Efficiency and Equal Protection in The New European Contract Law: Mandatory, Default and Enforcement Rules

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In this article, I use efficiency arguments against the emergence in modern Europe of the dichotomy between merchant law and consumer law as two different non-communicating bodies of contract law. I try to explain this phenomenon and to show its dangers, particularly in terms of missing institutional priorities. I further advocate for a higher degree of clarity in distinguishing between default, mandatory, and enforcement rules of contract, and for the development of a
minimum body of unitary mandatory contract law, possibly to be introduced in a European code applied by a circuit of lower European courts.

II. Economic Functions of Contract Law

Contract law is an essential institution for an efficient market. Since there is no such thing as a separate market for consumers (demand) and a separate market for producers (supply), contract law has to face the problem of how to merge supply and demand into a single market. The creation of two different bodies of law at odds with each other would ignore this reality, and, as a result, reduce the chance of building efficient private law institutions for modern Europe.

Contract law, as a market institution, plays a number of different efficiency functions. It supplies default rules that might enhance efficiency by reducing transaction costs produced by time and energy-consuming negotiations. It supplies mandatory rules that limit the enforcement of promises not stemming from real freedom of the parties: such promises might not be "win-win" pareto-efficient exchanges. It provides enforcement rules introducing incentives to perform that avoid opportunistic behaviors of the party that has yet to perform, thus enhancing efficiency by enlarging the number of exchanges and the size of the market. [FN2] Enforcement rules might also reduce transaction costs because parties do not have to invest resources in creating self-enforcing strategies, such as exchanging hostages.

*539 These three different functions of contract law are not usually kept conceptually separate from each other: neither the law and economics literature, nor in comparative law, nor in the current scholarship on European contract law. [FN3] It is, however, imperative to keep these functions separate in approaching the main normative question of this article, namely, whether, in a future comprehensive European codification of private law, commercial and civil law should be kept separate. [FN4] Indeed, whatever the odds are of reaching cost-effective codification in the domain of contracts, an efficiency case can still be made for the creation of a unified circuit of European contract law, possibly based on a system of European courts, and certainly on direct, "horizontal" impact of European legislation.

While it is still unclear whether it is necessary to codify default and/or mandatory contract rules, it is beyond discussion that equally effective enforcement rules throughout Europe are not only a necessary complement for any efficient European contract law, but also a minimal requirement for a non-discriminatory common market. This article is organized as follows: part three discusses some technical and ideological issues underlying the traditional distinction between civil and commercial contracts and shows how this dichotomy is at the roots of the modern European distinction between "consumer law" and "merchant law;" part four analyzes the institutional bases of European contract law and discusses the distinction between consumers and merchants as a proxy for developing default rules; parts five, six, seven and eight look at the incentive structures and the motivation behind the main suppliers of European contract law, i.e., scholars, judges and legislators, and show how this structure explains the emergence and establishment of schizophrenic contract law. Finally, parts nine, ten, and eleven develop a critique of the present state of affairs, argue for codification of unitary mandatory contract rules and for the development of uniform enforcement rules of European contract law.

*540 III. The Distinction Between Civil and Commercial Law

Both in the civil law and in common law traditions, the much acclaimed principle of equality before the law, in the sense of a single, legal order that is binding on every individual within a territory, irrespective of his or her status or social class, can be considered relatively recent and not particularly successful. [FN5] Indeed, the "personality principle," by which every individual in society is bound by the law of its own group and not by a common territorial law, is a much more
common institutional arrangement. [FN6] Even in the aftermath of the French Revolution, when "égalité" was interpreted by the Jacobins as synonymous of a single, hierarchical, state-centered legal order, a degree of pluralism survived. Within it, the most notable example of a status-based different legal regime was that of merchants. Thus, the idea that not all individuals are the same, and that some of them deserve a special legal status, has been behind the classic distinction between a law for merchants and a law for ordinary people, a distinction central both in the civil law and common law traditions. [FN7]

In England, commercial law has been for centuries the domain of special "civilian" jurisdictions [FN8] and it was only after Lord Mansfield's stormy tenure as Chief Justice of the King's Bench that the common law courts have been able to "attract" commercial law jurisdictions. [FN9] In France and Germany, commercial law has been incorporated in special codes and has been administered in special courts. [FN10] Even in the United States, where the principle of equal protection of the laws can be considered as a sort of religious dogma, the different needs of the mercantile class are behind much of Karl Llewellyn's concept of the Uniform Commercial Code (UCC) (although his proposal of a merchant's jury was not adopted). [FN11]

This "privileged" position of merchants as a class, able not only to be ruled by a special body of law, but also by a "better" legal system more appropriate for their special needs, did not remain unchallenged. Aside from Lord Mansfield's incorporation of commercial law within the common law, an event that might have been driven by concerns other than the operation of the personality principle, [FN12] all the more recent and significant codifications, from Switzerland, to Italy to the Netherlands, have refused to deal with merchants in different codes and have opted for a unified approach. [FN13]

The challenge to a different law for merchants has been both ideological and technical. Eugen Huber in Switzerland, for instance, driven as he was by socialist-democratic convictions, was the first to point out that the special status of the merchant class was incompatible with the principle of equal protection of the law. [FN14] Under this principle of equal protection, no social class could claim a different treatment from other classes. After all, the French Revolution had been waged against the privileges that the legal "ancièn régime" granted to landed noblemen. With the change of economic power from noblemen to mercantile bourgeoisie it was once again unacceptable for the class in power to be "more equal" than the others.

From a technical point of view, the critique was based on the absence, in modern times, of the very reasons that have formerly justified the distinction between civil and commercial codes. While civil law was the domain of "legal form" in pursuit of protection of the weak (usually illiterate people) and required a fair amount of enlightened paternalism, commercial law was the domain of informality, of self-responsibility, and of risk taking. Transaction costs introduced by formalism were not justified by the needs of protection. Merchants were the more sophisticated social class, could read, write and understand the consequences of their dealings. Therefore, the law could allow them to introduce in their contracts penalty clauses that could not be reduced by judges, to issue promissory notes as negotiable instruments, and to construct more easily silence as acceptance of an offer. The German Commercial Code provides other examples, such as *542 the principle of caveat emptor used to bar merchant's complaints for a discoverable defect of a good if not declared immediately upon arrival, and the legal interest rate being higher and more reflective of the business reality. [FN15] With the social improvement and development of western societies, illiteracy was no longer as widespread and protective formalism was less justified. Commentators discussing the phenomena could talk about commercialization of the civil law, in the sense that some of the more formalistic restrictions to market transactions that simply provoked the growth of transaction costs without any particularly sound policy behind them, were to be abandoned.
As a consequence of this double set of objections, the more recent codification of private law has merged civil and commercial law. The two bodies of law have influenced each other, and while useless formalism, in principle, has been abandoned, the more unconscionable practices due to the imbalance of economic power are not admissible, even when occurring among "merchants." Commentators might regard this as the "civilization of commercial law," [FN16] but such evolution and debates can not be understood unless the distinction between default and mandatory contract rules is kept clear. In fact, the discussion is framed exactly the way it is because such distinction is often opaque.

If the focus is on default rules, around which the parties can negotiate, a case can be made that the distinction between merchants and non-merchants is a good proxy upon which to frame default rules. The usual argument is that if most merchants with time and energy to bargain would agree to certain rules as conducive to the needs of their business, then it is efficient to adopt default rules reproducing such rules. In other words, if being a merchant is a good proxy for one's preferences about a certain legal regime, it is efficient to offer special default rules framed for merchants by merchants. The problem is that codes by no means contain only default rules, and that transactions between merchants do not involve only merchants. In other words, there are considerable externality problems involved in contracting between merchants that end up affecting third parties relying on the institutional arrangements created by merchants. To be sure, a lot of commercial law, as developed in the thirteenth and fourteenth centuries in Italy and reproduced all over the world, has and ought to have a strictly mandatory nature whatever the much acclaimed nexus of contract theory might argue. [FN17] Sufficient examples are found in corporate law, [FN18] including corporate governance, bankruptcy law, and the law of negotiable instruments.

In other words, when the justification of a different, less formalistic, law for merchants is based on the absence of potential informational asymmetry (or similar weak preference phenomena), the focus is on mandatory rules and not on default rules. The presence or the absence of a paternalistic provision limiting freedom of contract is a matter that has nothing to do with default rules, unless one wishes to formulate this notion in a way that entirely changes its meaning. [FN19] Civilian scholars and courts have long been familiar with the distinction between mandatory and default rules [FN20] and the framers of more modern codes have struggled to find an interpretive solution to the problem of distinguishing between the mandatory and default rules. The German Bürgerliches Gesetzbuch (BGB), for example, reaches a quite precise linguistic distinction by using the word "may," rather than "must," when expressing default rules. Consequently, the ideological and technical critique to the distinction is not undermined by observing that when one has a good proxy, one should use it to have efficient default contract law.

IV. Legal Form, Transaction Costs and the Merchant's Paradox

From the economic perspective, it can be sound policy to choose reduced formalism when the quality of the parties makes it unlikely that preferences are affected by an information imbalance. Legal form enhances transaction costs, because many resources that could be devoted to wealth-maximizing transactions end up being absorbed by instrument-drafting, notaries, attorneys etc. [FN21] Legal form should consequently be admitted only to the point at which the benefits, in terms of security of transactions, litigation-avoidance, and exclusion of transactions involving parties with unstable, unsettled or unduly influenced preferences are higher than such costs. [FN22]

Obviously, this is a very difficult economic measurement to carry out and a very difficult choice, even if the results of such measurements were available. Such a choice involves the legal system's fundamental understanding of how much of private law is mandatory and how much is default, an understanding that might itself be determined more by tradition and path-dependence than by
conscious policy. [FN23]

Nevertheless, this effort is worth striving for and, in fact, it was by the incremental evolution throughout the different legal systems of the western legal tradition of doctrines related to the "general part" of contract law, such as mistake, misrepresentation, duress, unconscionability, just to mention a few of the most important doctrines. [FN24]

The fact that merchants, rather than non-merchants, are involved might well have some bearing in terms of their different levels of risk aversion, but certainly cannot be assumed as an indisputable dogma sufficient to entirely give up the effort of developing efficient mandatory contract law, taking care of information imbalances or similar problems when merchants are involved. If a legal regime gives wrong incentives to economic transactions, it does so whatever the social status of the individuals involved in it. From this point of view, economic efficiency and equal protection of the law offer similar prescriptions. [FN25]

Another apparent problem stemming from the granting of a special legal status to merchants is that merchants do not solely deal with other merchants. It is problematic to base the distinction between market actors in need of, the protection of mandatory contract law, as opposed to market actors that do not need such a protection, on a very rough classification like the one between merchants and non-merchants. For one thing, there is no such thing as an ontological (or even economic) distinction between merchants and non-merchants *545 that can be used in all circumstances and throughout all legal systems. Different legal systems have used different criteria to figure out when transactions can be considered mercantile. [FN26]

We might try to compare such different national criteria from the point of view of economic efficiency to figure out which legal system uses a better proxy for the purposes of default contract law. We can even assume that the most efficient alternative that we are able to detect is the economic meaning of "commercial," but we still will not be able to account for a large variety of problems that arise when we turn from the default aspects of contract law to examine the mandatory ones. In other words, even assuming that there is such a thing as an efficient mercantile contract law that can be entirely default and that only the law for non-merchants has to be at least partially mandatory, what contract law should be applied when a member of one class deals with the member of the other? [FN27] Interestingly, different legal systems also disagree about this problem. [FN28]

There is a fundamental tension that explains why this problem is not easy to solve. The explanation can be somewhat framed in public choice categories, touching upon an important issue encountered below in the discussion of consumer contract law. When the law results in a special, "better" legal regime for one group, this is usually because this group is strong enough to lobby the political process to obtain it. If this is the case, the group that was able to receive a special legal regime will be guard it jealously. Consequently, when merchants and the non-merchants deal with each other, the former will require (having enough power to do so) their system to apply. On the other hand, as it happens in the case of the law for merchants, the special regime can be justified in terms of efficiency only within the group. If being a merchant is a good proxy for always being sufficiently informed, there is no need for the mandatory protection of contract law. Non-merchants, however, do need such protection with the consequence that when the conflict arises across the categories, the protection of mandatory contract law is still needed. Such a choice, of course, is in the province of courts to make in interpreting the usually ambiguous provisions that codes devote to the issue.

*546 This problem has been, and still is, very difficult to resolve in legal systems that accept the distinction between civil and commercial law as the basis for fundamentally different legal regimes.
or, sometimes, even for entirely different jurisdictional bases and decision-making. If litigation for merchants is handled in different courts and with different rules than litigation for non-merchants, the choice becomes crucial and is itself a high source of transaction costs. Resources are diverted from wealth-maximizing transactions to find out who is right and who is wrong in the given dispute. Furthermore, even before this substantive choice, resources are used to find out who decides and according to what rules. Such choice often affects the decision on the merits, which will come out differently according to the set of rules that one applies. Of course, sometimes this use of resources is unavoidable (e.g., in international litigation), but introducing it when not necessary results in a waste of resources.

Such a problem might absorb much of a lawyer's energy, thereby resulting in additional transaction costs, as always happens when one has to make a decision about who should decide. The difficulty is demonstrated by the fact that legal systems in the civil law tradition fundamentally disagree with each other on many points and have worked out complex lines of distinctions that become part of the legal culture of each of them, consequently contributing in making a common understanding of the problem even more complicated.

V. The Emergence of Schizophrenic Contract Law in Europe

The European systems that have abolished the different regimes between merchants and non-merchants have moved a step in the right direction in avoiding a potentially wasteful problem. Following a unitary approach that learns lessons both from the needs of protection lying behind the civil law and the needs of informality lying behind commercial law should allow a serious search for a sound system of private law. Striking this balance, and more generally that between default rules and mandatory rules in contract law, is certainly a key aspect of any system of private law seeking to create the institutional framework for an efficient market. The unitary approach does not necessarily imply abandoning the use of different default rules for merchants as opposed to non-merchants. But when it comes to mandatory rules of contract law, tackling problems of opportunistic or other inefficient behavior, efficiency dictates unified rules.

