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CORE ANALYSIS

Redefining equality in European contract law: protecting consumer interests in a post-consumer society

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Abstract

Consumers have in law been defined as the weaker parties in a transaction. Contract laws have integrated consumer protection with a view to balancing the interests of the parties, ensuring equal bargaining power and to some extent substantive fairness in contractual relations. Rules of consumer protection have therefore, from a contract lawyer's perspective, been construed as expressions of a general principle of equality. The principle of equality, conceived in this way, complements the general principle of autonomy underlying contract law, which embodies the idea that parties should have the capacity for self-realisation. Does this construction of consumer contract law still hold in EU consumer markets transformed by the rise of online platforms and the overall move towards an economy based on services and experiences rather than the sale of physical goods? Or do we need to redefine the ways in which the principle of equality is expressed in European contract law in order to correct for new inequalities arising between consumers and businesses? This article aims to answer that question against the backdrop of established insights of the ways in which the rationality of European contract law differs from that of national, doctrinal private law systems. It concludes that the rules laid down in instruments such as the Unfair Commercial Practices Directive (UCPD) and the Unfair Contract Terms Directive (UCTD) can protect consumers against exploitative practices. However, problems arise in cases where the interest at stake go beyond economic interests and concern also non-economic interests, such as data protection or freedom of expression, or do not have a market exchange value. Solutions can be pursued, it is submitted, by the European legislator and the European Court of Justice, potentially using the EU Charter of Fundamental Rights as a catalyst for reform.

Keywords: Consumer law; contract law; European private law; digital markets

1. Introduction

Can European contract law sufficiently address inequalities between consumers and businesses arising in digital markets? This question has gained prominence as the contractual relationships between consumers and suppliers of digital services are strongly informed by the terms set by suppliers and by practices that, often in non-transparent ways (eg through dark patterns), nudge consumers towards sharing their data or making purchases. Courts have on occasion dealt with questions concerning contractual limitations on the freedom of expression,[1] whilst legislators have considered the extent to which data can be monetised for contractual purposes. Other issues remain unsolved, such as the question whether content creators should receive remuneration for the value created by their TikTok videos, or other social media content. Such new forms of inequality arising between consumers and businesses in digital markets are part of a wider

[1]See for example the case law discussed by T Lutzi, 'Plattformregulierung durch AGB-Kontrolle?', Verfassungsblog 30 July 2021, available at <https://verfassungsblog.de/facebook-agb-kontrolle/> accessed 3 October 2024.

challenge for law and policy making in European contract law, seeking to address the societal challenges of our time. Besides digitalisation, the pursuit of ecological sustainability raises questions on how to balance the interests of consumers and businesses, for example with regard to the 'right to repair'[2] but also in relation to the balance of interests between buyers and sellers in the supply chain.[3] Of earlier date, but also still relevant, are challenges posed by the often exploitative practices of financial services providers in consumer markets. In that regard, one may ask whether the EU's regulatory actions to ensure access to finance for consumers have provided sufficient ground for safeguarding the interests of consumers.

These observations form the basis for an enquiry into expressions of equality in European contract law. The principle of equality aims to ensure that all actors have access to markets, whether large businesses, small or medium-sized enterprises (SMEs) or consumers. Also, it presumes a balance of justice, albeit that debates continue on what types of justice are protected by European contract law.[4] The principle of equality is closely connected to the principle of autonomy underlying contract laws at the national and the EU level which, as will be developed below, is concerned with contracting parties' capacity for self-realisation. These principles therefore are of fundamental importance for determining how lawmakers and judges balance the interests of businesses and consumers in contract law. They have in the past provided a framework for the introduction of rules aimed at the pursuit of social goals – such as consumer protection – into contract law. The question is whether they can protect the gains made on the basis of social policies now that societal challenges and ambitions related to the 'twin transition' processes of digitalisation and sustainability are raising complex questions for lawmakers.

This article analyses the meaning of equality in European contract law in the context of the societal challenges that are redefining the EU consumer market. The framework used is that of the different rationalities of European contract law, which is perceived as instrumentalist and grounded in the pursuit of an integrated EU internal market, and national contract laws, which are grounded in systematic, doctrinal structures. This descriptive setting will for some readers be well-known territory. Nevertheless, by going back to the foundations and recapping the development of European contract law alongside national laws, it is possible to identify more clearly which notions of equality exist in contract laws at the EU level and the national level and which processes determine their application in lawmaking and practice. That background enables an evaluation of the ways in which European contract law may deal with the societal challenges to which consumer markets are subject, with a specific focus on digitalisation as a case study from which to learn broader lessons for regulation. An essential aspect of the enquiry is whether the concept of equality is adaptable to change so that it can address issues going beyond the market rationale of European contract law.[5] If not, a follow-up question is whether a radical overhaul of the ways in which equality is expressed in European contract law is required. That question fits within a broader trend at the EU level of re-defining consumer vulnerability in terms that are broader than information asymmetry or lack of bargaining power in relation to businesses, as seen in policy papers from the European Commission and from the

[2]European Commission, 'Commission welcomes political agreement on new consumer rights for easy and attractive repairs', press release 2 February 2024, available at <https://ec.europa.eu/commission/presscorner/detail/en/ip_24_608> accessed 3 October 2024. See for the original proposal European Commission, 'Proposal for a Directive of the European Parliament and of the Council on common rules promoting the repair of goods and amending Regulation (EU) 2017/2394, Directives (EU) 2019/771 and (EU) 2020/1828' COM(2023) 155 final.

[3]V Ulfbeck and O Hansen, 'Sustainability Clauses in an Unsustainable Contract Law?' 16 (1) (2020) European Review of Contract Law 186, 199ff.

[4]See further below, *Islands and the Ocean: the rationalities of EU law and national private laws* under Section 2.B.

[5]R Michaels, 'Of Islands and the Ocean: The Two Rationalities of European Private Law' in R Brownsword, H-W Micklitz, L Niglia and S Weatherill (eds), *The Foundations of European Private Law* (Hart Publishing 2011) 139; H-W Micklitz, *The Politics of Justice in European Private Law. Social Justice, Access Justice, Societal Justice* (Cambridge University Press 2018) 266ff; M Hesselink, 'Reconstituting the Code of Capital: Could a Progressive European Code of Private Law Help us Reduce Inequality and Regain Democratic Control?' 1 (2022) European Law Open 316, 329; V Mak, *Legal Pluralism in European Contract Law* (Oxford University Press 2020) 75ff; S Weatherill, *Contract Law of the Internal Market* (Intersentia 2016) 6.

European consumer organisation BEUC.[6] The ways in which new perspectives on vulnerability can be operationalised into new benchmarks for regulation, and integrated into consumer law and policy, have yet to be determined. Furthermore, the enquiry relates to studies in consumer law seeking to determine whether private laws' focus on economic interests still does justice to the regulation of consumer markets. Framing the question in terms of 'interests' – eg economic versus social or societal – fits with an emerging literature in European consumer law reassessing the objectives of consumer protection. Grochowski, for instance, has posited that European consumer law is paying heed to the development of a post-consumer society in which traditional consumption – namely, the acquisition of things – loses its importance due to a shift of consumer activities towards experiences and services.[7] In that context, in particular for consumers of digital content and services, the question which interests require protection is up for assessment. Contract laws' focus on economic interests seems too narrow to take account of, for instance, risks for consumers with regard to data sharing or freedom of expression, on which businesses through their terms and conditions have a significant influence.[8] Also, its definition of economic interests, which in consumer contract law focuses on the value that consumers receive from providers of goods or services, seems too narrow to take account of the value created by consumers in digital markets.[9]

The article is structured as follows. First, the concepts of autonomy and equality in European contract law will be examined, mapping how they developed within national contract laws and how they came to be embedded into EU consumer law and policy (Section 2). Notably, this analysis focuses on the role of contract law in market regulation, staying away from general debates on non-discrimination, a principle that has been transformative in the development of worker protection and gender equality in the EU.[10] Second, autonomy and equality will be considered in light of the interests at stake in a post-consumer society. Noting the width of the enquiry and seeking to gain some in-depth insights, the enquiry will focus on digital markets primarily (Section 3). The final section of the article will consider whether a reform or even a radical overhaul of existing definitions of equality in European contract law is needed. It will also evaluate which routes can be followed, weighing the pros and cons of legislative action, litigation and private regulation. The conclusions from the analysis and a brief outlook for further research are presented in Section 4.

2. Contract Law as an Instrument for Rebalancing Equality

It is generally acknowledged that contract laws are based on a general principle of autonomy, where autonomy is defined as having the capacity for self-realisation.[11] Autonomy is expressed, by

[6]European Commission, 'Understanding Consumer Vulnerability in the EU's Key Markets' (January 2016), available at <https://commission.europa.eu/publications/understanding-consumer-vulnerability-eus-key-markets_en> accessed 3 October 2024; N Helberger, O Lynskey, H-W Micklitz, P Rott, M Sax and J Strycharz, *EU Consumer Protection 2.0. Structural Asymmetries in Digital Consumer Markets* (BEUC Report, March 2021), available at <https://www.beuc.eu/sites/default/files/publications/beuc-x-2021-018_eu_consumer_protection_2.0.pdf> accessed 3 October 2024. See also N Helberger, B Kas, H-W Micklitz, M Namysłowska, L Naudts, P Rott, M Sax & M Veale, *Digital Fairness for Consumers* (BEUC Report, March 2024), available at <https://pure.eur.nl/ws/portalfiles/portal/139212255/BEUC-X-2024-032_Digital_fairness_for_consumers_Report.pdf> accessed 3 October 2024.

[7]M Grochowski, 'Consumer Law for a Post-Consumer Society' 12 (2023) Journal of European Consumer and Market Law (EuCML) 1.

[8]Compare also J Quintais, N Appelman and RÓ Fathaigh, 'Using Terms and Conditions to apply Fundamental Rights to Content Moderation' 24 (5) (2023) German Law Journal 881. See further below, Section 3.

[9]Compare V Mak, 'The Contractual Rights and Obligations of Prosumers on Social Media Platforms', Verfassungsblog 19 May 2024, available at <https://verfassungsblog.de/prosumers/> accessed 3 October 2024. See further below, Section 3.

[10]See Micklitz (n 5) 196ff. On 'mainstreaming' equality in EU law and policy, see A Timmer, 'Editorial: Mainstreaming Equality in EU Law and Beyond' 19 (3) (2023) Utrecht Law Review 1–7.

[11]J Raz, *The Morality of Freedom* (Oxford University Press 1988) 424ff; G Dworkin, *The Theory and Practice of Autonomy* (Cambridge University Press 1988) 3, 6. For a broader analysis of autonomy in political philosophy, see A de Dijn, *Freedom. An Unruly History* (Harvard University Press).

corollary, in the general principles of freedom of contract and the equality of the parties, which are present in national contract laws as well as in a slightly different form in EU law. These principles are of fundamental importance for the regulation of markets based on liberal ideologies. Freedom of contract supports free competition. The principle of equality, alongside it, is of vital important for ensuring that markets are open to all actors – whether large businesses, SMEs or consumers. It also ensures that transactions are concluded, as far as possible, on equal footing by maintaining rules that safeguard the position of 'weaker' parties. Arguably, moreover, both equality and party autonomy should for these purposes be understood in a substantive sense.[12]

Moving from this general starting point to the more specific perspective, what does the concept of equality in European contract law entail? The answer to this question begins with an enquiry at the national level. As the concept of equality is closely related to the general principles of autonomy and freedom of contract, I will first map how these principles are embedded in national contract laws (Section 2.A). This analysis is followed by a description of how the principle of autonomy became one of 'framed autonomy' in the context of EU law's pursuit of market integration and what consequences this has for the substantive understanding of equality in European contract law (Section 2.B). Some of this will be familiar terrain for scholars in the field of European private law. Still, a brief recap is useful, as it forms the basis for the analysis in Section 3.

