Transatlanticism: The Trade in Legal Ideas in the Formation of European Private Law

fernanda g nicola

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1 Assistant Professor, Washington College of Law, American University. SJD Candidate, Harvard Law School and PhD in Comparative Law, University of Trento, Italy. I am greatly indebted for discussing this work in depth with Daniela Caruso, Duncan Kennedy, Michele Graziadei, Christian Joerges and Jerry Frug. I would like to thank Jane Bestor, Isabel Jaramillo, Janet Halley, Ugo Mattei, Anna di Robilant, Brishen Rogers, Teemu Ruskola, Ann Shalleck and the junior faculty workshop at the Washington College of Law for their thoughtful comments on this paper. I am grateful to my research assistant Megan Engebretson. Errors are mine only.
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INTRODUCTION

This article elucidates certain changes over the last decade in the way lawyers, judges and scholars addressed the question of codifying contracts and torts rules in European private law. I aim to demonstrate how the transatlantic trade in legal ideas helped alter the arguments made by lawyers engaged in the debate on European private law. Methodologically, this article departs from a timeworn comparative technique of emphasizing differences and similarities between rules and doctrines in United States and Europe. Rather, it focuses not only on the role played by legal doctrines, but also on the role of scholarly work, legal theories and ideologies in the reception and the production of legal thought on both sides of the Atlantic.

Part I analyses the creation of a European private law when the European Commission began harmonizing contract and tort rules in the mid-1980s. Towards the late 1990s both the Commission and a group of scholars embarked on a codification project proposing a uniform contract code. Meanwhile, since 1990s the European Court of Justice (ECJ) undertook the interpretation of European directives on contract and tort law, thus creating a federal common law for Europe.

Part II addresses the legitimation puzzle. Namely, European lawyers frequently attack the European Court of Justice (ECJ) on the ground that it lacks the institutional competence to adjudicate cases interpreting European private law directives. In

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6 The legitimation puzzle relates to the way in which lawyers attempt to sharply distinguish law from ideology because they believe that the former offers a more just and natural worldview than the latter. See Duncan Kennedy, A Critique of Adjudication (1997) at 236-7.

commenting on ECJ adjudication, jurists have often conflated institutional competence arguments (European level versus Member State level) with substantive values (efficiency versus distribution and free market versus social goals). The conflation of institutional competence and substantive arguments is tightly connected to the catchphrase that there is a “constitutional asymmetry” in the EU. Rather than evaluate the consequences of each case on its own merits, European jurists are constantly adopting constitutional asymmetry arguments to delegitimate ECJ law making and question the democracy of the European architecture.8

The process of harmonizing private law contributed to the larger politics of economic integration, highlighting the constant federal tension between the European and the Member State level of harmonization.9 Jurists, in particular as scholars, judges and lawyers, have significantly contributed to the process of European integration through the creation of a new professional vocabulary.10

Part III offers some explanation on why European scholars, lawyers, judges and technocrats have, in part, set aside the legitimation puzzle, have departed from constitutional asymmetry claims, and have lost enthusiasm for the European civil code. I claim that this change in European legal consciousness is characterized by three different elements. First, there is an increasing fragmentation of national legal orders in Europe,

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8 European scholars see an asymmetry in the fact that Community competences mostly encompass market and economic matters at the expense of social ones. Thus, while European competences affect mostly economic matters, Member States have full jurisdiction over both economic and social matters and the European constitutional structure leads to a market orientation in its supranational institutions, which is opposed to the social/political orientation in Member State governments. See FRITZ W. SCHARPF, GOVERNING IN EUROPE: EFFECTIVE AND DEMOCRATIC? (1999) The pervasiveness of these claims allows jurists addressing European adjudication to systematically conflate certain purported institutional competences arguments (courts/legislatures; Europe/Member States) with certain substantive outcomes (efficiency/distribution; market/social).


10 See PIERRE BOURDIEU, HOMO ACADEMICUS at 73 (1984); THE STATE NOBILITY. ELITE SCHOOLS IN THE FIELD OF POWER (1996) at 264 where he explains “The field of power is a field of forces structurally determined by the state of the relations of power among forms of power, or different forms of capital. It is also, and inseparably, a field of power struggles among the holders of different forms of power, a gaming space in which those agents and institutions possessing enough specific capital (economic or cultural capital in particular) to be able to occupy the dominant positions within their respective fields confront each other using strategies aimed at preserving or transforming these relations of power.”
with the emergence of conflicts at every level of government, in which the ECJ often plays a quasi-constitutional role in interpreting EU law. The Tobacco advertising judgment in 2000 shows how, in exercising the power of horizontal judicial review, the ECJ divided a plurality of public and private actors along political rather than national lines.

Second, in the debate on the European civil code, jurists have received United States law and economics in a context that has been hermeneutically rich but increasingly ideologically divided. The “selective reception” of United States law and economics contributed to the radical change of views by scholars involved in the codification debate. An example is the deployment of the “subsidiarity” argument, which over time was adopted to achieve opposite political outcomes. Initially scholars on the progressive side of the spectrum deployed the principle of subsidiarity to resist the harmonization of private law and protect national private laws. Later, scholars on the conservative side of the spectrum deployed the subsidiarity principle to advocate for regulatory competition and diversity of legal rules rather than the adoption of a European civil code. Recently, some scholars have demonstrated the impenetrability of United States law and economics in Europe a phenomenon that “can be traced to characteristics of European culture, legal system and the European legal academy.” In contrast, my

13 See the subsidiarity principle, art. 5 (ex 3B) of the Treaty of the European Community: “In areas which do not fall within its exclusive Competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community”. This article provides a procedural approach to determining issues of subsidiarity, rather than substantive criteria to apply. See George A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 Colum. L. Rev. 332 (1994).
claim is that the reception of law and economics took place in European private law, but in a selective form.18

The third element in the European legal consciousness change is the prominence of a particular law and society approach to legal thought characteristic of European lawyers.19 By decentering traditional top-down approaches to regulation, these scholars celebrate transnational deliberative processes, soft law and new forms of governance spurred by European integration.20 Jurists adopting this view understand Europeanization as a destabilizing but promising process within a multi-level system of governance.21 By celebrating the progressive potential of supranational deliberative networks, new governance and non-binding tools for regulating the market as well as its social components, these scholars depart from a dichotomized understanding of European integration as law versus politics, market versus social citizenship and Europe versus Member States.22 Despite the fact that scholars of this persuasion have been criticized for generalizing their enthusiasm for democratic deliberative processes and new modes of governance as a means of transnational conflict resolutions, they have had a tremendous influence not only in Brussels but also across the Atlantic.23

18 This part provides some explanations as why a selective reception in European private law has entailed Right jurists’ adoption of mainstream law and economics theories and Left jurists’ rejection of the entire discipline, in its mainstream, liberal and critical strand. For an account of reception of legal theories and ideologies in different hermeneutical contexts see DIEGO LOPEZ MEDINA, LA TEORIA IMPURA DEL DERECHO (2004).


23 See JOANNE SCOTT AND GRAINNE DE BURCA EDS, LAW AND NEW APPROACHES TO GOVERNANCE IN THE EU AND US (2006)
A. European Integration and the Harmonization of Private Law

The creation of a European private law is conceptually problematic for jurists who traditionally understand private law as those provisions enshrined in continental civil codes to regulate contract, tort and property law and later on, included consumer, landlord and tenant and labor law provisions. Therefore, European lawyers tend to consider this more or less coherent body of private law rules as inherently controlled by national governments and interpreted by domestic courts. However, due to the prominent role of the European Community in adopting and interpreting directives modifying private law rules, this belief has radically changed in the last twenty years. Today jurists are obliged to re-conceptualize conventional legal categories in order to address the changing notion of European private law.

In 1992 the Treaty of Maastricht (1992) adopted Articles 95 EC, which gave the Community the power to harmonize national legislation only if this contributes to is the establishment and functioning of the internal market. Similarly to the Unites Stats commerce clause, under this provision the Community enjoys a relatively broad power to issue directives to harmonize specific private law rules. However the late 1950s, it was not clear which instruments the Community could use to create the internal market and implement the four freedoms. By the 1960s, the ECJ began “constitutionalizing” the Treaty: through the adoption of the doctrines of supremacy of EC law and direct effect, the Court exercised strict scrutiny over the implementation of EC law by the Member

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24 See FRANZ WIEACKER, A HISTORY OF PRIVATE LAW IN EUROPE, WITH PARTICULAR REFERENCE TO GERMANY (1995).
25 On the understanding of “private law” as a coherent body see Duncan Kennedy, Thoughts on Coherence, Social Values and National Tradition in Private Law (2006).
26 The term “harmonization” or approximation of the laws was introduced in the original Treaty of Rome (1958) under article 100 (now 94EC) with the goal of eliminating the distortions of competition created by the laws of the Member States. The Single European Act (1987) adopted article 100A (now 95 EC) which required majority voting rather than unanimity to achieve the approximation of national measures for the establishment and functioning of the common market. In contrast, Moreover, under Article 95 EC the Council decides via majority voting through a co-decision procedure, art 251 EC in which Council and EP share equal powers, see http://europa.eu.int/eur-lex/lex/en/treaties/index.htm. See Walter van Gerven, Harmonization of Private Law: Do we need it? 41 CMLR 505-532 (2004).
States. For many commentators, the Court became the engine of market integration, acting as a quasi-federal judiciary. Through vertical judicial review, the ECJ struck down national laws in conflict with EC law because, according to its rule of reason, they created an impediment to free movement of goods across Member States. By the 1990s, it became clear that EC law, encompassing free movement and competition law, as interpreted by the ECJ, was the instrument par excellence of market integration.

Unlike the United States, the EU did not create a system of federal courts, thus what is largely understood as European private law results from the complex interplay between harmonizing directives and national private law regimes. The process of private law harmonization encompasses a large number of legal formants and institutional actors both at the European and at the national level. European private law comprises a variety of legal rules, which derive from legislative, judicial and scholarly formants operating at different levels of government. The legislative formant of European private law comprises both the body of EC legislation, namely directives that since the mid-1980s created a patchwork harmonization of private law rules, as well as national legal rules.

27 With the doctrine of Direct Effect the ECJ has confirmed that the Treaty as well as Regulations and in certain cases European directives directly confer to individual rights to persons who can enforce those rights before their domestic courts, see Van Gend & Loos, Case 26/62 [1963] ECR 1; re: Supremacy see Costa v. E.N.E.L., Case 6/64 [1964] ECR 585.

28 See J.H. WEILER, THE CONSTITUTION OF EUROPE (1999), note 4. The question whether Europe is a federation or something else has been the object of studies on integration through law since the late 1970s. See CAPPETTELLI, MAURO, SECCOMBE, MONICA, & WEILER, JOSEPH (EDS.). (1986). INTEGRATION THROUGH LAW: EUROPE AND THE AMERICAN FEDERAL EXPERIENCE. NEW YORK: de Gruyter. However, during the 1990s, the dominant political science vocabulary addressed the EU as a polity less integrated than a federation but more integrated than a custom union, namely a “multi-level system of governance”, a polity composed of multiple layers of government, in which power is diffused across the different levels rather than hierarchically imposed. See LIESBET HOOGHE AND GARY MARKS, MULTI-LEVEL GOVERNANCE AND EUROPEAN INTEGRATION (2001); F. SCHARPF, P. SCHMITTER AND W. STREECK, GOVERNANCE IN THE EUROPEAN UNION (1996) and G. Marks, Liesbet Hooghe and Kermit Blank, European Integration from the 1980s: State-Centric v. Multilevel Governance 34 JCMS 341 (1996). However, to simplify some aspects of the comparison with the United States this article deploys the term “federal” with all the cautions pointed out by literature on multi-level governance.

29 See Case 8/74 Procureur du Roi v. Dassonville [1974] ECR 873, para 5 enshrines the broad formula deployed by the ECJ ‘All trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions.’


enshrined in continental Civil Codes, “which in some cases are naturally converging.”

Therefore European Private law also encompasses those legal provisions, which transpose European directives that Member States introduced into their pre-existent civil codes.

B. From Harmonization to the European Civil Code

In response to the increasing democratic concerns raised by policy-makers and academics, in 2001 the Commission launched an extensive consultation of the stakeholders who are likely to be affected by European contract law on whether continuing the adoption of consumer protection directives and soft law instruments or whether to adopt a more comprehensive European contract code.

In February 2003, the European Commission published an Action Plan aimed at achieving greater coherence in European contract law. The Action Plan continues the ongoing debate with stakeholders and academics launched in 2001 to foster dialogue on the practical as well as technical problems arising from the divergence of national contract law regimes. By targeting the obstacles, which prevent the ‘smooth functioning’ of the internal market, the Action Plan aspired to improve the quality of Community regulation through legislative transparency and stakeholders’ participation.

In the Action Plan the Commission is careful to take further action in the field of contract law but uncertain on the tools to employ to meet this objective such as whether hard and soft, sectoral or comprehensive measures will achieve an efficient and coherent regulation of contract law. In departing from a European codification, the Action Plan chooses to ameliorate the existent contract acquis, by improving its coherence through both hard measure and soft one, in particular a non-binding Common Frame of Reference.

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37 See supra note 116.
Like a United States Restatement of Contracts, the CFR aims to increase the coherence of European contract law and to achieve the uniform application of directives. But the language of the Commission carefully avoids the term “code” while adopting the softer notion of CFR. This non-binding codification should provide common principles, terminology and rules for contract law to address gaps, conflicts and ambiguities emerging from the application of European contract law.

According to the Commission, the obstacles arising from the non-uniform implementation of directives by Member States leads to inconsistencies and fragmentation of contract regimes, creating different legal rules for the same commercial situation. The Commission maintains that a non-uniform application of contract rules entails high transaction costs burdening both industries and ‘active’ consumers in search of precious information. High transaction costs emerge not only in the phase of formation of cross-border contracts, but also through judicial control over the fairness of contractual terms. In order to achieve greater coherence in the application of European contract law and consequently reduce transaction costs, the Commission’s strictly functionalist approach is to improve the quality of the existing European legislation and case law. In short, the Action Plan reinforces the view that the existence of different contract law regimes creates a barrier to trade in cross-border transactions within the

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38 See Communication from the Commission to the European Parliament and the Council - A More Coherent European Contract Law - An Action Plan, COM (2003) 68 final OJ 2003, C 63/01 at 77 addressing consolidation, codification and the existing instruments as possible means to achieve greater coherence and at FN 56 “The codification means the adoption of a new legal instrument which brings together in a single text, but without changing the substance of a previous instrument and it successive amendments, with the new instrument replacing the old one and repealing it”.

39 See Action Plan, Executive Summary at 1, paragraphs 4.1 and 4.1.1 “[…] the Commission will seek to increase, where necessary and possible, coherence between instruments, which are part of the EC contract law acquis, both in their drafting and in their implementation and application, Proposals will, where appropriate, take into account a common frame of reference, which the Commission intends to elaborate via research and with the help of all interested parties. This common frame of reference should provide for best solutions in terms of common terminology and rules (…).”

40 See Action Plan at §16-24 and § 57. On this point see R. Sacco, L'Interprete et la regle de droit europeenne in RODOLFO SACCO (ED.), LES MULTIPLES LANGUES DU DROIT (2001).

41 Id. at § 25-51.

42 Id. at § 34-36. – for example more information is necessary for different national mandatory rules limiting or excluding contractual liability.
internal market, thus coherence means more efficient outcomes that can be reached through more uniformity in implementation and maximal harmonization.\(^{43}\)

In response to the Action Plan, the European Parliament also recognized the need of further harmonization in order to facilitate cross-border transactions within the internal market.\(^{44}\) Even though the EP offered its political guidance to drive further Europeanization of contract law, it warned the Commission not to overstep the boundaries of Community competences.\(^{45}\) Article 5 EC and the principle of attributed competences of the Community is the major concern of supranational institutions. In response, the Commission increasingly argued that via greater coherence in the *acquis*, through maximal harmonization and less differentiation, European contract law would serve the goal of eliminating obstacles to trade, rather than creating new ones.

C. Conflicting Views on the Federal Common Law in the European Union

One the European Commission adopts the directives the ECJ has in the last ten year exercise its role of uniform interpreter of Community law, thus creating a federal common law for Europe. This part addresses the Products liability saga and the numerous decisions by the ECJ on the non-conformity of national laws with the Products liability directive. The focus in on the different reactions by two groups of scholars to the ECJ judgments interpreting the Product liability directive and the Travel package directive. This section emphasizes how, despite their conflicting political views and normative aspirations on private law, both groups of lawyers deploy similar arguments to criticize the ECJ adjudication. I argue that, in expressing their concerns towards these judgments, both groups utilize similar institutional competence arguments. In fact they both claim for

\(^{43}\) Id at § 57 “An improved *acquis* should enhance the uniform application of Community law as well as facilitate the smooth functioning of cross-border transactions, and thereby the completion of the internal market.”

\(^{44}\) See EP final report on the Communication from the Commission to the European Parliament and the Council – A more coherent European contract law – An action plan COM(2003) 68-A5-0256/2003 9 July 2003). Here the EP argues that new harmonizing directives on contract law should be base on article 95 EC treaty and, in the aftermath of the Tobacco advertising judgement, there should have as a primary goal the achievement and functioning of the internal market.

\(^{45}\) See D. Staudemayer, supra note 36, at 116-117.
different reasons, that rather than having the ECJ deciding over crucial distributive questions through private law adjudication, these decisions should be taken by democratically elected national legislatures.

1.1. Interpreting European tort law: Gonzaléz Sánchez, Commission v. France and Commission v. Greece

A Spanish citizen, Maria Victoria Gonzaléz Sánchez, brought a claim under a Spanish law seeking compensation for the fact that during the course of a blood transfusion she was infected by the Hepatitis C virus. The defendant, Medicina Asturiana, who owned the medical premises where the transfusion took place, challenged the applicability of the national provisions in light of a subsequent national law that transposed the Product Liability directive.46 In analyzing both provisions, the national court concluded that the rights conferred to consumers were more extensive under the Spanish law invoked by the plaintiff than under the law transposing the directive.47 Through a preliminary ruling the Spanish tribunal referred to the ECJ asking whether Article 13 of the Product Liability directive was to be interpreted as meaning that the rights conferred under national legislation to the victims of damages caused by a defective product were to be restricted or limited as a result of the transposition of the directive into domestic law.48

The Spanish government and the Commission supported the defendant’s argument, asserting that the purpose of the Product Liability directive was to harmonize the laws of the Member States. Therefore, Article 13 of the directive did not allow Member States to maintain a liability regime that was more favorable to plaintiffs than the one provided by the directive.49

On the plaintiff’s side, the Greek, French and Austrian governments advocated the opposite reading of the product liability directive provision. They argued that because the

46 See Product Liability directive, supra note.
47 See Gonzaléz, supra note 29 at § 12 and the opinion of the A.G. Geelhoed explaining the difference between the regime under Spanish law and the regime set up by the Product Liability directive, at §16-19.
48 Id. § 13.
49 Id. § 19 and at 33-34 such interpretation would create barriers to trade for the functioning of the internal market.
directive was an incomplete measure, it allowed Member States to exercise their discretion in adopting a liability standard more favorable to the plaintiff. Relying on the EC consumer protection title enshrined in Article 153 EC Treaty the governments claimed that the directive entailed only a minimal harmonization, which did not preempt Member States laws. In light of this provision the Community was committed to guaranteeing a minimum threshold of protection, while allowing Member States to maintain or adopt more stringent protective measures in the harmonized field.\(^\text{50}\)

The ECJ held Article 13 of the directive could not be interpreted as giving the Member States the possibility of maintaining different product liability regimes from the one provided by the directive.\(^\text{51}\) The opinion of Advocate General (A.G.) Geelhoed recalled the history of the directive with its difficult negotiation process due to the high political stakes involved for both industries and consumers. Very differently from Article 95 EC, the legal basis of the directive, adopted by unanimity in the Council, was Article 94 EC that did not explicitly allow Member States to maintain or establish more stringent provisions. Because of the difficulty in reaching an agreement among conflicting interests, the directive was intended to harmonize completely the liability for defective products and to establish a specific liability regime resulting from a complex political equilibrium.\(^\text{52}\)

Moreover, the ECJ held that the consumer protection title contained in Article 153 EC, allowing Member States to maintain higher standards of consumer protection, was not to be relied on to seek a minimal level of harmonization.\(^\text{53}\) The ECJ followed the

\(^{50}\) Id. ¶¶ 21 to 28, The Court relied on three arguments addressing the purpose, the wording and the structure of the directive. First, the ECJ clarified that the purpose of the directive was to “[…] ensure undistorted competition between traders, to facilitate free movement of goods and to avoid differences in levels of consumer protection.” Second, in addressing the text of the directive the Court highlighted that “[…] the Directive contains no provision expressly authorizing the Member States to adopt or maintain more stringent provisions in matter in respect of which it makes provision, in order to secure a higher level of consumer protection.” Third, in clarifying the structure of the directive, the Court held that “[…] the fact that the Directive provides for certain derogations or refers in certain cases to national law does not mean that in regard to the matters which it regulates harmonization is not complete.”

