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On the Legitimacy of Europeanising Europe's Private Law:

Considerations on a Law of Justi(ce)-fication (*justum facere)* for the EU Multi-Level System

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Translated from the German
by
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Zur Legitimität der Europäisierung des Privatrechts
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European Private Law Forum at the EUI Law Department

With the establishment of the European Private Law Forum, the Law Department gives more emphasis in its research, teaching, publications and further activities to a field, which has gained considerable momentum in recent years.

The Forum's research activities will in the foreseeable future focus on the constitutional dimensions of the private law Europeanisation process; the emergence of transnational private governance arrangements and the role of non-governmental actors in lawmaking processes; the relationship between market regulation and the Europeanisation of private law; the analysis of external factors affecting the integration process of European private law (i.e. globalisation, private and public actors) the role of the European judiciary in the Europeanisation process. In this field the Department can build upon prior research and present resources. The Europeanisation of private law is often neglected in the intense debates over the future European Constitution or the modes of governance in the EU - and *vice versa*: the private law communities rarely enter the neighbouring arenas. It seems to us that the embeddedness of private law in the European polity, in particular the constitutional significance of the European Treaties, the Human Rights Convention and the forthcoming Constitutional Convention, as well as the implications of the diversity of regulatory and institutional traditions and practices are widely underestimated in their importance for the Europeanisation process.

The ever growing importance of the judiciary in the development of private law is uncontested phenomenon in all national private law systems as is the constitutive role the ECJ has played in Europe's integration through law. The widening and deepening of the Europeanisation process, however, is challenging the functioning of the judiciary at both the European and the national level. This issue may become even more important should the present efforts to codification of areas Europe's private law be successful.

An extended research agenda entitled "European Private Law and the Constitutionalisation of the European Union" has been submitted by the EUI to the Commission as an *Expression of Interest for a Network of Excellence under the Sixth Framework Programme of the European Community for Research,*

Technological Development and Demonstration. Here the Forum is co-operating with academic institutions from Italy, Germany, France and the UK as well as two transnational academic research groups. A workshop dedicated to the further elaboration of the research perspectives of the network is scheduled for October 2003.

The Forum will certainly not confine itself to fundamental research. In fact, its first project, supported by the Grotius Programme for Judicial Co-operation in Civil Matters, is concerned with a comparative and interdisciplinary assessment of national tenancy laws and procedures in the European Union. This project is pragmatic in its practical ambitions; it will nevertheless explore issues of principle importance, in particular the potential of the "open method co-ordination" in a field where a harmonisation of law cannot be envisaged. Work on this project has been taken up. At the beginning of July, the comparative reports and a number of background papers will be discussed in a workshop at the EUI.

The Forum's focus on Europe is not meant to exclude the discussion of general issues of private law, comparative law, private international law, and legal method. What the Forum seeks to emphasize is the importance, theoretical and practical, of the Europeanisation process for substantive law and the transnational disciplines.

With its new series of Working Papers, the Forum will seek to promote its agenda through the publication of contributions of its initiators, guests, and EUI Researchers. Directors of the Forum are Professors Fabrizio Cafaggi, Christian Joerges and Jacques Ziller. Dr. Christoph Schmid is acting as the Scientific Coordinator of the Forum. Inquiries should be directed to him [Christoph.Schmid@IUE.it] or to Elina Sipilainen, who provides administrative support [Elina.Sipilainen@IUE.it].

Introductory Remark

This essay deals with both theories of private law and *its Europeanisation. These are issues usually treated in separate academic communities. But they have become interdependent. This interdependence is becoming ever more apparent – and it is important to understand the reasons and the implications of this development.*

A preliminary version of the essay was presented at a Workshop on private law theory organised in co-operation with Gunther Teubner (Frankfurt a.M.) at the European University Institute in April 2002. The language of the proceedings was German. So was the core contribution to the workshop, Rudolf Wiethölter's 'Recht-Fertigungen eines Gesellschafts-Rechts'[1] *– a very dense text the discussion of which in English certainly requires unusual skills of the translator,*[2] *and may in addition presuppose some familiarity with its author's legal thought. Even if this may be so, this text was in fact much more intensively used by the contributors to the workshop as a source of inspiration for the analyses of Europeanisation processes than the organisers had expected.*[3]

A new version of the German draft was presented at the Ius Commune Conference in Amsterdam and subsequently again revised. I would like to thank many participants of the Amsterdam conference and the contributors to the workshop in Florence for their comments and suggestions. I am in particular indebted to Christoph Schmid (Florence/Munich), much more than the references to his work in my footnotes can indicate.

Florence, January 2003

Christian Joerges

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[1] Frankfurt a.M. 2001.

[2] Iain F. Fraser has in the meantime taken up this challenge. His translation is 'Just-ifications of a Law of Society", adding that the German *Recht-Fertigung* can be etymologized as making/manufacturing law/right. "Justi(ce)-fication" or "justice-making law" may retain a touch more of the German term's message. But it needed a connaisseur of Roman law, namely Wolfgang Ernst, Bonn/Cambridge to remind me *justum facere* is the common root of Recht-Fertigung and justification.

[3] The proceedings will be published: Christian Joerges & Gunther Teubner (eds.), *Rechtsverfassungsrecht. Recht-Fertigung zwischen Privatrechtsdogmatik und Gesellschafts-theorie* (Internationale Studien zur Privatrechtstheorie 4), Nomos Verlag, Baden-Baden 2003.

On the legitimacy of Europeanising Europe's **private law: Considerations on a law of justi(ce)-fication (*justum facere*)[*] for the EU multi-level system**

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[*] On the term cf. the *Introductory Remark* to this essay.

I Introduction

The Europeanisation of private law is very much a topical theme. And although this theme is no longer very new, it has, in the last three years, developed a new dynamic. Anyone taking it up with the intention or hope of keeping up with the pace of legal policy development and remaining on top of the current stage of the academic debate is letting themselves in for a race in which he will inevitably feel like the unfortunate hare which, despite all its efforts, kept on arriving too late: something else will have changed or articles whose relevance has to be assessed first will have appeared. Anyone seeking to dodge such a race by specialising in the general is not necessarily any better off. Hasn't everything already been said? Is it enough to add, as Karl Valentin did in a ceremonial address, "Quite so, but not by everyone"?

Surveys of the development of the law, legal policy and the academic debate remain meaningful if and because every new systematisation of the material takes some constructive steps. Admittedly, the more immense the material appears, the more time consuming it becomes to sift through it. In the present context, I have to have recourse to a form of reconstruction of the factual position that lets me refer to previous work, [4] which I now sharpen so as to relate the debates on the Europeanisation of private law to the basic problem of the legitimation of law production in the EU (?). I distinguish between the three strategies of legitimation and, in the next section (II), go on to test and to query their viability on the basis of three sets of examples. These theses and antitheses are intended pave the synthesis in the closing section (III), intended as an outline

[4] Esp. Ch. Joerges/G. Brüggemeier, Europäisierung des Vertrags und Haftungsrechts, in: P.-Ch. Müller-Graff (ed.), *Gemeinsames Privatrecht in der Europäischen Gemeinschaft*, Baden-Baden: 2 nd ed. Baden-Baden: Nomos 1999, 301 ff.; The Impact of European Integration on Private Law: Reductionist Perceptions, True Conflicts and a New Constitutionalist Perspective, *European Law Journal* 3 (1997), 378 ff.

of the constructive answer to the principal question of the legitimacy conditions of the Europeanisation process.

I Three competing patterns of legitimation

Europe expects much of the law, exposing it to changes from top to bottom – and it has to justify these challenges itself. This is a requirement that may sound like a matter of course, which, indeed, is really a claim raised in the Treaties and Treaty amendments, but is, in reality, in need of clarification and hard to meet. Why? The process of European integration has been seen as forming and formatting a "sovereignty association of a special nature" [*Herrschaftsverband eigener Prägung*] as M. Rainer Lepsius[5] puts it – a happy formulation, since, by simply using the Weberian category of *Herrschaft* (domination/sovereignty) it designates a continuing key problem in the European project. This *Herrschaftsverband* is dependent on recognition by its subjects – and this de facto dependency has continued to become visible and perceptible.[6] Social scientists ought not, and we lawyers may not, satisfy ourselves with an empirical concept of legitimacy: are Europe's sovereignty claims so justifiable as to deserve our recognition, too? This is a question which we have to ask ourselves, irrespective of whether we bring in Jürgen Habermas[7] for the purpose or not.

[5] For this German term, see M R Lepsius, Die Europäische Union als Herrschaftsverband eigener Prägung (The European Union as a Sovereignty Association of a Special Nature), in: Ch. Joerges/Y. Mény/J.H.H. Weiler (eds.), *What Kind of Constitution for What Kind of Polity? Responses to Joschka Fischer*, Europäisches Hochschulinstitut, Florenz/Harvard Law School, 2000, 203 ff. (213 ff.); http://www.iue.it/RSC/symposium/.

[6] This has now been given thorough treatment by the explanatory disciplines, most recently in K.J. Alter, *Establishing the Supremacy of European Law: the making of an international rule of law in Europe*, Oxford/New York: Oxford University Press 2001; A. Wiener, They Just Don't Understand! Finality and Compliance: Opposing Rationales in the European Constitutional Debate, Ms. Belfast 2002.

[7] For a very pointed treatment, see, once again, J. Habermas, Remarks on Legitimation through Human Rights, in *id.*, *The Postnational Constellation*, Cambridge: Polity 2001, 113 ff., 113

And, in fact, legal science did ask the question of the basis of the validity of European law "from the outset", namely, in the very stage of the establishment of the EEC. It is my impression that this happened more fundamentally in Germany than elsewhere – not necessarily for good reasons, but certainly for compelling ones: the Federal Republic was still a very young democracy at that time and did not need to call this achievement into question. At the same time, it was dependent on being included in Europe. The basic law had emerged with foresight and consistency, and had made both aspects into positive law: the inviolability of democracy (in Article 79 III) and its openness to integration (in Article 23). Is this a paradox which is an example of the intrinsic contradictoriness of all law? It is, at any rate, a challenge around which all European law to date must turn and which keeps its interpreters so restless I wish to distinguish between three sets of attempts to find fixed points here and give the European process a firm normative basis.

1.1 Market rationality as a principle of (constitutional) law

The first, "*ordo*-liberalism" (a German version of neo-liberalism), was ready even before the EEC existed. It had been developed in the confusion of the Weimar Republic, and posited that a free order for economic life must be legally shaped ("constituted") so as to be protected from the opportunistic, discretionary encroachments of politics.[8] This tradition survived the "Third Reich", and marked the Federal Republic's sensibility in relation to economic policy as

[8] Cf., on this tradition D.J. Gerber, Constitutionalising the Economy: German Neo-liberalism, Competition Law and the "New" Europe, *American Journal of Comparative Law* 42 (1994), 25 ff.; W. Sauter, *Competition Law and Industrial Policy in the EU*, 1997, 26 ff.; Oddly (and significantly), this tradition hardly appears in political science and sociology. An applaudable exception is Ph. Manow, *Modell Deutschland* as an interdenominational Compromise. Program for the Study of Germany and Europe, Working Paper No. 00.3. Center for European Studies, Harvard University, Cambridge, MA, 2000.

Ordnungspolitik.[**] In the course of European integration, *ordo*-liberalism became the German "dominant theory", with a peculiar double meaning for both the components of the term: it "dominated" among professors of economic law and in many unofficial and officious policy statements; but the practice of law and of politics looked different.[9] The same holds true for the Community and its law: The "four freedoms" guaranteed in the EEC Treaty, the opening up of the national economies, the bans on discrimination and the competition rules, were understood as a "decision" in favour of an economic constitution which met the conceptions of the *ordo*-liberal school with regard to the framework conditions for a competitive market system.[10] And the very fact that Europe was set in motion as a mere economic community conferred plausibility on the *ordo*-liberal argument: through the interpretation of the economic law provisions in the EEC Treaty as a legally established order committed to guaranteeing economic freedoms, the Community gained a legitimacy of its own, which was independent of the institutions of the democratic constitutional state, and from which legally binding policy commitments of this Community followed.[11] This was a framework which left room for alternatives. For many years, in fact, until the internal market programmes of 1985 and the Single European Act of 1987,

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[**] Again (see note * above) a notion which tends to loose its meaning in translation. "Economic governance", the term used in pertinent documents of the European Convention website (http://european-convention.eu.int).

