



**Department of Law**

# **LEGITIMACY AND EUROPEAN PRIVATE LAW**

**Marija Bartl**

Thesis submitted for assessment with a view to obtaining the degree of  
Doctor of Laws of the European University Institute

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Thesis has been submitted for language correction to the EUI Language Centre.

## ***ABSTRACT***

This thesis inquires into the Legitimacy of Harmonisation of European Private law (EPL) against the background of the broader debate on the Legitimacy of the EU, and its so-called Social and Democratic deficits. While the ‘Social’ deficit has a fundamental importance for the ‘self-understanding’ of the EU and its role in private law, the ‘Democratic’ deficit impacts on the capacity of the democratic self-government in private law, which in the past proved fundamental for pulling out the market re-embedding function of private law.

The legitimacy concerns increase with the expanding powers of the EU. In private law, the main triggers have been the attempts by the EU to become an exclusive locus of private lawmaking through ‘full’ or ‘maximum’ harmonisation of big parts of private law, which gave rise to concerns regarding the impact of such a competence shift on the content of private law.

This thesis can be understood both as a critique of the current efforts in EPL, equally as an exploration of how to address the normative challenges of private law making in the context of a postnational polity such as the EU, which as a matter of broader concern needs to compensate for the mismatch between its factual powers and its legitimacy resources at the ‘macro’ level.

The Legitimacy ‘Deficits’ of the EU are the consequence of its postnational origin – both the functional character of the EU and the mode of governance adjusted to its functional purpose. It is also for this reason that, despite all ‘democratisation’ efforts, our normative concerns regarding the legitimacy of the EU have still not been satisfied at the *macro* level and we need to shift our attention to legitimacy at a different scale of observation - at the *micro* level.

The postnational entities more broadly need to seek additional legitimisation for their actions on an ad hoc basis, through the *micro* legitimacy of rules, decisions and procedures that lead to them. At this level, we have also a better chance to overcome the limitations of the double democratic deficit of the EU (economic rationality on the one hand, and the lack

of republican dimension of its democratic institutions on the other) through designing legitimate micro procedures. Such micro legitimate procedure shall enable the co-existence of both market and non-market rationalities in the decision-making of the EU, fundamental for allowing private law to fulfil its market re-embedding function.

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**PART I:**

**LEGITIMACY AND THE EUROPEAN  
UNION: THEORETICAL FRAMEWORK**



## 1. INTRODUCTION

This thesis inquires into the Legitimacy of Harmonisation of European Private law (EPL) against the background of the broader debate on the Legitimacy of the EU, and its so-called Social and Democratic deficits. While the ‘Social’ deficit has a fundamental importance for the ‘self-understanding’ of the EU and its role in private law, the ‘Democratic’ deficit impacts on the capacity of the democratic self-government in private law, which in the past proved fundamental for pulling out the market re-embedding function of private law.

The legitimacy concerns increase with the expanding powers of the EU. In private law, the main triggers have been the attempts by the EU to become an exclusive locus of private lawmaking through ‘full’ or ‘maximum’ harmonisation of big parts of private law, which gave rise to concerns regarding the impact of such a competence shift on the content of private law.

This thesis can be understood both as a critique of the current efforts in EPL, and equally as an exploration of how to address the normative challenges of private law making in the context of a postnational polity such as the EU, which as a matter of broader concern needs to compensate for the mismatch between its factual powers and its legitimacy resources at the ‘macro’ level.

The Legitimacy ‘Deficits’ of the EU at the macro level are the consequence of its postnational origin – both the functional character of the EU and the mode of governance, adjusted to its functional purpose. For this reason, despite all ‘democratisation’ efforts, our normative concerns regarding the legitimacy of the EU still cannot be satisfied at the *macro* level. The EU suffers from double democratic deficit, which implies at one level the lack of a republican dimension to its governance, while the other level its democratic deficit relates to the inbuilt economic rationality linked to the lack of politicisation of the ‘raison d’être’ of the EU, the market as a foundation of the EU order, which is at root of its ‘Social’ deficit.<sup>1</sup>

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<sup>1</sup> It is important to understand that the economic rationality (expressed as liberal bias of the EU) is a dimension of *democratic* deficit which, despite being in essence a substantive economic policy, has

Insofar as the legitimacy deficit at the *macro* level proved difficult to solve, we need to shift our attention to legitimacy at a different scale of observation - to the *micro* level. This is the level where postnational entities more broadly need to seek additional legitimisation for their actions, on an ad hoc basis, through the *micro* legitimacy of outcomes, decisions and procedures that lead to them. At this level, we have also a better chance to overcome the limitations of the double democratic deficit of the EU and allow for the further co-existence of both market and non-market rationalities in its decision-making – which is fundamental for allowing private law to fulfil its market re-embedding function.

This introduction will attempt to introduce these points firstly by setting the scene, though elaboration on the interplay between EU policy in the face of globalisation (the external ‘face’ of the EU) and the way it impacts on internal policies in the EU and its efforts in EPL. In particular, the interaction between the external and internal face seems to strengthen the economic rationality and exacerbate the legitimacy deficits, which calls into question the compromise between the EU and MS with regard to the social sphere - in private law and beyond.

The following part then introduces the First Part of the Thesis, which elaborates on the past and present of legitimacy efforts in the EU, and in particular the shift from performance to regime legitimacy in the EU. It expands on the different attempts to increase the democratic legitimacy of the EU, as well as the reasons for their relative failures, and suggests means of how to approach democratic legitimacy in a qualitatively different kind of entity (polity) such as the EU - through Micro legitimacy.

The third part of the Introduction then deals with the Second and Third Part of the Thesis and it outlines how Micro legitimacy could be achieved in the framework of the EPL, both at the level of private law making (part II) and in the interpretation of EPL (part III). It suggests how the increase in the democratic legitimacy of the processes happens at the *micro* level, which should contribute to ‘preserve’ the normative content and social dimension of the EPL, and contribute to the overall legitimacy of the polity.

The final part of the Introduction then aims to give reader a ‘taste’ of what is meant by the ‘locking’ in of economic rationality in policy process, and what consequences it has

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been removed from the democratic contestation and political struggle. This would have been unimaginable at the level of liberal constitutional democracies.



for the content of EPL. Specifically, we will look at the example of the ‘process’ which led to the elaboration of the 2008 Proposal of the Consumer Rights Directive (CRD), illustrating how the economic rationality (‘Social’ Deficit) and undemocratic procedures (‘Democratic Deficit stricto sensu’) have influenced the outcome of the measure, and the design of the procedure that lead to it.

### **1.1. *Setting the Scene***

When the Communities were created more than fifty year ago, their design gave expression to a concrete vision of the role of the state in economy, embodied in the function of the EU and responding to the question of what the appropriate mode for ‘public’ involvement in the economy would be.<sup>2</sup> In particular, the EU has aimed to create a common market and to allow free movement of production factors, along with ensuring efficient competition – which first acquired shape through mostly negative integration, before in the mid-1980s embracing a greater pull toward positive integration.

The development of the EU in the last two decades has been understood as a shift away from its economic ‘ordo-liberal’ constitution. The EU has embarked on the path of becoming a political union, by shifting its emphasis from minimal intervention and the securing of competition to adding new (often social) competences, new values, or incorporating such important milestones as European Citizenship or the Charter of Fundamental Rights.

Yet, from time to time, we are reminded that the self-perception of the EU and its main claim to legitimacy based on the ‘market’ have changed very little. The decisions of the Court of Justice are the best evidence of this self-understanding. Decisions such as *Laval* or *Viking*, *Axa Belge* or *Product Liability* show that the EU still remains a market-enabling polity whenever it comes to areas linked (often indirectly) to the Internal Market. There are still some objectives and values which are held as more ‘European’ than others – whatever status the others have achieved in the Treaties. This phenomenon has been popularly called the ‘liberal bias’ of the EU. Most of the efforts to increase the legitimacy of the EU were at

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<sup>2</sup> See Ch. 3.

root concerned with liberal bias, and this question becomes ever more important with the role that the EU assumes in the process of globalisation

Private law will guide us in our thinking about the ‘liberal bias’ of the EU. It is in this sphere that old battles re-emerge with unprecedented salience, and where we need to ascertain the causes and consequences of the bias and eventually, the cure. Private law is further an interesting field of study insofar as it is a major ‘public’ link between the market and society, and it raises a broadly interesting theoretical and empirical question of what the transfer of competences to a ‘market polity’ may imply for the framework which it puts in place. Finally, private law can offer an additional contribution to the study of the EU, insofar as it has itself gone through a number of controversies regarding the kind of governance, goals, and the role of the ‘public’ and democracy in its development, thus we can readily find parallels between the debate and the controversies present in the EU more broadly.

What is at stake when talking about ‘liberal bias’ (here the concept of a free market) is that such *pre-understanding* structurally leaves out other aims and goals which might have competed as alternatives to this very pre-understanding. In private law, this will impact on the debate about the alternative visions of a good life or of a human being (citizen instead of consumer or shopper), who may care more for the environment or social and societal issues than for low prices or greater choice.

There are three reasons that serve to ‘lock in’ the market or economic rationality of the EU. First of all, it is still the primary *performance* and *responsibility* of the EU which lie in the internal market building and which shape the primary motivation of the European Commission (Commission) and the Court of Justice (CJEU). Secondly, the postnational character of the EU, where the combination of ‘international’ (contractual) commitment to substantive economic policy, the large and increasing powers of the EU and the comparatively low level of social legitimacy *may raise fears that any politicisation and questioning of the ‘foundation of the EU’ – namely its internal market foundation – may threaten the whole project*. Thirdly, thanks to institutional limitations, we see increasing reliance on ‘neutral’, *quantified expert and economic justifications which seem to place fewer demands on legitimacy resources* vis-à-vis the Commission and the EU, and which are increasingly institutionalised by the Commission through ‘evidence based decision-making’.

This, as Kohler Koch rightly posits, gives *preference to expert knowledge and puts political, value oriented debates second*.<sup>3</sup> Thus we can approximate the same kind of justification, which Majone suggests for the Regulatory State, and which links back to the ‘ordo-liberal’ intellectual heritage.<sup>4</sup>

The problem of such reductionist (economic and instrumental) rationality is becoming increasingly salient since the EU is a natural locus for the European response to globalisation. The agenda of ‘more market’ and the stress on competitiveness<sup>5</sup> have been automatic responses insofar as they fit perfectly with the constitutional self-understanding of the EU.<sup>6</sup> This determinism is so deeply ingrained that political subjects who may have furthered ‘non-market’ responses to globalisation do not even try to seek a response at the European level, for such non-market alternatives seem structurally locked out. Yet the EU is the only forum where any meaningful ‘non- market’ response to globalisation may be found.<sup>7</sup>

Now, there is a noteworthy dynamic between the internal and external faces of the EU, and the role of the Commission in private law. In particular, the ‘external face’ of the EU (which has so easily adapted to the ‘more market’ form) has an impact on the ‘internal face’ of the EU and the way in which the EU pursues policies within its borders. The whole attempt for exclusive competence in private law can be understood as a response to the need

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<sup>3</sup> B. Kohler-Koch, “II. Civil Society Contribution to Democratic Governance: A Critical Assessment,” *Opening EU-Governance to Civil Society* (2008): 15.

<sup>4</sup> See Chapter 3.1.

<sup>5</sup> With its inbuilt preference for the market, the natural tendency of the EU is to respond to the global market by ‘more market’. This will lead to, as Kumm correctly identifies for the national level, the costs of liberalisation being shifted to those immobile economic actors (low-wage labour, small firms). This can not be sufficiently addressed in the EU, which is epistemologically bound to market solutions. See Mattias Kumm, “Constitutionalising Subsidiarity in Integrated Markets: The Case of Tobacco Regulation in the European Union,” *European Law Journal* 12, no. 4 (July 2006): 503–533.

<sup>6</sup> The major challenges are, of course, also the major chances. Thus a more confident politicisation of market objectives, and the question of ‘what kind of economic model’ in the external face of the EU, may become a crucial mobilisation factor for the democratisation of the EU at the macro level, insofar as it carries the mobilisation potential that we have not witnessed before. The EU has in this case more to offer than its MS – it is a sufficiently ‘big market’ that it can be a serious ‘debate partner’ to the global markets. Thus it can appeal to the self-interest of a large portion of the population, which is increasingly negatively affected by the austerity coming with an ‘unavoidability’ of consequences of global economic forces.

<sup>7</sup> In J. Habermas, “Erste Hilfe Für Europa,” *Die Zeit* 29 (2007), Habermas critiques the SDP ‘national’ response to the challenges of the global market. The reason however may not be ‘unwillingness’, but rather the institutional setting and inbuilt rationality of the EU which is centred on market responses, which may appear as leaving no space for solutions based on non-market rationalities.

to ‘make the EU [a] more competitive economy’ externally,<sup>8</sup> or to lower the impact of the ‘economic crisis’ by removing the ‘fragmentation’ of private law.

Looking at internal matters from the external ‘competitiveness’ perspective makes us forget that there are ‘internal’ reasons which ground the inappropriateness of transferring exclusive competence in private law to the EU level. These reasons relate particularly to the *social* and related *democratic* deficits of the EU, which have so far made the MS a necessary component in the creation of private law in Europe – in particular if we recognise the need for truly ‘social’ dimension of private law,<sup>9</sup> equally as the democratic ambition of private law to *re-embed* the markets.<sup>10</sup>

### **1.1.1. Why ‘deficits’ matter: On the market re-embedding function of private law.**

The relation between *private law*, *democracy* and the *social* is not an easy one. It is more than one hundred years since the foundations of classical private law were successfully contested, primarily in the framework of democratic processes in nation states, and its founding (allegedly universal) values, goals and objectives were exposed to democratic scrutiny. The analysis has uncovered the ‘liberal’ bias of ‘neutral’ and ‘universal’ private law, shaking permanently the way we view economic order and the role of the state and private law in the market.<sup>11</sup>

Opening the founding values of private law to democratic discussion has proved fundamental for reconceptualising the relationship between the market, the state and private law. ‘Justice’ as a basic goal ceases to be understood as formally universal and *inherent* to private law, but becomes the responsibility of the state, which from now on must bear the responsibility for ‘just social order’. A *performance* of the democratic state thus becomes bound to delivering (social) justice through private law.

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<sup>8</sup> H.W. Micklitz, “The Targeted Full Harmonisation Approach: 13 Looking Behind the Curtain” (2009).

<sup>9</sup> Social referring to the social rationality for public action – the public action primarily motivated by the social, as opposed to market, concerns. Treating ‘social dimension’ within the market framework (as market failure), as we will see, can not content-wise substitute the social rationality.

<sup>10</sup> To counter ‘economic’, market rationality by the alternative societal, or non-market, rationalities.

<sup>11</sup> See Chapter 4.1.

This is a fundamental change in the understanding of private law. This paradigm shift turns classical private law, which had been the exacerbating force in the process of dis-embedding of the markets in the nineteenth century, into one of the main tools for embedding the markets.<sup>12</sup> On the one hand, we can see the re-embedding through the interventions of the democratic legislator, countering market outcomes through private legislation based on non-market rationality, and embodying gradually the protective rules on labour, tenancy, consumer protection, product liability, and also company law (codetermination in Germany), regulation of services, free professions etc.

On the other hand, we can also see a shift in the decision-making of the courts, which has been described as the shift from ‘form to substance’<sup>13</sup> or the ‘materialisation’<sup>14</sup> of private law, which continues with the ‘constitutionalisation’ of private law. There are many elements to this process. In essence, without abandoning the idea of freedom or equality as main values behind private law, the courts understand them in a different way, in ‘substantive’ as opposed to ‘formal’ terms, with the aim of protecting the individuals on a more personalised (de-formalised) basis, primarily against the exercise of private (economic) power. Thus both at the level of legislative law-making, equally as in judicial interpretation, private law becomes one of the major tools for constraining the effects of the market. This function becomes increasingly important in the privatised world of today.

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The move toward the ‘full harmonisation’ of private law in the EU threatens the market re-embedding function of private law. The root of the EU’s Social Deficit is its economic rationality,<sup>15</sup> which ‘consumes’ the social concerns by incorporating them into the market or economic paradigm of its own when they start to be viewed as ‘market failures’, to be addressed within the framework of the market. Already this terminology implies the economisation of the concern, which sees the market as the central goal, and thus divests the ‘social’ of its self-standing status. It removes the capacity of the ‘social’ to counter the

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<sup>12</sup> Polanyi uses examples of the limitations of ‘freedom of contract’ as main examples related to the re-embedding measures. Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time*, 2nd ed. (Beacon Press, 2002), 191.

<sup>13</sup> Keneddy, D., “Form and Substance in Private Law Adjudication,” *Harvard Law Review* 89 (1976).

<sup>14</sup> Weber, *Economy and Society*, New Ed. (University of California Press, 1992), 886.

<sup>15</sup> It is important to understand that the economic rationality is, in essence, a dimension of *democratic* deficit insofar as – despite being practically a substantive economic policy – it has been removed from the democratic contestation and political struggle. This would have been unimaginable at the level of liberal constitutional democracies.

market, and makes it complacent to market building. The incorporation of private law into the economic rationality of the EU, as was the case in EPL so far, would prevent private law from embracing non-market (social) rationality as a self-standing rationale, countering market effects by non-market logic, and thus ‘humanising’ the market.<sup>16</sup>

The second level of democratic deficit is the lack of ‘republican’ democratic institutions (such as public sphere, sufficiently thick political identity, or majority rule in a traditional sense). The lack of these democratic prerequisites has an important effect on the capacity of the democratic processes in the EU to translate and channel the social ‘countermove’ to re-embed the markets into the law-making processes.

To illustrate this last point, we can look at broadly debated privatised public services (in EU terminology, the Services of general *economic*<sup>17</sup> interest), which will transfer ever larger amounts of responsibility for ensuring the ‘social’ elements of the provision of public services to private law.<sup>18</sup> Privatisation thus pushes private law to the centre of political struggle because it must deliver fundamental services in circumstances of exceptionally unequal contractual setting, where the customers are particularly vulnerable to the exercise of private power.

The promised example comes from the UK. An elderly couple, Mrs. and Mr. Bates, failed to pay an invoice to their gas supplier. After making several attempts to contact them without receiving satisfactory response, the gas supplier disconnected their household from the supply. Several days after the disconnection, Mrs. and Mr. Bates were found dead in their house, and the cause of death was hypothermia. This tragedy has generated large public

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<sup>16</sup> The re-embedding function in Polanyian terms implies ‘de-commodification’ of fictitious commodities (labour, land and money) by public involvement which transcends the market logic, and thus allows these fictitious commodities (people and nature) to find recognition for their inherent value (not market value).