*547 In Europe today, the need to create such an efficient system of private law is a high priority in the legal agenda. Indeed, both needs--efficient market and protection of the weak--are spelled out clearly in the constitutional structure of Maastricht. The Maastricht Treaty [FN29] makes it clear that the creation of a community based on a "market economy" and on "free competition" in a common market is to be considered a top priority. [FN30] According to its language, the creation of a common market and of a monetary and economic union is a prerequisite for balanced, harmonious, sustainable growth and development, aimed at a high level of employment and of social protection, at the improvement of the standard and quality of life in the European Union (EU) and at the fostering of solidarity and social and economic cohesion between the "Member States." [FN31]

Their emphatic constitutional phrasing makes the priorities of the EU action clear. Among those particularly relevant for the aim of this article are: the harmonization of national legal systems to the degree necessary for the operation of a common market [FN32] and the contribution of the EU to a stronger consumer protection regime. [FN33] The fundamental principle of subsidiarity [FN34] allows the EU to also take action in areas other than those of its exclusive jurisdiction if the general targets set forward in Article 1 can be "better" obtained by community action rather than by State action. [FN35] Some scholarship has argued that this principle is primarily aimed at the fostering of efficiency in the common market, [FN36] but whatever its meaning might be, it is a truism that the market imagined by the European framers should be efficient. The attribute of efficiency to a market is like that of justice for the law. No one would argue against it, nor would one dispute that an efficient market needs good institutional arrangements. In other words, there is a constitutional
mandate in Europe today to think about the best possible institutional arrangement for a common market. This market, of course, finds among its actors both merchants/suppliers and consumers/demanders.

As the previous discussion suggests, efficiency requires as small a number of mandatory rules as possible, but it also suggests the general applicability of the ones that are considered unavoidable. Knowing which rules of mandatory contract law are unavoidable requires a thorough discussion and much empirical testing; such need for discussion seems behind the emergence of a large literature devoted to what is called the "new common law of Europe." [FN37]

One would think that in the creation of this institutional structure much use is made of past experience, that the number of mistakes are avoided, and in particular that the aim of the whole enterprise is clear to everyone at least in those circles, such as the academic ones, that do not have a direct stake in it. Unfortunately, the experience of the rise and fall of the opposition between civil law and commercial law has not taught us much.

Instead, a rather curious phenomenon is occurring, whereby two separate non-communicating bodies of law are growing independently from each other, fostered by different agents, and approaching common problems from entirely different points of view. This phenomenon represents a structural deepening in the dichotomy between merchants and non-merchants discussed thus far. Indeed the relationship between the commercial code and the civil code has long since been settled, with the commercial code assuming the function of lex specialis. This "seemingly simple" arrangement provides that if the matter is not commercial, the civil code controls the transaction in its entirety (perhaps with some other special statute). If the matter is commercial, the civil code governs only with respect to questions not covered by provisions of the commercial code. [FN38] No such arrangement, although problematic, has been worked out in the case of the twentieth century's novelty of an explosion of consumer law, nor as far as I know, has it been significantly discussed. The "new merchant law," predominantly made of default rules, and the "new consumer law," predominantly made of mandatory rules, compete in the attempt to attract within their philosophy the general contract law, traditionally contained in national civil or commercial codes. [FN39] While "[b]oth legislative and doctrinal attempts to establish a demarcation line between 'commercial' and 'civil' transactions have lead to obscurity and excessive refinement," [FN40] it nonetheless remains true that civil and commercial codes, although the product of different legal traditions, share the characteristic of being the product of long incremental and relatively principled evolutions in the law. This fundamental structural similarity is lacking between new merchant law and consumer law. The new merchant law is to a large extent the product of a variety of private legislatures motivated by the technocratic ideal within a structure of incentives that de facto fosters the status quo and whose conservative agenda ends up having a relatively limited impact in the real life of the law. [FN41] The new consumer law is the product of a more traditional political process determined to a large extent by pressure groups whose agendas do not necessarily correspond to the largely "progressive" rhetoric characterizing the new European consumer law. [FN42] Interestingly, both these developments in European contract law share a similar lack of legitimacy and both involve not only as spectators, but also as protagonists, legal scholars in a variety of capacities.

Scholars are assisting or participating in enlarging the gap between a supply-oriented contract law and a demand-oriented one. Such separation is neither challenged from the technical nor from the ideological perspective. In Europe today, scholars are assisting the repetition of the old story under a new label of the birth of "consumer contracts" and more generally of a European consumer law. [FN43] Unfortunately, changing the name neither precludes even worse problems of coordination and of recurring tensions within the system, nor the increase of transaction costs created by the use
of such rough unprincipled proxies (merchants vs. non-merchants; consumers vs. non-consumers) to solve the fundamental tension between what should be mandatory and what can be default in the general contract law. As a consequence of this schizophrenic attitude, we are assisting today a comedy of errors in European law with the result that the only significant mandatory contract law is that produced at Brussels in the field of consumer protection. Meanwhile transactions that are not covered by such random and sweeping, but piecemeal and unprincipled legislation, are left entirely in the hands of national courts or in the entirely default world of the new merchant law. [FN44]

For instance, the example discussed by Kötz in the domain of abusive clauses in consumer contracts concerns a clause that limits liability in a parking garage that would not be sustained if one's personal car was stolen, but would bar one's company from recovering if the car was an official company car. [FN45] Patently absurd results of this kind end up discrediting European contract law in general. Further intellectual consequences are addressed below in the conclusion.

The obvious question is why, once more, rather than focusing on the crucial issue of striking a balance in the domain of contract law between the needs of protecting the weak party and of not wasting resources in the process does Europe follow the path of dividing up the system of private law? Why are two systems created, one for the assumed weak, or less informed, party in need of protection and one for the assumed strong party that does not need it? Why has the thorough and articulated discussion that has accompanied the enactment of the unitary option in Switzerland, Italy, and the Netherlands been forgotten? Why have the needs of "commercialization" of the "common law" that Lord Mansfield (coming from a civil law system) so brilliantly carried out in the formalistic common law system of three hundred years ago not taught a lesson to lawyers engaged in the building of a common law of Europe?

One possible way to offer an explanation is to observe what European lawyers are currently doing to establish European contract law, as well as what the European legislative institutions are doing, what problems they are facing, and how the case law is developing in this area. For such an analysis to be complete, it needs to deal with all the fifteen European state jurisdictions, as well as with the Community-wide level, something that goes beyond the limits of this article. I will, therefore, only address a few broad issues to briefly explain the motivations behind the different formats of European contract law and to attempt an explanation for the observed emergence of the two non-communicating bodies of contract law. I will finally leave the analytical framework and provide normative lessons on the issue of European codification.

This phenomenon of the growth of consumer law as a product of substantive lobbying at different levels of government is not unique to Europe. In the United States, for example, the most significant recent developments in the domain of contract law are in the area of consumer protection. These developments have created a fascinating dynamic between state law and federal law. While it would go beyond the modest scope of this article to compare the consumer protection law of Europe with that of the United States, I still submit that the presence of a thoroughly national legal culture in the United States significantly facilitates the coordination between the different bodies of contract law and makes the explosion of consumer legislation to be absorbed more smoothly within the system of general private law. Although many different positive systems of contract law have always existed in the United States (e.g., federal law, state law, and the U.C.C.), there is little question that there is only one unified body of general contract law taught nationally, and that this body addresses many of the fundamental questions, such as the degree of desirable paternalism. [FN46]

VI. Thriving and Divided Scholars
Scholars are active in the making of European private law, both as individual teachers and legal writers and in a number of different collective scholarly projects. The most important technical contribution in the domain of contract law is certainly the path-breaking work of Hein Kötz who, together with Axel Flessner, has recently published an important introduction to European contract law. [FN47] It was in the methodological nature of this work to be purely positive, and, as a consequence, it attempts to reflect the reality of the emergence of the new merchant and consumer laws, rather than discuss the normative perspective. The Trento Common Core of the European Private Law Project has a similar nature. With its different questionnaires on contract law, it reflects the existence of different regimes for merchants and/or for consumers. Once enough data is available, the effective impact of the different regimes and the extent to which the French-German approach is actually shared in a majority of other legal systems will also be clear. [FN48]

Meanwhile, the work of Reinhard Zimmermann is concerned with the situation prior to codification and, as it should be in Europe, once the crusade against the idea of a European codification of private law is finally successful. Zimmermann's methodology is not openly normative, but his political agenda is rather clear in promoting a return to the hegemony of the German model whose leadership is threatened by American law. Within this approach, the emergence of a scholarly body of new jus mercatoriorum, can only be welcome as it is the assumed re-emergence of what he calls the "usus hodieri mus pandectarum." [FN49] The piecemeal, unprincipled, unsophisticated nature of Brussels consumer law is just another piece of evidence in building the indictment case against the European Civil Code.

The most important collective enterprise producing samples of codified work is that led by Ole Lando in the so-called Lando Commission. The first piece of the Commission's published work, reflective as it is of the UCC and of the Americanization of the modern international academic community, confirms the centrality of the new merchant law in the interest of European legal scholarship. [FN50]

Although the Principles of European Contract Law, like the American UCC, are not limited in application to merchants, the "modern formulation of a Lex Mercatoria" is considered "[o]ne of the immediate aims of the Principles." [FN51] It remains to be seen how the proposed idea of integrating the ambiguous Unfair Terms Directive within the principles will be carried out by the Lando Commission. [FN52]

The extremely warm reception of the Unidroit Principles, a "model code" expressly devoted to the merchant law, completes the evidence. [FN53] As I have elsewhere argued, both these pieces of normative work hide under the technocratic ideal a market ideology aiming to keep contract law "that really matters" in the hands of leading law firms and of their corporate clients. Both these projects are entirely unconcerned about the emergence of consumer contract law, a device that, given the present European enforcement structure, at most makes products slightly more expensive without threatening the status quo. [FN54]

In Italy, at least one scholar has indicated that the phenomenon of the re-emergence of a dual body of contract law is an issue in itself, although a lot of work has been published merely to try to reconcile the language of European law with that of the Italian Civil Code. Only one scholar has ventured to question why such a dual body of contract law is reemerging, and has come out with results entirely consistent with the American literature on network externalities and hierarchical organizations. [FN55] Consumer law is described as a reaction to efficient organizational practices.

Interestingly, the Pavia Project, led by Professor Gandolfi, that has not resisted the temptation to propose "Book Four" of the Italian Codice Civile as the basis for the future European codification,
has not based this choice on the Italian "unified" approach. Rather, the project, concerned more with political than with technical matters, has insisted on being equidistant from the French and the German codes. [FN56]

In France, a whole movement known as "fairness in contract" has developed which carries away a lot of contract law from economic soundness. [FN57] The emergence of crucial aspects of consumer contract law, introduced by statute as early as 1972, not only have offered the model for subsequent EU legislation, but have made France the forerunner for those who consider consumers as weak per se and who consequently claim a special law for them. [FN58]

*554 The issue of codification, central in the European debate after the 1989 "Resolution" of the Strasbourg Parliament, has produced a lot of discussion but very few clear ideas. A few scholars have recommended limiting the Codification's scope to contract law and a few more, particularly the Dutch, have proposed their own code as a model. But none of the two traditional preliminary issues in recent private law codification has been solved, nor, thoroughly discussed: should the code contain a general part? Should commercial law and civil law be merged or separated? [FN59] An international community of consumer lawyers seem also to be emerging to praise the development of consumer protection and to extend this group's privileged status (at least on the books). [FN60]

In general, observing the scholarly debate and activity in Europe today, one could make the following remarks: On the one hand, European scholars are certainly assisting the development of a European scholarly community, and starting to deal with European law not as a foreign legal system but as an institutional reality in which scholars must play a large role. On the other hand, the debate seems still quite general, the issues on the table are not clear, and the interpretation given by lawyers to the idea of a common market is rather unsophisticated.

What is more important, ideological polarization has divided consumer contract law scholars, usually from the left, from new merchant law scholars, usually from the right. The extremely limited interaction among the two groups has increased the gap between the two types of contract law. Commitment to free market principles too often translates into believing in a value-neutral system of private law; in turn, in the domain of contract law, such a system desperately tries to resist making value judgments. Unfortunately, politically legitimate values are simply not there in Europe, so that, when choices are made, they appear too easy to challenge on the political ground. [FN61] Commitments to consumer rights, on the other hand, regularly fail to acknowledge *555 the boomerang effect of inefficient mandatory contract law on those weak market actors that consumer contract law wishes to protect. [FN62]

The hegemony of the three stronger EU partners (Germany, France and England) seems rather intense, and patterns of academic prestige characterize the domain of scholarship. The emphasis on the need for a closer union, the only politically acceptable "value" in Europe today, points at American law not only as a prestigious reservoir of experience (e.g., the UCC, and the Restatements), but also as a neutral one, accepted by many just because it is a third party in the internal competition for power of the larger partners. [FN63]

Interestingly, the distinction between merchant and consumer law is perfectly functional with both the puzzle of political values in the making of the European market and as it is fostered by the choice of U.S. law as a model. [FN64] A law of contract that supports purely free market-oriented decisionmaking is much more acceptable and easy to support when dealing with businessmen. [FN65] In arguing for a fully default legal regime that might accept harsh treatment of the weaker party in the name of market competition, it is nice to know that there also exists a different body of law applicable to the weak consumer who really deserves protection. Conversely, when arguing for
patently inefficient rules that substitute the will of the parties for that of the judge without taking too much care of the incentives that this kind of decision making might introduce, it is comforting to know that there also exists a "real," efficient contract law that works as a framework for business transactions. In other words, the artificial creation of one legal framework for the supply side and of one for the demand side lowers responsibility and is, therefore, easy to accept as a mediation between conflicting ideological positions. [FN66]

While there is no agreement on drafting a code of private law, there is surprising agreement on placing contract law as the frontrunner of the areas of law which are candidates for codification. More *556 interestingly, the emphasis on uniformity quite naturally points to the UCC as a model. [FN67] Most of the rules that European civil law countries would regard as the "general part" of contract law are those already incorporated in the UCC. The frequent use of the UCC as a model (in both Lando's principles and the Unidroit Principles, for example) reinforces the cultural tendency to reproduce the dichotomy between consumer and merchant law in private law.