[9] Cf., for example, Ch. Joerges, The Market without a State? States without Markets? Two Essays on the Law of the European Economy, EUI Working Paper Law 1/96, San Domenico di Fiesole 1996 (http://eiop.or.at/eiop/texte/1997-019 and -020.htm); "Good Governance" in the European Internal Market: Two Competing Legal Conceptualisation of European Integration and their Synthesis, in: A. v. Bogdandy/P.C. Mavroides/Y. Mény (eds.), *European Integration and International Co-ordination. Studies in Transnational Economic Law in Honour of Claus-Dieter Ehlermann*, Den Haag-London-New York: Kluwer Law International 2002, 219 ff.

[10] Admittedly, the EEC Treaties many regulatory policies exclaves must then be treated as mere exceptions, and one has to be willing to overlook the "original sin" of the agricultural policies.

[11] Particularly significant, here, is A. Müller-Armack, Die Wirtschaftsordnung des Gemeinsamen Marktes, in *idem*, *Wirtschaftsordnung und Wirtschaftspolitik*, Freiburg i.Br.: Rombach 1966, 401 ff.

private law was left to itself.[12] In the course of these initiatives, the legal principle of mutual recognition was discovered for private law, thus establishing the hope that the mechanisms of regulatory competition would promote an "economic" rationalisation of private law in Europe.[13] At any rate, a European code of private law was also envisaged in the early 90's.[14] The newest version of this idea is now, however, called the "privatisation of private law".[15]

I.2 Integration Functionalism

The reference to market rationality was not, however, enough to allow European law to establish supranational validity claims. In international law, constitutional law and law of the state [*Staatsrecht*], – and it was in the categories of these

[12] Or more or less decisively preserved itself against relevant early "special statutory private law" [*sonderprivatrechtliche*] projects, which existed from the mid-seventies onward (and fit in with the picture sketched out here; cf., Ch. Joerges, Zielsetzungen und Instrumentarien der Europäischen Verbraucherrechtspolitik: Eine Analyse von Entwicklungen im Bereich des Zivilrechts, *Zeitschrift für Verbraucherpolitik* 3 (1979), 213 ff.; cf. B Börner, Die Produkthaftung oder das vergessene Gemeinschaftsrecht, in: W.G. Grewe (ed.), *Europäische Gerichtsbarkeit und nationale Verfassungsgerichtsbarkeit. Festschrift zum 70. Geburtstag von Hans Kutscher*, Baden-Baden 1981, 43 ff.

[13] For an official position, see Wissenschaftlicher Beirat beim Bundesministerium für Wirtschaft, *Stellungnahme zum Weißbuch der EG-Kommission über den Binnenmarkt* (Schriften-Reihe 51), Bonn 1986.

[14] Cf., in particular. E.-J. Mestmäcker Die Wiederkehr der bürgerlichen Gesellschaft und ihres Rechts, *Rechtshistorisches Journal* 10 (1991), 177 ff., 190 ff.; W. Tilmann, Eine Privatrechtskodifikation für die Europäische Gemeinschaft, in P.-Ch. Müller-Graff (ed.), *Gemeinsames Privatrecht in der Europäischen Gemeinschaft,* Baden-Baden: Nomos 1993, 485 ff.

[15] See the programmatic title of the September 2002 Heidelberg conference of the German Association of young teachers of civil law, http://www.junge.zivilrechtswissenschaftler.de/ – Another school of thought, represented first and foremost by Reinhard Zimmermann, conceptualises private law as an autonomous body of law freeing itself from national ties (and finding the way back to the *ius commune europaeum*); cf. R. Zimmermann, Das Römisch-Kanonische Ius commune als Grundlage europäischer Rechtseinheit, *Juristen Zeitung* 1992, 8 ff.; Der Europäische Charakter des englischen Rechts – Historische Verbindungen zwischen civil law und common law, *Zeitschrift für Europäisches Privatrecht* 1993, 4 ff. [reprinted in P.-Ch. Müller-Graff (ed.), *Gemeinsames Privatrecht in der Europäischen Gemeinschaft*, 2. Aufl., Baden-Baden: Nomos 1999, 103 ff.]; see, also, *idem*, Roman Law and European Legal Unity, in A.S. Hartkamp/M.W. Hesselink/E. Hondius/C. Joustra/E. du Perron (eds.), *Towards a European Civil Code,* 2nd ed., Nijmwegen-Den Haag: Kluwer 1998, 21 ff.

disciplines that Europe was probed in legal terms – the concept of a supranational legal order binding on constitutional states was hard to follow.[16] However, since no constitutional justification, i.e., one based on a parliamentary majority, for supranational political governance was available, the Community's possibilities of action had to be limited by restrictions on both its powers and its future positions in favour of the "masters of the treaties". Admittedly, it was to be foreseen that these restrictions would constrain the integration project too much and therefore endanger it. For this very reason, the need was to find an alternative basis for legitimising supranational governance. Hans Peter Ipsen very soon succeeded in this, with his description of the (then) three European Communities as "special purpose associations for functional integration" [*Zweckverbände funktioneller Integration*].[17] The term "special purpose association" denoted areas not foreseen in the *ordo*-liberal concepts – without, however, exposing Community law to democratic requirements. As a special purpose association, Europe was supposed to deal with questions of "technical realisation", i.e., administrative tasks that could – and had to – be conveyed to a supranational bureaucracy.[18]

That all this has to do with private law may seem an assertion which is far-fetched, but it will, perhaps, become easier to see if one bears in mind that Ipsen's functionalism was a continuation at European level of the second tradition in German economic law that K.W. Nörr[19] has called the concept of the "organised economy". This tradition is indifferent as to the *ordo* in its economic policy: or to put this in a constitutionally positive way, it leaves the ordering of

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[16] For a instructive account of the legal history, see Ch. Tietje, *Internationalisiertes Verwatunngshandeln*, Berlin: Duncker & Humblot 2001, 50 ff., 86 ff., 155 ff.

[17] H.P. Ipsen, Der deutsche Jurist und das Europäische Gemeinschaftsrecht, *Verhandlungen des 43. Deutschen Juristentages*, München: C.H. Beck 1964, Bd. 2 L 14 ff.

[18] H.P. Ipsen, *Europäisches Gemeinschaftsrecht*, Tübingen: Mohr/Siebeck 1972, 176 ff.

[19] *Die Republik der Wirtschaft. Teil I: Von der Besatzungszeit bis zur Großen Koalition,* Tübingen: Mohr/Siebeck 1999, 5 ff.; cf., earlier K.W. Nörr, *Zwischen den Mühlsteinen. Eine Privatrechtsgeschichte der Weimarer Republik*, Tübingen: Mohr/Siebeck 1988.

the economy to the democratically certified legislator. But, once again, the question arose of how politics is to be legitimised if it outgrows this framework without being able to find a basis in international law? Ipsen's ingenious answer: Europe should be understood as institutionalising technocratic, functionalist rationality as the basis of and contents of its law. And this seemed, for a considerable period of time, to be an adequate cause for what integration policy was actually doing. However, this ceased to be the case when the internal market programme mentioned set to work, leading to regulatory strategies that Giandomenico Majone saw as copies of the American "economic and social regulation".[20] Europe was a "regulatory state", whose main task was to correct the manifestations of market failure, and it should be interested to quote non-majoritarian institutions.[21]

From such perspectives, "private law proper" continues to be marginal. Both European lawyers and private lawyers shared this view: the former were participating in renewing the whole regulatory framework for Europe's economy; the latter – most especially, Germany's academic community – complained about distortions of private law by European statutes but emphasised that the core areas of private law continued to be in national hands: the logic of integration policy and the logic of the development of private law were, seemingly, operating autonomously.[22]

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[20] As a paradigm example: Regulating Europe: Problems and Perspectives, *Jahrbuch zur Staats- und Verwaltungswissenschaft* 3 (1989), 159 ff. for which he developed the corresponding legitimising formula.

[21] For an interim balance, see G. Majone, *Regulating Europe,* London: Routledge 1996. Since then , the conceptual edifice has been steadily perfected: cf., for example, G. Majone, Non-majoritarian Institutions and the Limits of Democratic Governance: A Political Transaction-Cost Approach, *Journal of Institutional and Theoretical Economics* 157 (2001), 57 ff.

[22] For more details, see Ch. Joerges/G. Brüggemeier, Europäisierung des Vertrags und Haftungsrechts (note 1 *supra*), Ch. Joerges, The Impact of European Integration on Private Law (note 1 *supra*).

I.3 Europe as a (social) state and legislator for private law?

"Hard Code Now!" This title sounded like a battle cry and was meant to. Ugo Mattei, who inscribed it on his banners,[23] is more conciliatory and circumspect in reality than the slogan he chose is. A European civil code ought to lay down binding provisions, but be content with a minimal programme and be process orientated. Only in this way could it fit the "social fabric of European capitalism". Would this, then, mean a code "with deep enough foundations and high enough vaulting" to include these social matters "in its conceptual edifice" to a sort of Otto von Gierke *redivivus*? [24] Otto von Gierke may be forgotten outside Germany; but his critique of the formalism of the German code would still seem to be alive and topical.[25]

Would the "social" aspects of private law be in a safe harbour in a European civil code? This is a question that does not concern private law alone, but is connected with the fate of the welfare state as a whole. We shall come back to this.[26] The difficulties that such a vision faces are however, so massive that there is no sense in putting them off. To anticipate the argument that we are developing: the normative quality of the constitutional "social private law" is dependent on the interplay of parliamentary legislation and the non-parliamentary production of law, on regulatory policy, special statutory law and codification, on expert communities and on the general public.[27] These circumstances are not

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[23] U. Mattei, Hard Code Now!, *Global Jurist Frontiers*, Vol. 2: No. 1 (2002), Article 1.

[24] O. v. Gierke, *Die soziale Aufgabe des Privatrechts*, Berlin 1889, 17.

[25] Cf., Ch. Schmid, On the Legitimacy of a European Civil Code, *Maastricht Journal of Comparative Law* 8 (2001), 277 ff.

[26] Sections II.3 and III below.

[27] Cf., Ch. Joerges, Formale Freiheitsethik, materiale Verantwortungsethik und Diskursethik im modernen Privatrecht, in: F.U. Pappi (ed.), *Wirtschaftsethik. Gesellschaftswissenschaftliche Perspektiven (Sonderheft der Christiana Albertina Universität)*, Kiel 1989, 127 ff.; The Science of Private Law and the Nation-State, in F. Snyder, *The Europeanisation of Law. The Legal Effects of European Integration*, Oxford/Portland: Hart 2000, 47 ff., 70 ff.); O. Gerstenberg, Public Intervention, Private Ordering and Social Pluralism, in Ch. Joerges/O. Gerstenberg (eds.), *Private governance, democratic constitutionalism and supranationalism,*

present in the European context, and will not emerge in any near future. That this is the case follows simply from "state of the (European) Union": this polity is not unitary, but plural[28] ("heterarchical", as some call it;[29] or "mixed", as others do[30]). In it, there are – relatively – autonomous political units, none of which are empowered with the *Kompetenz-Kompetenz* which would be needed for an authoritative resolution of jurisdictional conflicts. The result is a very specific disjunction of "society" and "state", of economic freedoms and political rights, market citizenship and political citizenship. Let us distance ourselves from the two approaches initially dealt with: Europe has never become a "market without a state" in which a supranational economic constitution can assign private law in its area; and it is even less the European social state described to the nation states. Instead, it is a *tertium* which finds itself in a "constitutional moment" that will continue to last for some time yet.[31]

Luxembourg: European Commission (Directorate-General Science, Research and Development; EUR 18340 EN), 1998, 205 ff.

[28] As so well argued by N. Walker, The Idea of Constitutional Pluralism, *Modern Law Review* 65 (2002), 317 ff.

[29] K.-H. Ladeur, The Theory of Autopoiesis. An Approach to a Better Understanding of Post-modern Law. From the Hierarchy of Norms to the Heterarchy of Changing Patterns of Legal Inter-relationships, EUI Working Paper Law 99/3.

[30] G. Majone, Delegation of Regulatory Powers in a Mixed Polity, *European Law Journal* 8 (2002), 319 ff.