\(^{51}\) Id. ¶ 30 decision

\(^{52}\) Id. ¶ 23 and see the Advocate General (A.G.) opinion ¶ 39. The Advocate General is not a public prosecutor, but he is a member of the ECJ even though he does not participate in its deliberations and he has the same status as a judge. His individual reasoned opinion is presented after the oral proceedings but it does not reflect the view of the Court. However, when the ECJ follows the A.G. opinion this constitutes a precious source of information on the legal reasoning adopted by the ECJ in a particular decision.

\(^{53}\) Id. ¶ 24 and see also opinion ¶ 43, “[…] inserted into the Treaty after the adoption of the Directives (…) Article 153 EC is worded in the form of an instruction addressed to the Community concerning its future
reasoning of the A.G. Geelhoed, who claimed that if the Community wanted to change the liability regime, it could adopt a new directive under a different legal basis and modify the particular balance between consumers and producers struck in 1985 when the directive was adopted.  

Through a deductive legal reasoning, the A.G. further justified a maximal harmonization regime for the Product Liability directive on textual grounds. He referred to the preamble of the directive, which explicitly referred to the unity and the functioning of the internal market. Therefore he claimed that a minimal harmonization regime would not be adequate to reach this goal.

The same opinion by A.G. Geelhoed in Gonzaléz supported the analogous judgment Commission v. France. The Commission challenged the French government for non-conformity in transposing the Product Liability directive. The French government argued that such transposition would have infringed Article 6,1 of the European Convention on Human Rights by denying a fair trial to plaintiffs, who, under the Product Liability directive, were left in a situation of 

\textit{damnum absque injuria}. The ECJ decided that European law preempted those French product liability provisions, which were incompatible with the directive and more favorable to consumers. Thus, the Court condemned France for not implementing the same liability standards imposed by the Product Liability directive.

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\item policy and cannot permit Member States, owing to the direct risk that would pose by the acquis communautaire, autonomy to adopt measures contrary to Community law.”
\item \textit{Id. ¶ 24} this interpretation by the ECJ has huge implications for the future harmonization measures since it establishes a presumption in favor of a maximal harmonisation. Unless future directives will contain a provision explicitly authorising Member States to maintain or adopt legislation that is more stringent to secure a high level of consumer protection, the presumption will be against such possibility.
\item See A.G. Geelhoed Opinion on C-52/00 and C183/00 of 18/09/2001 at ¶ 50 “The objective of the unity and functioning of the common market, which is set out in the first and last recitals, does not accord with the view that the Directive only provides for minimal harmonization. It can be deduced from the wording of the last two recitals that the Community legislature considered that harmonization was incomplete because there were still derogations open to Member States”.
\item See \textit{Commission v. France}, Case C-52/00 [2002].
\item \textit{Id. ¶ 49}, “[…] by including damage less of EUR 500 in Article 1384-2 of the Civil Code; - by providing in the first paragraph of Article 1386-7 thereof that the supplier of a defective product is to be liable in all cases and on the same basis as the producer, and - by providing in the second paragraph of Article 1386-12 thereof that the producer must prove that he has taken appropriate steps to avert the consequences of a defective product in order to be able to rely on the grounds of exemption from liability provided for in Article 7(d) and (e) of the Directive, the French Republic has failed to fulfil its obligations under Articles 9(b), 3(3) and 7 of the aforementioned directive.”
\end{itemize}
In his opinion, A.G. Geelhoed explained that the evolution of western private law at the beginning of the twentieth century developed social legislation in order to protect vulnerable categories such as employees, tenants and consumers. This *ad hoc* legislation, deployed to protect particular situations of disadvantaged groups, was created in derogation of general private law regimes, which continued to apply as the default rule. The decision about which category of harms and which situation the law should protect is the result of a balancing between conflicting considerations, and only the legislator can balance between “l’interet juridique materiel et l’efficacite de l’administration de la justice”. The A.G. explained that the product liability directive was the clear expression of this balancing and no individual Member State could derogate from it alone. Thus, changes would require a future policy enacted by the Community legislature.58

In the aftermath of this judgment, France did not change one of the provisions of its civil code in conflict with the Products liability directive that expressly excluded the liability of the supplier when the producer of the product can be identified. In contrast, the French civil code considered the supplier of a defective product as liable on the same basis as the producer where the producer cannot be identified, even though the supplier has informed the injured person within a reasonable time of the identity of the person who supplied him with the product. In its judgment on March 2006 the ECJ held that France was in breach of Community law not only by non-transposing correctly the directive but also by non-complying with the previous judgment of the ECJ.59 Thus the French republic was commanded to pay a penalty to the community, whereby the ECJ ordered:

the French Republic to pay to the Commission of the European Communities, into the 'European Community own resources' account, a penalty payment of EUR 31 650 for each day of delay in taking the necessary measures to comply fully with the judgment in Case C-52/00 *Commission v France* from delivery of the present judgment until full compliance with the judgment in that case60

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58 See the A.G. Geehoeld opinion at ¶ 68.
59 See Case C-177/04, the ECJ holds that “the French Republic has failed to take the necessary measures to comply fully with the judgment in Case C-52/00 *Commission v France* as regards the transposition of Article 3(3) of Council Directive 85/374/EEC of 25 July 1985 [...]”
Similarly to the French saga, in *Commission v. Greece*, the ECJ found that the Greek consumer protection law did not include a provision limiting the recoverable damages to the 500 Euro threshold mentioned by Article 9 of the Product Liability Directive. The Hellenic Republic attempted to justify its domestic provision by arguing that the directive merely achieved a minimum ‘harmonization regime, which allowed the Member States to maintain domestic provisions more favorable to consumers. Moreover, it argued that the concept of damage is not within the scope of the directive, thus, it should be interpreted under national law requiring full compensation to the injured party.

In following its previous judgments and the Opinion of the A.G., the ECJ held that the Directive “seeks to achieve in the matters regulated by it, complete harmonization of the laws, regulations and administrative provision of the Member States.” As to the incompatibility of the threshold with the principles of Greek private law, the ECJ adopted a deductive reasoning by holding that, “[…] the recourse to provisions of domestic law to restrict the scope of the provisions of Community law would have the effect of undermining the unity and efficacy of that law and cannot consequently be accepted.”

Commentators have largely discussed this well-known trilogy of cases. Especially commentators on the Left were enraged at the ECJ judicial lawmaking for at least three different reasons, which have varied over time. First, Daniela Caruso addressed legislative resistance against European integration emerging from the failed transposition of the Product Liability directive in France. According to the resistance thesis, while European bureaucrats and judges were deploying increasing formalism in defending the doctrinal coherence of European law, national elites were resisting its effects in France.

In the context of transposing the directive, the French government was in the Procrustean situation. France had to adopt very unpopular legislation resisted by national

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62 Id, ¶ 22-23.
63 Id, ¶ 20.
64 Id, ¶ 24.
65 See Daniela Caruso, *The Missing View of the Cathedral: The Private Law Paradigm of European Legal Integration*, 3 European L. J. 3 (1997), where she claims that the implementation of the product liability directive had important distributive consequences that the French parliament was not at ease to deal with.
legal elites because it had to comply with its obligations towards the Community under article 10 EC.\textsuperscript{67} Not surprisingly, France took more than a decade to implement the product liability directive and it was condemned twice by the ECJ. Despite the fact that at the declaratory level in the French civil code embraced a negligence regime, in practice, due to an active judge made law, courts relied on the code provisions on sales contracts to enact a strict liability regime for victims of product-related accidents. For a second time, in 1998, the French government was brought by the Commission before the ECJ to implement the directive because its liability standards were considered more favorable to consumers than the ones set by the directive. Both the national politicians and the legal profession in France had persistently resisted the complete transposition of the Product liability directive.

Second, European consumer advocates claimed that the ECJ rulings tipped the balance in favor of a particular approach to European consumer policy, mostly serving consumer interests through the internal market and increasing consumer choice.\textsuperscript{68} In contrast, they maintained that, despite the ECJ trend toward self-regulation and the increasing maximal harmonization tendency, EC consumer policy should remain a critical tool to be widely developed for the protection of weaker parties rather than enhance consumer choice.\textsuperscript{69} In particular they showed that up to this judgement the Court had never taken such a clear-cut position toward maximal harmonization. In fact,

\textsuperscript{67} Article 10 EC imposes upon Member States an obligation “[to] abstain from any measure which could jeopardize the attainment of the objectives of this Treaty”. The ECJ has interpreted Art. 10 to apply to unimplemented Directives and has imposed a duty on MS to “refrain from taking any measures liable seriously to compromise the result prescribed”, see Case C-129/96 Inter-Environnement Wallonie [1997] ECR I-7411, ¶¶ 45-47; Case C-14/02 ATRAL SA v. Belgium, [2003] ECR I-4431.

\textsuperscript{68} See Jules Stuyck, European Consumer Law after the Treaty of Amsterdam: Consumer Policy in or beyond the Internal Market? 37 CMLR 367-400 (2000) at 399 “The acceptance of the proper functioning of the (internal) market and the effective competition policy as the very foundations of consumer policy does not mean that the consumer is reduced to the status of a benefit-maximizing creature. Consumer wants, no matter how frivolous, […], can be expressed in the market.”

\textsuperscript{69} See G. Howells, T. Wilhelmsson, EC consumer law: Has it come of age? 28 E.L.Rev. 370 (2003) at 376 “Thus, the scope for using the Treaty to allow Member States to improve on European solutions is therefore very narrow. If maximal harmonization is the favored approach of the Commission there will be no minimal harmonization clauses in the directive(s) and the Court is unlikely to be able to construe the directive as a minimal one. […] Maximal harmonization fits into a pattern of approaches to Community regulation that favor trade liberalization.”
previous ECJ judgments interpreting harmonizing directives in this area suggested a less strict rule and a more flexible standard *vis à vis* the preemption of Member State laws.\

Third, the group of Social Justice advocates argued in addressing these cases that the ECJ should refrain from deciding over questions that should be taken by democratically legitimized institutions.\(^7\) Even though not explicitly, these lawyers have deployed institutional competence arguments to express their skepticism on two different fronts. First, they are skeptical that legal elites sitting in Luxembourg will preserve social justice values embedded in national traditions at the expense of internal market goals. Second, in following a Jacobinian tradition, legal elites are not to be trusted to achieve social justice, because contrary to legislatures, courts are not the sites where social struggles have been traditionally dealt with.\(^8\)

1.2 The Activist European Court of Justice: *Simone Leitner*

In *Simone Leitner v. TUI Deutschland GmbH & Co KG* the Court was asked to interpret the notion of damage for non-performance of a contractual obligation.\(^9\) Simone Leitner, a ten years old girl whose parents booked an all-inclusive holiday of two weeks in a club in Turkey through the travel agent TUI, showed symptoms of salmonella poisoning attributable to the food offered in the club. The girl’s illness lasted long beyond the end of the holiday and two weeks after her return to Austria. Simone Leitner brought an action for damages against TUI before the Austrian court of first instance, which awarded her only the physical pain and suffering caused by the food poisoning and dismissed the compensation for non-material damage caused by loss of enjoyment of the holiday.

On appeal the Austrian *Landesgericht Linz* referred the question of the interpretation of Article 5 of the Package Travel directive to the ECJ. The question


\(^{73}\) See Case C-168/00, Judgment on 12/2/2002.
concerned the notion of damage for which the organizer and/or the retailer must be held liable as a result of the non-performance or the improper performance of the package tour contract. The Austrian court asked the ECJ whether the directive required Member States to provide for compensation of non-material damages, which were excluded under Austrian law.

On the defendant’s side the Austrian, the French and the Finnish government asserted that the directive aimed to provide a minimal harmonization; what was not expressly covered by the text of the directive remained a matter of Member States’ competences. On the plaintiff’s side, the Belgian government and the Commission pointed out that since the purpose of the directive was to approximate the laws of Member States, the notion of damage referred to in the text was to be ‘construed broadly’ to include the notion of non-material damages caused by loss of enjoyment of a holiday. The ECJ holding recognized the existence of a right to compensation for damage other than personal injury including non-material damage.

Prominent commentators of this case have criticized the holding of the ECJ. In particular, jurists advocating for regulatory competition and greater efficiency of the common market, commented on the activism of the Leitner court and the consequences precipitated by the case. They argued that the judgement created a ‘floodgate’ concern

74 Directive 90/314/EEC- Package travel, package holidays and package tours (Hereinafter Package Travel directive) Article 5 provides that:

1. Member States shall take the necessary steps to ensure that the organizer and/or retailer party to the contract is liable to the consumer for the proper performance of the obligations arising from the contract, irrespective of whether such obligations are to be performed by that organizer and/or retailer or by other suppliers of services without prejudice to the right of the organizer and/or retailer to pursue those other suppliers of services.

2. With regard to the damage resulting for the consumer from the failure to perform or the improper performance of the contract, Member States shall take the necessary steps to ensure that the organizer and/or retailer is/are liable unless such failure to perform or improper performance is attributable neither to any fault of theirs nor to that of another supplier of services (…).

In the matter of damages arising from the non-performance or improper performance of the services involved in the package, the Member States may allow compensation to be limited in accordance with the international conventions governing such services.

In the matter of damage other than personal injury resulting from the non-performance or improper performance of the services involved in the package, the Member States may allow compensation to be limited under the contract. Such limitation shall not be unreasonable.

3. Without prejudice to the fourth subparagraph of §2, there may be no exclusion by means of a contractual clause from the provisions of §1-2.

75 See Leitner, supra note 33 at §24 the Court affirmed that Article 5 “[…] is to be interpreted as conferring, in principle, on consumers a right to compensation for non-material damage resulting from the non-performance or improper performance of the services constituting a package holiday”.
within the Austrian legal system about the potential for judges to award high non-material damages for the non-performance of the package-holiday. They argued that that Leitner would function as a precedent to create incentives for litigation entailing higher compensation for consumers and turning litigation into an insurance mechanism. Scholars have pointed out how, in extending the compensation for non-material damages, this decision “[…] stands as a fundamental value judgement with far-reaching economic implications which the Community apparently was not (yet) ready to take when the Directive was discussed by its institutions. This issue was still left to the Member States.”76

These jurists have a neoliberal of Hayekian understanding of how the market should function in the European Union and what is the role that courts and legislatures ought to play in the single market. In particular, these Neoliberal jurists have pointed out that the problem with the EU legal system is that courts instead of national parliaments taking important social welfare choices embedded in the Austrian private law system. Finally, these jurists highlighted that the Leitner holding is likely to alter an important equilibrium within national private law regimes by undertaking the “[…] Promethean job of creating a European private law, which should be the task of other institutions.”77

1.3 Legitimation Puzzle in European legal consciousness

In commenting on Gonzaléz, Commission v. France and Leitner, social justice and neoliberal jurists have criticized these controversial rulings interpreting the Product liability and the Package Travel directive. Even though these jurists have opposite political views towards the goals of European integration, they both condemned the ECJ adjudication for making decisions that, in their eyes should be left to the legislature rather than courts. Social justice advocates openly address questions concerning distributive justice and the shrinking of the welfare state in the EU. In contrast, neoliberal advocates were openly committed to efficiency goals and limited social intervention to promote economic life and fairness. However, paradoxically, they both espoused similar

76 See Wulf-Henning Roth, Case C-168/00 Simone Leitner v. TUI Deutschland GmbH & Co.KG, CMLR 40:4, 937-952 (2003).
77 Id. at 950.
institutional competence arguments to evaluate the ECJ jurisprudence and delegitimate the role of courts in favor of legislatures.

In part II my aim is to contextualize both the social justice and the neoliberal views in order to offer an explanation of the evolution of European private law in light of wide constitutional, political and comparative law changes affecting legal scholarship. Through an understanding of the institutional and the substantive evolution of European integration –from merely market to social policy objectives— this work traces the appearance of legitimation concerns first appearing in Left circles around the 1980s and then in the mid-1990s, prominently marking the debates on the Right.

By analyzing the constitutional changes in the European Union, my aim is to show how scholars have strategically adopted over time, depending from the political circumstance and the debates they participated in, the claim that there is a “constitutional asymmetry” in the EU. When this claim is translated into the Europeanization of private law discourse, it enabled jurists to collapse institutional competence arguments (courts versus legislature and European level versus Member State level), with substantive arguments (efficiency versus distribution and free market versus social goals). Thus, initially from the Left and later on from the Right, scholars on both sides of the political spectrum have made constitutional asymmetry claims to criticize the ECJ judgments and delegitimate the structure of the European architecture.
2. THE POLITICS OF UNIFORMITY: THE RISE OF THE EUROPEAN CIVIL CODE

A. Integration through Law: Building the Internal Market

Economists predicted that market integration would entail initially the elimination of trade barriers via market liberalization but it would require later extensive re-regulation.\(^78\) In the mid-1980s, the *Delors* Commission launched its agenda for the completion of the internal market.\(^79\) Deepening market integration entailed for the Commission a wide policy action at the Community level via abundant re-regulation and harmonization also of contract and tort law.\(^80\) In particular, the Community harmonized national consumer laws that, due to diverse regulations, impeded goods from circulating freely across the internal market.\(^81\) The Commission regulated sectoral areas of private law via directives, which obtained the necessary political support by Member States notwithstanding their thin legal basis.\(^82\) Initially, the Commission addressed the mere diversity of consumer regulations to assert the existence of an obstacle to cross-border trade, which prompted the use of directives as a re-regulatory device. Later, the Commission became more cautious in adopting directives for cases in which the link between the harmonized measure and the establishment of the internal market was tenuous.\(^83\)


\(^{79}\) See JAQUES DELORS, OUR EUROPE (1996), and OLIVO BINI, L’EUROPA DIFFICILE (2001).


\(^{81}\) See STEPHEN WEATHERILL, CONSUMER LAW AND POLICY (1997).

\(^{82}\) Id. at 346; Stephen Weatherill, *Reflections on the EC’s Competence to Develop a ‘European Contract Law’* 13 ERPL, 3-405-418 (2005) at412 “In some cases, however the political reality was that Member States were committed to the development of an EC consumer policy and, in the absence of any more appropriate legal basis in the Treaty, chose to ‘borrow’ the competence to harmonize laws to put it in place.”

