and civil liability in the context of EU law, see, e.g., Cafaggi, above, n. 79, at 214 *et seq.*

[86]ELD, art. 1.

[87]*Ibid.*, recital 2.

[88]*Ibid.*, art. 2(6).

[89]An 'occupational activity' is considered to be any activity carried out in the course of an economic activity, a business, or an undertaking, irrespective of its private or public, profit, or non-profit character. See ELD, art. 2(7).

[90]See E. Brans, 'Fundamentals of Liability for Environmental Harm under the ELD', in L. Bergkamp and B.J. Goldsmith (eds.), *The EU Environmental Liability Directive: A Commentary* (Oxford University Press, 2013) 31, at 32–33.

[91]ELD, Annex III.

[92]*Ibid.*, art. 2(1)(a)-(c). See also Brans, above, n. 89, at 35.

operator.[93] Last but not least, none of the exceptions (such as force majeure) or defences (such as the regulatory compliance defence) provided for by the Directive should apply.[94]

At first sight, these provisions of ELD may seem to be private law-oriented, bearing a close resemblance to those of PLD which also uses tort law for regulatory purposes, all the more so, given that most environmental liability instruments, including international treaties that include rules on liability for environmental damage,[95] are private law regimes on civil liability.[96] However, a closer look at ELD reveals that although this Directive uses legal constructs that are characteristic of private law regimes, such as fault and strict liability, in essence, it establishes a public law regime.[97] Crucially, ELD requires public authorities to ensure that polluters take the necessary measures to prevent and/or remedy environmental damage.[98] In particular, these authorities may at any time require the operator who has caused such damage to limit or prevent further damage and to take remedial action.[99] The operator is obliged to identify potential remedial measures and submit them to the public authority for its approval.[100] As a rule, the operator will bear the costs of the preventive and remedial actions taken under ELD.[101] At the same time, the Directive explicitly excludes the private parties' right of compensation as a consequence of environmental damage or of an imminent threat of such damage.[102] Neither does it apply to cases involving personal injury, damage to private property or any economic loss, or affect any right regarding these types of "traditional damage".[103]

In fact, the initial proposal of the European Commission sought to harmonise both the private law and administrative law dimensions of environmental liability.[104] Such an approach would clearly be more aligned with international law in this area. However, the idea of approximating the national tort law systems was ultimately dropped following the opposition from the Member States and European professional groups.[105]

Given the ELD's focus on administrative law, it is not surprising that this Directive has had a very limited harmonising effect on national tort law.[106] One may even question whether the reference to "environmental liability" in the Directive's title has been a clever move in terms of providing legal certainty.[107] After all, against the backdrop of different national legal orders, this broad term may encompass at least three categories of liability: civil liability under private law, criminal liability and administrative responsibility. The ELD's exclusive focus on administrative responsibility could have been made more clear, particularly in its title. In any case, ELD provides a striking example of the publicisation of tort law by the EU legislator and the continued relevance of the public/private divide in the context of its harmonisation efforts, despite the blurring line between public and private law in combatting contemporary environmental challenges.

[93] *Ibid*., art. 4(5).
[94] *Ibid*., art. 4(5) and art. 8(3), (4).
[95] See, e.g., the 1969 International Convention on Civil Liability for Oil Pollution Damage (CLC) as amended; the 1996 International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (HNS); the 2001 International Convention on Civil Liability for Bunker Oil Pollution Damage.
[96] See, e.g., E.H.P. Brans, *Liability for Damage to Public Natural Resources: Standing, Damage and Damage Assessment* (Kluwer Law International, 2001) 365 *et seq*.
[97] Cf., e.g., G. Winter, J.H. Jans, R. Macrory and L. Krämer, 'Weighing up the EC Environmental Liability Directive' (2008) 20 *Journal of Environmental Law*, 163, at 163–164; Brans, above, n. 89, at 38.
[98] ELD, art. 6.
[99] *Ibid*., art. 6(2), (3).
[100] *Ibid*., art. 7(1).
[101] *Ibid*., art. 8(1).
[102] *Ibid*., art. 3(3).
[103] *Ibid*., recital 14.
[104] European Commission, White Paper on Environmental Liability, COM(2000) 66 final.
[105] On this in more detail, see Winter *et al*., above, n. 96, at 163 *et seq*.
[106] See, e.g., M. Hinteregger, 'Comparison', in M. Hinteregger (ed.), *Environmental Liability and Ecological Damage in European Law* (Cambridge University Press, 2009), 579.
[107] Winter *et al*., above, n. 96, at 167.

3.3 | Payment Services Directive II (PSD II) vs. Markets in Financial Instruments Directive II (MiFID II)

The EU legislation in the field of financial services, in particular PSD II and MiFID II, affords another remarkable illustration of the public/private dichotomy within EU private law and its practical implications in national legal systems. It is worth mentioning that both Directives were adopted in the third phase of the EU harmonisation of private law, which has witnessed a particularly strong "agencification" in the area of financial services.[108] This trend has manifested itself most strikingly in the establishment of a new institutional framework at EU level—the European System of Financial Supervision (ESFS)—designed in response to the global financial crisis to strengthen financial supervision and to ensure, *inter alia*, financial stability and financial consumer protection in the Union. ESFS includes three sectoral European Supervisory Authorities (ESAs)—the European Securities and Markets Authority (ESMA), the European Banking Authority (EBA), and the European Insurance and Occupational Pensions Authority (EIOPA)—the European Systemic Risk Board (ESRB) and local supervisory authorities. This major move towards a greater Europeanisation and centralisation of financial supervision goes hand-in-hand with the strengthening of the role of public authorities and administrative enforcement in the field of financial private law, at both EU and national level. Contrary to what one might expect, however, this has not automatically led to the adoption of EU legislation with a predominantly "public law" grammar across the whole spectrum of financial services. Rather, as will be shown below by using the examples of payment and investment services, the more public and private law-oriented EU measures in the financial sector continue to exist side by side in the era of "agencification", pointing to the need for possible additional explanations for the choice of a particular legal grammar.

Before harmonisation in this area, (retail) payment services were predominantly governed by the general contract and consumer law of the Member States, being subject to a patchwork of various rules. Initially, the EU relied on private actors, notably banks, to develop private multilateral contracts which would constitute the foundation for European payments and which were later supplemented by EU legislation to harmonise national laws. This led to the creation of the Single Euro Payments Area (SEPA) as a hybrid public-private governance regime,[109] which in turn led to an exponential growth of EU legislation on payments services, including PSD II. This Directive was adopted in 2015 as a full harmonisation measure to replace its predecessor, PSD I,[110] with a view to fostering competition and innovation in the payments sector, while at the same time ensuring a high level of consumer protection.[111] For these purposes, the EU legislator has chosen a combination of public and private law rules. The former govern authorisation and supervision of payment service providers, and, in particular, require banks to allow non-bank, typically 'fintech', payment service providers (referred to as payment initiation service providers and account information service providers) to access banks' payment systems and client databases.[112] The latter concern transparency and rights and obligations in relation to the provision and use of payment services.[113]

The private law component of PSD II is especially strong compared to other measures in the field of financial services. In particular, the Directive contains detailed information requirements to be complied with by payment service providers prior to the conclusion of a single payment transaction, a framework contract as well as payment transactions covered by it.[114] Notably, PSD II even places the burden of proof in relation to such requirements with the payment service provider, acknowledging the procedural difficulties faced by consumers in enforcing them.[115] In

[108]On this in more detail, see O.O. Cherednychenko, 'Public and Private Enforcement of European Private Law in the Financial Services Sector' (2015) 23 *European Review of Private Law*, 621.

[109]On this is more detail, see A. Janczuk-Gorywoda, 'Public-Private Hybrid Governance for Electronic Payments in the European Union' (2012) 13 *German Law Journal*, 1438.

[110]Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and repealing Directive 97/5/EC, OJ L 319/1, 5.12.2007.

[111]PSD II, in particular, recitals 6 and 33.

[112]See, in particular, *ibid.*, title I and title II.

[113]See, in particular, *ibid.*, title II, title III and title IV.