A. The principles of autonomy and equality in national private laws

The principle of autonomy in contract law is often understood as personal autonomy, referring to individual self-government. This encompasses that one is able to live one's life according to one's own reasons and motives and also that one is free to make one's own choices while assuming responsibility for them.[13] This conception of autonomy fits well with the nature of contractual obligation as an essentially self-imposed obligation. The principle of freedom of contract supports it by enabling parties to determine for themselves under what conditions they wish to engage in legal transactions with others. That freedom has two sides, which can be defined with reference to the terminology of freedom used in political philosophy.[14] Freedom of contract entails that parties are free to decide with whom and on what terms to enter into a contractual agreement (positive freedom), but also that they cannot, in contrast to former socialist systems, be forced to contract (negative freedom).[15]

This idea of individual autonomy, at least in some theoretical conceptions of contract law, is supplemented by the limitation that one must also respect the autonomy of others and allow them their space for self-realisation.[16] In that sense, the protection of weaker parties such as the consumer or the employee can also be seen as expressions of the principle of autonomy in contract law. Businesses entering into contractual agreements with consumers or employees will have to consider the space needed by these actors for realising their individual autonomy and are therefore curtailed in which terms and conditions they can impose. As businesses generally focus on profit maximisation and are therefore not motivated voluntarily to adjust their contractual terms in consideration of others, consumer protection rules and employment law have stepped in to secure the protection of weaker contracting parties.[17] Although conceptions of the consumer or employee

[12]M Hesselink, *Justifying Contract in Europe. Political Philosophies of European Contract Law* (Oxford University Press 2021) 311–12, referring to the German Constitutional Court's judgment of 19 October 1993, *BVerfGE* 89, 214 (*Bürgschaft* case) and for EU law to the CJEU's judgment in case C-168/05 *Elisa María Mostazo Claro v Centro Móvil Milenium SL* ECLI:EU:C:2006:675 (*Mostaza Claro*).

[13]Hesselink (n 12) 210.

[14]I Berlin, 'Two Concepts of Liberty' (1958) in H Hardy (ed), *Liberty* (Oxford University Press 2002) 195.

[15]N Reich, *General Principles of EU Civil Law* (Cambridge University Press 2017) 19.

[16]Compare the idea of moral autonomy, prescribing what we owe to *any* other person, or in fact to each other as human beings; see Hesselink (n 12) 257.

[17]Micklitz (n 5), part I (national legal systems) and part II (EU law).

as a weaker party are changing, this is the format into which contract laws have consolidated since the emergence of labour law during the Industrial Revolution and consumer law from the 1960s onwards.[18]

Private laws conceptions of autonomy and freedom of contract are not only expressions of moral perspectives on rights, but are also grounded in the function of private law as an ordering mechanism for facilitating market transactions.[19] Contract law is seen as a means for regulating private exchange.[20] In doctrinal analyses of contract law this aspect of contract law is often not explicitly highlighted and the moral nature of rights takes centre stage. Relying on traditional justifications of contract law as grounded in morality, rights are presented as natural rights. When considering private law as part of market ordering, however, that perspective seems wrong. The justification for private law, arguably, is not provided by regarding rights in contract and property law as moral rights. Instead, the moral case for the practice of private ordering 'is that morally significant social benefits flow from social practices of private ownership and private exchange.'[21] This view emphasises that private law should be approached from an ordering perspective so as to do justice to discussions of social justice and institutional design.[22] This justification, based on a general classification of private law as an ordering mechanism, can be seen as an additional argument for limiting the autonomy of private parties if the interests of others demand it. The balance between autonomy and the protection of weaker parties goes beyond individual interests and impacts also on broader discussions of social justice and distributive justice in contract law.[23]

With an eye to enabling consumers as weaker parties to realise their autonomy, contract laws have been infused with rules aimed at establishing a contractual equilibrium between businesses and consumers. Hence, their aim is to establish equality between the parties. For many national contract laws in Europe, EU law has been the main catalyst for the development of consumer protection rules.[24] However, the origins of consumer law in Europe can be found already at earlier stages in national private laws. While developments also occurred in relation to product liability in tort law,[25] I focus here on contract law. Germany, the Netherlands and France had introduced their own rules for unfair terms control in standard terms before the adoption of the Unfair Contract Terms Directive (UCTD) by the European legislator.[26] Poland, which acceded to the EU

[18]Compare V Mak, 'The Contractualisation of the Consumer Worker' in H-W Micklitz and G Vettori (eds), *The Person and the Future of Private Law* (Hart Publishing, 2025); H-W Micklitz, 'The Intellectual Community of Consumer Law and Policy in the EU' in H-W Micklitz (ed), *The Making of Consumer Law and Policy in Europe* (Hart Publishing 2021) 63.

[19]Compare J Smits, 'European Private Law: A Plea for a Spontaneous Legal Order' in D Curtin, A Klip, J Smits and J McCahery (eds), *European Integration and Law* (Intesentia 2006) 85, explicitly embracing the ideology of Hayek; R Brownsword, 'The Theoretical Foundations of European Private Law: A Time to Stand and Stare' in R Brownsword, H-W Micklitz, L Niglia and S Weatherill (eds), *The Foundations of European Private Law* (Hart Publishing 2011) 159–60. See also Weatherill (n 5) 1–3, taking this as a starting point for an analysis of contract law in the context of the EU internal market.

[20]Cf A Bagchi, 'Distributive Justice and Contract' in G Klass, G Letsas and P Saprai (eds), *Philosophical Foundations of Contract Law* (Oxford University Press 2014) 193, 195.

[21]L Murphy, 'The Artificial Morality of Private Law: The Persistence of an Illusion' 70 (2020) University of Toronto Law Journal 453, 456. Compare for civil law systems H Beale, B Fauvarque-Cosson, J Rutgers and S Vogenauer, *Cases, Materials and Text on Contract Law. Ius Commune Casebooks for the Common Law of Europe* (3rd edn, Hart Publishing 2019) 3–34.

[22]Ibid., 454.

[23]Compare also M Trebilcock, *The Limits of Freedom of Contract* (Harvard University Press 1993); H Collins, *Regulating Contracts* (Oxford University Press 1999).

[24]Compare H-W Micklitz and C Twigg-Flesner (eds), *The Transformation of Consumer Law and Policy in Europe* (Hart Publishing 2023).

[25]See H-W Micklitz (ed), *The Making of Consumer Law and Policy in Europe* (Hart Publishing 2021), Part II.

[26]Council Directive 93/13/EEC on unfair terms in consumer contracts [1993] OJ L95/29. See K Tonner, 'German Consumer Law: Own Initiatives in the 1970s and Transposition of EU Directives Since the 1980s' in H-W Micklitz (ed), *The Making of Consumer Law and Policy in Europe* (Hart Publishing 2021) 95, 96ff; P Rott, 'Germany: Who Transformed Whom?' in H-W Micklitz and C Twigg-Flesner (eds), *The Transformation of Consumer Law and Policy in Europe* (Hart Publishing 2023) 261; E Hondius, 'Unfair Contract Terms and the Consumer: ECJ Case Law, Foreign Literature, and Their Impact on Dutch Law' 24 (2016) European Review of Private Law 457. See also H-W Micklitz, E Hondius, T van Mierlo and T Roethe (eds),

in 2004, had also developed its own rules on unfair terms control well before, as early as 1933.[27] In Italy, unfair terms control and protection against unfair commercial practices developed from the 1950s onwards through a process of 'constitutionalisation' of private law and the use of open norms such as good faith and fairness, public order and morality as a means of introducing a sort of contractual justice in economic relationships between private actors.[28] The Scandinavian countries, often seen at the forefront of legal developments due to their pragmatic approach to societal challenges, adopted various legislative reforms in private law with an eye to consumer protection from the 1970s onwards.[29]

The principle of autonomy in national contract laws therefore came to be complemented by rules aimed at establishing equality between businesses and consumers.[30] This process started in some legal systems as early as the 1930s, but in most from the 1970s onwards, a few steps behind the protection of workers as weaker parties in private law relationships. Moreover, preceding legislative reforms in most countries legal scholarship had already started to engage with the question of how to ensure protection for the consumer as a weaker party in contract law. The engagement with that question fit with the rise of the mass production of consumer goods, which gave consumers access to a wide range of products and services, albeit with the downside that the quality of products could often not be easily assessed. At the same time, however, most national systems also regarded consumer protection as a broader social goal. The protection of the consumer as a weaker party in contract law focused on economic interests, but often in connection to the state's aim of taking responsibility for citizens' welfare (in the Nordic countries),[31] or the infusion of 'drops of socialist oil' into the Civil Code (in Germany).[32] As will be seen, the development of consumer law and policy at the European level had a narrower focus, directed first and foremost at market regulation as part of the pursuit of an integrated EU internal market.

B. Framed autonomy

European contract law, like national contract laws, is based on general principles of autonomy and freedom of contract. However, the autonomy of the parties is, in the words of Norbert Reich, a 'framed autonomy'.[33] This term denotes that while in European contract law the principle of autonomy is leading, as it is in national contract laws, it is circumscribed by legal rules of primary and secondary law aimed at protecting objectives that have a higher or at least equal ranking.[34] Besides such limitations, the principle of autonomy in EU law itself requires some elaboration. Even if it coincides with the general principle of autonomy found in national contract laws, its foundation is a different one, as it rests upon the pursuit of not just any market economy but specifically the European market economy. This difference is important.

The Fathers and Mothers of Consumer Law and Policy in Europe: The Foundational Years 1950–1980 (European University Institute 2019).

[27]A Wiewiórowska-Domagalska and M Grochowski, 'Consumer Law in Poland: Or There and Back Again' in H-W Micklitz (ed), *The Making of Consumer Law and Policy in Europe* (Hart Publishing 2021) 193, 195.

[28]G Alpa, 'The Making of Consumer Law and Policy in Italy' in H-W Micklitz (ed), *The Making of Consumer Law and Policy in Europe* (Hart Publishing 2021) 137, 140.

[29]T Wilhelmsson, 'The Emergence of Nordic Consumer Law and a Nordic Consumer Law Community and Its Impact on Nordic Legal Unity' in H-W Micklitz (ed), *The Making of Consumer Law and Policy in Europe* (Hart Publishing 2021) 171, 175–6.

[30]Contract law regulating private exchange, if understood in a broad sense, encompasses rules regulating specific contracts, such as consumer contracts. See Bagchi (n 20) 196.

[31]Wilhelmsson (n 29).

[32]H-W Micklitz, *Brauchen Konsumenten und Unternehmen eine neue Architektur des Verbraucherrechts? Gutachten A zum 69. Deutschen Juristentagung* (CH Beck 2012) 11–12, 26, with reference to O von Gierke, *Die soziale Aufgabe des Privatrechts* (Springer 1889).

[33]Reich (n 15) 20.

[34]Ibid.

In this section, I will first explore in more detail which rationalities underlie the principle of autonomy in EU law, contrasting it with the rationalities underlying national private laws. I will then consider the rights and principles laid down in EU law that can restrict the principle of autonomy, making it a 'framed' autonomy.