In the 1990s, scholars pointed at the increasing “competence creep” behind the Commission’s initiatives to harmonize private law.\(^{84}\) They pointed to the principle of attributed competences enshrined in Article 5 EC, which limits the power of the Community to the competences attributed by the Treaty.\(^{85}\) Because there is no explicit competence to harmonize private law rules in the Treaty, consumer contract directives were based on an expansive functional reading of Article 95 EC, as a means to achieve the establishment and functioning of the internal market.

However, a decade after the adoption of the Treaty of Maastricht, the Tobacco advertising judgement (2000) manifested the importance of the competence creep problem. In striking down for the first time a European directive, the ECJ has set new limits to positive integration through Community re-regulation. In this case the ECJ relied on the constitutional principle of attributed competences enshrined to limit the expansive reading of Article 95 EC by the Community decision-maker.\(^{86}\)

Even though the negative and positive integration were institutionally associated respectively to the ECJ and the Commission, this part shows that both phases are present simultaneously rather than alternatively in the process of integration because of the same centralizing or decentralizing agenda of the ECJ and the Commission.

2.1 Negative Integration through European Adjudication

Scholars depicted negative integration as coinciding with the initial phase of the internal market (1960-70s), in which the Community aimed to remove “tariffs or quantitative restrictions, and other barriers to trade or obstacles to free and undistorted competition.”\(^{87}\) Negative integration was built into the Treaty of Rome (1957) through the explicit commitment to reduce tariff and non-tariff barriers and to enhance competition within the internal market.


\(^{85}\) See Article 5 ¶1 EC “The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein.”


\(^{87}\) See FRITZ SCHARPF, *supra note 6* at 45.
Negative integration coincides with the prohibition of quantitative restrictions to trade under Article 28 EC, comparable to a European dormant commerce clause.\(^{88}\) The ECJ widely defined the concept of national measures having an equivalent effect to quantitative restrictions, thus exercised vertical judicial review each time that national laws created an impediment to interstate commerce.\(^{89}\) In this scenario, the ECJ played a crucial role in constitutionalizing the four freedoms (free movement of goods, services, capital and persons). By means of direct effect and supremacy of EC law, the Court interpreted the four freedoms to prevail over national legislation.\(^{90}\) Through vertical judicial review, which had “low visibility” compared to the political opposition of Community decision-making, the ECJ struck down national laws, which created barriers to trade.\(^{91}\)

Conflicts arose within the internal market when an increasing number of national measures were caught by the limitations of the European dormant commerce clause, or when businesses entering a new market denounced the facility of a Member State to impose technical requirements limiting the free movement of goods. In response, the ECJ adopted two competing strategies. First, interpreting restrictively the list of derogations falling under Article 30 EC,\(^{92}\) the Court clarified that Member States could not deploy the exemptions to serve their economic objectives.\(^{93}\) Second, in its landmark decision *Cassis*...
The ECJ deployed the reasonableness test of *Cassis de Dijon* to strike down national laws that were not proportionate to their goals. By balancing the (national) mandatory interests permitted under article 30 EC against the (European) guarantees of free movement, the ECJ upheld national laws that were proportionate to their goals. The *Cassis* test allowed the ECJ to increase the realm of application of the European dormant commerce clause, but it also increased the ambiguity of the ECJ jurisprudence. On the one hand the test enabled the ECJ to strike down national laws that were not proportionate to the interests they were protecting; on the other, the *Cassis* test allowed the ECJ to expand the list of derogations to Article 28 EC.

In implementing the *Cassis* test, the Commission adopted the concept of “mutual recognition” prescribing that when a product was lawfully marketed in one Member State it could circulate freely in the others. By focusing on only one side of the test, namely that national measures restricting cross-border trade should be void unless these were proportionate to their aims, the Commission interpreted *Cassis de Dijon* in a pro-freedom of movement way. Mutual recognition alleviated the harmonization burden of the Commission that could now secure the Europeanization of national regulations creating obstacles to trade. According to some scholars, the implementation of the *Cassis* test by the Commission aimed to limit Member States’ regulatory powers rather than its

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94 See *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein*, Case 120/78 [1979] ECR 649, O.J. C 256/2 (hereinafter *Cassis*) *Cassis* is the landmark decision concerning the free movement of goods. In interpreting article 28 EC Treaty that regulates the free movement of goods, the ECJ asserted its competence to assess the intrinsic reasonableness of all national health, safety, or environmental product regulations that could have a negative impact on cross-border trade.

95 See Cases

96 Id. ¶ 9 the ECJ laid down the test and the list of the mandatory interests Member States could deploy to justify their national legislation: “obstacles to movement within the community resulting from disparities between the national laws relating to the marketing of the products in question must be accepted in so far as those provisions may be recognized as being necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer.”

97 See *ECJ Danish bottle case environmental exception and France Cinémathèque cases*.

98 See Communication from the Commission Concerning the Consequences of the Judgement Given by the Court of Justice on 20 February 1979 in case 120/78, O.J. C 256/2 (Mar. 10, 1980).

opposite. In short, they maintained that mutual recognition triggered a race to the bottom within the internal market by endorsing free movement at the expense of Member States welfare legislation, thus promoting European consumer choice over national social standards.\(^{100}\)

2.2 Positive Integration through European re-regulation

Negative integration left a need for a supplementary positive contribution by the Community to harmonize Member States’ laws.\(^{101}\) In the mid-1980s the Community harmonized door to door sales and product liability rules.\(^{102}\) By the end of the 1980s, numerous consumer contracts directives created a body of EC consumer policy, which was expressly included under the competence of the Community in Maastricht (1992).\(^{103}\)

Even though these directives regulated consumer contracts, their goal was the establishment and functioning of the internal market, based on Article 95 EC, rather than the creation of a body of EC consumer policy under Article 153 EC.\(^{104}\) Jurists both

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100 See F.W. SCHARPF, supra note 6. In the 1980s the ECJ deploys the rhetoric of the active European consumer who shops and enters into contracts across Member States. This became a powerful imagine in order to eliminate national regulations “over-protective” towards European consumers which limited the free circulation of goods.

101 See Giandomenico Majone, The Rise of Statutory Regulation in Europe, 47-0 at 58 in G. MAJONE, REGULATING EUROPE (1996). Similarly to environmental protection, consumer regulation included hundreds of pieces of legislation, but as Majone puts it “ […] while the first directives were for the most part concerned with product regulation, and hence could be justified by the need to prevent the national standards would create non-tariff barriers to the free movement of goods, later directives increasingly stressed process regulation (…) and thus aimed explicitly at environmental rather than free-trade objectives.”


103 See Article 153 EC Treaty and STEPHEN WEATHERILL, supra note 9, describing how EC consumer policy constructed its identity in the shadow of fundamental constitutional omissions from the original treaty. See G. Howells, Soft law and Consumer law in P. CRAIG AND C. HARLOW. EDS., LAW MAKING IN THE EUROPEAN UNION (1998).

104 From 1985 to 1999 the Commission agenda triggered off seven directives on European contract law. See the GREEN PAPER ON CONSUMER PROTECTION (2001). The most recent European legislation in contract law is the Directive on Consumer Sales and Associated Guarantees (1999/44), described by the EC in the Green Paper as a “recent attempt by the Commission to harmonize the disparate existing laws of the Member States concerning implied warranties in consumer sales” at 7.
criticized and acclaimed these directives, which in certain contexts lowered and in others raised national standards of protections.\textsuperscript{105}

Positive integration led jurists to start questioning the relation between European constitutionalism and the harmonization of private law. Despite the fact that Community had no explicit competence to harmonize private law by the end of the 1990s there was a consistent European contract law functional to market integration.\textsuperscript{106} Moreover, in 2001 the Commission envisaged among other things, the possibility of adopting a uniform European contract code, which became central to scholarly debates.\textsuperscript{107}

First of all, jurists questioned the competences of the Community to regulate private law in order to avoid \textit{ultra vires} acts annulled by the ECJ.\textsuperscript{108} To demonstrate the competence of the Community to harmonize a particular private law rule, the Commission often selects Article 95 EC as a legal basis because it is a wide provision for the establishment and functioning of the internal market. However, disgruntled minorities are increasingly challenging Community acts adopted through majority voting through horizontal judicial review, which questions the legitimacy of their legal basis. In the Tobacco Advertising judgement, the ECJ for the first time annulled a directive for lack of legal basis by elaborating a test to assess the correct adoption of Article 95 EC as a legal basis.\textsuperscript{109} The ECJ made clear that the Community had not a general power to regulate the


\textsuperscript{106} The \textit{acquis communautaire} is the result of the body of directives and their common interpretation by the ECJ. See R. Schulze, \textit{The Acquis Communautaire and the Development of European Contract Law} at 15 in R. SCHULZE, M. EBERS AND H.C. GRIGOLEIT, \textit{INFORMATION REQUIREMENTS AND FORMATION OF CONTRACT IN THE ACQUIS COMMUNAUTAIRE}, explaining the development of a European contract \textit{acquis}.


\textsuperscript{108} See Tobacco Advertising judgement, supra note (…)

\textsuperscript{109} See Article 230 EC specifying four ground of review for community acts: “The Court of Justice shall review the legality of acts adopted jointly by the European Parliament and the Council, of acts of the Council, of the Commission and of the ECB, other than recommendations and opinions, and of acts of the European Parliament intended to produce legal effects vis-à-vis third parties. It shall for this purpose have jurisdiction in actions brought by a Member State, the European Parliament, the Council or the
internal market rather it should show a significant distortion of competition deriving from
the existence of different acts affecting the free movement of goods. Therefore, the
Commission has become more cautious in its harmonization proposals, which need to be
based on relevant hard data demonstrating the malfunctioning of the market or the
obstacles to competition arising from disparities in national contract laws. As scholars
pointed out, the competence creep turned into a heightened burden of proof for the
Commission’s regulatory initiatives on European private law.

Second, jurists questioned the pre-emption of national laws by European
directives and the shift of the ECJ and the Commission toward a maximal approach to
harmonization. While the Commission can determine the type of harmonization adopted
by a directive, which is then amended or adopted as a result of the political compromise
between the Council and the EP, however the level of harmonization often results
unclear from its text and the ECJ is called upon to interpret the directive. Lately, the ECJ
jurisprudence and the Commission’s initiatives on European contract law have favored a
maximal approach to harmonization, which entails no derogation by Member State laws,
thus the directive completely preempts the field. In contrast, a minimal harmonization
approach allows Member States to maintain more stringent rules than the ones set by the
directive. The Commission justification for maximal harmonization is the deepening of
market integration that will on the one hand increase the coherence of existent acquis
communautaire, while on the other, it will benefit both businesses and consumers by

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110 See Tobacco advertising judgement; supra note, ¶¶ 106-7 and A.G. Fennely’s Opinion ¶¶ 82-98.
111 See Communication on European Contract Law, COM (2001) 398. For a comment see S. Weatherill,
The Commission’s Options for Developing EC Consumer Protection and Contract Law: Assessing the
112 See Steven Weatherill, Reflection on the EC’s Competence to Develop a ‘European Contract Law’.
ERPL 13 n. 3 405-418 and A. Von Bogdandy & J. Bast, The EU’s vertical order of competences: The
113 See W. Van Gerven, Harmonization of European Private Law, CMLR at 508-512, explaining how the
Commission combined the different harmonization methods in the various fields.
114 See González, supra note (….) and The way forward, supra note Error! Bookmark not defined. at 3.
115 See The Queen v. Secretary of State for Health ex parte Gallaher Ltd., Case C-11/92 [1993] E.C.R. I-
3545.
116 The acquis communautaire in a particular legal field encompasses all EC law sources stemming from the
Treaty, Community Acts (regulations, directives or communications) and case law from the ECJ and the
Court of First Instance (CFI). See Reiner Schulze, European Private Law and Existing EC law, ERPL 1-
ensuring legal certainty in contractual transactions.\textsuperscript{117} In addressing this regulatory shift, scholars are highly divided between those advocating in favor of maximal harmonization because this it will lead to a more integrated and efficient common market, and others advocating against maximum harmonization because it is likely to lower, rather than increase, national standards of protection.\textsuperscript{118}

In describing European integration, scholars associated negative integration to the constitutionalization of free movement via ECJ adjudication, whereas they associated positive integration to European re-regulation via the legislative initiatives of the Commission. But in fact, both supranational institutions have been jointly involved in both positive and negative integration phases. In order to legitimize Community action in the eyes of the Member State, the cooperation between the ECJ and the Commission was necessary to assure the implementation of EC law and to strengthen Community trends towards centralization or decentralization.

As shown earlier, a striking example of this supranational cooperation that centralized and strengthened Community action \textit{vis a vis} the Member States took place in the mid-1970s with the creation of the \textit{Cassis} test by the ECJ, which was subsequently adopted by the Commission. According to the \textit{Cassis} test, any national regulation hindering cross-border trade could stay in place only if justified by a mandatory interest and further prove to be proportionate to its regulatory aim.\textsuperscript{119} In the aftermath of \textit{Cassis} judgment, the Commission adopted the principle of mutual recognition, which entailed the automatic harmonization of legal standards. In adopting the \textit{Cassis} test, the Commission was pursuing, together with the ECJ, the Community centralizing agenda.

\textsuperscript{117} See Gonzalez and the Action Plan on European Contract Law, supra 107.
\textsuperscript{119} Following \textit{Cassis}, the Commission interpreted the ECJ holding as advancing the principle of mutual recognition entailing the automatic harmonization of legal standards, see \textsc{Guide To Implementation Of Directives Based On A New Approach And A Global Approach}, \texttt{http://europa.eu.int/comm/enterprise/} “The Cassis the Dijon case provides the key elements for mutual recognition (…) Products legally manufactured or marketed in one country should in principle move freely throughout the Community where such product meet equivalent levels of protection to those imposed by the Member State of exportation and where they are marketed in the territory of the exported country. In absence of Community measures, Member States are free to legislate in their own territory. Barriers to trade, which result from differences between national legislations, may only be accepted, if national measures: 1. are necessary to satisfy mandatory requirements (such as health, safety, environmental and consumer protection 2. serve a legitimate purpose justifying the breach of the principle of free movement of goods, and 3 can be justified with regard to the legitimate purpose and are proportionate with the aims.”
Another example of this joint cooperation emerged in the mid-1980s, with the distinction elaborated by the ECJ in *Keck* that influenced the Commission regulatory initiatives with its decentralization trend aiming to restrain Community action *vis a vis* the Member States. In *Keck*, the ECJ created the distinction between “product requirements”, falling under the scrutiny of the Article 28 EC and “selling arrangements”, which did not fall under the ECJ scrutiny because of their different regulatory nature. In characterizing selling arrangements as a neutral regulatory device, the ECJ allowed Member States to regulate the modalities of sales because, according to the Court, these did not directly affect inter-state sales. Thus selling arrangements were left to the discretion of local regulatory interventions. Similarly, the Commission adopted *Keck* decentralizing strategy in its proposals to harmonize product requirements but let the Member States regulatory control over their selling agreements.

These examples show how both centralization and decentralization strategies are part of the Community agenda pursued jointly by the ECJ and the Commission, despite their diverse political powers and institutional capacities. Moreover, it shows that as predicted by scholars, the question of creeping competence when adopting harmonizing provisions under the broad provision of Article 95 EC needs to be substantiated by evidence showing the real obstacles to competition created by the diverse national legislative provisions.

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121 For instance, the *Tobacco Advertising* judgement, *supra*, note 47 at I-8495-96, ¶¶ 177-9. and its follow up reflects this process, see F.Nicola and F.Marchetti, *supra* note 70.
B. Constitutional Asymmetry in European Legal Consciousness

Scholars have divided the process of integration into two competing phases. A first phase, negative integration, entails market-making strategies through EC competition law and the constitutionalization of the four freedoms (goods, services, capital and workers). A second phase, positive integration, entails Community re-regulation through market-correcting strategies. For some scholars the process of negative integration advanced by supranational institutions consisted mostly in market deregulation through the elimination of trade barriers. Under the pressure of negative integration, Member States managed to preserve their national welfare states, but their capacity to maintain public interest regulations through national environmental, public health and consumer safety laws was severely limited by the pressure of negative integration.

Initially, positive integration, or market-correcting measures, consisted in re-regulation at the Community level, mostly via directives, aiming at the narrow understanding of establishment and the functioning of the internal market. Later, in 1992 the Treaty of Maastricht expanded EC competences to regulate consumer and environmental protection while maintaining high standards of protection to guarantee the safety and public interest of European citizens. Because of these constitutional changes, the Community had broader competences that went beyond the mere internal market scope. In noticing this change, scholars who were concerned with national welfare regimes, maintained that a constitutional asymmetry pervaded the EU institutional arrangement. Thus, the legitimacy of the Community was at stake, the interrelation between economic globalization and European integration though judicial activism led to the “weakening of political legitimacy in Western Europe”.

According to Fritz Scharpf, while negative integration leads to the establishment of the internal market, positive integration or market-correcting strategies were

122 The shift in the burden of proof began with the ECJ case Dassonville, in the early 1970s supra note.
124 See Article 95 (ex 100A) of the EU Treaty introducing majority voting for harmonization measures and Artt.152-4 EU Treaty expanding the competences of the EU for consumer protection and public health.
“systematically disadvantaged in the process of European integration.” Likewise, jurists addressing European law, and in particular the process of harmonization of private law, argued that positive integration could not always fill the regulatory gap left by negative integration in the EU.

2.3 A Genealogy of Constitutional Asymmetry

This part provides a genealogy of the scholarly claim that the EU is pervaded by a constitutional asymmetry when compared to the constitutional arrangements of the Member States. The adoption of a genealogical inquiry does not stress questions of origins or a search for the foundations of constitutional asymmetry claims made by jurists. Rather it focuses on accidental events, historical facts and influential scholarship, which shaped the widespread discourse on the Europeanization of private law.

During the 1980s, scholars were familiar with the notion of a “democratic deficit” intrinsic to the Community decision-making processes. According to Joseph Weiler, the democratic deficit could be traced back to the Treaty of Rome (1957), which gave power to the executive branch (the Commission) at the expense of the legislative branch (the EP). In Weiler’s view, supranational structural deficiencies were aggravated by two elements. First, the dual character of supranationalism revealed how legal instead of political processes fuelled European integration. Second, the lack of democratic

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126 Id, at 58, where Scharpf explains the difference between negative and positive integration in the EU, which “depends upon the agreement of national governments in the Council of Ministers and, increasingly, on the agreement of the European Parliament as well (in which the ‘diffuse’ interests of consumers and environmental protection have gained a strong foothold).”

127 See Daniela Caruso, Limits of The Classic Method: Positive Action In The European Union after the New Equality Directives, 2-44 HARV INT’L L.J. (2003) at 378 claiming that “For many years, this test allowed the ECJ to strike down many forms of state regulation as incompatible with the Treaty of Rome. Such holdings resulted, to varying degrees, in the disempowerment of local governments. The ensuing normative vacuum would at times, but not always, be filled by Community regulation.”


129 See J.H. Weiler, supra note 4, at 77, where he explains that the notion of a “democratic deficit” reinforced the fear that the Community would increasingly decide on issues that are perceived to be symbolically of national competence, thus triggering off reactions from French or Germans citizens that the Brussels bureaucrats tell us “how to run our lives”. In Weiler’s view at the core of the democratic deficit there were European policies ramifying beyond the economic sphere and decision-making processes with low accountability.
legitimacy was reflected in the activism of a quasi-federal judiciary and the limited powers of the EP. Thus, in the aftermath of the Maastricht Treaty (1992), the transformation of Europe lead to a paradoxical situation. While political scientists speculated that intergovernmental decision-making slowed down European integration, lawyers, observing the federal judiciary, perceived European integration as “powerfully moving ahead”. The widespread concern among scholars, observing a quasi-federal judiciary driving European integration, leaving behind politics and democratically elected bodies was that of an increasing asymmetry between law and politics pervading the EU.