<sup>17</sup> The EU understanding of these services naturally stresses their economic character - despite the fact that it is their social dimension that has long been constitutive. In the framework of the Lisbon Treaty then the long fight has been fought in order to include ‘*non-economic services of general interest*’ in order to immunise them from market logic. See Art. 2 of the Protocol 26 to the Treaties on the European Union.

<sup>18</sup> Electricity, Gas, Hot Water, just to name a few, are services crucial for social inclusion, services without which we cannot imagine a single day of our lives. Those services have been privatised within the framework of European lead privatisation, and thus exposed to (desired) market pressures.

debate and discontent with the practices of privatised suppliers in the UK, and it intensified pressure on the government and the responsible agency to act practically immediately. In light of this, the government enacted a regulation dealing with the mutual obligations of the supplier and customer, and conditions for the ‘termination of the contract’, or more popularly, disconnections.<sup>19</sup>

This sad case shows us two significant dimensions of democracy in private law. Namely, governments in even the most liberal countries are still responsible for a much broader set of normative expectations, which come under the tag of ‘justice’. Its action thus has to reach beyond the economic rationality, beyond purposive or instrumental rationality, and into the ‘value’ rationality.<sup>20</sup>

The second element that appears crucial is the existence of the public sphere and the democratic accountability of the government. This includes mobilisation and opinion formation in communicative public spaces<sup>21</sup> (monitory democracy<sup>22</sup>), and the responsiveness of the government in delivering what is deemed to be a ‘just social order’. Whether this lies in pursuing the free market, or whether it counteracts or restricts it, is *open* to democratic process – in theory there are no primary and secondary goals and objectives, as all compete from the same starting line.<sup>23</sup>

Transferring the whole competence to the European Level implies that private law would lose much of either of these dimensions, and suffer a strong hit with regard to its capacity to counter market pressures through a *self-standing ‘social’ rationality*. The significance of this will be ever more visible with the further liberalisation of public services. For this very reason, the EU correctly relies on private law with regards to the democratic

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<sup>19</sup> Ibid. Now, partially thanks to the dogmatic of private law itself, this element tends to be overlooked in the debate on private law, and ‘intervention’ of this kind may be placed outside of the ‘true’ private law - as ‘regulation’ or ‘regulatory private law’. This has long been the case also with consumer law, which has in the last period taken over.

<sup>20</sup> I am indebted to Polanyi, Weber and Habermas for my (considerably less sophisticated) understanding of the term. Polanyi, *The Great Transformation*. Weber, *Economy and Society*, 82-109. Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, New Ed. (Polity Press, 1997), 25–27.

<sup>21</sup> Habermas, *Between Facts and Norms*, 185,6.

<sup>22</sup> J. Keane, *The Life and Death of Democracy* (WW Norton & Company, 2009).

<sup>23</sup> A very similar, even if less tragic case will be discussed later on the part on the Functionalism and European Private Law.

processes at the national level. This is possible through the so-called ‘minimum harmonisation’, which allowed the MS to act for primarily ‘social’ reasons in private law, thus providing a ‘safety net’ through private law, while the EU at the same time could have pursued its own market building objectives.

Yet, as a consequence of the link to the external face of the EU, it appears that these two parallel rationalities in EPL started to be viewed only as a disturbance to the *market*, causing legal ‘fragmentation’ and transaction costs to businesses, thus undermining the market goals and impeding the capacity of the EU to become the most cost-efficient (competitive) economy in the world.<sup>24</sup>

The first part of the thesis (discussed below) analyses the attempt to overcome the economic rationality of the EU through the efforts to democratise its functioning. I will try to address the question of why these were relatively unsuccessful, and what can be done in order to reverse this outcome which is threatening the ‘Social’ in Europe.

## **1.2. Legitimacy and The European Union**

The Legitimacy of the EU was initially not dependent on its democratic qualities or the presence of the ‘social’ dimension. Rather the legitimacy of the EU rested in its fulfilment of the task assigned to it – specifically, the building of the Internal Market. Its governance design was adjusted to such a task, with expert or technocratic ‘government’ of the Commission and the supranational Court, both guarded by the representation of the MS interests in the Council. The Parliamentary Assembly initially had only decorative purpose.

This initial governance structure seemed to pose little worry, and may have continued to do so had the EU not expanded its powers<sup>25</sup> into neighbouring fields which happened to ‘cross-cut’ with the primary objective or function of the EU. Gradually, the EU has impacted on a number of fields, such as health, education, public services, welfare provision, abortions,

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<sup>24</sup> Micklitz, “The Targeted Full Harmonisation Approach.”

<sup>25</sup> The whole process of transformation has been most famously described in J.H.H. Weiler, “The Transformation of Europe,” *Yale Law Journal* (1991): 2403–2483; and E. Stein, “Lawyers, Judges, and the Making of a Transnational Constitution,” *Am. J. Int’l L.* 75 (1981).



trade unions etc, where we see the MS increasingly obliged to make concessions to market concerns, with adverse impact on what was initially a rather ‘solidaristic’ rationality that drew them.<sup>26</sup>

This power acquisition has caused uneasiness, both with regard to the legitimacy of the institutional framework at EU level, equally as regarding the increasingly distributive consequences of its policies. Thus we witness growing awareness that the EU needs to shift the main legitimisation from performance legitimacy (mainly market integration) to the more traditional procedural (regime) legitimacy, in particular by the improvement of its democratic credentials.<sup>27</sup> The oldest pull in the process of democratisation was the replication of the institutions of representative democracy from the national level, thus concentrating on the macro institutional level and mainly on the EU Parliament.

This, however, did not remove either level of democratic deficit, and since the powers of the EU have continued to increase,, some MS have pushed for the incorporation of the second, more passive element of democratic legitimacy- the principle of subsidiarity. The Principle of Subsidiarity is an important element of the *democratic* legitimacy of the EU since it assumes that the EU shall draw extensively on the democratic processes and legitimacy of the MS. Broadly, it sets the balance between the economic objectives of the EU and the democratic processes at the national level, thus a balance between the economic/market rationality of the EU and non-market rationality of the MS.

Inasmuch as a balance between both rationalities is necessary to make the EU legitimate (the attempts to incorporate more ‘social’ dimensions in the Treaties testify to this), the Principle of Subsidiarity becomes an important legitimising device in the EU.<sup>28</sup> It is important not only for its procedural or regime qualities (balancing between the different levels of governance, depending on the importance of their aims and their democratic quality), but also for what will be called here ‘polity legitimacy’. That is to say, the balancing

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<sup>26</sup> M. Dougan, “Fees, Grants, Loans and Dole Cheques: Who Covers the Costs of Migrant Education Within the EU?,” *Common Market Law Review* 42, no. 4 (2005): 943–986.

<sup>27</sup> See Chapter 3.2.

<sup>28</sup> At least until such a time as the EU adapts so as to be able to have more generalist normative preferences and thus become able to endorse a self-standing non-economic rationality in the area of the internal market.

processes that are made obligatory have a purpose to put forward the costs of jurisdictional changes with their impact on the different cultural, social and broadly societal values.<sup>29</sup>

The Principle of Subsidiarity has however earned little respect, either from the Commission or from the Court.<sup>30</sup> The last attempt then to operationalise the principle is the designation of guardianship to the national parliaments, which are presumably those most affected by the ‘Competence Creep’.

The third and -so far- last broad strand of thought about the democratic (regime) legitimacy of the EU is that of participatory democracy, which has gained constitutional recognition in Art. 11 TEU. The origins of thinking about participatory democracy in the EU can be traced back to the debate on the New Modes of Governance and Better Lawmaking. Since the idea originates from processes concerned with effectiveness rather than democratic credentials, the idea of participatory democracy in the EU needs to be reconceptualised so as to emphasise its democratic qualities.<sup>31</sup>

The democratisation of European, however, needs to take a fourth step – a turn away from *macro* legitimacy, towards *micro*, decisional, ad hoc legitimacy.<sup>32</sup> This shift may be considered a consequence of its postnational and functional character. In essence, it advocates the need to rethink the balance between law and politics because of the increasingly attenuated political legitimacy of the functional entities at the macro level.

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To substantiate this point, we need to look back. The stark disparity between law and politics, and our refuge in the rule of law as a means of protection against the misuse of powers of public authority, become self-defeating in the postnational context. The reliance on the ‘formal quality of law’ and formalism has served functional entities (such as the WTO and the EU) as a tool for the extension of their rationalities, at the expense of non-market

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<sup>29</sup> See Chapter 3.2.2.

<sup>30</sup> T. Tridimas, “The General Principles of EU Law” (2006); Gareth Davies, “Subsidiarity: The Wrong Idea, in the Wrong Place, at the Wrong Time,” *Common Market Law Review* 43, no. 1 (2006): 63. Tridimas, Davies

<sup>31</sup> See Chapter 7.4, 7.5, 9.3.

<sup>32</sup> See Chapter 6.

rationalities, cutting back collective self-determination and public autonomy far beyond the boundaries of their functional mandate.<sup>33</sup>

In essence, in fields which are diagonally cross-cut by functional purposes (environment, health, social policies etc.), which are, as Joerges has put. in ‘diagonal relation’ to the (EU) functional objectives,<sup>34</sup> the functional entities have not stepped back or even attempted an impartial (non-arbitrary) assessment of the competing rationalities. They have rather undertaken to assess the competing rationalities from the stand-point of their own unquestioned purpose, which has led to the prioritisation of their functional aims and values.<sup>35</sup> Thus the paradigm of ‘integration through law’<sup>36</sup> has also implied the extension of the economic rationality (characterised by its constitution around the ‘market’), through the reliance on the ‘formal quality of law’, to areas outside of the context so far considered appropriate for this rationality.

The functional entities have profited in this regard from the fact that respect for the rule of law is a core value of modernity, which on the international level promised peace (and often prosperity) through international law and international trade, as well as from the high costs of exiting the international regimes which they established. As some accommodations through the ‘exceptions’ or ‘mandatory requirements’ served to lower the saliency of the conflicts, the expansion could continue *without changing the basic rationality and core order of values ‘inbuilt’ in the system.*

One of the main claims of the thesis then is that when functional entities step outside their proper ‘business’ (if they are faced with a different rationality than their own and have to decide about issues which are motivated by these different rationalities), they find themselves outside of the constitutional mandate which would have lent (indirect) legitimacy to their consequent claim to the legality of their decisions.

In such cases, they shall be barred from relying on the formal argument, which would only extend their rationality (such as deciding issues led by a rationality centred on the value of human life or environmental protection from the perspective of trade law), but instead will

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<sup>33</sup> See Chapter 5.1.

<sup>34</sup> C. Joerges, “Challenges of Europeanization in the Realm of Private Law: A Plea for a New Legal Discipline, The,” *Duke J. Comp. & Int’l L.* 14 (2004): 149.

<sup>35</sup> Such as the WTO applying trade law and trade objectives to assess environmental concerns.

<sup>36</sup> Mauro Cappelletti, Monica Seccombe, and Joseph Weiler, *Integration Through Law: Europe and the American Federal Experience* (Walter de Gruyter, 1985).

have to find *ad hoc micro legitimacy* for the particular decision. While for the WTO this may mean deferring to other institutions or incorporating alternative values (or alternative international law obligations) in a way which will give them *impartial* treatment, the EU, which has larger powers and indeed has already reached some level of political integration, has to build democratically much denser micro procedures.<sup>37</sup>

### **1.2.1. Micro Legitimacy and the EU**

The concept of Micro Legitimacy proposed here is a *minimal* response to problem of the still prominent functional character of the EU, which is at the root of its double democratic deficit. Micro Legitimacy aims to respond to the question of how the EU can legitimise its decisions, in particular when it comes to matters which fall outside of the constitutional boundaries *stricto sensu*, i.e. where different rationalities (and responsibilities) not inherent to the ‘thinking’ of the EU can claim equal or superior importance.<sup>38</sup>

To this extent, it builds on the already existing elements of democratic legitimacy in the EU, and translates them to the micro framework in such a way as will address the ‘double’ democratic deficit at the EU level. On the one hand, it is the relative lack of openness of its value system (goals and objectives) which is at the root of its economic rationality, and on the other hand, missing republican dimension of its democratic institutions.<sup>39</sup> Micro legitimacy more broadly is a necessary element for the overall legitimacy of any postnational polity, which in the EU needs to be added to complement its democratic institutions at macro level.

As for its inner structure, the concept of Micro Legitimacy draws on Walker’s framework for analysis of legitimacy in the EU, which distinguishes between three normative justifications of political authority - Performance, Regime and Polity Legitimacy. Performance Legitimacy refers to the utilitarian justification of the political authority, through the legitimacy of outcomes, and it addresses how this still important legitimising dimension of the EU can be (perhaps more efficiently) achieved in the Micro Legitimacy framework.

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<sup>37</sup> See Chapter 5.1.

<sup>38</sup> Joerges has been using the term ‘Diagonal conflicts’, see C. Joerges, “Challenges of Europeanization in the Realm of Private Law: A Plea for a New Legal Discipline, The,” *Duke J. Comp. & Int’l L.* 14 (2004): 149. I will be using in particular the term that the functional competence ‘cross-cuts’ other fields, with different dominant rationality.

<sup>39</sup> See Chapter 6.

Regime Legitimacy refers to legitimacy on the basis of the legitimate procedures. In the EU this implies an increase in democratic legitimacy, which in the framework of Micro legitimacy is directed towards removing the two levels of the democratic deficit. Finally, Polity Legitimacy refers to legitimacy which stems from the value basis and shared identity that underpin any polity. This dimension is captured in the framework of micro legitimacy through the Subsidiarity analysis, as well as the designation of appropriate procedures. Micro Legitimacy thus examines how the normative justifications present according to Neil Walker in any polity can be, at present, (better) achieved at the micro level in the EU.<sup>40</sup>

### **1.3. *Legitimacy in European Private Law***

The following two Parts of the Thesis link the discussion presented above to the framework of Private Law. As has hopefully been made clear already, to overlook the relevance of broader questions vis-à-vis private law may prove very detrimental for the framework which it establishes. The second part of the thesis examines the legitimacy of European ‘private law-making’, while the third part looks at the legitimacy of the ‘interpretation’ of EPL. These two sides of the one coin establish the institutional framework of EPL, which is the point of departure for any analysis and evaluation of the legitimacy of EPL. The thesis will do so critically, but constructively, in the light of the Micro Legitimacy framework.

Private law is a tool for facilitating the exercise of the autonomy of individuals, and it leaves great scope for individuals to fill it with their own life projects, on the basis of voluntary agreements. The main source of legitimacy in private law is *consent*. The ‘meaning’ of the consent, however, is given through the framework of private law, which sets a frame for the evaluation of validity, and the minimum requirement of fairness expected from individuals when engaging in their private affairs.

The private law framework (and in particular the contract and tort law) constitutes one of the most important ‘public’ links between the two types of social integration – that of the market and that of society. The shift from ‘classical’ to ‘social’ private law then is a shift in

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<sup>40</sup> See Chapter 2.

the conditions of the legitimacy of state action as a mediator between the economic (market) sphere and the social (societal) sphere.

The kind of ‘public’ link that was considered legitimate was connected to the shift in the role of the state in the market. In liberal-utilitarian understanding, the *laissez-faire* was considered a correct answer for a big portion of the nineteenth century, insofar as the economic rationality in self-regulated markets was to achieve the greatest benefit for the greatest number (‘justice qua markets’) – even if that required some sacrifices in the meantime. It was later understood (very visibly with the emergence of democracy) that the remoteness and uncertainty of ‘justice qua market’ (if it is possible at all) can not justify the suffering ‘on the road’, particularly if this is concentrated unevenly, and thus, the negative effects had to be softened. The macro concerns (of market efficiency) cannot overshadow the micro concerns – justice here and now – also within the framework of private law.

This shift represents a profound paradigm shift in private law, which from starting out as a tool of support for the effective ‘exploitation’ of those having lower economic power, gradually becomes a tool for countering the greater economic powers – on the basis of non-market (social or protective) rationality. Thus, along with the social policies, it becomes one of the most important tools to ‘humanise’ the market - to re-embed it into broader social matrix.<sup>41</sup>

The paradigm shift in legal terms lies in the reinterpretation of the founding values of the self-reliant individual and formal equality, linked strongly to the *laissez-faire* period of economic liberalism,<sup>42</sup> in favour of a substantive understanding of justice, freedom, and equality. Private law becomes a social constitution *proprio sensu*, aiming to lower inequalities stemming from different levels of economic power between the individuals, giving shape to a different vision of social order constituted by private law. This re-embedding function of private law is often called ‘social justice’ in private law.<sup>43</sup>

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<sup>41</sup> See Chapter 4.

<sup>42</sup> Polanyi, *The Great Transformation*; D.M. Patterson and A. Afilalo, *The New Global Trading Order: The Evolving State and the Future of Trade* (Cambridge Univ Pr, 2008); J.G. Ruggie, “International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order,” *International Organization* 36, no. 02 (1982): 379–415; J. G Ruggie, “Taking Embedded Liberalism Global: The Corporate Connection,” *Cambridge, Mass* (2003).

<sup>43</sup> Gert Brueggemeier, Mauro Bussani, Hugh Collins, Aurelia Colombi Ciacchi, Giovanni Comandé, Muriel Fabre-Magnan, Stefan Grundmann, Martijn W. Hesselink, Christian Joerges, Brigitta

The most interesting element to the abovementioned is that the paradigm shift overall did not involve a significant shift in the legitimacy rhetoric vis-à-vis the most important value pursued – that of ‘justice’. What has changed is the understanding of what justice (including freedom and equality) implies, and correspondingly also the private law framework which gives it meaning.

Only when the EU enters the scene does the justificatory rhetoric change. Thus the main performance expected of the EU is fundamentally different than that at nation state level – namely the shift in the role of the ‘public’ from securing ‘justice’ in private law to ensuring the smooth functioning of the internal market. As we will see, this market orientation of the EU will have a significant impact on substance, equally as on the procedure deployed to develop the EPL.

More generally, private law is an important field of enquiry for all those interested in the empirics of the employment of ‘economic’ or market rationality and the way it can lead to different outcomes, despite all ‘social’ concern (in this case, for consumers). Furthermore, it can contribute to indicating the direction in which further research and reform initiatives in the EU should be directed.