Islands and the Ocean: the rationalities of EU law and national private laws

As set out above, national contract laws have in the course of centuries developed their own conceptions of autonomy and freedom of contract in relation to moral notions of self-realisation and the respect of others' autonomy. At the same time, the function of private law, including contract law, in society has been regarded as a means of facilitating market transactions. In this context, the central position of the general principle of autonomy and the freedom of contract fits with the ideologies of liberal market economies.[35] At the EU level the same justifications can be put forward with regard to the recognition of a general principle of autonomy, but with an important adjustment: in the context of the internal market the instrumental function of contract law appears to supersede other, moral foundations on which autonomy might arguably be grounded. Moreover, European contract law is instrumental to one goal, which is the furthering of the integration of the internal market. Michaels in this respect contrasts the juridical rationality of national private laws with the market-oriented, instrumentalist rationality of European private law.[36] EU law, with its goal-oriented and piecemeal approach, is in this sense contrasted with the systematic character of national private laws. Expressed in a famous metaphor, European private law directives are regarded as 'islands in an ocean of national private laws'.[37]

Expressions of the market-oriented rationality of EU law can be seen foremost in the legal basis for the development of EU regulation in the field of private law. The EU Treaties contain several provisions that give competence to the European legislator for introducing legislation in the field of contract law, some specifically connected to the pursuit of consumer protection.[38] Whilst some, like Article 169 of the Treaty on the Functioning of the European Union (TFEU), give competence for the introduction of legislation aimed at consumer protection as a self-standing goal, the EU legislator has in practice primarily made use of Article 114 TFEU as a legal basis for harmonising legislation in the field of consumer contract law.[39] Further evidence for the market-based character of autonomy in EU law can be deducted from the way in which freedom of contract is embedded in the EU's legal framework. Free movement regulation does not make explicit mention of a principle of autonomy. However, the objective of Article 34 TFEU to ensure open markets through the free movement of goods, unhindered by disproportionate restrictions in the member states' national laws, presupposes a principle of freedom of contract. As Reich states, '[t]he Article says nothing about freedom of contract; it simply takes it for granted'.[40] In a similar vein, Weatherill states that '[f]ree movement law promotes freedom of contract – it opens up and protects a wider terrain of contractual autonomy within the internal market'.[41] In other words, for the free movement of goods to be effective, parties must be free to choose contracting parties in other member states and to determine the terms of their contract.

The foundation of principles of autonomy and freedom of contract at the EU level within the pursuit of market integration also explains the definition of an 'average consumer' as a rational

[35]See above, Section 2, introduction.

[36]Michaels (n 5) 139.

[37]H Kötz, 'Gemeineuropäisches Zivilrecht' in H Bernstein, U Drobnig and H Kötz (eds), *Festschrift für Konrad Zweigert zum 70. Geburtstag* (Möhr Siebeck 1981) 481, 485, cited by Michaels (n 5) 140.

[38]S Weatherill, *EU Consumer Law and Policy* (2nd edn, Edward Elgar 2013) 15–18; S Weatherill, *Law and Values in the European Union* (Oxford University Press 2016) 136–7.

[39]Compare Mak (n 5) 83–4.

[40]Reich (n 15) 21.

[41]Weatherill (n 5) 5, 21ff.

actor who, with the right information, can make sound purchasing decisions. This image of the consumer in EU law fits with the internal market logic. The 'average consumer' is construed as a confident consumer who actively shops across borders and reaps the benefits of the availability of products and services in the internal market.[42] Moreover, the consumer is construed primarily as an economic actor, with until recently little recognition of other aspects, such as citizenship.[43]

It is noteworthy also that the conception of justice in European contract law can be perceived as different from that in national laws. Micklitz has posited that the market-oriented rationality of European contract law has resulted in legal rules based on 'access justice'. This is a narrower concept of justice than corrective justice, distributive justice, or other forms of justice that form the foundation of private laws around the world. It sits somewhere in between the libertarian justice that characterises market law and the expressions of social distributive justice seen in national laws.[44] The term access justice embodies the idea that European contract law is aimed at empowering consumers and businesses to pass the threshold for taking part in the internal market. Ideally, as is Micklitz's normative claim, this conception of justice in theory would mean that all consumers and workers would be included in the market and by extension in society.[45] It is questionable whether European private law has lived up to that goal.[46] As will be seen in the discussion in Section 3 of this paper, access justice alone is likely to be insufficient for protecting and including the most vulnerable in society. It rests perhaps too much on the principle of autonomy, without taking sufficient account of the obstacles that some of the more vulnerable actors in society encounter with regard to self-realisation.

Balancing autonomy with competing rights and principles – the EU Charter

This background explains the ways in which the principle of autonomy in European contract law is reflected in specific rules and regulation. In EU law the principle of autonomy is firmly embedded within the (positive) move towards harmonisation of private law, as well as in the (negative) control of private law rules that might count as restrictions under the free movement rules.[47] The approach is distinctly different from that in national contract laws. At the EU level, the concept of autonomy in contract law is primarily related to the market, whereas national laws regard autonomy as one of the principles that fundamentally define the balance of interests between actors in private law relationships.

Another aspect requires elaboration, namely the statement that autonomy in EU law is 'framed'. According to Reich, as stated above, this means that the principle must be balanced against rules of EU law with objectives of higher or at least equal ranking. Which objectives are these, that compete with the pursuit of a liberal market economy grounded on the principle of autonomy? Reich, in his foundational study of general principles in European private law,

[42]H-W Micklitz, 'Introduction – Social Justice and Access Justice in Private Law' in H-W Micklitz (ed), *The Many Concepts of Social Justice in European Private Law* (Edward Elgar 2011) 3, 30. The 'average consumer' was defined as someone who is 'reasonably well-informed and reasonably observant and circumspect' in Case C-210/96 *Gut Springenheide GmbH and Rudolf Tusky v Oberkreisdirektor des Kreises Steinfurt – Amt für Lebensmittelüberwachung* ECLI:EU:C:1998:369 (*Gut Springenheide*), para 31 and copied in Directive 2005/29/EU on unfair business-to-consumer commercial practices in the internal market [2005] OJ L149/22 (UCPD), Art 5(2)(b) and recital 18.

[43]V Mak and E Terryn, 'Circular Economy and Consumer Protection: The Consumer as a Citizen and the Limits of Empowerment Through Consumer Law' 43 (2020) Journal of Consumer Policy 227; K Cseres, 'Instrumentalization of Consumer Law in Central and Eastern Europe for Populist Politics: A Citizen-Consumer Perspective', Amsterdam Law School Legal Studies Research Paper No. 2022-19, Amsterdam Centre for European Law and Governance Research Paper No. 2022-03, available at SSRN <https://doi.org/10.2139/ssrn.4162963> accessed 3 October 2024.

[44]Micklitz (n 5) 18 ff.

[45]Micklitz (n 10) 20.

[46]Compare Mak (n 5) 101ff.

[47]On the distinction between positive and negative harmonisation, see H Unberath and A Johnston, 'The Double-Headed Approach of the ECJ Concerning Consumer Protection' 44 (2007) Common Market Law Review 1237, 1240.

distinguishes at least three areas in which rules of EU law exist that limit the principle of autonomy in contract law: competition law; laws protecting the weaker party to a contract, mostly in labour and consumer law as part of the 'social' in the market economy according to Article 3(3) of the Treaty on European Union (TEU); and non-discrimination laws.[48] Besides these competing objectives of EU law itself, the autonomy of market actors can be restricted by national legislation aiming to protect national public interests within the *Cassis de Dijon* exception in free movement law codified in Article 36 TFEU for the free movement of goods,[49] or other justifications such as non-discrimination or proportionality.[50]

Interestingly, the idea that autonomy is a principle that can be subject to balancing with other rules or principles of EU law finds some reflection in the finding that the EU Charter of Fundamental Rights also, without expressly stating so, presupposes freedom of contract.[51] Focusing on autonomy and freedom of contract, Title II of the Charter is relevant as it is concerned with 'freedom' in a broad sense. It includes as fundamental rights the freedom of association (Article 12), the freedom to choose an occupation and the freedom to engage in work (Article 15), the freedom to conduct a business (Article 16), and the right to property (Article 17). In order for these rights to be effective, contract law is an essential feature. As Reich states, '[c]ontracts are the dynamic form of putting to work the freedoms of economic and civil actors, whether they use their right to engage in work, to conduct a business, or to possess and use property'.[52] Weatherill also regards the rights laid down in the Charter as providing a frame for determining in which ways autonomy exists, and in which ways it can be restricted in EU law. He posits that Articles 16 and 17, with their emphasis on freedom with regard to conducting a business and the use of possessions, support the ideal of contractual autonomy and in that sense 'challenge the ambition pursued by the EU in the name of harmonisation.'[53] That freedom is nonetheless restricted by other Charter rights and principles that favour intervention in the public interest.[54] The freedoms expressed in Title II of the Charter are for example limited by the rights laid down in Title IV, which may restrict market regulation with an eye to achieving broader goals in the collective interest.[55] Rights laid down in this title include public health (Article 35), environmental protection (Article 37), and consumer protection (Article 38). Besides restrictions to autonomy arising from the balancing of competing rights, the Charter provisions also in some cases themselves indicate that rights can be restricted. Article 17(1), on the right to property, for instance contains a sub-clause stipulating that '[t]he use of property may be regulated by law in so far as is necessary for the general interest'. An example of a limitation in the general interest was given by the CJEU in *Sky Österreich*.[56] In this case, the public interest in access to news reports on Europa League football outweighed Sky Österreich's freedom to enjoyment of property as well as its freedom of contract. This can be seen as confirmation that the Charter creates a space for the social in European private law, anchoring the pursuit of a certain public interest within the EU's

[48]Reich (n 15) 20.

[49]According to Micklitz, the rationality test 'cuts across primary and secondary EU law horizontally, and national laws vertically. The rationality test allows for placing each kind of restriction to the market and to personal autonomy under scrutiny'. See Micklitz (n 5) 258.

[50]Reich (n 15) 20–1.

[51]Compare Reich (n 15) 29. For instances in which the freedom of contract was, in the application of Art 16 of the Charter, considered a requirement for giving effect to the fundamental right of the freedom to conduct a business, compare Case C-283/11 *Sky Österreich GmbH v Österreichischer Rundfunk* ECLI:EU:C:2013:28 (*Sky Österreich*) and Case C-426/11 *Mark Alemo-Herron and Others v Parkwood Leisure Ltd* ECLI:EU:C:2013:521 (*Alemo-Herron*), para 33–5.

[52]Reich (n 15) 29.

[53]Weatherill (n 5) 7.

[54]Moreover, the freedom of contract is balanced on equal footing with other Charter and Treaty rights if it is considered a fundamental right, rather than a principle only. Compare S de Vries, 'Balancing Fundamental Rights with Economic Freedoms According to the European Court of Justice' 9 (2013) Utrecht Law Review 169.

[55]Weatherill (n 5) 7.

[56]Case C-283/11 *Sky Österreich* (n 51) para 21, 24.

market-constitution.[57] On a more general level, Article 52(1) on the scope and interpretation of rights and principles laid down in the Charter states that limitations to the exercise of rights and principles are recognised as 'provided for by law'.[58]

How do these provisions sit with other rules of EU law? The Charter stipulates in Article 51(1): 'The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law.' Therefore, the Charter is intended as a constitutional instrument, providing normative direction for avoiding conflict between pluralist sources.[59] As such, it can affect the way in which restrictions in national laws with regard to the freedoms listed in the previous paragraph should be interpreted.