In the mid-1990s, Fritz Scharpf elaborated further on the idea of an asymmetry between European law and politics by analyzing the patterns of the economic integration. He argued that negative integration had prevailed at the expense of positive integration in Europe. As a result, negative integration constrained national regulatory capacities through the legal prohibitions contained in the Treaty and the downward pressure of regulatory competition. According to Scharpf there is a “fundamental asymmetry between policies promoting market efficiencies and those promoting social protection and equality” which are not competing on a similar constitutional level. European integration created a relation between economic and social policies which “[…] has become asymmetric as economic policies have been progressively Europeanized, while social protection policies remained at the national level.”

By referring to these scholarly interpretations of European integration, jurists perceived the process of harmonization as having a deregulatory bias, enabling European bureaucrats and especially judges to foster market deregulation at the expense of national social provisions. When translated to the realm of private law, the constitutional asymmetry claim enabled jurists argue around recurrent legal dichotomies which

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132 See F. W. SCHARPF supra note 6 at 59-60. Through the “constitutionalization” of competition law, the European Court of Justice (ECJ) launched a successful “legal attack on the privileged status of the public service (…) on the grounds that the authorizing legislation was in violation of competition law” and in Scharpf’s view, the liberalization of EC policies has “eliminated the possibility of using public-sector industries as an employment buffer,” therefore “European legal constrains have greatly reduced the capacity of national governments to influence growth and employment in the economies for whose performance they are politically accountable.” The European Social Model: Coping with the Challenges of Diversity, 5 JCMS (2003) at 112.
133 Id. at 129.
structure their legal arguments as European versus Member State level, law versus politics and market versus social. Thus, jurists made constitutional asymmetry claims about the EU in two different ways. On the one hand, the asymmetry claim stood for the predominance of European free movement over national social provisions; on the other, the imbalance between a powerful ECJ and a weak Community legislature.

When these claims were translated into the private law debate, some jurists envisioned contract law as a set of market-oriented informational measures, aiming to extend party autonomy. They welcomed the harmonization of contract law characterized by negative integration.134 In contrast, other jurists conceiving contract law as a solidaristic and redistributive tool, limiting individual freedom, argued in favor of a national resistance to Europeanization, thus attacking harmonization to promote national private law traditions.135

2.4 Democratic Legitimacy in Constitutional Adjudication

In addressing ECJ adjudication, European jurists put forward democratic legitimacy concerns by adopting the recurrent legal dichotomies, which characterize the constitutional asymmetry claim (market/social, Europe/Member States and law/politics). Jurists have pointed out at the dangers of European judicial lawmaking, which tends to structurally prevail over national legislation, over Community acts and even over national judiciaries. They have put forward two different democratic legitimacy arguments in relation to vertical and horizontal power of judicial review by the ECJ and a third one concerning the power of the ECJ to interpret directives harmonizing private law rules.

First, jurists claimed that the constitutionalization of the European dormant commerce clause enabled the ECJ through vertical judicial review to strike down national legislation aiming to protect consumer, environmental and public health.136 Jurists claim

136 See M. Poiares Maduro, supra note 5, highlighting that the ECJ could interpret art 28 EC Treaty to create refined criteria to prevent State protectionism or to rely on the general notion of a European economic constitution, which was “built on the free market, open competition, and a particular view of the kinds of regulation that are acceptable” at 60.
that the ECJ will generally annul domestic regulations democratically approved by national parliaments by means of counter-majoritarian rulings. Moreover, they claim that in balancing free movement against national social goals, in European jurisprudence the first one structurally prevails over the second.\footnote{See Cassis, supra note 94 and Centros Ltd. v. Erhvervs- og Selskabsstyrelsen, Case C-212/97 [1999]. In this case Danish authorities denied the freedom of establishment (art. 43 TEU) to Centros, a private limited company registered in the UK trying to circumvent national rules concerning the paying-up of minimal capital. The ECJ ruled that this Danish provision is contrary to the free movement. Similarly to the mutual recognition principle Centros establishes that, since the company was legally incorporated in accordance with the law of another Member State (UK), it has the right to register its branch in Denmark.} For instance, in Gambelli the ECJ was called to interpret the Treaty provisions on freedom of establishment and the free movement of services.\footnote{See Piergiorgio Gambelli and 137 others, Case C-243/01 [2003] proving the consistency of the ECJ jurisprudence on the four freedoms.} Mr. Gambelli, who gathered bets from Italian gamblers on sports events, transmitted these data electronically to a UK betting company. His activity constituted a fraud against Italian law, which requires that each gambling activity on sporting events obtain a state granted license. The ECJ ruled that Italian administrative and criminal rules were not proportionate to the mandatory interest they ought to protect. Thus they created a barrier to provide cross-border services that was incompatible with the principle of free movement of services enshrined in the Treaty. In short, the ECJ ruling annulled two national provisions democratically approved by a national parliament, and it did so by favoring free movement at the expense of the legal protections set up by Italian legal rules.

A second democratic legitimacy claim addresses the power of horizontal judicial review of the ECJ as deployed in the Tobacco advertising judgement to annul a directive.\footnote{See the Tobacco advertising judgement; supra note (...). In annulling the directive on the ground that it was a ban on tobacco advertising regulating public health instead of the internal market, the Court held that the ban fell under the competence of Member States and not of the Community legislature.} After the judgement, the democratic legitimacy concern with EC law prevailing over European politics increased exponentially. Jurists have highlighted how horizontal judicial review enables disgruntled legislative minorities (i.e. national governments) may bring their claims before the ECJ against Community institutions to strike down directives adopted through the co-decision procedure.\footnote{See Stephen Weatherill, The European Commission’s Green Paper on European Contract Law: Context, Content and Constitutionality, JOURNAL OF CONSUMER POLICY, 24:339-399 (2001).} Because of the administrative legal nature of the Treaty, ECJ has wide power to exercise horizontal
judicial review over Community legislation. However, in the aftermath of the Tobacco advertising judgement scholars claimed increasing similarities in the ECJ adjudication and the Rehnquist court in striking down federal legislation adopted by Congress under the Commerce Clause in the well-known U.S. Supreme Court cases Lopez and Morrison.

A third democratic legitimacy concern addresses the excessive use of preliminary ruling procedures by domestic courts referring questions of EC law interpretation directly to the ECJ. Some jurists maintain that this process will undermine the role of national courts, while the ECJ will obtain more power to judicially create contractual rules. Thus, scholars have suggested that ordinary courts should be more cautious in referring questions to the ECJ though preliminary rulings and in some Member States, in particular in Scandinavian countries; this has been the attitude at large of domestic courts.

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141 See G.Bermann and P.Lindseth addressing EU law in relation to French administrative law.
142 See Geraint G. Howells, Federalism in the USA and EC: The Scope for Harmonized Legislative Activity Compared, ERPL 5: 601-622, at 620 comparing the Tobacco advertising decision to the U.S. Supreme Court decisions on the limits of the Commerce Clause, Lopez and Morrison. “Within this area of exclusive Community competence it is to be hoped that the Court does not become too interventionist both because it is not well equipped to determine what is needed to create the internal market and because as protection is a legitimate objective, the level of that protection is best determined by the political procedures laid down in the Treaty.”
143 See Article 234 (ex 177) EC Treaty.
144 This phenomenon became relevant in Sweden when the Commission asked the government to press courts to refer preliminary questions to the ECJ, see http://www.broch.se/html/sve/news/2004/news6.htm;
Table 1. **Institutional Competence and Democratic Legitimacy in the EU**

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<thead>
<tr>
<th>EU =Free Market</th>
<th>vs.</th>
<th>Member State=Social</th>
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<tr>
<td>(J.H.Weiler) <strong>European Law</strong></td>
<td>vs.</td>
<td><strong>European Politics</strong></td>
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<tr>
<td>(F.Scharpf) <strong>Negative Integration STRONG</strong></td>
<td>vs.</td>
<td><strong>Positive Integration WEAK</strong></td>
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<th>European Rule of Law</th>
<th>vs.</th>
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<td>ECJ vs. National Legislation (<em>Cassis, Gambelli</em>)</td>
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<td>ECJ vs. National Courts (<em>Océano, Leitner</em>)</td>
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<tr>
<td>ECJ vs. EU Legislation (<em>Tobacco Advertising</em>)</td>
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C. Mainstream and Resistance in European Legal Scholarship

2.5 Three Phases in European Private Law Scholarship

From the mid-1980s until today, three different scholarly phases have characterized the debate on the harmonization of private law. Each period reflects a change in the methodologies as well as in the normative aspirations of lawyers who have shaped the field of European private law. A first phase was characterized by market functionalism in the harmonization of private law rules (1985-1992). The second phase was characterized by three different constitutional understandings of European integration (1992-2000): the European Economic constitution, the Constitutional Asymmetry in the EU. Finally, a deep ideological divide between Neoliberal and Social Justice advocates characterized the third phase of European contract law (2001-present) together with a new trend in European scholarship that I will calls Deliberative supranationalism or New Governance advocates.

During the first phase, the consolidation of the internal market led the Community to harmonize private law through sectoral directives in the areas of consumer law. By deepening market integration, the Commission harmonized contract and tort law as a functional tool for the completion of the single market. Likewise, jurists addressed contract law as a technical tool, which was functional to the Commission agenda of realizing an efficient internal market.

In this phase, scholarly projects shared a similar technical approach to the harmonization of private law. However, methodologically they oscillated between advocating for the unification of contract law rules, which was merely functional to the
achievement of the internal market, or they adopted a more sophisticated comparative law methodology to unearth the “common core” of European private law.  

In 1992, the Treaty of Maastricht created the European Union and expanded Community competences beyond merely economic activities. This constitutional transformation inaugurated the second phase of the European private law debate. Paradoxically, in expanding the functional capability of the Community, the Commission and the ECJ showed greater uncertainty about the Community re-regulation resulting in the decentralization approach a la Keck. Towards the end of the 1990s, scholars increasingly accused the Community of exceeding its capacity through a “functional creep”. They often highlighted that the Commission lacked of the competence to regulate private law.

In this phase, scholars involved in the Europeanization debate expressed two major views. On the one hand some jurists claimed that the European Economic constitution should bear the project of harmonization of private law because this could enhance private autonomy and procedural guaranteed to marker freedoms. On the other hand, jurists who claimed that the EU was pervaded by a constitutional asymmetry, resorted national lawyers, judges and politicians to resist the harmonization of private law, which reflected the free market bias of the Commission’s bureaucrats. Both views reinforced the widespread claim that while the European level was connected to free market, the national level was connected to social goals.

This second phase arrived at an end with the Tobacco advertising judgment in which for the first time the ECJ invalidated a directive on the ground that it lacked a legal basis. This decision produced a shift in consciousness among jurists by showing that

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152 In curtailing the action of the Community legislature, the ECJ interpreted art. 95 of the EU Treaty, which allows harmonization of laws only for market functioning measures. In presenting an insufficient connection between the market-building process and the total ban of advertising of tobacco products, the court considered the directive a disguised public health measure, which the Community cannot regulate.
the Commission aimed to adopt a ban on tobacco advertising that was challenged by a Member State. For the first time, it became clear that a social policy, environmental, consumer protection agenda of the Community was now challenged by the Member States policing the boundaries of the Internal market.

The third phase of European private law began in July 2001, when the Commission published the White paper on European Governance, and the Green Paper on European Contract Law. In both cases the Commission sought to involve a larger public, such as academics and stakeholders, in the process of re-regulation and harmonization of contract law. These documents expressed the anxieties on the democratic accountability of European institutions and highlighted the need for more effective and transparent regulatory strategies. The Green paper signaled that the Commission intended to move ahead with the harmonization of contract law by triggering off wider public debates and academic involvement. Jurists were now expressly invited by the Commission to participate, in the debate about the desirability of further harmonization of private law.

The shift of consciousness produced by these European transformations triggered some skepticism among lawyers committed to the Economic constitution. Moreover, during this phase jurists began deploying prominently United States economic analyses. Thus, Regulatory Competition advocates began arguing in terms, which were radically different from their predecessors. According to them, diversity of legal rules, rather than uniformity, was more efficient to achieve a competitive internal market. In contrast, jurists who had before opposed the harmonization of contract law began addressing Social Justice in European contract law, thus insisting that the Commission would adopt a distributive justice perspective in the process of harmonization of private law.

since it falls under the exclusive competence of Member States (art. 152 EC). See Stephen Weatherill, The Commission’s Options for Developing EC Consumer Protection and Contract Law: Assessing the Constitutional Basis, EBLR (2002) 5: 497-515 where he explains that in annulling the tobacco advertising directive, the ECJ reaffirmed that "there is not carte blanche to harmonize national laws, but rather only a power to achieve defined ends," at 504.

153 See the White Paper on European Governance (COM 2001; 428) Brussels.
154 See the European Commission Communication to the Council and the European Parliament, the so-called “Green Paper” on European Contract Law (COM 2001; 398) Brussels.
155 The shift of consciousness of European private lawyers and the reception of United States law and economics is analysed in Part IV.
Table 2. **Three Phases in the Europeanization of Contract Law**

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<th>Phase</th>
<th>Approaches</th>
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<td>PECL, Unidroit Principles and Common Core &amp; Casebook Project</td>
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<td>Comparative Law Approaches</td>
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<td>Doorstep Selling Directive 85/577</td>
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<td>Directive on Consumer Credit 87/102 (amended 98/7)</td>
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<td>Directive on Package Travel, Holidays and Tours 90/314</td>
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<td>More Europeanization vs. Constitutional Asymmetry</td>
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<td>Resistance to Europeanization</td>
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<td>Directive on Unfair Terms 93/13</td>
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<td>Timeshare Directive 94/47</td>
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<td>Directive on the Protection of Consumers in Respect of Distance Contracts 97/7</td>
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<th>Third Phase (2001-present)</th>
<th>Ideological Divide Deliberative Supranationalism and New Governance</th>
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<td>Efficiency Regulatory Competition</td>
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<td>Distribution Social Justice</td>
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2.6 Market Functionalism and Uniformity in Contract Law

In 1999 Professors Ole Lando and Hugh Beale published the Principles of European Contract Law (PECL). The so-called Lando Commission sought to contribute vigorously through PECL to the unification of European contract law launched by the Commission.156 The Lando principles represented an important model for a uniform body of contract law and provided a basis for a future codification. In advocating for a uniform body of contract law, the functionalist approach of the Lando Commission was to strengthen the single market by overcoming the obstacles to trade created by different legal regimes.157 The PECL approach put emphasis on private autonomy in contractual obligations by giving a central position to the principle of freedom of contract and elaborating its exceptions through general clauses or mandatory provisions.158

European comparative lawyers, differing from the uniform law approach of PECL, sought to contribute to European scholarship and legal education by drawing a map of the similarities and differences emerging in private law regimes.159 Compared to the PECL, the Common Core Project160 and the Casebook Project161 are methodologically more eclectic in their attempt to be purely descriptive and therefore to present greater scientific neutrality. The scope of the Common Core was to create a cartography of European private law in order to highlight differences and commonalities emerging among different private law regimes. The Casebook Project deploys the comparative methodology to shape European legal education. Through a rigorous examination of national and ECJ case law, the Casebook project aims to introduce civil lawyers to the analytics of a case-law approach and foster a bottom up approach to

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156 The Lando Principles were inspired by the UNIDROIT Principles for international contract law adopted in 1994.
158 See PECL Art. 1:102. For a comment see MARTIN W. HESSELINK, THE NEW EUROPEAN PRIVATE LAW: ESSAYS ON THE FUTURE OF PRIVATE LAW IN EUROPE (2002) AT 112-3. Even though the regime of freedom of contract is subject to the requirements of good faith and fair dealing and other mandatory requirements
159 For this distinction see Elena Ioriatti, supra note 34.
161 See Professor Walter van Gerven’s project which began in 1994 in Amsterdam. The ex-advocate general of the ECJ became the general editor of several casebooks in the area of Tort, Contract and Company law, see VAN GERVEN, LEVER, LAROUCHE, TORT LAW (2000).
Europeanization.162 Both projects undertake an anti-formalist exercise in inquiring into the application of legal doctrines. In assessing the role of the national courts in shaping contract law rules, they maintain a cautious and at times skeptical approach towards the Europeanization of contract law. While distancing themselves from the functionalist approach of the PECL, these European lawyers affirm their methodological maturity and eclecticism, and emphasize their political neutrality, which is in tune with their claim to scientific reliability.163

2.7 Constitutional Asymmetry in European Private Law

In the second phase of the Europeanization process, some jurists claimed that European contract law was a “constitutive element” of the internal market, one that enhanced its functioning mechanisms by designating the rules of the game. The harmonization of contract law contributed to strengthening the single market by ensuring a level playing field that enhanced individual freedoms. In supporting the PECL agenda these jurists emphasized that the harmonization of contract law could provide greater information to private actors and enhance their private autonomy.164 In supporting the idea of a European economic constitution, they argued in favor of a European codification, which guaranteed to each person the disposition of her individual entitlements. Jürgen Basedow maintained that the notion of freedom of contract remained the core idea for a European codification since every individual has the right to affirm his will to enter into a binding contract. In his view, European codification strengthened economic freedoms and counterbalanced the growing importance of consumer regulation that undermined those common values enshrined in the notion of contractual freedom.165 For these lawyers the scope of market harmonization was to remedy the market failure

162 See Walter van Gerven, supra note 107.
165 See Jürgen Basedow, Codification of Private Law in the European Union: The making of a Hybrid, 1 European Rev. of Private Law 35-49 (2001). Along this line see “The freedom to bind oneself contractually to a future disposition is an important and striking example of this freedom”. The role of contract law “is based upon the theoretical perception that a promise and the reliance on it is a basic behavior in human society” at 37.
created by the cleavage between commercial and non-commercial contractual regimes, which restricted market competition and created informational asymmetry. These lawyers have tied claims for European codification to a notion of contract law as a tool for enhancing party autonomy across Member States.

These pro-harmonization lawyers have devoted great attention and support to legislative measures made by the Commission. However, they highlighted that Community action should be cautious not to undermine its democratic legitimacy, which is guaranteed by European procedures and mostly by national democratic processes. For instance, the Community cannot take away individual rights from European citizens that the Treaty has conferred upon them. In casting light on the procedural guarantees of EC law, they advocated for a European codification in tune with the functioning of the single market and for legislative discretion by supranational institutions.

Jurists who favored the harmonization of contract law often shared a common intellectual tradition, which can be traced back to the Freiburg ordo-liberal school, which also goes under the rubric of German neo-liberalism, founded in the 1930s. In drawing on the ordo-liberal intellectual tradition they traced back the meaning of notions such as contractual freedom to the post WWII economic compromise of the German social-market economy. The ordo-liberal tradition offered to the integration project an influential model of legitimation through the notion of the “economic constitution”. In relying on the central tenets of the ordo-liberal tradition, jurists perceive the European economic constitution enshrined in the Treaty as a means to ensure greater individual autonomy within the internal market. In arguing in favor of a European codification, they are attempting to provide a framework of general contract rules that will ensure equal possibilities to all players in a free market.

168 See Stefan Grundmann, supra note 70 and GRUNDMANN AND STUYCK, AN ACADEMIC GREEN PAPER ON EUROPEAN CONTRACT LAW (2003).
170 See Ernst-Joachim Mestmäcker On the Legitimacy of European Law, RABELS ZEIT. 58, 615-635 (1994).
After World War II, as a reaction to totalitarian regimes and economic collectivism, ordo-liberalism became one of the most influential schools of thought among political economists and lawyers, whose views ranged from neo-liberals to socially conservatives. The aim of ordo-liberal scholars was to break with a tradition in the social science that was highly influenced by historicism and Marxist relativism. Ordo-liberals wanted to re-center economic and legal disciplines on the role of individual action and to reconcile both creativity and reason within their work. In their 1936 Manifesto, Frantz Böhm, Wilhelm Eucken and Grossman-Doerth highlighted that in order to protect individual freedom, a polity should have an “economic constitution” modeled after a “general and political decision as to how the economic life of the nation is to be structured”. The economic constitution provided a minimal regulatory framework to avoid monopolies, to ensure the private ownership of the means of production and to protect individual freedom. In their view, both efficiency and distributive considerations were relevant for market correcting purposes and competition rules, which prevented the creation of monopolies and the abuse of a dominant position.