Finally, the hegemony of Germany and France also pushes in the same direction, because the institutional distinction between commercial law and civil law is a deep cultural characteristic of both of them. Both German and French scholars are quite fond of this institutional distinction, and they quite naturally reproduce it as a point of departure.

VII. Prolific Eurocrats

As European contract law scholars from various countries discuss, restate, answer questionnaires, produce model codes, and write teaching materials and hornbooks in European contract law, the political-bureaucratic institutions at Brussels are active legislating in the field of contract law. [FN68] Yet, the only official European production of contract law thus far is in the field of consumer contracts.

In creating special rules for consumer contracts, Brussels has acted as if consumer protection could be handled outside the more fundamental issues of efficient contract law and institutions. As usual, the target of protecting consumers by means of directives 85/577 [FN69] (on door-to-door sales) and 93/13 [FN70] (concerning unconscionable clauses in consumer contracts) has been pursued without taking into account the real dynamic of private law in the majority of the member States.

The obsolete distinction between civil and commercial law has been reproduced by emulating the hegemonic European models (mainly French and German), mixing them with some rhetoric of consumerism imported from the United States, and enacting them as directives. Unfortunately, the reality of national and European law and legal processes cannot be ignored without creating a mismatch that, *557 on top of frustrating the protective target of consumer-friendly law, enhances transaction costs. [FN71]

Brussels has attempted to remedy the absence of a fundamental technical understanding of the complexity of national contract law by using the instrument of the directive rather than that of regulation. On its face the choice is sound and arguably mandated by the European Treaty. Directives are softer law, and most often they only set forward the minimum targets. The States are left free to choose the way to reach the objectives by means that are more compatible with their internal legal structures. [FN72]

In practice, directives, which over time became more and more detailed and specific, are only politically easier legislative instruments. It is easier to put together the high majority that is still needed to legislate in Europe today when Member States know that they will keep some freedom in the way (and in the timing) they reach results. It is also technically easier to use a directive. Poor
drafting techniques, non-technical terminology, lack of precision, and other defects that would be
difficult to bear in a directly effective regulation become excusable defects when affecting a
preliminary phase that requires another enactment to become "real," enforced law. Directives fix a
term within which they should be implemented by a national law. Only after this enactment do
directives become "real law." In theory, there is plenty of time to correct technical mistakes in the
process of translating them into the States legal systems. This assumption could not be less
accurate. Legal systems are always late in the process of enactment, and they end up enacting laws
hastily under Community pressure without devoting much time to the technical aspects of a good
reception. [FN73]

Some Member States, in which being late is part of the national culture, systematically receive the
directives with years of delay from the deadline. Usually directives are plainly ignored by the
scholarly debate until they become "real law." When the directive is eventually translated, it is
often done in a rush, without a thorough discussion of how it might have been done better.

*558 Note that this problem burdens legal national legal systems in an uneven way. Those systems
that are more powerful in Brussels have been able to have their own law introduced in a directive
and imposed on everyone else without having substantial changes made in their legal systems. For
every example, very little change was needed in Germany to receive the directive on products liability.
[FN74] The strict liability standard was already the law. [FN75] Similarly, very little change was
needed in France for the directive on contracts concluded outside of the business premises, [FN76]
because that had been the law in France thirteen years ago! [FN77] Therefore, very rarely are
directives "improved" in the process of reception. Usually the shortcomings of the national
legislators and political processes are added to those in Brussels.

Moreover, despite the clear formal distinction, the substantial difference between directives and
regulations is blurring. Even directives that resemble mere stating principles have become more
and more detailed. The two mentioned directives on consumer contracts, for example, are in fact
very detailed. One grants to the consumer a peremptory right to change his or her mind within one
week of signing the contract. The other contains a precise, extended list of contractual clauses that
are considered unconscionable per se when contained in consumer contracts.

Looking for explanations of irrational legislation is a rather easy exercise. The literature on public
choice has been used and adapted to explain the political bureaucratic process in Brussels. [FN78]
Interest groups are active and this highly rhetorical kind of legislation might be welcomed both by
consumer activists and by large businesses. For example, with respect to the products liability
directive, [FN79] a compromise was reached on "development risk," shielding the large business
enterprises from the more threatening claims. [FN80] The different, much *559 lower impact of
consumer protection in Europe, as compared to the United States, offers the best evidence of the
effectiveness of the Brussels lobbying industry. [FN81] However, one can find even more
persuasive explanations within organization theory. [FN82] Organizations and bureaucracies have
their own survival and enlargement as principal targets. An ad hoc General Division exists in
Brussels devoted to consumer's protection (Dg 24). The production of an outpour of legislation is
the best strategy available to this division to be perceived as alive, useful, and in need of more
funds.

VIII. Distracted Judges
The European Court of Justice (ECJ) has found itself in trouble within this institutional scenery.
The ECJ's case law is extremely interesting, although not easy to rationalize. To make some sense
of it, I suggest that the ECJ has attempted to reconcile two needs: the substantial need of the
effectiveness and supremacy of European law, and the need of maintaining a formal distinction
between directives and regulations. From the first perspective, absent a formal "supremacy clause" in the European "constitution," the ECJ has been busy introducing such a clause through its case law. Early decisions such as Costa v. Enel [FN83] or Simmenthal [FN84] are the European counterpart of the famous American cases, such as Chisholm vs. Georgia, [FN85] Martin vs. Hunter's Lessee [FN86] or Cohens vs. Virginia. [FN87] In this early case law, the ECJ has successfully persuaded reluctant Member States to give up enough sovereign power to create a true European legal system.

Reforms induced by European directives, despite the already discussed possible effectiveness of the Brussels lobbying, might still create a more difficult business environment for business firms. Such firms might then be attracted by those States in which national law imposes a lower standard than European law. As a consequence, States have an incentive to avoid implementing directives in order to attract business. This phenomenon, sometimes referred to as the "race to the bottom," is very well known within the American experience through the making of much of corporation law in the state of Delaware. [FN88] The ECJ has attempted to solve this problem with different degrees of effectiveness.

Specifically, in light of the problem of States not respecting the obligation to translate directives in their own legal systems, the ECJ has developed a number of principles. As early as 1970, in the case S.A.C.E., the Court introduced the principle that directives that are mere applications of rules contained in the Maastricht Treaty are directly binding in legal systems of the Member States, after the expiration of the term of reception, even in the absence of a formal reception. [FN89] Four years later, in 1974, in Van Duyn, the ECJ held that when directives merely impose on member States a "negative" duty of abstention from a given discriminatory act, they are also directly effective after the expiration of the deadline. [FN90] Finally, five years later, in the leading case of Ratti, the Court decided that when a directive is sufficiently clear and imposes absolute and unconditioned positive duties to Member States, it can be considered directly binding. [FN91] The scheme was completed by the line of decisions following the much discussed Francovich case. [FN92] If an individual is damaged by the fact that a State has not timely translated a directive, he has a right to be compensated by the State. [FN93]

Then, what's left of the formal difference between a directive and a regulation after this case law? [FN94] The ECJ has not been able to accept that the formal distinction has disappeared in practice and that the choice is now a mere matter of political opportunity or of technical draftsmanship, perhaps dictated by the subsidiarity principle. It would have been a contribution in the direction of giving some meaning to this mysterious category to say, for instance, that in some areas of the law national legal cultures are in a better position to monitor the compatibility between the substantial standards contained in the directives and the form of State private law. In some other cases, the necessity to carry on the European action could well require less freedom to national legal systems which should adapt to European law rather than the other way around. [FN95] From a specific decision passing through a regulation, all the way to a broad directive, there is a continuum that allows discretion to the European institutions in the form to give to their decisionmaking. The language of the Maastricht Treaty is certainly not conclusive in guiding the choice. The exploration of such a continuum, the semantic level of European enacted law, and the relationship of this discretionary power with the subsidiary nature of European law are within the ECJ's province of determination.