Beyond its constitutional role, the significance of the Charter for private law relationships is not straightforward, as it is not firmly established in which circumstances its provisions can have horizontal effect.[60] That is, it is unclear whether the provisions can be applied to private law relationships or be invoked by private parties to effectuate rights against a contractual counterparty. The case law of the CJEU indicates that direct horizontal effect can exist, but only in limited circumstances. Where those circumstances were initially defined on the basis of Charter provisions stipulating rights and not mere 'principles' in accordance with the distinction made in Article 52(5) of the Charter,[61] recent case law has placed less emphasis on this distinction.[62] Instead, the case law attributes horizontal effect to Charter rights if they provide for mandatory and unconditional rights.[63] As of date, the case law has established that Article 21 (non-discrimination), Article 31 (the right to fair working conditions including paid annual leave), and Article 47 (the right to effective judicial protection) can have horizontal direct effect.[64] The case law on Article 21 and Article 47 is extensive and on occasion reflects aspects of social justice, eg, with regard to the right to housing laid down in Article 7 of the Charter.[65] Further, the Charter can have indirect horizontal effect, meaning that courts take account of fundamental rights in the interpretation of open norms in private law, such as good faith.[66] Occurrences of this are rare and are dependent upon national systems' constitutional traditions. Still, recent case law at the

[57]C Mak, 'Reimagining Europe Through Private Law Adjudication' in C Mak and B Kas (eds), *Civil Courts and the European Polity. The Constitutional Role of Private Law Adjudication in Europe* (Hart Publishing 2023) 63, 71.

[58]See Weatherill (n 5) 7. On the background and application of Art 52(1) of the Charter, see S Peers, T Hervey, J Kenner and A Ward (eds), *The EU Charter of Fundamental Rights: A Commentary* (Hart Publishing 2021) para 52.14ff.

[59]Peers et al (n 58) para 55.02.

[60]For an exploration, see E Frantziou, 'The Horizontal Effect of the Charter: Towards an Understanding of Horizontality as a Structural Constitutional Principle' 22 (2020) Cambridge Yearbook of European Legal Studies 208.

[61]Joined cases C-569/16 and C-570/16 *Stadt Wuppertal v Maria Elisabeth Bauer* and *Volker Willmeroth v Martina Broßonn* ECLI:EU:C:2018:871.

[62]It seems useful to explore other directions, as the status of Charter provisions as rights or principles is not clear and the application of specific provisions in individual cases may require confirmation from the Court. Cf Case C-176/12 *Association de médiation sociale (AMS) v Union locale des syndicats CGT cs* ECLI:EU:C:2014:2, on which see S de Vries, 'Securing Private Actors' Respect for Civil Rights within the EU: Actual and Potential Horizontal Effects of Instruments' in S de Vries, H de Waele and M-P Granger (eds), *Civil Rights and EU Citizenship. Challenges at the Crossroads of The European, National and Private Spheres* (Edward Elgar 2018) 43, 60–1. The Advocate-General in this case made a plea for assuming that social and employment rights generally belong to the category of principles; see Opinion of A-G Cruz Villalon, Case C-176/12 *Association de mediation sociale (AMS)* ECLI:EU:C:2013:491 at [49] and [55].

[63]See eg, Joined Cases C-569/16 and C-570/16 *Stadt Wuppertal v Maria Elisabeth Bauer* and *Volker Willmeroth v Martina Broßbonn* ECLI:EU:C:2018:871 (*Bauer*), para 84. See Mak (n 57) 74.

[64]Frantziou (n 60) 209.

[65]Compare B Kas, 'The Societal Impact of EU Anti-Discrimination Law: Widening and Deepening Equality in the Private Sphere' in C Mak and B Kas (eds), *Civil Courts and the European Polity. The Constitutional Role of Private Law Adjudication in Europe* (Hart Publishing 2023) 101; G Gentile, 'Article 47 of the Charter of Fundamental Rights in the Case Law of the CJEU: Between EU Constitutional Essentialism and the Enhancement of Justice in the Member States' in C Mak and B Kas (eds), *Civil Courts and the European Polity. The Constitutional Role of Private Law Adjudication in Europe* (Hart Publishing 2023) 141.

[66]On the terminology used in private law and its relation to EU law, see C Timmermans, 'Horizontal Direct/Indirect Effect or Direct/Indirect Horizontal Effect: What's in a Name?' 24 (2016) European Review of Private Law 673.

national level concerning restrictions to the freedom of expression in Facebook's standard terms has reignited the debate on the horizontal effect of fundamental rights.[67] The case law shows that in some national legal systems indirect effect can be construed through the classification of fundamental rights, such as the freedom of expression, as personal rights in private law.[68]

In sum, this brief exploration shows that EU law does pay heed to non-economic interests. However, the effect on private law relationships is limited. Even if the EU Charter of Fundamental Rights enables a balancing of economic rights with public interests, its horizontal effect on private law relationships is reserved for the few instances in which Charter provisions stipulate rights of a mandatory and unconditional nature, or instances in which national laws allow for indirect effect. Furthermore, the free movement provisions, which could set limitations to contractual parties' freedom of contract and hence their autonomy, are not often applied in that way. In practice, contract law will rarely count as a restriction to inter-state trade in the EU.[69]

Nonetheless, the framing of contract law in the context of the internal market has important ramifications for the substance of contract law in EU law. The market-oriented approach of European private law entails that emphasis is placed primarily on the economic interests of private actors, such as businesses and consumers. Other aspects of private law relationships garner less attention, which raises the question what the 'social' has meant and will mean in the future development of the EU market, with its stated aim of pursuing the establishment of a social market economy (Article 3(3) TEU).

C. The interplay between national contract laws and EU law

What can be seen is that the concepts of equality and autonomy as embedded in national contract laws are of a different nature than the 'framed autonomy' of EU law. That is important as the different rationalities of national and European private law have an impact on substantive choices in lawmaking. The impact on the substance of private law will be briefly summarised in this section. At the same time, it has been shown in the past that EU law can act as a catalyst for the development of consumer protection, even if it starts from different premises than national private laws. It is important, therefore, to examine under what conditions EU law can be used as an instrument for rebalancing equality in private law relationships. Part of that exercise requires examining the role of the Court and the potential of the Charter of Fundamental Rights as a source for balancing autonomy with collective interests. Another question is what role the European legislator should play. In both cases, the competences of the EU are limited. The next section briefly sets out the opportunities and restrictions, laying the basis for a further exploration specifically with regard to equality in digital markets in Section 3.

Substantive choices in lawmaking

In relation to the first point, substance, the main difference between national contract laws and European contract law is in their weighing of interests. National contract laws are primarily concerned with the balancing of interests between individual contracting parties. Even when concerned with the protection of weaker contracting parties, such as consumers or workers, they start from the premise that contract law is of a facilitative nature. Its aim is to provide a framework that ensures legal certainty for parties entering into contracts based on their own terms, with a view to self-realisation. In other words, the foundations of contract law are the freedom of contract and the autonomy of the parties. The restrictions placed on the freedom of contract in consumer

[67]Quintais et al (n 8) 882–3.

[68]See eg, K Jansen, 'Het Handvest als Privaatrechtelijk Instrument' in J Gerards et al (eds), *Waarde, werking en potentie van het EU-Grondrechtenhandvest in de Nederlandse rechtsorde. Preadviezen* (Handelingen van de Nederlandse Juristen-Vereniging) (Wolters Kluwer 2024) 223, 246–7.

[69]Albeit that restrictions may be posed by national regulations affecting contracts (eg, labelling rules), see Weatherill (n 5) 21.

law or employment law, eg through mandatory rules, are regarded as exceptions that are necessary for ensuring that *both* contracting parties have a real opportunity for self-realisation. Businesses will mostly be in a stronger position for setting the terms and conditions of a contract and the law in this way forces them to take account of the interests of consumers. One may regard this balancing of interests as a pursuit of interpersonal justice.[70] National laws also contain other instruments for doing this, such as contractual doctrines that protect against misleading information or conduct (eg, misrepresentation or mistake).

The focus on individual rights in national contract laws does not exclude that account is taken also of the broader goals of private law, eg, in relation to its role in the pursuit of social justice and its institutional design. In that sense, contract law can be regarded as instrumentalist, a means to achieving a societal goal. Yet, national contract laws are set to the pursuit of different goals than EU contract law's market-oriented instrumentalism, their aim being to ensure just outcomes for society as a whole.[71] Although rules of consumer or worker protection are distinct from such doctrines in their categorical approach, in individual cases that distinction falls away as judges will focus on the balance of interests in the individual relationship between the parties.

EU law adopts a different perspective which in essence is much more aimed at the macro-economic ordering of the consumer market. The protection of consumers as weaker contracting parties is embedded within, on the one hand, the framework for free movement regulation and, on the other hand, the pursuit of market integration through legal harmonisation. As a result, the balancing of interests between businesses and consumers focuses on narrower aspects of the contractual relationship than in national contract laws and on a more aggregate level. The rules of harmonised European consumer contract law that, like national laws, have a direct impact upon the substance of contracts are limited to rights that enable consumers to make the most of the EU internal market. They contain information rights for consumers as well as rules that protect against unfair information and practices, complemented by some basic contractual remedies. The benchmark for determining what protection is required is set by the 'average consumer', who is conceived as a rational, confident consumer. Only some protection is directed specifically at consumers who are vulnerable due to age or disability. Although the EU Charter of Fundamental Rights has created openings for balancing consumer protection with other rights, potentially including social rights in the mix, the case law post-*Aziz*[72] has been disappointing.[73] It appears that EU consumer law is still primarily market law.

The different structures of national contract laws and EU consumer contract law – or in the words of Michaels, different rationalities – will not always be visible in the weighing of interests between businesses and consumers. At heart, whether at the EU level or the national level, contract law is concerned with economic interests. Therefore, the policy objectives of many harmonisation measures in the field of private law will often be compatible with national laws' choices based on interpersonal justice.[74] Still, it is important to bear in mind the difference, as the instrumental nature of European private law means that rules developed at the EU level will sometimes cut through doctrinal structures of national private laws. That can result in conflicting norms. For

[70]Presuming that interpersonal justice is not only part of national laws but also of European private law; compare Hesselink (n 12) 310. See also O Cherednychenko, 'Islands and the Ocean: Three Models of the Relationship between EU Market Regulation and National Private Law' 84 (6) (2021) Modern Law Review 1294, 1295.

[71]Compare Murphy (n 21) 457–9.

[72]Case C-415/11 *Mohamed Aziz v Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)* ECLI:EU:C:2013:164.

[73]With the exception of a number of other cases in which Art 47 provide procedural safeguards in relation to the UCTD. *Aziz* also had tremendous impact on Spanish national case law, in which follow-up cases consolidated the protection of the right to housing (laid down in Art 7 of the Charter) and on a fundamental level reinforced the constitutional protection of having effective judicial remedies. See A van Duin, *Effective Judicial Protection in Consumer Litigation. Art 47 of the EU Charter in Practice* (Intersentia 2022) 120–2, 249–51.

[74]Cherednychenko (n 70) 1304.

example: the general norm of the UCPD with regard to misleading commercial practices is based on the benchmark of the average consumer, representing a category; whereas rules of misrepresentation, protecting similar interests with regard to misleading information, are tailored to the individual consumer. In individual cases, the application of the rules may lead to different outcomes. From a systematic perspective, the question arises as to whether the EU's pursuit of maximum harmonisation implies that the open norms defining misrepresentation have to be adjusted to the general norm of unfairness in the UCPD.[75] The UCPD's market-based nature, centred on the average consumer as a rational actor, may come into conflict with the balance of interpersonal justice in national laws' doctrines of misrepresentation.