Within the ordo-liberal tradition there were two different lines of thought, which reflect significant differences in their economic and legal approaches. If the early ordo-liberal founders developed a procedural approach to the economic constitution, a second generation was largely associated with the social market economy. The founders of the Freiburg school, Walter Eucken and Franz Böhm (whose disciple Ernst-Joachim Mestmäcker actively participates in the debate on European private law) were concerned with a procedural and rule-oriented approach to law. Their goal was to establish a framework of general rules implemented by a centralized and interdependent administrative system that would reform the market in an indirect way. In contrast, the second generation of ordo-liberal scholars with Alfred Mueller-Armack and Wilhelm Röpke were associated with the notion of a “social market economy”. Their interventionist economic project focused on outcome-oriented solutions, including a

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174 See V. J. VANBERG, supra note 73 at 37.
comprehensive welfare program, which Kerry Rittich defined as somehow “nostalgic, if not utopian, in its orientation.”\(^{175}\)

In this second phase of European private law scholarship, lawyers were divided between those favoring and those opposing the harmonization process. The latter ones addressed the European constitutional arrangement by claiming that not only the Community decision-maker was severely constrained to regulate social policy by its attributed competences but that the ECJ jurisprudence was pervaded by a “market holistic” bias.\(^{176}\)

These jurists relied on the claim that while Member States regulatory capacity was constrained by the “legal prohibitions of negative integration,”\(^{177}\) the future harmonization of private law was severely constrained by the single market rationale. In response to the argument that there was a constitutional asymmetry in the EU, they advocated for a social and redistributive notion of contract law, which was embedded in national private law regimes, now under threat by Europeanization of contract law.\(^{178}\) Despite the increasing harmonization of private law, these jurists opposed the Europeanization process. They advocated for a “national resistance”\(^ {179}\) against future harmonization by praising the values intrinsic to their local private law traditions.\(^ {180}\)

Jurists, who advocated for a welfarist approach to private law and distributive justice in contract law, argued that contract law should abandon a procedural conception of justice and move towards a substantive one.\(^ {181}\) If the notion of procedural justice entailed the protection of individual rights and market efficiency, they favored a substantive notion of justice in order to achieve an “acceptable pattern of welfare” with fair distributive results.\(^ {182}\)

\(^{175}\) See Kerry Rittich, Recharacterizing Restructuring (2002) at 112.


\(^{177}\) See F.W. Scharpf supra note 6 claiming “[…] even where national regulations are legally permissible, a second, economic, constraint is defined by the downward pressure of regulatory competition.” at 117.


\(^{179}\) See Daniela Caruso, supra note .

\(^{180}\) See Pierre Legrand, supra note 12, at 61-76.


According to these lawyers the Community *leit-motif* in drafting consumer protection directive rested on a market efficiency rationale, which aimed to expand consumer choice. They pointed out that the directive described buyers shopping for their best contractual terms across Member States and assumed that consumers would be better off through greater competition among contractual terms. They remarked that the Commission assumed consumers to be actively involved in gathering and using information to make their decisions.\(^\text{183}\) The directive enlisted contract law as a market-perfecting device, through which properly informed consumers could police unfair terms.\(^\text{184}\)

When explaining the stakes of harmonization jurists put forward three different theses that share a skeptical view on the European constitutional arrangement: national resistance, subsidiarity and cultural difference. The resistance thesis focuses on the reactions of national legal regimes to the implementation of European directives.\(^\text{185}\) According to this view, the problem of the harmonization of contract law related to the implementation of directives in Member States legal orders, often represented by national civil codes. The different outcomes of the Italian, German and French legal regimes in implementing the Unfair Terms Directive revealed not only the difficulty in harmonizing contract rules but also how little national contract laws were harmonized in practice.\(^\text{186}\) Daniela Caruso claimed that the attempt of the Commission to reform private law through directives has actually engaged state legislators and national courts in resistance against the Europeanization process.\(^\text{187}\)

The subsidiarity thesis, based on the principle introduced by the Maastricht Treaty,\(^\text{188}\) focuses on the social dimension of contract law as being inherently national

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\(^\text{184}\) See Hugh Collins *supra* note 103, at 237. As Collins puts it, there is the consumerist movement which “has percolated into the organs of the EC.”
\(^\text{186}\) See Id. at 104. Daniela Caruso shows how the Unfair Contract Terms directive struggled in its reception by national legal orders. In particular the Product Liability Directive of 1985 was a big disappointment since Member States took enormous delays in its implementation.
\(^\text{187}\) See Id. at 104.
\(^\text{188}\) See the subsidiarity principle, art. 5 (ex 3B) TEC: “In areas which do not fall within its exclusive Competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and
and therefore culturally diverse. Some jurists claimed that contract law couldn’t rely on abstract general principles that Europeanization brings with it. They argued that the Commission should make greater use of the subsidiarity principle allowing Member States to regulate their contract law regimes differently. The subsidiarity thesis has advanced the view that national contract law is shot-through with distributive concerns, which are now threatened from above by European market integration. According to this thesis, Europeanization is a formalist process that is suppressing diversity as an obstacle to free trade while it undermines the distributive capacity of national contract law.

Some jurists have advanced a third thesis based on the notion of cultural difference. In highly valuing the cultural diversity among national legal regimes, they demonstrated skepticism about the possibilities of the harmonization process. Drawing on sociological, cultural, and linguistic insights, these scholars were skeptical of the unification of private law regimes, which happened more at the level of declamations than at the level of operative rules. In their view, the harmonization of contract law erased European identities and offered a troubling systematization of contract law without attempting to tackle the fragmentation of legal contexts and the dilemmas of the welfare state. Scholars adopting the cultural difference thesis generally argued against Europeanization as a formalist threat to preserving the cultural tradition inherent in local or national contract law regimes.

See Hugh Collins, Transaction Costs And Subsidiarity In European Contract Law, in STEFAN GRUNDMANN AND JULES STUYCK (EDS.) AN ACADEMIC GREEN PAPER ON EUROPEAN CONTRACT LAW (2003) at 280.

See Hugh Collins, Good Faith in European contract law, supra note 103.


Pierre Legrand, European Legal Systems are not converging, 45 INT. AND COMP. LAW QUAR. (1996).

See RODOLFO SACCO (ED.), LES MULTIPLES LANGUES DU DROIT (2001).


3. The Politics of Fragmentation in European Legal Consciousness

A. The Politics of Fragmentation: Conflicts are everywhere

This part analyzes the changing European scenario when in 2000 the ECJ for the first time held that a European directive was void for lack of legal basis. This case as well as the judgments ECJ interpreting the Unfair Terms directive triggered very different scholarly reactions from the previous ones. First, it became evident that EU triggered greater fragmentation of national interests before a European court. Second, in Océano, the ECJ adopted social welfare considerations to interpret the Unfair Terms Directive and enhance Spanish standards of consumer protection. Commentators advocating for efficiency in European private law criticized the activism of the ECJ, deploying a teleological interpretation to achieve judicial lawmaking. In Freiburger Kommunalbauten the ECJ showed great deference to a German tribunal because instead of deciding, it remanded the interpretation of an unfair contract term to the local court. Some scholars commented that the reaction of the ECJ was a moment of realist jurisprudence.

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197 See Case C-237/02 Freiburger Kommunalbauten GmbH Baugesellschaft & Co. KG, v. Ludger Hofstetter and Ulrike Hofstetter, not yet reported (hereinafter Freiburger).
3.1 The Tobacco Advertising Saga

The Tobacco Advertising judgment exemplifies how the conflicts arising in the harmonization process have fragmented national interested in the European community. Fearing the expansion of Community competences at the expense of Member States, the German government challenged the legitimacy of the Tobacco Advertising directive, which imposed a total ban on the publicizing of tobacco products. In questioning the legitimacy of the directive before the ECJ, Germany alleged that the center of gravity of the directive was the regulation of public health rather than the marketing of tobacco products. Through judicial review, the ECJ annulled the directive for lack of legal basis on the grounds that it was a disguised health measure rather than an internal market provision. Because the Community had no competence to harmonize public health matters, which fell under the regulatory competence of the Member States, the Court ruled, the directive was void.

In reaching its judgment the ECJ also relied on an opinion by Advocate General Nial Fennelly, who argued that differences among national tobacco advertising regulations did not justify a total ban on tobacco advertising. Instead of improving the functioning of the internal market by eliminating appreciable distortions of competition, he suggested, the directive eradicated advertising of tobacco products on posters, ashtrays and parasols, and at sporting events such as Formula 1 races. The Court held that within a predominantly local market of tobacco advertising, there was no appreciable obstacle to trade and distortion of competition prompting Community re-regulation.

However, the ECJ decision opened the possibility for the Commission to draft a new directive in case of future obstacles to trade in the context of cross-border

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198 Tobacco Advertising Judgment, supra note 14.
200 Tobacco Advertising Judgment, supra note 14. The Tobacco Advertising Directive was enacted pursuant to EC Treaty, supra note 2, Article 95, which authorizes the approximation of national laws with the express objective of establishing a single European market.
201 Tobacco Advertising Judgment; supra note 14, at I-8430 ¶ 83.
202 In the words of Advocate General Fennelly: “The Directive’s sole effect, within its extensive sphere of application, is to prohibit trade in the services in question. There are no compensating gains for undertakings active in the production or provision of such service.” Id. at I-8472, ¶ 113.
203 Id. at I-8495-96, ¶ 177-79
publications or broadcasts and sponsorship events.\textsuperscript{204} A few months after the judgment, the Commission drafted a new Tobacco Advertising directive, which included a ban on tobacco advertising for all printed publications, Internet services, radio broadcasting, and sponsorship events with cross-border effects. The new directive was rapidly approved and published in 2003.\textsuperscript{205} Six months after its approval, the German government issued a new challenge, arguing before the ECJ that this second directive too lacked a proper legal basis.\textsuperscript{206} The story of the first Tobacco Advertising directive is likely to be repeated.\textsuperscript{207}

The Tobacco Advertising directive has fragmented both national interests and private businesses. The behavior of tobacco manufacturers and national governments exemplifies the strategic use of multi-level governance alliances, which can no longer be captured in terms of an opposition between Europe and its Member States or between tobacco manufacturers and consumers. Multi-level governance alliances have developed among public and private actors, local governments and supranational institutions, all of whom have political stakes in the harmonization process. These political stakes vary according to the uneven impact of harmonization in diverse geographical contexts.

The first Tobacco Advertising directive was part of a long-standing Community anti-tobacco agenda sponsored by the Commission since 1989.\textsuperscript{208} The long drafting process of the Tobacco Advertising directive became the target of tobacco lobbies both at the national and at the European level.\textsuperscript{209} In the 1990s the common goal of the monolithic tobacco industry was to prevent the implementation of the directive, first through

\begin{footnotesize}
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\item \textsuperscript{204} Id. at I-8527-28, ¶ 98.
\item \textsuperscript{206} Case C-380/03, Federal Republic of Germany v. Parliament and Council, 2003 O.J. (C 275) 31.
\item \textsuperscript{209} See Mark Neuman, Asaf Bitton and Stanton Glantz, \textit{How the Tobacco Industry Elaborated Different Strategies to Influence the Outcomes of the European Community’s Tobacco Legislation}, 359 LANCET 1323 (2002). As the anti-tobacco lawyers put it: “The tobacco industry sought to delay, and eventually defeat, the EC directive on tobacco advertising and sponsorship by seeking to enlist the aid of figures at the highest levels of European politics while at times attempting to conceal the industry's role.” Id. at 1324.
\end{itemize}
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lobbying and then through litigation.\textsuperscript{210} This goal was successfully accomplished with the Tobacco Advertising judgment in 2000. However, when the second Tobacco Advertising directive was under judicial consideration,\textsuperscript{211} the tobacco industry was highly fragmented and politically divided: well-consolidated tobacco manufacturers with a large impact on the EU market did not oppose the ban, while weaker tobacco manufacturers lobbied against it.\textsuperscript{212} Thus, the most powerful tobacco manufacturer allied with the Commission in favor of the directive, whereas the others allied with the German government to lobby against it.

In a similar way, Member State governments were internally divided on the approval of the second Tobacco Advertising directive. In Italy the Ministry of Finance lobbied against the ban, because of the high stakes in tax revenues from tobacco consumption while the Ministry of Public Health advocated in its favor.\textsuperscript{213} The new coalition politics triggered by harmonization fragmented both private and public interests in accordance with their conflicting political objectives. The quasi-monopolistic tobacco manufacturer, the Italian Ministry of Public Health and the Consumer Directorate of the

\textsuperscript{210} See \textit{The European Ban on Tobacco Advertising} (Hans-Peter Schneider and Stein Torseten eds., 1999). The lobbying strategies deployed by the tobacco industry to impede the adoption of the first tobacco advertising directive began in 1989 and lasted until 1997 when the directive was finally approved.

\textsuperscript{211} European Parliament and Council Directive on the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning the Manufacture, Presentation and Sale of Tobacco Products, 2001/37/EC, 2001 O.J. (L 196) 26, challenged before the ECJ and upheld in Case C-491/01, The Queen v. Secretary of State for Health \textit{ex parte} British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd., 2002 E.C.R. I-11453 [hereafter \textit{Tobacco Labeling Judgment}]. The \textit{Tobacco Labeling Judgment} was referred to the ECJ by an English court for a preliminary ruling. The questions raised by two British Tobacco manufacturers concerned the validity and the interpretation of Directive 2001/37 on the manufacture, presentation and sale of tobacco products. They argued that this was a disguised measure mainly intended to ensure the protection of public health rather than the free movement of tobacco products within the internal market. The challenge raised the question of Community competences – including its power to harmonize national provisions. The ECJ interpreted EC Treaty Article 95 so as to uphold the directive and clarified that the Community did not have the competence to harmonize national rules in the domain of public health as such, but that it could do so if the measure ‘genuinely’ had the object of improving the establishing and functioning of the internal market.

\textsuperscript{212} Comments by Fabio Marchetti (JT International) at a talk delivered at Harvard Law School on 03/01/2003 with Professor Alexander Somek: \textit{Good News for a Bad Habit: Competence Allocation in the EU post the Tobacco cases}, http://www.law.harvard.edu/programs/elrc/events/2003-2004/somek.php (last visited March 10, 2006). Fabio Marchetti explained that due to the ban on misleading descriptors such as “light”, “mild” and “ultra-light” contained in the Labeling directive, JT international was prevented from marketing “Mild 7”, the second most sold brand in the world after Malboro. Therefore, the ban favored those tobacco companies that competed with “Mild 7” and through the directive obtained its exclusion from the European market.

\textsuperscript{213} This type of fragmentation is peculiar to each political tradition of European member state. On this see the insightful distinction between simple and compound polities by Vivien A. Schmidt, \textit{The European Union: Democracy and Legitimacy in a Regional State?} 42 J. COMMON MKT. STUD. 4 (2004).
Commission allied pro-ban, while the German government, the other tobacco manufacturers and the Italian Ministry of Finance, allied against it.

In heightening fragmentation rather than uniformity, the Tobacco Advertising directive had unequal effects on consumers and local communities situated in different geographical contexts. The ban is a progressive measure to the extent it contributes to lower smoking rates and reduced public health expenses, but there are costs that must also be acknowledged, as the following examples illustrate.\textsuperscript{214} Spa, a Belgian city that hosts a Formula 1 event every year, suffered major economic losses when the race was relocated to China after the early implementation of the Tobacco Advertising directive by the Belgian government.\textsuperscript{215} The ban is also likely to contribute to the disappearance of local newspapers in Germany, where, in contrast to other Member States, there is an important local editorial tradition. Finally, the directive may consolidate the dominant position of one tobacco manufacturer at the expense of others by creating a preferential treatment for cigarettes already manufactured and extensively sold in the EU. The continuing difficulty, of course, is to determine which groups of industries, consumers and local communities were favored by the ban at the expense of others, to what extent, and with what effect.

3.2 Interpreting European contract law: \textit{Océano and Freiburger}

On the private law side, the ECJ saga in contract law represents a chance in the ECJ interoperation and its commentators much more careful about the social welfare implications of the European decisions. In \textit{Océano Grupo editorial SA v. Rocio Murciano}

\textsuperscript{214} See Richard T. Ford, \textit{Bourgeois Communities: A Review of Gerald Frug’s City Making}, 56 STAN. L. REV. 231, 232 (2003). In commenting on Jerry Frug’s progressive urbanism Ford says “Frug is acutely aware of the shifts in consciousness and sacrifices the more privilege residents of our cities will need to make in order to make better cities for everyone, but the left will eventually have to swallow hard and acknowledge that the groups we normally consider our constituencies will have to change too. If making better cities means changing the cities we’ve got no, then fostering better citizenship means changing the people we’ve got now: rich and poor, white and black, well-housed bourgeois and homeless vagrant.” \textit{Id.}

\textsuperscript{215} See Breffni O’Rourke, \textit{EU Tobacco Ban puts Union, Formula 1 Racing on Collision Course}, http://www.eubusiness.com/Homepage_Other_News/109756/view?searchterm=EU%20Tobacco%20Ban%20puts%20Union (last visited March 10, 2006) explaining the case of Spa-Francorchamps in Belgium where the Belgian Grand Prix takes place. Because the Belgian government decided to comply with the Tobacco Advertising Directive, it banned the display of tobacco advertisements on the cars and the course. The Federation Internationale d’Automobile (FIA) therefore decided to reallocate the race to China.
Quintero\textsuperscript{216} two Spanish sellers of encyclopedias sued five buyers before the Court of First Instance of Barcelona for unpaid sums due under a contract of adhesion for the sale of encyclopedias on deferred payments terms. In April 1998, the Court of First Instance of Barcelona referred the case to the ECJ for interpretation of the European Unfair Contract Terms Directive. The conflict in this case emerged between the role of the domestic judge in the Spanish civil process and the substantive law contained in the European directive. The summary proceedings for unpaid sums before the Court of First Instance of Barcelona were based on the exclusive jurisdiction clause contained in the contract of adhesion, which resulted in an “unfair contract term” under the classification of contractual terms adopted by the EC directive. The Spanish judge referred the following question to the ECJ:

Is the scope of the consumer protection provided by the Directive on unfair contract terms in consumer contracts such that the national court may determine of its own motion whether a term of a contract is unfair when making its preliminary assessments as to whether a claim should be allowed to proceed before ordinary courts?\textsuperscript{217}

The ECJ explained that it would have been paradoxical to oblige the consumers to accept the jurisdiction of the Court of Barcelona in order to prove that the court had no jurisdiction.\textsuperscript{218} The Court held,

The protection provided for consumers by Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts entails the national court being able to determine of its own motion whether a term of a contract before it is unfair when making its preliminary assessment as to whether a claim should be allowed to proceed before the national courts. The national court is obliged, when it applies national law provisions predating or postdating the said Directive, to interpret those provisions, so far as possible, in the light of the wording and purpose of the Directive. The requirement for an interpretation in conformity with the Directive requires the national court, in particular, to favor the

