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BRIDGING THE GAP(S): THE IMPORTANCE OF PRIVATE LAW THEORY IN THE EU CONTEXT

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Abstract

This article advocates for applying private law theories originating in the common law to EU private law. It argues that those theories can enhance the coherence and workability of EU private law, which currently lacks a comprehensive doctrinal structure. They can also help EU private law overcome the prevailing but flawed functionalist approach that suggests that EU private law primarily serves as a policy tool to achieve specific goals. The article unfolds in three parts: first, it compares the development of civil and common law private law theory, highlighting why thick private law theory only developed in common law jurisdictions and arguing that the same reasons apply to EU private law. Second, it contends that common law theories can enrich the discourse on EU private law, emphasising the need to consider both EU and national private law norms together. Lastly, it proposes that the common law-derived New Private Law theory offers a promising approach to interpreting EU private law, reconciling interpersonal aspects with instrumental objectives. This integration could foster a common language for discussing EU private law, akin to Roman law's historical role. The paper encourages scholarly debate and adaptation of these theories to local conditions, aiming to bridge the gap between private law theory in common and civil law jurisdictions.

1. Introduction

European Union (EU) private law and much of modern private law theory do not sit well together.[1] EU private law is said to be significantly different from

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1. EU private law is defined for the purposes of this article as the law originating from the EU institutions that has a bearing on private relations.

the national private laws of both common and civil law jurisdictions.[2] The prevalent approach asserts that EU private law is a policy tool aiming to achieve a set of instrumentalist objectives: facilitating the EU internal market, fostering competition, or ensuring consumer protection. This approach, which in this article is called *functionalist*, argues that EU private law is distinct from national private laws grounded in principles such as autonomy or interpersonal justice. The functionalist approach derives its main argument from the incomplete character of EU private law. Whereas national private laws are comprehensive and all-encompassing, EU private law addresses a narrow set of issues stemming from the limited law-making competences of the EU.[3] Thus, the incompleteness of EU private law entails its limited, goal-oriented character.

In this article, an attempt is made to challenge the above view. It is argued that the incompleteness of EU private law does not necessarily mean that it is based on principles different from national private laws. Rather, the main difference between the two stems from how they invite us to theorise about them – the divergent modes of reasoning they encourage. National private laws, at least those in civil law jurisdictions, encourage what might be called the *"thin" mode of reasoning*: a formalist investigation based on a web of established legal concepts and principles. Inversely, EU private law encourages a more "*thick" mode of reasoning*, relatively independent from such concepts, and refers to values and principles external to legal doctrine.

The thin mode of reasoning is self-sufficient and self-referential; it consists of the analysis of legal doctrine itself, using established legal rules and principles to make claims about the law. The thick mode of reasoning needs extra-legal concepts – drawn from morality, economy, or the social sciences – in order to make claims about the law. The functionalist view is an example of the thick mode of reasoning, since it refers to various objectives, such as facilitating the internal market, to explain and evaluate EU private law.

Based on the above distinction – which presents ideal types rather than entirely separate ways of thinking – this article argues that EU private law is not qualitatively different from national private laws. The difference between the two is, rather, quantitative. EU private law has not yet developed comprehensive doctrinal structures that rendered the thick mode of reasoning less necessary in national private laws. The failure of EU private law

2. See e.g. Schmid, *Die Instrumentalisierung des Privatrechts durch die Europäische Union. Privatrecht und Privatrechtskonzeptionen in der Entwicklung der Europäischen Integrationsverfassung* (Nomos, 2010); Hesselink, "Contract theory and EU contract law" in Twigg-Flesner (Ed.), *Research Handbook on EU Consumer and Contract Law* (Edward Elgar, 2016), pp. 508–534.

3. On the limited, functionalist competences of the EU and their implications for EU private law, see Hesselink, "EU private law injustices", 41 YEL (2022), 83–116, at 102–104.

codification projects might suggest that it will not develop such structures any time soon.[4] However, contrary to what functionalists claim, this does not imply that EU private law does not strive for doctrinal coherence, the main task of the thin mode of reasoning. While its policy objectives cannot be neglected, a consistent interpretation of EU private law – particularly its application to disputes between individuals – reveals that the functionalist view is too narrow in a double sense. First, any attempt to understand and justify EU private law cannot neglect the thin, doctrinal mode of reasoning. Second, the thick mode of reasoning applied to EU private law cannot be limited to extra-legal concepts offered by the functionalist view but takes explicit inspiration from a variety of theoretical approaches.

To support this claim, the article draws on insights from common law theories, particularly those referred to as New Private Law (NPL). It is acknowledged that NPL is not an exhaustively defined school of thought but rather a mosaic of different theories that share some family resemblance.[5] What those theories have in common is that they attach importance to private law's "self-understanding": they "take the language of law at face value, rather than treating that language as code for other concepts".[6] The main aim of "new formalism" is to reestablish the importance of legal principles and concepts against extra-legal considerations, such as the economic efficiency paradigm – which has dominated American legal scholarship – without neglecting the latter's relevance.[7] The crucial inspiration to be taken from NPL is thus seeking convergence between thin and thick modes of reasoning about private law, as well as its emphasis on coherence as the criterion for evaluating the success of theorising about private law.[8] Therefore, this article's understanding of "theory" accommodates both internal and external perspectives on private law – contrary to, for instance, Kelsenian "pure theory of law" – and reconciling the two is a crucial task of theorising about it. In addition, more specific concepts used within NPL scholarship – such as private law's internal

4. On efforts to develop such a structure see Zimmermann, "Savigny's legacy: Legal history, comparative law, and the emergence of a European legal science", 112 *Law Quarterly Review* (1996), 576–605.

5. Goldberg, "Introduction: Pragmatism and private law", 125 *Harvard Law Review* (2012), 1640–1663.

6. Gold, "Internal and external perspectives. On the New Private Law methodology" in Gold, Goldberg, Kelly, Sherwin, and Smith (Eds.), *The Oxford Handbook of the New Private Law* (OUP, 2020), p. 4.

7. See Miller, "The new formalism in private law", 66 *American Journal of Jurisprudence* (2021), 175–238; Getzler, "Historical perspectives" in Gold et al., op. cit. *supra* note 6, p. 214: "New Private Law has revived doctrinal thinking in order to provide a counterweight to an exaggerated dependence on social science, utilitarian and deontic ethics, and indeed raw politics in the life of private law".

8. Cf. Smith, *Contract Theory* (OUP, 2004), pp. 5–6.

point of view or "scaling up" of private law norms – will be particularly useful to illustrate the claims of this article.

This scholarship strand is especially useful for analysing EU private law. The authors' understanding of the goal of private law theory – as an attempt to reconcile the thin and thick modes of reasoning in order to fully understand and justify this area of law – is consistent with that of NPL. In the common law, referring to the thick mode of reasoning was essential for two reasons: discovering coherence in the scattered body of private law; and providing a common language to discuss it. This motivated the construction of thick theoretical accounts in the common law, which did not develop in civil law. The same tendency can be observed in EU private law. Its incompleteness and the variety in doctrinal structure between the private laws of EU Member States create a need for coherence and for finding common ground between European jurisdictions. Drawing on NPL, this critique of the functionalist account follows the same reasoning. While important, it is argued that policy objectives cannot overshadow the fact that EU private law ultimately regulates horizontal relationships and resolves individual disputes. Both the thin mode of reasoning and the resort to extra-legal principles other than facilitating the internal markets are indispensable to fully appreciating private law's role in that regard. Those similarities also justify why common law theories are invoked instead of those developed in civil law jurisdictions. Several continental scholars made similar attempts to create coherence within EU private law and its relationship with national private laws.[9] They strive to reconcile apparently different rationalities that underlie both of those areas. As is elaborated on below, the approach taken in this article is, to some extent, consistent with those attempts. What distinguishes NPL – and, accordingly, this article – is the particular way in which it adheres to private law's internal point of view and how it can absorb different extra-legal considerations. Accordingly, the approach adopted here can be considered theoretically more ambitious than alternative attempts, as it offers an innovative reinterpretation of the role of private law doctrine, its system-building function, and its relation to functionalist objectives of EU private law.[10]

The argument unfolds in three parts. Section 2 explains in detail why private law theory has flourished in common law jurisdictions – most notably in the

9. See e.g. Ackermann, "Sektorielles EU-Recht und allgemeine Privatrechtssystematik", 4 *Zeitschrift für Europäisches Privatrecht* (2018), 741–781; Basedow, "Sektorielle Politiken und allgemeine Privatrechtssystematik", 4 *Zeitschrift für Europäisches Privatrecht* (2018), 782–787; Dutta, "Privatrechtsvereinheitlichung – (weiterhin) ein (sinnvolles) Anliegen der Europäischen Union?", 2 *Zeitschrift für die gesamte Privatrechtswissenschaft* (2024), 217–236.