My basic critique of the action of the EU in EPL is grounded in the ‘liberal bias’ of the EU, which, unless we are ready to renounce the embedding function of private law, has to be reflected upon. The EU as it stands thus far does not have the capacity to ‘re-embed’ the markets, i.e. to counteract the negative effects of economic rationality by non-market rationality – in particular in the area of the ‘internal market’ (directly relevant for EPL) where it acts primarily with the intent to enhance the markets. This is at the core of one dimension of its democratic deficit – and is something that must be acted upon, not just criticised.

The constructive part of the argument looks at how we can compensate for the limited market or economic rationality of the EU, in the sphere of EPL. There are two (complementary) options for how to achieve this. First of all by ‘cooperation’ with the nation states, which are able (and often expected) to react on the basis of non-market rationality in private law.

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Lurger, Ugo Mattei, et al., “Social Justice in European Contract Law: A Manifesto,” *European Law Journal* 10, no. 6 (n.d.): 653–674.

Secondly then, opening the ‘market’ to the political contest at the EU level, by which the EU would be equipped with the capability to take responsibility for a much broader scale of values, relevant for the mediation between the market and society. Micro legitimacy aims to combine these two strands into one theoretical whole, making either of them more realistic by shifting the focus to the micro level. With regards to the interpretation of private law (third part of the thesis), Micro Legitimacy will then take a somewhat different but related form.

In Private-law making (part II), we can accommodate the first option (‘cooperation’) by way of the preservation of the two different rationalities in EPL (EU market rationality and MS social rationality), thus managing to avoid shifting the whole competence away from private law, to the EU level.<sup>44</sup> The second suggestion then is accommodated by the deployment of Micro Legitimacy procedures, which aim to remove the deficit by way of the broadening and politicisation of consultation procedures, which shall spill into the debate in front of the European Parliament.<sup>45</sup>

The more we succeed in making the non-market rationalities become equal ‘playing’ partners to the market rationality at EU level - making the EU incorporate the ‘social’ objectives in private law in amongst its *self-standing* performance criteria - the more the EU will be capable of ensuring the market re-embedding function of private law. How far we can go in the end would depend on how politicised the *raison d’etre* of the EU becomes, and how successful is the spill-over from the micro level (consultation) to the macro level (discussion in the EP).

With regard to the interpretation of EPL, the two principles for legitimisation of EU action in private law play out in somewhat different ways. The constitutive parts of micro legitimacy (performance - subsidiarity, as well as polity legitimacy - values and importance of the collective) can be translated into elements of the theory of interpretation. These would require the CJEU to embrace a different vision of the EU and its multi-level character, which would be embodied in a holistic understanding of the constitutional telos (see below 1.3.2.).

The interest in the market re-embedding capacity of EPL and the EU has had a decisive influence on the methodological selection of the case studies in EPL. I have concentrated on cases where the EU has attempted (or succeeded) to take over the full

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<sup>44</sup> See Chapter 7 and 8 on the application Principle of Subsidiarity.

<sup>45</sup> See Chapter 7, 8 and 10 parts of the Regime Legitimacy of the Procedure.



competence in private law – and thus aimed to break the link with the democratic processes at the national level. On the side of Private-Law making, it is the debate surrounding the Consumer Rights Directive, and the harmonisation of General Private Law through the Optional Instrument – which, if opted into, becomes a full harmonisation measure. In regards to the ‘interpretation’ of the EPL, I have looked at the Product Liability case law of the CJEU, as well as at the possible interpretations of the *autonomous* EOP clause. Both of these consider how legal interpretation should reflect the reality of the EU polity.

### **1.3.1. Private-law making**

The first case concerns the 2008 Proposal for the Consumer Rights Directive, which was, in essence, aimed at establishing the online internal market. The Proposal is discussed from the perspective of Micro Performance, and in particular, performance related to the jurisdictional assignment of regulatory competence to the higher level (subsidiarity principle), as well as the link between the procedure and the content of the legislative proposal.

The 2008 Proposal of the CRD was rejected as it did not stand even by its own standards – it could not satisfy the main purposes or objectives set out by the Commission. It failed because it did not fulfil the economic criteria of the principle of subsidiarity. Yet, what appears worrisome is the fact that little discussion was devoted to the ‘democratic dimension of subsidiarity’. No important political actors spelled out the constitutional questions behind this shift,<sup>46</sup> nor were the actual costs of such a shift discussed, or eventual alternative options proposed. Neither has anyone demanded substantially more democratic (politicised) procedures, as would be warranted by the constitutionally important move of transferring competences to the EU, in particular with regard to all its normative limitations relative to private law.

Instead, the debate may be described as avoiding, or skipping, the question regarding its *goals* (these are given, not debatable - more efficient online internal market, low prices for consumers and larger choice), and so the discussion basically starts with the question of the

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<sup>46</sup> I refer here to the complete shift of the regulatory paradigm in private law, not only with regard to the level of governance, but also to the kind of rationality implemented by the particular level.

*means* with which to achieve these market-building goals through private law. More specifically, the Commission is mainly concerned regarding the creation of the online internal market, which would bring benefits in the form of lower prices and increased consumer choice.

Yet, the discussion in a democratic polity would however require the discussion as to whether it is truly desirable to give *public support and encouragement to online markets*. For example, can it be seen as truly desirable to give public support to those consumers who sit apathetically at home in their armchairs, cut off from other human beings, becoming increasingly overweight (from static access to cheaper goods), with all the environmental, social and psychological costs - just to create more cross-border trade and lower prices?<sup>47</sup>

Yet alternative conceptions of what constitutes a ‘good life,’ or alternative visions of a human being, structurally could not even have come into the discussion. This is particularly worrisome because we are talking about *full* harmonisation, which could be seen to suggest that such discussion in private law could be entirely lost, since the market oriented EU is to take over the whole competence in this field.

The concentration on market building tends towards a reductionist conception of human beings, as consumers or ‘shoppers’, the people who are mainly concerned with cheap goods and do not care about their broader social context. This kind of understanding would permeate the whole of EPL, if the full harmonisation takes place without EU opening up to broader normative questions. It also threatens to have a broader systemic impact on the overall social framework, insofar as such limited logic takes very little account of other potential *costs*,<sup>48</sup> as these are not a *primary* responsibility of the EU.

It is important to bear in mind that, as the Critical Legal Studies have long since been persuasive in showing, the ‘omissions’ to discuss do not mean that the response to a

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<sup>47</sup> It would be incorrect to understand that I advocate that we should prevent consumers to shop online. My point is that if public funds and efforts are being invested in some goal, it may well be necessary to debate exactly the merit of the goal - instead of skipping this question and passing to the next question ‘how best to achieve an online market’.

<sup>48</sup> Examples of these would be healthcare costs for increasingly obese and depressed populations, the large environmental costs of transport and increased consumption of cheaper goods, social costs such as what will happen to small businesses (‘around the corner shops’) and their employees, but also how our towns and cities will look like without all of those shops... As has already been made clear, incorporating these into the economic ‘models’ and treating them as market failures is not sufficient to answer my concerns.

particular question has not been given. Rather, the consequence of the ‘bracketing’ out of certain questions has been to reveal the preference for the status quo – and for goals and redistribution patterns as they currently exist. In other words, not ‘discussing’ for example a possible urban impact brought about successful ‘online internal markets’ (such as disappearance of small shops) implies that *we have decided to for the online market and against alternative vision of good life*, such as vivid city centres.

The micro performance then aims to ensure the ‘full picture’ of what any decision implies - bringing forward the full breadth of costs and thus a more reflective assessment of the costs of action. Yet, as we have seen in the paragraph above, this can not be done by bracketing the discussion, but by its *opening*. This links us to the importance of procedure. It appears to be necessary to open and broaden the ‘issues’, and consequently also to broaden the range of actors participating in the ‘*issue*’ *publics* (centred in this case on the ‘online internal market’<sup>49</sup>), in order to allow alternative visions of both ‘good life’, and the costs, to find expression in the process of preparation of legislation.

Given the range of issues implicated in the debate on private law, we should see the involvement not only of consumers and businesses, but of environmental advocates, fair trade advocates, human rights advocates etc. The expansion of ‘issues’ would have an important impact on the expansion of issue publics, with impact both on the debate in front of the European Parliament as well as the easier overspill of such broadly relevant questions into the national general public spheres.<sup>50</sup>

Clearly, Micro Legitimacy is a parallel or complementary level of legitimisation alongside the more traditional (macro) ‘representative’ democratic institutions. It is fundamental for opening the debate in front of macro democratic institutions such as the European Parliament. The European Parliament, despite its democratic ambitions, has largely so far remained within the frame of the debate set by the Commission – arguing over the same issues which the Commission has decided itself to turn into political ones. However, if we see a more politicised participatory debate in the preparatory phase, it will open the doors

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<sup>49</sup> This may seem like a paradox for outsiders to the discussion about EPL, but the objective of the *Consumer Rights* directive is the ‘internal online market’. Thus the main concern is not the question of ‘how best to protect consumers’, but of ‘how best to achieve the internal market’.

<sup>50</sup> Which is a pre-requisite for any meaningful democracy.

for a truly politicised discussion in the Parliament, which could touch the foundations of the EU order.<sup>51</sup>

The consultation procedure as we have witnessed it in the Consumer Rights Directive, however, suggests that the European Commission had much more intention to cut the debate than to open it, and that it would use it solely to legitimate its own choices.<sup>52</sup> Internally, the Commission may believe it is legitimate to do so because it has a large task to complete - make the EU ready for global competition. Yet, that is in fact the major issue that shall be opened to the debate at EU level.

The crown of the EU efforts in private law is the general contract law instrument, Common European Sales Law (CESL), an Optional Instrument or a second legal order in the framework of national private laws, which was the parallel project to the Consumer Rights Directive in the quest to make the EU more efficient internally, and more competitive externally. If successful then this model should be followed by other optional private law instruments. The idea behind this is that parties (business) may opt into the Instrument, and thus opt into full harmonisation by European Law.

The optional nature and ‘softness’ of the instrument are supposed to remove any objections toward its constitutionality, insofar as the instrument is presumably left to the private parties to opt into – thus acquiring legitimacy of its own, and additionally, it model has minimal impact on national private law. Taking in account what has been said so far, however, is the situation truly so innocent?<sup>53</sup>

There are several dimensions that could worry us. First of all, the democratic dimension of ‘opting in’ will be left to the stronger party of the contractual relation. IT may be objected however, this is always the case. What changes in the EU though is the

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<sup>51</sup> The fact that the EU enjoys a lower level of social legitimacy has been the reason for the scant political discussion about the ‘*raison d’être*’ of the EU – questioning the internal market agenda. With increasing powers, however, this fear becomes self-defeating – the lack of politicisation of the ‘market’ as a response to social problems has to be challenged and debated, insofar as we will otherwise miss the chance to increase the social legitimacy of the EU, or we will even decrease it through expanding a particularly substantive economic policy, often tagged as neo-liberal policy, into ever broader field of its action.

<sup>52</sup> See Chapter 7.5.

<sup>53</sup> See Chapter 8.3.

*institutional framework in which the choice of the stronger party will be placed.* The institutional framework will influence on the one hand the kind of legislative initiatives in private-law that we may expect in the future (i.e. when public intervention is necessary), equally as the kind of interpretation that the instrument will acquire in the context of a functional entity such as the EU.

Even if the ‘content’ of the CESL itself was partially<sup>54</sup> shielded from the functional rationality through the involvement of academics, this will hardly be the case with the future changes of the instrument. The Commission will not be likely to outsource the changes, and we may see the same market tendencies as, for example, in the case of the CRD. On the other hand, the instrument will be also interpreted in the framework of functionally oriented polity. The systematicity that the instrument offers will only provide further space for the realization of the functional rationality of the CJEU, a stronger claim to legality when extending the market rationality.

Finally, the exclusion of the national democratic processes from having the possibility to ‘cut out’ (regulate) what may seem right or just on the basis of ‘social’ as opposed to the ‘market’ rationality will have negative consequences for the level of social justice – or- more in line with the language of this thesis- the market re-embedding capacity of private law, as we could have seen in case of the CRD.

Now, as I have mentioned, the attitude of the thesis is not only critical, but also constructive. If legislative action were to take place, it would be in order to ask the question of how we should design the procedure so as to come to grips with the ‘social’ and related ‘democratic’ deficit of the EU, which impact on the social dimension of private law – particularly being that the aim is full harmonisation.<sup>55</sup> Again, what we have seen is a particularly ‘European’ solution, which pays tribute to its self-reinforcing lack of social

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<sup>54</sup> The Commission has still kept the ‘chapeau’, equally as it had the final word on the content. What’s more, the stakeholder input was balanced towards those who are actually going to ‘opt-in’ and who are more important for the opening of the market – the businesses. The so called ‘Stakeholder Expert Group’ in the last stage of the process has had five business associations and only one consumer association. No other groups were present.

<sup>55</sup> See Chapter 8.4. ‘Opting-into’ is a reality for some parties more than for the others, thus it does not exclude the necessity for the democratic involvement.

legitimacy, juggling with the ‘academic’ and ‘political’ projects, and finally leading to the procedure which can hardly stand by any democratic standards.

The Chapter on Polity Legitimacy develops a broad idea of how the European Civil Codification could strengthen the ‘feeling of community’, the common identity of the EU. The debate puts the discussion on the European Civil Code in the wider framework of the debate on European Identity, and links it to the debate on the liberal bias of the EU. The outcomes are (perhaps) unsurprising. When it comes to the creation of the common identity, the shortcuts cannot work, and we can not dissociate the emergence of identity from the opportunity to have a voice (democratisation).

The greatest *democratic mobilisation* potential that the EU disposes with currently is not however in the European Civil Code or European Constitution, but rather it lies in offering a forum for a more meaningful *non-market* response to globalisation. It carries critical potential for mobilisation of the popular commitment in the EU to engage ‘together’ in the administration of common affairs.

The EU has, for the first time, more to offer overall than its MS. It can appeal in a politically salient way, to the self-interest of the large portions of the population who are negatively affected by the globalisation and the strength of dis-embedded global market. The EU is a sufficiently ‘big market’ that it can be a serious ‘partner’ to the global markets - unlike the nation states dragged by the global markets, and justifying their action mainly with the rhetoric of the ‘unavoidability’ of conforming to the all mighty global market. Such great mobilisation potential, unique in the history of the EU, should not be wasted.

Yet, in order to make use of it, it requires more confident politicisation of the EU market objectives by politicisation of the question ‘what kind of economic model’ in the external face of the EU. This requires in essence shaking the market rationality locked in the institutional and legal structures of the EU. This thesis, and in particular its second part, aims to establish how we may make first steps in this direction through destabilisation of market rationality (in private law) in the institutional setting as it stands right now. The response lies in Micro Legitimacy.

### 1.3.2. Interpretation of EPL

The third part of the thesis then looks at the interpretation of EPL, and the role of the Court of Justice in EPL. The tenth chapter is devoted to the Court-imposed maximum harmonisation of Product Liability law, while the eleventh chapter is devoted to the interpretation of the ‘maximum harmonisation’ which would have taken place in instituting an *autonomous* European order public clause.

While not primarily targeted at legal interpretation, the Micro Legitimacy framework does have numerous implications for the theory of interpretation in the framework of postnational entities. First of all, it is concerned with the exercise of authority through legal interpretation by the CJEU, acting in the framework of a postnational entity, where, as we will see in Chapter 5, the claim to *legality* is considerably weakened. This shall motivate the Court to avoid the reliance on formal arguments comparatively even more than national courts, and rather acquire ad hoc legitimacy at the micro, decisional level.<sup>56</sup>

Secondly, the main judicial bodies in the EU are legally obliged to respect the principle of Subsidiarity (which is directed at establishing jurisdictional performance), both in its economic and democratic dimensions. Thirdly then, within the shift from ‘form to substance’, substantively justified decisions become a fundamental right of individuals. Even if the individuals are instrumentalised for purposes beyond their cause, such decisions shall be based on substantive (as opposed to formal) arguments, and on principally acceptable reasons.<sup>57</sup>

Finally, and perhaps most importantly, the concern of Micro Legitimacy is the extent to which the Court understands the particular character of the EU as a multi-level polity, where each level of governance has different concerns and administers them in a different way. The question is as *to what extent the Court respects such different rationalities as*

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<sup>56</sup> See Chapter 5.

<sup>57</sup> Ideally then within the framework of ‘hybrid reasoning’, as advocated by Hugh Collins, where however (unlike in front of the CJEU) justice comes first.

*legitimate expressions of the interests of EU citizens at the different levels of governance*, which is a condition for the overall social legitimacy of the EU.<sup>58</sup>

The example of maximum harmonisation by the CJEU in the field of product liability is used here as an example of ‘bad law’, law without legitimacy. This is so not only because of the lack of performance legitimacy of the Product legislation itself, but more so because the Court has increased the level of illegitimacy through its decision, which Joerges has neatly described as an example of ‘ortodox supranationalism’.<sup>59</sup> The example also allows us to develop what kind of decision would be ‘micro legitimate’ in the framework of the Court’s institutional options.

In the line of cases on Product Liability, the Court asserts authority on the basis of formal arguments and a very particularistic (as opposed to holistic) understanding of the *telos* of the legislation – without taking interest in the micro legitimacy of the legislation and thus the impact of the decision on the legitimacy of the EU. Instead of minimising the effects of the failed Community measure, the Court extends and increases the impact using the formal argument regarding the *telos* of the measure – the unquestionable constitutional objective of market integration to which existing legal disparities are an obstacle, and which thus have to give way, whatever the consequences for alternative values and objectives.

With the expanding powers of the EU, however, the Court increasingly stands in front of the challenge to open up its understanding of what the constitutional *telos* of the EU stands for. In a compound entity, where the power of the EU grows, there is no place for the ‘agents of specifically EU interests’ since these would have rather questionable consequences for the social legitimacy of the EU.

Rather, the time has come for the CJEU to become an agent of the citizens – rather than of the level of governance of which it is part - and thus embody a holistic concept of the constitutional *telos*, reflecting the legitimate interests of the citizens within each level of governance. The Court thus needs to incorporate not only the aims and objectives of the EU,

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<sup>58</sup> I may sometimes reduce the whole area of EU policy making mainly to the internal market – not only because it remains the most important area, but also because it is mainly relevant for private law.

<sup>59</sup> Joerges, “Challenges of Europeanization in the Realm of Private Law.”



but also those which were assigned to different levels of government and the reasons for that assignment (allowing the EU to profit from democratic processes at the lower levels of governance), and the non-market rationalities that these are able to produce, thus enriching the normative basis of the whole polity.

What does such a holistic understanding imply for the interpretation of private law? One of the implications would be the incorporation, among its performance criteria, of the major performance criterion for the MS in private law, namely the concern to deliver ‘justice among parties’.<sup>60</sup> This means that the concern for justice would be (at least) equally as strong as the concern for the internal market. Thus the Court would try to minimise the effects of its decisions which could potentially impede the just solution of a case, or eventually find a way of deferring the decision to MS level, in case the concerns for systemic effects would prevent it from deciding on the basis of justice.<sup>61</sup> In other words, the *Marleasing* doctrine the other way round, prompting the Court to incorporate both the basis of Performance Legitimacy of the MS, as well as the basis of their Polity Legitimacy (values) into its understanding of the holistic constitutional *telos* of the compound EU.

While the chapter on Product Liability deals with the concrete interpretation of a case within the ambit of EPL, the chapter on European Ordre Public (EOP) elaborates theoretically the possible consequences of ‘maximum harmonisation’ of the autonomous EOP clause. The Draft Common Frame of Reference (DCFR) includes in the text the *autonomous* EOP<sup>62</sup>, however, the Commission has decided to abandon the idea in the framework of the Common European Sales Law (CESL), leaving the *ordre public* to the MS - despite the ‘threat’ to the autonomous character of the CESL. The Chapter deals with the likely development of the content of the clause in a polity such as the EU.

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<sup>60</sup> See also chapter 4.

<sup>61</sup> The reference that the Court solely ‘interprets European law’ can not insulate it from the responsibility – for both the impact of its decisions on private parties equally as the legitimacy of the polity in the name of which it acts.

<sup>62</sup> The ‘autonomous’ standing of the clause was also to be underlined by a novel terminology ‘Principles principle recognised as fundamental in the *laws* of the Member States of the European Union’. It implies the common core to be developed at the European Level. See also Bénédicte Fauvarque-Cosson et al., *Principes Contractuels Communs : Projet De Cadre Commun De Référence* (Paris: Société de Législation Comparée, 2008).

The *ordre public* is a clause that aims to protect the core values of *political, economic and social order* of the polity in question, and it gives judges ‘carte blanche’<sup>63</sup> to strike down private agreements (or decisions of foreign courts) on the basis that they infringe the social economic or political order of the society. Empirical analysis of the case law, however, shows that the courts have tended to decide rather conservatively in *ordre public* cases,<sup>64</sup> using the clause usually when it responds to a long established social consensus with regard to some question, while leaving the politically sensitive issues to the democratic debate.

If we compare the CJEU with national courts in terms of their appropriateness to assert the values embodied in the *ordre public*, we find a number of fundamental differences between the national courts and the CJEU. First of all, the CJEU has more difficulty in articulating matters of general consensus – in particular if this means avoiding ‘majoritarian bias’. Secondly, the Court would not have the support of thick democratic processes and the public sphere,<sup>65</sup> which would otherwise aid it with the articulation of the values. Finally, and most importantly, the Court is an institution entangled in the functional rationality, linked to the limited performance and limited responsibility, of the EU. In such circumstances, we would see a very different normative content of the EOP, and very likely an imbalance between its constitutive orders,<sup>66</sup> with liberalisation of the moral order on the one hand, and conservatism in the social order on the other. So the introduction of the *ordre public* would not, as some may have hoped, give the Internal Market a more human, normatively richer face, but rather the EU would adapt the *order public* to fit its own picture.

To conclude, the legitimacy of EU action in the field of private law is dependent on the extent to which its ‘social’ deficit is mitigated by openness to the non-economic rationality. This may happen only through the politicisation of the *raison d’être* of EPL – the internal market, and the raising of non-market rationalities to the equal status.<sup>67</sup> The

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<sup>63</sup> Of course, the ‘carte blanche’ is limited by the previous case law and the self-censorship of the courts.

<sup>64</sup> Chantal Mak, *Fundamental Rights in European Contract Law: a Comparison of the Impact of Fundamental Rights on Contractual Relationships in Germany, the Netherlands, Italy, and England* (Kluwer Law International, 2008).

<sup>65</sup> The ‘dialogue’ with the national courts or eventually legal academia are both narrow, and mainly restricted to the legal community, to have sufficient legitimacy strength.

<sup>66</sup> See Chapter 11.

<sup>67</sup> It useful to have in mind a broader point put forward by Zürn, ‘*there is just as much an elective affinity between executive multilateralism and excessively liberal policies as there is between the welfare state and democracy.*’ Zürn, “Global Governance and Legitimacy Problems,” 279.

instruments are already available, but what seem to be necessary are a different mind-set and a bit of courage. Micro Legitimacy offers a coherent framework in which this may take place.

If we superimpose an ‘economic rationality’ onto private law, however, without opening its goals and objectives up to democratic debate, and thus allow the access of ‘non-economic rationality’ into the process, then we would see private law lose its capacity to re-embed the markets. Private Law would become primarily an economic instrument for achieving efficiency, but without ambition to achieve justice. That implies that the basic question behind private law - that of ‘what we owe to each other’ - will be responded to in terms of what is most efficient for overall economic welfare, in the framework of purposive or instrumental rationality.

#### **1.4. On the Rationality of the EU in Private Law, and Beyond.**

Few words are due on what is meant here by the economic or market rationality of the EU. The debate on economic rationality is linked to a fundamental dimension of the democratic deficit in the EU. It may be understood as suppression of debate regarding the alternative goals and visions of good life in the EU, which is accomplished by structurally limiting the possibility of contest, or competition of these alternative views with the constitutionally endorsed ‘market’ objectives.

So far, neither strengthening the democratic institutions, nor the incorporation of new values, has interfered with the economic rationality, or ‘liberal bias’ of the EU. The EU acts in a normatively restricted and instrumental way, related to the fact that it assumes much narrower *primary performance* and *responsibility*. While the legislator at the national level carries the normatively thicker responsibility for the general issues of justice, or other democratically selected goals and aims (which would make it responsive to the public opinion), the primary responsibility of the EU remains linked to its main ‘performance’, and that is the efficient market internally, and competitive market externally, which requires it to concentrate on the issues of effectiveness and economic welfare rather than ‘justice’.<sup>68</sup>

The rationality of the EU presents us with something like the ‘thought structure’, embedded in its institutional processes and conditioned by the self-understanding of the EU, its primary motivations, objectives and values. The EU has started, and largely remains, a market building polity. Its strongest competences and tasks relate to integration through the market, by which the EU vindicates its main performance and fulfils its *raison d’être*. The EU did not take over the *independent primary responsibility* for any of the later added ‘rationalities’ (the social, environmental, home and justice, or external policy). Nor did it create institutional practices which would allow for the contesting of the market with these non-market rationalities. It thus remains bound to offer ‘market’ solutions to the detected

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<sup>68</sup> Respectively, justice is also integrated in the economic rationality – ‘justice qua market’ - the consumer welfare (low prices, larger choice) being a prime example of the idea of justice in the internal market. Micklitz then talks about ‘access justice’ as being a main paradigm in the internal market. H.W. Micklitz, *Social Justice and Access Justice in Private Law* (EUI Working Paper 2011). Access justice remains part of the paradigm of ‘justice qua market’ insofar it aims to secure just access to the market, which shall then take care of justice.

social problems (for market is its primary responsibility), which further entangles it in the economic rationality.

To approximate how the economic rationality functions in practice, we will have a closer look into framing the sequence and the discussion of the Consumer Rights Directive. First I will make a small graph of the design of the process, which will be followed by the discussion of the problems.

## Commission (EC)

Goal:<sup>69</sup> Internal (Online<sup>70</sup>) Market (Art. 114 TFEU)

Obstacle: Transaction Costs – in particular the Fragmentation of Consumer Law.

Solution: How to solve the problem? Harmonisation? To be consulted.

Designated Interests in the Debate: Consumers, Businesses, SMEs (can be inferred from the way the DG frames the consultation questions, whom it designates as stakeholders and experts)

Consultation Process: Even if the consultation is *public*, the way the ‘issue’ is framed makes clear both the participants and the borders of the debate:

- How great is the problem of fragmentation for the Internal Market?
- What is the appropriate level of harmonisation?
- What shall be the balance between consumer and business interests?

On the basis of such Consultation, the Proposal goes to the Political Institutions.

### The European Parliament (EP)

The Debate – the debate and contestation continues in front of the EP. Broadly the same questions are discussed as in front of the Commission, and the same actors appear in Parliamentary Hearings.

The question of the appropriateness of lending public support to the goal of internal online market is *not an issue*.

The EP then understands its democratic role in listening more to the weaker parties (in this case the consumers) and not in questioning the goals and objectives themselves, as would be the case at the national level.

### The Council

Proposal prepared for the discussion by COREPER (Brussels based committees). MS remain bound to the frame proposed, and try to see what their national interests are, and eventually deal with some concerns regarding their national autonomy. There is however no discussion of the alternative visions of where the common action/public support should go. The debate and the decisions remain in the framework the Commission, which has the legislative initiative, has set.

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<sup>69</sup> Even in the first 2001 Communication, the goal was rather straightforward. Not only have the measures of EPL so far been based on Internal Market Legal basis, but the Commission is structuring the debate from the beginning so as to address the performance which it is expected to deliver. This is what the first Communication of the Commission States: ‘*The Commission is seeking information as to whether problems result from divergences in contract law between Member States and if so, what. In particular, the Communication asks whether the proper functioning of the Internal Market may be hindered by problems in relation to the conclusion, interpretation and application of cross-border contracts. Also the Commission is interested in whether different national contract laws discourage or increase the costs of cross-border transactions.*’

<sup>70</sup> The fact that the main concern is the online market clearly appears only in the later Communications, notably the Impact Assessment of the Consumer Rights Directive.

**Where is the Problem?** If we look at the table above, and how the ‘debate’ is structured, we will see that *the goal itself* was not discussed - neither in the preparatory phase where the Commission designs the consultation, nor later on, for the debate remains in the boundaries set by the Commission.

However the goal setting itself has implied a very large number of choices and balancing regarding the costs and benefits of the proposed action – which effectively have been left to the Commission (DG Sanco in this case), which have a rather limited vision of what exactly the tasks and responsibilities of the EU are. Thus the potential costs of the ‘online internal market’ will not be given any large consideration – at least if we are to assess according to the Impact Assessment. But there are costs, and they should not pass unnoticed.

**Social costs.** Employment – how many employment opportunities have been gained and how many will be lost? What quality of employment opportunities are we actually discussing?

**Environmental costs.** Increased transport, increase in consumerism (more goods for the same price) resulting to increase in pollution through increased production of waste and the use of natural resources.

**Health costs.** Isolation, mental health issues, obesity, health problems related to lack of movement, etc.

**Societal costs** Impact on urbanism – how will the cities look like without ‘the content’? Elimination of on-site shopping, which may be viewed as a type of ‘public service’, insofar as one does not always have to wait for delivery, etc.

Now, the Impact Assessment in the CRD (but also CESL) mentions Environmental (only transport) and Social costs (how many new jobs will be created), but it appears that the ‘winning’ solution has practically only positive effects on all these fields!<sup>71</sup> Not only is it questionable as to how this conclusion came about and what the costs actually are (since they were not exposed to debate or contest e.g. in consultation procedures), but it becomes apparent that these objectives were considered from the position of the need to open the market up, and they alone were aware of the possible ‘side-effects’ of the primary goal, not as

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<sup>71</sup> European Commission, “Commission Staff Working Document Accompanying the Proposal for a Directive on Consumer Rights. Impact Assessment Report.”, 2008, 39.

something that could possibly take precedence, or implicates a serious *responsibility* of the EU - even if they figure prominently in the Treaty.

There is additionally no indication of how the DG SANCO came up with such positive conclusions regarding the ‘side-effects’ and what ‘indicators’ it took into account. With whom did it consult? Why don’t we see Civil Society actors (such as Social Platform or environmental NGOs), which could actually have brought up the broader social relevance and costs of the proposal? If we look at the way in which the consultations were phrased, there was no potential for attracting the interest of those civil society actors, as it did not leave any space for the discussion of other plausible alternatives to public action directed toward the improvement of online market.

This may not have been a problem at the national level, where whatever was in the proposal of the government, the media, public sphere and the opposition in the Parliament would have brought up these costs, but in the EU there seems to be little chance for them to be articulated. For this reason the so-called ‘democratic dimension of subsidiarity’ becomes of crucial importance. It embodies the concerns regarding the articulation of all costs, alternative goals, objectives and visions of good life, in order to get some consideration in the EU policy making. Thus, if the Commission had invited other civil society actors into the process – for they do seem to have stakes in the subjects – the debate about costs could have taken a different shape. However, it is the Commission which decides where to *start* the debate, which phrases ‘the issues’ for the debate, and thus may alone decide on what is to be discussed, and what on the other hand are the issues (costs) to be left out of the debate, which it ends up assessing alone.

Now, when the issue gets to the ‘political’ institutions, in particular the comparatively democratic European Parliament, the ongoing debate between the interests of consumers and businesses continues – in the frame set at the beginning by the Commission. The questions suggested by the Commission are discussed, argued about, criticised and balanced amongst each other.

Even if the Parliament understands itself as a protector of the citizens, or consumers or weaker parties, yet we see little of traditional opposition which would open up broader political questions. It does not touch the question of the appropriateness of the goal itself (online internal market) – something that would very likely happen in the national



parliaments.<sup>72</sup> Or have we ever witnessed a MP for the EP standing up and saying in front of her colleges – ‘Maybe this internal market as a free trade area is not such a good idea in the end, and maybe the EU should strive for a different kind of economic order,’? Eventually, that could lead to the assertion that ‘maybe we should not concentrate on liberalising the market, but rather on the protection of those who are not able to participate in the market.’

We are not too likely to see the Green Parties in the European Parliament militating against the EU Online Internal Market *per se*, on the account that it is too environmentally unfriendly, or that it puts forward a very limited conception of what is good for people (low prices and large choice), of human beings as consumers rather than the citizens who care about much broader scale of social issues. And this is exactly because the centre-left parties are usually rather pro European that they will avoid putting the whole project into question.<sup>73</sup>

In such constellations we lock out the discussion of alternative conceptions of good life at the European Level, allowing a rather reductionist rationality of, for example, DG SANCO, to put forward proposals in line with its functional rationality and limited responsibility, which will neglect the ‘side-effects’ on, from this perspective, less significant issues like environment, social or societal impact and the potential alternatives.

The same DG SANCO (Directorate for Health and Consumers) happened to produce in this case also a particularly *consumer unfriendly* piece of consumer legislation – which again is nothing to be surprised about because the main performance remains the ‘internal market’ – whatever may be found in the name of the Directorate.<sup>74</sup> And the way the arguments have been dealt with in the Impact Assessment shows a clear bias.<sup>75</sup>

Now, even if we do not consider what I raise here as being important in this case, there will be cases when each of us will consider it important to discuss the alternatives to the internal market, and what constitutes a worthy goal to pursue. The discussion is, however, structurally designed in such a way that similar concerns are difficult to raise at any point in the debate.

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<sup>72</sup> The refusal of the Consumer Rights Directive in its 2008 version has not occurred because of the

<sup>73</sup> The possibility of opening up real questioning, in particular in regard to the European response to globalisation, may however become a strong mobilising factor for the democratisation of Europe. Europe can offer a ‘left’ response to globalisation – which the nation states (who seem to give up to the global markets also because of their considerably smaller size than that of Europe, not to mention that the relevant competences have already ended up in the European hands) cannot, since they have largely given in to the pressure of global markets.

<sup>74</sup> The same can be said about the Directorate for Home and Justice affairs, which took over the responsibility over private law in Europe, but remained primarily interested in the Internal Market.

<sup>75</sup> See Chapter 7.

Such an institutional framework has serious implications for the legitimacy of the EU being the sole creator of the private law framework in Europe. Private law acquires ever increasing importance in the market economy, as it gives a shape to market transactions among actors in often fundamentally unequal bargaining positions. It becomes one of the most important tools in the privatising and globalising world for successfully re-embedding the markets, and lowering the negative effects of increasing inequalities. So, if the private law framework is taken over by the polity which considers itself as predominantly responsible for securing the efficiency of the Internal Market and making the EU externally competitive – without simultaneously being able to endorse ‘alternative’ (social or societal) rationalities<sup>76</sup> in a democratic (or any) debate - there is a considerable chance that we will lose much of the capacity of private law to fulfil its market re-embedding function.

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<sup>76</sup> Rationality always implies certain objectives and values, and their order.

## **2. ON THE ANALYTICAL FRAMEWORK: PERFORMANCE, REGIME AND POLITY LEGITIMACY**

### **2.1. On Political Legitimacy: An Instrumental Introduction**

When we say ‘legitimacy’, very different things will spring to the minds of different people, depending among other things on their expertise as philosophers, sociologists, political scientists, anthropologists, lawyers or psychologists. Thus one cannot start without a short introduction of the concept, which will on the one hand put the topic in a somewhat broader frame of social sciences and on other hand, equip us with terminology which will be used throughout the thesis. The main theoretical claims of the thesis are dealt with elsewhere – particularly in the Chapter on Postnational Constellations, as well as the Chapter on Micro Legitimacy and the two chapters on Polity legitimacy.

In political theory, the term ‘political legitimacy’ is associated with certain positive traits or virtues, of either political institutions and/or political decisions (about, for example, laws, policies, or persons, or other kinds of administrative action). In substantive terms it refers to the justification of political authority, or the right to rule. Legitimacy may be understood as an ‘invisible institution’,<sup>77</sup> which should guarantee the stability of the political authority.<sup>78</sup>

One of the most important conceptual distinctions attached to the concept of legitimacy is the distinction between normative and descriptive (or social) legitimacy. Often considered as the father of sociological inquiry into legitimacy, Max Weber was interested in the ‘descriptive’ (or social) concept of legitimacy, taking the sociological and historical (external) perspectives on the matter of legitimacy and associating it with the various types of beliefs which people hold about political authority. In his view, legitimacy has been based either on ‘traditional’, ‘charismatic’ or ‘legal-rational’ grounds.<sup>79</sup> Weber did not aim to evaluate how ‘just’ a certain order was, or to create a set of normative conditions for legitimacy, but rather he has tried to *understand* the reasons why certain regimes were considered legitimate by those subject to them.

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<sup>77</sup> P. Rosanvallon and A. Goldhammer, *Democratic Legitimacy: Impartiality, Reflexivity, Proximity* (Princeton Univ Pr, 2011), 9.

<sup>78</sup> Weber, *Economy and Society*, 212.

<sup>79</sup> Weber, *Economy and Society*. Volume I, Chapter III.

On the other end of the spectrum we find the politico-philosophical inquiry into the subject, which concentrates on the moral justification of the political authority, evaluating claims to political authority, and answering the question as to why subjects should voluntarily obey commands (or even feel the moral obligation to obey).<sup>80</sup>

There are several standard strands of normative justification of political authority, and as we will see further, they all tend to be present in the nation states. The first strand is the Utilitarian justification of political authority, which is based on the (overall) utility stemming from obeying the commands of a particular political authority. The second strand concerns the consensual (or contractual) theories of political legitimacy, which base the justification on the consent of those governed<sup>81</sup> – either actual or hypothetical consent.

The democratic theories, which are a sub-set of consensual theories, found legitimacy in the *equality* of those governed, which is usually expressed in the principle of equal vote. The democratic theories can then be either purely proceduralist (content independent), or they can condition the legitimacy by the combination of procedural with substantive aspects (outcomes).<sup>82</sup> Thus they can embody thinner<sup>83</sup> or thicker normative conceptions of democratic legitimacy.<sup>84</sup> We will look more closely into these in the discussion about the legitimacy of the nation state below.

It is important to note, however, that the distinction between normative and social legitimacy relates mainly to perspective. Many theorists<sup>85</sup> would understand the two dimensions of legitimacy to be inseparable from one another. ‘Legitimacy’ from the internal

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<sup>80</sup> See T. Christiano, “Authority,” *Stanford Encyclopedia of Philosophy* (2004).

<sup>81</sup> In particular the consensual or ‘contractarian’ theories of legitimacy are clearly inspired by private law legitimacy through consent, which thus becomes the Enlightenment individualist paradigm for justification of political authority. Both political legitimacy and private law legitimacy start from the premise that a free individual lends legitimacy to any cooperation based on its voluntary consent – be that in relation to an individual (contract) or collective (the political organisation).

<sup>82</sup> Deliberative accounts of democracy are to some extent content-based accounts insofar as they underline the importance of deliberation for the ‘rationalisation’ of the outcomes. See to that effect F. Peter, “Political Legitimacy,” *The Stanford Encyclopedia of Philosophy* (2010) or Christiano, “Authority.”

<sup>83</sup> J.A. Schumpeter, *Capitalism, Socialism and Democracy* (Psychology Press, 1994).

<sup>84</sup> I. Shapiro, *Democratic Justice* (Yale Univ Pr, 2001).

<sup>85</sup> J. Habermas, “Legitimation Problems in the Modern State,” *Communication and the Evolution of Society* 178 (1979): 205. Also N. Walker, “The White Paper in Constitutional Context,” in *Symposium: Mountain or Molehill? A Critical Appraisal of the Commission White Paper on Governance*, 2001.

point of view always entertains a ‘normative dimension’, for it is impossible to believe in the legitimacy of a political authority without having any reasons as to why one believes in it. The exercise of authority<sup>86</sup> (as opposed to naked power or coercion) is conditional on the normative acceptability of (the reasons behind) that authority to those who are subject to it. In other words, “the power relationship is not legitimate because people believe in its legitimacy, but because it can be justified in terms of their beliefs”.<sup>87</sup> Thus an external perspective on the ‘social’ legitimacy of a certain authority has to take into account the content of those internal beliefs which serve to legitimise political authority and the commands (law) issued by such an authority. As we will see later, very similar reasoning can and should be applied to positivism as legal theory.<sup>88</sup>

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<sup>86</sup> Sometimes maybe more precisely translated as ‘Domination’ from the original ‘Herrschaft.’

<sup>87</sup> D. Beetham and C. Lord, “Legitimacy and the European Union,” *London/New York* (1998): 11.  
See also Chapter 5.1.

<sup>88</sup> See Chapter 5.1.

We can best illustrate the relation between ‘legitimacy’ and for lawyers much more comfortable ‘legality’ in the context of constitutional liberal democratic nation states, which happen to be a starting point for the discussion of political legitimacy, on the scheme put forward by Beetham and Lord:<sup>89</sup>

<p align="center"><b><u>Legality</u></b></p> <p align="center">lib-dem form of legality: constitutional rule of law</p>		
<p align="center"><b><u>Normative Legitimacy</u></b></p>		
<p><b>rightful source of political authority</b></p> <p><i>lib-dem: popular sovereignty</i></p> <p><i>definition of the people:</i></p> <p><i>identity, inclusion</i></p>	<p>criteria for electoral authorisation</p> <p>electoral accountability</p>	<p><b>proper ends and standards of government</b></p> <p><i>rights protection</i></p> <p><i>performance criteria; procedures</i></p> <p><i>to remove failure</i></p>
<p align="center"><b><u>Legitimation</u></b></p> <p align="center">lib-dem: consent subsumed in electoral authorisation;</p> <p align="center">recognition by other legitimate authorities</p>		

<sup>89</sup> Beetham and Lord, “Legitimacy and the European Union.”

The central part of the scheme refers to ‘Normative Legitimacy’ in constitutional liberal democratic nation states, responding to the questions of what makes political authority legitimate, and why the law (the commands of the authority) should be obeyed. The normative legitimacy of political authority in liberal democracies then stands on two grounds. The first ground is based on the idea of *popular sovereignty and democratic governance*, when free and equal individuals come together for the building of the constitution in order to settle the ways of organisation of their political and social life.<sup>90</sup> The Constitution is the ‘evidence’ of such decisions of the people. The nation state experience also shows that deeper levels and justifications of democratic governance (and majority decision-making) are dependent on the existence of a certain *common identity*, or the ‘*demos*’ as is often put.<sup>91</sup>

The second ground of normative legitimacy is *Performance* – namely the proper ends and standards of government. Liberal states have to secure high levels of protection for liberal rights, including efficient judicial systems. Very few policy outcomes and performance criteria are set as normative requirements and incorporated into the constitutions of liberal democracies (usually Human Rights, or the principle of democratic state), and the rest are left for the democratic process.<sup>92</sup> This limited interference with democratic process is the concession that the democracy has made to constitutionalism, when the underlying rationale is that we can not (or only to a very limited extent can we) limit the freedom (to self-governance) of those who come after us. The ‘social approval’ or social legitimisation of the regime happens regularly through electoral authorisation (elections), as well as through the ‘recognition of legitimate authorities’ (such as courts).<sup>93</sup>

<sup>90</sup> Habermas argues that the ‘nation’ has been so far the highest level of closure achieved for the purpose of political organisation. J. Habermas, *The Postnational Constellation: Political Essays*, 2001.

<sup>91</sup> See e.g. F.W. Scharpf, *Governing in Europe: Effective and Democratic?* (Oxford University Press Oxford, 1999).

<sup>92</sup> The legitimacy of the system was predominantly based on the performance legitimacy and the promise of social security - 100% employment, free education, health system etc. When the ideological language had lost its justificatory strength, the reproduction of the system was based on certain ‘privatisation’ or withdrawal from the ‘political’- into the cottage houses or the world of communist TV series, wishing foremost ‘peace’ rather than change of the political system. Finally, and perhaps the most important condition which shaped the understanding of the legitimacy of the system is the presumed ‘longevity’ of the regime, or ‘It was forever, until it was not over.’ For an excellent discussion (in Czech) see Michal Pullmann, *Konec Experimentu: Přestavba a Pád Komunistu v Československu* (Scriptorum, 2011).

<sup>93</sup> See the lower part of the scheme.

Finally, the upper part of the scheme refers to the constitutional rule of law, and it is conditioned by the lower parts of the scheme. Thus the ‘rule of law’ in constitutional democracies is preconditioned by the normative acceptability of the political authority and its social confirmation through general elections and practices of legitimate authorities, which also gives grounds to the positive theory of law. Thus legal positivism in constitutional democracies depends on accepting normative reasons which ground the positivity of law (normative positivism).

## **2.2. On the Analytical Framework: Performance, Regime and Polity Legitimacy**

The analytical framework should help us to expose and analyse different dimensions of legitimacy in the EU and the EPL. For this purpose I have adopted Neil Walker’s framework, which seems to incorporate all relevant dimensions of possible normative justification of the EU. It is then with the help of this framework that I have recursively developed the main normative message of this thesis – namely Micro Legitimacy.<sup>94</sup> I have shifted the focus from the macro to the micro level, which may be conceived as a consequence of postnational constellations,<sup>95</sup> and I have given it a normative content drawn largely from the EU constitution.

Neil Walker identifies three grounds of normative legitimacy to be found in each known political community, and analyses their content and interdependence at the European level. To his (and my) defence, this step should not be interpreted as ‘methodological nationalism’<sup>96</sup>, but it rather forms an acknowledgment of our epistemic constraints, and aims for an *‘analytical framework which emphasises continuity with what we are already familiar without compromising our capacity to acknowledge and imagine what is new.’*<sup>97</sup> As we will see presently, stripped of large portions of its normative content and employed primarily as

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<sup>94</sup> Walker, “The White Paper in Constitutional Context.”

<sup>95</sup> See Chapter 5.

<sup>96</sup> Chernilo defines ‘methodological nationalism’ as the *nation-state* being *treated as the natural and necessary representation of the modern society*, or, *the equation between the idea of society as social theory’s key conceptual reference and the process of historical formation of the nation-state in modernity*. D. Chernilo, “Methodological Nationalism: Theory and History,” in *Annual Conference of the International Association of Critical Realism*, King’s College, London, 2008, 2.

<sup>97</sup> Walker, “The White Paper in Constitutional Context.”



an analytical framework, it can serve as a useful analytical lens for investigation of the levels of legitimacy in the EU context.

The first dimension of legitimacy in Walker's framework is **Performance Legitimacy**. This corresponds to the utilitarian justification of political authority and is concerned with *outcomes* of a polity, rendering the legitimacy dependent on providing material (or other kinds of) *welfare*. It is of little importance how the decision is reached so long as it is considered by subjects to meet their requirements. There are several significant differences between the EU and the MS when it comes to the vindication of performance legitimacy.

To be precise, while national constitutions have left most of the performance goals to be elaborated in and challenged by the democratic process, the EU constitutionalises the most important issue of democratic contestation at the national level – the broad framework of economic policy, and more recently also monetary policy.

Simultaneously, the EU has been defined through limited 'purposes' and goals that it is supposed to pursue. It still remains primarily a functional entity even though many new objectives have been integrated into its constitution – without however changing its primary performance (and responsibility). The EU Treaty does proclaim the 'democracy' as a guiding value, but it does not open the economic policies, market integration, market efficiency, etc. to democratic contestation, or allow other goals or social objectives to compete with market objectives from the same starting line. Rather, these new 'goals' become integrated into the constitutional framework with a secondary or supporting (even rhetorical<sup>98</sup>) function, and these remain primarily in the responsibility of the nation states.

On the contrary, the nation states – as can be also seen from the Beetham's and Lord's framework - are concerned with a much broader scope of 'purposes'. More precisely, the very purposes of the nation states are not only *open to democratic contestation*, but they are

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<sup>98</sup> C. Joerges and. F. Rödl, "Informal Politics, Formalised Law and the 'Social Deficit' of European Integration: Reflections After the Judgments of the ECJ in Viking and Laval," *European Law Journal* 15, no. 1 (2009): 1–19.

largely *undefined*, thus the debate is not limited and allows all kind of values and conceptions of good life to enter into the debate.

The third significant difference between the EU and the MS, which is derived from performance, concerns the dimension of responsibility. Responsibility is a mirror image of performance. Thus, while the EU's performance is measured primarily against economic goals, and the goal of creating an internal market, or more recently of securing the 'competitiveness of the EU economy' in the face of globalisation, the performance of the nation states as generalist policies is measured against their much broader scale of responsibility- to achieve justice, wellbeing, and numerous other issues which the wider public finds important. These different expectations will largely influence the 'outcomes' that each level will aim for.

The relevance of 'performance legitimacy' for the private law debate is paramount. The 'authority' in private law-making has been often derived from the 'performance', and in particular the *quality* and *rationality* of private law rules.<sup>99</sup> The consideration of 'quality' presupposes that some solutions are better than others, thus they conceptually presume one right answer. The 'one right answer' understanding implies either 'value neutrality' and thus the 'apolitical' character of private law, or 'value universality' which needs reason rather than democracy, presupposing the sufficiency of formal rationality to build a high quality system of private law. If these two are the constitutive elements of private lawmaking, the development of these rules is better left to those best equipped to develop such rules, namely private law experts. Thus the claims to 'informal' authority in private law are claims that the legitimacy of private law is based on performance legitimacy (legitimacy qua quality/rationality, and legitimacy qua the capacities of the persons, legitimacy qua expertise).

**Regime Legitimacy** is concerned with the institutions and procedures for reaching decisions. In Walker's words it refers to *'the deep pattern of political organisation and "style" of political engagement within the entity in question, with the role, "scope" and representative quality of governing institutions and their mutual relationship, both as a*

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<sup>99</sup> See N. Jansen, "Legal Pluralism in Europe-National Laws, European Legislation, and Non-Legislative Codifications," *Legal Pluralism*, 2012 (2011): 4. See also N. Jansen, *The Making of Legal Authority: Non-legislative Codifications in Historical and Comparative Perspective* (Oxford Univ Pr, 2010).

*matter of formal law and active political culture.'*<sup>100</sup>. This is the dimension of legitimacy which allows us to go beyond constitutional norms or institutional design (law in books) and look at the actual composition, functioning and merit of institutions and their interactions, and equally at the level of their political (not merely electoral) accountability.

How does the regime legitimacy come into play in the EU? We will consider this question in depth in the following chapter on the Political Authority of the EU. Here a brief sketch is sufficient. As long as the EU could have been considered a limited entity, its Regime could have relied on technocratic governance, shielded from democratic requirements by the kinds of task that were assigned to it. The technocratic justification became a problem with the extension of powers into the ever-broadening field of policymaking, which was a natural consequence of the 'functional' definition of EU competences.

The 'spill-over' in turn brought into question the kind of legitimacy its institutions enjoyed.<sup>101</sup> The sensitive 'social' issues, which had been left to the MS because they were seen to require higher levels of solidarity and political legitimacy, were at once being decided upon by the EU – from its own functional standpoint. This made the transgression of the original 'constitutional' assignments even more critical, and created a more salient need to supplement the Performance Legitimacy with a different kind of legitimacy, *Regime* legitimacy.

Again, we can find a very close parallel in the century-long debate about private law. For a long time, private law was considered a rational, value-neutral field of law, secure in its stark difference to political public law. Once the democratic legislator was elected by universal (even if only male) suffrage, however, questions were raised as to whether private law could really be seen to be so neutral if it often led to factually unjust outcomes, often structurally benefiting some groups over others.<sup>102</sup> Thus in broad terms, the 'authority' in private law was 'politicised', opened up to democratic discussion, and passed from the hands of 'experts' to the hands of the democratic legislator. In those segments of private law, where

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<sup>100</sup> See also Habermas, J., Remarks on Legitimation through Human Rights; in Habermas, *The Postnational Constellation*.

<sup>101</sup> F.W. Scharpf, "The European Social Model," *JCMS: Journal of Common Market Studies* 40, no. 4 (2002): 645–670.

<sup>102</sup> See Chapter 4.1.

the intervention was most necessary, the legislator has ‘carved out’ parts of general private law into emergent ‘regulatory private law’.

Finally, the third dimension of legitimacy to be found in each known polity is **Polity Legitimacy**. In Walker's understanding this has two basic meanings. The first of these is overall polity legitimacy, or the extent to which the political authority is embedded in the society with all of its legitimisation discourses – performance, regime and identity.<sup>103</sup> On the other hand, it has a horizontal dimension which is related to the commonly shared identity, the feeling of 'sameness'; 'belonging'; common 'origin', 'fate' or 'destiny'.<sup>104</sup> This second meaning denotes the deepest and the most stable dimension of legitimacy.

This is clearly the most precarious dimension to be asserted or found in the European Union. The Communities have emerged as a performance-oriented entity, even if not lacking some ethos of their foundation.<sup>105</sup> The founding ethos of peace has however slowly evaporated, without creating sufficient allegiance and with little new to be replaced by.<sup>106</sup> Several attempts to boost the common identity have been mixed experiences.

European Citizenship has been complemented by the confrontational case law of the CJEU, associated with ‘competence creep’ and a capacity to dismantle national welfare systems.<sup>107</sup> The discussion surrounding the European Constitution had some potential. It was removed from the purely supranational institutions with narrower functional focus, and shifted to the Constitutional Convention, which was less constrained by functional rationality and was able to consider the larger scale of questions, values and interests. The success of this attempt, however, remains more on the phenomenological level than on any tangible achievement.

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<sup>103</sup> This is what Walker calls the vertical dimension of polity legitimacy. See Walker, “The White Paper in Constitutional Context.”

<sup>104</sup> M. Marcussen et al., “Constructing Europe? The Evolution of French, British and German Nation State Identities,” *Journal of European Public Policy* 6, no. 4 (1999): 614–633. See also T. Risse and D. Engelmann-Martin, “Identity Politics and European Integration: The Case of Germany,” *The Idea of Europe: From Antiquity to the European Union* (2002): 287–316.

<sup>105</sup> J. Weiler, *The Constitution of Europe: “Do the New Clothes Have an Emperor?” and Other Essays on European Integration* (Cambridge Univ Pr, 1999).

<sup>106</sup> Ibid.

<sup>107</sup> E. Spaventa, “Seeing the Wood Despite the Trees? On the Scope of Union Citizenship and Its Constitutional Effects,” *Common Market Law Review* 45, no. 1 (2008): 13–45.

From the private law side, Consumer Law- which was considered in the beginning as an opportunity for the Communities to get closer to their citizens- has been completely taken over by the pervasive performance narratives of internal markets, economic efficiency and competition, which proved to hold little potential to create deeper allegiances.<sup>108</sup>

The idea of the European Civil Code (ECC) on the other hand, raised a lot of discussion and a lot of passion. Civil codes enjoy large fidelity in their respective societies, and are often associated with legal cultures and national identities. Beyond these nationalist sentiments,<sup>109</sup> private law constitutes a basic framework for interactions between private parties, with an important civilizing impact on both social relations and the minimum level of obligation that citizens have towards each other. Harmonisation would imply an important statement of emergent European Identity, but also the values that underpin its common market.

The implications of the EU framework (as it now stands) on the kind of social order that might be constituted through the ECC will be discussed extensively in particular in Chapter 9. ‘What kind of social order’ will become ever more salient question with the increasing importance of private law as a ‘market re-embedding’ tool for societies, when other means of market control are disappearing. It becomes in fact one of the ‘rare’ tools through which we can put into place the collective idea of what constitutes a just social order.

### **2.3. Why not Scharpf?**

Many lawyers have asked me why I have not used Fritz Scharpf’s famous ‘input’ and ‘output’ legitimacy framework, which leads me to believe that an explanation is warranted. First, I will give a few words about the framework itself, and then some reasons why I did not go along with this course.

Scharpf’s framework has had a large impact on legal academia, particularly in the edition of his book ‘*Governing Europe: Efficient and Democratic?*’ published at the end of

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<sup>108</sup> T. Risse, “Neofunctionalism, European Identity, and the Puzzles of European Integration,” *Journal of European Public Policy* 12, no. 2 (2005): 291–309.

<sup>109</sup> M.W. Hesselink, “The Case for a Common European Sales Law in an Age of Rising Nationalism,” *Forthcoming* (2012).

the 1990s<sup>110</sup>. Scharpf distinguishes between *Input oriented legitimacy* and *Output oriented legitimacy*, which correspond to government *by* the people and *for* the people.<sup>111</sup> Input oriented legitimacy concerns government *by* the people- it is centred on the individual<sup>112</sup>. The more the distance between the people and the representatives increases, the lower the levels of participation and consensus in the decision. Given that the individual is the central focus of input oriented legitimacy, there must be reasons why such an individual should accept the decision of the majority in certain polity. The major question of input oriented legitimacy thus becomes the *justification of majority rule*. This, Scharpf claims, is secured through the broad collective identity, building on the feeling of sameness, which reduces the fear that we would be harmed as individuals by the decisions of the majority.

In terms of input legitimacy as understood by Scharpf, there are substantial problems at the EU level. We can hardly claim there is a thick conception of European Identity, the fact of which is aggravated by the insufficiently developed European Public sphere, necessary for the government *BY* the people.<sup>113</sup>

Output legitimacy, on the other hand, represents government *for* the people, deriving its legitimacy from governing in the interests of the people, offering solutions to different common problems. Output legitimacy implies problem-solving capacity, and includes institutional arrangements for collective action on issues that can not be solved on an individual basis or on the basis of exchange.<sup>114</sup>

The preconditions for the development of output oriented legitimacy are far less demanding. It is sufficient to ascertain a set of common concerns which are to be solved by the collective action. Of course, output oriented legitimacy does not require strong collective identity nor primary loyalty from its constituencies, nor does it have *'difficulty in allowing for*

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<sup>110</sup> F.W. Scharpf, *Governing in Europe: Effective and Democratic?* (Oxford University Press Oxford, 1999).

<sup>111</sup> Translating it into Beetham's and Lord's framework mentioned above, these are on the one hand self-government based on the positive definition of people and their identity, and on the other hand the (proper) aims or goals of the government, i.e. protection of rights, performance in terms of material welfare and redistribution.

<sup>112</sup> F.W. Scharpf, "The Double Asymmetry of European Integration-Or: Why the EU Cannot Be a Social Market Economy" (2009)., 89.

<sup>113</sup> Scharpf, *Governing in Europe*.

<sup>114</sup> Scharpf, *Governing in Europe*, 11.

*the coexistence of multiple, nested or overlapping, collective identities defined by specific classes of problem solving concerns and organised according to territorial as well as functional criteria'*.<sup>115</sup> Thus, in this area, the EU can build a much more robust legitimacy framework.

Scharpf further develops four mechanisms which contribute to the robust output oriented legitimacy – some of which are present in the EU, and some of which are not. First of all is *electoral responsibility* which, though not targeted perfectly, punishes the government if it diverges too far from the majority view. *Independent Expertise* is outlined as another mechanism, as some decisions are considered to be better dealt with by experts, thus leaving them outside of the remit of the majority – traditionally this *independent expertise* comes from the judiciary, and contemporarily also from a number of independent agencies. Most importantly, without denying the credibility of these mechanisms, the national systems leave room for the overriding of such decisions by the majority, thus increasing their legitimacy. The other output oriented legitimacy mechanisms are the *corporatist and intergovernmental agreements*, and *pluralist policy networks*.

According to Scharpf, the European Union has only a claim on the output side. This is where it needs no evidence of strong identity, and it suffices to be ‘equipped’ with a set of effective common institutions, through which collective action in areas of common interest may be taken<sup>116</sup>. Now, the trouble obviously begins when the EU acts beyond the sphere in which its legitimacy is sufficient. The EU has however developed three major techniques for achieving ‘problem solutions’ with the least opposition. These are *low visibility* (advantage of judicial governance<sup>117</sup>), *conflict minimising policies* (in particular the outsourcing of the political process to the network governance and the rise of Comitology, Lamphalussy Procedure, and Open Method of Coordination<sup>118</sup>) and *borrowed national legitimacy*.

In his later work, Scharpf develops the idea that EU legitimacy is two-tiered- bottom up, and top down (the latter being when both the participation of the citizens and the

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<sup>115</sup> Ibid.

<sup>116</sup> Although Scharpf emphasises the deficiency of problem solving at the European Level

<sup>117</sup> Scharpf, *Legitimacy in the Multilevel European Polity*, 23.

<sup>118</sup> See also the ‘indirect forms of governance’ in N. Bernard, *Multilevel Governance in the European Union*, vol. 35 (Kluwer Law Intl, 2002), 107.

enforcement are mediated through the MS).<sup>119</sup> In top down dimensions, the states enforce EU law, and should justify the policy decisions in their national communication processes - in the areas where they had a voice at European Level<sup>120</sup>. This, however, cannot take place in case of non-political or non-majority based decision-making, such as that of the judiciary (and the European Court of Justice). In these circumstances, the EU loses the legitimacy resource stemming from national republican democratic processes, that would take place through justification of EU policies by MS (for they have participated in their creation).

Even though I will on numerous occasions use Scharpf's terminology (and for that reason the discussion above may prove useful), there are several reasons I did not choose this framework as a main theoretical lens. Conceptually, Walker's framework provides a much better tool with which to tease out the substantive similarity in the discourse on political legitimacy and legitimacy in private law. The term Performance strongly resonates with adjectives like 'quality' and 'rationality' used in private law. It also underlines something of the managerial dimension which is very useful when thinking about the EU. Finally, unlike 'output' legitimacy, which semantically refers more to the 'end product', performance legitimacy is a more dynamic category, which refers rather to the actual process.

Furthermore, this framework should be appreciated on account of the fact that it makes a distinction between Regime and Polity Legitimacy, which In Scharpf's framework would end up in the same category of 'Input oriented Legitimacy'. First of all, it allows us to distinguish between them and thus makes us concentrate on their interaction and interdependence, rather than a more deterministic dependence, which is achieved by putting them in 'one basket'. Walker also stresses the temporal dimension, or gradation, which can be found in discourses on private law as well as in EU law. Finally, Walker's framework is conceptually clearer, and requires very little insight to understand the message which appears important for the public and which the thesis tries to address.

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<sup>119</sup> Scharpf, *Legitimacy in the Multilevel European Polity*.

<sup>120</sup> V.A. Schmidt, "Re-Envisioning the European Union: Identity, Democracy, Economy\*," *JCMS: Journal of Common Market Studies* 47 (2009): 17–42.



### **3. POLITICAL AUTHORITY OF THE EU**

#### **3.1. Long road from Performance to Regime Legitimacy**

To understand the role of ‘performance’ for the legitimacy of the EU, equally as the reasons why the performance ceased to be sufficient at certain point, we need to look at ideational origins of the EU on the one hand, and the theories which aimed to describe and explain the EU on the other.<sup>121</sup> We will look how ordo-liberals, equally as proponents of various theories of integration have viewed the relation between performance and regime legitimacy, between the input and output legitimacy, or between the executive and democratic governance of the EU.

##### **3.1.1. Ordo-liberal Heritage**

There is a striking resemblance in both the institutional structure as well as its initial legitimacy discourses of the EU with one politico-economic theory – that of ordoliberalism. Even if ordoliberalism was a direct inspiration for only a minority of the creators of the Communities, in their final design the Communities came very close to the ordo-liberal ideal.

Ordo-liberalism is a school of constitutional thought, which posits the most desirable relation between the state, market and society. It has first significantly influenced political thought in post-war Germany, and also to some extent German post-war institutional and policy design.<sup>122</sup> However, the main political success of ordo-liberal thought was the final design of the European Communities, influenced significantly by one branch of ordoliberalism (represented in the negotiations process by the Muller Armack.<sup>123</sup>).

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<sup>121</sup> Yet, this is not to exclude that descriptive theories not only have normative message, but also are to certain extent constitutive of the described object itself.

<sup>122</sup> C. Joerges and F. Rödl, “‘Social Market Economy’ as Europe’s Social Model?” (2004); M.P. Maduro, *We the Court: The European Court of Justice and the European Economic Constitution* (Hart Publishing, 1998).

<sup>123</sup> Joerges and Rödl, “‘Social Market Economy’ as Europe’s Social Model?,” 14.

The ordo-liberals, contrary to classical liberals, argue for a strong, even if minimal, state. The state is entrusted with the task of setting the *ordo* of the economy, the economic constitution, which would enable free economic activity, while at the same time setting limits to private power (through competition law).<sup>124</sup> The theory presumes the existence of a large private sphere of individuals, free from the interference of other human beings and the interference of public power, where the individuals can arrange their matters as they like. The legitimacy of the order then always stems from the bottom – from the uncontrolled interaction between the individuals within their broad private sphere, while the state is responsible for the constraint of private power through competition, and at the same time is prevented from further interference in the economy.

The mistrust of ordo-liberals toward the state is a consequence of the experiences of the Weimar Republic and the Nazi Regime. On the one hand, competition law is needed to prevent recurrent cartelisation of the economy which was the reality of the Weimar Republic; while on the other hand, the minimal state and broad private sphere were aimed at preventing the recurrence of the tragedies such as those of National Socialism in Germany.

The theory has an uneasy relationship with democracy for the same reason, and it can be seen to be generally mistrustful towards any democratic involvement in the economy on account of non-market (social) goals. The reason is that any such interference would become a tool for increasing powers of one group at the expense of others. Social justice should rather be secured on the *macro* level ‘by creating a well functioning system as a whole’,<sup>125</sup> where rules of competition are in place, along with private law rules which secure and enforce our claims to undisturbed enjoyment of private property.

Private law so becomes a crucial part of the *ordo*, insofar as it creates a framework for the peaceful enjoyment of private property and a neutral set of rules for market interaction among individuals. Franz Bohm then famously develops the idea of a

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<sup>124</sup> Hayek, a descendent of the ordo-liberals who substantially radicalised the theory, contends that the legal interference has to be neutral – they have to lead to results which are neither just or unjust. See F.A. Hayek, *Law, Legislation and Liberty, Volume 2: The Mirage of Social Justice*, vol. 2 (University of Chicago Press, 1978), 70.

<sup>125</sup> Walter Eucken, *Grundsätze der Wirtschaftspolitik*, as cited by Manfred E. Streit, “Economic Order, Private Law and Public Policy The Freiburg School of Law and Economics in Perspective,” *Journal of Institutional and Theoretical Economics (JITE) / Zeitschrift Für Die Gesamte Staatswissenschaft* 148, no. 4 (December 1, 1992): 148.

Privatrechtsgesellschaft,<sup>126</sup> where private law becomes a major steering mechanism<sup>127</sup> - alongside the language and the market<sup>128</sup> - of societal coordination based on the voluntary cooperation of individuals and on consensual relations.<sup>129</sup> The concern with the economic constitution in general and private law in particular is political in essence – it aims to secure freedom and equality of the individuals in the face of freedom-hostile public and private intervention.

The relationship between ordo-liberals and the ‘Social’ is also ambiguous. Ordo-liberals do not dispute that there is a political constitution aside from the economic one, but how much would be left to the ‘political’ sphere would be something open to contestation among the ordo-liberals themselves. Hayek was mistrustful towards any public intervention and believed in the justice delivered by the market.<sup>130</sup> On the other hand, Muller Armack, as previously mentioned, has been a proponent of the ‘social market economy’ (the term which found its way into the Treaty of Lisbon) and which implies public intervention in order to establish ‘social balance.’<sup>131</sup> This *intervention, however, has to be congruent with market objectives*, or at the very least it cannot impede the market.

The idea of a ‘social market economy’ thus implies the (free) market as a first among all objectives – the constitution still remains the economic constitution. Joerges and Rodl thus argue (rightly) that ‘social market economy’ is a *non-desirable* model for the EU, since it prioritises the market as opposed to other social goals.<sup>132</sup> Descriptively however, as this thesis will show, ‘social market economy’ is a very accurate concept to describe the most optimistic destiny of the ‘social’ in the EU - unless we see the politicisation of the *raison d’être* of the EU.

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<sup>126</sup> Bohm, F. ‘Privatrechtsgesellschaft und Marktwirtschaft’, in F. Böhm, *Freiheit und Ordnung in der Marktwirtschaft* (Baden-Baden: Nomos, 1980) 105.

<sup>127</sup> K. Günther, “Ohne Weiteres Und Ganz Automatisch»? Zur Wiederentdeckung Der «Privatrechtsgesellschaft,” *Rechtshistorisches Journal*, no. 11 (1992): 473.

<sup>128</sup> Günther, “Ohne Weiteres Und Ganz Automatisch»?”.

<sup>129</sup> N.M.P. Oliveira, “The Private Law Society and Contract Law Application,” *European Review of Contract Law* 5, no. 1 (2009): 31.

<sup>130</sup> Hayek, *Law, Legislation and Liberty, Volume 2*, 2.

<sup>131</sup> Joerges and Rödl, “‘Social Market Economy’ as Europe’s Social Model?,” 16.

<sup>132</sup> *Ibid.*

Since the ordo-liberal mistrust of democracy and public intervention has found only limited support in post-war Germany, the creation of the European Communities may have seemed as a welcome opportunity to put theory into practice. The European Communities were designed as a market enabling entity, with design adjusted to the ‘efficient’ administering of this function, and which should have been proud of its inbuilt ‘democratic’<sup>133</sup> and ‘social’<sup>134</sup> deficit.

The European Communities were to provide the economic *ordo*, to open up a common market and secure the competition therein. The ‘political’ and ‘social’ spheres, as well as ‘democracy’, were then left to the Member States, who in their own political arenas could distribute and redistribute the wealth created in the common market, while at the same time keeping the EU intact by those feared elements of governance. Very similar division could also have been observed in European Private Law before the maximum harmonisation debate.

An interesting point of ordo-liberalism relates to the legitimacy of the EU. The ordo-liberals believed that the legitimacy of the system stems from the free interactions of free individuals in the free markets. The legitimacy in the ordo-liberal framework is produced in uncontrolled interactions; it is a bottom-up legitimacy which does not depend on the macro picture and democratic institutions. In its essence, ordo-liberalism makes a ‘micro’ legitimacy- a private law consensual legitimacy- the *basis of overall polity legitimacy* (of the ‘macro’ constitutional legitimacy), eschewing completely the ‘public autonomy’<sup>135</sup> or ‘republican’<sup>136</sup> forms of legitimisation.

As Maduro underlines, this kind bottom-up legitimisation envisaged by ordo-liberals does an important job for the legitimacy of the EU – it places the legitimacy of the EU beyond the need for democratic legitimacy and beyond nation states, and it positions it within

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<sup>133</sup> The first time it was used in the Manifesto of Young European Federalists as means to describe the alienation and democratic externalities at the national level! <http://www.federalunion.org.uk/the-first-use-of-the-term-democratic-deficit/>

<sup>134</sup> Scharpf, “The European Social Model.”

<sup>135</sup> Habermas, *Between Facts and Norms*.

<sup>136</sup> For an excellent discussion of the impact of this idea on current legitimacy of the EU see Scharpf, *Legitimacy in the Multilevel European Polity*.

the capacity of the EU to grant individual rights to citizens.<sup>137</sup> The legitimacy of the EU has been fully reliant on liberal grounds, without the republican dimension.<sup>138</sup> It thus becomes an economic order legitimated by the enlarging economic rights and freedoms of the individuals. What is more, the purpose of such an order is to enlarge the sphere of economic freedom of individuals and to prevent further public intrusion. Thus the negative integration could have been viewed as a perfect tool to further the ordo-liberal political project – it liberalises through non-majoritarian expert institutions (the CJEU).

A note of caution is due here. The described ordo-liberal concept of ‘micro’ (bottom-up) legitimacy through the free interaction of individuals is very different from the micro legitimacy proposed in this thesis.<sup>139</sup> While both concentrate on the micro level, the legitimacy proposed by this thesis is *public*, *democratic* and *republican*, in contrast to the *liberal* and *private* ordo-liberal conception of micro legitimacy. Furthermore, the reason ‘why’ it is proposed here is exactly the opposite to that which the ordo-liberals had in mind – it aims to become a means by which to overcome the democratic and social deficits at the *macro* level, which are desired by ordo-liberalism, and in this sense it stands in direct and stark opposition to the ordo-liberal understanding of micro legitimacy.

Relating the discussion to European Private Law, it seems rather surprising that despite the importance of private law in the ordo-liberal framework, private law was only appropriated by the EU long after its birth. This may provide evidence that private law did not seem a priority insofar as national private laws served their function rather well, providing ‘sufficiently’ liberal frameworks for market transactions. The later involvement of the EU in consumer law may be seen in this light as preventative action to avoid the growth of national consumer law (with different rationality). In addition, as Grundmann argues, EU consumer law is in fact in line with the ordo-liberal thought, insofar as it aims to remove market failures, and thus improve market functioning -rather than be concerned with consumer *protection*, as started to be the case at the national level.<sup>140</sup>

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<sup>137</sup> Maduro, *We the Court*, 128.

<sup>138</sup> Scharpf

<sup>139</sup> See Chapter 6.

<sup>140</sup> S. Grundmann, “The Concept of the Private Law Society: After 50 Years of European Business and European Business Law,” *European Review of Private Law* 2008, no. 4 (n.d.): 557. *Such action is*

With the entrance of the EU in private law, we can speak about multi-level systems of private law in Europe which mirrors the structure of the EU. EU Regulatory Private Law and National Private laws formed a system centred on the principle of co-existence between the two different rationalities – the European *economically oriented* and the national *socially oriented* rationality - a system enabled by ‘minimum harmonisation’.

At a certain point – a point which is a focus of this thesis - the EU action has put this model into question. The economic rationality has basically ceased to be patient and tolerant toward the different (social) private law rationality at the national level. The EU aims for the complete appropriation of private law for the reasons of market efficiency internally and competitiveness externally.<sup>141</sup>

### ***3.1.2. Failure of Legitimation qua Performance and a Turn toward Regime Legitimacy***

The ordo-liberals have viewed the ‘performance’ of the EU in providing the *ordo* and ensuring free competition, when the ‘regime’ was designed as intentionally undemocratic. Others who have theorised on the EU have also viewed it as a performance or outcome oriented entity, the justification of which is based on the delivery of expected performance (market integration and economic prosperity), rather than on the democratic qualities of its regime. The EU ‘input’ legitimacy rested mainly on indirect legitimacy from the MS through the Council, along with the ‘expertise’ Commission, which ensured its impartiality as well as the quality of its outputs.

The first theory of European Integration, which arose immediately after the emergence of the Communities, was to a large extent accurate prediction of the dynamics and mechanisms of the integration process. Haas believed that once integration started, the trajectory of the development of the EU would lead to further integration and finally to a federal state. His theory was based on the idea of interdependence and the unavoidable spill-

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*however conditioned by making sure that the risk of the state failure does not outweigh the harm of the market failure.*

<sup>141</sup> Walker, “The White Paper in Constitutional Context.”

overs from one functional area to another.<sup>142</sup> As long as the EU would have been successful in securing welfare for its citizens, it would reach the point when the loyalties would naturally shift from national to European level, enabling the conditions for the emergence of a Euro-state (as a federal state).<sup>143</sup>

The functionalists view presupposes the reliance on the institutional framework, which should be able to secure the ‘quality’ of outputs, thus the performance legitimacy, which in turn should create greater loyalty amongst its citizens. Regime or democratic legitimacy would then, eventually, become the end result, rather than a means of achieving quality of performance or the creation of loyalties through public autonomy.

What Haas has not paid much attention to are the normative implications of the functional rationality of the EU which, carries with it order of values and shapes all fields entered by the EU to fit this particular rationality. This will impact on the justification for particular actions, the values pursued and finally the outcomes of such actions.

Additionally, the failure of ‘functionality’ to ensure expected shift of loyalties may be ascribed to the fact that in the current institutional framework, there has been comparatively little democratic exchange and involvement among people (despite enlarging powers). This may be ascribed to the ‘non-availability’ of the basic questions to democratic debate in Europe - namely ‘what kind of economic order’ for the EU.

Somewhat later, the ‘Intergovernmentalists’ refused this ‘neo-functionalist’ vision of overspill (in the atmosphere of general discouragement of the path of integration, thanks to the ‘joint decision trap’<sup>144</sup>), and argued that the national governments hold the key to

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<sup>142</sup> E.B. Haas, “International Integration: The European and the Universal Process,” *International Organisation* 15, no. 03 (1961): 366–392.

<sup>143</sup> Ibid.

<sup>144</sup> Fritz W Scharpf, “The Joint-decision Trap: Lessons from German Federalism and European Integration,” *Public Administration* 66, no. 3 (September 1, 1988): 239–278. See also F.W. Scharpf, “The Joint-Decision Trap Revisited,” *JCMS: Journal of Common Market Studies* 44, no. 4 (2006): 845–864.

integration firmly in their hands. The EU so becomes more like a forum where a course of common action can be established on the basis of interstate bargaining.<sup>145</sup>

While the neo-functionalists seemed to be content with the existing institutional framework of the EU, presuming that the supranational expert governance would convince through performance, the intergovernmentalists stressed rather the importance of state involvement (indirect legitimacy) for the performance legitimacy of the EU, and that the performance legitimacy of the EU in turn should be measured against the objective of fulfilling the expectations of the states.<sup>146</sup> Moravcsik has consistently contended that the democratic deficit is a misunderstanding at best.<sup>147</sup>

Giandomenico Majone then offers a third influential theory, which understands the legitimacy of the EU in terms of performance. He understands the EU as a ‘Regulatory State’,<sup>148</sup> the main legitimisation of which stands on the presumption of the division of ‘tasks’ between the regulatory EU and the redistributive MS tasks (not dissimilar to the ordo-liberal idea). The EU in this view acts as an Independent Agency, when its technocratic nature is its *raison d’être* and proper legitimisation, insofar as it allows the avoidance of the pitfalls of democratic governance.

Technocratic governance should enjoy a sufficient level of legitimacy until the EU is concerned only with regulation (as opposed to redistribution). Given that this regulation is oriented towards the removal of market failures, it leaves everyone better off, thus there is no need for further justification of non-contentious decisions by means of (democratic)

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<sup>145</sup> A. Moravcsik, “Liberal Intergovernmentalism and Integration: a Rejoinder,” *JCMS: Journal of Common Market Studies* 33, no. 4 (1995): 611–628. A. Moravcsik, “The Myth of Europe’s Democratic Deficit,” *Intereconomics* 43, no. 6 (2008).

<sup>146</sup> Moravcsik, “The Myth of Europe’s Democratic Deficit,” 340.

<sup>147</sup> A. Moravcsik, “What Can We Learn from the Collapse of the European Constitutional Project?,” *Politische Vierteljahresschrift* 47, no. 2 (2006): 219–241; A. Moravcsik, “In Defence of the ‘Democratic Deficit’: Reassessing Legitimacy in the European Union,” *Integration in an Expanding European Union: Reassessing the Fundamentals* 7 (2003): 77.

<sup>148</sup> G. Majone, *Regulating Europe* (Psychology Press, 1996); G. Majone, “The Rise of the Regulatory State in Europe,” *West European Politics* 17, no. 3 (1994): 77–101; G. Majone, “From the Positive to the Regulatory State: Causes and Consequences of Changes in the Mode of Governance,” *Journal of Public Policy* (1997): 139–167.



procedures. Limiting the function of the EU to regulation only would also help to avoid the politicisation of the EU and the replication of the unsatisfactory national models.<sup>149</sup>

There are weaknesses in both latter arguments. First of all, the line between regulation and redistribution is difficult- if not impossible- to draw. Moreover, the ever-increasing expansion of EU lawmaking into other subject areas, along with the case law of the CJEU, has long-since begun to interfere in issues which could not rightfully be called economic.<sup>150</sup> This also calls into question Moravcsik's argument – in particular, the proliferation and increase of powers of supranational and often 'non-majoritarian' institutions undermines the contention that policies are the outcomes of state bargaining, or that the states maintain control.<sup>151</sup>

Recognising all these legitimisation problems early on, the EU institutions and MS decided to take action early in the development of the Communities. They undertook to remove the 'democratic deficit' by strengthening those elements of governance where the deficit was alleged. This was to be executed by way of the reconstruction of its institutional structure, in order to get as close as possible to the paradigm of a legitimate polity – namely that of a nation state. Unfortunately, this has proved to be a Sisyphean task so far.

The main concern was with elements of democratic accountability<sup>152</sup>, and thus the first steps of 'democratisation' went through direct suffrage to the European Assembly (from the SEA European Parliament)<sup>153</sup> and further steadily increased of the powers of the European Parliament.

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<sup>149</sup> G. Majone, "Nonmajoritarian Institutions and the Limits of Democratic Governance: a Political Transaction-cost Approach," *Journal of Institutional and Theoretical Economics JITE* 157, no. 1 (2001): 57–78.

<sup>150</sup> D. Damjanovic, B. De Witte, and European University Institute. Law Dept, *Welfare Integration Through EU Law: The Overall Picture in the Light of the Lisbon Treaty* (European University Institute, 2008). For the Service of General Economic Interest from private law perspective see Peter Rott, "Consumers and Services of General Interest: Is EC Consumer Law the Future?," *Journal of Consumer Policy* 30 (February 8, 2007): 49–60. On education see Dougan, "Fees, Grants, Loans and Dole Cheques."

<sup>151</sup> Scharpf, *Legitimacy in the Multilevel European Polity*.

<sup>152</sup> M. Bovens, "Analysing and Assessing Accountability: A Conceptual Framework 1," *European Law Journal* 13, no. 4 (2007): 447–468.

<sup>153</sup> Decision 76/787/EEC, OJ 1976, L278/1.

The success of the White paper on the Competition of the Single Market and the Single European Act led to a considerable increase in the political power of the Communities. Legitimacy then comes to form a main point of departure in the Treaty of Maastricht.<sup>154</sup> The Maastricht Treaty brought numerous innovations for the legitimisation of the EU. These included significant increases of the legislative powers of the European Parliament and the establishment of the Office of European Ombudsman to counter maladministration of European Institutions and to increase administrative accountability.<sup>155</sup>

The link between the EU and its citizens was strengthened also on a symbolic level (polity generative constitutional discourse<sup>156</sup>) through the introduction of European Citizenship. Finally, it introduced the principle of Subsidiarity, aimed at getting the ‘competence creep’ under control. The Treaty of Amsterdam further elaborated the Principle of Subsidiarity in a Protocol – adding the flesh to its ‘democratic dimension’. Finally, the Lisbon Treaty completed the process by making national parliaments the guardians of the subsidiarity principle. It introduced the European Citizens Initiative, the articles on Democratic Governance (art. 11 TEU), as well as the office of European Council President, and the External Relations Commissionaire.<sup>157</sup>

What was this all for? Joseph Weiler identified many years ago the challenges of this approach to the ‘democratisation’ of Europe. He points out that the increases in power of the European Parliament would not bring about the desired goal of the democratisation of the EU.<sup>158</sup> Rather, he recognises the problem in the lack of republican properties of the EU, whereby the shift in decision-making (from majority based decision-making to the higher level of governance) is not accepted by the constituency.<sup>159</sup>

Weiler was one of the first to explore the legitimisation of the EU, which is different from that of states as well as that of international organisations, and which appropriates its *sui generis* character. In his ‘The Transformation of Europe’, Weiler develops a model which he

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<sup>154</sup> D. Chalmers, G. Davies, and G. Monti, *European Union Law: Cases and Materials* (Cambridge Univ Pr, 2006), 28.

<sup>155</sup> Ibid.

<sup>156</sup> Walker, “The White Paper in Constitutional Context.”

<sup>157</sup> Treaty on the Functioning of the European Union.

<sup>158</sup> Ibid.

<sup>159</sup> Weiler, *The Constitution of Europe*.

calls the *Community Approach*. He believes that the creation of the Communities was based on certain values (those of Peace, Prosperity and Supranationalism)<sup>160</sup> which transcended the values known from the Westphalian and Versailles framework, and in particular the ‘egoism’ of international law.

The community is based on the celebration of '*the reality of interdependence, and on counterpoising to the exclusivist ethos of statal autonomy.*'<sup>161</sup> It is characterised by a different, new kind of intercourse, diverse ways of doing things<sup>162</sup> and it is the foundation of Europe's own *Sonderweg*.<sup>163</sup> Later he criticises the abandonment of the founding ideals of the Community by turning to the nation state model, which cannot however offer a credible or convincing solution to the problem of legitimacy deficit, nor an attractive option for the future.<sup>164</sup>

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<sup>160</sup> Ibid.

<sup>161</sup> Ibid., 92.

<sup>162</sup> J.H.H. Weiler, “The Commission as EuroSkeptic: A Task Oriented Commission for a ProjectBased Union. A Comment on the First Version of the White Paper,” *Mountain or Molehill* (2001): 183–188.

<sup>163</sup> J.H.H. Weiler, “Federalism Without Constitutionalism: Europe’s *Sonderweg*,” *The Federal Vision* 1, no. 9 (2001): 54–71.

<sup>164</sup> Weiler, *The Constitution of Europe*.

### 3.2. *Three Pillars of Democratic (Regime) Legitimacy in the EU. Or what do we have?*

The institutional framework of the EU relying on the Performance Legitimacy was increasingly considered unsatisfactory. The EU has intervened in issues which did not fall within the proper scope of its ‘economic constitution’, and very often this has been done through the non-majoritarian institutions such as CJEU or, increasingly today, the European Central Bank. The decisions of the EU were becoming ever more politically salient, with large redistributive consequences. The ‘performance’ (outcomes) thus became ever more contentious, and new sources of legitimacy had to be sought in the EU. These sources had to be procedural (legitimate ways how to bring about the decisions) since the controversy regarding substantive matters could no longer be resolved by means of deferral to experts etc. The only path was the *democratisation* of Europe.<sup>165</sup>

We can identify three main pillars of EU Democratic/Regime Legitimacy incorporated in the Treaties. The first pillar forms the institutions of Representative Democracy. Even if not entirely successful, the representative institutions are certainly not devoid of importance. The second pillar of its legitimacy is the principle of Subsidiarity, which is aimed at drawing on the legitimacy of the democratic processes at the national level, and culminated in the involvement of the national parliaments in the EU legislative process and as the guardians of the Principle of Subsidiarity. The third pillar then mobilises a more innovative kind of procedural legitimisation and, in particular, Participatory Democracy.

Finally, the processes of ‘de-functionalisation’ and ‘de-marketisation’ need to be completed if democracy is to become a real option for the EU. That is to say that until the primary performance of the EU is being understood in terms of ‘more market’, or ‘competitiveness’, we can not expect democratic governance insofar as these most important

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<sup>165</sup> The Regime Legitimacy will often be used interchangeably with the Democratic Legitimacy, since the two largely conflate in the discourse about the legitimacy of the EU (empirical claim), which is a normatively attractive and desirable mode of searching for the Regime Legitimacy in the EU (normative claim). This needs to be however complemented with the *micro* approach to democratic legitimacy in the EU, since either level of democratic deficit (lack of republican democratic institutions, equally as liberal bias of the EU) can not currently be sufficiently addressed at the macro level.

topics of economic policy are ‘immunised’ from politicisation.<sup>166</sup> Several paths how to achieve this will be presented in this thesis – both at *macro*<sup>167</sup> and *micro* level.

### **3.2.1. I Pillar: Representative democracy**

The EU has steadily increased its powers, and simultaneously it has aimed to compensate this extension by increasing its democratic legitimacy. The main efforts have been directed at the ‘macro’ (institutional) level, mimicking the national models of democracy. This has of course happened with the reservation made in the paragraph above – the ‘immunisation’ of certain basic economic choices.

Thus we see a steady increase of powers of the EP, and its input into lawmaking<sup>168</sup>, which is envisaged as the main path how to raise the democratic legitimacy of the EU lawmaking. Another ‘macro’ (institutional) initiative was the establishment of office of European Ombudsman to counter maladministration of European Institutions and improve administrative accountability.<sup>169</sup> Substantive input came in attempts to strengthen the link between the EU and its citizens through the introduction of European Citizenship.

The European Commission as the ‘government’ was obviously somehow hard to be improved within the framework of the nation state model, if no true democratic adjustments were to be made. Thus we see a number of (unsuccessful) proposals to increase the democratic accountability of the Commission, by making it accountable to the European Parliament, eventually leaving the selection of the president of the Commission to the EP or to the public.

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<sup>166</sup> See Cass Substein, in J. Elster, R. Slagstad, and France) *Maison des sciences de l’homme* (Paris, *Constitutionalism and Democracy* (Cambridge Univ Press, 1988), 340.

<sup>167</sup> Last significant initiative that would touch the macro structures relates to the intention of the European Commission to explore the possibilities for the closer political union. Despite all the reservations with regard to the political impact of the ‘exclusion of the political’ in the functioning of the European Commission (which ends up as a strong ‘liberal bias’ of the Commission), this initiative is in principle a very positive step. See <http://euobserver.com/19/116336>.

<sup>168</sup> Treaty of Lisbon makes the national parliaments main guardians of the Subsidiarity. See Art. 5 TEU, and Protocol 2 to the Treaties.

<sup>169</sup> Chalmers, Davies, and Monti, *European Union Law*, p 28.

So far, however, these efforts have turned out to be largely insufficient to convert the EU into a democratic polity.<sup>170</sup> They have not managed to overcome the two dimensions of EU democratic deficit, which stem from a lack of republican preconditions for democracy<sup>171</sup> on the one hand, and the ‘liberal bias’ on the other. In particular, the EU framework does not provide the institutions (public sphere, common language, pan-European media, pan-European parties) nor the topics (‘what kind of economic order’ for the EU) in order to stimulate the popular engagement and democratic governance.

Nonetheless, this does not make the representative democracy in the EU redundant. The European Parliament remains an important forum for democratic involvement, and it has proved important also in some initiatives in EPL. In addition, the self-understanding of the Parliament as a democratic institution will make it more open to questioning regarding the ‘liberal bias’ and a prominent status of the market rationality of the EU - if the conditions are put in place for the true ‘politicisation’ of the *raison d’être* of the EU.

### **3.2.2. II Pillar: The Principle of Subsidiarity and the ‘Light Touch’<sup>172</sup> of the EU**

At the most basic level, if we consider that EU decision-making suffers from the ‘democratic deficit’, then another means to reduce the breadth of the problem is by *non – action*, i.e., leaving as much decision-making as possible to the democratically legitimate levels of government<sup>173</sup> Unless there is a sufficiently convincing reason why the action is both necessary<sup>174</sup> and superior to the action at nation state level, the EU should refrain from action. A sufficiently convincing reason is a precondition for performance (legitimacy), which can *balance* out the harm done by the fact that decisions are taken in a democratically

<sup>170</sup> Nation state democracies are equally far from ideal. See P. Mair, “Representative Versus Responsible Government” (2009).

<sup>171</sup> Scharpf, *Legitimacy in the Multilevel European Polity*.

<sup>172</sup> Bernard, *Multilevel Governance in the European Union*, 35.

<sup>173</sup> The extent of the deferral is dependent on the Performance Legitimacy.

<sup>174</sup> The Reasoned Opinion of the Bundestag in the CESL Yellow Procedure has underlined that the question of competence is an inherent part of the principle of subsidiarity. The ‘necessity’ presumes competence, but more is needed than that. For all reasoned opinions see <http://www.ipex.eu/IPEXL-WEB/dossier/dossier.do?code=COD&year=2011&number=0284&appLng=EN> (last visited 13/03/2012)

less legitimate manner. Striking the balance between the economic and democratic concerns on the one hand, equally as providing the institutional set up for the articulation of all *costs* of action at the higher level of governance is the main democratic contribution of the principle.

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What are these 'convincing reasons' which are behind decisions regarding the legitimacy of action under the subsidiarity principle? Most commentators would agree that subsidiarity has (at least) two major dimensions.<sup>176</sup> The 'democratic dimension' refers to the requirement that '*all governmental tasks are to be carried out at a level... close to the citizens affected*' and the 'economic dimension', which refers to the superiority of collective action at the higher level – for the reason that the economic benefits are superior despite the loss of the democratic legitimacy of decision-making.

The 'double character' of EU subsidiarity can be supported on several grounds. The first grounds for support are the ideological sources of EU subsidiarity<sup>177</sup> (Catholic Personalism and Economics of Federalism)<sup>178</sup>. Secondly, the text of the Treaties, which refers to both comparative effectiveness<sup>179</sup> as well as the democratic dimension, can also be seen to support the hypothesis.<sup>180</sup> Finally, it is an argument of principle. *A polity which adheres to democratic governance (as it is proclaimed by the Treaties) has to minimise the restrictions and interferences with the principle of democratic governance – in particular by leaving as many issues as possible to the lower and/or more democratic level of government.* This is

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<sup>175</sup> A further step in the analysis refers to the question of 'how' action should be taken - in the condition of democratic deficit at the higher level of government. The principle of proportionality here mandates again a 'Light touch', or minimal intrusion.

<sup>176</sup> E.g. G. De Búrca, "The Principle of Subsidiarity and the Court of Justice as an Institutional Actor," *JCMS: Journal of Common Market Studies* 36, no. 2 (1998): 217–235. Andreas Follesdal, "Subsidiarity, Democracy, and Human Rights in the Constitutional Treaty of Europe," *Journal of Social Philosophy* 37, no. 1 (March 2006): 61–80; Davies, "Subsidiarity"; G. De Búrca, "Re-appraising Subsidiarity's Significance After Amsterdam" (1999); N. MacCormick, "Democracy, Subsidiarity, and Citizenship in the 'European Commonwealth'," *Law and Philosophy* 16, no. 4 (1997): 331–356.

<sup>177</sup> Andreas Follesdal, "Survey Article: Subsidiarity," *Journal of Political Philosophy* 6, no. 2 (June 1998): 190–218; Follesdal, "Subsidiarity, Democracy, and Human Rights in the Constitutional Treaty of Europe." K. Van Kersbergen and B. Verbeek "The Politics of Subsidiarity in the European Union" (1994) 32 *J.C.M.S.* 215

<sup>178</sup> Follesdal, "Survey Article."

<sup>179</sup> Art. 5 TEU

<sup>180</sup> Protocol no. 2 to the Treaties.

even more the case in a polity where the higher level government suffers from grave democratic deficit. We will first look at the ideological sources of the principle.

The first ideological source of the 'double sided' concept of Subsidiarity in the EU is Catholic Personalism, as presented by Encyclica Rerum Novarum (1891) and further developed by Encyclica Quadragesimo Anno (1931).<sup>181</sup> The principle of subsidiarity in this understanding becomes an expression of the idea of 'personalism' – the idea that people are to develop and realise their individual potential, as made in the image of god. Subsidiarity becomes a protective tool for individuals to use against the state, when the state must serve the common interest, and intervene to further individuals' autonomy.<sup>182</sup>

Subsidiarity in this view underlines the democratic dimension of the principle-sufficient autonomy and highest level of involvement in governmental tasks. It supports not only the preference for governance by lower levels of government, but also addresses the relationship between the individual and the state<sup>183</sup> - a fundamental issue in the context of private law. It places normative requirements on governmental action intruding into the private sphere, when the action should enable individual development and flourishing, on the premise of equal dignity and respect. Thus the action should leave as much autonomy as possible to individuals to regulate their own matters- either alone or together with others, and should support state intervention only to such an extent as is necessary to further the aim of individual development.

The second source, and another face of the principle of Subsidiarity, is connected to the Economics of Federalism. Economics presumes that individual preferences vary systematically according to parameters such as geography, tastes and values. Given this diversity, the decentralised government seems more appropriate for achieving efficiency for epistemic reasons - local decision-makers have more information about the content of preferences and alternatives and thus would provide a 'better service'. The public choice theory advocates the preference for decentralised decision-making when it underlines the

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<sup>181</sup> HW Micklitz, "The Maastricht Treaty, the Principle of Subsidiarity and the Theory of Integration," *LAKIMIES, The Periodical of the Association of Finnish Lawyers, Special Issue on European Integration* 4 (1993): 508.

<sup>182</sup> De Búrca, "Re-appraising Subsidiarity's Significance After Amsterdam," 18.

<sup>183</sup> Micklitz, "The Maastricht Treaty, the Principle of Subsidiarity and the Theory of Integration."



danger of political rent-seeking, which is more dangerous on the higher level, and is also more likely to occur when the channels of democratic accountability are at their narrowest.<sup>184</sup> The reasons for decision-making at the higher level are then those of economies of scale, externalities, or transaction costs.<sup>185</sup>

The economic dimension was never usually overlooked – this is less so the case for the democratic dimension. Some commentators infer, on the basis of the wording of Article 5 TFEU, that the European understanding of Subsidiarity refers mainly to its economic dimension.<sup>186</sup> That, however, could not have been a convincing argument at any point in time, insofar as both the kind of governance and the predominant legitimisation in the EU imply the ‘co-originality’<sup>187</sup> of both dimensions of Subsidiarity.

First of all, the underlying division of powers indicates the conferral of powers relating to the limited task of building the Internal *Market*, an economic action that could not be achieved by MS themselves. Simultaneously, the legitimacy of EU governance (leaning on Technocratic or Expert Governance) was considered a sufficient resource only for legitimating economic governance, while the rest (such as social legislation and redistribution) were left to national democratic polities, as they needed democratic (regime) legitimisation. Thus both dimensions are ‘co-original’ and inherent to the design of the EU, and the explicit introduction of Subsidiarity is meant to underline this inherent logic, and can be understood as a reaction to the transgressions of the EU (‘cross-cutting’) with regards to the MS’ spheres of decision-making.

The justification of this understanding of Subsidiarity, however, goes even further. The reverse side of subsidiarity is responsibility. As strongly argued by the BVG in the Lisbon judgment, the national democratic processes shall not be ‘hollowed out’ by the EU – in particular because it is the nation states that carry the responsibility for the ‘social’

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<sup>184</sup> R. Van den Bergh, “Subsidiarity as an Economic Demarcation Principle and the Emergence of European Private Law,” *Maastricht Journal of European and Comparative Law* 5, no. 2 (1998): 129–152. R. Van den Bergh, “The Subsidiarity Principle in European Community Law: Some Insights from Law and Economics” (1994).

<sup>185</sup> Follesdal, “Survey Article.”

<sup>186</sup> De Búrca, “Re-appraising Subsidiarity’s Significance After Amsterdam.”

<sup>187</sup> Parallel to Habermasian co-originality of private and public autonomy. Habermas, *Between Facts and Norms*.

dimension<sup>188</sup> of integration and have to be able to fulfil this expected performance – otherwise the legitimacy of the whole multi-level polity would be undermined.

The salience of this question becomes even more visible if one agrees that the market rationality and the functional commitment of the EU level are fundamentally different to the generalist and open approach to the setting of goals at the national level. Harmonisation will then always mean a reordering of the values underlying the particular field so as to prioritise the aims and objectives of the EU.

The later elaboration of the Subsidiarity Principle in the Treaties, culminating in the Lisbon Treaty, seems to be a gradual discovery of the important democratic quality which the principle carries with itself, and its capacity to enhance the overall democratic legitimacy of the multi-level polity. The involvement of the national parliaments as its guardians allows the development of what is meant by this democratic dimension and thus a significant contribution can be made towards the articulation of the democratic legitimacy of the EU.<sup>189</sup>

The growing awareness of the Democratic Dimension of the Subsidiarity Principle is also discernible from the opinions of the National Parliaments in CESL Reasoned opinions, even if neither of the two parliaments which raised the question (the Belgian Parliament and the UK House of Commons) has gone into it in depth. The UK Parliament gives it the default position, while the Belgian parliament falls back into discussion of the economic reasons (thus inadvertently falling back into the discourse set by the Commission).

Despite its importance, the Subsidiarity Principle has remained a toothless animal. Davies argues that subsidiarity is a lost battle, insofar as the current practice is to set a goal which is Europe-relevant.<sup>190</sup> In other words, the EU will frame questions from its own perspective and within the frame of its own rationality, concerns, responsibilities and the performance it expects from itself – and proceed from there to engage in the subsidiarity

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<sup>188</sup> Scharpf, “The European Social Model.”

<sup>189</sup> So far it was mostly the constitutional courts, such as the BVerfG, which were concerned with the articulation of the quality of democratic governance, and the need to communicate its importance to the EU institutions, however, often in the nationalist tone, undermining basic democratic argument. Instead, we should concentrate its democratic quality to increase overall sources of democracy in the EU.

<sup>190</sup> Davies, “Subsidiarity.”

analysis - remaining thus blind to the alternative rationalities and costs of such action. The articulation of these costs, and thus making a ‘responsible jurisdictional analysis’, is however the core purpose of the principle of Subsidiarity.

Now, is something wrong with the principle, or is the problem only lying in the application? Subsidiarity can be a meaningful tool for guiding the action of the institutions only if it already contains a balancing exercise at the earliest stage of analysis - thus weighing gains and losses in economic and democratic terms simultaneously.

The losses in particular include the impacts on policy fields which are *cross-cut* by EU action<sup>191</sup>, the articulation of various other values and rationale that will be influenced, and eventually also cultural or identity concerns. To put it another way, the analysis in the first step shall concern not only the economic dimension of ‘comparative effectiveness’ articulated from the perspective of the Internal Market, but also the *democratic dimension* of the principle, which relates to those issues that the EU is not responsible for (instances where responsibility remains with the states) and which thus often remain forgotten in the articulation of EU goals. This, however, does not mean that they are unimportant and thus do not influence the overall legitimacy of the polity.

In broader terms, every decision the EU makes to enter into the harmonisation of a certain issue represents a constitutional question, insofar a broad contestability of the values that lies behind each piece of legislation would in this way be relinquished, and replaced by a narrower set of values, departing from a market as a main organisational paradigm. In addition, all of this would be placed within a comparatively undemocratic institutional framework. For this reason the Subsidiarity Principle is a crucial filter which, on the basis of articulate reasons, passes only those concerns (and responsibilities) of the Communities which can be justified vis-à-vis the omitted concerns and lost capacity to act on them of the lower levels of governance.<sup>192</sup>

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<sup>191</sup> At some level we could understand it as Joerge’s ‘diagonal’ conflicts. See Joerges, “Challenges of Europeanization in the Realm of Private Law.”

<sup>192</sup> Davies makes a telling example of how to argue for the harmonisation of educational systems on the basis of removing obstacles to the free movement of persons. Davies, “Subsidiarity.” The point

Even if the EU enjoys the 'comparative efficiency' advantage (in particular if we set the goals in terms of the internal market), the MS always enjoy the 'comparative democracy advantage' in regulating (also for economic reasons!) the spectrum of other issues. Ascertaining then the 'comparative legitimacy' means creating a realistic and holistic balance – taking EU legitimacy as a whole.

Now, subsidiarity needs to be complemented by the principle of proportionality in order to make it a coherent whole. If we have decided on the basis of the abovementioned criteria that a certain EU goal is worth pursuing with regard to both dimensions of legitimacy, and that the EU is the appropriate level, we next need to respond to the question of how the EU action should be taken - under the conditions of democratic deficit at this higher level of government.<sup>193</sup>

Provided that democratic governance is a benchmark for legitimacy in the EU, then the principle argument would be that less democratic levels of government should interfere with democratic decision-making as little as possible - that goals should be achieved with minimal harm to democratic decision-making, or the *minimal intrusion* of less legitimate (higher) levels of governance. Proportionality as a constitutional principle thus becomes a tool for equilibrating subsidiarity – conditioning the proportionality of measures by the least restrictive means, towards the aims of democratic legitimacy and value plurality.

It is sufficient here to put forward one claim, namely, the Proportionality Principle militates against such understandings of EU action and EU competences as would lead to results which are more intrusive on national democratic processes - on the basis of a formal argument. This objection in particular relates to the interpretation of the Legal Basis in the debate on the Common European Sales Law, where it is often argued that Art. 114 TFEU cannot provide a legal basis because the 'harmonisation' is not sufficiently intrusive.<sup>194</sup> If

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made here however is not that the EU shall in principle be excluded from harmonisation of educational systems, but that it cannot do so until it is able to embrace non-market rationality.

<sup>193</sup> Increasing the distance from the person to the decision is always a loss of democratic legitimacy. This is, however, particularly grave in the EU, where the higher level of governance is not only further from the individual but also exhibits a double democratic deficit.

<sup>194</sup> This *prima facie* unconstitutional argumentation is put forward in order to change the legal basis into the legal basis requiring unanimity. Formalism here serves to blind the substantive message of the constitution in one point, perhaps in order to arrive at a constitutionally desired solution in the end. This shall however not justify such undesirable practice.

goals can be achieved by less intrusive means, that is always preferable to the greater intrusion.

### **3.2.3. III Pillar: (Vertical) Participatory Democracy**

The relative failure of a rather long path of experimentation with the traditional forms of democratic legitimisation in the EU gave the impetus to the EU to look elsewhere for sources of democratic legitimacy. The response has been found in the Participatory Democracy, which has earned the constitutional status.

The Lisbon Treaty thus introduces Art. 11 TEU, which used to be called ‘On Participatory Democracy’ in the framework of the debate on the Constitutional Treaty. In essence, the article makes already a direct participation of citizens and their representative organisations into a condition of the legitimacy of EU governance. In particular, the Commission is since constitutionally required to carry out consultation procedures when preparing legislation.<sup>195</sup>

The inspiration for the Participatory Strand has come from processes which are already ongoing within the EU – such as the debate on New Modes of Governance or Better Lawmaking. Even if a move toward participatory methods is undoubtedly a promising step in the search for democratic legitimacy in the EU, a word of caution is needed. All of the preceding initiatives were primarily motivated by reasons of effectiveness or expediency, and thus they need to be looked at through a critical lens in order to understand and critically evaluate their democratic potential.<sup>196</sup>

#### **3.2.3.1. Better Lawmaking**

As early as the 1990s, the Commission was already increasingly involving those to whom its regulation was addressed in the legislative process – both to collect expertise (thus increasing the quality of performance), and to increase the acceptability of and compliance

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<sup>195</sup> The Micro Legitimacy proposed here tries to enrich the Participatory methods with a republican dimension of horizontal deliberation, broadening the publics, and openness of aims and goals to the broader debate. See Chapter 6.

<sup>196</sup> The largest contribution to the debate has been made in the framework of the CONNEX project, see <http://www.mzes.uni-mannheim.de/projekte/typo3/site/index.php?id=173>.

with regulation.<sup>197</sup> These efforts were given a more ‘democratic’ presentation in the ‘White paper on Governance,’<sup>198</sup> framed in part as the Commission’s response to the simultaneous Convention on the Future of Europe (where the Commission happened not to be the main protagonist).

The White Paper was intended to launch the process of transformation of the governance of the EU in its relationship with the citizens.<sup>199</sup> The participatory legitimisation stands on so-called ‘good governance’ principles, such as openness, participation, accountability, effectiveness and coherence, which should secure better lawmaking – more effective and more inclusive (democratic) lawmaking:

*‘Each principle is important for establishing more democratic governance. **They underpin democracy and the rule of law in the Member States**, but they apply to all levels of government - global, European, national, regional and local. (...) **Policies can no longer be effective unless they are prepared, implemented and enforced in a more inclusive way.** The application of these five principles reinforces those of proportionality and subsidiarity (...)’<sup>200</sup>*

The remaining emphasis on effectiveness can leave us with the impression that the Commission may in reality be more concerned with the effectiveness of the policy-making than the democratic dimension of the participatory process. This warrants caution, insofar as the main concern may have, as we will see later, a significant impact on the design of and the sought ‘participation’ in the consultation procedures.<sup>201</sup>

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<sup>197</sup> European Commission and others, “European Governance: Better Lawmaking,” COM (2002) 275, no. 5 (2002); European Commission and others, *Better Lawmaking 2000* (COM, 2000); Giuseppe Ciavarini Azzi, “Better Lawmaking: The Experience and the View of the European Commission,” *Columbia Journal of European Law* 4 (1998): 617.

<sup>198</sup> European Commission, “The White Paper on Governance, COM (2001) 428 Final.”

<sup>199</sup> While other institutions enjoyed a more direct link to the ‘people’, the Commission was a technocratic institution proprio sensu. Concentrating on the participation allowed it to further several objectives at once – gaining knowledge, ensure regulatory compliance and additional legitimacy. Beetham and Lord, “Legitimacy and the European Union.”

<sup>200</sup> European Commission, “The White Paper on Governance, COM (2001) 428 Final, part II.

<sup>201</sup> The focus on effectiveness as opposed to democracy would influence the kind of ‘participation’ sought. Thus, for the effectiveness of a market building measure, it may be more important to ensure the contentment of those expected to ‘use’ some instruments or those generally more responsible for building the market (in private law thus often the business community rather than the dispersed and weak consumers). The ‘democratic’ consultation procedures shall guard the actual ‘democratic’ credentials of the consultation – such which approximates the best the political equality of the people. The private law discussion in the second part of the book shows then that

After the White Paper, the Commission develops a set of implementation measures, setting forth the framework of the Commission's involvement with 'interested parties' and institutionalised partners (Economic and Social Committee, and the Committee of Regions).<sup>202</sup> The minimum standards for the consultation procedure elaborated by the Commission stand on four principles- clear consultation documents, the consultation of all target groups, sufficient time for participation and the publishing of results and provision of feedback.<sup>203</sup> The practical application of these procedural elements will be discussed extensively in the Second Part of the Thesis in the framework of European Private Law.<sup>204</sup>

The Commission has further developed a set of standards and principles for the inclusion of expertise,<sup>205</sup> impact assessments,<sup>206</sup> the reduction of administrative burden,<sup>207</sup> simplification of the regulatory framework<sup>208</sup> and improvement of implementation and enforcement.<sup>209</sup> Among these elements, