New Directions in European Private Law

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Introduction

I. Background

After some years of growth, European private law has reached a stage of relative maturity as a distinct area of law that brings together elements of private law, regulation, EU law and comparative law. The adoption of numerous directives and several regulations, as well as the development of interesting (though often unsettling) case law, by the CJEU has contributed to a substantial, albeit incomplete, corpus of law at Union level, the *acquis communautaire*. Maturity, however, does not mean stasis. Amid economic, technological and political developments, European private law is undergoing substantial changes. In particular, the rapid, relentless development of new technologies poses new challenges and requires adjustments in policy consensus. This book explores contemporary challenges, identifies problems and proposes solutions in light of the developments in European private law.

The contributions to this book are based on papers delivered by leading law scholars and practitioners at the conference ‘The future of EU Private Law’, held at the Centre of European Law, Dickson Poon School of Law, King’s College London, in February 2019, organised by Mateja Durovic and Takis Tridimas. The first cluster of essays assess the existing theoretical framework and traditional legal scholarship underpinning European private law. The second group of contributions examine the important and current topics of geo-blocking and standardisation in the context of recent legislative developments and the CJEU case law. A third cluster of essays assess the very challenging task of adequate regulation of the collaborative (sharing) economy and of online platforms, issues which European private law has continuously addressed over recent years. The fourth group of chapters deal with the regulatory challenges brought by an increasing development of artificial intelligence and blockchain technology, and the corresponding question of liability. The final group of essays assess recent European legislative developments in the area of goods and digital content, and identify potential future policy directions in which the European private law may develop in the future.

II. Content

In the opening chapter, Roger Brownsword examines the future of European private law in light of the impact emerging technologies have on how lawyers and
regulators think and reason. How one responds to technology such as artificial intelligence and machine learning, blockchain and cryptocurrency depends on the responder's mindset. In this respect, the author argues that 'regulatory instrumentalist' and 'technocratic mindsets', ie technology-provoked mindsets, challenge the traditional mindset and give rise to an uneasy coexistence between different fractions of the law community. This uneasy coexistence is formed around three tensions which impact on the use of general principles: the use and fitness of rules and standards; accommodation of conflicting and competing interests; and the recognition of fundamental values. In this chapter, the author acknowledges that technology will play a significant part in shaping the future of EU private law, particularly in a disruptive manner. However, the direction taken by European private law will be shaped by the approaches to the current tensions underpinning the mindset of lawyers and regulators.

Francisco de Elizalde examines the issue of standardisation of agreement in EU law by seeking to prove the existence of a 'mass European contract law' (MEUCL). Here, the author claims that EU law is establishing general rules for the formation of contracts by following a radically new approach to procedural fairness. By analysing key EU legislation and case law, the author argues that EU law is transforming the rules on contract formation and validity through the use of legal standards such as the 'average consumer' rather than consideration of the individual characteristics of the contracting parties. By applying this 'contractual position' approach, the author suggests that the development of core EU rules for the formation of contracts could lead to a harmonised mandatory system of MEUCL and a contract law that is technologically more efficient. According to the author, however, the process of MEUCL is ongoing and fraught with various difficulties and complex issues due to the unresolved extent of the EU's competence to harmonise contract law and the relationship between the roles of EU law and national law. Nonetheless, it is claimed that MEUCL has the potential to reinvigorate, from a new angle, studies on harmonisation of European contract law, including harmonisation by mandatory law and the use of legal standards to deal with the intrinsic complexities of EU law as a pluralistic legal system.

Cristina Poncibo and Oscar Borgogno reflect upon the future of private law in a challenging environment in which there is a general distrust in the positive force of the law as a vehicle of integration and thus in the means to achieve a new spirit of pacification, cooperation and solidarity in Europe. In their view, legal scholars should respond to the current challenges and be the driving force of private law in Europe. For this purpose, the chapter focuses on identifying the main 'schools of thought' in European private law and their role in the future development of private law. Using the role of 'integration through law' as a starting point, the authors distinguish between the classical schools, which take for granted the subordination of private law to the construction of EU integration and the internal market, and the modern schools, which reject such subordination and search
instead for the foundations of private law in Europe. In this latter context, the chapter reflects on the role played by (behavioural) law and economics, giving weight to the argument that EU private law scholarship is driven by the diversity of perspectives as well as sharing ideas, tools and approaches. By taking stock of and analysing the current confusion, the authors furnish preliminary insights into the approaches that have emerged in European private law scholarship and the new directions needed in the future.

Valeria Falce and Giusella Finocchiaro assess the extent to which an effective digital ecosystem requires a combination of competition policy and regulation. To this end, the authors examine how the recent Geo-blocking Regulation 2018/302 works in synergy with EU competition rules, consumer protection, e-commerce regulation and data protection to fully unlock e-commerce in the EU and to shape a single European digital ecosystem. In this respect, the authors focus on the common aims of tackling the problem of market partitioning and avoiding discrimination. Following a comprehensive review of the Geo-blocking Regulation, the authors highlight how and the extent to which EU competition policy, especially as applied by the ECJ and the European Commission, combats geo-blocking practices. In a final step, the authors discuss the interplay between the Geo-blocking Regulation, consumer protection, e-commerce regulation and data protection, in particular from the perspective of non-discrimination. Considering that in many Member States national competition authorities will be in charge of supervision of compliance with the geo-blocking rules (including the imposition of fines), the interplay between competition and regulation is expected to be even more fruitful and successful, and the new provisions against geo-factors are likely to enrich what has been happily defined as a ‘smart’ economic integration through technology, regulation and competition law, thus confirming the need for a direction which takes a ‘circular’ and integrated approach in applying regulation and competition policy in the digital datasphere.

Eileen Sheehan analyses how ECJ case law on Directive 98/34 (which is now replaced by Directive 2015/1535) has impacted on private relations. The Directive employed standardisation as a means to prevent national standards and regulations from presenting barriers to trade and is thus key to European integration. In the author’s view, the impact of the ECJ case law can be seen, on the one hand, in the context of failures by Member States to comply with the Directive’s notification/communication and standstill procedure and, on the other, in the way the ECJ defines information society services and thus the Directive’s scope of application. In this latter respect, the definition of information society services greatly affects the rules applicable to new technologies and intermediation services. The author points out that the recent judgments of the ECJ in Asociación Profesional Elite Taxi, Uber France and Airbnb are expected to have considerable implications for private parties depending on how information society services are interpreted, though further legislation or case law is needed to resolve the issue clearly.
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Vassilis Hatzopoulos examines the relationship between European private law and a rapidly developing cultural, social and widely unregulated phenomenon, namely the collaborative economy. Described as a contributing factor to a fourth industrial revolution, particular features of the collaborative economy not only disrupt traditional models and raise new legal issues, but can also cause fragmentation within the EU internal market. In his chapter, the author examines the relationship between features of the collaborative economy and the challenges they present for general principles (eg effet utile) and key policy areas of European private law (eg consumer protection and data protection). The author argues that legislative outcomes in the form of lacunary regulation and fragmentation are not conducive to the proper application of EU law but are unavoidable in a field as innovative, dynamic and fast-evolving as the collaborative economy. In this context, the author argues that the general principles of EU law may prove crucial both by allowing existing rules to expand and cover original situations and by informing the content of new rules. Accordingly, EU law may need to create a new general principle, enhanced by the interpretative method of analogy, which would be tuned to technological innovation to build a bridge between old (analogue) and new (digital) realities.

Menno Cox explores how the platform economy will drive the future of European private law by analysing the world’s first horizontal platform regulation, EU Regulation 2019/1150. The author proceeds from the premise that the online platform business model is overwhelmingly beneficial and requires further support, including through (harmonised) rule setting – of which Regulation 2019/1150 represents a first important step. The chapter starts by introducing Regulation 2019/1150 against the background of the rise of the online platform economy, or simply economy – online intermediation being the new normal. It then describes some unique features of online platforms to underline that they are a truly novel phenomenon that warrant an ‘ex novo’ approach to regulation. The central section of the chapter covers the novel interplay between government regulation and private law in the inherently cross-border, and frequently global, online platform economy. The author concludes his contribution with a reflection on the future of European private law by being optimistic about its future developments.

George Dimitropoulos examines various legal issues and responses surrounding a revolutionary technological development: blockchain. Although increasing in importance, the legal framework surrounding is especially complex as blockchain not only transcends various different traditional categories of law but also gives rise to a new kind of legal system known as the lex cryptographia. Accordingly, the author discusses the idea of a new blockchain law, which will serve to enable public and permissionless blockchain, establish new foundations of trust in society, and achieve new interoperability functions between the public and the private, as well as the physical and the digital, world. In the chapter, the author focuses on the nature of the interactions and different phases of development between blockchain technology and the laws of the analogue and digital worlds. A blurred picture
emerges of a complex interaction between multiple areas of law, self-regulation and external regulation by ordinary law, which will require the EU to develop new types of laws in order to protect its citizens from the risks of blockchain technology whilst not stifling technological innovation.

Michel Cannarsa addresses the relationship and suitability of national and EU rules governing civil liability to tackle challenges posed by new technologies. Although often overlooked, new technologies pose a variety of challenges and questions for civil liability. If left unanswered, market fragmentation, legal uncertainty and lack of consumer protection would potentially emerge. The chapter considers several core questions, which stem from the underlying issue of whether the legal basis and provisions established by the rules in question in the various Member States and at EU level are fit for the changes under way. In seeking to answer these questions, the author puts forward a number of principles and methods of analysis with a view to identifying some avenues leading towards concrete solutions. In this respect, a response by the EU would offer an environment that would be favourable to the development of new technologies in Europe but would revive thinking on the harmonisation of private law, given that many aspects of it may be affected by the emergence of new technologies.

Andrej Savin examines the broader question of the relationship between private law and the regulation of the Digital Single Market. Using two new EU directives – Directive 2019/770 and Directive 2019/771 on certain aspects concerning contracts for the sale of goods – as a basis, the author questions the extent to which harmonised private law can contribute to achieving the EU Digital Single Market, more specifically its adequacy for addressing problems in the digital world and its ability to adapt to new technology. In the modern world, which moves forward at frightening speed, it may be questioned whether further civil law instruments are needed or what their purpose might be. It is equally important to pose the question whether full harmonisation is preferable to a partial, consumer law-driven approach. At the same time, new developments such as the use of artificial intelligence and the emergence of a data-based economy inevitably challenge the foundations of the traditional law of obligations; they require the rethinking of fundamental concepts such as offer and acceptance, and thus question the extent and role of harmonised EU private law in the digital world.

In the concluding chapter, Hans Micklitz adopts different perspectives to approach the fundamental question of the direction(s) that European private law should take. The author begins by presenting seven possible directions, ranging from conceptual to doctrinal, and from technological to ecological, and viewing European private law in each of these contexts. In a second step, the author addresses the development of European private law scholarship, identifying three distinct phases, but hinging the success of the search for new directions on self-critical legal scholarship. In a third step, the author reflects on the role of European private law as European economic law. On the basis of the contributions to this volume, the author identifies three different options to handle the search
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for a self-critical direction in European private law as European economic law. Moreover, the author proposes a particular methodology and technique that could serve as a starting point for considering possible 'new directions': identifying the different constituent elements in the pre- and post-contractual stages of a contract shows how the EU uses not only private law, but also codes of conducts and technical standards. Although the search for new directions depends on who is searching for what, the author reinforces the critical role that legal scholars will play in the future direction of European private law.
I. Introduction

The expression 'European private law' is relatively new and has various meanings according to the scholarship that has appeared in recent decades. The expression concerns the contributions of scholars from different legal and cultural backgrounds. The concept cannot be analysed according to the paradigms to which legal scholars used to be accustomed, because EU private law is not domestic law or supranational law; rather, it is both together and something more.¹ In the words of one author: 'When we speak of European private law we use a highly evocative term, because it refers to Europe that is a myth, a geographical expression, an economic and social idea, and finally a political expression.'²

Currently, the European private law field of study – that is, studies in EU private law traditionally supporting and consolidating the integration of the internal market – is in difficulties.³ The EU seems to have lost law as a vector of dynamism and cohesion. This should result in the worrying question for scholars today about the future of private law in Europe. More generally, the process of European integration has undoubtedly encountered many other difficulties. What is striking about recent events (specifically Brexit and the rise of nationalism), however, is a general distrust in the positive force of law as a vehicle of integration.⁴

¹ Author of sub-sections IIIB and C.
² Alpa (ibid).
⁴ L. Azoulai, “Integration through Law” and Us’ (2016) 14 ICON 449.
The legal form is no longer seen as the means to achieve a new spirit of pacification, cooperation and solidarity in Europe. EU private law is perceived as the vehicle of economic forces and government apparatuses at the origin of processes of restructuring national societies and their remaining welfare states. At this juncture, two authors have urged reconsideration of the EU's legal and political construction.\(^5\) We note that the challenge is twofold: it is both substantive and methodological. The former concerns the scope of EU private law and its meaning; the latter concerns how to approach it. Although these issues are closely related, this chapter focuses on the latter.