10. On differences between NPL and German doctrinal scholarship, see Hosemann, "'The New Private Law': Die neue amerikanische Privatrechtswissenschaft in historischer und vergleichender Perspektive", 78 RabelsZ (2014), 37–70.

United States (US) – rather than in civil law. The lack of robust and comprehensive doctrinal structures and the lack of a common language to discuss private law made it necessary for common lawyers to resort to theory, much like in the present state of affairs in EU private law. Section 3 investigates why the functionalist view is the dominant approach to EU private law. It is argued that EU private law shares many structural similarities with the common law described in the previous section and that the functionalists have drawn the wrong conclusion from its incompleteness. Instead of recognising that the main difference between EU private law and national private laws is based on the divergent modes of reasoning they encourage, functionalist accounts posit that the incompleteness reflects instrumentalist rationality inherent in EU private law. Several examples are used to illustrate how thick and thin modes of reasoning are reconciled in different areas of EU private law. In Section 4, a more appealing alternative is proposed, which reconciles the policy objectives of EU private law with the thin mode of reasoning. Drawing parallels with NPL theories and using examples of the main areas of EU private law, it is argued that the approach advocated in this article can prove more successful in achieving the main aims of theorising about private law: securing its coherence and providing a common language to discuss it. The concluding Section 5 demonstrates how this argument can contribute to several important debates. First, and most obviously, it can uncover the shortcomings of the functionalist approach to EU private law. Accordingly, it can contribute to the more general discussion about EU law's objectives and underlying principles.[11] Second, it can inform the further development of EU private law, allowing its policy objectives to be reconciled with the fact that it is ultimately applied to resolve disputes between individuals. Third, combining American and European scholarship can bridge the trans-Atlantic gap between them and thus enrich the landscape of the burgeoning field of private law theory.

2. Where does private law theory develop?

This section discusses why private law theory develops in certain jurisdictions. The topic is vast, and the aim is not to offer anything resembling a systematic intellectual inquiry. Rather, the intention is to develop a rough but plausible hypothesis for why some systems tend not to rely exclusively on doctrinal law. It is argued that theoretical analysis appears in legal orders with structural features in the form of a certain "incompleteness". Incompleteness

11. See generally Dawson and de Witte, *EU Law and Governance* (Cambridge University Press, 2022), pp. 1–22.

is not a pejorative term: in this article it means the absence of a comprehensive doctrinal structure that can provide solutions to legal questions by itself; rather, law users realise that legal norms must be complemented by wider accounts to serve their purpose. The need for coherence and practical application – for workability, which ensures that private law operates in a way consistent with moral intuitions and policy goals that the law aims to enact, is at the root of the issue. Theory steps in to fill gaps when thinner, doctrinal accounts are not available. Specifically, this overview aims to demonstrate why theoretical accounts of private law developed in the common law, particularly in the US, why they took this specific form, and why they did not take hold to the same extent in civil law Europe. The same reasons that led to theoretical developments in the common law world could help explain why it is desirable in EU private law, which shares many characteristics, as is argued in Section 3.[12]

A good starting point is to show where thick theoretical accounts do *not* dominate. Most civil lawyers, academics included, do not "do theory" in the same way that common lawyers, especially in the US, do.[13] This is particularly pronounced in academia, but the same can be seen in lawyers' briefs or court decisions, where legal doctrine remains prominent, a result of the strong ties of practitioners with academic law.[14] A typical law student in a civilian class on contract or tort might have a rudimentary discussion on the aims of the law.[15] Basic principles of these areas of private law, such as compensation, loss spreading, or deterrence, are discussed at the graduate level, but in most cases, these discussions remain relatively shallow. The student will not have to trace the foundation of the law of obligations to a theory of corrective justice or modern ethical or political theory. They will not have to inquire about external or internal points of view in understanding legal theory, question the importance of keeping or breaking promises in everyday ethics, or try to resolve the problem of moral luck and accidents. Equally, they will not have to

12. On the dominance of theoretical accounts in the US see Goldberg and Zipursky, "The place of philosophy in private law scholarship" in Kuntz and Miller (Eds.), *Methodology in Private Law Theory* (OUP, 2024), pp. 277–298.

13. See Bomhoff's observation that "German law students too are largely taught not to speak in overtly substantive terms, like "fairness" or "justice" in Bomhoff, "Making legal knowledge work: Practising proportionality in the German *Repetitorium*", 32 *Social and Legal Studies* (2023), 28–54, at 31.

14. See generally Auer, "A genealogy of private law epistemologies" in Kuntz and Miller, op. cit. *supra* note 12, p. 6.

15. The above remarks apply not just to German law, with its distinctive "*Rechtsdogmatik*", but also to other civilian jurisdictions, such as France, the Netherlands, and others. Germany is here used as the paradigmatic legal order where *Rechtsdogmatik* has thrived, even if nowadays it is challenged to a certain extent; see generally Vranken, "Exciting times for legal scholarship", 2 *Law and Method* (2012), 42–62.

calculate the total consumer welfare benefit of specific rules nor try to match legal principles with those of economic efficiency.[16] In fact, they probably will not even have to think about these things in the first place. It is not impossible that when asked the question of "*why not*", the student might reply with a curt "*it's not necessary*".

This is not mere academic parochialism or closed-mindedness. In most cases, theory indeed seems redundant in civil law jurisdictions. The deeper reason for the *prima facie* a-theoretical attitude of civilian lawyers is that the formalist way of thinking about the law has never truly gone away in continental Europe.[17] Coherence, system building, tradition, and the invisible connections that exist in the codes are the main ways to make the law work.[18] This is combined with the *internal* assessment of what the law is about: the law is about itself, its concepts, and its doctrines – it is self-referential.[19] Tort law is about compensation by the wrongdoer for harm, so much can be surmised by a cursory look at the civil code. Contract law protects agreements between parties and is based on the *pacta sunt servanda* principle, with exceptions established by the law. No thicker theoretical account is necessary, as there is a pre-existing consensus among users on the premises of private law.[20] Moral intuitions or policy concerns that common law theorists attempt to uncover

16. In fact, law and economics is rather underdeveloped and rarely taught in European law schools: see Mackaay, *Law and Economics for Civil Law Systems* (Edgar Elgar, 2021) p. 20.

17. On an arguable weakening of the belief in *Rechtsdogmatik* and law as a science, see, however, Vranken, op. cit. *supra* note 15; and Jansen, "The point of view in doctrinal legal science" in Kuntz and Miller, op. cit. *supra* note 12, pp. 179–204.

18. On the importance of these "virtues" in traditional civil law scholarship see Zimmermann, "The 'Europeanization' of private law within the European Community and the re-emergence of a European legal science", 63 CJEL (1995), 63–105.

19. See the definition of formalism by Ernest Weinrib: "Formalism reflects the law's most abiding aspiration: to be an immanently intelligible normative practice" in Weinrib, "The Monsanto Lectures: Understanding tort law", 23 *Valparaiso University Law Review* (1989), 485–526, at 486. On a persuasive account of what the internal point of view is and what it is not, see Shapiro, "What is the internal point of view", 75 *Fordham Law Review* (2006), 1157–1170.

20. This exclusively legal reasoning means that civilian law is often called legal science, thought to work quasi-deductively: see generally, Berkowitz, *The Gift of Science: Leibniz and the Modern Legal Tradition* (Harvard University Press, 2005). However, this does not mean that civil law is averse to theory. It only means that its current practitioners are. If one inquires a little, one can find accounts that are thicker, especially in recent years. See the magisterial account of Nils Jansen's *The Structure of Tort Law* (OUP, 2021), which combines in-depth historical and doctrinal analysis with common law-originating theory. See also the work of James Gordley, who has for decades analysed the civil law system in a way that is mostly unknown to many practitioners but also to academic lawyers in continental Europe, e.g. Gordley, *Foundations of Private Law: Property, Tort, Contract, Unjust Enrichment* (OUP, 2006). Many EU legal scholars have gradually started to adopt these methods: see e.g. Collins, "Interpersonal justice as partial justice", 1 *European Law Open* (2022), 413–422, and Hagland, "From Aristotle's 'arithmetic proportion' to ménage-à-trois – Anglo-American justice theories in the context of Norwegian tort law", 6 *Oslo Law Review* (2019), 78–89.

and put to the fore *are already being enacted* through a formalist analysis of a legal doctrine. Courts do not need to refer to them explicitly, except in rare hard cases, nor do students utilise them to answer their problem essays and questions.[21] The positive law provides ample guidance and argumentative space. Any debate on whether one or the other rule should apply will rely much more on systemic reasoning and thinner accounts of the normative goals of the law.