EU law as a catalyst – opportunities and limitations

The pursuit of consumer protection at the EU level, nonetheless, has advantages over national approaches. Even if EU law is primarily market law, it contains openings for the pursuit of a social agenda, in some cases stronger than those available at the national level. As Micklitz notes, this is often not recognised. The shared competences of the EU and the member states are closely intertwined, yet '[t]he current situation is curious: the Member States appear as the potential savers of the Social, while the EU is blamed as its destroyer. Historically, this is not correct'.[76] Notably, in picking up the challenge of the pursuit of social justice the legislator can play a role, but also the CJEU, in particular through the application of the Charter of Fundamental Rights. In both cases, however, account will have to be taken of limitations.

For legislation in the field of consumer law, the EU has a shared competence with the member states. That explains in part why European consumer law is heavily based on market integration goals, as this is an area in which competence can often fairly easily be constructed.[77] The first waves of harmonising legislation in the field of consumer law, for example, fit exactly within this 'integration through law' logic. If EU law were to be used as an instrument for the extension of consumer protection beyond economic interests, it can only be done within the competences determined by the Treaties. When exploring avenues for the development of the social market economy envisaged by Article 3(3) TEU, it is vital to reassess the potential legal bases for legislation and policy making. As things stand, this is likely to still lead to Article 114 TFEU as the most suitable legal basis. Alternatives, such as Article 169(2)(b) and Article 352 TFEU, have in the past been considered, but are rarely used as bases for harmonised legislation.[78] Also, one must assess how far the application of existing rules based on the pursuit of market integration can reasonably be extended to non-economic issues, such as data protection. Until now the EU legislator has not considered it to be problematic to use Article 114 TFEU as a legal basis, as the Digital Services Act (DSA) and the Digital Markets Act (DMA) are based on this provision. The same is true for the AI Act, even if Article 16 TFEU (on data protection) is cited as a corollary basis.[79]

[75]This question has received different responses in the literature. Assuming that national doctrines can coexist with UCPD norms, F De Elizalde, 'Standardisation of Agreement in EU Law. An Adieu to the Contracting Parties?' in M Durovic and T Tridimas (eds), *New Directions in European Private Law* (Hart Publishing 2021) 29; F Patti, '"Fraud" and "Misleading Commercial Practices": Modernising the Law of Defects in Consent' 12 (2016) European Review of Contract Law 307, 310; V Mak, 'Full Harmonization in European Private Law: A Two-Track Concept' 20 (2012) European Review of Private Law 213.

[76]Micklitz (n 5) 269.

[77]Weatherill, *EU Consumer Law and Policy* (n 38) 16–17.

[78]Compare J Rutgers, 'European Competence and a European Civil Code, A Common Frame of Reference or an Optional Instrument' in A Hartkamp et al (eds), *Towards a European Civil Code* (Wolters Kluwer 2011) 311; Weatherill, *EU Consumer Law and Policy* (n 38) 18.

[79]Regulation (EU) 2022/2065 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act) [2022] OJ L277/1; Regulation (EU) 2022/1925 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) [2022] OJ L265/1; European Commission, 'Proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence (Artificial Intelligence Act) and amending certain Union legislative acts' COM(2021) 206 final.

Some pressing issues cannot, and do not, wait for legislation. Courts at the European level and the national level have already dealt with issues concerning new inequalities in private law relationships.[80] The case law for now mostly turns upon the (indirect) application of the European Convention for Human Rights (ECHR). For EU consumer law, the Charter could of course also have an impact. If the Charter were to be applied more often to private law relationships, it could therefore be of great significance for the pursuit of the EU's social (or societal) goals. Problematic is however that the Charter is considered only in limited circumstances to have horizontal effect. Even if pleas have been made for construing a self-standing principle of horizontality of the Charter,[81] the development of a structured approach to this issue will likely take yet more time. In terms of agenda setting, therefore, one might plead in favour of looking at the legislator for further action in the pursuit of the EU's social market economy.[82] That does not prevent courts from exploring the opportunities and limits of horizontal effect of Charter provisions at the same time.

3. Towards a new conception of equality in European contract law

It is time to return to the core question of this paper. Can the existing conception of equality, focused on the economic interests of private actors, be adjusted to take account of new inequalities in consumer markets? Or do we need a radical overhaul of the ways in which equality finds expression in European contract law? As can be gleaned from the analysis in Section 2, the answer to this question is likely to be complex. The analysis in this paper should therefore only be seen as a first exploration of the issues at stake and the potential pathways for addressing them. In this section, a case study of inequality in digital consumer markets will be used as a starting point for a more general reassessment of equality in consumer markets. The analysis is structured into two parts, combining a descriptive analysis (Section 3.A) with an evaluative analysis of the need for a reform of European contract law in light of a new conception of inequality (Section 3.B). The analysis will throughout the section be connected to the interaction between national private laws and EU law described in Section 2.

The structure of this section is as follows. The first part of the analysis aims to determine which new forms of inequality arise in digital consumer markets that are different from the way in which European contract law currently addresses inequality in business-to-consumer relations (Section 3.A). In order to establish which differences there are, the first part of the section will take stock of existing rules of European contract law, whereas the second part will describe in which ways consumers in digital markets have become more vulnerable. The analysis will show that the interests at stake are different from those addressed by existing contract laws, entering territory beyond economic interests. Section 3.B uses that finding as a basis for evaluating how European contract law can address the gaps in existing consumer protection in digital markets, and whether for that purpose a reconceptualisation of the principle of equality is required. The analysis will draw some tentative conclusions as to what reforms could be needed and how radical they need to be.

A. Causes of inequality and legal responses

The wider causes of inequality in consumer markets have been examined before, and some are persistent. When looking at the past, financial inequality stands out as a main concern in consumer markets. Caplovitz's seminal work *The Poor Pay More* revealed that poor consumers in many cases pay more for the same products than rich consumers.[83] That has been, and still is,

[80]See Section 3 for examples on restrictions to the freedom of expression in online platforms' terms and conditions. See further C Mak, 'Giving Voice: A Public Sphere Theory of European Private Law Adjudication' 2 (2024) European Law Open 697.

[81]Frantziou (n 60).

[82]M Bartl, *Reimagining Prosperity. Toward a New Imaginary of Law and Political Economy in the EU* (Cambridge University Press 2024).

[83]D Caplovitz, *The Poor Pay More* (Free Press 1967).

particularly true for financial services such as credit. Lenders often charge more to poor consumers, with the justification that the risk of non-payment is greater with this group of consumers than with others.[84]

It is naïve to think that consumer law can take away all inequality in society. Income distribution and taxation are outside of its remit. Still, consumer exploitation is one of the main causes of inequality and regulation is therefore likely to have a real impact. What openings does European consumer contract law contain for addressing new forms of inequality arising in light of the challenges of digitalisation and sustainability? In order to answer that question, in this section an attempt will first be made to better define what makes these inequalities different from earlier forms of exploitation in consumer markets.

Consumer exploitation, access justice and vulnerable consumers

The term 'exploitation' does not have a set definition and further work needs to be done in order to operationalise it for use by legislators and policy makers.[85] Still, it is not difficult to find examples of practices that structurally make consumers worse off. In some cases, the vulnerability of poor consumers has even been a central factor in the creation of profit-making schemes designed by banks. The sub-prime mortgage crisis of 2007 in the United States is an example, in that instance caused by a number of factors. Poor consumers were but one element in the fateful steps that were taken in the run up to what would become a global financial crisis. Securitisation practices that initially led to profits for investors were sustained by underlying assets consisting of consumer mortgage loans held by banks. As a means to build up mortgage portfolios, mortgage loans were widely offered to consumers without any kind of back up in the form of income or other financial means check. Although this helped increase the loan portfolios that could be used for securitisation, that process came at the cost of the consumers lured into mortgage loan contracts. Many ended up being unable to pay their loan instalments. The practices of banks in many US states allowed them to walk away from unpaid loans by handing in the keys to their homes upon foreclosure, therefore releasing them from further payment obligations. That nevertheless left them homeless.[86] Practices such as these, where securitisation structures were created for the sake of investors but at the cost of poor consumers, can be designated as part of 'extraction logic', indicating practices by which vulnerable groups in society are exploited for the gain of other economically or politically powerful actors.[87] In Europe, consumers have also been subject to extraction practices in mortgage markets, albeit due to other risk factors. In some member states the conditions for obtaining mortgages allowed for borrowing above the value of the property, leading to high household debt. In other members states, in particular in Central and Eastern Europe, foreign currency mortgages denominated in Euros or Swiss Francs were offered on a large scale from the early 2000s onwards. The providers of such loans were foreign banks who saw opportunities for investment. The credit contracts that they offered, however, placed the exchange rate risk mostly with consumers. That became apparent when that risk materialised, causing payment problems for many consumers and leading to a large number of defaults on mortgages.[88]

[84]Cf T Wilhelmsson, 'Contract and Equality' 40 (2000) Scandinavian Studies in Law 145, 155.

[85]For explorations of this issue, see eg M Brenncke, 'A Theory of Exploitation for Consumer Law: Online Choice Architectures, Dark Patterns, and Autonomy Violations' 47 (2024) Journal of Consumer Policy 127.

[86]V Mak, 'Predatory Formations: Post-Financial Crisis Lessons for the US and Europe' 24 (3) (2019) Tilburg Law Review 5.

[87]S Sassen, 'Predatory Formations Dressed in Wall Street Suits and Algorithmic Math' 22 (2017) Science, Technology & Society 1. For other examples, see eg the 'aandelenlease-affaire' in the Netherlands and payment protection insurance cases in the UK. On this, V Mak, 'The "Average Consumer" of EU Law in Domestic and European Litigation' in D Leczykiewicz and S Weatherill (eds), *The Involvement of EU Law in Private Law Relationships* (Hart Publishing 2013) 33.

[88]For the aftermath, see eg E Miscenic, 'Currency Clauses in CHF Credit Agreements: A "Small Wheel" in the Swiss Loans' Mechanism' 9 (2020) Journal of European Consumer and Market Law (EuCML) 226; S Grundmann and N Badenhoop, 'Foreign Currency Loans and the Foundations of European Contract Law – A Case for a Financial and Contractual Crisis?' 19 (2023) European Review of Contract Law 1.

The question whether, and if so how, European consumer law should address socio-economic vulnerabilities has been asked before. To some extent, also, EU law has responded by introducing rules to protect vulnerable citizens. Of note are rules in relation to services of general economic interest, such as energy, communications, transport, and banking services.[89] The EU has approached regulation primarily from the viewpoint of access, competition and choice. Regulation, however, also affects consumer contract law, for example by ensuring that contracts do not pose direct or indirect impediments to switching to another provider.[90] Such regulation can still be regarded as fitting within the internal market rationality of EU law. Where it goes further, however, is in maintaining an obligation for member states to protect the most vulnerable final consumer. A general obligation to that effect is laid down in Directive 2019/944 on energy markets, which stipulates that[91]:

> Member States should take the necessary measures to protect vulnerable and energy poor customers in the context of the internal market for electricity. Such measures may differ according to the particular circumstances in the Member States in question and may include social or energy policy measures relating to the payment of electricity bills, to investment in the energy efficiency of residential buildings, or to consumer protection such as disconnection safeguards.