[31] This scepticism does not, as in P. Legrands [European Legal Systems are not Converging,. *International and Comparative Law Quarterly* 45 (1996), 52 ff.], result from presumed unbridgeable communication difficulties between common law and civil law. Nor is it meant, as, for instance, in H. Collins, [European Private Law and the Cultural Identity of States, *European Review of Private Law* 3 (1995), 353 ff.] as a rigid defence of the "cultural" ties of private law. Instead, it assumes "two kinds of social integration – *cultural and political.* The former denotes the kind of integration that is needed for individuals and groups that seek to find out who they are or would like to be…, the latter does not rest upon a particular set of values but on trans-cultural norms and universal principles", E.O. Eriksen and J.E. Fossum, The EU and Post-national Legitimacy, Oslo: Arena-Working Paper 26/2000, text accompanying notes 40 ff. It is in this sense that I understand M.W. Hesselink, *The New European Legal Culture*, Deventer: Kluwer 2001, 72 ff.

II Three sets of examples

Verba docent, exempla trahunt. But it is by no means the case that the sets of examples from the case law of the ECJ discussed below could "confute" the paradigms sketched out in the first section, or represent some "higher law". This is because these paradigms merely refer to sets of ideas in which legal concepts and arguments can find a theoretical basis. To that extent, they compete with each other. But it is not to be expected, say, that one of them will totally dominate "practice", or that one tradition of thought will disappear without trace. Nevertheless. The analysis below pursues systematic and theoretical claims: they are intended to illustrate problems graphically with all three of the paradigms set forth in the previous section, thus preparing the transition to the view sketched out in the concluding section.

II.1 Centros and Überseering: Freedoms of market citizenship as political rights, and the obsolescence of traditional private international law

The ECJ's *Centros* judgment[32] is to be regarded as its most important,[33] or, at least, the most debated one since the legendary Cassis de Dijon decision of 1979.[34] Expectations of the subsequent *Überseering* judgment were correspondingly tense.[35] So much has been written that it would seem appropriate to start with the three theses that are to be established below: (1) This case law transforms economic freedoms into rights of political participation. (2) It strives towards a juridification of regulatory competition. (3) It has the potential of

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[32] *Case 212/97*, judgment of 9 March 1999, ECR [1999-I] 1459 – *Centros Ltd* v. *Ervervsog Selskabsstrylsen.*

[33] A Celex search on 25, March, 2002 indicated 112 commentaries. That figure was too modest, for it did not take into account, for instance, of H. Halbhuber's monograph *Limited Company statt GmbH? Europarechtlicher Rahmen und deutscher Widerstand – Ein Beitrag zur Auslegung von Art. 48 EG und zum Europäischen Gesellschaftsrecht*, Baden-Baden: Nomos 2001.

[34] Rs. 120/78, Slg. 1979, 649 – *Cassis de Dijon.*

"constitutionalising" the Europeanisation process through a law of just-ification that leaves orthodox supranationalism behind without seeking refuge in classical private international law.

II.1.1 Centros

The judgment in *Centros* concerns the core of the European legal *acquis*, namely the freedoms of market citizens which apply directly and ought therefore to take primacy over national law. Moreover, the decision counts as a prolongation and strengthening of a perception that has deeply penetrated the legal consciousness and awareness of economic law: it is held to serve the so-called negative integration, because the directly valid freedoms support review of the content of national law by the ECJ, exposing the law to regulatory competition. The justification would deserve a more detailed argument than space allows here.[36]

As so often occurs, the facts of this seminal case were trivial: a Danish married couple, Marianne and Tony Bryde, wished to import wine into Denmark but not pay the fee of the DK 200,000 (28,000 Euro) that Denmark requires for the registration of companies. The two then hit on the idea of "cocking a snoot" at their Danish Law.[37] They founded, and this was in May 1992, a private Limited company in England, the now legendary Centros Ltd., and set up a subsidiary in Copenhagen – for none of these steps did they require more than the minimum capital investment.

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[35] Rs. 208/00, U. v. 5.11.2002 – *Überseering BV* v. *Nordic Construction Company Baumanagement* GmbH (NCC).

[36] The following owes much to Barbara Trefil (whose LL.M. Thesis on "Centros und die Niederlassungsfreiheit von Gesellschaften in Europa" will soon be available as a Working Paper of the EUI Law Department).

[37] Their conduct is interpreted with this degree of severity by Germany' *maître penseur* of private international law, G. Kegel in his editorial in *Europäisches Wirtschafts und Steuerrecht* Heft 9/1999 ["There is something rotten in the State of Denmark"].

However, the Danish authorities refused registration; the Brydes went to court; after all the courts had been gone through, the Højesteret brought the question[38] of whether the refusal of registration was compatible with the guaranteed of freedom of establishment (Article 43 [ex 52] taken together with Articles 52 and 58 EC Treaty) before the ECJ in early June 1997. The ECJ's answer (given on 9 March 1999) read:

> "It is contrary to Articles 52 and 58 of the Treaty for a Member State to refuse to register a branch of a company formed in accordance with the law of another Member State in which it has its registered office but in which it conducts no business where the branch is intended to enable the company in question to carry on its entire business in the state in which that branch is to be created, while avoiding the need to form a company there, thus evading application of the rules governing the formation of companies which, in that state, are more restrictive as regards the paying up of a minimum share capital.[39]

II.1.2 Interpretation

The ECJ is seen by some[40] as cautiously continuing its earlier case law on freedom of establishment[41] or radicalising it in a questionable fashion.[42] The incorporation theory [*Gründungstheorie*] is seen as having won through against the *Sitztheorie* (company seat principle) with the help of the ECJ.[43] None of this

[38] Para. 13.

[39] Sentence 1 of the tenor of the judgment ECJ [1999] I- 1947.

[40] Completeness can scarcely be achieved by portraying the range of opinions. Specifically on the response in Germany, see H. Halbhuber, National Doctrinal Structures and European Company Law, *Common Market Law Rev.* 38 (2001); a very comprehensive survey "from outside" on the overall development of company law is offered by J. Wouters, European Company Law: *Quo Vadis*?, *Common Market Law Rev*. 37 (2000), 257 ff.; more topically, B. Trefil (note 36).

[41] Judgment of 10.07.1986, Case C-79/85, [1986] ECR 2375 – *Segers*.

[42] An opinion to be found in E Steindorff, Centros und das Recht auf die günstigste Rechtsordnung, *Juristen Zeitung* 1999, 1140 ff.

[43] Cf., for example, P. Behrens, Das Internationale Gesellschaftsrecht nach dem Centros-Urteil des EuGH, *Praxis des Internationalen Privat und Verfahrensrechts* 19 (1999), 323 ff.; this was

is true, it is argued by others: in Denmark, the incorporation theory applied anyway, and recognition of the seat of the company principle through the Daily Mail decision[44] does not come into it: hence, it is business as usual for private international law (PIL).[45] Again, the ECJ is seen as opening the road to regulatory competition, so one would now have to expect Delaware effects in Europe.[46]

My first thesis[47] seeks to demarcate itself from the doctrinal dichotomy between European law and PIL, between thinking in terms of primacy and linkage and the associated policy dualism of "negative" and "positive" integration. The way the ECJ treated the conduct of the Bryde couple seems to me to make this sort of interpretation plausible. European law, says the criticism of the ECJ, has no business interfering with a purely internal Danish matter. The Brydes, who were pursuing no business interests in England, ought to have bowed to their home sovereign. But are the Brydes only Danes? Do they have the "right to the most favourable legal system",[48] just because they are not merely citizens of Denmark, but also citizens of the EU? This is the way that I, in fact, read the ECJ: there is nothing in itself abusive in a citizen of a Member State founding a company in accordance with another Members State's provisions which are more favourable for him. That is simply his right.[49]

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the question the Federal High Court submitted to the EJC on 25.05.2000; cf., the *Uberseering* decision, II.1.4 below.

[44] Case C-81/87, judgment of 27.09.1988, [1988] ECR 5483 – *The Queen/Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust PLC*.

[45] Thus, for example, W. Ebke, Das Schicksal der Sitztheorie nach dem Centros-Urteil des EuGH, *Juristen Zeitung* 1999, 656 ff.; P. Kindler, Niederlassungsfreiheit für Scheinauslandsgesellschaften? Die Centros-Entscheidung des EuGH und das inernationale Privatrecht, *Neue Juristische Wochenschrift* 1999, 1993 ff.; W.-H. Roth, Case Note, *Common Market Law Rev*. 37 (2000), 147 ff.

[46] It was especially paragraph 20 in Advocate General La Pergola's Opinion that inspired this sort of interpretation.

[47] Above text before Section II.1.

[48] E. Steindorff, Centros und das Recht auf die günstigste Rechtsordnung, note 42 *supra.*

[49] Para. 27; cf. para. 29.

Certainly, *Centros* concerned the incorporation of a company in England; the Brydes never intended to do business in England, but merely wished to start their activities to Denmark. But can one call the freedom to exploit the provision of English law an abuse? No, the ECJ insists:

> "[T]he fact that a national of a Member State who wishes to set up a company chooses to form it in the Member State whose rules of company law seem to him the least restrictive and to set up branches in other Member States cannot, in itself, constitute an abuse of the right of establishment. The right to form a company in accordance with the law of a Member State and to set up branches in other Member States is inherent in the exercise, in a single market, of the freedom of establishment guaranteed by the Treaty".[50]

Is this "negative integration", interference with Denmark's constitutional autonomy, or new confirmation of the deregulatory effect of the freedoms?[51] Is the ECJ sending Europe's constitutional law off on the road to Delaware? Not really. For Denmark remains entitled to impose regulatory requirements on both its own – and on foreign – citizens, but has to adduce "compelling grounds of public interest". European law does not push Danish law aside, but places it under pressure of justification. It was this pressure that Denmark could not stand up to: it was completely unable to achieve the protection of creditors which, according to the Danish government's presentation, was the object of the Danish regulation – that was the ECJ's finding.[52] The ECJ acted as a constitutional court. It d assumed the right to test Danish law according to whether it respects rights guaranteed at European level. However, the limits imposed on Denmark are limited. Denmark is entitled to protect its creditors and act against fraud – but in accordance with the provisos familiar to the readers of the case law on Article 28

[50] Para. 35.

[51] M. Baudisch discusses and contests this point in a very comprehensive study: From Status to Contract. A American Perspective on Recent Developments in European Company Law, Ms. New York (Columbia Law School) 2002.

[52] Para.s 34-36.

[ex 30].[53] Denmark very soon, in May 2000, adopted a new regulation according to which companies wishing to do business in Denmark and having their main administrative centre there, must either deposit a caution amounting to DK 110,000 with the Danish bank authorities in the form of cash, government bonds or bank guarantees (which in the event of insolvency serve exclusively to meet tax demands), or else it must be clear that minimum assets of at least DK 125,000 are available.[54]

Merely putting new gloss on the old provisions? Danish commentators think so.[55] In its judgement of 3 February 2002, the Danish Supreme Court was silent on the issue of Centros' tax liability; it simply reprimanded that the forms had not been completed correctly.[56] What, then, is so "rotten" – in the State of Denmark - or elsewhere?[57] Denmark has to justify itself before its own citizens in the forum of the ECJ. It is entitled to pursue its regulatory interests, but it also has to show that the means it chooses serve the ends it pursues. What sort of law, then, are we dealing with here? Provisions that subject the case to the "geographically" best-suited jurisdiction? A legal innovation supported by comparative studies? What is at stake rather a European "conflict of laws" to the extent that it involves dealing with legal differences, a conflict of laws that seeks to reconcile Denmark's political autonomy with the granting of European citizenship rights to Danish citizens? In reshaping economic freedoms as rights to political participation, I see the constitutional core of the decision: private

[53] Paras 37-39; for a particularly lucid analysis, cf., U. Forsthoff, Niederlassungsrecht für Gesellschaften nach dem Centros-Urteil des EuGH: Eine Bilanz, *Europarecht* 2000, 167 ff.,, 192 ff.

[54] Cf., B. Trefil (note 36 *supra*), at 31 ff., with references to www.retsinfo.dk and a survey of the debate on the questionability in European law of the new regulations.

[55] F. Hansen, From C 212 to L 212 – *Centros* Revisited, *European Business Organization Law Review* 2 (2001), 141 ff., 156: "… a flagrant violation of Article 43 EU".

[56] Ugeskrift for Retsvæn 2002.1079H; Laurits Christensen (Copenhagen) and Hanne B. Jensen (Florence) kindly pointed me to the judgment.