\textsuperscript{216} See Océano Grupo Editorial C-240/98, European Court of Justice, 27 June 2000.
\textsuperscript{217} Id., ¶ 19.
\textsuperscript{218} Id. at § 23 “The aim of the Directive requires Member States to lay down that unfair terms are not binding on the consumer. However this would not be achieved if the consumer were himself obliged to raise the unfair nature of such terms. In disputes where the amounts involved are often limited, the lawyers' fees may be higher than the amount at stake, which may deter the consumer from contesting the application of an unfair term.”
interpretation that would allow it to decline of its own motion the jurisdiction conferred on it by virtue of an unfair term.\footnote{219}{Id at § 33.}

The ECJ judgment allowed Spanish judges to declare the term void of their own motion, provided that the term was not individually negotiated. In interpreting the unfair terms directive the Court referred to its purpose as a measure of consumer law protecting weak parties.\footnote{220}{Id. at § 25, the ECJ held that “As to the question of whether a court seized of a dispute concerning a contract between a seller or supplier and a consumer may determine of its own motion whether a term of the contract is unfair, it should be noted that the system of protection introduced by the Directive is based on the idea that the consumer is in a weak position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge. This leads to the consumer agreeing to terms drawn up in advance by the seller or supplier without being able to influence the content of the terms.”}

But the \textit{Océano} court did not give further indication of its teleological interpretation\footnote{221}{On the ECJ teleological interpretation and the \textit{effet utile} doctrine see Peter L. Lindseth, \textit{Democratic Legitimacy And The Administrative Character Of Supranationalism: The Example Of The European Community} 99 COLUM. L. REV. 628 (1999) at 701-702 “The internal market is the cornerstone of that "ever closer union," and together they constitute the very purpose - the "telos" - of the EC. The method of Treaty interpretation geared to achieving this telos - the "teleological method" - has thus dominated the reasoning of the European Court of Justice since the early 1960s.” and “The Court's reasoning in \textit{Van Gend & Loos} manifested another element of the ECJ's teleological approach: the so-called doctrine of \textit{l'effet utile} ("useful effect"). According to this doctrine, “once the purpose of a provision is clearly identified, its detailed terms will be interpreted so 'as to ensure that the provision retains its effectiveness.'” Innocuous in the abstract, the doctrine has in fact enabled the ECJ to arrogate to itself an extraordinary degree of normative power, sometimes bending or ignoring literal meanings of Treaty provisions, other times ‘filling in gaps, quite unashamedly, without hesitation’. “} and its doctrine of effective judicial protection or “\textit{effet utile}.”\footnote{222}{See J. Rutgers, \textit{Note on ECJ-Océano Grupo/Codifis}, 1ECLR 87 (2005) at 90 explaining that the doctrine of judicial protection, that “individuals must be able to enforce rights conferred upon them by European law before national courts” was more openly embraced by the A.G. opinion in \textit{Océano} and in a subsequent case C-473/00 \textit{Codifis SA v. Jean-Luis Fredot} [2002] ECR I-10875 (ECJ).}

A teleological interpretation of the directive emerged from the opinion of the A.G. Saggio. Based on the \textit{effet utile} doctrine, Saggio argued that in cases of “significant unbalance between the two parties to the contract” the Directive would require national legal systems to introduce an active system of protection through effective remedies.\footnote{223}{A.G. Saggio Opinion in \textit{Océano}, § 24-26 stating “In short, I believe that to confer on the court the power to declare of its own motion an unfair contractual term to be void falls squarely within the general context of the special protection that the Directive is intended to provide for the interests of the community which, because they are part of economic public policy, extend beyond the specific interests of the parties concerned. In other words, there is a public interest in terms harmful to consumers not producing effects. That interest constitutes the ground, from the substantive point of view, for the sanction of the 'non-binding nature of the term - despite the fact that the consumer may have signed the contract even though it has not been negotiated individually - and, from the procedural point of view, for action by the court which, having assessed the harm done to the consumer, may decide to disapply the term irrespective of the consumer's procedural conduct.”}
Océano provoked inflamed comments by European jurists, who deployed a variety of policy arguments to comment, criticize or praise the ECJ decision. Neoliberal scholars presented a set of policy arguments to criticize the Océano judgment because it overlooked the autonomy of the consumer. Their moral argument suggested that consumers should look out for their own interests since they had the choice to show up or not to show up in court. Through a social welfare argument they claimed that the judgment created drawbacks for competition and market freedom, and thus discouraged consumers’ self-determination and their ability to look out for themselves. With an administrability argument they concluded that Océano imposed on national judges the requirement to decide the unfairness of terms and therefore imposed new standards of equity and flexibility that were both inefficient and difficult to apply.

Finally, Neoliberal scholars interested in efficiency gains for the internal market highlighted the troublesome aspect of an ECJ endowed with tremendous powers, whereas the Community decision maker finds numerous obstacles in re-regulating the single market.

In Freiburger Kommunalbauten the ECJ took a very different approach from Océano in interpreting the unfair terms directive. In Freiburger Kommunalbauten, a municipal construction company acting in the course of its business, had sold to two consumers, Mr. And Mrs. Hofstetter, a parking space located in a car park that the company was going to build. Under a contract clause, the whole price of the parking place was due by the consumers upon delivery by the contractor of a security in form of a bank guarantee. Moreover, in case of late payment, the contract clause established that the purchaser was liable to pay default interests. When the bank guarantee was delivered to the consumers, they refused to make the payment alleging that the contract clause requiring payment of the whole price was contrary to article 9 of the AGBG, the law on

225 See STEFAN GRUNDMANN AND JULES STUYCK, AN ACADEMIC GREEN PAPER ON EUROPEAN CONTRACT LAW (2003).
226 See P. Rott, note 57 at 11. As Rott puts it, in describing the academic criticism to Océano, “Whilst they did not oppose the substance of the decision as such, they argued that the ECJ should not have decided on the unfairness of the jurisdiction clause at all.”
227 See Freiburger Kommunalbauten GmbH Baugesellschaft & Co. KG, supra note 34.
standards business terms, which governs the unfair contract term directive under German law.228

In refusing to pay the price upon delivery of the bank guarantee, Mr. and Mrs. Hofstetter made clear that they would pay the entire amount only after they accepted the parking space free of defects. The municipal company sued the consumers to recover default interests for late payments; the claim was first dismissed by the regional court but then successfully appealed on a point of law before the Bundesgerichtshof. The court of appeal held that the disputed contract clause, which might not be unfair under German law, fell under the scope of article 3(2) of the directive on unfair contract terms,229 and as a preliminary ruling, referred the ECJ the question whether the clause of the contract at stake was to be regarded as unfair within the meaning of article 3(2) on the directive.230

The municipal company and the German government argued that the term was not unfair because the disadvantages for the consumer were counterbalanced by the bank guarantee which offered two advantages to the consumers: a lower price of the good since the company will not borrow money, and the guarantee of refund in case of non-performance or defective performance even if the builder was insolvent.231 In contrast, Mr. and Mrs. Hofsetter claimed that the clause was unfair because it contravened the general principle of ‘equality of arms’: mutual obligations must be performed contemporaneously otherwise, once litigation arises, the consumer in a weaker position will suffer detriment.232 After revising the arguments of each party, the ECJ followed the conclusions of the European Commission:233 “[…] it is for the national court to decide whether a contractual term such as that at issue in the main proceedings satisfies the requirements for it to be regarded unfair under article 3(1) of the Directive.”234

228 See AGBG, article 9.
229 See art. 3 of the unfair terms directive, supra note 32.
“(1) A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties’ right and obligations arising under the contract, to the detriment of the consumer.
(2) A term shall always be regarded as individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term, particularly in the context of a pre-formulated standard contract”.
230 See Freiburger Kommunalbauten, supra note 34, ¶14.
231 Id., ¶ 16.
232 Id., ¶ 17.
233 See Id., ¶ 18.
234 See Id, ¶ 25.
In holding that the interpretation of an unfair term in a contract between a private party and a public agency was to be decided by the national tribunal, the ECJ established that the interpretation of a general criterion of unfairness of a contract term was to be developed according to a determined local context with a particular socio-economic purpose and therefore, the contract term should “be considered in light of the particular circumstances of the case in question.” 235 The hard task of the Court was to depart from its own precedent, since in Océano the ECJ interpreted the directive through “general criteria” which defined the concept of contractual unfairness deployed by the Community legislature. In departing from Océano, the A.G. Geelhoed claimed that the Court “[…] should not rule on the application of these general criteria to a particular term, which must be considered in light of the particular circumstances of the case in question.” 236 After balancing the different considerations presented by the municipal corporation on the one hand, and the consumers on the other, the ECJ held that in light of the nature of the contract, the clause was not so completely one-sided and pro-seller as the clause addressed by the Océano court.

In Freiburger Kommunalbauten the ECJ after “balancing [...] the advantages and the disadvantages of the disputed clause under the national law” 237 remanded the judgment to the local tribunal in Germany. The judicial reasoning of the Court in Freiburger Kommunalbauten departed from Océano’s teleological stance. Instead, it adopted a balancing approach between conflicting considerations entailing advantages or disadvantages for each party involved in the dispute. In light of this balancing approach, the ECJ remanded the decision back to the Bundesgerichtshof that was better apt to balance the conflicting interests of the parties and evaluate the consequences of the contract rule in question. Niglia has commented that this case is an exemplary example in which the court departs from a deductive interpretation or a rule-centered approach. Thus, the ECJ adopts almost a realist lenses by adopting its reasoning to the circumstances of

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235 Id. § 22.
236 Id, § 22.
237 Id., ¶ 15.
the case and interpreting the rules of the Unfair Terms directive in light of their consequences in that particular case.\textsuperscript{238}

B. The Selective Reception of U.S. Law and Economics in Legal Scholarship

Under the new wave of consultation launched in 2001 by the Commission, the discourse on European private law underwent some major transformation. Scholars began taking positions by which they openly de-linked institutional competence arguments (European level and Member State level) from substantive values (free-market and social goals). However, jurists familiar with United States law and economics literature or generally suspicious of judicial lawmaking argued against or in favor of a European contract law by linking institutional competences arguments (courts and legislatures) with substantial values (efficiency and distribution). By deploying a law and economics methodology, some jurists advocated against a forced harmonization of private law while favoring greater diversity in contract law regimes.

3.3 The Reception of Mainstream Law and Economics in European Private Law

In the late 1990s jurists advocating for greater efficiency for the internal market opposed the “forced harmonization of contract law in Europe” while supporting greater diversity among private law regimes.\textsuperscript{239} These neoliberal scholars justified the diversity of national contract laws by means of interpretation of the subsidiarity principle.\textsuperscript{240} Roger Van den Bergh affirmed that Member States should resist the harmonization process because the diversity of contractual regimes improved efficiency within the single market. According to this view, the application of the subsidiarity principle could

\textsuperscript{238} See Leone Niglia, Taking Comparative Law Seriously -Europe’s Private Law and The Poverty of the Orthodoxy, American Journal of Comparative Law.
\textsuperscript{239} See Roger Van den Bergh, Forced Harmonization of Contract Law in Europe. Not to be Continued in S. GRUNDMANN, J. STUYCK, AN ACADEMIC GREEN PAPER ON EUROPEAN CONTRACT LAW (2002) at 249.
\textsuperscript{240} See the subsidiarity principle, Art. 5 EC Treaty, supra note 188.
enhance regulatory competition, reduce transaction costs and satisfy higher preferences, thus maximizing market efficiency.241

In adopting United States mainstream law and economics insights, neoliberal jurists attacked welfare provisions contained in European directives.242 They deployed public choice rationales to undermine the goals of the unfair terms directive, which “may cause inefficiencies rather then curing them”.243 In drawing on law and economics insights, they argued that although the directive aimed to protect consumers against unfairness, in reality it raised potential causes for inefficiencies, thus creating negative welfare implications.244

In particular, neoliberal jurists claimed that by policing the unfairness of contracts, the directive has been “abused” because it created more stringent provisions than the ones contained in the German AGB-Gesetz. They argued that courts have gained disproportionate power through the black list of unfair terms adopted by the directive since they can void those contract terms they consider unfair. As Roberto Pardolesi highlighted, from an economic perspective the paradox is that in declaring the terms void judges cannot consider the price of the contract or of the term since this is expressly left out from the realm of the directive.245

Some comparative lawyers adopted law and economics approaches to shed light on a “common core of efficient principles hidden in the different technicalities of the legal systems”.246 They suggested that competition among legal rules was an efficient and alternative model to hierarchical cooperation and argued “diversity increases efficiency

242 For a definition of United States mainstream law and economics see Duncan Kennedy, supra at 17. In European private law see Roberto Pardolesi Clausole abusive, pardon vessatorie: verso l’attuazione di una direttiva abusata, in CARDOZO ELECTRONIC LAW BULLETIN, 1995 www.gelso.unitn.it/card-adm/Review/Review.html attacking the unfair contract terms directive and its “shocking black list of standard forms whose common thread is to shift risks from sellers to buyers.”
243 See Roger Van den Bergh, supra note 134, at 261.
245 See Roberto Pardolesi, Clausole Abusive (nei contratti con i consumatori) Una direttiva abusata? Il Foro Italiano, fasc.3 (marzo1994) 137-152, at 150
since it creates institutional competition".\textsuperscript{247} Through a decentralized and non-state-centered approach to legal sources, competition among legal rules maximizes wealth and increases efficiency of the market because in the selection and creation of new legal norms, participants choose the legal rule that lowers transaction costs.\textsuperscript{248}

In deploying the legal formant approach to comparative law,\textsuperscript{249} these jurists criticized the unitary understanding of legal norms and they emphasized the benefits of competition among legal sources instead of hierarchical cooperation. They inquired into tensions among legislative, doctrinal and jurisprudential sources produced by the interaction of the Community and its Member States.\textsuperscript{250} In their view, competition ensured that the best legal rule is also determined by the most efficient institutional level at which the decision is taken.\textsuperscript{251}

In receiving United States mainstream law and economics views, European jurists began associating institutional competences arguments (courts versus legislatures) with substantive values (efficiency versus distribution). For instance, in criticizing the institutional changes triggered by the unfair terms directive, they deployed Mitchell Polinsky’s view to argue that the increased discretion of judges deciding on the unfairness of the terms would limit the autonomy of private parties to achieve an efficient solution.\textsuperscript{252} They claimed that since efficiency provides objectivity, this is a “technical everyday problem solving” tool that keeps “political disagreements outside the core” of scholarly fields.\textsuperscript{253} According to these jurists, distribution, which is inherently political and subjective, should remain outside both the sphere of judicial interpretation and of “scholarly analysis of lawyers.”\textsuperscript{254} When contributing to the European private law debate, they argued that the interpretation of directives by courts should be guided by efficiency

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\item \textsuperscript{247} UGO MATTEI, THE EUROPEAN CODIFICATION PROCESS (2003), where the author quotes Rodolfo Sacco for this idea, and he claims at the end of his piece that Comparative Law and Economics should be deployed more critically, at 37.
\item \textsuperscript{248} See Ugo Mattei and Francesco Pulitini, \textit{Modelli Competitivi, Regole Giuridiche ed Analisi economica}, Il Quadrimestre, n.1 (1990) at 102.
\item \textsuperscript{249} See Rodolfo Sacco, \textit{Legal Formants}, supra note 31.
\item \textsuperscript{250} See UGO MATTEI supra note 136 at Chapter 4.
\item \textsuperscript{251} See LUISA ANTONIOLLI DE FLORIAN, LA STUTTURA ISTITUZIONALE DEL NUOVO DIRITTO EUROPEO (1996) at 106.
\item \textsuperscript{252} Id. at 149.
\item \textsuperscript{253} See UGO MATTEI, supra note 136 at 5-7.
\item \textsuperscript{254} Id. at 3.
\end{itemize}
instead of distributive considerations. Thus, if the ECJ can legitimately address efficiency considerations, distributive concerns should be left to Member State legislatures.255

In adopting selectively US law and economics, European scholars received mainstream legal economists advocated for minimal state intervention in private transactions, allowing pockets of public regulation as long as these ensured free and competitive market places.256 They claimed that, instead of benefiting consumers, welfarist legislations created regulatory backfiring by hurting the people they were trying to help. In fact, through the increase in prices of consumer goods, sellers could easily pass on the costs of a warranty to the consumers. In this way, the beneficiaries of the warranty would be driven out from the market.

In addressing compulsory terms, which performed an insurance-like function for buyers, US mainstream law and economics scholars argued that they created inefficient outcomes by diminishing overall consumer welfare by creating higher prices. The warranty undermined the purpose of reducing transaction costs through contracts of adhesion, while it made worse off marginal groups of consumers that were priced out of the market. Thus, compulsory warranties in consumer contracts ‘run counter to redistributive rationales’ by creating non-optimal market results.257

Chicago legal economists argued that when buyers are free to choose any contractual term they benefit from market competition and they choose the most efficient term for their transaction.258 If traditional limits to freedom of contract did not undermine the efficiency intrinsic to the freedom of contract regime, however the regulation of consumer contracts through judicial or legislative intervention such as unconscionability

255 See Wulf-Henning Roth commenting on Leitner, supra note 76.
256 See Richard A. Epstein, Contracts Small and Contract Large: Contract Law through the Lens of Laissez Faire 30-31 in F.H. Buckley ed., The Fall and Rise of Freedom of Contracts (1999) where he states that laissez-faire makes “explicit substantive judgments about which kind of regulations work in the common interest and which do not; (…) its practical side stresses the bad consequences to civil society that flow from ambitious government regimes of taxation and regulation that violate its precepts.”
257 Alan Schwartz, A Reexamination of non-substantive unconscionability, at 1058 VA L Rev. (1977) at 1067. The efficiency of standardized contract lies in its internal construction: Once the seller pre-establishes the terms of the contract and the consumer is presented with a ‘take it or leave it’ agreement. Both buyer and seller thereby avoid further transaction costs of negotiating individual agreements while a legal rule restricting the enforceability of standardized contracts creates large efficiency loss.
doctrine or compulsory warranties diminished the overall market efficiency for different reasons. First, equity doctrines allowed judges to deploy the unequal bargaining power rhetoric, which was not a ‘fruitful, or even meaningful’ criterion to assess legal consequences. Second, in limiting contractual freedom through equity considerations, courts were “institutionally incapable of choosing the defining values and finding the relevant facts”. Third, private regulation made by markets was more efficient than judicial intervention based on fairness, since the former accurately reflected the aggregate preference of buyers.

Even more significantly, European scholars adopted what U.S. mainstream legal economists referred to “Kaldor-Hicks efficiency” as the objective guiding principle that would drive decisions of both legislators and judges. While the Pareto-superiority criterion did not favor those rules, which cannot make both buyers and sellers better off, the Kaldor-Hicks criterion allows choosing a rule even if only the seller is better off, as long as the seller’s gain exceeds the buyer’s losses in order for the seller to compensate the buyer. Even when the choice of a determined rule justified by a Kaldor-Hicks criterion creates actual losers, the rule is the most efficient one, since as Posner puts it “the winners could compensate the losers, whether or not they actually do”.