The protection of consumers in energy markets, therefore, does take account of socio-economic circumstances that render them vulnerable. Notably, however, the EU legislator leaves it to the member states to determine which specific measures are introduced for the protection of this group. Moreover, the Directive also stipulates that the concept of vulnerability should be determined at member state level. Article 28(1) states: 'each Member State shall define the concept of vulnerable customers which may refer to energy poverty and, inter alia, to the prohibition of disconnection of electricity to such customers in critical times'. By way of indication the provision adds that 'the concept of vulnerable customers may include income levels, the share of energy expenditure of disposable income, the energy efficiency of homes, critical dependence on electrical equipment for health reasons, age or other criteria'.

The socio-economic protection of vulnerable consumers seen here for energy is mirrored in EU legislation concerning access to banking and other financial services. Social inclusion in Europe has increasingly come to depend on financial inclusion, meaning that citizens' inclusion in society is dependent upon their access to financial services.[92] In addition, financial stability has become a cornerstone of EU regulation after the financial crisis of 2018. That is visible in the recitals of directives adopted since then, such as the Consumer Mortgage Credit Directive and the revised Consumer Credit Directive,[93] as well as in the case law of the CJEU. In the case law, besides the principle of effectiveness, financial stability seems to have become a new overarching principle also for contract law.[94] In terms of consumer protection in contract law, however, the move towards financial inclusion in EU law is in some respects a double-edged sword. First, regulation aimed at access to services, such as bank accounts and credit, ensures that citizens should be able to at least pass the threshold for access to markets. The protection against over-indebtedness in EU

[89]Cf Reich (n 15) 81–4.

[90]Directive (EU) 2019/944 on common rules for the internal market for electricity and amending Directive 2012/27/EU (recast) [2019] OJ L158/125.

[91]Directive (EU) 2019/944, recital 58. See also recital 60 and Arts 5, 28 and 29.

[92]G Comparato, *The Financialisation of the Citizen. Social and Financial Inclusion through European Private Law* (Hart Publishing 2018) 21ff, 71ff.

[93]Directive 2014/17/EU on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010 [2014] OJ L60/34; Directive (EU) 2023/2225 on credit agreements for consumers and repealing Directive 2008/48/EC [2023] OJ L, 30.10.2023.

[94]Comparato (n 92) 136.

law, however is mostly formal in nature, focusing on information rights for consumers and the requirement of passing a creditworthiness assessment. Ex post protection for those who have become unable to pay off their debts is left to national laws. Financial consumer law, therefore, like energy law follows the model of access justice in European contract law.[95] Moreover, due to its focus on interpersonal exchange, EU law fails to fulfil its social function in terms of distributing market risks fairly between both contracting parties.[96] Second, financial stability policies aim to secure a stable financial environment where consumers can place trust in financial institutions. However, there is also another, darker side to the influence of financial stability on contract law. It may conflict with other principles and aims in private law and it may, even if only theoretically, lead to a decrease in consumer protection.[97] Also, the use of the consumer benchmark of a 'responsible financial citizen' in EU supervisory regulation of retail investment markets can result in instances where consumers have to bear the losses in cases of bank resolution. Consumer protection in that case is trumped by financial stability goals.[98] In summary, therefore, EU financial consumer law ensures that all citizens have access to financial services, but it leaves much to the member states for ensuring consumer protection.

Noteworthy is that the approach of EU law towards the protection of vulnerable consumers of services of general interest is sector-specific and leaves much space to the member states for determining what types of protection will be maintained. The EU does not prescribe to what extent socio-economic inequality can be addressed. One may wonder whether it is in a position to do better. As noted above,[99] the EU and the member states have shared competences and responsibilities with regard to social policy. Perhaps they can use these as a basis for regulating beyond access justice. In digital markets, as the following will show, that seems a prerequisite for consumer protection.

Consumer exploitation in digital markets

The societal challenges of digitalisation and sustainability that have arisen in recent years have created new forms of inequality that have yet to be addressed by regulators. In earlier work, I have focused on three examples: vulnerability of consumers in digital markets, who are targeted by (often hidden) profiling techniques aimed at influencing their purchasing behaviour; an unfair balance of responsibility for 'prosumers' in platform markets who may be subject to liability towards consumer-buyers, whilst the platform acts as an intermediary only; and the potentially unfair expectation of consumers to act as responsible citizens in the pursuit of sustainability goals, which may require them to give up established consumer rights whilst it is unclear what contribution towards sustainability is made by industry and/or government.[100]

Elaborating on these observations, I will focus on digital markets as a testing ground for addressing inequality. The digital market is at the centre of current legislative proposals and scholarly debates due to its rapid overtaking of traditional models of consumer markets. Grochowski in this context has posited that we are witnessing the development of a post-consumer society in

[95]Compare Comparato (n 92) 70–1; I Domurath, 'Book Review: The Financialisation of the Citizen – Social and Financial Inclusion through European Private Law, by Guido Comparato' 42 (2019) Journal of Consumer Policy 329, 330.

[96]I Domurath, 'Mortgage Debt and the Social Function of Contract' 22 (2016) European Law Journal 758, who refers to this as a traditional or formalistic understanding of contract law, in which formal equality prevails over substantive equality between contracting parties.

[97]G Comparato, 'Financial Stability in Private Law: Intersections, Conflicts, Choices' 58 (2021) Common Market Law Review 391, 394.

[98]Cherednychenko (n 70) 1304–5.

[99]See Section 2.C.

[100]V Mak, 'How Can Consumer Interests be Protected When Consumer Identities are Increasingly Diffuse?' in H-W Micklitz and C Twigg-Flesner (eds), *The Transformation of Consumer Law and Policy in Europe* (Hart Publishing 2023) 43.

which traditional consumption – namely, the acquisition of things – loses its importance due to a growing interest of consumers in experiences, emotions and services.[101] If online platforms are considered digital services, that means that consumer interests have shifted towards the creation of content (pictures, videos), the expression of thoughts and opinions, and the use of digital content (ebooks, apps). The protection of such interests requires a different framework from that of traditional consumer law, which focused on economic interests. Instead, account has to be taken of risks typical to digital markets, such as the oversharing of data, the risk of harming one's individual sovereignty in social interactions mediated by professionals such as online platforms, and risks to one's personal and political freedoms.[102]

One step that needs to be taken, therefore, is to redefine the interests that are taken into account in consumer contract law. It is helpful to consider that question in relation to the concept of 'digital asymmetry', a term coined by Helberger and Micklitz et al. Digital asymmetry denotes the structural imbalance between tech-providers and consumers, due to consumers' structural and universal inability to fully understand the digital architecture.[103] This concept of asymmetry is tailored to the legal domain, finding a medium between broader notions of 'vulnerability' or 'weakness' used beyond law, and narrower notions of information asymmetry in consumer contract law.[104] It provides a framework for deciding which vulnerabilities, when encountered in digital markets, can be tackled by private law. Important for the analysis here, is that the concept allows for an exploration of vulnerability beyond the economic interests of consumers that existing contract laws focus on. The concept of digital asymmetry also provides an opening for considering other types of vulnerability on the fringes of consumer law, such as data protection concerns, the safeguarding of freedom of expression, and the (lack of) remuneration for digital 'prosumers'. Some of these issues are already being picked up by lawmakers and policy makers, whilst others require attention.[105]

Focusing first on issues that have been picked up, the expansion of consumer contract law beyond economic rights has started to gain traction in the case law of national courts as well as the CJEU. The lines between the protection of consumers' economic interests and fundamental rights protection are blurring, as evidenced by judgements of the German Bundesgerichtshof (BGH)[106] and the Italian Administrative Court of Appeal, confirming a decision of the Italian Authority for Consumers and Markets (AGCM).[107] These national courts and authorities applied the Unfair Contract Terms Directive (UCTD), respectively the Unfair Commercial Practices Directive (UCPD), to Facebook's terms and conditions concerning freedom of expression.[108] These judgements are part of a recent trend in which the European consumer *acquis* in individual cases extends to other interests, such as data protection and freedom of speech, as long as the claim is related to an infringement of economic interests.[109] That is an interesting development, but it is

[101]Grochowski (n 7) 1.

[102]Ibid., 2–3.

[103]Helberger et al, *EU Consumer Protection 2.0* (n 6) 50–1.

[104]Ibid.

[105]See also N Helberger et al, *Digital Fairness* (n 6) 16 ff. Examples of legislative action are, eg, prohibitions on the use of dark patterns laid down in the Digital Services Act (recital 67 and Art 25(1)), the Data Act (Arts 4(4) and 6(2)(a)) and the proposed AI Act (Art 5(1)(a)).

[106]See Lutzi (n 1).

[107]L Zard and A Sears, 'Targeted Advertising and Consumer Protection Law in the European Union' 56 (2023) Vanderbilt Journal of Transnational Law' 799, 827. See also Tribunale Amministrativo Regionale per il Lazio 10 January 2020, no. 260; A. Tuninetti Ferrari and I D'Anselmo, 'Italian court confirms that personal data has economic value in Facebook case', *Lexology* 28 January 2020, beschikbaar via: <https://www.lexology.com/library/detail.aspx?g=ae5ee175-e3b0-4239-b8c9-ccd296ec2929> accessed 3 October 2024.

[108]Grochowski (n 7) 1; Zard and Sears (n 107) 828–9.

[109]Case C-252/21 *Meta Platforms Inc v. Bundeskartellamt* ECLI:EU:C:2023:537. See also the case commentary by I Graef, 'Meta Platforms: How the CJEU Leaves Competition and Data Protection Authorities with an Assignment' 30 (2023) Maastricht Journal of European and Comparative Law 325–34.

not unproblematic. Whereas the extension of the scope of the consumer *acquis* can lead to greater protection of consumers in digital markets, it should be borne in mind that the protection of fundamental rights is in essence a different issue than the weighing of contractual interests. On what basis then will a civil court determine a term 'unfair'?[110]

Another issue, not yet subject to lawmaking action but identified in scholarship, is whether legal reforms are needed to do justice to the value created by content creators on social media platforms.[111] Content creators are an interesting category, as they can be labelled 'prosumers'. Alvin Toffler coined the term prosumer in his 1980 book *The Third Wave*, conflating the concept of the consumer with that of the producer.[112] The prosumer is a natural person, not acting in the course of a business (ie, a consumer) but also a creator (ie, a producer). The relevance of this concept is that it relates to a part of the economy that is mostly invisible. It concerns value created outside the market for mass produced goods and commodities, referred to by Toffler as Sector B. Taking note of the rise of 'do it yourself' practices and in general acknowledging housework as part of economic productivity, Toffler stated: 'But even in these words the "productivity" of the consumer is still seen only in terms of Sector B – only as a contribution to production for exchange. There is no recognition as yet that actual production also takes place in Sector A – that goods and services produced for oneself are quite real, and that they may displace or substitute for goods and services turned out in Sector B.'[113]

Prosumers are therefore part of the economy, but not by way of exchange. This can be seen if we look closer at the position of prosumers as content creators. Social media platforms TikTok, Facebook and Instagram can only be viable if users keep posting new content. Content attracts users and makes a platform interesting for advertisers, who in many cases are the main source of funding for online platforms. Despite their importance for keeping the business model afloat, creators themselves hardly ever reap the financial benefits of the content posted on a platform.[114] Although some content creators earn large amounts of money through social media platforms, most do not. Somewhat surprisingly, the literature does not consider them to be badly off. It has been said that '[i]t's difficult to think of prosumers as exploited. This idea is contradicted, among other things, by the fact that prosumers seem to enjoy, even love, what they are doing and are willing to dedicate long hours to these activities without receiving anything.'[115]

Still, viewed from the perspective of rewards and distribution, it is odd that creators earn nothing while online platforms that only offer a space for content dissemination make a profit. To address this imbalance, one step forward would be to give recognition to the value created by users other than that having *quantitative* economic value on the market. That value, named exchange value, is recognised by law and forms the basis of the ways in which Western private law systems balance the economic interests of businesses, consumers and other private actors. Prosumers on social media platforms, however, also create *qualitative* value. They post photos, videos and other digital content aimed at connecting socially with other users of the platform. That social goal is not reflected in the exchange value that can be quantified in relation to products exchanged on a market. It should rather be seen as a satisfaction of needs in a qualitative way – a *use value*.[116]

[110]Fairness in consumer law is still mostly seen as an economic issue. See eg, P Siciliani, C Riefa and H Gamper, *Consumer Theories of Harm. An Economic Approach to Consumer Law Enforcement and Policy Making* (Hart Publishing 2019).