[57] G. Kegel, note 34 *supra.*

autonomy and political rights in democracies, so has Jürgen Habermas continually argued since Between Facts and Norms,[58] have to be conceived as having the both an equivalent original dignity.[59] What does this mean in the European context? According to the Centros judgment, it means that a Danish citizen can bring his sovereign to court with the argument that the latter has no good reasons for denying him the use of the regulatory alternatives offered by another Member State. Adoption of Rudolf Wiethölter's term "law of justification" in order to conceptualise this type juridification of the Europeanisation process seems to me at least admissible.[60]

So much for the bright side of the *Centros* story. It is, however, not the only one. Neither the Danish legislator nor administrative practice, and not even the judiciary demonstrate themselves as deliberating actors ready, let alone eager, to learn from their European neighbours. It seems all the more important, then, that the ECJ can play its role convincingly. And this is one of the troubling impasses of the Europeanisation process: although the Court's statements convince normatively, it is questionable whether the Court will be able to cope factually with the supervision functions it has assigned to itself. I will have to come back to this question in all sets of the examples and in my conclusions.

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[58] *Faktizitiät und Geltung,* Frankfurt a.M.: Suhrkamp 1992, 109 ff.; *Between Facts and Norms*, Cambridge, MA: MIT Press 1998, 82 ff, 133 ff.

[59] Cf., his recent restatement in Constitutional Democracy: A Paradoxical Union of Contradictory Principles?, *Political Theory* 29, 766-781) as well as "So, why does Europe need a Constitution?", http://www.iue.it/RSC/EU/Reform02(uk).pdf.

[60] S. Deakin, Regulatory Competition versus Harmonisation in European Company Law, *Cambridge Yearbook of European Law* 2 (1999), 231 ff. illustrates with the help of CentrosCentres his concept of "reflexive harmonisation" which risks, in my view, deducing normative conclusions from analytical concepts and factual observations. But, see M. Dougan, Vive La Différence? Exploring The Legal Framework For Reflexive Harmonisation Within The Single European Market, ms. Cambridge 2002; O. Gerstenberg, Expanding the Constitution Beyond the Court: The Case of Euro-constitutionalism, *European Law Journal* 8 (2002), 172 ff., 179 ff.

II.1.3 The consequences, and "Überseering"

What will the impact of *Centros* be on European company law? Will the courts of the Member States "implement" its deregulatory potential?[61] Will Europe's small firms flee to British law?[62] Will increasingly outlandish services be offered by limited companies incorporated in the UK?[63] Will the German model of company law that seeks to protect the public interest through mandatory organisational provisions and regulation be replaced by Anglo-Saxon corporate governance philosophies?

Can the ECJ be expected to have the answers to all these questions? To start with, it has had to face the legal "logic" of its views. In a reference for a preliminary ruling by the Federal High Court of 30 May 2002 (*Überseering*[64]), the ECJ was asked whether German law could prevent a Dutch plaintiff from suing for over 1.000.000 DM by, firstly, restricting in § 50 (1) of its *Zivilprozessordnung locus standi* to those legally competent [*rechtsfähig*] companies, and secondly, by prescribing that a company incorporated according to Dutch law could lose its legal capacity once it transferred its activities to Germany in a way which constitutes, according to German law, a transfer of its "seat" or legal headquarters [*Verwaltungssitz*].[65] In the conditions of an internal market, such legal principles seem downright incredible – if they were indeed as rigid or as stringent as the Federal High Court insinuates. As Advocate General Colomer noted, the German government had argued in the oral hearings that a

[61] Cf., the case note by K. Nemeth, 37 *CMLRev.* (2000), 1277 ff.

[62] This is discussed and disputed by M. Baudisch, From Status to Contract. An American Perspective on Recent Developments in European Company Law, ms. New York (Columbia Law School) 2002 (on file with the author).

[63] Cf., D. Karollus-Bruner, Das steirische Bordell als Zweigniederlassung einer englischen "Private Limited Company", *ecolex* 200, 725 ff.

[64] BGH *Europäische Zeitschrift für Wirtschaftsrecht* 2000, 412; on which see the editorials by P. Behrens, *Europäische Zeitschrift für Wirtschaftsrecht* 2000, 385 und *Europäische Zeitschrift für Wirtschaftsrecht* 2002, 129.

company in the plaintiff's position could, in fact, continue to assert its rights under German law;[66] in addition, he also pointed out that, in German law, Überseering's passive *locus standi* continued to exist despite the new "seat" of the company.[67] But even if the ECJ had kept strictly to the preliminary question submitted to it, it would have been sufficient to rule that German law must not foreclose the Dutch company's rights to sue in Germany, and that German international civil procedural law, if prescribing such effects, was not discriminatory, but unreasonable. The arguments of the Advocate General are noteworthy in one further respect: the general reasons in favour of the "seat" theory (protection of creditors/protection of subsidiary companies/co-determination/avoidance of double taxation), which all have to be acknowledged as compelling reasons of general interest, simply did not enter in here/do not enter the argument here/do not come into the argument here/simply do not concern us here/simply are of no concern here.[68]

Advocate General Colomer's arguments and recommendations fit in with a Europeanisation practice that would respect the autonomy of Member States while nevertheless insisting on the compatibility of national policies with Community values.[69] By contrast, in its judgment of 5 November 2002, the ECJ used much stronger language. Its criticisms of German private international law and international procedural law leave the possibilities addressed by Advocate General Colomer out of account, and sound correspondingly self confident, if not self-righteous: "A necessary precondition for the exercise of the freedom of

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[65] Cf., para.45 in Advocate General Colomer's opinion of 4.12.2001 in the Case C-208/00 – *Überseering*.

[66] Para. 55; cf., more generally Bundesverfassungsgericht, decision of 2. September 2002 (1 BvR 1103/02), *Neue Juristische Wochenschrift* 48 (2002), 5333.

[67] Para. 46.

[68] Paras. 50 ff.

[69] Cf., F.W. Scharpf, Autonomieschonend und gemeinschaftsverträglich. Zur Logik der europäischen Mehrebenenpolitik, in *idem*, *Optionen des Föderalismus in Deutschland und Europa*, Frankfurt a. M.: Campus, 131 ff.

establishment is the recognition of those companies by any Member State in which they wish to establish themselves."[70] German law ought not to disregard the point that the Dutch company never actually intended to transfer its seat.[71] Is one to understand the statement to the effect that, in the EU, it cannot be tolerated that each Member State determines "unilaterally", according to its *lex fori*, what legal significance it attaches to border-crossing actions, without taking into account the legal views of the Member States concerned and/or the interests of other Community citizens? This sort of civilising admonition is one thing. An unconditioned comprehensive conversion of German PIL to the incorporation theory would be another *problématique*.[72]

This issue arises once again in connection with the ECJ's discussion for the reasons adduced for the "seat" theory. To be sure, according to para. 92 of the judgment, it is "not inconceivable that overriding requirements relating to the general interest, such as the protection of the interests of creditors, minority shareholders, employees and even the taxation authorities, may, in certain circumstances and subject to certain conditions, justify restrictions on freedom of establishment". But the next paragraph goes on to say: "Such objectives cannot, however, justify denying the legal capacity and, consequently, the capacity to be a party to legal proceedings of a company properly incorporated in another Member State in which it has its registered office. Such a measure is tantamount to an outright negation of the freedom of establishment conferred on companies by Articles 43 EC and 48 EC." Did the ECJ wish to indicate that it seems no longer necessary to say anything about the rationale underlying the "seat" theory; that there is no longer any reason to take co-determination commitments seriously, because the regulation on the *societas europa* will come into force on

[70] Case C-208/00, para. 59.

[71] Case C-208/00, paras 62, 63.

[72] A *problématique* of huge dimensions at least in German perspectives; cf., for an overview D. Sadowski/J. Junkes/S. Lindenthal, The German Model of Corporate and Labour Governance, *Comparative Labour Law & Policy Journal* 22 (2000), 33 ff.

the 8 October 2004,[73] and that, alongside, there is a Directive on Employee Participation?[74] An interpretation of the judgment which takes its practical outcome in the decision, and not its generalizing doctrinal framework, as its rational would suit the Court's authority better.[75]

II.2 De-couplings and rearrangements of regulatory law and general private law: Pronuptia and Courage

The second set of examples has to do with the tensions between private law and economic law, and between general and statutory private law. Such conflict constellations have been widely and intensively discussed, especially in Germany.[76] These tensions cannot be adequately understood as doctrinal problems which arise from imperfectly systematicised legal fields. They usually relate to regulatory functions of legal provisions, especially of economic law, which are in conflict with the background assumptions of "classical" private law.[77] Déjà-vu reactions are not, however, appropriate when one encounters such

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[73] Council Regulation 2157/2001 of 8 October 2001.

[74] Council Directive 2001/86 of 8 October 2001.

[75] E. Schanze/A. Jüttner, Annerkennung und Kontrolle ausländischer Gesellschaften – Rechtslage und Perspektiven nach der Uberseering-Entscheidung des EuGH, *Die Aktiengesellschaft* 2003, issue 1 (forthcoming), consider these concerns exaggerated and rather unhelpful for the development of a control theory moderated by European law ["*europarechtlich moderierte Kontrolltheorie*"] (c.f. P. Ulmer, Schutzinstrumente gegen die Gefahren aus der Geschäftstätigkeit inländischer Zweigniederlassungen von Kapitalgesellschaften mit fiktivem Auslandsbesitz, *Juristen Zeitung*, 199, 662 ff.). The more one believes in the benefits of competition between regulatory systems or in the competence and capacity of a European judiciary, the more one would agree with their views. This is, to cite Theodor Fontane, a vast field, cf. Ch. Joerges, Interactive Adjudication in the Europeanisation Process? A Demanding Perspective and a Modest Example, *ERPL* 8 No. 1 (2000), 1 ff. and below III.5.

[76] Cf., Ch. Joerges, The Science of Private Law and the Nation State, in Francis Snyder, *The Europeanisation of Law. The Legal Effects of European Integration*, Oxford/Portland: Hart 2000, 47 ff., 70 ff. But "Sonderprivatrecht" does by no means point to some German "Sonderweg"; here, it is sufficient to recall G. Calabresi's *A Common Law for the Age of Statutes*, Cambridge, MA/London 1982, 72 ff.

[77] Cf., R. Wiethölter, Wirtschaftsrecht, in A. Görlitz (ed.), *Handlexikon zur Rechtswissenschaft*, München: Ehrenwirt 1972, 531 ff.

conflicts in the course of Europeanisation processes. It is a specific feature of the European multi-level system that, particularly in the course of the programme to "complete" the internal market being pursued in the mid eighties, practically the whole of economic law came under European direction. Consumer protection fits into this pattern. This explains why the European law community could ignore private law for so long.[78] Yet, the de-couplings of (European) regulatory law and statutory private law, on the one hand, from general (national) private law, on the other, were all to produce ever more disintegrative side-effect in national legal systems, the more resolutely the internal market policy was pursued.[79] And the question, therefore, inevitably also arose of the level at which, and the actors by whom, it is then to be dealt with – which also means what legitimation strategies come into consideration.

Let us again anticipate the findings of the analysis below in the form of theses. (1) Just as the "regulated" regulatory competition that the ECJ promotes in company law does not fit the guiding ideas of the *ordo*-liberal tradition, so the patterns for resolving conflicts between the European regulatory law and national private law do not fit the guiding ideas of functionalism and the models of a European "regulatory state". (2) Instead, we witness the emergence of a law of conflict of laws for "diagonal" conflict situations that makes European initiated regulatory policy – the law covered by EU competence – compatible with general private law – the sphere of competence of the Member States. Here, three answers are conceivable: a) European law and/or national law each insist on their own legitimacy (they reach for their *lex fori*); b) both pursue a strategy of conflict avoidance by each treating their own law restrictively; and c) they discover a principle or a rule that allows a conflict resolution which is compatible with the regulatory concerns of both legal layers.

[78] See Sections I.1 and I.2 above.