260 See Alan Schwartz, Seller Unequal Bargaining Power And The Judicial Process 49 Indiana Law Journal 367-368 (1974) to assess whether buyers in a given transaction do or do not have unequal bargaining power. Courts have the impossible task of knowing in relation to the market and to the choice of terms offered to buyers at different prices whether the term of a contract is fair or not. In Schwartz’s view, courts do not have standard criteria to strike down a clause for an excessive price. Moreover, judges use two sets of non-convincing arguments: on the one hand, the term can be void because it produces effects which are inconsistent with the policies that the court enforces; on the other hand, the term can be void because the seller’s power produced that term.
261 See Alan Schwartz, supra note 201, at 380. uses the consumer sovereignty rhetoric even in the case in which buyers negotiate for terms with a monopolist since they “may still in their aggregate, choose the contract clauses which monopolists offer. Those choices are more likely to reflect their own preferences than the choices courts would make for them.” Richard Posner, Economic Analysis 86-129 (5th ed. 1998). Posner offers an alternative interpretation of the Thomas Walker Furniture, where he states that the right of repossession of the seller was an efficient way to allow consumers to purchase the goods in advance. As Posner put it if from an efficiency perspective a broad interpretation of unconscionability doctrines by common law judges “makes it more difficult for poor people to borrow, thus harming them ex ante though benefiting them ex post”
262 See Richard Posner, supra note 203, at 518 where he states that “The use of liability rules or other legal sanctions to redistribute income from wealthy to poor is likely to miscarry. A rule of liability is like an exercise tax: it induces a contraction in output and increases price. However, the part made liable may be able to shift much of the liability cost on the poor through prices. The result is a capricious redistribution of income and wealth within the class of poor people themselves and an overall reduction in their welfare.”
The Kaldor-Hicks criterion refers to the relationship between the aggregate benefits and the aggregate costs of a situation, thus referring to the “size of the pie” and its overall maximization. The attractiveness of this criterion, which mainstream legal economists presented as an objective one, is that everyone can be better off if society is organized in an efficient manner. In dismissing the distributive consequences of the efficient solution while depicting society as an aggregate of individual well being, mainstream legal economists deployed Kaldor-Hicks efficiency as a neutral and non-political criterion. In allowing this trade-off between ‘efficiency’ and ‘distribution’ of resources, because of the beneficial increase in aggregate wealth, mainstream legal economists set aside more political and costly distributive choices.

Mainstream legal economists put forward a consistent institutional competence argument according to which judges should pursue Kaldor-Hicks efficiency while they should set aside distributive goals in adjudication. According to them, it was difficult or impossible to redistribute through legal rules, and legislatures only had the competence to deal with distribution of resources. In their view legislatures rather than courts were institutionally capable of deciding distributive questions. By means of the government’s tax and transfer systems legislative decisions were likely to be more precise than the decision of a random judge. Due to high administrative costs of the legal system, mainstream legal economists advocated that the legislature was not only the most apt but also the most efficient institution to decide about distribution.

In receiving United States mainstream law and economics views, European jurists began associating institutional competences arguments (courts versus legislatures) with

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263 See ROBERT COOTER AND THOMAS ULEN, LAW & ECONOMICS (1999) “Economists understand how laws affect the distribution of income and wealth across classes and groups and while they often recommend changes that increase efficiency, they try to avoid taking sides in disputes about distribution, usually leaving recommendations about distribution to policy-makers or voter.” p.4

264 See A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS (2d ed. 1989) “If income cannot be costlessly redistributed there may be conflict between efficiency and equity, and income redistribution is costly and therefore efficiency should be the principal criterion for evaluating the legal system. It is often impossible to redistribute income through the choice of legal rules and even when it’s possible redistribution through government tax and transfer system may be cheaper and is likely to be more precise”. p. 9-10 and “redistribution through legal rules is costly, not precise for income groups purposes and it only takes place when a dispute happens, not on a consistent base.” at 125. KAPLOW AND SHAVELL for whom redistribution through legal rules offers no advantage over redistribution through income tax system. In their view both systems distort work incentives, but legal rules also create inefficiencies in the activities regulated by the legal rules, so that there is an additional inefficiency, which would be avoided by retaining the efficient non-redistributive rule and simply increasing taxes.
The interpretation of directives by courts should be guided by efficiency instead of distributive considerations. Thus, if the ECJ can legitimately address efficiency considerations, distributive concerns should be left to Member State legislatures.268

3.4 Social Justice in European Contract Law

Jurists advocating for social justice in European private law drafted a Manifesto to address the concerns of citizens about a European civil code “as an expression of cultural identity and a scheme of social justice for a market order.”269 In their intellectual enterprise, these jurists embraced the idea that the new European legal culture offers a possibility to escape from the formalism of private law regimes, allowing for a more open and frank dialogue on the political and social stakes of the Europeanization process.270 In sharing a realist understanding of contract law, they drafted a Social Justice Manifesto to oppose the notion that drafting a civil code should be a “technical problem to overcome by experts.”271

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265 Id. at 149.
266 See UGO MATTEI, supra note 136 at 5-7.
267 Id. at 3.
268 See Wulf-Henning Roth commenting on Leitner, supra note 76.
Rather than a technocratic enterprise based on neutral principles such as freedom of contract, Social Justice advocates envisaged European contract law as a set of doctrinal rules chosen to advance fairness and distributive justice. They emphasized that the harmonization of contract law needs to be understood as part of European multi-level governance creating political consequences for citizens of the Union instead than merely a tool functional to the completion of the internal market. In opposing a technocratic approach to harmonization, they departed from those progressive views suggesting *tout court* the need to resist harmonization of contract law because the European level is pervaded by a constitutional asymmetry. In contrast, they sided with the slogan “Hard Code now!”

Thus Social Justice advocates claimed that the unification of private law proceeds as part of the political evolution of the construction of the European Union. Therefore the Commission should address socio-economic values more openly and democratically through “new methods for the construction of this union of shared fundamental values (which include respect for cultural diversity) as represented in the law of contract and the remainder of private law.” Finally, in their plea for greater social justice and regulatory legitimacy they maintain: “Unless a more democratic and accountable process is initiated, there is a clear danger that these fundamental issues will never be openly addressed, and a serious risk that powerful interest groups will be able to manipulate the technocratic process behind the scenes in order to secure their interests at the expense of the welfare of ordinary citizens.”

The Manifesto starts from the assumption that the Commission, in its regulatory agenda, lacks of a vision of fairness, because “As traditionally understood, the function of the European Community is to promote a free market, not to ensure that this market is corrected in the light of distributive aims.” The three ideas around which the Manifesto unfolds are fairness in contractual relations, the constitutionalization of private law and the legitimacy of European modes of governance. As to the notion of fairness and the

275 *Id* at 662.
distributive effects of contract rules the Manifesto suggests following the examples of national private law systems, in which the protection is based “upon social needs rather than equal opportunities, or a concern about the distributive consequences of legal rules between groups, such as creditors and debtors, and equally importantly, within such groups.”

Despite this sophisticated analysis, in the Manifesto scholars argue that the problem arises when national fairness standards will be replaced by a much narrower conception of the principle of social justices to secure the effective realization of European regulation. In embracing the view that the European Union is pervaded by an asymmetry when it comes to social justice they claim, “The values of negative integration and competition were never intended to provide an exhaustive scheme of social justice for a market order. They should not be used now as the exclusive determinative foundations for a consensus of values underpinning European contract law.”

In considering the distributive consequences of contract law, the Manifesto provides no answer to neo-liberal critiques for which social legislation is highly inefficient because it passes on the costs of protections to beneficiaries and that when the distribution of wealth happens through cross-subsidies among differently situated groups of buyers these “are prima facie unjustifiable”.

As to the second idea of the Manifesto, the constitutionalization of private law suggests that the development of contract law provides the opportunity to give a concrete expression to individual rights protected by the European Convention of Human Rights and to social and economic rights recognized by the Nice Charter of the Fundamental Rights of the European Union. However, the constitutionalization approach of the Manifesto recognizes social rights only to European citizens. Immigrants, or socially marginalized individuals, excluded from the possibility of concluding contracts, will not enjoy European social rights.

The Manifesto focuses on the need of securing legitimacy, namely the democratic acceptance of the socio-economic values embedded in the harmonization of private law.

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276 Id at 666.
277 On both issues Duncan Kennedy, Thoughts on Coherence, Social Values and National Tradition in Private Law at 18 (manuscript on file with the author) and Duncan Kennedy’s comments on Hugh Collins, ELRC workshop “A Conversation on Private Law Harmonization in the EÜ” on 03/30/04, HLS.
278 See the Social Justice Manifesto, supra note 269, at 667.
In advocating for greater social justice and legitimacy in European contract law, the Manifesto casts light on the importance of preserving cultural and local diversities that allow “variation, experimentation and innovation.” However, this approach dismisses the disparate impact that both the choice of harmonization or diversity will create, by advantaging some communities and disadvantaging others. In short, the Manifesto aims to tie closely the European notion of a social market economy, together with democratic endorsement and regulatory legitimacy.

3.5 The Distributive Analysis: A Limited Reception

In response to the attacks of Chicago legal economists to welfare regulation by administrative agencies and courts, some United States jurists developed a distributive analysis of legal rules as an alternative law and economics project. In deploying a law and economics methodology these progressive scholars began writing in the 1970s, but it was not until the 1990s that European jurists became aware of the distributive analysis.

One could trace the distributive analysis back to Arthur Leff’s article, which demonstrated how the legal process creates high transaction costs that are unequally distributed among litigants, especially between business and consumers. The following

279 Id at 672.
281 See Hugh Collins, supra note 271 at 650, arguing that “The institutions of the European Union, with their unique constellation of multilevel systems of governance, are not designed, and were never intended to be competent, to engage in the construction of such a political settlement. If Europe is to embark on this process of general harmonization of laws, it should not start here, that is the current processes for enacting legislation, because those processes lack of the necessary legitimacy to engage with these fundamental political questions.”
282 See Richard Posner, Economic Analysis of the Law (1st ed. 1973), at 337-338 in which he claims that three factors can affect the decision to settle rather than litigate: “the relative cost of litigation and settlement, the parties’ attitude toward risk and differences between the parties judgment of the likely outcome of litigation”. See also Arthur A Leff, Injury, Ignorance, Spite-The Dynamics of Coercive Collection, 80 YALE L.J. 1-8 (1970 engaging with the law and economics methodology by offering four reasons of the costs of the due process: “First, due process demands that at the outset the court and its officers be wholly ignorant of what happened and it is expensive to educate them, at least using the pleading-and-playelet format of the common law. Second, the process of education cannot proceed on a generalized (mass produced) basis; each case is theoretically handcrafted. Third, save in a court of small claims it is usually specialists (e.g. Lawyers) who do the crafting. Fourth, because the courts do not allocate docket space by competitive bidding between plaintiffs, the creditor with the largest claim at stake must take his place in a “queue” behind plaintiffs with smaller claims.”
year Bruce Ackerman’s response to the attack by Chicago legal economists against welfare regulation elaborated an economic model to justify the enforcement of housing codes as a means to rectify inequalities in wealth distribution. In response to the argument that the cost of social legislation is passed on to the poor he elaborated an economic model that showed the contrary. An effective and comprehensive housing code could, under certain conditions, redistribute income from landlords to tenants.

In the 1980s scholars shifted their attention from administrative regulation to private law rules because housing codes were no longer a viable option under the current administration. Duncan Kennedy applied Ackerman’s economic model to justify the use of compulsory terms in contract and tort rules. Despite the attempt by sellers to pass on the costs of the mandatory term to buyers, their effectiveness depended on the shape of supply and demand curves and the competitive structure of the market. By disaggregating the group of buyers in at least four sub-groups, in relation to their utility and risk preferences, the introduction of an insurance-like term had distributive consequences “possibly, not necessarily including enriching part of the buyer group at the expense of other buyers and sellers”.

In following the compulsory terms analysis, Richard Craswell demonstrated that the benefit of a warranty in consumer contracts is “inversely related to the seller’s ability to pass on the costs”. In rejecting the indeterminacy of the passing-on-the-cost argument, he showed that distributive gains were perceived, not by an increase in price, but through the willingness to pay of marginal consumers. More recent applications have analyzed the favorable consequences of welfare regulations for determined groups

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283 See Bruce Ackerman, Regulating Slum Housing Markets On Behalf of the Poor: Of Housing Codes, Housing Subsidies and Income Redistribution Policy, 80 YALE L.J. 1093 (1971).
284 Id, at 1111.
287 Id., as Craswell puts it “if sellers can pass on much of the costs of a rule, this indicates that consumers benefit a good deal from the warranty, but if sellers cannot pass on much of their costs the rule has made their product less attractive to consumers”.

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of workers through accommodation mandates, and particular debtors through the imposition of compulsory terms protecting mortgagors.

One of the most important receptions of the distributive analysis in European scholarship can be traced to Hugh Collins’s work in the 1990s. In response to European lawyers engaging with mainstream law and economics, Collins addressed the regulation of contractual unfairness and the costs of an effective welfare regulation. In examining the unfair terms directive, he emphasized that consumers are unlikely to litigate the term before a court, thus the directive has little impact on the use and content of adhesion contracts.

Moreover, according to Collins the directive suffered “the weakness of creating an unsophisticated framework for enquiry,” in which the judge lacks information to police a particular clause while dismissing the market conditions, the particular quality of the product and the business conditions to supply it. Finally, the vagueness of the good faith clause contained in the directive precludes business to determine the costs derived from the unfair term and consequently determining the level of insurance needed by consumers.

In attacking the “open texture rules” or general clauses to police unfairness, Collins claimed that these function better for business than for consumers since they require judges to contextualize the legal framework. In contrast, in addressing contractual unfairness, private law regulation can improve not through open texture rules, but through higher formal standards. For instance, the unfair terms directive set up a black list of unfair terms, which are to be immediately voided by judges.

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288 Christine Jolls, Accommodation Mandates, 53 STANFORD L. REV. 223 (2000). In demonstrating that favourable distributive effects are assured for certain accommodated groups, Jolls provides a counterpoint for the existing literature, which assumes that desirable effects for accommodated workers are unlikely to happen, because costs will be shifted to the accommodated group in the form of reduced wages or reduced employment.

289 See Duncan Kennedy, The Ex-Post Distributive Case for Insurance Like Compulsory Terms in Consumer Contracts, on file with the author HLS (1998).

290 See HUGH COLLINS, REGULATING CONTRACTS (1999).

291 Id. at 233.

292 On this see the outcome of Freiburger Kommunalbauten, supra note 34.


294 See Article 3(3) of The Unfair Terms Directive EC 93/13, that addresses the “indicative,” “non-exhaustive” list of terms that “may” be unfair (hereinafter blacklist).
However, through an examination of empirical models, Collins convincingly argued that there are markets in which the price of welfare regulation, such as minimum wages or compulsory duties of disclosure, cannot be passed on to the protected group. In these cases a distributive analysis shows that regulating unfairness produces the desired redistributive results and formal standards or compulsory terms produce a better regulatory outcome than open texture rules such as good faith or general clauses.

The reception of the distributive analysis in European legal thought was limited to those progressive scholars addressing consumer regulations and tangentially European private law. However, in response to the attacks against social welfare regulation by jurists who support regulatory competition for European contract law, scholars have not yet elaborated a response aiming to show desirable economic effects of welfarist regulations for determinate groups of buyers, debtors or workers.

An example of regulatory effort that, while highly criticized by scholars, has not been subject to ant form of meaningful scrutiny is to be found in a European directive harmonizing the law of consumer sales and warranties. Adopted by the Council in 1999, after a long and difficult struggle between conflicting political and economic interests, the directive is an outstanding example of how European scholarship fails to address the distributive consequences of this Community re-regulation. Aimed at improving the functioning of the internal market, the directive harmonizes guarantees regimes in consumer sales.

Under the directive, sellers must warrant the conformity (merchantability) of their goods for at least two years following the delivery to the consumer. The order of remedies available to the consumer when the lack of conformity of the goods becomes apparent is repair and replacement of the good and in alternative price reduction and

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295 See HUGH COLLINS, REGULATING CONTRACTS at 286.
297 See Jules Stuyck, supra note 68.
299 See the preamble, recital 4 of the Directive 99/44/EC (25 May 1999). The definition of the guarantee “[… ] shall mean any undertaking by a seller or producer to the consumer, given without extra charge, to reimburse the price paid or to replace, repair or handle consumer goods in any way if they do not meet the specifications set out in the guarantee statement or in the relevant advertising;”
rescission of the contract. Member States have the possibility of introducing an obligation for consumers to inform the seller of the defect within a flexible notification period of at least two months. The directive requires that if under national laws the guarantee has a limitation period this cannot be less than two years from the day of delivery. In this case the directive places consumers in a more advantageous position than under several national sale of goods laws.

Some jurists have criticized this measure as a paternalist intervention that imposes a compulsory warranty harming consumers instead of protecting them. By overestimating the risks for consumers, the introduction of the compulsory warranty allows sellers to pass on the cost of the term to consumers. Thus, the mandatory warranties will increase the prices of the goods while stimulating alternative solutions to circumvent the compulsory term. For instance, after the adoption of the directive, Germany has imposed a mandatory liability for used cars of at least one year. Scholars argued that this regulation has increased market prices for used cars, while creating incentives for lawyers to circumvent the compulsory warranty. In light of these assumptions, they suggested that a more sound solution would have left to private parties the autonomy to negotiate the conditions of the warranty for non-conformity of the goods. Rather than adopting an ex-ante perspective by imposing the mandatory warranty, they suggested that in case of violation of contractual good faith, national courts could enforce ex-post the unfair contract terms directive.

In response to such claim, a distributive analysis of the German market of used cars could show how the ‘passing on the cost’ argument is highly indeterminate, and that the argument that consumers benefit from a mandatory rule only when sellers cannot pass on the cost of the warranty is misleading. For instance, a distributive analysis of the effect of the warranty in this case could demonstrate if the value of the good offered in the

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300 See Artt. 3-5 of the EC Sales And Warranties Directive.
301 Id, Article 5(2) and for used goods art. 7(1) states that the period should be no less than one year. Both provisions allow Member States to take more stringent provisions.
302 Id. Article 5 states: “The seller shall be held liable under Article 3 where the lack of conformity becomes apparent within two years as from delivery of the goods. If, under national legislation, the rights laid down in Article 3(2) are subject to a limitation period, that period shall not expire within a period of two years from the time of delivery”.
market, after the imposition of the compulsory term, is underestimated or overestimated by marginal consumers. Through a cross subsidization among marginal and infra-marginal consumers, some buyers will fully benefit from a compulsory warranty “only when sellers are able to pass on a large share of their costs”\(^{304}\). Consequently, jurists should argue whether the compulsory warranty creates more or less consumer welfare without relying on the consumers’ willingness to pay, which is a highly indeterminate criterion.

If by imposing a compulsory warranty the European directive favors certain consumers because it burdens the sellers with the cost of the information about the risk of the products, however one should still assess how redistribution plays out not necessarily among buyers and sellers but between different groups of buyers. In Craswell’s analysis of consumer contracts, buyers might end up benefiting from the mandatory guarantee, but their willingness to pay varies in a way that is not related to the warranty’s true benefits. In order to determine whether consumer welfare increases, one should address the “relationship between the warranty’s true benefits and the marginal consumer willingness to pay for the warranty” rather than the sheer price increase.\(^{305}\) In the case of second hand cars in Germany, jurists should verify which groups of consumers are benefiting from the warranty and how redistribution takes place in that market. By means of this analysis scholars could respond to the ‘passing on of the cost’ claim by showing that consumers are willing to pay for a product, namely the used car plus the guarantee, that, without the regulatory intervention of the directive, they would not get from the market.\(^{306}\)

According to Social Justice advocates, the ECJ is institutionally constrained to address efficiency consideration because of a constitutional asymmetry pervading the EU. Ultimately, these jurists argue that judges and European judges in particular, cannot be fully trusted to promote social justice.\(^{307}\) This idea entails that substantive and social justice concepts should pass through legislatures as the main site for democratic consensus, whereas one should be skeptical of judges because of their elitist or passive take on such concepts.

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304 See Richard Craswell, supra note 286 at 361.
305 Id, at 391.
This part demonstrated that Neoliberal advocates have deployed United States law and economics theories to limit the harmonization of private law rules. In contrast, Social Justice advocates have resisted the reception of United States law and economics and its critiques to argue in favor of harmonized rules. However, both groups deploy similar institutional competence claims and they have strategically deployed constitutional asymmetry claims to criticize the ECJ adjudication and to delegitimate the European or national courts and the benefit of Community or national legislatures.