It is not claimed that it is an ideal state. Limiting deeper theoretical enquiry into the fundamentals of private law via resorting to a comprehensive formalist doctrine might lead to a less critical approach to the law.[22] It might also be self-deceiving: substantive argumentation on policy and fairness is almost wholly displaced in favour of abstract concepts or obscured behind them.[23] The common lawyer's combination of deep theoretical insights and knowledge of legal doctrine has proven highly fruitful over the years. However, this article does not aim to take a stance on "who does it best".[24] Instead, the aim is to inquire why theory did not establish itself in civilian jurisdictions and the EU but did in the common law world.

Indeed, theory has been increasingly prominent in common law scholarship. Philosophical publications abound, and so do economic or critical approaches that adopt an external perspective.[25] This is a prominent phenomenon which is not confined to academic work and classroom teaching; it has also influenced practice. Theoretical and philosophical accounts have flourished in other common law countries, such as Australia, Canada, and the

21. On courts, see Latour's study of the council of the French Council of State who emphasises the superficiality and process-oriented dynamics that are important in law. Even if Latour's insights originate in another philosophical tradition and analyse the workings of an administrative court, his ethnographic findings seem to confirm the above: Latour, *The Making of the Law: An Ethnography of the Conseil d'Etat* (Polity Press, 2010). On the adversity of including such considerations in legal educations see Wolff, "Structured problem solving: German methodology from a comparative perspective", 14 *Legal Education Review* (2003), 19–51, at 50.

22. This does not mean that private law theory is the only way to do theory in private law. There are alternatives such as systems theory, Marxist approaches and critical theory that have flourished in Europe. Arguably, however, to a lesser extent in recent times than in the US. See e.g. Hesselink, "Reconstituting the code of capital: Could a progressive European code of private law help us reduce inequality and regain democratic control?", 1 *European Law Open* (2022), 316–343. For an early effort cf. Study Group on Social Justice in European Private Law, U Mattei et al., "Social justice in European contract law: A manifesto", 10 ELJ (2004), 653–674.

23. On the limited critical potential of doctrinal scholarship, see Krell, "The critical potential of doctrinal analysis" in Kuntz and Miller, op. cit. *supra* note 12, pp. 345–370.

24. On the dangers of using legal theory while ignoring the internal point of view, see Dagan, "'New Private Law Theory' as a mosaic: What can hold (most of) it together?", 23 GLJ (2022), 805–817.

25. See e.g. examples listed in Goldberg and Zipursky, op. cit. *supra* note 12.

United Kingdom, even if doctrinal scholarship tends to be more influential there.[26]

2.1. *Internal reasons*

The deeper reasons behind this civil-common law split might have more to do with what one believes motivates theory building. On the one hand, it could be due to the internal evolution of theoretical discourse, i.e. theory might have developed in response to other theories. Alternatively, it could be adapting to external material conditions, i.e. a theory might respond to political or economic exigencies.

At the internal, theoretical level, one reason might be that legal realism and law and economics did not make the same inroads in Europe as in the United States, at least not to the same degree.[27] In the common law, particularly in the US, formalism and doctrinal analysis faced the onslaught of legal realism first and economic instrumentalism second, which took hold and had a major impact on courts' practice.[28] As Goldberg and Zipursky argue, theoretical, philosophical accounts were developed not "to replace legal concepts with preferred abstractions" but rather to "shield them from reductive approaches".[29] This did not happen to the same extent in continental Europe and the United Kingdom, as realist or economic accounts of the law were far less popular. The absence of a systematic assault on formalist, doctrinal methodology in the law meant there was no urgent need to develop thick theoretical accounts to defend formalist reasoning and the internal point of view.

Furthermore, in common law, there was additional pressure: the private law material was dispersed due to the nature of the precedent-based character of those jurisdictions. This more disconnected material created a pressing need for theory to bridge separate concepts, such as when creating a theory of unjust enrichment, uncovering the commonalities of economic torts, or trying to explain why specific performance is not always available. Moral and instrumental theoretical accounts have been used to create such bridge

26. On the reasons behind this divergence, see Priel, "Conceptions of authority and the Anglo-American common law divide", 65 AJCL (2017), 609–657.

27. Cf. the influential interwar schools of sociological jurisprudence and the *Interessen-jurisprudenz* in Germany, and Scandinavian legal realism that mirrored legal realist thought in many aspects. See e.g. Heck, *Begriffsbildung und Interessenjurisprudenz* (Mohr, 1932).

28. See an overview of the US theoretical developments and their impact on practice in Goldberg, "Twentieth-century tort theory", 91 *Georgetown Law Journal* (2003), 513–583.

29. Goldberg and Zipursky, op. cit. *supra* note 12, at p. 297.

concepts and explain developments in the case law.[30] Thus, according to this line of thought, the structure of the common law and its incrementalism leads to the flourishing of theoretical accounts of private law.[31]

It is remarkable that a similar movement took place in civil law during the era of pandectist law in the 19th century.[32] This long and arduous process could be paralleled to how modern accounts of academic, private law theory in the common law developed.[33] Indeed, academic writing in that era played a similar role: making the law coherent and "whole". In this regard, pandectists had an important impact on legal practice – despite or rather *because* of the fact that they were removed from it.[34] Like in modern common law theory, they, too, used thicker accounts, distinct from those used by courts and positive law of the time.[35] Admittedly, those accounts relied on the in-depth knowledge of Roman law and its historical origins rather than deep philosophical considerations. Nevertheless, they, too, eschewed formalist analysis, practical considerations, and the positive law as applied in contemporary courts; instead, they built a system capable of bridging what they believed to be its structural incompleteness. In that sense, 19th-century civilian lawyers' attempts resemble the modern, thick theoretical accounts.[36] Once the law became coherent enough – once it became a system – those techniques were abandoned: the code and modern formalist law provided ample guidance and could be self-sufficiently applied.[37] Roman law was no longer necessary, and there was no need to resort to higher-level historicist principles anymore.[38]

30. See ibid.: "common law reasoning involves abstracting from a set of decisions to rules or principles that can guide persons and other courts".

31. The same set of arguments is put forward by Goldberg and Zipursky as a plausible explanation, see ibid., at pp. 279–282.

32. For an influential account of this process see Zimmermann, *Roman Law, Contemporary Law, European Law: The Civilian Tradition Today* (OUP, 2001).

33. It is not by coincidence that Germany at the time, just like the common law today, was not a unified jurisdiction: see Jansen, op. cit. *supra* note 17, at p. 191. Regarding the relationship between the German scholarship and NPL, see also Getzler, op. cit. *supra* note 7.

34. Jansen, op. cit. *supra* note 17, at p. 192.

35. Zimmermann, op. cit. s*upra* note 4; Auer, op. cit. s*upra* note 14, ff.

36. It is also not a coincidence that much of the historical school's scholarship was based on Kantian ideas, similar to modern private law theory that often uses Kantian framework to explain the basic structure of private law. See, e.g. Weinrib, *The Idea of Private Law* (OUP, 1995) who argues that corrective justice, the basic principle of private law, embodies the Kantian conception of rights and duties of legal subjects.

37. Auer, op. cit. s*upra* note 14, p. 11, describes this as a move to legal science, i.e. a "genuinely juridical method of legal interpretation".

38. On the fading of the importance of this scholarship except as an academic resource after the Civil Code was enacted see Rückert, "The unrecognized legacy: Savigny's influence on German jurisprudence after 1900", 37 AJCL (1989), 121–137.

2.2. *External reasons*

There are also other external and material reasons why theoretical accounts did not develop. The opportunities for using private law instrumentally were more limited in civil law. Continental European jurisdictions were less likely to resort to private law policymaking or enforcement. Tort law, for instance, has a more limited role to play and is not used as an instrument of policy. Court style does not allow for outright policy arguments in quite the same way as American law does.[39] A common law court, especially in the US, will explicitly explain why it chooses to award a judgment to a plaintiff, and those might be instrumental- or fairness-based. This might be a distinctive characteristic of the American court style, but it exists in other common law jurisdictions. Judges frequently make explicit policy or theoretical arguments, and courts perceive their role as balancing pragmatism, policy, and principle.[40] In Europe, courts would be far more reticent and refer to previous cases or provisions of civil codes. Therefore, in most cases, they can rely on something other than thick accounts resting on distributive justice or efficiency to explain why they decided one way or the other.