The examples that demonstrate this pattern of conflict are legion. Let us here merely pick out two prominent cases involving tensions between European competition law and national private law. These examples will illustrate once again how limited the potential of the three paradigms set forth at the outset is to provide guidance in the just-ification of law in the Europeanisation process. European antitrust law has developed into an increasingly more complete system – so strong that, by now, the mere interest in getting it implemented has made the strengthening of the Member State level inevitable.[80]

The need to co-operate across the levels of governance in the EU has "always" existed in relation to the civil law implications of antitrust violations. To be sure, national legal systems, too, have to decide how far the objectives of antitrust law take primacy over private law. But in the EU context, the division of competences between the two levels of governance renders this issue more complex: to what extent can antitrust powers "intrude" on the realm of private law where that law remained national. Neither the principle of the supremacy of European law – a "vertical" conflict of law rule – nor PIL with its "horizontal" conflict rules are equipped to handle such constellations: what is involved here are "diagonal" conflicts.[81]

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[79] Cf., Ch. Joerges, Economic Law, the Nation-State and the Maastricht Treaty, in: R. Dehousse (ed.), *Europe after Maastricht: an Ever Closer Union?*, München: C.H. Beck 1994, 29 ff.

[80] Cf., The Commission's White Paper on modernisation of the rules implementing Articles 81 and 82 of the EC Treaty *(formerly Articles 85 and 86 of the EC Treaty)*, O.J. C 132/1999; on its significance for integration policy, see R. Wesseling, *The Modernisation of EC Antitrust Law,* Oxford: Hart 2000, 168 ff., 174 ff.

[81] Ch. Joerges in co-operation with A.Furrer/O.Gerstenberg, Challenges of European Integration to Private Law, *Collected Courses of the Academy of Law*, Den Haag-Boston-London: Kluwer, Vol. VII, Book 1, 281 ff., 311 ff.; Ch. Schmid, Diagonal Competence Conflicts between European Competition Law and National Regulation. A conflict of laws reconstruction of the dispute on book price-fixing, *European Review of Private Law* 8 (2000), 155 ff.

II.2.1 Dodging the conflict: Pronuptia

Franchising has found legal form in Europe through the ECJ's *Pronuptia* decision, which declares the franchisees ties, which are regarded as essential to this business concept, to be outside the reach of Article 81 [ex 85], and franchising to be an innovative and, in general, pro-competitive business strategy.[82] The acceptability of franchising from the antitrust viewpoint has its price in civil law: imposing it effectively requires that the ties, which are legalized in antitrust terms, are not found unfair by law of contract.[83] These tensions between "competition justice" and "contractual justice" first emerged in car-dealing concessionaire contracts – they were reduced by including provisions to protect dealers in the relevant group exemptions.[84] In franchising law, this escape route was not sought. The resulting potential for conflict has, however, been kept latent. Yet the situation in itself is definitely potentially conflictual: the contract for marketing the Pronuptia collection that Ms. Irmgard Schillgalis had signed provided for territorial protection which can be taken as a precise precondition for the appropriateness of the ties that Ms. Schillgalis was being asked for; and the resale price maintenance throughout the system was also thoroughly in the interests of the franchisees. But even were one to regard the antitrust penalty of nullity of the contract as irrefutable, this in no way means that Ms. Schillgalis was not due at least compensation under enrichment law.[85]

[82] Cf., Case C-161/84, [1986], ECR 353 – *Pronuptia* and in the follow-up Group Exemption Regulation. 4087/88, O.J. L 359/88, 46.

[83] On the ECJ's case law, cf., Ch. Schmid, Europäische Europäische Wirtschaftsverfassung und Privatrecht, ms. Florence/Munich 2002, Part 1, Section 1.

[84] Ch. Joerges, Relational Contracts Law in a Comparative Perspective: Tensions Between Contract and Antitrust Law Principles, *Wisconsin Law Review* 1985, 581 ff.

[85] § 817, 2 BGB does not run counter to this view as any *connaisseur* of that provision will confirm.

This was the position that Pronuptia sought with extraordinary stubbornness to impose legally.[86] The Pronuptia suit, originally launched in Hamburg in December 1981, progressed through all the German courts, then to the ECJ and back again until, in1994, the Oberlandesgericht Frankfurt allotted Pronuptia precisely the amount that the Hamburg district court had already tried to award it in 1981. "Justice delayed is justice denied"? "Postponed does not mean suspended"? Both questions can be answered in the affirmative. The German judicial system was not prepared to enrich Ms. Schillgalis unjustifiably in the name of an antitrust *effet utile*. However, from the viewpoint of EC antitrust law, nothing much can be objected to. The grip of antitrust law on Ms. Schillgalis' contract is not to be explained from the efforts to promote the sales of wedding dresses in the region outside Hamburg or even abroad. Nor is it intended seriously to disrupt the pricing polity of a franchise system. Instead, the point was to remove the uncertainties in antitrust law, which the development of a contractual arrangement that was thoroughly desirable in terms of competition policy could not properly cope with.[87] This objective was achieved by the decision. It did not concern a "true" conflict but only a false one.[88] The fact that it took so many years to get it straight is a high tribute levied by EU practice in the manufacture of law on its citizens.

[86] For a detailed history of the dispute, see W. Skaupy, Der Pronuptia-Prozess 1974-1995, *Betriebsberater* 1996, 1899 ff.

[87] Cf., in detail, Ch. Joerges, Franchise-Verträge und Europäisches Wettbewerbsrecht: Eine Kritik der Pronuptia-Entscheidungen des EuGH und der Kommission, *Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht* 151 (1987), 195 ff.; 223; Contract and Status in Franchising Law, in *idem* (ed.), *Franchising and the Law: Theoretical and Comparative Approaches in Europe and the United States*, Baden-Baden: Nomos 1991, 11 ff., 50 ff.

[88] On the conceptual and conflicts of law theory still worth studying B. Currie, Notes on Methods and Objectives in the Conflict of Law, in *id.*, *Selected Essays on the Conflict of Laws*, Durham, N.C., 177 – 187 [c.f., for a concise summary, his comment on Babcock v. Jackson, *Columbia Law Rev.* 63 (1963) 1233 ff., 1242 ff.]. For an instructive actualisation, c.f. R. Wai, Transnational Liftoff and Juridical Touchdown: The Regulatory Function of Private International Law in a Era of Globalisation, *Colum J. Transnational Law* 2002, 209 ff., also H. Muir Watt, Choice of law in integrated and interconnected markets: a matter of political economy, Ms. Paris 2002, each with further references.

II.2.2 Justi(ce)-fication in a legal vacuum: Courage

An agreement of null and void under European competition law was also the point in the *Courage* case,[89] which, admittedly, was marked by a special feature that guaranteed it a place in EU legal history:[90] Bernhard Crehan, licencee of a Courage pub, not only refused to pay £15,266 for beer supplied, but in a counter suit asked to be compensated for the drawbacks he had suffered because the "tied house" contract imposed a sole supplier obligation upon him for beer at prices considerably above those asked from free houses which were not tied to a sole brewery. The Court of Appeal (for England and Wales) that made the submission stated that, in English law, a party to an unlawful contract was not entitled to claim compensation for damages.[91] The legal position is, as it were, a mirror of the one in *Pronuptia*: There, EU antitrust law had to be enriched by law of contract; but here antitrust law had to equip itself with sanctions that were non-existent in English law. The judgment treats this as a matter of course: "As regards the possibility of seeking compensation for loss caused by a contract or by conduct liable to restrict or distort competition, it should be remembered from the outset that, in accordance with settled case-law, the national courts whose task it is to apply the provisions of Community law in areas within their jurisdiction must ensure that those rules take full effect and must protect the rights which they confer on individuals".[92] This statement is accompanied by an

[89] Case 453/99, judgment of 20.09.2001 [2001] ECR I-6279 – *Courage* v. *Bernard Crehan.*

[90] The case attracted much attention even in the run up to the ECJ decision; cf., for example, W. van Gerven, Substantive Remedies for the Private Enforcement of EC Antitrust Rules before National Courts, in C.-D. Ehlermann/I. Atanasiu (eds.), *European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law*, Oxford/Portland: Hart 2002 (forthcoming) and the references in A.P. Komninos, New Prospects for Private Enforcement of EC Competition Law: *Courage* v. *Crehan* and the Community Right to Damages, *Common Market Law Rev*. 39 (2002), 447 ff., 479 ff., 9 ff., to whose comprehensive assessment of the judgment we herein refer.

[91] References on the English law can be found in A. Komninos (note 90), at 462.

[92] Case C- 453/99 – *Courage,* para. 25.

emphatic reference to the Community guarantees of subjective rights and the direct effect of the competition rules.[93] Yet the matter is not simply a sort of European octroi. The ECJ pays its respects to the procedural[94] and substantive[95] autonomy of national law. It takes account of the fact that the innovations that the European law requires differ from country to country, and tolerates legal divergences. It is manifestly concerned not to homogenize the legal systems, but to have each of the private law systems learn what they have to learn in order to lend European competition law its validity. And, as in *Centros*, it is individual rights that can be asserted by the citizens of the European Union in order to achieve a reshaping of their own law in each case.

II.3 The logic of market integration and the logic of private law just-ification

It is always a delight to re-read: "Tucked away in the fairyland Duchy of Luxembourg and blessed, until recently, with benign neglect by the powers that be and the mass media, the Court of Justice of the European Communities has fashioned a constitutional framework for a federal-type Europe";[96] and even now that the ECJ has definitely become visible, respect has remained high: criticisms like those which national courts are accustomed to are exceptional phenomena.

[93] Case C-453/99 – *Courage,* paras. 19, 20, 23.

[94] "However, in the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to designate the courts and tribunals which have jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding the rights which individuals derive directly from Community law, provided that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and that they do not render practically impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness)", Case C-453/99 – *Courage,* para. 29.

[95] "Similarly, provided that the principles of equivalence and effectiveness are respected …, Community law does not preclude national law from denying a party who is found to bear significant responsibility for the distortion of competition the right to obtain damages from the other contracting party", C 453/99 – *Courage*, para 31.

[96] E. Stein, Lawyers, Judges, and the Making of a Transnational Constitution, *American Journal of International Law* 75 (1981), 1 ff., 1.

There are many reasons and explanations for this.[97] Assessments of the ECJ's performance usually refer to, and appreciate, its role as a promoter of integration project. But this is not the only conceivable yardstick. The Court is exposed to very diverse expectations: its case law is not just to promote integration but also to guarantee the normative integrity of the integration process, to respond sensitively to political concerns. Can such a court at the same time operate as a court of ultimate review, earning the respect of the specialized courts of Member States? And with all that, can it alleviate the pangs of citizens seeking justice in courtrooms?

Specifically, consumer protection, which has been the pioneer and engine for the Europeanisation of private law, raises such questions. The two examples dealt with here concern two very prominent instances of European legislation, namely, the Clause Directive of 1993[98] and the Product Liability Directive of 1985.[99] Let us once again recall the outcome of the analysis: in the *Océano* decision[100] on the Directive on unfair terms in consumer contracts, the ECJ managed to implement the Directive's provision in national (Spanish) law by redefining the functions of courts in such a way that Spain's legal system could transform that intervention into an innovative reform. One can, in contrast, attribute to the decisions on the Product Liability Directive of 25 April 2002[101]

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[97] Cf. only A.-M. Slaughter/A. Stone Sweet/J.H.H. Weiler 1998: *The European Court and National Courts – doctrine and jurisprudence: legal change in its social context*, Oxford/Portland: Hart, 1998.; K.J. Alter, *Establishing the supremacy of European Law: the making of an international rule of law in Europe*, Oxford/New York: Oxford UP 2001.

[98] Directive 93/13/ EEC of 5.04.1993 on unfair terms in consumer contracts O.J. L 95/1993, 29.

[99] Directive 85/374/EEC of 25.07.1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, O.J. L307/1988, 54; amended by Directive 1999/34/EC of the European Parliament and of the Council of 10.05.1999, O.J. L 283/1999, 20

[100] Cases C-240-244/98, Judgment of 27.06.2000, [2000]-ECR I-4941– *Grupo Editorial SA* v. *Rocío Murciano Quintero et al.*

the much more ambitious goal of taking on product liability law in the European system – an undertaking that, admittedly, would, in all likelihood, fail thoroughly.

II.3.1 Océano

Océano Grupo Editorial SA[102] was the first legal pronouncement, urgently awaited by the protagonists of European consumer policy, on the Directive about Unfair Terms in Consumer Contracts, adopted in 1993 after long preliminaries.[103]

The defendants to the underlying cases had entered into contracts for the purchase, by instalments, of an encyclopaedia for personal use. The instalment purchase contract was completed in 1995 but the instalments had not been paid. The purchaser filed suit in 1997 with the Juzgado de Primera Instancia No. 35 in Barcelona. This was in line with the conferral of jurisdiction on the courts in Barcelona in the contractual terms. The defendants, who came from all over Spain, did not turn up for the hearing scheduled in Barcelona.