In light of the foregoing discussion, we believe that legal scholarship should drive the future of private law in Europe.\(^6\) Consequently, in what follows, we attempt to take stock of and analyse the current confusion, an exercise we deem necessary in these troubled times.\(^7\) This will not be enough to resolve the issue, which is far too complicated, but we hope to furnish some preliminary insights into the approaches that have emerged in EU private law scholarship. First, we describe the main schools of thought, or intellectual traditions, in European private law, ie groups of scholars who share an opinion or a similar outlook on European private law. Secondly, we argue that such schools may be classified into classical and modern because of a shift of paradigm in understanding the relationship between private law and EU integration. The classical schools expressly admitted the subordination of private law to the construction of EU integration, while the modern schools have not followed the same path while searching for the foundations of private law in Europe.

For the purposes of this chapter, a school of thought is 'a community of expertise which considers itself a comparatively self-contained, teachable and knowable domain, while the act of 'disciplining' is the enforcement of circumscribed, usually conservative, views of such discipline.'\(^8\)

On this basis, we deal with the merits of a 'polyphonic' engagement between the main theories that have been propounded to address the present challenges. We argue that if EU private law scholarship is to become a more productive and inclusive academic field, it should open itself up to critical self-reflection, which - surprisingly - is almost non-existent in the field,\(^9\) and overcome the

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\(^8\) I Manners, 'Normative Power Europe: A Transdisciplinary Approach to European Studies' in C Rumford (ed), Handbook of European Studies (New York, Sage, 2009).

\(^9\) A notable exception is C Joerges and C Kreuder-Sonnen, 'Europe and European Studies in Crisis, Inter-disciplinary and Intra-disciplinary Schisms in Legal and Political Science' (2016) Berlin Social Science Centre Discussion Paper No 109. The authors conclude their contribution by saying: 'We are confident that contestation and critique will generate new ideas and perspectives for a European future beyond the present emergency politics.'
confusion of the present. Accordingly, the chapter benefits from a dialogue conducted between a researcher studying law and economics and its current developments and a researcher in comparative private law, in order to identify the main schools of thought from classical to modern and their role in the future evolutionary path of European private law.¹⁰

II. Classical Schools of Thought

A. Integration through Private Law Scholarship

The 'Integration through Law' school has been one of the most influential narratives of European integration.¹¹ In *Integration Through Law: Europe and the American Federal Experience*, the authors stressed that 'integration is fundamentally a political process' and law is 'but one of the many instruments' harnessed to achieve the objectives of integration, while 'law has a vital role to play in the process'.¹² Accordingly, the European Community has often been presented as a juristic idea; the written constitution as a sacred text; the professional commentary as a legal truth; the case law as the inevitable working out of the correct implications of the constitutional text; and the constitutional court as the disembodied voice of right reason and constitutional theology.¹³

The traditional role of a court of law is to interpret law already in effect, but the European Court of Justice (now the CJEU) has declared itself to be a 'new legal order of international law'.¹⁴ In this respect, we underline that legal scholars have always been fascinated by the role played by the CJEU in dealing with national legal traditions (and specifically private law issues) in a more express or implicit way.¹⁵ It has been stressed that the above-mentioned project viewed law as both an object and an agent of integration: while law is a product of the polity, the polity is

¹¹ M Cappelletti, M Seccombe and J Weiler, 'A General Introduction' in M Cappelletti, M Seccombe, J Weiler (eds), *Integration through Law: Europe and the American Federal Experience* (Brussels, De Gruyter, 1985) 3–15 (describing the project as aimed at examining 'how law can be used to promote ... economic integration').
also to some extent a creature of the law.\textsuperscript{16} This mutual conditioning of legal structure and political process explains the project for integration of and through law in the European Union. On the one hand, this school of thought has capitalised on the instrumental role of (statutory) law in integrating modern societies characterised by a complex differentiation of functional spheres of social reproduction (politics, economics, culture, etc). On the other hand, it has imbued European legal integration with a broader normative vision of 'convergence' that should lead to the emergence of a common European identity.

Unfortunately, the instrumental role of statutory law has been perceived as an appendage to EU economic forces and governmental mechanisms that undermine the social structures of the Member States, producing social commodification and cultural standardisation. The question of integration has now to be defined as a process that is legally structured not only by alleged homogeneity, equality and inclusion, but also by increased forms of heterogeneity, inequality and exclusion.\textsuperscript{17}

Private law has indubitably played a significant role on the political agenda of this school and, particularly, in establishing and removing the barriers to the internal market of the EU.

In other words, the rationality of EU private law, focused as it is on the integration of the internal market, can be regarded as primarily instrumental. Consequently, private law was initially conceived as an instrument with which to achieve the policy objectives of the EU. These objectives were primarily related to the integration of the internal market, and the framework within which the discipline was perceived was, therefore, one of pragmatic and purposive rulemaking based on statutory law (ie regulations, directives). In particular, one author has demonstrated that private, as opposed to public, law played a central part in European integration.\textsuperscript{18}

While the idea remains valid, the context has dramatically changed in Europe. The dichotomy between EU and domestic legal cultures in private law created by the market-driven EU private law has significantly contributed to the failures now apparent. An example is the key role assigned to the discipline of consumer contract law that, evidently, is important for the establishment and functioning of the internal market in the EU.\textsuperscript{19} After the adoption of various consumer law measures, the EU decided to conduct a profound review of the consumer acquis, and proposed major reforms. Initially, the EU's activities were based on a minimum harmonisation approach which allowed Member States to adopt more protective rules. In the past decade, activities have revealed the change in the EU's

\textsuperscript{16} D Augenstein, "Integration through Law" Revisited. The Making of the European Polity (Farnham, Ashgate, 2012).
\textsuperscript{17} Jorges and Kreuder-Sonnen (n 9).
approaches, since measures have been based on a full harmonisation approach, removing Member States' freedom to rule by favouring more protection rules in the areas covered by those measures.\textsuperscript{20} 

Indeed, the notion of 'integration through law' has proved to be an extremely powerful concept providing a group of scholars, civil servants from the Community institutions and CJEU judges with 'a flattering self-image and a raison d'être expressed in three little words'.\textsuperscript{21}

B. Market-Driven Private Law Scholarship

Private law has indubitably had a significant role on the political agenda of the school of thought of Cappelletti and others and, particularly, in establishing and removing the barriers to the internal market of the EU.\textsuperscript{22}

For example, legal scholars have noted that France reacted fiercely to the Product Liability Directive\textsuperscript{23} with what can be called national resistance. The transformation of this directive into a full harmonisation measure occurred through the CJEU's interpretation in a number of infringement proceedings. In France, in particular, resistance was raised by two actors on the legal scene: the legislator and legal scholars.\textsuperscript{24} The example shows that EU private law has been 'applied' as an instrument with which to achieve the policy objectives of the EU. These objectives primarily concern integration of the internal market, and the framework within which the discipline has been perceived is therefore one of pragmatic and purposive rulemaking. This approach implies that EU private law has had a limited doctrinal autonomy and is focused on specific sectors of the market according to EU policy goals.

C. The Enchantment with Full Harmonisation and Codification

Our contention here is that EU private law scholarship has focused on the goal of European integration and, for this reason, has supported EU institutions in a process of 'Europeanisation by imposition' grounded on harmonised rules


\textsuperscript{22} Caruso (n 18).


\textsuperscript{24} Caruso (n 18).
(ie regulations, directives) and/or a codified EU private law. One author has argued that, on the contrary, there was a tension between the objectives of the original integration through law-project and its reliance on a positivist conception of law.25

Nevertheless, the turn to positivism occurred, and it took place either in piecemeal fashion, by way of harmonising directives, or in the comprehensive style of a supranational civil code.

On the one hand, it is well known that the harmonisation of private law had the objective of establishing an equivalent or even uniform set of rules in private law, with the effect of 'approximating', ie bringing closer together, the heterogeneous legal systems in the EU. One way to approximate national laws is to set minimum standards (minimum harmonisation), thus enabling Member States to maintain or introduce more stringent measures of protection above the limit. Another approach is that of maximum harmonisation, which gives no room for manoeuvre to Member States, since the measure fixes an upper limit.26 The terminology is confused, since terms such as 'complete, total or full harmonisation' are also used. For example, legal scholars usually indicate the Unfair Commercial Practices Directive as an example of full harmonisation containing more hardcore measures of maximum harmonisation providing expressly for uniform rules.27

On the other hand, legal scholars then focused on the codification of EU private law to absolve a prominent 'state-making function' for the EU. This view was grounded on the role that codification played in eighteenth- and nineteenth-century continental Europe. Napoleon's imperial vision relied on both military victories and the success of his codification.28 Like France, many other European nations linked the definition of a coherent body of private law to state unity, constitutional breakthroughs and national identity.29 In contrast, we agree with the scholarship noting that

private law codification is not as indispensable to continental legal culture as standard legal histories would have us believe. Law was modernizing roughly at the same time, and in the same way, in Western countries that did not codify private law, including the common law world and Scandinavia.30

Unfortunately, mainstream legal scholarship has mainly relied on the imposition of positive law and full harmonisation of domestic private law. Moreover, it

25 C MacAmhlaigh, 'Concepts of Law in Integration through Law' in Augenstein (n 16) 69.
27 H Collins, 'Harmonization by Example: European Laws against Unfair Commercial Practices' (2010) 73 MLR 89. The authors claimed (118) that this directive represented a 'much more aggressive approach to harmonization'.
29 Caruso (n 18).
has embraced the myth of developing a civil code to support the making of the EU. Indeed, such a descriptive and normative approach was very successful for decades, with few exceptions (see sub-section IIID), until its recent failure.\(^{31}\) There is no need to stress that Legrand was among the first leading academics in the field to maintain that merely drafting uniform rules does not result in uniform law.\(^{32}\) Law is, after all, much more than just formally uniformed rules: the meaning of a particular rule in a particular cultural and national context can only be established after studying that context. This context differs among the various cultures. According to Legrand, the contexts were also irreconcilable in the case of civil law and English law.\(^{33}\) He put forward other arguments as well: the whole idea of a European codification is arrogant in his view, because it imposes on common lawyers the supposedly superior worldview of continental lawyers. They each offer different accounts of reality and those preaching codification of private law consider the Anglo-American reality as being without merit.

Legrand noted that the project of a European Civil Code was primarily in the interests of the development of the internal market. Furthermore, he also stressed that the suggestion that Europe would return to the golden age of the *Ius Commune* was misleading, because English law was never part of it.

Notwithstanding the above, the enchantment of certain legal scholars with full harmonisation and then the codification of private law has flourished until recently.\(^{34}\) Specialised academic journals have been launched and many tomes on 'European' tort and contract law have appeared; courses and modules are offered throughout the continent and the UK; chairs and graduate schools are dedicated to the subject; and a variety of lavishly funded transnational research projects have produced libraries full of works: the *Ius Commune* school has identified common principles through a series of casebooks and the 'Trento' Group has gradually distinguished the common core of European private law.\(^{35}\) In addition, it is well known in academia that the 'Lando Commission' has produced its 'Principles of European Contract Law' and the Study Group on a European Civil Code has worked away on its draft articles and comparative studies.\(^{36}\)


\(^{33}\) Legrand, 'Against a European Civil Code' (ibid). It is very interesting to read Legrand now.


On this basis, the project of establishing European private law has also re-energised comparative law as an academic discipline and has given research funding, international recognition and renewed prestige to an elite of European scholars. Some of this work has certainly been driven by intellectual curiosity and a thirst for knowledge. Nevertheless, a large part of the success of this scholarship has been undeniably rooted in the political and financial support for the endeavour of European institutions to harmonise national private laws. On the contrary, comparative law should have prevented the underestimation of cultural differences and dealt with the complexity of a private law having supranational and national sources.

Accordingly, the chapter argues that current criticism may offer an opportunity to debunk the narratives of EU integration with a view to overcoming the monophony of the functionalist doctrine in our discipline. First, we claim that EU private law scholarship has tended to passively accept the conceptual subordination of research and studies in the field to the process of integration and specifically market integration. Secondly, we note that many scholars have induced the study of private law to focus on institutions, policy-making processes and the EU’s normative agenda. Finally, this scholarship has also endorsed the idea of codifying EU private law as the result of a turn to legal positivism that is subject to criticism.

The results are there for all to see. In fact, it is the disintegration, not the integration, of law which seems to be the dominant motive behind contemporary politics in Europe. We refer, in particular, to the fact that the European Commission’s proposals were made in a political climate of rising nationalism. This is, for example, the case of the Proposal for a Regulation on a Common European Sales Law (CESL), which contained rules applicable to cross-border transactions for the sale of goods, for the supply of digital contents and for related services. Clearly, it would have introduced into each Member State an optional common European law governing cross-border contracts for the sale of goods and digital content. We agree with Cygan, who noted that ‘the CESL provides a solution to a problem that does not really exist’ and proposes that the Commission...
prioritise the modernisation of the legislation on enforcement, which was considered part of the review of the Regulation No 2006/2004 on consumer protection cooperation. The withdrawal of the CESL in 2014 marked the end of the heyday of the endeavour to harmonise European private law after decades of enthusiasm, which included other Commission-backed proposals such as the Principles of European Contract Law (PECL) and the Draft Common Frame of Reference (DCFR). Although the withdrawal of the CESL in December 2014 suggested that there would be a period of inaction in the field of EU consumer and contract law, there were indications that there would be a new initiative in the context of one of the EU Commission's priority areas: the Digital Single Market.

In early May 2015, the EU Commission published its Digital Single Market Strategy, which contained a set of proposed actions. Surprisingly, in the proposals of December 2015, the EU Commission followed the approach that had failed with the CESL and the Consumer Rights Directive. Then, after several years of uncertainty, in 2019 the EU adopted directives on the sale of goods (Directive 2019/771) and distance sale of content and services (Directive 2019/770).

In our view, the Commission's argument is unlikely to convince the opposition because it still focuses exclusively on the internal market. The reason is that it fails to address the main unanswered question about the division of competences between the EU and the Member States in private law matters. To be clear, there are sectors of private law that probably do not require full or minimum harmonisation at the European level. Until recently, saying this was tantamount to heresy.

Indeed, for too long a time, any criticism of EU proposals in the field was dismissed as the outcome of a kind of critical legal studies exercise. According to some scholars, criticism was the result of 'an age of rising nationalism' and 'ignorance, myopia or fear of the foreign and the new'. For example, according to a scholar, the process of 'Europeanisation' should 'finally' step away from 'the obfuscatory shadow of the Volksgeist'. In other words, if the French prefer their Civil Code to a European equivalent, they are defending a 'pre-modern artefact', while their reaction to a possible European civil code could be compared to the American reaction to Pearl Harbour in 1940. In particular, some scholars also argued that France's reluctance to adopt a European Civil Code could be seen as

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48 Kennedy (n 41).
49 Comparato (n 42).
50 Weatherill (n 19) 211, quoting Ralf Micheals.
evidence of a 'crypto nationalistic' discourse, containing hidden Europhobic rhetoric and resting on 'sentimental and irrational argumentation'.\footnote{Weatherill (n 19) 211 ff, quoting Ruth Sefton-Green.} Lastly, one author was also right to argue for a 'democratic contract law', insisting that legal experts should not exclusively create rules of contract law, but must participate in an inclusive democratic debate.\footnote{MW Hesselink, 'Democratic Contract Law' (2014) 11 European Review of Contract Law 81. See also JM Smits, 'Democracy and (European) Private Law: A Functional Approach' (2010) 2 European Journal of Legal Studies 26.}

One may easily note that very few academics have had the courage to recognise the limitations of the previous analysis by seriously challenging the 'market integration functionalism doctrine'.\footnote{Jorges and Kreuder-Sonnen (n 9).} Our main point here is the following: the logic of private law is not necessarily the logic of market integration, and academic analysis has failed to advance the autonomy and self-standing of our discipline. There are some notable exceptions, however; for example, when two authors note that 'Europe is in troubled waters. What does the unfortunate state of the European Union (EU) reveal about the state of the scholarly study of the integration project?' In this regard, they conclude that 'legal scholarship is in short supply of normatively convincing theoretical paradigms'.\footnote{ibid.}

D. Early Critical Thinkers

In such a context, early critical voices that attempted to theorise EU private law differently (ie a private law with a certain distance from the EU's political agenda, not necessarily subordinated to the needs of the internal market and formally imposed from above) and advocated another European trajectory have gone unheard in discussions over the past decades of scholarship and analysis. In the words of one author:

Cinderellas have always tended to flock to court balls, whether or not pleased with the prince's looks or intentions. Private law departments throughout the Union are the home of Cinderellas of an intellectual type, whose esoteric expertise in either legal history or comparative law is rather tangential to mainstream legal education. Having long been accorded only marginal positions in the conventional hierarchy of law schools, they now welcome opportunities for change.\footnote{Caruso (n 18) 23.}

Indeed, mainstream scholarship has broadly, though often implicitly, accepted the premise that Europeanisation is a one-way process for national private laws. While scholars have considered themselves to be 'pluralists', this self-reading only makes sense within a narrow conception of the scope (ie the subordination to a political agenda) and the methodologies (ie full harmonisation by imposition)
for sectors of domestic private laws. By contrast, scholars working from a critical perspective adopt a variety of standpoints, such as arguments grounded on very different opinions concerning pluralism (Rasmussen), national cultural defence (Legrand) and criticism against the market-driven nature of EU private law and the consequent lack of any social dimension (Joerges and others).

This criticism focuses on the sovereignty of national law, its ‘integrity’ and ‘coherence’; and it considers that the changes brought about by European law jeopardise ‘essential’ elements of national identity and social justice. The criticism of which we speak raises a question of another kind: how can we prevent a normative strategy designed to promote cohesion and emancipation on a continental level from eventually producing division and alienation?

The birth of this current of thought came late in the history of integration, and Hjalte Rasmussen was undoubtedly its precursor. The book entitled Law and Policy in the European Court of Justice, published in 1986, was the first to clearly describe the signs of activism by the European Court of Justice (now the CJEU), a factor in delegitimisation of the European project. This earned Rasmussen the recognition of his peers, but also a form of banishment. The scope of this criticism, however, remained limited since it was content to focus on interpretation of the law by the court. Nevertheless, at the time it was formulated, this criticism went against the grain. Indeed, the dynamic interpretation of the law by the CJEU at that time reflected a commitment on behalf of European governments to integration. Since they could expect long-term benefits for their economies and nationals from the creation of the European Single Market, they gracefully accepted that court interpretations might conflict, in some cases, with their interests. This dialectic has now ceased to flourish. In the context of a broader integration into non-market domains (European citizenship is the best example), the teleology of integration no longer enjoys a consensus. This explains why Rasmussen’s criticism moved on from the university to resurface in political speeches.

Criticisms developed by authors such as Joerges and Everson, to name but two, is not restricted to an attack against the interpretations of the CJEU. Their critiques have an otherwise profound meaning. Such criticism concerns the consequences of the law on integration for the cohesion of national societies and the structuring of populations in the EU. According to Joerges and Everson, EU law, rather than fully fledged EU citizens, produces ‘de-socialized market citizens’.

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While different, all these critical views start by noting that, since its beginnings, the study of EU private law has had a dominant set of discursive, intellectual and academic practices, which they seek to challenge. The message is that the law of the EU is unable to live up to the ideals (prosperity, justice and freedom) that it has set for itself. Early criticism was based on affirmation of the legitimacy of the integration project and its right, and argued that the right of the Union is to serve legitimate interests, building new collective solidarities and desires for individual emancipation. The problem is that EU law had not been properly able to pursue these interests in recent decades.60 This is true for political and institutional reasons, but also for a deeper-lying one. What is lacking in this construct can be put simply: it is a theory of justice. It is quite clear that European institutions have had the opportunity to develop arguments on the fairness of the objectives of the European Treaties and the consequences of their interpretation. Nevertheless, the criticism made is that these are theoretically incomplete arguments. The CJEU and the Commission and Council need to develop clearer and stronger criteria for justice in order to regulate the interpretation of European private law.61 Modern schools of thought tend now to stress that the project of ‘integration through private law’ has not been able to prevent subordination, inequality and alienation becoming an integral part of the process. This situation points to a need for an analytical critique.62

III. Modern Schools of Thought

We point out that modern schools of thought are different from classical schools because they are not openly subordinated to the integration narratives.63 We provide some examples in the following sub-sections by focusing on pluralism theories and economic and justice traditions in private law scholarship.

A. EU Private Law and Constitutional Values

We note that many legal scholars have addressed the task of identifying the role that EU constitutional values play, or should play, in the field of European private law.64

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60 Everson and Joerges (n 58).
61 Kochenov et al (n 59).
62 Azoulai, “Integration through Law” and us’ (n 4).
63 Besides the traditional actors, new ones have emerged, such as the European Law Institute (ELI), an independent organisation set up in 2011 that aims to enhance the quality of the European legal integration process.
The central idea is that the laws of contract, tort or property have to be designed or developed by the CJEU and national judges in a way that aligns all fields of private law with constitutional traditions of the EU and Member States.\(^\text{65}\) This approach requires that, although private law does not have to duplicate constitutional rights exactly, it should not contradict or subvert constitutional rights. In practice, the requirement of alignment means that courts should interpret and develop private law rules and doctrines in a way that ensures that their content conforms to, and is consistent with, the rights that are protected as constitutional values.\(^\text{66}\) By contrast, some legal scholars are concerned about theory on the constitutionalisation of private law for various reasons: they underline, for example, the risk that the application of fundamental rights to private law may prove extremely disruptive, lead to uncertainty and foster litigation.\(^\text{67}\)

B. Pluralism and EU Private Law Scholarship

The idea of pluralism has gained attention also with respect to the development of EU private law.\(^\text{68}\) Here, we are referring to Michaels, who has scrutinised the concepts of legal pluralism used by three of its most prominent proponents: Pierre Legrand, Jan Smits and Thomas Wilhelmsson.\(^\text{69}\)

Michaels has attempted to offer a fully fledged criticism of their theories (each of which are among the most fascinating and helpful in the European private law debate). His contribution has mainly addressed the use of ideas of legal pluralism by the above-mentioned authors in the academic discussion about pluralism and EU private law.\(^\text{70}\)

More recently, Mak has also reconsidered legal pluralist thinking in private law by examining the concept of 'ordered pluralism', recognising that multiple sources of rules may coexist in EU law. Specifically, her article assesses some of the leading theories of legal pluralism in European private law. It analyses how these theories of pluralism may be ordered and applied by considering what space they give to deliberation between lawmakers at different levels of regulation.


\(^\text{67}\) The main objections are indicated by H Collins, 'Private Law, Fundamental Rights, and the Rule of Law,' (2018) 121 *West Virginia Law Review* 1, 9.


\(^\text{70}\) Michaels (n 68).
The author argues in favour of developing a "strong legal pluralist theory for European private law."71

For the purposes of this chapter, we stress that central to the various concepts of legal pluralism is the issue concerning power relations between the Member States and the EU. While legal scholarship appears confused on this point, the basic question of legal pluralism remains unresolved despite constituting the central node of Europeanisation with respect to private law. To be clear, the questions are the extent to which private law should be harmonised on the European level, the extent to which law should remain within the Member States, and how relations between the European and domestic levels should be organised to overcome the shortcomings of current approaches.

In particular, we note that recent political developments have confirmed the degree of resistance of domestic private laws and cultures to Europeanisation and their ability to contain EU rules so that they do not undermine the coherence of domestic private law systems. Indeed, we hope that it is now clear that private law not only regulates markets, but also takes part in the construction of national identities in the Member States. This connection may not be reduced to an exercise of 'nationalism'.72 Our point is that this is a simplistic reconstruction of the historical development of Member States' private laws and the role that these laws still have in shaping our identities as jurists.

C. The Law and Economics Perspective

From a different perspective, EU private law scholarship also draws on the economic tradition in approaching the matter. Indeed, the application of empirical methods and the conceptual toolbox of economics to the study of law - commonly known as 'law and economics' - has been praised as one of the most successful interplays between applied economics and the legal field.73 In its very essence, law and economics considers efficiency to be the main standard of evaluation of legal rules. As such, efficiency is regarded as a constituent part of justice, because "in a world of scarce resources waste should be regarded as immoral."74 Even though the precursors of this school of thought were identified in Europe during the early nineteenth century, it is widely acknowledged that contemporary law and economics dates back to the USA in the 1960s and the seminal works of Ronald Coase, Richard Posner and Guido Calabresi.75

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72 Comparato (n 42).
75 R Coase, 'The Problem of Social Cost' (1972) 3 Journal of Law and Economics 1; R Posner, 'A Theory of Negligence' (1972) 1 Journal of Legal Studies 29; G Calabresi and D Melamed,
As a result of these contributions, the subject of economics was found to be relevant not only to regulation initiatives (such as antitrust, tax, and labour), but also to both positive and normative analysis of the entire private law domain. Accordingly, the methodological breakthrough engendered by this early stage of research enabled insightful applications in the fields of contract, tort, and property. It is no surprise that, as far as private law is concerned, modern economic analysis of law has gained ground in transatlantic legal scholarship. From a methodological perspective, the influence of economic analysis in the study of law makes it possible to investigate legal systems as working systems rather than as a coherent body shaped on the basis of systematic internal consistency. This development has implied a striking departure from the old-fashioned Langdellian tradition, as well as from the 'mainstream' continental historical school.

Such a change of approach helps to explain the initial reluctance of European scholarship to accept and implement this new view. Within continental civil law countries, legal scholarship was considered a hermeneutic science used to interpret the law according to principles of the system's internal consistency in terms of language and value judgments. Policy arguments remained outside the scope of the legal endeavour. In fact, one of the main (and controversial) theses put forward by Posner was that common law is inherently better suited than civil law to deploying economic logic since judges are driven by an invisible hand nudging them to shape the law according to efficiency. Since the continental European concept of separation of powers implies that a judge may only 'interpret' the law, policy arguments such as those provided by law and economics fell outside the scope of the legal discipline.

The development of law and economics in continental European scholarship started only in the late 1980s with the seminal works of Mattei, Pardolesi, Schäfer and Ott. In contrast to the USA, law and economics scholarship in Europe
was more formal (both theoretical and empirical) and was primarily driven by economists – a feature that, to some extent, still persists today. At the same time, non-formal law and economics scholarship kept growing in law faculties thanks to the establishment of research centres: namely, the Max Planck Institute for Research on Collective Goods in Bonn, the Rotterdam Institute of Law and Economics, the Center for European Law and Economics and the Tilburg Institute of Law and Economics. Moreover, several European universities established graduate courses and PhD programmes specifically based on law and economics.

This steady growth culminated with the academic contribution to the codification process of European private law. In fact, the debate on the role of civil law and European integration witnessed a wide use of arguments based on law and economics. Advocates of both sides (harmonisation versus regulatory competition) relied heavily on economic reasoning to sustain their views and, as a result, drove widespread adoption of this school of thought throughout European scholarship. This wide adoption of law and economics arguments proves that this school of thought has been recognised in recent years as a well-established methodology within the realm of European private law.

Somewhat surprisingly, the core arguments against the harmonisation of European private law have been grounded in law and economics as well. For instance, by relying on the empirical findings provided by Eurobarometer surveys, Hubbard questioned the essential premise of the European codification movement by highlighting that, since contract law is not a substantial hindrance to cross-border trade in the internal market, there is no economic need for a European body of private law. Eric Posner stressed that not only would an optional instrument such as the CESL increase transaction costs for market players, but it was also inherently unfit to help foster a common European identity. Two authors

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85 To mention just a few: the joint European Doctorate in Law & Economics set by the Universities of Bologna, Haifa, Hamburg and Rotterdam; the IEL 'Institutions, Economics and Law' International PhD Programme established by University of Turin and Collegio Carlo Alberto. Several other universities set up courses focused on law and economics, such as the 'Law and Economics of Corporate Transaction' within the MSc in Law and Finance at the University of Oxford, which focused on the role of 'business lawyers as transaction cost engineers', according to RJ Gilson, 'Value Creation by Business Lawyers: Legal Skills and Asset Pricing' (1984) 94 Yale Law Journal 239.
have argued that the project to harmonise private law risks seriously jeopardising the regulatory competition dynamics between Member States, ultimately leading to a race to the bottom.\(^9\) Whittaker pointed out that the legal uncertainty over the interpretation of the open-ended provisions of harmonised European private law was set to be exacerbated by the different legal cultures of the judges implementing it.\(^9\) This, ironically, could have ended up with non-uniform interpretation and adjudication throughout the internal market. Whittaker also noted that in the USA convergence in commercial and consumer law was achieved by means of convergence rather than top-down authoritarian impositions. He warned of the risk that harmonisation efforts might be twisted by organised interest groups to the detriment of European social interests at large.\(^4\)

This intense debate proves that law and economics has attracted a high level of attention in the European scholarship in recent years and will continue to be the backbone of European private law's analytical methodologies. In this regard, an increasing number of edited books, treatises, specialised journals and textbooks devoted to law and economics have been published in the European arena.\(^5\)

New theories of private law dealing with the economisation of private law are flourishing: from transnational private regulation\(^6\) to contract governance.\(^7\) Indeed, since the seminal works on civil liability, law and economics scholars have stressed the regulatory functions of private law.\(^8\) At the same time, the EU governance has incorporated such changing patterns into its policy strategies aimed at building the internal market.\(^9\) As a result, many commentators maintain that the divergence between American and European law and economics is set to disappear.\(^1\) As recognised by Ben-Shahar, the law and economics methodology 'has taken a stronghold in European legal academia.'\(^1\)

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\(^1\) Depoorter and Demot (n 84).

\(^1\) Ben-Shahar (n 88).
Nevertheless, it goes without saying that this methodological school is still more influential on the mainstream legal judicial discourse in the USA than in the European Union. As is known, continental courts and non-specialised lawyers are not accustomed to deploying economic arguments when evaluating the outcomes and effects of rulings. In this regard, failure to deliver a European Civil Law Code or a Common European Sales Law finally leaves law and economics free from the constraints artificially imposed by the mantras and narratives centred on European integration. Legal scholarship is no longer subject to political constraints and can deploy economic analysis of private law by focusing on market failures involving private transactions (such as principle-agent problems, asymmetric information, unequal bargaining power and bounded rationality).

D. The Behavioural and Empirical Analysis

The current discourse concerning law and economics has incorporated many of the insights and critiques brought by psychology, neuroscience and empirical research to the concept of rationality. Indeed, economists and early law and economics scholars grounded their analysis on the rational choice theory, ie the simple premise that a rational player selects actions so as to promote outcomes that satisfy his or her motives, objectives, emotions or sentiments to the best of his or her understanding of the causal relationship between the action taken and the outcome generated. However, empirical and experimental data suggest that, in many instances, individuals behave in ways which systematically conflict with models based on the theory of rational choice.

Therefore, behavioural law and economics relaxes those rational assumptions and builds on the biases and heuristics targeted by cognitive psychology and neuroscience. From this perspective, behavioural insights do not disrupt the

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methodology of law and economics. Rather, by recognising that welfare maximisation is still a valid goal from a normative perspective, it complements it by fine-tuning the economics model of rational players according to the bounded rationality paradigm. More specifically, legal rules should be evaluated and designed by considering potential biases affecting individuals' behaviour.108

A growing body of legal literature, therefore, has started to shed light on this area by making use of empirical evidence such as field data, experimental data and laboratory experiments that demonstrate how human conduct occurs under legally relevant circumstances.109 Consumer protection is likely to be one of the legal fields most impacted upon by these findings: regulatory remedies would have to be shaped by taking due consideration of consumers' (bounded) rationality. In this respect, product governance in retail banking has delivered better results than mandatory disclosure rules. The pro-competitive data sharing regimes introduced by the Competition and Market Authority in the UK are in the same vein.110 According to this empirical methodology, legal scholarship should focus on market-based remedies (primarily competition and reputation) and legal measures (primarily disclosure and mandatory regulations) to tackle the issues affecting consumer contracts.111

In many respects, even if empirical behavioural studies are still in their infancy, the years to come will see extensive interactions between legal theory and empirical social analysis.112 It should come as no surprise, therefore, that legal scholars,
as Becker predicted, are going to acquire the rudiments and basics of econometric and empirical methods so as to update private law consistently with the most recent behavioural and economic findings.113

E. Justice and EU Private Law Scholarship

The call for a 'theory of justice' broadly refers to the development of clearly articulated foundational principles adjusted to the different contexts in which EU law intervenes (ie the national, transnational and supranational contexts). Depending on the diagnosis and context of the critique, this approach develops as political theory, theory of values or social justice theory for the EU.

In particular, with regard to EU contract law, in 2004 a group of academics issued a manifesto exploring the challenging agenda of social justice and regulatory legitimacy in European contract law.114 The authors argued that existing initiatives had failed to address this agenda adequately. As a consequence, they claimed, EU institutions had failed to sufficiently consider the appropriate methods with which to help construct a European contract law. The narrowness of focus combined with the inadequacy of methodology in current initiatives posed a threat to the successful achievement of a suitable set of fundamental principles that could serve as a legitimate basis for the governance of social and economic relations among the citizens of Europe. Or perhaps, if these initiatives continued in their current orientation, they might result in the creation of a European contract law that ignored the demands of social justice and regulatory legitimacy, thereby increasing scepticism in regard to the value of European unity and its multilevel governance structure. The document was therefore both a plea for reconsideration of the current trajectory towards harmonisation of European contract law and an exploration of an appropriate way forward which fulfilled the twin objectives of social justice and regulatory legitimacy.

More recently, Micklitz has also highlighted the differences among the Member States' concepts of social justice, which have developed historically, and the distinct European concept of access justice.115 Contrary to the emerging critique of Europe's justice deficit in the aftermath of the euro crisis, Micklitz argues that developing beneath the larger picture of the monetary union is a more positive and more promising European concept of justice. European access justice is thinner than national social justice, but access justice is a distinct conception of justice.116

113 Becker and Posner (n 76) 3.
IV. The Paradigm Shift: The End of a Noble Narrative

In this chapter, we have provided an early-stage overview of the main schools of thought that have emerged to date in the realm of European private law. Furthermore, we have warned about the risk that a debate excessively biased by political goals could exclude theories and approaches diverging from the discipline of orthodoxy.\textsuperscript{117} Two authors have noted how far European scholars have not kept enough professional distance from their object of research.\textsuperscript{118} This is because classical schools of thought have accepted the instrumentalisation of EU private law to the goal of EU integration and its subordination to the rationales of the internal market. Modern schools are attempting to theorise private law independently of the paradigm of integration through law, and we think that such an effort is necessary after Brexit and the most recent developments. The classical approach has resulted in a lack of scholarly criticism of EU projects for law codification and a sort of wishful thinking about the impact of EU-driven regulations and directives on the everyday practice of the law in domestic courts and national legal professions.

Accordingly, we believe that the future of private law in Europe depends on a ‘new private law scholarship’ that is detached from the integration paradigm and the market-driven rationale. In this regard, we note that, for example, both Zimmermann\textsuperscript{119} and Joerges\textsuperscript{120} have repeatedly called for a ‘new legal science’ breaking down the barriers between any combination of private law doctrine, comparative law, EU law, legal history and international private law. As Jürgen Basedow approvingly notes: ‘legal scholars transcend the traditional limits of the analysis of legal development and try to shape the future European law themselves.’\textsuperscript{121}

Here, we have gone further by trying to imagine the form that EU private law scholarship should assume while benefiting from the freedom resulting from the collapse of the integration paradigm depicted above. In particular, we are in favour of directing the study of private law away from legal positivism and towards methodology, away from legal rules and towards principles and shared values.

\textsuperscript{117}Brownsword et al (n 34).
In particular, two authors have noted that 'what is desperately needed is more reflection on methodology and theory building in European legal scholarship.' Legal scholarship in the field should adopt the opposite perspective with respect to the processes of full harmonisation of statutory law in the Member States. On the contrary, the discipline may benefit by focusing on the coexistence of the different cultures, ideas and approaches to the study of private law that have been developed by legal scholars in recent decades. National laws do not constitute an obstacle to the harmonisation and uniformity of EU private law to the extent that legal science, as a cognitive activity, has no boundaries. Indeed, this argument clearly draws on European history.

Thus, we put forward the idea that EU scholarship in this field of law primarily consists of theories and approaches – for example, pluralism, justice, efficiency – that are different from those of the past, when the integration and harmonisation rationales drove research. The paradigm shift from classical schools and modern schools mainly consists in the end of the (noble) integration narrative briefly mentioned in the first sections. Put differently, the driving force of EU private law scholarship is the diversity of perspectives and the sharing of ideas, tools and methodologies. Furthermore, rapidly emerging in the field are new perspectives that may be understood in terms of modern (or post-modern) schools of thought. To provide an example, we cite the recent 'technological turn' of private law scholars in the EU: they increasingly examine the impact of technological change and disruptive innovation in the field with a specific focus on big data and personalisation (ie granularity theory).

EU private law is characterised by the heterogeneity of the actors (eg consumers, retail investors). While special rules exist for certain subgroups of actors, the members of these legal categories still exhibit marked differences in behaviour, degrees of rationality, vulnerability and economic endowment. This new scholarship draws on behavioural economics and big data analytics to develop a comprehensive framework for the personalisation of EU private law through different regulatory tools such as disclosures, nudges and mandates. In brief, these authors argue that, by harnessing big data techniques, laws can be tailored to individual characteristics of addressees.

Having noted the above, our purpose in this chapter has not been to definitively address one theory among the many that have been briefly mentioned, but rather to point out the various perspectives of the past and the present that many wrongly believe are bound to decline because of Brexit and the rise of nationalism.

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122 van Gestel and Micklitz (n 118).
In the same vein, it is also important to underline that, unlike in the past, we have not pursued a sole understanding of the goals and tools of private law as an instrument to advance the EU political agenda. It is also important that this chapter has not opposed the economic and justice perspectives on private law theory because both are important for the future of this field of law.

V. Conclusion

We have argued in this chapter that scholars have the responsibility to rise to the challenge. The latest developments in the EU, together with the processes of pluralisation, differentiation and trans-nationalisation of the past 20 years, have arguably challenged the centrality of law to European integration. However, these developments also furnish opportunities to gain new understandings of private law triggered by European integration.

Thus, the chapter has tracked the reassertion of legal scholarship as an autonomous source of European private law. First, we hope that studies in the field of law will benefit from the recently achieved freedom from the narratives of EU market integration and mainly from the enchantment with full harmonisation and codification. We stress that this change of paradigm also represents the end of the 'noble narrative' of integration through (private) law. EU private law scholarship can no longer rely on the traditional assumption that law is the natural cement that holds the Member States, their citizens, and social and legal structures together. Secondly, the past tendency in EU scholarship has been to view every critical voice as a Eurosceptic threat. This is no longer the case, and we now enjoy the benefit of freedom and diversity in scholarship. Thirdly, the various theories briefly examined in this chapter can now follow a path which is not bound to the precarious routes of European integration and stick to their arguments in a rigorous and consistent way.

Our answer to the main research question of the conference is as follows: the future of private law in Europe should be based on a legal scholarship more diverse and robust than both of the economic and justice traditions mentioned above. In particular, we stress that EU private law scholarship consists of the various views, approaches and methods from a wide variety of theoretical perspectives that our chapter has explored in order to analyse and reconstruct the classical and modern schools of thought in the field. Instead of basing our scholarship on classical approaches, we suggest that we should take courage and develop our methodological approaches to private law in Europe. Finally, if legal scholarship is to become

126 The concept may be better understood with respect to the experiences of third countries: see M Cremona and H-W Micklitz, Private Law in the External Relations of the EU (Oxford, Oxford University Press, 2012).
the engine of EU private law, it must leave behind the market integration narrative which characterised scholarly debates in the ‘classical’ period and embrace a plurality of methodologies and theories.\textsuperscript{127} We think that a field of study that is diverse, productive, inclusive, robust and engaged would be able to make a greater contribution to the debate regarding a healthier EU private law and provide a firm foundation for further exploration of private law theories.