As a result, European jurists on both sides of the political spectrum have not yet engaged with the distributive consequences of private law rules. In particular, when European courts rather than national legislatures determine private law rules, European jurists tend to collapse institutional competence arguments with substantial ones rather than assessing their distributive consequences.

This article showed that even if some jurists have welcomed – and others have resisted – the virtual transplant of United States legal thought for a variety of legal, socio-economic and historical reasons, at the operational level both groups recurrently adopt constitutional asymmetry claims in ways that constrain the debate on European private law to a pair of stifled positions.

C. Production of legal thought: The Procedural Turn in European Legal Consciousness

The third element characterizing the current European legal consciousness is a set of legal ideas addressing the relation between law and society which are being produced by European scholars over time and that are now traveling across the Atlantic.308 Going beyond the collapse of institutional competence with substantive arguments, the “proceduralization approach” to private law focuses on the deliberative process taking place before the ECJ as a new possibility to find forms of legitimacy and governance in the European legal order. By focusing on formal as well as informal procedures, this

approach aims to offer new rational justifications through the emergence of legal rules governing conflicts in European law.

In this way, the proceduralization approach emerges from the failure or both the liberal and the welfarist paradigm in private law. However, the proceduralization paradigm of the law encompasses both, because it elaborates new forms of legitimacy that are based on the mutual and simultaneous interaction between private and public forms of communication.\textsuperscript{309} This model characterizes the liberal welfare state model of democracy taking place in Europe.

3.7 Procedure, Supranationalism and New Governance in EU law

This part describes another view put forward by a number of jurists focusing on the regulatory autonomy of supranational institutions rather than on democratic legitimacy concerns emerging from EC law.\textsuperscript{310} According to Joerges and Nyer, new supranational deliberative processes are not a threat to social democracies, but rather a democratic advance taking place in the European post-national constellation.\textsuperscript{311} These scholars have argued that supranational deliberations convey to European citizens not only economic freedoms but also participatory and political rights.\textsuperscript{312} In departing from the claim that the European level lacks democratic legitimacy, Joerges and Nyer celebrate the democratic experimentalism triggered by a multi-level system of governance while stressing the indeterminacy of outcomes. They highlighted that multi-level governance enables a variety of private and public actors to engage in transnational horizontal

\textsuperscript{309} Supra, at 409 “After the formal guarantee of private autonomy has proven insufficient, and after social intervention through law also threatens the very private autonomy it means to restore, the only solution consists in thematizing the connection between forms of communication that simultaneously guarantee private and public autonomy in the very conditions from which they emerge.”

\textsuperscript{310} See GIANDOMENICO MAJONE, REGULATING EUROPE (1999) and for a distinction between alternative democratization approaches, P. Lindseth, \textit{Democratic Legitimacy and the Administrative Character of Supranationalism: The example of the European Community}, 3 COLUMBIA L.R. (1999) 628.

\textsuperscript{311} JÜRGEN HABERMAS, THE POSTNATIONAL CONSTELLATION (2001) where a European post-national constellation can gives voice to a multitude of different actors thus insuring greater procedural fairness and dialogical solutions to social conflicts.

networks and dialogical projects, which replace the hierarchy of national regimes with new forms of legitimacy.

According to Joerges, a first aspect of Deliberative Supranationalism in European Law entails the possibility to respond to conflicts emerging between the national and the European level not by imposing the supremacy of EU law but rather by conceptualizing new forms of conflict resolutions and new procedures. According to these proceduralist scholars, a version of deliberative supranationalism correspond to the supplement to traditional constitutional nation-states, which respects their legitimacy but it simultaneously clarifies and sanctions “[…] the commitments arising from its interdependence with equally democratically legitimate states, and with the supranational prerogatives that the institutionalization of this interdependence requires.” 313

For instance, in addressing mutual recognition constitutional asymmetry scholars maintained that Cassis de Dijon was the landmark decision of negative integration, which triggered a race to the bottom by promoting free movement over social regulations. 314 Likewise, the Commission adopted mutual recognition to create an automatic recognition for lower product standards, thus opening a race to the bottom among Member States. In contrast, jurists belonging to the procedural tradition, have argued that European adjudication did not necessarily privileged free movement at the expense of social legislation, but it created new justifications before supranational deliberative fora. For proceduralists, mutual recognition did not entail a race to the bottom nor the opposite.

According to Christian Joerges, through Cassis de Dijon the ECJ did not bless the notion of free movement of goods enshrined in Article 28 EC. Rather the judgement created a “meta-norm” which redefined the authority of the Court to review national legislation and, at the same time, it created a test that both parties would accept as the Court’s rule of reason. 315 In Damian Chalmer’s analysis of Deliberative Supranationalism I, the expression coined by Christian Joerges, Cassis de Dijon provides a “dynamic model”, which allows and requires each participant in the dispute, through a system of

314 See F.W. SCHARPF, supra note 6. In the 1980s the ECJ deploys the rhetoric of the active European consumer who shops and enters into contracts across Member States. This became a powerful imagine in order to eliminate national regulations “over-protective” towards European consumers which limited the free circulation of goods
315 See C. Joerges, supra n.313 at 18-19.
check and balances, to respect each other interest. As he puts it, “supranationalism is, above all, a form of accountability. Local actors may have priority for their actions, but their actions do not merely affect themselves. They must be open to the interest of others and account to others for their actions.”

Moreover, Kenneth Armstrong has argued that mutual recognition, created higher levels of protection for product standardization because it allowed Member States to exchange information, observe different practices and learn from other experiences. In fact, in a number of fields such as foodstuffs, consumer law, baking and work safety regulation scholars presented evidence of sectoral amelioration of product or service standards triggered by mutual recognition.

To grasp the role played by law in European integration, these scholars have focused on the constant tension between the functional market integration characterized by the “four freedoms” and the democratic processes taking place at the national level. According to them, free movement has created new rights that individuals can use in order to mount legal challenges against those domestic regulations that stand in the way of their cross-border mobility. In this sense, the four freedoms represent not only a challenge to national welfare regulations but also an enactment of liberal autonomy and the expansion of individual rights through ‘Euro-constitutionalism.’

In addressing multi-level governance, proceduralists suggest that the European legal processes substitute for the hierarchy of national constitutional regimes through the generation of European decentralized networks among agencies, courts and stakeholders involved in a supranational deliberative process. For instance, in recognizing that supranational institutions have become complementary to national ones, the legal

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316 See Damian Chalmers, Deliberative Supranationalism and the Reterritorialisation of Authority, at 42, in C. Joerges, supra n. 313.
317 See K.A. Armstrong, supra n. 99.
318 See C. Joerges and R. Dehousse, Good Governance in Europe’s Integrated Market (2002). However, Scharpf is still critical of the fact that the ‘European level’ is a more effective problem-solver than the ‘national level’. But, nota bene, this is true for product standards precisely because here national problem-solving capacity has not been destroyed by negative integration— and hence, is also less constrained by the economic pressure of regulatory competition.
profession has to recognize that democracy is enhanced through a supranational process which conveys to EU citizens not only economic freedoms but also political rights.\textsuperscript{321}

In irritating nationally legitimated processes, the European multi-level system of governance also provides a freedom-enhancing mechanism, opening possibilities for experimentalism and new justificatory processes.\textsuperscript{322} In addressing a multi-level European policy, they have put forward ideas of ‘social constitutionalism’\textsuperscript{323}, ‘constitutionalization from below’ and federal experimentalism, which innovatively address the constitutionalization of private law as a “[…]
legal binding of governance based on being able to structure the processes of political opinion formation and decision making ‘deliberatively’ using law therefore securing their legitimacy.”\textsuperscript{324} For instance, Deliberative Supranationalism at work aims to reduce the tensions and irritations deriving from transnational governance.\textsuperscript{325} In their introduction to one of the most exhaustive works on new governance in Europe and the United States Joanne Scott and Grainne de Burca admit that even though there are similarities between experimental forms of governance across the Atlantic “it can fairly e said that this development has occurred in a more self-conscious and more closely scrutinized fashion in the European Union.”\textsuperscript{326}

Thus proceduralist approach to European law and multilevel governance represents a new and intriguing paradigm, which goes beyond constitutional asymmetry concerns. In the genealogy of this approach are equally present the proceduralist paradigm of law, elaborated by Jürgen Habermas, the notion of reflexive law, elaborated

\begin{footnotesize}
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\item See Damian Chalmers, supra n. 316 at 43. In Damian Chalmers’ words the open method of coordination can provide a new ’synthetic unity’ where, “[A]n assembly place is created at the apex of any regime for the different interests to frame the problems and values of the regime. This does not have to take place in a central setting, but it must create a European frame (OMC) […] In all these instances, the golden thread running through these different sites of governance is a European line of reason which is assumed to be sufficiently flexible and open to incorporate all concern. For current analyses of the OMC see D. Chalmers and J.Lodge, The OMC and the Welfare State, Paper n.11 at ESRC, London School of Economics; (2003).
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by Gunther Teubner and the law and society approach addressing informality in the
law.\textsuperscript{327} This joint legacy led to the concept of a reflexive and formalized welfare state,
which has stirred numerous praises as well as critiques of new governance and
proceduralization.\textsuperscript{328} Critics have argued that the notion of a reflexive and formalized
welfare state is ultimately vague and it could also backfire.\textsuperscript{329} With these observations in
mind, proceduralist scholars conceptualizing Deliberative Supranationalism for European
law and governance have become increasingly careful in the elaboration of grand and
optimist theories.\textsuperscript{330}

3.7 Beyond Institutional Competences

The proceduralization view brings a new perspective in the current phase of the
debate on European Private law. This view takes a radically different approach to current
constitutional claims because it departs from the notion of a European economic
constitution and also from asserting that there is a constitutional asymmetry in the EU.\textsuperscript{331}
These scholars highlighted the persistent ambiguity and paradoxes embedded in the
European multi-level governance system. Thus, they suggested that the Europeanization
process is highly indeterminate, and that while it increases conflicts or collisions, it can
trigger new doctrinal solutions.\textsuperscript{332} Finally, the proceduralization view sets aside the claim
that courts are not as democratically legitimated as legislatures to address distributive

\textsuperscript{327} See JÜRGEN HABERMAS, BETWEEN FACT AND NORMS (1998) Chapter 9; Gunther Teubner, Substantive
and Reflexive Elements in Modern Law, 17 LAW AND SOCIETY REV. 239-86 (1983) and D. Trubek and L.
\textsuperscript{328} See JEAN COHEN, A NEW LEGAL PARADIGM: REGULATING INTIMACY (1993), Ingebor Maus,
Perspektiven ‘reflexiven Rechts’ im Kontext gegenwärtige Deregelierungstendenzen, 19 Kritische Justiz,
390-405 (1986).
\textsuperscript{329} See William E. Scheuerman, The Proceduralist Paradigm of Law, manuscript on file with the author,
at 19, 22-23
\textsuperscript{330} See C. Joerges, supra n. 313 at 27.
\textsuperscript{332} On conflicts, collisions and paradoxes among legal regimes see Gunther Teubner, Dealing with
Paradoxes of Law: Derrida, Luhmann, Wiethöller, in OREN PEREZ UND GUNTHER TEUBNER (HG.) ON
PARADOXES AND SELF-REFERENCE IN LAW (2004) and Christian Joerges, The Impact of European
Integration on Private Law: Reductionist Perceptions, True Conflicts and New Constitutionalists
questions. Instead, these jurists aim to identify effective solutions to supply European governance with market pluralism and new legitimacy for EC law.\footnote{Id.}

In private law, these jurists oppose both an efficiency and a solely welfarist rationale to European contract law. They suggest that European private law sheds light on the paradoxes of contract law, through the simultaneous coexistence of “freedom and coercion”,\footnote{See C. Jeorges, The Europeanization of Private Law as a Rationalization Process and as a Contest of Disciplines- As Analysis of the Directive on Unfair Terms in Consumer Contracts, EUROPEAN REVIEW OF PRIVATE LAW (1995) at 181.} and the possibility of both discrete and relational contracts, thus offering new possibilities to create networks contracts, which have a hybrid nature and require European judges to find new doctrinal solutions.\footnote{See Gunther Teubner, Coincidentia Oppositorum: Hybrid Networks Beyond Contract and Organization, Storrs Lecture Series, Yale Law School, October 7-9, 2003.} In their view the constitutionalization of private law enables ordinary and European courts to supervise contractual rights and duties and to provide a forum for new interpretations of European contract law. Joerges has emphasized the importance of the relational dimension of contract law, as a response to a decline of Weberian formal rationality leading toward an irrational re-politicization of the law.\footnote{See C. Joerges, supra note 22, at 612;}

In response to the rationalization of the Europeanization process, proceduralization scholars claim that through the proceduralist paradigm of the law, the European level promises to open up an impartial and discursive forum through new justificatory mechanisms and procedures.\footnote{Rudolf Wiethölter, Materialization and Proceduralization in Modern Law, G. Teubner (Ed.) DILEMMAS OF LAW IN THE WELFARE STATE (1986) and for a comment see Duncan Kennedy, Comment on Rudolf Wiethölter’s “Materialization and Proceduralization in Modern Law and “Proceduralization of the Category of Law” in C. Joerges and D.M. Trubek (Eds.) CRITICAL LEGAL THOUGHT: AN AMERICAN-GERMAN DEBATE (1989).} In their view, participation allows social actors to justify their contractual claims and legitimates the accepted legal principles and duties.\footnote{See C. Joerges, supra note 22, at 612;} The constitutionalization of private law entails the participation of a plurality of private actors participating in a transnational legal process giving voice to a plethora of private, local and peripheral actors.
3.8 The Lack of Consequentialist Considerations

Proceduralization advocates have emphasized the persistence of legal conflicts and the indeterminacy of their resolution. In their view, the role of European private law is to normalize paradoxical situations, rather than assessing how bargaining power is shaped by the choice between two different legal rules. In focusing on conflict resolution through dialogical processes, the proceduralization view sets aside legal coercion in bargaining, which determines the costs of conflicts resolutions for each individual party.

According to these jurists, the European economic constitution is vanishing to give way to a post-national constellation where private law has to deal with new multi-level conflicts. The role of European private law and in particular ECJ adjudication is to provide a procedural context, which organizes the interaction and manages conflicts among parties. Thus, when procedural fairness is ensured, the outcome of a decision is a free and voluntary agreement among parties, rather than the result of coercion, which is reflected in the uneven distribution of resources among the different actors.

The proceduralization view characterizes courts as a space where irritation happens through dialogical exchange among a plurality of actors. However, supranational deliberative processes entail new solutions through further justifications of legal doctrines. If “Europeanization is about social learning through conflict management and contestation” the role of law is “to find principles and provide procedures which organize the interaction between political actors and courts at varying levels of governance (...)”.

341 This view in private law theory is represented by the legacy of Wesley N. Hohfeld, Fundamental Legal Conceptions as Applied In Judicial Reasoning, 26 YALE L.J. 710 (1916), Robert L. Hale, Coercion and Distribution in a Supposedly Non-Coercive State, 38 POL. SC. Q. 470 (1923) and Bargaining, Duress and Economic Liberty 43 COLUM. L. R. 603 (1943).
343 See Robert L. Hale, Coercion and Distribution in a Supposedly Non-Coercive State, 38 POL. SC. Q. 470 (1923).
344 See C. Joerges, The Challenges of Europeanization in the Realm of Private Law, supra note 342 at 37
According to this view all institutions are equally legitimate, thus the focus is no longer on national constitutional settlements but rather on the transnational formation of conflicts, disagreements and paradoxes and their possible resolutions though dialogical or deliberative supranational projects. To a United States audience, their contribution appears as a revival of the Legal Process approach plunged into a European context.

The notion of proceduralization stands as a procedural solution of disputes by letting individuals work out their disagreements through, for instance, public litigation. However, the proceduralization view does not endorse rational and coherent resolutions through the legal system as envisaged by the Hart and Sacks model of “institutional settlement”. Rather, for proceduralists European private law enables legal debates giving voice to individuals and it gains incremental normative coherence in the effort of adjudicating the market while balancing pluralistic social values. Therefore the critiques of the Hart and Sacks’s principle of “institutional settlement” and the Legal Process grand theory of conflicting considerations, for their claims of neutrality and coherence as well for their consistent separation between law and politics, are not appropriate exchangeable for the proceduralization approach within the European context.

A crucial difference between the Legal Process School and the proceduralist view within the realm of European integration lies in what Joerges has called Deliberative rather than Orthodox Supranationalism in EU law. In light of the supremacy of EU law, Deliberative Supranationalism emerges in two dimensions, which radically distance themselves from the Legal Process school attempt to separate form from substance and avoid interfering in democratic decision-making because of the substantive belief in the

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348 See *Henry Hart and Albert Sacks*, supra note 275 at 167 “Doubts about the purposes of particular statutes or decisional doctrines must be resolved (…) so as to harmonize them with more general principles and policies. The organizing and rationalizing power of this idea is inestimable.”
democratic character of social life.\textsuperscript{351} In its first dimension, Deliberative Supranationalism (DSN I) deploys conflict of law methodology to illuminate how the interplay between European and traditional law requires mutual changing, learning and transformations. As Joerges puts it, “DSN I is not about constituting some transnational democracy; conflict of law has never aspired such a thing. Instead DSN I is about the respect of constitutional democracies and the limitation of one of their failures, It is neither anti-democratic not technocratic.”\textsuperscript{352}

Whereas Deliberative Supranationalism (DL II), in its second dimension complements the first one but it is even more rooted in the specificity of the European experience as a response to the paradox of unity in diversity. DL II consists in the move from government to governance and it operates through “institutionally unforeseen governance arrangements.”\textsuperscript{353} While DL I is a new way to conceptualize conflict of law in the EU, DL II is a law that “responds to the apparently irresistible transformation of institutionalized government into transnational governance arrangements.”\textsuperscript{354}

This twofold reconceptualization of Deliberative Supranationalism in European law represents the attempts by the proceduralist view to elaborate new forms of legitimacy in European private law by departing from the classical political theory approach.\textsuperscript{355} Rather than stemming from popular sovereignty and fundamental rights, Joerges model of legitimacy takes place through Deliberative Supranationalism, which by respecting and organizing national and local diversity, “ […] ensures the development of law-mediated governance practices and conflict resolutions which ‘deserve recognition’.”\textsuperscript{356}

\textsuperscript{351} See Gary Peller, supra note 349, at 564-5.
\textsuperscript{352} See C. Joerges, \textit{Rethinking Law’s Supremacy}, EUI Working papers, Law No.2005/12 at 19.
\textsuperscript{353} Id, at 20.
\textsuperscript{354} Id, at 21.
\textsuperscript{356} See C. Joerges, supra note 296 at 21.
CONCLUSION

In the current scenario, lawyers, scholars and judges have elaborated new ways to tackle the changing circumstances triggered by European integration. This essay demonstrates how in the last decade the claim that there is a constitutional asymmetry in the European Union has lost its appeal among lawyers active in the debate on European private law. While a deeper understanding of European integration has obliged lawyers to pay greater attention to the ECJ jurisprudence, lawyers have engaged in the bigger enterprise of elaborating new ideas on how to approach the harmonization of legal rules. The change in European legal consciousness can in part explain the European Commission’s greater emphasis on modernizing rather than drafting new regulation.357 On the one hand the selective reception of United States law and economics has induced lawyers to reject the harmonization of legal rules while favoring regulatory competition. On the other hand the production of ideas on deliberative supranationalism and new governance has shifted the interest of lawyer from formal to informal processes, from command-and-control regulation to experimental forms of governance, from hard to soft law. Legal ideas have been traded both ways across the Atlantic with their instruction manuals on how to apply the law as well as descriptions of their ideological background.