Not a very tough story in itself, one might think. Yet the Juzgado saw itself barred from rejecting the suit. The "juicio di cogniciòn" is a summary procedure for legal cases with a small sum in dispute (between 80,000 and 8,000,000 Pesetas).[104] Admittedly, the Tribunal Supremo had repeatedly declared such venue clauses to be unfair. What was disputed, however, with whether the Juzgado was also entitled to make this finding when it had not been brought up in the proceedings by the defendants themselves. The question of whether it could

[101] Case C-52/00 – C*ommission* v. *France* ; Case C-183/00 – *María Victoria González Sánchez* v. *Medicina Asturiana SA* ; Case C-154/00 – *Commission* v. *Hellenic Republic*; see, also, Case C-203/99 – *Henning Veedfald* v. *Århus Amtskommune* – [2000] ECR I-3569.

[102] Note 100.

[103] M. Tenreiro/J. Karsten, Unfair Terms in Consumer Contracts: uncertainties, contradictions and novelties of a directive, in H. Schulte-Nölke/R. Schulze (eds.), *Europäische Rechtsangleichung und nationale Privatrechte*, Baden-Baden: Nomos 1999, 223 ff.

[104] Para. 16 in Advocate General Saggio's Opinion of 16.12.1999.

pronounce nullity ex officio had been presented to the Juzgado by the Spanish Attorney General, and had received a negative answer.[105] Undaunted, it approached the ECJ with a preliminary ruling question as to whether Directive 93/13 required verification ex officio.

Before addressing that procedural issue one has, in the Advocate General's view,[106] to deal with the unfairness of the clause conferring jurisdiction to the Barcelona courts. This question was answered by the ECJ without further ado: the clause, not having been individually negotiated, was held to be unfair within the meaning of Article 3 of the Directive.[107] The importance of the fact that this clause was not contained in the indicative list in annex to the Directive was not explored by the ECJ. Similarly, the further question concerning the competence of the Spanish court submitted to the ECJ and discussed in great detail by the Advocate General,[108] caused no trouble: it would be contrary to the Directive's protective objectives if one were to require a consumer to appear before a court even though the venue clause requiring such appearance is unfair.[109] This holding may be seem quite a modest step but is nonetheless a noteworthy reform: Spain is expected to adapt national procedural rules to consumer policy objectives agreed throughout Europe. Since Spain itself shared these objectives, it is at the same time merely a sort of self-correction, namely, the realisation of procedural requirements without which agreement to judicial review of general terms of business would not be credible.

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[105] *Ibidem.*

[106] *Ibidem* para. 20.

[107] ECJ (note 100), paras. 21 ff.

[108] *Ibidem* paras. 20-27.

[109] ECJ, *ibidem*, paras. 25-29. – Spain had in 1995 (the time when the encyclopaedias were being sold) not complied with its obligation to implement the Directive. This, according to the ECJ (*ibidem*, para. 31), could, in the present case, be compensated by an interpretation of

II.3.2 Product Liability

In its three judgments of 25 April 2002,[110] the ECJ seems to have enhanced the value of the, so far quite dormant, Directive 85/374/EEC[111] on product liability by asserting that this legislative act did not merely lay down minimum standards but instead aimed at "complete harmonization". This came as a surprise: at the time, the very modest harmonization effects had been minutely elaborated,[112] and the Directive was characterised as a product without much effect in terms of integration policy and rather defective in terms of liability law. There was, at any rate, broad agreement that the Directive did not affect the general law of tort, and specifically therefore also the general law of tort liability and its judicial extension in the Member States.[113]

This consensus has an objective basis. To be sure, product liability in tort law in the various countries overlaps with the Product Liability Directive. But the conceptual approach of, say, German law of tort on manufacturer liability and the conceptual design of the Product Liability Directive differ as significantly as do the procedures of national and European law. What is true of Germany is true equally of other jurisdictions, for instance, with regard to France and its *non cumul* principle. It is this very consensus which the ECJ now seems to wish to dismiss, that tends towards a position which was called the "fossilization theory"

Spanish law "in accordance with the Directive"; cf. the interpretations by J. Stuyck in his annotation, *CMLRev.* 38 (2001), 719 ff.

[110] Note 100 *supra*.

[111] Note 99 *supra.*

[112] Cf., for example, H. Koch, Internationale Produkthaftung uznd Grenzen der Rechtsangleichung durch die EG-Richtlinie, *Zeitschrift für das gesamte Handsels- und Wirtschaftsrecht* 152 (1988), 537 ff.

[113] References in G. Brüggemeier, Produkthaftung und Produktsicherheit, *Zeitschrift für das gesamte Handsels- und Wirtschaftsrecht* 152 (1988), 511 ff., 531 f.

[*Versteinerungstheorie*] at the time.[114] The decision on the Spanish law in particular[115] nourishes such fears.

The plaintiff had been infected by Hepatitis C virus in a clinic, because of a blood transfusion. She based her suit on Law No. 22/94 on civil liability for damage caused by defective products of 6 July 1994 that transposed the Directive, on the general liability provisions of Spanish civil law, and finally on the General Law No 26 of 19 July 1984 for the Protection of Consumers and Users, which, in its turn, is based on a "objective liability regulation" according to which the suing party had only to prove its damage and a causal connection. She directed her action for compensation for damages against the owner of the medical establishment (Medicina Asturiana SA), not the manufacturer of the blood product (the Centro Comunitario de Transfusión del Principado de Asturias).

The submitting court found that the provisions of Law No. 22/94 that implemented Directive 85/374 were more restrictive than the older 1984 law. The *lex posterior* states that the older provisions "do not apply to apply to liability for damage caused by products defective within the meaning of the [new] law".[116] This perception brought it to the preliminary ruling question of whether Article 13 of the Product Liability Directive could "be interpreted as precluding the restriction or limitation, as a result of transposition of the Directive, of rights granted to consumers under the legislation of the Member State?"[117]

Oddly, there is no further mention in the sequel of the temporal conflict provision of the Spanish law just cited. Instead, the court employs the traditional

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[114] G. Brüggemeier, *ibid.*, at 531.

[115] Case C-183/00, judgment of 25.04.2002 – *María Victoria González Sánchez* v. *Medicina Asturiana SA*.

[116] Case 183/00, para. 8.

[117] Case 83/00, para. 13. Article 13 states: "'This Directive shall not affect any rights which an injured person may have according to the rules of the law of contractual or non-contractual liability or a special liability system existing at the moment when this Directive is notified."

principles on full harmonization of the directives enacted under Article 100, old version, with its pre-emptive effects: Hence, "the margin of discretion available to the Member States in order to make provision for product liability is entirely determined by the Directive itself and must be inferred from its wording, purpose and structure".[118] And, accordingly, it is not some self-correction of Spanish law but the supremacy claim of Community law that is the basis for lowering the standard of protection in Spain. Is this then also to lead to the "fossilization" of the general civil law which was forewarned in the early debate on the Product Liability Directive?[119] The ECJ does not, in fact, go that far:

> "The reference in Article 13 of the Directive to the rights which an injured person may rely on under the rules of the law of contractual or non-contractual liability must be interpreted as meaning that the system of rules put in place by the Directive, which in Article 4 enables the victim to seek compensation where he proves damage, the defect in the product and the causal link between that defect and the damage, does not preclude the application of other systems of contractual or non-contractual liability based on other grounds, such as fault or a warranty in respect of latent defects."[120]

Less dramatic questions are raised by the two parallel decisions. Both concerned the conformity with the Directive of transpositions going beyond its standards of protection: Greece had wanted to spare its citizens from the personal contribution of 500 Euro provided for in Article 9 I (b) of the Directive.[121] France additionally wanted to hold the distributor liable alongside with the manufacturer, and additionally to restrict the exemptions from liability foreseen in Article 7 of the Directive.[122]

These deviations would have been unproblematic had the Directive sought to lay down minimum standards of the European consumer protection. And

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[118] Cf., C-183/00, para. 25.

[119] G. Brüggemeier , *supra* note 119, 531.

[120] Case183/00, para. 31.

[121] Case 154/00, para. 6.

[122] Case 52/00, para. 6 ff.

indeed, had the Directive been adopted after the Single European Act and accordingly based on Article 100a (now 95), then the procedure pursuant to Sections 4 and 5 of that provision would have applied. But that was, after all, an old directive, the spiritual father of which had always stressed that it was aimed at the development of the internal market and only implicitly achieved consumer protection objectives.[123] Thus, Advocate General Geelhoed – as also in Case C-183/00 – was able to bring the orthodox understanding of supremacy and pre-emption to bear.[124] The ECJ followed suit.[125] This is, after all, not particularly tragic, since Article 13 of the Directive "does not preclude the application of other systems of contractual or non-contractual liability based on other grounds, such as fault or a warranty in respect of latent defects",[126] and because Article 9 (1) (b) means only that those harmed "must bring an action under the ordinary law of contractual or non-contractual liability".[127] Should one expect the ECJ, especially in view of the Spanish case,[128] to hold next that e.g. Germany's rules on the manufacturers burden of proof are incompatible with the European directive? Hardly so. Such a step would be damaging to product liability law – and to the ECJ's authority.

II.4 Interim Comment

Exempla trahunt? The three groups of examples are intended to demonstrate the relevance and the limited interpretive power of the legitimation patterns

[123] Cf., H.-C. Taschner, Die künftige Produzntenhaftung in Deutschland, *Neue Juristische Wochenschrift* 1986, 611 ff.; that it was also advisable to argue that way can be seen from B. Börner, Die Produkthaftung oder das vergessene Gemeinschaftsrecht, *Festschrift zum 70. Geburtstag von Hans Kutscher*, Baden-Baden: Nomos 1981, 43 ff.

[124] Conclusions, Case154/00 para. 4; para. C. 52/00 and C 183/00, para.s. 27 ff.

[125] Case C-154/00, para. 10; Case C-52/00, para. 14.

[126] Case C-52/00 para. 22.

[127] Case C- 52/00 and Case C-154/00 both in para.30.

[128] Note 101 above.

submitted in the first section. The three paradigms, we can summarize, have all left their traces but none of them applied "in full" or exclusively. *Centros* and *Uberseering* by no means document willingness to expose law making in company law to mechanisms of regulatory competition. Neither *Pronuptia* nor *Courage* can be used to deduce primacy of European competition policy over competing conceptions of contractual justice in private law. And nowhere, and definitely not in the case law on consumer protection, can one witness anything like the formation of a European (social) state. All three paradigms are insufficiently complex analytically, and have defects in normative terms. In the seemingly incomprehensible, jigsaw puzzle of viewpoints that come to bear in the Europeanisation process, one can, however, certainly also find positive messages. This, admittedly, presupposes the extension of the conceptual worlds hitherto employed.

III Conclusions:
Justice-Making Law for the Europeanisation of Private Law

Back to the beginning: when conceptualising the Europeanisation of private law, we ought, said our initial thesis, to bear in mind the legitimation *problématique* that has, at times explicitly, at times less visibly, been on the agenda of the integration project from the outset, and which is now, since the success of the Human Rights Convention,[129] the Treaty of Nice,[130] the "post Nice process" and "Convention process"[131] been met with increasing academic and public attention. "Europe is not a state but it need a constitution" – this is not exactly a *communis opinio*, yet it is a formula that typifies the current discourse on European law.[132] "Europe already has a constitution that now needs to be developed further, but

[129] O.J. C 364/2000, 1.

[130] O.J. C 80/2001, 1.

[131] See http://european-conventiom.eu.int.