[114]*Ibid.*

[115]*Ibid.*, art. 41.

addition, PSD II lays down extensive contractual obligations of payment service providers towards their users.[116] These include, for example, the obligations to make sure that the personalised security credentials are not accessible to parties other than the payment instrument's user,[117] to ensure that the amount of the electronic payment transaction is credited to the payee's payment service provider's account by the end of the following business day upon receipt of the payment order,[118] and to refrain from deducting charges from the amount transferred, unless agreed otherwise between the provider and the payee.[119] Even more importantly, PSD II also provides for detailed liability rules, which lie at the heart of payments law, governing the allocation of losses resulting from fraud, forgery and error between payment service providers and users and between the providers themselves.[120]

For example, as a general rule, the payment service provider is liable for all losses related to unauthorised payment transactions.[121] In order to ensure a high level of consumer protection, the payer is always entitled to address his or her claims to a refund to his or her account servicing payment service provider, even where a payment initiation service provider is involved in the payment transaction.[122] However, the payer may be held liable up to a maximum of €50 for losses relating to any unauthorised payment transactions, unless the loss, theft or misappropriation of a payment instrument was not detectable to a bona fide payer prior to a payment or the loss was caused by the payment service provider.[123] This rule is intended to encourage payment service users to promptly notify their providers of any theft or loss of a payment instrument.[124] The payer will be fully liable for all losses if he or she has intentionally or with gross negligence failed to do so or comply with the obligations under the terms of the issue and use of the payment instrument, or acted fraudulently.[125]

As these provisions show, PSD II is clearly concerned with ensuring the balance between the interests of payment service providers and users, even though it also requires Member States to ensure administrative enforcement of implementing rules[126] and, like all measures in the field of EU private law, is also underpinned by the internal market rationale. The impact of PSD II on national private laws is therefore undisputed. This does not necessarily mean that all the substantive PSD II rules have been integrated into private law at national level. The way in which PSD II has been implemented in the Netherlands, for instance, illustrates this point. While the directive's private law component has for the most part been transposed into the Dutch Civil Code,[127] the detailed information requirements have been translated into substantive financial supervision standards of a public law nature.[128] By making cross-references to these standards in the Civil Code,[129] however, the Dutch legislator has ensured that the information rules of PSD II are not only relevant from a supervisory perspective, but that they also govern the private law relationship between payment service providers and users and can be enforced through the private law means.[130] A marked orientation of the important parts of PSD I and PSD II towards private law appears to have prompted the Dutch legislator to adopt this solution.[131]

[116] *Ibid*., title IV.
[117] *Ibid*., art. 70(1)(a).
[118] *Ibid*., art. 83(1).
[119] *Ibid*., art. 81.
[120] *Ibid*., arts. 20, 73, 74, 88–93.
[121] *Ibid*., art. 73.
[122] *Ibid*., art. 73(2) and recital 73. This rule is without prejudice to the allocation of liability between the payment service providers themselves.
[123] *Ibid*., art. 74.
[124] *Ibid*., recital 71.
[125] *Ibid*., art. 74(1) in conjunction with art. 69.
[126] *Ibid*., art. 100.
[127] Dutch Civil Code (*Burgerlijk Wetboek* (*BW*)), book 7, title 7B.
[128] Financial Supervision Act (*Wet op het financieel toezicht* (*Wft*)) 2006, art. 4:22. See also Business Conduct Supervision (Financial Enterprises) Decree 2006 (*Besluit Gedragstoezicht financiële ondernemingen Wft* (*BGfo*)), arts. 59b–59 g.
[129] See, e.g., Dutch Civil Code, arts. 516, 517, 526.
[130] Conversely, those provisions of the PSD II that have been implemented into the Dutch Civil Code can be enforced through administrative law means. This outcome has been achieved through the inclusion of a special provision—Article 4:25d—into the Financial Supervision Act 2006, according to which a payment service provider must comply with Title 7B of Book 7 of the Dutch Civil Code.
[131] Implementatiewet herziene richtlijn betaaldiensten: Memorie van Toelichting, *Kamerstukken* 34813, n. 3, 14–15.