Other reasons might be even more mundane. Private law in Europe is primarily a *national* subject, with national court systems and scholarship.[41] Efforts to unify European private law have never been hugely successful.[42] Therefore, grand-European-scale theory building that would traverse jurisdictions like common law did not find fertile ground. More importantly, there are few links between common law and civil law academia in private law.[43] There are, therefore, few opportunities for theoretical cross-pollination that would allow those theories to be transplanted and spread to Europe. This can be contrasted with the situation in the US, where much of private law is state-based, but scholars and teachers have to elaborate on the law of the

39. The most authoritative accounts of the distinctive lawyer-influenced regulatory model are Kagan, *Adversarial Legalism: The American Way of Law* (Harvard University Press, 2019); and Farhang, *The Litigation State: Public Regulation and Private Lawsuits in the United States* (Princeton University Press, 2010). Arguing that American-style court regulation is spreading to Europe, see Kelemen, *Eurolegalism: The Transformation of Law and Regulation in the European Union* (Harvard University Press, 2011). On the limited inroads of Eurolegalism, see Foster, "Legalism without adversarialism?: Bureaucratic legalism and the politics of regulatory implementation in the European Union",18 *Regulation and Governance* (2024), 53–72.

40. In the UK, see e.g. Morgan, "Policy reasoning in tort law: The courts, the Law Commission and the critics", 125 *Law Quarterly Review* (2009), 215.

41. Zimmermann, "Comparative law and the Europeanization of private law" in Reimann and Zimmermann (Eds.), *Oxford Handbook of Comparative Law* (OUP, 2006), pp. 557–598.

42. Ibid.

43. See e.g. Markesinis (Ed.), *The Gradual Convergence: Foreign Ideas, Foreign Influences and English Law on the Eve of the 21st Century* (OUP, 1994).

country as a whole and thus have an incentive to use theoretical accounts that are able to bridge differences between jurisdictions.[44]

2.3. *Incompleteness and workability*

Out of all these reasons, structural incompleteness is the most pertinent explanation. What private law – any private law– needs is a system capable of producing satisfactory, workable solutions. This workability, which the incompleteness hinders, can perform its functions adequately. This implies that the system has enough doctrinal material to translate essential moral and policy insights into workable law that its users can accept. The system should be able to explain and help develop the law without resorting to external, theoretical accounts. Legal concepts and principles should be enough to guide courts in creating legal outputs. This is what doctrinal civil law attempts to achieve through its formalist structure. Take the quasi-deductive *Prüfungsschema* in German legal education, which leads law students to think about solving a legal problem by exclusively employing existing concepts and rules that make sense.[45] Complemented with commentaries, any lawyers can give answers that reduce the inherent indeterminacy of private law.

In summary, this section showed that civil law works without instrumentalist or moral theories, without being unable to handle the immense complexity of human situations. It has been argued that the existing formalist doctrine is simple and workable. This means that civil law does not need theory to operate.

What, though, if a body of law is newer and does not have the same concepts and self-referential understanding built into it? What if its academia is dispersed, its statutes cover very different fields, and its development is primarily case law based? In these cases, a complete absence of theory might be problematic. To ensure workability, some theory or system might have to grow organically to create the coherence necessary for the law's application. The alternative would be to stray into vapid instrumentalism and apply the law in an *ad hoc* quasi-policy instrument way.[46] The latter is a pervasive affliction of current EU private law.

In the next section, it will be demonstrated that these elements – that exist in common law and do not exist in civil law – might be present in EU private law. EU private law is differently structured from national, doctrine-based laws in

44. Goldberg and Zipursky, op. cit. *supra* note 12, at p. 279.

45. Bomhoff, op. cit. *supra* note 13, at 33.

46. On the dangers of this "hollowing out" of private law see Collins, "The revolutionary trajectory of EU contract law towards post-national law" in Worthington, Robertson, and Virgo (Eds.), *Revolution and Evolution in Private Law* (Hart Publishing, 2018), p. 315.

civilian Europe, and its partial structure means that gaps abound there and need to be bridged. Given this structural dissimilarity, the need for theory is more acute.

3. Theoretical accounts of EU private law and their shortcomings

EU private law resembles common law in that it exhibits a similar structural incompleteness. First, its norms are often not freestanding: they must be attached to national private law orders to take effect. This follows from the EU's limited law-making competences and leads to a lack of internal coherence in EU private law.[47] Second, EU private law has no overarching structure similar to those in civil law systems. Due to the absence of doctrinal coherence, ensuring the workability of EU private law invites a thicker mode of reasoning.

This is acknowledged in the literature, which often emphasises the differences between EU private law and national private law. According to the functionalist view, the incompleteness of EU private law makes it qualitatively different from national private laws, which are comprehensive and all-encompassing. EU private law, on the other hand, addresses only a narrow set of issues. For this reason, the functionalist view considers EU private law as merely a "techno-law" designed to pursue a limited number of goals or policies, the most important of which is facilitating the EU internal market.[48] Functionalists claim that EU private law is grounded in a different rationality than its national counterparts. Whereas the latter are structured around doctrinal coherence, the former picks and chooses specific goals and policies that it deems socially desirable and attempts to pursue them through narrowly designed regulations and directives.[49] Accordingly, functionalists assert that the divergent rationalities of EU private law and national private law orders cannot be reconciled. They claim there is a firm division between the two.[50]

Consequently, functionalists attempt to secure the workability of EU private law through policy-based arguments without the mediation of self-standing

47. See Hesselink, op. cit., *supra* note 3, at 102–104.

48. Comparato, "Public policy through private law: Introduction to a debate on European regulatory private law", 22 ELJ (2016), 621–626.

49. On the distinction between the two rationalities, see Michaels, "Of islands and the ocean: The two rationalities of European private law" in Brownsword, Micklitz, Niglia, and Weatherill (Eds.), *The Foundations of European Private Law* (Hart Publishing, 2011), p. 142 (defining them as "…concern[ing] questions asked and frameworks of discussion, not answers given and ideologies leading to such answers").

50. Cf. Micklitz, "The visible hand of European Regulatory Private Law—The transformation of European private law from autonomy to functionalism in competition and regulation", 28 YEL (2009), 3–59.

doctrinal concepts. While this approach is to some extent justified – as EU private law has not been able to develop a sophisticated doctrinal apparatus similar to those of national private law orders – the authors believe that functionalists' conclusions are too far-reaching. Elsewhere, the authors have argued that functionalists do not draw adequate conclusions from the structural incompleteness of EU private law and neglect features that render it similar to national private law orders.[51] Since both are necessarily intertwined, EU private law relies on doctrinal structures of national private law orders. Ultimately, this undermines the claim about their ostensibly distinctive and irreconcilable rationalities.

In this article, a related yet distinct argument is made. Since norms of EU private law must work through national private law orders to have any impact, how EU private law is theorised – and how its workability is ensured – must also change. While functionalist accounts recognise the need for a thicker mode of reasoning regarding EU private law, their accounts are too narrow in two different ways. First, they ignore an important subset of non-functionalist theoretical accounts. Second, they do not appreciate the gradual development of doctrine at the EU level. Thus, while the current lack of a comprehensive doctrinal structure of EU private law requires a departure from the thinner, doctrinally-oriented mode of reasoning, it does not mean that EU private law must necessarily be analysed and evaluated in merely functionalist terms. There are other ways of ensuring the workability of EU private law that accommodate both policy objectives and its emerging doctrine.

New Private Law theory provides some insights in that regard. In particular, it allows for a deeper understanding of how thinner and thicker reasoning about private law can ensure its workability. As argued by Paul Miller and Jeffrey Pojanowski, a developed private law system "will often resemble an intricate, artificial normative universe with its own language and logic" and "will draw less on abstract moral norms as on the virtues of doctrinal learning, intellectual facility and honesty, diligence, and sound judgment born of tacit knowledge about law and associated social practices".[52] However, they continue, this "does not mean a healthy and mature system of private law is unmoored from thicker moral reasons", and the doctrinal vocabulary predominantly stems from a "nested specification of moral reasons whose guidance, while abstract, is general".[53]

51. Bacharis and Osmola, "Rethinking the instrumentality of European private law", 3 E.R.P.L. (2022), 457–480 (arguing that the dissimilarities have been overemphasised because of an excessive focus on law in the books rather than how it is actually applied).

52. Miller and Pojanowski, "The internal point of view in private law", 67 *American Journal of Jurisprudence* (2022), 247–277, at 271.

53. Ibid.

This claim demonstrates the dynamic interaction between thin and thick modes of reasoning. The more private law doctrine there is, the more explicit the doctrinal, thinner mode of reasoning tends to become, whereas the thicker mode starts to operate in the background. Both modes of reasoning, however, are grounded in underlying principles of private law, and they operate together to ensure its workability. The difference between thicker and thinner accounts of private law is quantitative rather than qualitative.