Rather than embark on such a worthy journey, the ECJ has struggled to save a formal distinction between the two categories of regulations and directives. The Court has ignored the detailed structure of most directives (certainly those on consumer contracts) that in its previous, already mentioned, case law it had rightly put in the center of the stage. It is particularly interesting to see at
work here the path-dependent behavior of most of the ECJ justices, enslaved by the fundamental private law-public law dichotomy shared by the majority of the member States. [FN96] Indeed, in a line of cases inaugurated by Marshall [FN97] and carried to its consequences in Faccini Dori, [FN98] the Court has looked for a formal difference between directives and regulations in the difference between: (a) the relationship between the individual and the State; (b) the relationship between individuals. According to this line of distinctions, directives only affect the relationship in category (a), but only regulations can grant real rights reaching the relationship in category (b).

The case of Faccini Dori involved an individual who had bought an "English language course" at a Railroad station. The consumer had subsequently changed his mind and had communicated to the seller that he wished to rescind the contract, an option that the Directive made open to consumers contracting outside of commercial premises. Despite the contrary opinion of the Advocate General, pointing at the frustration that such a decision would produce not only to a too pro-consumer policy in European law, but particularly to the frustration of the uniformity of private law within Europe, the Court referred to Marshall to decide its case. It held that directives, until formally *563 received by national legal systems, despite the clarity of their content and despite already being part of the European legal system, and, therefore, binding on Member States, do not grant rights or duties to individuals against other individuals. In other words, they do not have "horizontal value." [FN99] This line of decisions, although severely criticized by most scholars, not only has thus far resisted being overruled, but has been reinforced by even more recent case law.

IX. The Vertical vs. Horizontal Mismatch

But how can a system of private law, particularly as ambitious as one creating a new consumer contract law, live in such a state of suspension? How can a State have an obligation to consider a not yet formally received directive as law (binding in all its institutions) and at the same time have its judges not be able to apply it in the natural domain of private law, i.e., in the relationship between individual market actors?

The European private law coming out of this institutional picture is the least ambiguous. On the one hand, European institutions seem eager to protect consumers to the point of creating a special law and reintroducing a schizophrenic contract law, despite the inefficiency of and the denial of equal protection that such an approach creates. On the other hand, consumers, the direct beneficiaries of such a policy, are left without a place to claim the rights that have been granted to them.

The problems behind this ambiguity are exemplified by two episodes. At the end of the 1980s, when Germany had already formally received the directive protecting consumer contracts concluded outside of business premises, while Italy and Spain had not, it was customary for German travel agencies to have their customers sign contracts directly with local, Spanish or Italian colleagues. Such contracts would subsequently be re-transferred to German tour operators in order to have Italian or Spanish law apply. So much for uniformity! [FN100] An economist would say that such an arrangement would make a travel package cheaper than concluding the contract directly in Germany. However one might look at this picture, as an incentive to the so-called "rush to the bottom," [FN101] or simply the avoidance of the costs introduced by an inefficient mandatory contract law in an industry such as tour operators in which early planning has a high value. The fact is that such disparity of legal regimes within the Union was directly conferring advantages to operators located in one Member State over those operating in another.

The binding nature of non-ambiguous, non-received directives on Member States is a settled principle. Francovitch introduces a liability rule that gives an incentive to Member States not to
cause damages to their citizens by delaying the enactment of the directives. A judge that reads the ECJ precedents in their correct meaning, being an official of the State, might feel, as an obliged official of the State, to directly apply a clear directive. And indeed, a number of lower Italian judges have interpreted their role in accordance with this duty, enforcing the duty to communicate to consumers their right to change their mind without explanation. [FN102] This unclear state of contract law is very inefficient. A rule of contract law should be as stable as possible to allow market actors to arrange their business around it. Not knowing whether a market actor has the duty to invest money in the knowledge of European contract law contained in clear directives certainly multiplies the inefficiencies. [FN103]

*564* X. A Critique of Substantive Contractual Schizophrenia

Issues of tremendous importance are approached and hastily solved by the directives that are creating the new consumer contract law. Are the business planning costs of a rule, such as the one contained in directive 85/577, [FN104] that considers a consumer as a market actor with unstable preferences and that one cannot bargain around, justified by their benefits? Is it worthwhile to exclude from the market, as done by directive 93/13, [FN105] for example, an entire set of actors due to the ban on the clauses by which suppliers guarantee themselves against the risks created by the economic weakness of demand, because those clauses are perceived as abusive? [FN106] Is it worthwhile to consider the consumer "per se" economically weak to the point of needing paternalistic protection (mandatory nature of consumer contract law), without distinguishing between different consumers? In other words, are consumers a class specific enough to be efficient (like classes for purposes of insurance coverage) or could the costs of further specifying the class be covered by the benefits of a more precise discipline? Is it fair or efficient to consider on the same footing the big multinational firm and the small business in their contracts with each other just because they are both professional?

Such questions need to be approached and discussed in a thorough debate before they become the law for all of Europe. The previous analysis of the fundamental institutional motivations of the different formats of modern European contract law suggest that very little, if any, of such a discussion has taken place. Scholars, busy in maximizing prestige and visibility, occupy politically divided circles developing sectarian ideologies fundamentally coherent with the two models of non-communicating contract law that we have explored. Leftist scholars support mandatory consumer law while rightist scholars devote themselves to the all default new merchant law.

The ECJ, meanwhile, is busy maximizing central control and leadership over national courts, making its constitutional law concerns prevail over its responsibility in the domain of private law. Brussels bureaucrats are busy maximizing organizational health and size, as they are exposed to well developed lobbying activity, playing their role outside of the effective political control. Such different concerns all end up working in favor of the status quo of compartmentalized knowledge and lack of basic research into the nature of a new system of European contract law. The distinction between merchants and consumers might consequently seem natural because it is part of that tacit knowledge transmitted from one generation of lawyers to another without real awareness of its implications. Such implications were, at least in part, and in a different context, discussed in a number of systems when deciding whether or not to keep a separate commercial code. However, they have never been dealt with by the leading European civil law systems and, as a consequence, are not confronted in light of the strong re-emergence of schizophrenic contract law. Today, with the more sophisticated and less positivistic legal approaches available, there are a variety of options that might be pursued in the domain of the balance between default and mandatory contract law, in that of the soft or hard nature of European institutional instruments, and that of the better located institutional actors in the building of European contracts.
Such options deserve to be explored by authoritative institutional actors, who accept their responsibility, acknowledge the importance of these options for an efficient common market, and do not incidentally make decisions under different institutional worries. Certainly, if the incentives introduced by private law are not uniform through the European market, some actors will lose and some will win from the disparity. Uncertainty, however, results in everyone losing.