[132] Quite symptomatically J. Habermas, "So, why does Europe need a Constitution?", note 59 *supra.*

not necessarily in writing" – this is one of the more nuanced contrary positions.[133] Private lawyers are hard to hear in the current legal disputes over Europe's constitution. This indication of shortcomings is not without its ironies or its deeper significance: For, after all, it concerns a project which the founding fathers set going as a "economic community". To be sure, a key piece of the overflowing debates on the Europeanisation of private law is formed by the question of the advisability of a European Civil Code. As such, this is a constitutional question par excellence. It cannot be dismissed on the model of Paolo Cecchini's writings on the internal market,[134] i.e., via some estimate of the "costs of a non-code"; neither can we rely on the German experience of a pre-republican and pre-democratic history of private law unification. Unfortunately, the booming constitutional debate going on in public law offers limited help. Certainly, any internal market policy project, any directive, however technical and functionalist it may seem, regularly sparks off far-reaching controversies. But the constitutionalists, have lost the? economy and society from their vision: their readiness to embrace a "constitution without a state" – a prospect which now hardly seems to offend anyone anymore – seems to promote a constitutionalism beyond and above conflicts over the economic and social conflict constellations, thereby strengthening the traditions of a non-political, economic or technocratic rationality that determine the integration process in the formative stage.

Such an abstract constitutionalism would call valuable achievements into question. The private and the public, the economic freedoms and political rights of citizens, can, in a democratic constitutional state, be understood as

[133] J.H.H.Weiler, Prologue: Amsterdam and the Quest for Constitutional Democracy, in B. O'Keeffe/ P. Twomey (eds.), *Legal Issues of the Amsterdam Treaty*, Oxford/Portland: Hart 1999, 1 ff.; M. Poiares Maduro, Where to look for Legitimacy?, in E.O. Eriksen/J.E. Fossum/A. José Menéndez (eds.), *Constitution Making and Democratic Legitimacy*, Oslo: ARENA Report No 5/2002, 81 ff.

[134] Cf., P. Cecchini/M. Catinat/A. Jacquemin, *The European challenge, 1992: the benefits of a single market*, Brookfield: Aldershot 1988.

interdependent categories.[135] Private law has found its way into these contexts, finding its constitutional place in the interaction between legislation, case law, legal expertise and the political public.[136] The European constellation is different. But is it really of such a nature that economic freedoms must be understood as operating in a sphere which remains disconnected from political processes and beyond the reach of the political rights of European citizens? The answers to this question will depend on our understanding of the re-configuration of politics, economy and society that characterize the European Union, and on the functions of private law in this new environment.

This is a very abstract way to describe the theme of this section. In order somewhat to alleviate its abstractness, we shall anticipate the end result in two theses. The first is that we cannot conceive of the process of the Europeanisation of private law as the construction of a private law edifice with a unitary structure. Instead, we have to accept a multi-layer process in which very different sets of problems will have to be dealt with. The second is that the Europeanisation of private law has to base its legitimacy on the quality of the processes through which it comes about; we have to juridify these processes; we must, to rephrase the title of this essay, juridify the changes and innovations that the Europeanisation process brings about; we need a procedural law of Europeanisation.

Let me develop this argument in five steps:

(1) the first refers to the analyses, widespread in political science, of the EU as a multi-level system; on these analyses, it bases the assertion that "orthodox" supranationalism and its hierarchical concepts of supremacy have to be replaces by a "deliberative" re-conceptualisation of supranationalism (Section III.1).

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[135] References to Jürgen Habermas are insufficient as an explanation yet must suffice here; cf., the references in notes 7 and 59 *supra.*

[136] Cf., The references in note 27 *supra.*

(2) A deliberative supranationalism promoting communication and co-operation – and dependent of them – must not rely on the "power of the better argument" alone. It needs a law with the potential to transform strategic interactions into argumentational interaction. The second step of the argument will go into this (Section III.2).

(3) The superiority of these categories to the paradigms presented in the introductory section will be defended in a retrospective look at the sets of examples discussed in the second section (Section III.3).

(4) Fourthly, we shall point to the emergence of genuinely transnational "governance arrangements", without, however, offering any comprehensive analysis (Section III.4).

(5) The vision of a (procedural) law of the Europeanisation process denotes a normative programme. Its defence does not imply the prediction that this vision will become reality (Section III.5).

III.1 "Deliberative" Supranationalism

European integration research has kept on saying, for some years now, that the EU is to be understood as a "multi-level system of governance *sui generis*."[137] Jürgen Neyer, in particular, has enriched this debate in normative terms: if and because the powers of action and resources for action are located at various relatively autonomous levels in the EU, then coping with functionally interwoven problem situations will continually depend on communication between the actors competent in their various domains.[138] Such communication can be achieved in manifold ways. But Neyer is now seeking to make it plausible that, in the specific conditions of the EU, successful solutions to problems can be expected from the "deliberative" mode of communication based on universalizable motivations and

[137] For a summary, see M. Jachtenfuchs, The Governance Approach to European Integration, *Journal of Common Market Studies* 39 (2001), 245 ff., and F.W. Scharpf, Notes Toward a Theory of Multilevel Governing in Europe, *Scandinavian Political Studies* 24 (2001), 1 ff.

[138] J. Neyer, Discourse and Order in the EU, A Deliberative Approach to Multi-Level Governance, *Journal of Common Market Studies* 41 (2003) (forthcoming).

tied down to rules and principles.[139] To be sure, the multi-level approach cannot be understood as revealing a "fact" to which legal constructions would have to orient themselves. This is especially true of Neyer's theoretical arguments. Nonetheless, the multi-level analysis does refer to problem situations that legal science confronts in similar fashion.[140] And the normative turn that Neyer gives to the multi-level approach does, at any rate, support the assumption that Europe need not sink into chaos if it relies on deliberative interaction instead of the formation of hierarchies.

III.1.1 Diagonal conflicts

In delimiting and harmonizing European and Member State powers, the parallels become particularly clear. Conflicts as to competencies are typified in the EU by the fact that the Member State defending its autonomy itself belongs to the Community against whose demands it is defending itself. Here, the principle of enumerated powers (Article 3-4; now 3-7), according to which the Community should act only in the areas specifically allotted to it, is quite often dysfunctional: activities oriented towards the solution of economic and social problems will often have to involve both Community and Member State powers. The resulting overlaps, in practice, compel the Community and Member States de facto to

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[139] Set out in the same sense and in more detail in his Habilitation Thesis "Politische Herrschaft in horizontalen Mehrebenensystemen. Effektivität und Vergesellschaftung jenseits des Staates", Bremen 2002.

[140] And has started to acknowledge this; cf. A. Furrer, *Zivilrecht im gemeinschaftlichen Kontext. Das Europäische Kollisionsrecht als Koordinierungsinstrument für die Einbindung des Zivilrechts in das europäische Wirtschaftsrecht*, Bern 2002, 56 ff., 155 ff, with references. Oddly (if not incomprehensibly) the comparative law tradition seems less impressed by all this than conflict of laws scholarship. At the same time, the conceptualisation of the EU as a multi-level system demonstrates with particular poignancy mutual influences between regulatory systems and the restructuring of international relations. Of course, generalising judgments on a discipline can always be falsified. The law will respond in some way real problems and legal science in turn will reflect on them, explicitly or more implicitly; cf. with further references H. Muir Watt, *ibidem* (note 88); R.. Michaels, Im Westen nichts Neues? 100 Jahre Pariser Kongress für Rechtsvergleichung – Gedanken anlässlich einer Jubiläumskonferenz in New Orleans, *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 66 (2002), 97 ff.

complex harmonisations of their activities: each can block the other, but neither can achieve solutions to the problems when acting alone.[141] "Diagonal" conflict constellations of this sort are an everyday experience in European law and European policy:[142] the Community holds powers that relate only to one segment of interdependent issues. The Member States hold partial powers that equally do not suffice to achieve a solution of problems autonomously.

III.1.2 Deliberative Supranationalism I: European law as law of conflict of laws

It is a small step from this insight to an interpretation of legal provisions as precepts for a communication oriented, "deliberative" political style which can be more positively justified if set in its broader context. In the "post-national constellation" typified by economic interpenetration and interdependency, the extraterritorial effects of the decisions and omissions of democratic polities are unavoidable; but the burdens loaded unilaterally on to one's neighbour in each case cannot be justified by democratic processes internal to the state: "No taxation without representation" – this is a principle that imposes on the Member States of the EU the obligation to take account of the interests and concerns of non-nationals even within the national polity.[143]

But it is precisely this that is the normative core of these supranational rules and principles which legitimise European law, where it requires Member States to "apply" foreign law and to refrain from insisting on their *lex fori* and

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[141] The joint-decision trap: lessons from German federalism, *Public Administration* 66 (1988), 239 ff.; A. Benz, Politische Steuerung in lose gekoppelten Mehrebenensystemen, in R Wehrle/U. Schimank, (eds.), *Gesellschaftliche Komplexität und kollektive Handlungsfähigkeit*, Frankfurt a.M./New York: Campus 2000, 99 ff.

[142] Cf., II.2 and II.3 above.

[143] Cf., earlier Ch. Joerges, The Impact of European Integration (note 1), 390; and very similarly M. Maduro Poiares, Where To Look For Legitimacy?, note 133 *supra*.

domestic interests.[144] This sort of restriction of a Member State's political autonomy is, however, limited. In particular, the case law on Article 30 (now 28) has repeatedly indicated[145] how the idiosyncrasies of individual states can be identified as such and reduced to a civilised level – "*autonomieschonend und gemeinschaftsverträglich*".[146]

The mediation between differences in regulatory policies and the diverse interests of the concerned jurisdictions that it achieves overcomes the one-sidedness of PIL-rules; it represents a truly European law of conflict of laws. It is "deliberative" if and because it does not content itself with appealing to the supremacy of European law; it is European because it seeks to identify principles and rules which make differing laws in the EU compatible; with this ambition it stands "above" national law because it indicates and declares binding a metanorm under which intra-European conflicts can be resolved.[147]

III.2 Supranational law

One of the analytical strengths of deliberative supranationalism is to conceive of the EU as a non-unitary polity in which Member States are not only "relatively"

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[144] Cf., the analyses by A Furrer, *Zivilrecht im gemeinschaftsrechtlichen Kontext. Das Europäische Kollisionsrecht als Koordinierungsinstrument für die Einbindung des Zivilrechts in das europäische Wirtschaftsrecht*, Bern: Stämpfli 2002, 171 ff.; J. Fetsch, *Eingriffsnormen und EG-Vertrag*, Tübingen 2002, 126 ff., 139 ff. (on the conflict of laws principles, see 21 ff., 71 ff.); Ch. Schmid, Europäische Wirtschaftsverfassung und Privatrecht (note 83), Kap. IV. – For a heuristic using American conflict of law methodologies for the structuring of European *Kollisionsrecht* cf., Ch. Joerges, "Deliberative Supranationalism" – Two Defences, *European Law Journal* 8 (2002), 133 ff., 135 ff. with references esp. to B. Currie, Notes on Methods and Objectives in the Conflict of Law, in *idem, Selected Essays on the Conflict of Laws*, Durham, N.C.: Duke UP, 177 ff. and B. Currie's particularly lucid summary of his position in his Comment on Babcock v. Jackson, *Columbia Law Rev*. 63 (1963) 1233 ff., 1242 ff.

[145] See, for example, M. Maduro Poiares, *We the Court*, Oxford: Hart 1998, 150 ff.; J.H.H. Weiler, *The Constitution of Europe*, Cambridge: Cambridge UP 1999, 221 ff.

[146] F.W. Scharpf, Autonomieschonend und gemeinschaftsverträglich, note 69 *supra*.

[147] A law of conflict of laws which has a legally weak enforcement apparatus behind it is dependent on having it accepted as fragile: but this applies to all universal rules of conflict of laws, too.

autonomous but also “relatively” different, in which cultural differences[148] can continue to exist.[149] This opens up realistic perspectives for the design of the European policy. It suggests “soft” forms of control that take account of the special features of national institutions and experience. At the same time, I believe, its compatibility with democracy of deliberative supranationalism is plain to see – indeed, it can be seen as a requirement for democracy, given that it seeks to enhance the influence of European citizens who are affected by decisions which they cannot influence.[150]

The legitimacy of a deliberative supranationalism which seeks to give voice to foreigners and seeks to promote deliberative political process in the EU is not really problematical. Instead, what is questionable is whether the EU’s institutional circumstances and configurations of interests actually do favour such legitimated solutions to problems. The empirical dimension of this question must be left out of consideration here.[151] Though, we do wish to assert, at least, that important rules and principles of European law can be interpreted as institutionalisations of a deliberative style of politics, and thus that, in supranational European law, there is indeed a layer of law that does not merely favour deliberative interactions, but ties these interactions to substantive and enforceable rules.[152] This genuinely constitutional law includes the ban on

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[148] See note 31.