Therefore, the lack of a coherent doctrine of EU private law does not necessarily tip the balance in the direction of functionalism. While the structural incompleteness favours thicker modes of reasoning, it does not imply that EU private law is necessarily functionalist. By dominating EU private law theory, functionalist accounts prevent the creation of a synthesis between doctrine and theory, so the workability of EU private law is secured. Too thin on the doctrine and not thick enough on theory, functionalists offer an overly shallow account of what EU private law is and can be.

The shortcomings of functionalist accounts are evident if the focus is on how EU private law is applied to actual private law disputes.[54] By neglecting the application of EU private law in individual disputes, functionalists underestimate the impact of national private law doctrines on the workability of the former. National and EU private law norms are necessarily intertwined. For instance, EU rules on consumer protection must interact with national doctrines regarding contract formation, interpretation, and enforcement in order to be operational. Therefore, the thinner mode of reasoning that informs doctrinal structures of national private laws must also be considered while theorising about EU private law. The current development of EU private law illustrates that both modes of reasoning can coexist harmoniously: private law theory can inform its doctrine, and vice versa.[55] The workability of EU private law can be much better achieved by accounts that reconcile theoretical and doctrinal modes of reasoning within a single, coherent framework.

The authors thus disagree with the claim, recently put forward by Olha Cherednychenko, that "in contrast to national private law, EU private law is not primarily concerned with private individuals and their independent interests as ends in themselves, but rather with the creation of the European

54. On the application-oriented focus of private law theory in the European context, see Grundmann, Micklitz and Renner, "New Private Law Theory. The core ideas" in Grundmann, Micklitz and Renner, *New Private Law Theory. A Pluralist Approach* (Cambridge University Press, 2021), p. 3.

55. This aspect of the argument mirrors Poncibò and Borgogno, "Schools of thought in European private law" in Durovic and Tridimas, *New Directions in European Private Law* (Hart Publishing, 2021), pp. 61–84.

internal market and individuals' roles in this process as market participants".[56] For Cherednychenko, EU and national private law should be considered parallel legal regimes that operate separately from each other or substitute and complement each other.[57] However, all these forms of interactions that Cherednychenko distinguishes already assume that "EU private law is being absorbed into the fabric of national private law" due to the structural incompleteness of the former.[58] And since all norms of EU private law are ultimately applied to particular private law disputes, even if by different institutions,[59] the conflict between their allegedly divergent rationalities dissolves.

The 2016 reform of the French Civil Code illustrates this point. One of the changes introduced by the reform was the new Civil Code Article 1128, which establishes that the validity of contracts depends on whether their content is lawful. By introducing such a provision, the French legislator attempts to protect weaker parties from exploitative contracts that create significant imbalances in the parties' rights and obligations. The Civil Code thus inserts into the French legal system those provisions of EU private law that protect consumers and further extends them to include other vulnerable groups, such as small businesses.[60] However, while the Civil Code accommodates seemingly policy-oriented norms of EU private law, commentators note that the main reason behind its reform was to "reintroduce coherence into the substantive law of obligations".[61] The reform aimed to recalibrate the doctrinal structure of French private law in light of evolving market circumstances. It did not, however, attempt to challenge the validity of the thin mode of reasoning. Rather, it changed the premises on which such a reasoning would operate.[62] Accommodating policy-oriented considerations, the reform was based on "an idea of the law as self-contained meaning", independent of any economic or moral reasons.[63] While prompted by functionalist

56. O Cherednychenko, "Islands and the ocean: Three models of the relationship between EU market regulation and national private law", 84 *Modern Law Review* (2021), 1294–1329, at 1300.

57. Ibid., at 1307–1327.

58. Ibid., at 1320.

59. Ibid., at 1314–1315; the authors believe that what institution applies private law norms is relevant from a pragmatic – but not necessarily a theoretical – point of view; functionalists accounts remain surprisingly formalistic in this regard.

60. See Hesselink, *Justifying Contract in Europe: Political Philosophies of European Contract Law* (OUP, 2020), pp. 278–279.

61. Watt, "The reform of the French Civil Code at a distance: An international and comparative perspective", 13 *European Review of Contract Law* (2017), 445–458, at 447.

62. Somek, *The Legal Relation. Legal Theory after Legal Positivism* (Cambridge University Press, 2017), p. 106.

63. Watt, op. cit. *supra* note 61, at 448.

considerations, the ultimate aim of the reform was to exclude such considerations from future applications of private law, remaining attached to the thin mode of reasoning.[64]

The next section explains how thinner and thicker modes of reasoning can coexist and create the most suitable way of securing the workability of EU private law. Before that, however, this section concludes with the observation that even within EU private law itself, the move from the theoretical to the doctrinal mode of reasoning is taking place.[65] An argument often offered in favour of the functionalist interpretation of EU private law is its relatively simple form. This results in a "less formal, dogmatic, and positivistic" legal culture, where substantive arguments come to the fore more easily than in doctrinally developed national private law orders, and in which "the borderline between the external and the internal perspective is gradually blurring".[66]

Nonetheless, the development of EU private law, often led by the Court of Justice of the European Union (CJEU), might put this statement into question. The CJEU's pragmatic style might indeed focus on problem-solving and directly reference substantive, policy-oriented considerations.[67] However, a closer look at the gradual accumulation of the CJEU's private law cases reveals that even EU private law can rely on the thin mode of reasoning. Both scholars and the Court aim to create local coherence within and between different parts of EU private law. For instance, there are several attempts to attune the parallel regimes of consumer law and data protection at the EU level.[68] The concept of the average consumer, initially codified in the Unfair Commercial Practices Directive, has made its way to other areas of the CJEU's case law on consumer protection.[69] There has been a significant doctrinal development regarding the notion of transparency in the Court's

64. On how the doctrinal progress is dependent on extra-legal circumstances, see Auer, op. cit. s*upra* note 14, pp. 19–20.

65. Michaels, op. cit. *supra* note 49, p. 143, acknowledges that the doctrinal mode of reasoning might occur within the instrumentalist rationality but does not develop this thought further.

66. Hesselink, "A European legal method? On European private law and scientific method", 15 ELJ (2009), 20–45, at 31, 30.

67. On the CJEU reasoning in general, see Basedow, "The Court of Justice and private law: Vaccilations, general principles and the architecture of the European judiciary", 3 ERPL (2010), 443–474.

68. Cf. Borgesius, Helberger and Reyna, "The perfect match? A closer look at the relationship between EU consumer law and data protection law", 54(5) CML Rev. (2017), 1427–1465.

69. Cf. Loos, "Crystal clear? The transparency requirement in unfair terms legislation", 19 *European Review of Contract Law* (2023), 281–299.

jurisprudence.[70] Jürgen Basedow evidenced a tendency to apply similar liability standards across a range of different areas of EU private law.[71] Hans Wolfgang Micklitz and Rob Van Gestel identified the gradual emergence of the CJEU's approach to private standardisation bodies, piggybacking on the EU's new approach to technical standards, which began in 1985.[72] Thomas Ackermann analyses the CJEU's *Sturgeon* case related to the Air Passengers Rights Regulation[73] as another example of doctrinally-oriented, thin reasoning by the Court.[74] Each of those examples – and many more – could be extensively analysed. However, in what follows, the focus will be on two particular strands of the CJEU's jurisprudence that best illustrate the claims of this article. They concern two crucial areas of EU private law: the regulation of unfair terms in consumer contracts; and claims for competition damages.

The Unfair Terms Directive prohibits certain terms in consumer contracts – those that cause significant imbalances in the parties' rights and obligations and are inserted, to consumers' detriment, into standard form contracts, contrary to the requirement of good faith.[75] However, the Directive does not specify the exact consequences of evaluating a contract term as unfair. In *Banco Español de Crédito*, the CJEU stated that the Directive's provisions do not allow national courts to revise the content of unfair terms.[76] However, in *Kásler*, it clarified that such a prohibition does not preclude national courts from substituting unfair terms with "supplementary provisions of national law" if it is the only way of protecting consumers from "particularly unfavourable consequences".[77] The Court justified both decisions by referring to "the dissuasive effect on sellers or suppliers of the straightforward non-application with regard to the consumer of those unfair terms", which can be compromised by revising those terms[78] and fostered by replacing them with provisions of national law.[79] However, in subsequent cases, the CJEU departed from such policy-oriented reasoning and focused on what exactly constitutes illegitimate revisions of unfair terms contrary to their acceptable replacements. While the Court still referred to the "dissuasive effect" rhetoric,

70. Cf. Durovic, "The subtle Europeanization of contract law: The case of Directive 2005/29/EC on unfair commercial practices", 23 E.R.P.L. (2015), 715–749, at 722–732.

71. Basedow, op. cit. *supra* note 9, at 785–786.

72. Cf. Van Gestel and Micklitz, "European integration through standardization: How judicial review is breaking down the club house of private standardization bodies", 50 CML Rev. (2013), 145–182, at 151.