[111]See C Goanta, 'The New Social Media: Contracts, Consumers, and Chaos' 108 (2023) Iowa Law Review Online 118.

[112]A Toffler, *The Third Wave* (Bantam Books 1980) 280.

[113]Ibid., 280.

[114]Platforms tend to stipulate generous licensing rights for themselves; see H Bosher, 'Key Issues around Copyright and Social Media: Ownership, Infringement and Liability' 15 (2) (2020) Journal of Intellectual Property Law & Practice 123, 125.

[115]G Ritzer and N Jurgenson, 'Production, Consumption, Prosumption: The Nature of Capitalism in the Age of the Digital "Prosumer"' 10 (2010) Journal of Consumer Culture 13, 21–2.

[116]L do Nascimento Gonçalves and O Furtado, 'The Fake Simple Exchange between Facebook and its Prosumers' 2 (2) (2021) Socioscapes. International Journal of Societies, Politics and Cultures 181.

This exploration of issues is not meant to provide an exhaustive list of expressions of digital asymmetry in consumer markets. It does serve as a basis for assessing the concept of equality in European contract law. What can be gleaned from the analysis, is that in digital markets consumer contract law will have to take account of: (i) interests beyond economic interests, expanding also to fundamental rights such as freedom of expression and data protection; and (ii) economic value beyond the concept of exchange value, so as to include use value for online platform users. One could say that the first is an expression of a negative interest of digital consumers – eg, protection against unjust restrictions on the freedom of expression – whilst the second reflects a positive interest, namely the recognition of value created by prosumers. As existing regulation does not do justice to these interests of consumers, they could be seen as issues giving rise to new inequalities between businesses and consumers. Where existing regulation has aimed to secure equality for consumers and other 'weaker' parties, such as SMEs, by ensuring that they have access to markets and enjoy a certain level of substantive protection with regard to the quality of goods and services, the issues at stake in digital markets are different. We see in the two aspects identified here a reflection of a post-consumer society in which inequality arises not only in economic terms in existing conceptions of markets, but also with regard to potential harms to individual sovereignty and a lack of remuneration for non-market values when using online platforms.

For European contract law to address these issues, inroads would have to be made upon the existing framework of autonomy described in Section 2. Currently, online platforms enjoy a very large freedom to set the terms and conditions for use of their services. The question is whether that freedom, and hence their autonomy, should be restricted in order to do justice to the two interests – one negative and one positive – of digital consumers identified here. By questioning the scope for autonomy, we again come back to equality, as it is a corollary principle in contract law that can function as a mediator. Depending on what is needed for achieving a certain equality between consumers and providers of digital services, lawmakers and policy makers can establish what restrictions on businesses' autonomy are justifiable.

B. Addressing inequality through European contract law – revolution or reform?

This section aims to identify whether expressions of equality in European contract law need to be revised in light of the analysis of inequality in digital markets presented above. That question has in part already been answered. Seeing that existing rules of European contract law cannot address some of the new forms of vulnerability or value in digital consumer markets, there is a need to reassess equality between businesses and consumers active in these markets. Whether that enquiry should lead to reform or revolution has yet to be seen.[117] Also, whether the reassessment of equality in digital markets should be copied for other areas or silos of European private law requires further research. As indicated above, this paper does not aim to provide definitive answers, but seeks to identify some initial steps for further exploration.

As a preliminary finding, the new forms of inequality arising in digital consumer markets do suggest that radical reform, if not a revolution, is needed. By some scholars it is already envisaged.[118] Arguably, however, the way in which autonomy and equality are embedded within European contract law – taking account of the interplay between national and EU private laws – will create obstacles to the translation of broader policy goals into actual rules and regulation. However, these are not insurmountable.

I will substantiate these claims by examining a number of trends that, at the level of political ideology, have in recent years started to make a mark upon discussions on the substance of European market regulation, including private law. Discussions on the political economy of

[117]Revolution would imply a radical departure from the existing framework. Compare M Hesselink, 'Ethical Consumption. Privatisation of social justice or prefigurative politics?' (seminar held at Leiden University on 1 March 2024).

[118]See *New perspectives on prosperity and welfare*, under Section 3.B.

European private law suggest that neoliberal politics should be replaced by ideologies that leave room for the pursuit of economic policies aiming for welfare rather than for growth as a goal in itself (see *New perspectives on prosperity and welfare* section). These trends coincide with re-evaluations of value in economic discourses and can be connected to one of the new forms of inequality identified above, namely the conception of value for content creators in digital markets. The second aspect, relating to obstacles to reform, will be illustrated through an examination of the ways in which European contract law can address the protection of non-economic rights (see *Beyond non-economic interests – the EU Charter as a catalyst for legal development?* section). That analysis returns to the conceptions of autonomy in national laws and EU contract law discussed in Section 2. It will show that, in order for consumers and businesses to have real opportunities for self-realisation, European contract law will need to find ways for integrating non-economic interests into its fabric that may require regulatory action or, if the route of adjudication is chosen, a renewed enquiry into the horizontal effect of fundamental rights laid down in the Charter. While it would be desirable to pursue such goals at the EU level, as that ensures a harmonised approach for consumers and businesses throughout the EU, obstacles are likely to be encountered whether the route of regulation or that of application of the Charter is chosen.[119] They can, nevertheless, to some extent be overcome.

New perspectives on prosperity and welfare

While the consumer image provides a benchmark for lawmakers to determine appropriate rules for consumer contracts, the substance of those rules is influenced by the political economy of European contract law. The term 'political economy' does not have one defined meaning, but can be summarised as 'the methodology of economics applied to the analysis of political behaviour and institutions.'[120] Having been current in North-American legal scholarship for some decades, it is now also gaining ground as an approach in European legal scholarship. Of course, in the field of consumer law the influence of political philosophy and institutional economics has already made its mark, most notably through the work of Hans Micklitz.[121] The development that is now becoming apparent, however, augurs the acceptance of political economy into the mainstream of private law scholarship in Europe.

For European consumer law the political economy perspective can be of use for anchoring the meaning of the 'social' in the EU's objective of establishing a social market economy (Article 3(3) TEU). The social can, in a similar vein to Wilhelmsson's work on welfare approaches in contract law, be connected to models of welfare.[122] Although further research would be required to determine how a social policy can take shape in regulation, the EU Treaties arguably allow space for that. As Kaupa states, 'while neoliberalism continues to shape the Union's law and policies, the Treaty is yet not fully determined by it ... the Treaty allows for different readings in the light of competing socio-economic paradigms.'[123] In this light, economic theory has in recent years been a rich source for the discussion of values, in particular whether growth should still be the primary objective of economic policies. Authors such as Mazzucato and Raworth have offered alternative perspectives in which societal goals, such as the pursuit of sustainability, take over as the more important ones.[124]

[119]Compare *EU law as a catalyst – opportunities and limitations,* above under Section 2.C.

[120]B Weingast and D Wittman, 'The Reach of Political Economy' in B Weingast and D Wittman (eds), *The Oxford Handbook of Political Economy* (Oxford University Press 2009) 3.

[121]Micklitz (n 10).

[122]See Mak (n 5) 48–9, 69–70.

[123]C Kaupa, *The Pluralist Character of the European Economic Constitution* (Hart Publishing 2016) 6.

[124]M Mazzucato, *The Value of Everything* (Allen Lane 2018); M Mazzucato, *Mission Economy: A Moonshot Guide to Changing Capitalism* (Allen Lane 2021); K Raworth, *Doughnut Economics* (Cornerstone 2018).

Marija Bartl has in recent work suggested that the EU is in the process of developing a new imaginary of prosperity. The starting point of her enquiry is the 2022 proposal of the European Commission for a Directive on Sustainable Due Diligence.[125] Bartl regards this as an indication that the EU is moving away from the neoliberal image of prosperity that, so she argues, characterises the EU's internal market programme.[126] Whether that movement will consolidate into a new image of prosperity, nevertheless, will have to become clear over time. As Bartl states by way of comparison, neoliberalism did not become the hegemonic ideology of European politics overnight but through a process starting in the second half of the 1990s.[127] Her proposition of using social imaginaries as a means of changing the narrative for economic policy making in the EU nonetheless serves an important goal. It provides an image of what the future could look like. That in itself can be an inspiration for law and policy makers to align their choices towards that goal.

Other authors have also put forward visions for the political economy underlying European private law. Hesselink in recent work has made a plea for a progressive code of private law 'aimed at making progress towards a more just society, where there is less inequality and where we have more democratic control over our future'.[128] His argument starts from the diagnosis made by Katharina Pistor in her book *The Code of Capital*, which highlights the key role of private law in creating capital and, thereby, in producing and entrenching social and political inequalities.[129] Although the introduction of a European code, certainly in light of past failures of such projects, seems ambitious, the suggestion should not be discarded to soon. Even if the discussion of such a code is an academic exercise only, it could serve as an inspiration for future choices in lawmaking and policy making. Also, it can provide a touchstone for lawmakers against which to consider other available alternatives.

It can be seen, therefore, that the momentum for a reassessment of the political economy underlying European private law is growing. Perhaps this will lead to a return to earlier debates on the foundations of a European civil code, as conducted in the early 2000s by various study groups under the aegis of the European Commission.[130] Even if the objective is not so ambitious as to introduce a code, the use of political economy as a framework for legislative choices could give an impetus to lawmakers and policy makers at the EU level and the national level to look beyond neoliberal ideology as a basis for regulatory choices. If that leads to a reassessment of value in private law relationships, that could fundamentally change the way in which autonomy is 'framed' within European contract law. The pursuit of societal goals such as sustainability is likely in some cases to diminish the autonomy of private actors, businesses as well as consumers. At the same time, a change of perspective could in other instances give space to regulatory choices diminishing inequality in private law relationships.

Beyond non-economic interests – the EU Charter as a catalyst for legal development?

Debates concerning the political economy and the push for reform of institutions, as illustrated by the examples given in the previous section, often require the legislature to take action. For a reform of European contract law, therefore, the ball is in the court of the EU legislator to consider if and

[125]European Commission, 'Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937' COM (2022) 71 final.

[126]M Bartl, 'Towards the Imaginary of Collective Prosperity in the European Union (EU): Reorienting the Corporation' 1 (2020) European Law Open 957, 958.

[127]Ibid., 958.

[128]M Hesselink, 'Reconstituting the Code of Capital: Could a Progressive European Code of Private Law Help Us Reduce Inequality and Regain Democratic Control?' 1 (2022) European Law Open 316.

[129]K Pistor, *The Code of Capital* (Princeton University Press 2019).

[130]The most famous outcomes are the Principles of European Contract Law (PECL) and the Draft Common Frame of Reference (DCFR).

how new forms of inequality can be addressed. The recognition of value beyond market value or exchange value, extending for instance to the value created by content creators, could be a starting point for evaluating the regulation of the digital market. That could lead to reforms aiming at a redistribution of profits between providers of digital services and the users posting the content that they created. At least as a normative goal, the debate on the protection of non-economic interests in a so-called post-consumer society would seem to support that direction.