[149] This is how I read the plea for “constitutionalism pluralism” in N.Walker, The Idea of Constitutional Pluralism, *Modern Law Review* 65 (2002), 317 ff.

[150] The critique by A. Peters, *Elemente einer Theorie der Verfassung Europas*, Berlin 2001, 660, of what she calls a “democracy of concern” [“*Betroffenheitsdemokratie*”] does not meet our argument, which aims to explain why a European law rule of mutual considerations would be democratic, rather than to derive participation rights from a diffuse “concern”.

[151] Cf., the references to the recent work of J. Neyer in notes 138 and 139 *supra.*

[152] Deliberativen Suprantionalismus tends to undervalue perfectly legitimate validity claims of of suprantional law, argues Hans-W. Micklitz; cf., e.g., his Principles of Social Justice in European Private Law, *YEL* 19 (1999-2000), 167 ff. This objection is important, especially in the field of consumer protection. It seems to me, however, that our disagreement concerns the approaches to social protection in the EU, not the regulative idea of a „social“ private law as such (cf., Ch. Joerges, Interactive Adjudication in the Europeanisation Process? A Demanding

discrimination in Article 12 [ex 6], the basic freedoms that have developed into civic rights, the European Human Rights Convention, and (probably in the foreseeable future) also the basic rights proclaimed in Nice. Also parts of it are the co-operation duties in Article 10 [ex 5], the ban on protectionism in Article 28 [ex 30] and the mutual recognition obligation derived from this provision. All these legal positions are important not just because of their direct, both vertical and horizontal, effects, but also because they give guidance in the production of law, including legislative and executive law-making. They can be invoked in all modern and not-so-modern governance arrangements and constitute a protective shield against strategic patterns of argument.

III.3 Reinterpretations

Whether this conceptual framework is fruitful can be tested by using it to reinterpret the situation in the cases discussed in the second section, and contrasting it with the interpretations which keep to the traditional patterns of legitimation. In the requisite brevity:

Centros and *Überseering*[153] confirmed the fundamental importance of the freedoms in the TEU. At the same time, they show that this supranational or legal framework cannot be understood as rules capable of subsumption, or at any rate ought not to be understood that way: in the interpretation of the *Centros* judgment

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Perspective and a Modest Example, note 75 *supra*).In his essay "Transnational Governance without a Public Law?" Ms. Heidelberg/Florenz 2002, C Möllers [see, more recently, his Verfassunggebende Gewalt – Verfassung – Konstitutionalisierung, in A. von Bogdandy (ed.), *Europäisches Verfassungsrecht*, Heidelberg/New York: Springer (forthcoming), text accompanying notes 250 ff.] distinguishes between a "private law frameworks of public institutions" that understand the production of law or the generation of norms as the result of a spontaneous co-ordination processes) and a "public law framework" that conceives of the law as the outcome of authoritative legislative acts legitimated by majority decisions. Both forms could or should complement each other. The argument in the paper goes part of the way towards meeting this demand in that it insist on the indispensability of mandatory rules and principles governing interactions in the European polity.

[153] Section II.1 above.

advocated above, the freedom of establishment is not merely an economic freedom, but also not an element of a European economic constitution – preordained for Member States and/or exposing their laws to processes of regulatory competition. Instead, it is more of a freedom that simultaneously acts as a political right, because it puts the citizens of a Member State in a position to place their sovereign under a compulsion to provide justification.[154] In this interpretation, what is involved is indeed a procedural law of just-ification, which sets first of all the courts and then the legislator (and then, if necessary, the courts again) in motion. Is this wishful thinking? To some degree; but one ought to bear in mind the implications of a more rigid, interpretation which *Überseering* seems to suggest: if freedom of establishment were understood as a legal principle that could set aside the regulatory keystones of company law and historically and politically important concerns which the seat principle had defended,[155] then this "right" would not merely have disintegrative effects within some Member States but illegitimatise the Community and the integration project as a whole.

We have characterized the conflicts between European competition law and national private law in cases like *Pronuptia* and *Courage* as "diagonal" conflict constellations.[156] The "settlement" of this conflict occurred in the Pronuptia saga through sheer exhaustion. This is a mechanism which all legal systems use. But it is one which by no means does justice to the issues involved. What is at issue in cases like *Pronuptia* is whether European law incorporates elements of a law of franchisee protection as part of the European *order public* or tolerates such objectives where national contract law pursues them.[157] Again, we would then be witnessing a just-ification process emerging from the conflict between the two levels of governance in the EU; its legitimacy would rest either

[154] Section II.1.2. above.

[155] Section II.1.3 above.

[156] Section II.2 above.

[157] Ch. Joerges, Contract and Status in Franchising Law, note 87 above, 50 ff.

upon the insight that interests of franchisee protection are not discredited by competition law, although such protection need not be uniformly shaped throughout all European jurisdictions. What was merely implicit in *Pronuptia* came openly to the fore in *Courage*: here the conflict of laws has led to the justi(ce)-fication of new private law that the Member States have to incorporates their "law of the land". In this case, the prescriptive claims of Community law are certainly more rigid, even though the incorporation it requires may take doctrinally different shapes.[158]

One can hardly interpret the competition law judgments as confirming the emergence of a European "regulatory state"; such an interpretation would be equally implausible with the consumer protection judgments (on the Directives on Unfair Terms in Consumer Contracts and on Product Liability.[159] In *Océano*, the ECJ encouraged semi-autonomous developments of national laws.[160] Its holdings on product liability – hopefully! –cannot, despite their strong language, change anything in the fact that Directive 85/374/EWG has only a complementary significance that cannot contribute much to the tasks of extending the law that continually arise in manufacturer liability in tort law. Whether these decisions will instigate new Community legislation in the field of product liability remains to be seen. Even if such activities are being initiated, the tensions between the "logic of market integration" and the "logic of a law of private law justi(ce)-fication" will not come to a rest. The European legal machinery is simply not equipped to cope with the many facets of this field in a comprehensive, let alone centralising, fashion.

[158] Section II.2.2 above.

[159] Section II.3 above.

[160] Section II.3.1 above.

III.4 Deliberative Supranationalism II: Constitutionalising "transnational governance arrangements"

In many areas of regulatory policy, what is only rarely visible the realm of private law becomes plain: the building up of hybrid transnational governance arrangements, structured neither in purely private law terms not in purely public law terms, neither nationally nor European, neither purely governmental nor non-governmental,[161] in which societal and governmental actors adapt to a transnational reality which is no longer domesticisible nationally. What is so typical of regulatory policy also has to leave its traces in private law. Among the examples listed in Section II, the one in franchising law is the clearest: this law is neither purely national nor purely European. Both the Commission, the ECJ and the Member State courts are involved in its making – not to mention the enterprise associations that work out the contractual arrangements to transport the various franchising concepts, which, at the same time, have to be kept compatible with European competition law and many kinds of national legal systems. Yet, the field is even broader. With increasing intensity, groups of academics and associations are having their say on the Europeanisation of private law, not merely "portraying, but also producing" law, and referring, for the legitimisation of their claims to involvement, not just to their scholarly reputation, but also intending their contributions to apply in legal practice and legal policy.[162] What can be observed in legislation has long been underway in the context of judicial law finding. Public jurisdiction can play only a very limited part in settling disputes in European contexts. All of this is more than, and different from, the type of conflict of laws just described, because these transnational governance

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[161] On this term see Ph.C. Schmitter, What is there to legitimise in the European Union... and how might this be accomplished?", in Ch. Joerges/Y. Mény/J.H.H. Weiler (eds.) *Symposium: Mountain or Molehill? A Critical Appraisal of the Commission White Paper on Governance*, Jean Monnet Working Paper No. 6/01, 79 ff., 83 ff. (http://www.iue.it/RSC/Governance/; http://www.jeanmonnetprogram.org/papers/01/010601.html).

[162] For a comprehensive account, see K. Riedl, Europäisierung des Privatrechts: 'Recht-Fertigung' wissenschaftlicher Vereinheitlichungsprojekte, Ph.D. Thesis, EUI-Florence 2002

arrangements do not just mediate between different given policies and law, but are to elaborate genuinely transnational responses to transnational problem constellations. This type of governance cannot be rejected as being outright illegal or illegitimate, not just because of their factual importance, but also because of their normative potential. The need to design a law that would "constitutionalise" such arrangements so that they deserve the recognition they claim is only gradually being realized – and all I wish to do here is to emphasize that we will have to face these challenges.[163]

III.5 Bottlenecks

All this "may be true in theory, but does not apply in practice", says Immanuel Kant famous General Maxim,[164] which may be appropriate here – even if one accepts all the benevolent reconstructions of the examples presented in the preceding sections. For everywhere, bottlenecks, weaknesses and omissions have also become visible: in such a complex organization as the ECJ, there cannot be any unitary institutional self-perception. The interactions between the ECJ and the national courts are governed by formalist prescriptions and are vulnerable to strategic behaviour, be it of powerful private players, be it of governmental actors, be it of lower or higher courts: interactive adjudication does occur in the EU, although its quality is difficult to assess[165] and even more difficult to

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[163] For the area of European risk regulation in the foodstuffs sector cf., Ch. Joerges, Zusammenfassung und Perspektiven: „Gutes Regieren" im Binnenmarkt, in Ch. Joerges/J. Falke (eds.), *Das Ausschußwesen der Europäischen Union. Praxis der Risikoregulierung im Binnenmarkt und ihre rechtliche Verfassung*, Baden-Baden: Nomos 2000, 349 ff., 363 ff..

[164] I. Kant, Über den Gemeinspruch: Das mag in der Theorie richtig sein, taugt aber nicht für die Praxis (*Werkausgabe der Wissenschaftlichen Buchgesellschaft* Vol. 9, edited by W. Weischedel), Darmstadt 1971, 125 ff..

[165] There are very many examples of a fortunate interaction in the European judiciary. And there are counter-examples and borderline cases: *Überseering* (see Section II.1.3) and the recent judgments on the Product Liability Directive in den neuen Urteilen zur Produkthaftung (see Section II.3.2) are certainly not particularly encouraging although they are not as disappointing as Case C-481/99, judgment of 13.12.2001 – *Georg und Helga Heininger* v. *Bayerische Hypotheken- und Vereinsbank* and the critique by G.-P. Calliess, The Limits of

ensure.[166] And however careful courts may deliberate, they are not in control of the processes of law production. They do much if they ensure the respect for Europe's legal commitments and help to identify and to defend procedural guarantees which promote deliberative interactions. Do all these practical troubles, then, ultimately militate in favour of the project of a European civil code? First of all, they are in favour of accepting the view that, in such a project, the very difficulties that arise are those that it is supposed to solve. The "classical" models of private law codification do not come into consideration for today's Europe. First, because Europe will not become some hierarchically structured polity, but will remain heterarchical and plural; there is no legislative actor with the vocation for universal legislation that would bring Europe under a unitary codified regime. Nor, however, is Europe some sort of cultural nation able to write down its code without having to wait for the formation of a state. The mixed position we find ourselves in – a "primary law" that is about to learn how to organise the interdependence of the freedoms of the "market citizens" with the aspirations of political citizenship in the European Union; and a heterarchical regulatory policy organized in networks; a patchwork of specific legislation tackling concrete problems which produces a host of disintegrative effects in national legal systems – this is the "state of the (European) Union". Is the quality of private law harmed thereby, and is the idea of equal originality [*Gleichurspünglichkeit*] of private autonomy and of political rights to be written off AS theory? Will we be witnessing the generation of a "quilt", consisting of colourful yet disparate pieces, which have to be put together by people who are

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Eclecticism in Consumer Law: National Struggles and the Hope for a Coherent European Contract Law, *German Law Journal* 3/8, 1 August 2002, www.germanlawjournal.com). *Lasciate ogni speranza!?* Such a desperate outcry would be premature.

[166] Ch. Joerges, "La langue de l'étranger" – Observations on the need to observe and understand discourses on foreign territories, Comments on Silvana Sciarra (ed.), *Labour Law in the Courts. National Judges and the European Court of Justice*, Oxford/Portland: Hart 2001, http:\\www.europeanbooks.org/index2.htm

colour-blind?[167] This has by no means been established. The point is whether the development exceeds the learning capacities and productive imaginative power of those involved.

[167] Thus P. Schlechtriem, „Wandlungen des Schuldrechts in Europa" – wozu und wohin, *Zeitschrift für Europäisches Privatrecht* 10 (2002), 213 ff., 214.