73. O.J. 2004, L 46.

74. Ackermann, op. cit. s*upra* note 9, at 778–779.

75. Art. 3(1) and 6(1) of O.J. 1993, L 95.

76. Case C-618/10, *Banco Español de Crédito*, EU:C:2012:349, para 69.

77. Case C-26/13, *Kásler*, EU:C:2014:282, paras. 76–80.

78. Case C-618/10, *Banco Español de Crédito*, para 69.

79. Case C-26/13, *Kásler*, para 83.

the core of its argumentation becomes thinner and oriented at coherence between different cases. Instead of the thick mode of reasoning, the CJEU tends to focus on doctrinal questions, such as whether replacing unfair terms with ambiguous standards – like principles of equity or established customs – amounts to revising them[80] or whether national courts should be allowed to remove only some elements of unfair terms from consumer contracts.[81]

An area of what is termed "EU tort law", competition damages actions, can serve as another example. In the seminal *Courage* case, the CJEU essentially created this field of law, which has been generally perceived as pursuing the instrumental goal of protecting competition, deterring infringements, and regulating the market.[82] The Court seems to have taken an explicitly functional view that competition damages actions form a vital part of the competition regime in the EU, distancing itself from corrective justice-oriented national tort law.[83] It seemed as if this area was perceived as a mere tool to preserve the internal market, consistent with functionalist accounts and shown by the employment of the principle of effectiveness in its reasoning. However, the CJEU, in its subsequent case law, does not refer to considerations of enforcement or policy reasons alone. First, the Court often defers to the rules of national tort law and emphasises the need to guarantee compensation for victims of anticompetitive infringements. Second, it has underlined the importance of the right of victims to claim compensation and, by extension, considerations of corrective justice. The CJEU's rulings on causation and standing have been particularly illustrative on these points. In *Kone* and *Otis II*, cases decided more than a decade after *Courage,* the Court set aside national tort law on causation in this area, conferring standing to remote claimants that would otherwise be barred from suing.[84] The changes were not motivated by policy reasons alone; they rather aimed to guarantee

80. Case C-260/18, *Dziubak*, EU:C:2019:819, para 28.

81. Joined Cases C-70/17 & C-179/17, *Abanca Corporación Bancaria*, EU:C:2019:250, para 64; Case C-19/20, *Bank BPH*, EU:C:2021:341, para 80.

82. Case C-453/99, *Courage Ltd* v. *Bernard Crehan* and *Bernard Crehan* v. *Courage Ltd and Others*, EU:C:2001:465, para 27 ("Indeed, the existence of such a right . . . discourages agreements or practices, which are frequently covert, which are liable to restrict or distort competition"). See also Case C-724/17, *Skanska Industrial Solutions and Others*, EU:C:2019:204, para 45.

83. See a version of this argument in Dunne, "Antitrust and the making of European tort law", 36 *Oxford Journal of Legal Studies* (2016), 366–399.

84. Case C-557/12, *Kone AG and Others* v. *ÖBB-Infrastruktur AG*, EU:C:2014:1317; Case C-435/18, *Otis Gesellschaft GmbH and Others* v. *Land Oberösterreich and Others*, EU:C:2019:1069.

compensation for victims of anticompetitive infringements.[85] Any changes to national tort principles were incremental and addressed the question at hand rather than presenting entirely new causation standards – as Advocate Generals have called for in their opinions.[86] More importantly, the Court referred to principles that its earlier case law had already established concerning the extent of the right and carefully analysed the existing rules in national tort systems.[87] Its reasoning was, thus, thin and doctrinal, even in this enforcement-inflected area, and did not rely on some overarching theoretical account based on the imperative to complete the internal market. After all, it is beyond doubt that compensation and, more widely, corrective justice are principal goals of the private enforcement of competition law, a fact also evidenced by the damages actions regime's structure, which by definition utilises national tort rules, and by the secondary legislation, namely the EU Damages Directive.[88] EU law, therefore, deals with questions relating to the establishment of tort liability not solely by reference to deterrence and broader policy considerations. Any functional and enforcement-oriented assessments of tortious relations in EU damages can be understood and applied by courts only in the context of legally prescribed goals, institutional competences, and, importantly, in alignment with the private law reasoning existing in national systems.[89]

Those examples from crucial areas of EU private law illustrate how the thin mode of reasoning, with its attachment to structural integrity and coherence, is exhibited even at the EU level. They demonstrate that the gradual accumulation of doctrine, its "critical mass", can tilt the balance away from

85. This argument is developed more extensively in Bacharis, "Is 'more' better? Broadening the right to sue in competition damages claims in both sides of the Atlantic", 13 JECLAP (2022), 217–233.

86. See e.g. Opinion of A.G. Kokott in *Kone*, EU:C:2014:45, paras. 84 ff. Cf. Opinion of A.G. Wahl in *Skanska*, EU:C:2019:100, paras. 27, 28 and 46–50.

87. Case C-557/12*, Kone*, paras. 31, 32. See also, on the deference to national tort law, the earlier *Manfredi* case: "In the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to prescribe the detailed rules governing the exercise of that right [to claim compensation], including those on the application of the concept of 'causal relationship', provided that the principles of equivalence and effectiveness are observed". See also Joined Cases C-295/04 to C-298/04, *Manfredi* v. *Lloyd Adriatico Assicurazioni SpA*, EU:C:2006:461, para 64.

88. I.e. an action is national law-based but with certain areas governed by EU law. See Arts. 1 and 3 of the Damages Directive, O.J. 2014, L 349/16.

89. For a similar conclusion, see De Sousa, "EU and national approaches to passing on and causation in competition damages cases: A doctrine in search of balance", 55 CML Rev. (2018), 1751–1784, at 1780. On issues relating to the interaction between national law and primary and secondary EU law, see Franck, "Striking a balance of power between the Court of Justice and the EU legislature: The law on competition damages actions as a paradigm", 43 EL Rev. (2018), 837–857.

thicker reasoning. It is worth noting that such an incremental development resembles precedent-based mechanisms of common law. However, similarly to common law, the CJEU's reasoning is still grounded in substantive considerations about the objectives that private law is supposed to achieve. The thick mode of reasoning does not dissolve entirely. Contrary to civil law jurisdictions, EU private law does not assume that coherence can be achieved top-down by adopting a code and elaborating on its provisions solely within the thin mode of reasoning. Instead, EU private law's striving for coherence is bottom up. It attempts to create coherence incrementally, combining the thick mode of reasoning with gradual doctrinal developments.

The following section elucidates the authors' view on how such a combination of thick and thin reasoning can be used to make EU private law workable, and why this proposal is more appealing than functionalist accounts.

4. New private law theory and EU private law

The above text has presented the reasons why the theoretical mode of reasoning has developed in the common law, contrary to civil law jurisdictions, and demonstrated that, regarding EU private law, such thicker accounts are often associated with the functionalist approach. In this section, it is argued that the same reasons that ground the necessity of the theoretical mode of reasoning in common law apply to EU private law. However, there is nothing inherent to EU private law which suggests that the functionalist approach should prevail. Quite the contrary; only a theoretical approach that takes seriously the *interpersonal* aspect of EU private law – and its emerging doctrine – is able to secure the two main objectives of a private law system: achieving coherence and providing a common language to discuss and evaluate it.

Securing the coherence and a common language of EU private law cannot be achieved through mere doctrinal analysis of legal concepts as in national law, simply because the former lacks the robust doctrinal apparatus of the latter. Moreover, past efforts to unify EU private law through codification have failed. As argued by most scholars, this failure stems from the fact that national private laws employ different doctrinal frameworks and rely on the doctrinal mode of reasoning based on chains of formalistic, self-referential analysis of legal concepts.[90] Accordingly, the coherence and common

90. See Smith, "What is legal doctrine? On the aims and methods of legal-dogmatic research" in van Gestel, Micklitz and Rubin (Eds.), *Rethinking Legal Scholarship. A Transatlantic Dialogue* (Cambridge University Press, 2016), p. 210, who describes doctrinal legal

language of EU private law cannot be secured through a purely comparative/doctrinal project, since it can hardly provide any unified framework.[91] Common law theory does not rely on any comprehensive doctrine but rather on moral, political, or economic insights. Those could prove invaluable in EU private law.

Developing a theoretical approach to EU private law can benefit from the success of common law theories, in particular New Private Law, in three distinct ways. First, it will stress the practical importance of EU private law in solving bilateral disputes. Second, it could contribute to achieving the instrumental objectives of the EU's legal order by making private law norms easier to apply. Third, it will render EU private law more predictable.