The problem with consumer protection, as well as for most private law in Europe today, is not the lack of sound substantive rules throughout the legal systems. Data collected thus far in the Common Core Project (Zimmermann & Whittaker on good faith; Gordley on enforceability of promises) show clearly that legal systems have been able to work out acceptable substantive core principles of contract law to serve as a background for market transactions. There is a need to analyze data and to make explicit choices, such as those between mandatory and default rules that are too often carried on within the tacit, professional dimension of the legal system.

XI. The Case for European Enforcement Rules of Contracts

In approaching the last function of contract law, its enforcement rules, it is important to note that incentives are not given only by substantive law but mostly by the law as it is applied, including the timing of its enforcement. Contract law, as an institutional framework for a common market, is made up of the aggregate between substantive rules (mandatory and default) and enforcement devices. Uniformity of signals and incentives stems from this aggregate. Contract law is justified as an enforcing mechanism to avoid opportunistic behavior by the party who must perform later, especially because the quality of the supply sometimes appears only later.

As discussed earlier, from the substantive perspective, mandatory contract law is justified only when one party needs paternalistic protection because of instability of preferences, serious information imbalances, or risks connected with the uneven opportunity to express preferences (severe bargaining disadvantage). Whether all or most of the "consumers" fulfill these criteria and whether none of the "merchants" does, seems an assumption in need of some evidence. One needs to assess carefully the decision that the balance and equilibrium point of centuries of evolution in general contract law all of a sudden do not work for such a sweeping category as that of "consumers" (which after all is everybody not acting in a professional capacity). Such an assessment can come from the trial and error process, monitoring real life situations, and comparing what we have with what we desire. In other words, these are professional decisions better taken within professional circles and particularly by the judicial process. Unfortunately, such a judicial institution focusing on fundamental private law issues is simply absent in Europe today, and one can seriously doubt that from the substantive perspective national courts, imbedded in local culture, can act as good substitutes.

From the perspective of enforcement rules, the situation seems even worse. Assuming we were able to have a uniform interpretation of the broad issues of substantive contract law, much disparity would still be maintained by the nature of national judicial processes which are in charge of the enforcement function of contract law.

Institutions develop as a reaction to transaction costs. European institutions are justified by the subsidiarity principle when they are better transaction cost-reducers than national institutions. If there is one thing that we learn from neo-institutional economics, it is that when there are transaction costs there are institutions, and that there is no such thing as the absence of institutions. We learn only that there might be more or less efficient institutional arrangements. In Europe today, there are very large areas in which there simply is not an acceptably developed contract law enforcement activity in place. Due to delays in the judicial process, costs of justice, or "access to justice problems," incentives to opportunistic behavior in contract dealing persist. We do
not need more substantive law to tackle patterns of opportunistic behavior that would be patently wrong under any kind of substantive general contract law. We need incentives to properly perform, and such incentives can only come from enforcing mechanisms.

The lack of uniform enforcement mechanisms makes contract law completely uneven throughout the EU. The consumer will be the loser and the merchant the winner (or vice versa) in Italy whatever the substantial "gift" the former receives by a European directive, if litigation costs and other institutional incentives discourage litigation in most of the cases. With exactly the same substantive contract law, the situation might be the opposite in Sweden. Race to the bottom incentives might discourage national legal systems from upgrading their judicial systems for the very same strategy that discourages the timely reception of directives: business advantages in their territory and consequent incentives of business activity to relocate there. [FN112]

One could argue at this point for the introduction of a European system of courts, both trial and appellate, with concurrent decisionmaking responsibility with national courts in matters of European private law. The case law of such courts might properly tackle the number of issues that are left open in substantive contract law by the development of consumer contracts. This case law would be a better interpretive guide than the feeble one thus far provided by the Court at Luxembourg burdened as it is by other constitutional responsibilities.

Of course, such an arrangement has itself high administrative costs that have to be weighed, policy-wise, with the benefits of a thoroughly European system of private law. The function of such courts, however, would not only be substantial, but most importantly would be to offer a system of European access to justice, something needed much more by consumers and merchants than substantive rules diversifying their status inefficiently and against equal protection. The substantive common core of contract law that we already have needs to be applied rather than distorted.

The action for consumer protection required by Maastricht should be carried out with this priority in mind. [FN113]

Alternatively, one might rely on national courts and national systems of access to justice. This alternative makes it more difficult to have a reasonably uniform system of contract law judicially established. Until the ECJ realizes that in a Union based on a common market, soundness in contract law is no less important than other constitutional issues, and that consequently, in deciding the former one should not be concerned by the latter, scholars will have much more responsibility.

From the enforcement perspective, however, this State-based approach requires a serious effort by the EU to monitor the discrimination maintained by Member States by denying access to justice. This national strategy is certainly not less effective from the perspective of the rush-to-the-bottom than the delay in receiving directives. It is easy to suggest a reaction against the latter strategy: overrule Faccini Dori. If there is one meaning of the "supremacy" of European law in European issues, it is that all State institutional actors are bound by European law, particularly so in the national Courts of law that in matters of European law are serving as European agencies. Since the nature of private law decisionmaking is to adjudicate on rights and duties, the rule in Faccini Dori simply does not make sense.

Much more difficult to envisage is a reaction to the lack of enforcement strategy. It is doubtful that an extension of the principle in Francovich to cover this situation would be cost effective. Ad hoc European judicial institutions might be a simpler and more effective tool than monitoring some access to the justice standard against reluctant member States.

The comparison between the two institutional alternatives goes beyond the scope of this article.
Certainly, however, the unprincipled grant by European law of generic substantive benefits to consumers, without approaching the fundamental issues of contract law, neither works in favor of effective consumer protection, nor of the development of a good contract law as a background for an efficient market.

*569 XII. Conclusions: The Case for a Minimum Mandatory Contract Code

In this article, I have discussed some of the institutional incentives that make present European contract law inefficient from a variety of perspectives. I have indicated that the emergence of a dichotomy between consumers and merchants is one of the principal problems of European contract law today. I have argued in favor of a unified decisionmaking process, within a clear distinction of the three stages of contract law: creating mandatory standards; filling gaps by default rules; and reacting against opportunistic behavior.

I have shown how this analytical clarity, imperiled by the compartmentalization of contract law and by the absence of basic research, is unavoidable to make intelligent choices in the large number of issues that the European legal community has to decide today. Among such choices are whether or not to codify contract law and by what kind of instrument, whether or not to do so in a unitary way, whether or not we should rely more on a system of European courts, or whether we should continue to rely on national courts.

While a lot of empirical work is still needed to intelligently answer these questions, I venture to advance some suggestions stemming from comparative-economic institutional analysis, making it extremely clear that this is only one view aimed at beginning some basic discussion on the subject. My suggestion is to take a unitary approach, officially codifying at the European level only a minimum number of mandatory contract rules that would be binding on all the parties, whether consumers or not. Such a minimum code of mandatory contract law, should be applied by a double set of judiciary actors: a system of European lower courts of general jurisdiction in the matter of private law, staffed by a European professional judiciary, and national courts according to the Supremacy clause of the Maastricht Treaty.