How to give effect to such a redistribution through European contract law is not straightforward, but it is also not impossible. The EU legislator has limited competences in this field and will have to look for opportunities. In the past, these have been found in relation to issues that supersede national borders, of which digital markets are a prime example. The regulation of European contract law through directives and regulations, with a peak in the 1990s and 2000s, found its legal basis in the pursuit of market integration (Article 114 TFEU). In recent years, the regulation of digital markets through the DSA, the DMA and the AI Act have also all used this as a legal basis. The effect of this is that legislation, even if it extends beyond economic interests, is always connected to the EU's market-oriented rationality. That has in the past been seen as a barrier to distributive justice, as the discussion on 'access justice' in European contract law reflects.[131] The more recent legal instruments, in particular the DSA and the AI Act, however show that the European legislator does not shy away from expanding regulation to cover other interests, such as data protection and freedom of expression. To some extent, therefore, the protection of non-economic interests can go hand in hand with the protection of economic interests.

Of course, if the legislative route is chosen, other problems have to be dealt with. For example, how should economic and non-economic interests be balanced, should they conflict? Does the EU's market rationality prevail? And would the balance be struck differently if a national legislator had to weigh the interests at stake? Taking account of the characteristics that set EU private law apart from national laws – in particular its piecemeal approach and its instrumentalist, market-oriented rationality – it is likely that some outcomes will be different if the EU legislator determines how contract law should strike the balance between competing interests of private actors. In the past, instances have occurred where that has been the case, as the example of unfair commercial practices regulation shows.[132] In that case, discussions continue on whether the UCPD's aim of maximum harmonisation precludes national laws from offering remedies that potentially give more protection to consumers than the Directive does.[133] Such debates go to the heart of European contract law, as they concern fundamental aspects of how to define fairness and which protection to offer to consumers if a fairness rule is breached. It is inevitable that such tensions continue to exist between EU law and national contract laws. To some extent, they can be moderated through the use of open norms – as the general fairness rule of the UCPD is – for national courts can determine in individual cases what outcome is justifiable. Of course, that only works until a definitive interpretation of the fairness rule by the EU legislator or the CJEU renders national interpretations diverging from the Directive, even if on different legal grounds, impossible. Until then, however, legal pluralism prescribes that the EU rule and the national rules can coexist and, moreover, that their interaction can actually lead to legal development.[134]

Even if the legislator is better placed for general agenda setting in EU consumer law and policy, legal development can be instigated through alternative routes. One option is to leave the search for an appropriate balance to private actors themselves. That would be in line with the general principles of autonomy and freedom of contract. Also, the framework laid down by the DSA follows this approach, placing responsibility on online platforms for creating a safe digital

[131]Compare Hesselink (n 12) 310.

[132]Above, *Substantive choices in lawmaking* under Section 2.B.

[133]See recently M Schaub, 'Europese harmonisatie en algemene leerstukken van het verbintenissenrecht' [2024] Nederlands Tijdschrift voor Burgerlijk Recht (NTBR) 1.

[134]For that argument, compare Mak (n 5) 109 ff.

environment but otherwise leaving the design of the private law relationships with their users to the platforms themselves. Whether that is enough, however, can be doubted. The examples of exploitative practices that currently characterise digital markets suggest that private regulation by itself is not sufficient for protecting the interests of consumers. Some form of public control, whether through legislation or the courts, will have to safeguard that consumer interests are taken into account.

Another alternative route, namely through the courts, is worth considering in relation to digital markets, as private actors can relatively quickly access this route to address perceived injustices. Individual cases can highlight societal issues for which regulation does not provide adequate solutions, and they can in some cases be a starting point for exploring legislative solutions. As was seen, national courts have for now tried to do justice to users' interests by considering non-economic interests – such as the protection of freedom of expression – in cases where also economic interests were at stake. Would the same be possible at the EU level?

In relation to equality in digital markets, the question arises as to what role the CJEU can play, in particular through the application of the EU Charter of Fundamental Rights. The main relevance of the Charter, at least for now, appears to be the pathway that it opens towards effectuating legal protection for individual citizens. As the *Aziz*-judgment of the CJEU made clear, an appeal to the Court for the protection of fundamental rights can provide citizens with effective judicial protection also in private law relationships. The Court in that case held that a Spanish procedural rule allowing eviction on the grounds of non-payment of mortgage instalments should be set aside in cases where a consumer had instigated proceedings against the mortgage lender to challenge unfair terms in the mortgage agreement.[135] The case showed that the preliminary reference procedure could provide 'an open goalmouth' for effectuating consumer protection not available in a consumer's national legal system.[136]

For private actors, there is an opening here for the pursuit of fundamental rights protection with a view to safeguarding their autonomy and, by corollary, redefining equality. If we focus on digital markets, the right of freedom of expression laid down in Article 11 of the Charter could provide a basis for rebalancing the autonomy of platforms and their users. As was seen, national courts have made reference to that right in cases concerning restrictions to the freedom of expression laid down in Facebook's terms and conditions.[137] The UCTD and the UCPD were in those cases used as frameworks for assessing the fairness of terms, with the justification that fundamental rights could be taken into account if also economic interests were at stake. The Charter would not be limited to such instances but could also be invoked in cases where limitations to the freedom of expression did not affect economic interests but only other interests, eg, political speech. In such instances, the Charter would be applied through indirect horizontal effect.[138]

The application of the ECHR or, in some cases, national fundamental rights protection in recent case law could serve as an example. National courts in Germany and the Netherlands have dealt with 'put-back requests', ie, requests by platform users to have their content reinstated after it being removed by Meta/Facebook, LinkedIn or YouTube for violating their standard terms.[139] In the Netherlands, claims were based on the direct or indirect application of Article 10 ECHR, which contains the right to freedom of expression. German constitutional law itself enables the direct horizontal application of fundamental rights. The German *Bundesgerichtshof* in two cases dealt with the suspension of Facebook accounts for violation of the platform's terms and conditions on hate speech. In an interest-based balance of conflicting basic rights, the court held that Facebook

[135]Case C-415/11 *Aziz*.

[136]H-W Micklitz, 'The Expulsion of the Concept of Protection from the Consumer Law and the Return of Social Elements in the Civil Law: A Bittersweet Polemic' 35 (2021) Journal of Consumer Policy 283, 289.

[137]Above, *Consumer exploitation in digital markets* under Section 3.A.

[138]The freedom of expression is also recognised as a general principle of EU law; see Peers et al (n 59) para 11.34.

[139]Quintais (n 67) 899–901. Similar cases exist in Poland; see <https://en.panoptykon.org/win-against-facebook-giant-not-allowed-censor-content-will> accessed 3 October 2024.

was obliged to inform the user in advance of the intended blocking of his account, inform him of the reason, and give him the opportunity to reply.[140] The horizontal application of fundamental rights therefore can set limitations to the platform's contractual autonomy.

Nevertheless, even if one can look towards the Charter as a catalyst for redefining equality in European contract, at least two caveats are in order. First, until now the horizontal effect of the Charter has been minimal, partly due to the limited circumstances in which private actors can derive rights from it. The indirect application of fundamental rights could, as suggested, provide openings for expanding the protection of consumers in digital markets beyond economic interests. However, whether such application is possible depends on national law.[141] Court can therefore, unlike the EU legislator, not ensure that equal protection applies for consumers throughout the EU. Second, the comparison between the application of the Charter and the ECHR by national courts can be illustrative at a general level. However, seeing the very different frameworks through which the Charter and the Convention interact with national laws, further conclusions will require more in-depth research.

In summary, therefore, EU law provides some routes for addressing the new forms of inequality arising in digital consumer markets. Even if both the legislative route and the route of adjudication contain obstacles, it is worth pursuing these routes to see whether reform – or perhaps a revolution – can address the needs of consumers in digital markets. As an alternative, one may look towards national legislators for reform. They have already in some instances been at the forefront of legal development and could again take the lead, with the possibility of EU legislation following at a later time.

4. Conclusions

Can European contract law sufficiently address inequalities between consumers and businesses arising in digital markets and, if not, is a radical overhaul of the concept of equality in European contract law required? The question asked at the beginning of this paper seems a relatively small one, until one starts unpacking it. It is by now well-known that consumers are subject to new forms of exploitation in digital markets, eg, through the use of dark patterns or other profiling tools that influence their purchasing decisions. To some extent the rules laid down in instruments such as the UCPD can provide protection to consumers against such practices. However, problems arise in cases where the interest at stake go beyond economic interests and concern also non-economic interests, such as data protection or freedom of expression. What protection does European private law offer then? Another example of the limitations of the current framework is seen in relation to content creation. Here, the problem is not so much one of consumer protection, but a question of which value is being rewarded. Content does often not have exchange value in the market, yet creators enjoy the process of creating and sharing their work – in economic terms: it has use value – and, on an aggregate level, businesses such as TikTok would not exist without the content contributed by their users. Can European contract law address this imbalance?

The analysis put forward in this paper suggests that the existing rules of European contract law cannot sufficiently address these new forms of inequality. Building on a broader analysis of the principles of autonomy and equality in contract law, both at the EU level and at the national level, it becomes clear that simple readjustments or reinterpretations of existing rules are unlikely to provide outcomes fitting to this new reality. The post-consumer society, in which consumer transactions are not so much aimed at purchases as at obtaining services and experiences, requires a different balancing of interests than contract law offers. The issues at stake are often non-economic in nature and relate, eg, to the protection of fundamental rights of freedom of

[140] Ibid., 900.

[141] See also above, *EU law as a catalyst – opportunities and limitations* under Section 2.C.

expression or data protection. In other cases, as with content creation, the issues at stake relate to economic value, but not of the kind currently regarded as significant in the market for exchange.

What avenues are available for addressing these gaps in the existing framework of European contract law? One may look towards the EU legislator for proposing solutions, also in light of changing perspectives on prosperity and welfare, giving openings to a redefinition of economic value. In addition, private actors can turn to the courts for relief, seeking openings in the horizontal application of fundamental rights. The EU Charter is of limited application in horizontal relationships but it is worthwhile exploring what it could bring in terms of expanding consumer protection in digital markets. Both routes will only provide solutions if they are actively pursued by the stakeholders involved. That requires for the legislator that the objectives and values of EU law, as enshrined in the Treaties, will have to be revisited. What is needed to establish a social market economy? What vision of prosperity should provide context for the design of new regulation? For the Court, it means that new questions will arise with regard to the horizontal application of the Charter. Can it be a source for balancing freedom of contract, autonomy and equality? Considering the challenges that lie ahead, at least a reform of the current conception of equality in European contract law is needed – and if the pursuit of justice requires it, we may yet see a revolution.

The issues discussed here, to some extent, can be transposed to other societal issues in which contract law has a role to play. For European contract law, besides the digital challenge, another issue is how to integrate the pursuit of sustainability into the contractual relations between businesses and consumers. In this respect, the reassessment of the political economy underlying European contract law, with a particular view to prosperity and welfare, is of equal importance as it is to digital markets. If economic value is perceived as being focused not just on growth, but on sustainable growth, that changes the markers for European contract law, including consumer law and policy. The analysis of specific gaps, and potential solutions, can be conducted bearing in mind the framework for autonomy and equality set out in this paper. In the context of sustainability, perhaps autonomy should be even more 'framed' than in other areas, seeing that Earth's resources will at some point in time be depleted. If ever one was looking for the boundaries of market regulation, it appears that this is a natural one.

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