To begin with, the interpersonal aspect of EU private law, grounded in the legal doctrine, must be addressed. Are the EU directives on private competition law enforcement or anti-discrimination more about compensating claimants, fostering competition, or promoting the internal market? What considerations are relevant when a consumer seeks redress against unfair terms or when victims of competition infringements claim compensatory damages? Are these provisions designed to facilitate fair interpersonal relationships within a doctrinal legal structure or to achieve instrumental objectives, such as fostering competition and increasing market efficiency? Whatever the answer is, EU private law norms can be adequately evaluated only after their application to concrete private law disputes. What needs to be considered is how those norms operate in practice to come up with satisfactory solutions to the above dilemmas.[92] A certain kind of theoretical mode of reasoning can provide us with ideas on how to reconcile different considerations and uncover the objectives of EU private law – whether one thinks they are instrumental or not.[93]

Second, adopting a purely functionalist theory of EU private law can also jeopardise its instrumentalist objectives. Functionalism leads to the development of norms that do not comprise a system capable of achieving those objectives. Generally, the lifecycle of EU private law consists of three

method as "research that aims to give a systematic exposition of the principles, rules and concepts governing a particular legal field or institution and analyses the relationship between these principles, rules and concepts with a view to solving unclarities and gaps in the existing law".

91. For the landmark treatment, see Jansen and Zimmermann, *Commentaries on European Contract Laws* (OUP, 2018).

92. Cf. Grundmann, Micklitz and Renner, op. cit. *supra* note 54, p. 3.

93. For different attempts to do so, see Leone, "The missing stone in the cathedral: Of unfair terms in employment contracts and coexisting rationalities in European contract law" (PhD thesis, UvA, 2020); Esposito, *The Consumer Welfare Hypothesis in Law and Economics: Towards a Synthesis for the 21st Century* (Edward Elgar, 2022); Osmola, "Reflective choices. A liberal theory of consumer law" (PhD thesis, EUI, 2022).

stages: (i) first, EU private law norms are adopted, possibly with instrumentalist objectives in mind, and then implemented in national private law; (ii) second, they are applied to private law disputes, bundled with relevant national norms; (iii) third, after a number of disputes occur, those norms are adjusted, or new norms and principles arise. Any attempt to evaluate EU private law, including whether it achieves its policy objectives, must be mediated through individual cases. Only an accumulation of such cases makes it possible to assess whether EU private law is workable. Accordingly, the thin mode of reasoning produces more predictable results for legal subjects.

Functionalist theories of EU private law overlook that fact. They dismiss the logical necessity of stage (ii) and would like to jump directly from stage (i) to stage (iii). This is implausible because EU private law norms can only scale up – exercise a systemic impact – by bundling with national private law orders and being applied to concrete private law disputes.[94] It is also ineffective because neglecting stage (ii) loses sight of *how* instrumentalist objectives of EU private law can be achieved. Private law necessarily operates at the interpersonal level and refers to doctrinal legal concepts based on the network of mutual rights, duties, and responsibilities. An overemphasis on a limited set of instrumentalist objectives would exclude these crucial concepts from the picture. A merely functionalist approach would render EU private law qualitatively different from national private laws. And since the two are necessarily intertwined in their application to private law disputes, this could severely undermine the effectiveness of EU private law and possibly jeopardise its objectives, including instrumentalist ones. Thus, the scaling up of private law norms must be preceded by their application to concrete disputes.

How does this relate to the above discussion about theoretical and doctrinal modes of reasoning? In national private laws, coherence created by doctrinal structures makes scaling up of private law norms more predictable due to predetermined relationships and established hierarchies between different rules and principles. This makes it easier to evaluate both the direct impact of private law norms on interpersonal relationships and their contribution to instrumental objectives. Adopting a doctrinal mode of reasoning makes scaling up private law norms more predictable because it makes it easier for institutional actors – lawmakers, courts, and others – to apply private law norms to concrete disputes. The theoretical mode of reasoning requires a lot of sophistication that is not always available to those actors. Legal doctrine makes the application of private law norms operational and workable.

94. Gold and Smith, "Sizing up private law", 70 *University of Toronto Law Journal* (2020), 489–534.

However, the luxury of relying exclusively on doctrine is not yet available in EU private law. To secure its workability, thinner forms of reasoning must be supplemented by thicker theoretical approaches, at least for the time being. Like private law theory in common law jurisdictions, which is about discovering a unified legal system, the theory of EU private law should establish shared European legal principles that secure coherence and gradually create a common language for European lawyers. Such an approach respects the internal point of view of the subjects of EU private law and the interpersonal character of their interactions but also accommodates the policy considerations that inform a significant part of EU legislation. The authors believe that this perspective – consistent with the "new formalism" advocated for by New Private Law theory scholars[95] – is more appealing than the alternative functionalist approach, which entirely ignores private law's internal point of view.

Another advantage of this approach is that it guarantees the harmonious coexistence of the theoretical and the doctrinal modes of reasoning, where emphasis changes at different stages of the EU private law norms lifecycle. A thinner, doctrine-based reasoning comes to the fore at stage (ii), where those norms are applied to private law disputes, bundled with national norms or independently when EU private law is developed enough to make it possible. It is thus extensively employed at the stage where the interpersonal character of private law is the most evident. It can happen either at the national level, as illustrated by the example of the French Civil Code, or at the EU level, as illustrated by examples of unfair terms in consumer contracts and competition torts. On the other hand, a thicker, theoretical mode of reasoning becomes predominant at stage (i), where EU private law is enacted, and at stage (iii), where its effects are evaluated after its norms have had the opportunity to scale up. Nevertheless, since all three stages are equally important in the lifecycle of private law, these modes of reasoning do not exclude each other but rather are mutually supportive. As mentioned, theorising about EU private law must consider that applying it to particular disputes is necessary for its application.

Therefore, the doctrinal focus on interpersonal relationships must proceed with the awareness that they constitute part of the bigger picture. Whereas legal doctrine is an indispensable facilitator of scaling up EU private law norms, both at the national and the EU level, theory remains important. Both modes of reasoning are closely intertwined in the application of EU private law and are ultimately necessary for analysing and evaluating its impact.

The authors' approach to private law theory is thus pragmatic: it is believed that it can create coherence where there is none, find connections between norms and contribute to creating a private law system. This is not to say that it

95. Miller, op. cit. *supra* note 7.

is the only thing that private law theory can do. Nor is it claimed that it has been the dominant motivation behind all private law theories, which often have been employed to discover, rather than create, private law's internal coherence. However, when the New Private Law Theory's aims are examined, it is evident that the authors' approach is similar. By employing a dialectical process between functionalism and non-functionalism, NPL understands private law's underlying principles, criticises them, identifies gaps or inconsistencies, and suggests improvements. Private law theory supplements and does not supplant doctrinal private law scholarship and constitutes a good fit for current EU private law.

It is no coincidence that private law scholarship in the common law world nowadays is very rarely merely doctrinal. Even contributions that aim to inform court practice and the development of case law explicitly take into account theories of private law in a way that might have been unfamiliar some years or decades ago. Parallels can be drawn with Roman law scholarship in the 19th century, which might have been originally devised as an instrumental offshoot of canon law scholarship or of university scholarly debate but was eventually used as the fundament of the new private law and civil law codes.[96] Indeed, the natural law scholarship that preceded it, for all its elegance, had to be complemented with a systemic approach that could ground it with reference to an external criterion of validity.[97] This is the pragmatic value of private law theory, which is also embraced by the authors of this article. This is also where NPL – and common law theories in general – can learn much from the civilian perspective and its attachment to coherence and system-building.[98]

This argument might meet with the objection, raised in a similar context by Ackermann, that the task of ensuring coherence and consistency lies at the national level rather than the EU level.[99] The EU's multi-level structure makes its private law system different from other federal-state systems, suggesting that Member States' private laws could operate with their own "thin" doctrinal concepts and that coherence-building at the EU level should focus on EU law as a whole – both public and private. Nonetheless, this objection seems to overlook the distinction between public and private law, which is central not only to NPL but also to much of existing EU private law scholarship. Insisting that it is sufficient for EU private and public law to be consistent with each other, rather than situating coherence inside (EU and national) private law,

96. Zimmermann, op. cit. *supra* note 4; Getzler, op. cit. *supra* note 7.

97. See generally Mousourakis, *Roman Law and the Origins of the Civil Law Tradition* (Springer, 2015), pp. 254 ff.

98. See also Smith, "Civil and common law" in Gold et al., op. cit. *supra* note 6, pp. 228–240.

99. Ackermann, op. cit. *supra* note 9.

risks falling into the same pitfalls as market functionalists, i.e. an overly reductionist approach that disregards private law's particular structure and goals.[100]

In addition, this approach contradicts the emerging efforts by the CJEU to create a cohesive system of *private law* norms within EU law, efforts which were analysed above.[101] Furthermore, by its very architecture, EU private law is composed of national and harmonised EU laws. Therefore, focusing separately on national and EU-based coherence would be counterproductive, as it would introduce doctrinal fragmentation, inhibiting the process of harmonisation essential for the integration of EU private law. Lastly, such an approach does not offer any solutions in cases where national and EU private law and their respective quests for coherence point in different directions. It would require a meta-theory that would provide criteria for resolving such conflicts. The approach advocated in this article does not face such a problem.