Such an institutional scheme and the beneficial set of competitive incentives that it should be able to produce (both in enforcement rules and in private production of default rules) might be the most cost-effective way to create a framework for an efficient European market and a thoroughly common European contract law culture.

Unfortunately, arguing for hard codes is no longer in fashion. The poor quality of European contract law legislation--the product *570 of a variety of distorted institutional incentives some of which I have discussed--has fueled the self-serving attitude of some commentators that any possible code is bound to be tainted by bureaucratic reasoning and poor technique. This conclusion is not sound. If there is one thing that the story of civil law codification has taught us, it is that civil (and commercial) codes have never been the product of bureaucracy, but rather that of highly skilled scholarship. For reasons that we still have to fully explain, [FN114] civil law codes have been intellectual products almost entirely immune from interest group capture. They can be considered as "neutral" as the general common law principles, not more but not less. But codes can contain legitimate ideological choices that scholars as hidden legislators are not entitled to make.

In a world of second best, the European Code has to be compared with its alternatives. [FN115] The present situation of a clash between ideologically-conservative, nationally-biased, mainstream scholars, confronted by a captured body of piecemeal legislation (occasionally supported by some obsolete positivistic scholars) makes European contract law schizophrenic, and a minimum European contract code highly desirable.
The phenomenon of the rebirth of the traditional dichotomy is noticed and discussed by Vincenzo Zeno-Zencovich, Il diritto europeo dei contratti (verso la distinzione fra contratti commerciali e contratti dei consumatori), Giurisprudenza Italiana (IV) 57 (1993).

Market actors can extensively contract on a "one shot" basis and not limit themselves to repeated interactions with trustworthy negotiating partners. This function is emphasized by Douglass C. North, Institutions, Institutional Change and Economic Performance (1990).

A notable exception in the field of law and economics is Michael J. Trebilcock, The Limits of Freedom of Contract (1993).


For a discussion of the "personality principle" at work in Roman law, Germanic law, and Islamic law, see id. at 230-32, 236-38, and 302-03 respectively.


See id.

See Schlesinger et al., supra note 5, at 612-13, 636-46.


[FN14]. See Schlesinger, supra note 11.

[FN15]. For these and more examples, see Schlesinger et al., supra note 5, at 602-63.

[FN16]. See id.


[FN19]. Some confusion might have been created by the notion, developed by Ian Ayres, of "penalty" default rules as opposed to "majoritarian" default rules. See Ian Ayres & Robert Gertner, Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules, 99 Yale L.J. 87 (1989).


[FN23]. See Ayres & Gertner, supra note 19.


[FN25]. This is by no means an exception. For a discussion of more occasions, see Ugo Mattei, Comparative Law and Economics 1-25 (1997).

[FN26]. See Schlesinger et al., supra note 5, at 663-64.

[FN27]. For a discussion of the different criteria used by legal systems to solve these problems and for a discussion of the abuses following, see id. at 665-66.


[FN30]. See id. art. 3.
[FN31]. See id. art. 2.

[FN32]. See id. art. 3(1)(h).

[FN33]. See id. art. 3(1)(b). For a survey of recent developments in European consumer policy, see European Consumer Policy After Maastricht (Norbert Reich & Geoffrey Woodroffe eds., 1994).


[FN35]. EC Treaty art. 3(1)(b).


[FN38]. See Schlesinger et al., supra note 5, at 664.


[FN40]. Schlesinger et al., supra note 5, at 665.


[FN42]. The "Janus-faced ideology" of consumer contract law is discussed in Geraint Howells & Thomas Wilhelmsson, EC Consumer Law 89 (1997).


[FN44]. Some qualification is due. Because of a compromise, the Directive on Unfair Terms applies only to "non individually negotiated terms" giving the (false) impression of a default nature. However, the provision is interpreted in such a way to make the individually negotiated exception practically impossible to apply. See Howells & Wilhelmsson, supra note 42, at 91-93. The principles of European contract law safeguard the mandatory nature of four provisions. See The Principles on European Contract Law arts 1.106; 2.102; 3.109; 4.508 (Ole Lando & Hugh Beale eds., 1995).


[FN46]. The debate on unconscionability and penalties provides an example of this unified approach. For an outstanding example of the kind of basic foundational research lacking in Europe, see Melvin A. Eisenberg, The Limits of Cognition and the Limits of Contract, 47 Stan. L. Rev. 211.


[FN50] See The Principles of European Contract Law, supra note 44.

[FN51] See id. at xviii.

[FN52] We are informed about this idea by Howells & Wilhemsson, supra note 42, at 86. The ambiguity of the directive on its default or mandatory nature makes such incorporation easier.


For example, the directive on contract signed outside of business premises requires that the consumers are expressly told of the right to change their mind. It leaves to national legal systems the decision on the sanction that follows the lack of such explicit disclosure. See Howells & Wilhelmsson, supra note 42, at 115.


This is not necessarily always true. Sometimes the compromises reached at the European level make directive similar to a national model but not entirely coherent with it. Acoustic similarities might create serious problems of coordination during reception. An example of this kind of problems can be found in Germany in the case of the Unfair terms directive. See Kötz, supra note 47, at 621.


See Zajac, supra note 21.


See Schlesinger et al., supra note 5, at 628-33.

See Ponzanelli, supra note 75, at 242-44.

See generally Ugo Mattei & Fabrizio Cafaggi, Comparative Law and Economics, in 1 The
New Palgrave, supra note 24, at 346.

[FN82]. See Organization Theory: From Chester Barnard to the Present and Beyond (Oliver E. Williamson ed., 1995).


[FN85]. 2 U.S. (2 Dall.) 419 (1793).

[FN86]. 14 U.S. (1 Wheat.) 304 (1816).


[FN97]. Case 152/84, Marshall v. Southampton and S.W. Hampshire Area Health Auth. (Teaching), 1986 E.C.R. 723. This decision has been consistently followed by the Court. See Case 221/88, European Coal & Steel Community v. Busseni, 1990 E.C.R. I-495; Case 188/89, Foster v.


[FN99]. As such, these directives would not be binding on individuals in different member states.

[FN100]. The episode is discussed in Norbert Reich, Competition Between Legal Orders: A New Paradigm of EC Law?, 29 Common Mkt L. Rev. 861 (1992); Luisa Antoniollli-Deflorian, Il formante giurisprudenziale e la competizione fra il sistema comunitario e gli ordinamenti interni, 13 Rivista Critica del Diritto Privato 735 (1995).


[FN102]. See Antoniollli-Deflorian, supra note 87, at 352-60.

[FN103]. For a further nuance introduced by what has been called "incidental horizontal effect" of the directives, see Paul Craig & Gráinne de Búrca, EC Law: Text, Cases, and Materials 184-99 (1995).


[FN107]. See Bussani & Mattei, supra note 48.

[FN108].


[FN111]. See North, supra note 2.

[FN112]. See Cary & Eisenberg, supra note 88, at 125-32.

[FN113]. For a discussion of such a priority, see Norbert Reich, Protection of Consumers' Economic Interests by the EC, 14 Sydney L. Rev. 23 (1992).


[FN115]. This important point is made by Neil K. Komesar, Imperfect Alternatives: Choosing Institutions in Law, Economics, and Public Policy (1997).