By way of contrast, the major EU investor protection measures—MiFID II and its predecessor MiFID I[132]—were drafted from the manifestly public law perspective of ensuring effective supervision of securities markets. Similarly to the rules for payment service providers, the investment firms' duties of care and loyalty towards their (potential) clients initially developed within the national private laws of the Member States.[133] However, already in 1993—during the second harmonisation phase—the EU accommodated such duties within its first regulatory and supervisory framework for investment services—the 1993 Investment Services Directive (ISD)[134]—that paved the way for the adoption of MiFID I and MiFID II. In the context of the Single Market-building in this area, ISD transformed the private law duties of care and loyalty into financial supervision standards with a view to strengthening investor confidence in financial markets. This trend towards the publicisation of private law for investment services intensified in the pre-crisis Lamfalussy era, in which MiFID I was adopted, and especially in the post-crisis period of reform, which led to the adoption of MiFID II, with financial supervisory authorities getting more and more grip on the law-making process.[135] Particularly as a result of the ESMA's current activities aimed at supervisory convergence in the EU, the EU private law for investment services embodied in the MiFID II conduct of business regime for investment firms is becoming increasingly technocratic.[136]

The core of the MiFID II conduct of business rules is formed by the general principle establishing a duty of care and loyalty. Any investment service provider must act honestly, fairly and professionally in the best interests of its (potential) clients.[137] This general principle is fleshed out in more specific rules of conduct, such as (a) the duty to provide clear, fair and not misleading information, (b) various disclosure obligations (in particular concerning the risks involved in a certain investment service or product), (c) the duty to know one's client and to ensure the "appropriateness" or "suitability" of an investment service or a financial instrument to one's client, and (d) the duty to ensure "best execution" of the client's order.[138]

Although these supervisory standards of EU origin do not differ much in substance from the duties commonly owed by investment firms under national private law from which they originated, MiFID II, in the same way as its forerunners, does not require Member States to establish private law rights and remedies between the parties to an investment transaction.[139] While the initial consultation document of the European Commission included the "principle of civil liability",[140] the latter ultimately did not make it into the text of MiFID II, in particular as a result of the resistance of the financial industry, coupled with the disagreement among Member States.[141] MiFID II, viewed as a whole, primarily aims to strengthen the enforcement of the investor protection rules contained therein through administrative law means by specifying the range of administrative sanctions, including pecuniary penalties, which should be employed for certain types of breach and how the determination as to the appropriate sanction and level of sanction should be made.[142]

[132]Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC, OJ L 145/1, 30.4.2004.

[133]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.

[134]Council Directive 93/22/EEC of 10 May 1993 on investment services in the securities field, OJ L 141/27, 11.6.1993.

[135]On the Lamfalussy legislative architecture and the post-crisis changes to it, see N. Moloney, 'EU Financial Market Regulation after the Global Financial Crisis: "More Europe" or More Risks?' (2010) 47 *Common Market Law Review*, 1317.

[136]Cf. N. Moloney, 'EU Financial Market Governance and the Retail Investor: Reflections at an Inflection Point' (2018) 37 *Yearbook of European Law*, 251, at 277 *et seq*.

[137]MiFID II, art. 24(1).

[138]*Ibid*., arts. 24–30.

[139]See also, e.g., Cherednychenko, above, n. 132, at 408 *et seq*.; M. Andenas, 'Commercial Law, Investor Protection, EU and Domestic Law', in M. Heindemann and J. Lee (eds.), *The Future of the Commercial Contract in Scholarship and Law Reform: European and Comparative Perspective* (Springer, 2018), 437, at 455.

[140]See European Commission, Public Consultation. Review of the Markets in Financial Instruments Directive (MiFID) (MiFID Review), 63, 7.2.6 (Liability of firms providing services).

[141]Cf. N. Moloney, 'Liability of Asset Managers: A Comment' (2012) 7 *Capital Markets Law Journal*, 414, at 421.

[142]See, in particular, MiFID II, arts. 70–72.

The "public law" grammar of MiFID I and MiFID II has led Member States to implement the conduct of business rules within financial supervision frameworks, leaving the issue of their private law effects in the investment firm–client relationship to national civil courts.[143] The latter in turn have demonstrated varying degrees of willingness to grant effect to the respective supervisory standards in private law. While in some Member States, such as the Netherlands, civil courts tend to consider the conduct of business rules of EU origin when determining the private law standard of care or loyalty in individual cases,[144] in others, such as Germany and the UK, courts (or at least some courts) appear to be reluctant to do so.[145]

In its judgment in *Genil v. Bankinter*,[146] the CJEU has not taken the opportunity to unequivocally clarify its stance on the issue of the relationship between the MiFID I conduct of business rules and traditional private law duties of care and loyalty.[147] Such an opportunity was provided by the question of the Spanish court concerning the contractual consequences of the investment firm's failure to carry out the "appropriateness" and "suitability" tests required under Articles 19(4) and 19(5) of MiFID I. In particular, the Spanish court wanted to know whether the violation of these provisions should result in the nullity of the contract between the investment firm and the investor. When answering this question, the CJEU merely stated that, in the absence of EU legislation on this point, it is for the internal legal order of each Member State to determine the contractual consequences of non-compliance with the MiFID I conduct of business rules, subject to observance of the principles of equivalence and effectiveness.[148] This reasoning of the CJEU does not make it unambiguously clear that the MiFID I conduct of business rules should have effect in national private laws, albeit this might be the most plausible interpretation of the Court's dictum. Such a restrictive answer by the CJEU could in part be explained by a somewhat narrow formulation of the national court's question. Yet it may also be a sign of the Court's reluctance to adopt a uniform approach towards such a sensitive issue as the relationship between contract-related investor protection regulation and traditional private law, given a clear emphasis on public supervision and enforcement in MiFID I and MiFID II.

As a result, in some EU Member States, aggrieved retail investors may not be able to successfully rely on the national public law standards of financial supervision implementing the MiFID II conduct of business regime before civil courts, even where these standards provide for a higher level of investor protection than that afforded under national private law. Conversely, in other jurisdictions where civil courts are more receptive to the regulatory obligations of investment firms under public law, MiFID II may prompt national judge-made modernisation of national private law in the field of investor protection.[149] At the same time, the courts may impose more protective duties of care and loyalty under private law in individual cases. For instance, according to the settled case-law of the Dutch Supreme Court in civil matters, the banks' public law duties of care only influence their private law duties of care, but do not determine them.[150] A complementary relationship between the "public law"-coloured EU investor protection regulation and national private law along these lines ensures

[143]On this in more detail, see, e.g., Cherednychenko, above, n. 107, at 623 *et seq.*

[144]See, e.g., the decisions of the Dutch Supreme Court in civil matters (*Hoge Raad*) in HR 5 June 2009, *NJ* 2012, 182, 183 and 184 (*Levob v. B*, *De Treek v. Dexia*, and *Stichting Gedupeerden Spaarconstructie v. Aegon*).

[145]For Germany, see, e.g., BGH 17 September 2013, *XI ZR* 332/12, no. 20, where the Federal Supreme Court in civil matters dismissed the concept of the radiating effect (*Ausstrahlungswirkung*) of the MiFID I conduct of business rules implemented into the public law framework on the standard of care in contract law. For the UK, see, e.g., Court of Session 21 August 2012 [2012] CSOH 133 (*Grant Estates Ltd. (in liquidation) and others v. Royal Bank of Scotland plc and others*), where the fact that the MiFID I conduct of business rules were primarily addressed to financial supervisory authorities was used by the Scottish judge Lord Hodge as an argument against granting effect to such rules in common law. On this in more detail, see M. Wallinga, 'Why MiFID and MiFID II Do (Not) Matter to Private Law: Liability to Compensate for Investment Losses for Breach of Conduct of Business Rules' (2019) 27 *European Review of Private Law*, 515.

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

[147]Cf., e.g., S. Grundmann, 'The Bankinter Case on MiFID Regulation and Contract Law' (2013) 9 *European Review of Contract Law*, 267, at 275 *et seq.*; Andenas, above, n. 138, at 457.

[148]*Bankinter*, above, n. 145, paras. 57–58.

[149]Cf. Andenas, n. 138, at 467.

[150]Above, n. 143.

the impact of financial supervision standards on the private law concepts, while at the same time preserving the autonomy of private law from public law.[151]

4 | CONCLUSIONS AND OUTLOOK

EU law does not recognise the distinction between public and private law as it had evolved in national legal systems. The foregoing analysis, however, demonstrates the significance of this distinction within EU private law. While EU private law regulates the conduct of businesses vis-à-vis other private parties and/or liability for damage caused by their products or activities in the name of the internal market, the way in which specific EU measures do so differs considerably. A distinction reminiscent of the traditional public/private dichotomy manifests itself in the varying extent to which such measures engage with private law relationships when pursuing similar policy goals. Some EU Directives, such as UCTD, PLD and PSD II, clearly confer rights and remedies on private parties. Although these Directives aim at creating a level playing field for traders and often use new concepts previously unknown to national legal systems, they also have a strong interpersonal dimension.[152] By contrast, other Directives, such as UCPD, ELD and MiFID II, are not concerned with the balance between the parties' rights and obligations or individual redress, focusing instead on the relationship between regulators and regulatees and the role of public authorities in securing business compliance with regulatory requirements.

Apart from the overall regulatory bias of the EU integration paradigm, the more public or private law orientation of EU Directives in the field of EU private law appears to be primarily dictated by the path dependency of harmonisation in a given area (notably pre-existence of the national or EU legal framework of a particular type, such as in the case of UCTD, UCPD, PLD, PSD and MiFID II) and/or the political constraints surrounding the EU law-making process (notably resistance of the industry and/or (some) Member States to the harmonisation of civil liability, as exemplified by the legislative history of ELD and MiFID II). Interestingly, the historical dynamics of the EU harmonisation of private law do not appear to be the decisive factor in this context, as demonstrated by the use of different grammar options in PSD II (more "private law") and MiFID II (predominantly "public law"), both of which were adopted in the third harmonisation phase when full harmonisation and "agencification" were on the rise. Overall, the more "public" or "private law" grammar of EU harmonisation measures in the field of EU private law is not the result of a systematic analysis of the relative merits of each model in terms of their appropriateness for achieving particular policy objectives.

And yet, the legal grammar of a particular EU measure does matter in practice when it comes to the position of private parties in cases of breach of European regulatory standards at national level and the CJEU's ability and willingness to engage in judicial activism to improve this position. Once a certain piece of EU secondary law is adopted, the availability of individual rights and remedies for private parties in various legal systems will to an important degree be determined by the particular balance of public and private law elements that have emerged from the EU's legislative itinerary. Member States are clearly obliged to provide for such rights and remedies within their national legal orders where a given EU measure is concerned, *inter alia*, with relational justice between the parties. Yet, they have much more room for manoeuvre where this is not the case. The comparison between UCTD, PLD and PSD II, on the one hand, and UCPD, ELD and MiFID II, on the other, illustrates this point. The former seek to ensure the balance between the private parties' rights and obligations and effective consumer redress, equipping consumers with European remedies, such as "non-bindingness" of unfair contract terms, strict producer's liability, and the payment service provider's liability for unauthorised payment transactions. By contrast, the latter are predominantly oriented towards the harmonisation of the public law aspects of certain economic activities or

[151]On this in more detail, see, O.O. Cherednychenko, 'Contract Governance in the EU: Conceptualising the Relationship between Investor Protection Regulation and Private Law' (2015) 21 *European Law Journal*, 500, at 513 *et seq*.; M.W. Wallinga, *EU Investor Protection Regulation and Private Law: A Comparative Analysis of the Interplay between MiFID and MiFID II and Liability for Investment Losses* (Doctoral thesis, University of Groningen, 2018).
[152]Cf. Hesselink, above, n. 3, at 688; V. Mak, 'Pluralism in European Private Law' (2018) 20 *Cambridge Yearbook of European Legal Studies*, 202, at 213.

practices, leaving the issue of individual rights and remedies to national legal systems. This may ultimately result in restricted possibilities for aggrieved individuals to invoke the protective rules contained in the public law-oriented EU measures before national civil courts. In the absence of European remedies to this effect under UCPD, for example, in many Member States victims of unfair commercial practices do not have the right to contract termination and/or the right to compensation for damages yet. Similarly, not in all Member States may private parties be able to claim compensation for violations of the MiFID II conduct of business rules or to hold the polluter liable for the environmental damage stemming from the violation of ELD. Although the use of the "public law" grammar by the EU legislator in itself does not preclude national courts from giving effect to regulatory rules within traditional private law, whether, and to what extent, such a complementarity between the two will develop may vary considerably across the EU. In the end, therefore, the choice for a "public" or "private law" grammar in a particular legislative instrument also matters in terms of speed and efficacy with which its policy goals are achieved.

The differences between the "public" and "private law"-coloured EU measures in terms of individual rights and remedies may be reduced to some degree by the CJEU. To the extent that a certain public law-oriented directive also aims to protect the interests of private parties, the CJEU may interpret that (or a related) EU measure in light of the principles of effectiveness or effective judicial protection so as to enhance its potential to provide for individual redress in national legal orders. At the same time, the Court's ability and willingness to do so in case of the public law-oriented EU measures is not self-evident. As the preceding investigation has shown, the CJEU has mainly adopted an activist approach in cases involving the private law-oriented EU measures, such as UCTD and PLD, strengthening the link between individual rights, private law remedies and civil procedures. An important role in this context has also been played by the fundamental rights enshrined in the EU Charter of Fundamental Rights.[153] However, as its case-law regarding the predecessor of MiFID II demonstrates, the Court appears to be much more reluctant to "repair" the "public law"-coloured EU Directives in order to facilitate individual consumer redress. Moreover, the CJEU's ability to "insert" individual remedies in such Directives may be limited by their wording which, as exemplified by UCPD and ELD, may explicitly exclude certain or even all areas of private law from their scope.

The major lesson that can be drawn from this is that EU law should stop ignoring the existing differences between public and private law approaches and should explicitly adopt the public/private language in its discourse. Rediscovering the public/private law divide in this sense does not mean redrawing the strict line between public and private law. As this article has shown, the dividing line between public and private law has indeed blurred, with private law being used as an instrument of European market integration and the public and private spheres and enforcement modes in the field of EU private law becoming ever more closely intertwined. However, the entanglement between regulation and private law at EU and national level and the resulting rise of hybrid phenomena at the cross-section of public and private law does not mean that the public/private dichotomy has become totally superfluous in the context of a post-nation-state EU private law and that we should get rid of it altogether as the irrelevant legacy of the nation-state. As Armin von Bogdandy 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".[154] In my view, this is also true for EU private law.

The EU's experimentation with the "public" and "private law" grammar options in the field of EU secondary private law makes this area an interesting European laboratory. But in order to be able to experiment, one had better understand what one is actually experimenting with. The acknowledgement of the public/private distinction in this context for descriptive and analytical purposes should lead to more evidence-based law-making at EU level that would allow the EU legislator to assess the relative merits of each model (or a combination of the two) more

[153]See H.-W. Micklitz, 'The Consumer: Marketised, Fragmentised, Constitutionalised', in D. Leczykiewicz and S. Weatherill (eds.), *The Images of the Consumer in EU Law: Legislation, Free Movement and Competition* (Hart Publishing, 2016), 21, at 35 *et seq.*; Collins, above, n. 14, at 330 *et seq.*

[154]A. von Bogdandy, 'The Idea of European Public Law Today', in A. von Bogdandy, P.M. Huber and S. Cassese (eds.), *The Max Planck Handbooks in European Public Law. Vol. I: The Administrative State* (Oxford University Press, 2017), 1, at 13.

accurately, and to ultimately choose the one most suited to pursue a particular policy goal. The EU's Better Regulation agenda[155] provides an opportunity to improve private law making along these lines.

Furthermore, the public/private divide should be taken more seriously in European legal scholarship. Beyond ideological battles, greater conceptual clarity is necessary in order to be able to achieve breakthroughs in our understanding of how public regulation and traditional private law *should* relate to each other in the context of European integration in terms of ensuring the proper balance between public and private interests and the respective contributions of the EU and Member States to standard-setting and enforcement. The need for such breakthroughs is pressing more than ever today, particularly given the new technological and environmental challenges that the legislators, regulators, courts and other public and private actors currently face. The use of the "public law" grammar in the field of EU private law and its implications for interpersonal justice deserve special attention. What is needed is a common theoretical framework that would facilitate a meaningful dialogue between public and private lawyers and other stakeholders involved in the making of EU private law. Acknowledging the specificities of public and private law within EU private law, without introducing any sharp divide between these categories, must be seen as the first essential step towards such a dialogue.

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[155]European Commission, Better Regulation Guidelines, SWD(2017) 350.