A second objection is that common law is judge-made, whereas EU private law is predominantly based on legislation. This raises the question of whether different pieces of EU legislation, created at different times and by varying majorities, can fit into any cohesive system like the common law. However, this objection also falls short. Historical contingency and changing circumstances also characterise judicial decisions in common law systems, where hundreds of years of precedents can be systemised despite being developed piecemeal over time. Private law theory in the common law vein is inherently interpretative and depends on the creation of a coherent system. It does not assume uniformity in principles and concepts; to a certain extent, it creates it.[102] The process of interpretation and systematisation is not exclusive to judge-made law; it is equally applicable to legislation, as evidenced by the unifying efforts of Romanists in the past. Lastly, the CJEU has been very important in developing private law rules and principles. Thus, case law has a central role to play in EU private law – most of its landmark developments and controversies stem from the Court's judgments – much like in the common law. In view of the above, it would be wrong to assume that common-law theory is not transposable due to the prevalence of statutory law in the EU.

100. See *supra* section 3.

101. See *supra* section 3. On the importance of maintaining the public/private divide in EU law, see Cherednychenko, "Rediscovering the public/private divide in EU private law", 26 ELJ (2020), 27–47.

102. Khaitan and Steel call similar theories that can develop the law "reason-tracking causal theories", see "Theorizing areas of law: A taxonomy of special jurisprudence", 28 *Legal Theory* (2022), 325–351, at 334. Cf. however, Stephen Smith, who makes the claim that (his) interpretative theory intends not to develop the law but merely to enhance its understanding of *Rights, Wrongs, and Injustices* (OUP, 2019), pp. 11, 25.

To sum up, private law theory can be used to understand the underlying principles that govern the different areas of EU private law. It can also help identify and address any potential gaps or inconsistencies in the law and suggest ways in which the law could be reformed to serve society's needs better. In addition to its practical applications, common law theory also has an important role in legal education, as it helps develop the critical thinking skills of law students and exposes them to a wide range of legal ideas and perspectives beyond national legal traditions. It can also contribute to the development of legal doctrine and policy by providing a theoretical foundation for legal decisions and reforms. Thus, private law theory is an important field of study in EU private law, which should not be investigated solely on functionalist grounds. While functionalist accounts embrace EU private law's incoherence, this article attempt to mitigate it.

5. Conclusion

This article has argued for transposing theories drawn from common law scholarship, particularly New Private Law theory, to EU private law. The main reason for this is that those theories can contribute to ensuring the workability of EU private law – securing its coherence and providing a common language to discuss it – even in the absence of a comprehensive doctrinal structure.

The argument unfolded in three parts. First, the development of civil and common law legal orders was compared. There was an investigation of material and theoretical reasons why civil law jurisdictions did not need private law theory to a similar extent as common law did. Civil law was able to attain a degree of comprehensiveness – in the form of civil codes and of a systematic legal science – which made resorting to extra-legal concepts or thicker accounts unnecessary. In the absence of the above conditions, the common law used thicker, theoretical modes of reasoning to enhance the workability of its private law order.

This leads to the second step of ther argument, where it was claimed that common law theories can be fruitfully applied to the theoretical discourse on EU private law. At the outset, it was highlighted that EU private law is incomplete by design, as it needs national private rules to apply. It also develops incrementally, mainly through the case law of the European Court of Justice and individual statutes. In other words, the norms of EU private law are dispersed and isolated in the sense that they regulate specific situations and do not constitute an overarching system. As observed, this led many scholars to develop functionalist theories of law that overemphasise EU private law's limited, instrumentalist objectives. This, however, misses the fact that EU and

national private law norms are intertwined and must be considered together, and this requires a combination of thin (national) and thick (EU) modes of reasoning. Functionalist accounts also do not appreciate that the case law and principles of EU private law are already moving towards doctrinal coherence.

The article then proceeded to the third step of the argument and provided a more appealing alternative to the functionalist accounts. The functionalist approach exhibits a persistent inability to build a coherent picture of EU private law and has failed to provide a common language to discuss it. Therefore, it is not able to secure the workability of EU private law. In a sense, functionalism condemns EU private law to fragmentation and impedes an overarching, systemic approach from developing. It was argued that applying common law theories could help find coherence where, currently, there is none. In particular, it was demonstrated that NPL, which explicitly deals with the juxtaposition of instrumentalist and non-instrumentalist accounts of private law, can be helpful in developing an interpretative account of EU private law. NPL offers valuable insights that help reconcile the interpersonal aspect of private law relationships – and the legal doctrines governing them – with instrumentalist objectives. Accordingly, it provides an avenue for combining a thinner mode of reasoning associated with legal doctrine with a thicker, theoretical mode of reasoning associated with functionalist accounts.

Apart from providing coherence to EU private law, this approach can also create a common language to discuss it, just like Roman law did in the past. Utilising the insights of New Private Law theories can be crucial for making sense of the conflict between instrumentalist and non-instrumentalist approaches to EU private law. It can reconcile simple-to-use concepts out of interpersonal-based accounts with functionalist considerations in a manner easily transplantable to the EU context. In other words, the methodology of NPL allows for employing intuitive and scalable concepts such as responsibility, with considerations drawn from basic legal-moral insights, all of which would be familiar to civil law systems.

In this way, this article responds to the debate about the future of EU private law and how it should proceed in the absence of top-down harmonising legislation.[103] While previous proposals have tried to identify scholarly restatements or international private law as avenues for progress, this article calls for theory to play this role alongside other elements.[104] It is partly agreed that while Member States' private laws can maintain their doctrinal concepts,

103. See the 2014 debate on the future of EU private law in the *Zeitschrift für Europäisches Privatrecht*, especially the papers by Ackermann, op. cit. *supra* note 9, Basedow, op. cit. *supra* note 9, and Sirena, "Die Rolle wissenschaftlicher Entwürfe im europäischen Privatrecht", 4 *Zeitschrift für Europäisches Privatrecht* (2018), 838–861.

104. On international private law as a means of limited harmonisation see Dutta, op. cit. *supra* note 9.

creating coherence and consistency in EU private law cannot be left solely to the national level. The EU's multi-level structure necessitates a coordinated approach involving both EU national systematisation and theorisation. Coherence and consistency in EU private law must be a shared effort, with significant roles for both EU and national private lawyers. This approach ensures that national laws operate together effectively within the broader EU framework, facilitating the internal market while respecting the diversity of private law's other aims. It is very much possible that the spread of theory originating in the common law might invite resistance from European scholars.[105] In a way, this resistance should be welcomed. The very debate around these theories should encourage their adaptation to local conditions, and this is what this article aims to do. If morality or political theory is insignificant in the EU legal order, then at least a debate must be had about it.

Nonetheless, it has never been systematically applied and has not managed to displace formalist doctrine in Europe. Moreover, most formalist doctrine in Member States' law already rests on interpersonal concepts. Therefore, transposing common law theory to EU private law could be understood as a renewal of existing continental theoretical practice.[106] Ultimately, such theories can be linked to the existing doctrinal mode of reasoning. They constitute a boon for formalist scholars and courts struggling to integrate EU private law into their national systems.

However, the benefits do not need to be one-sided. Integrating EU private law with common law theories provides an opportunity for a comparative analysis of principles on which the common law rests. Anglo-American theories often seem to be attached to specific and often incidental features of common law, such as consideration in contract law or the lack of a duty to rescue in tort law. These doctrines do not exist in civil law.[107] Applying the same theoretical framework to common and civil law jurisdictions will allow scholars to establish what is indeed essential about private law and which features are merely contingent. It is hoped that this contribution can be a step towards bridging the gap between how private law theory is pursued on the two sides of the Atlantic.

105. See the 2014 paper by Hosemann, op. cit. *supra* note 11, at 65–69, on the extent that this NPL is compatible with existing doctrinal approaches in civilian systems.

106. Ibid., at 68–69.

107. It is not by chance that the two entries of the *Stanford Encyclopedia of Philosophy* on private law theory focus exclusively on the common law of contracts and torts and place much emphasis on such features: see Ripstein, "Theories of the common law of torts" in *The Stanford Encyclopedia of Philosophy* (Summer 2022 Edn.), Zalta (ed.), <plato.stanford.edu/archives/sum2022/entries/tort-theories/>, (last visited 26 July 2024).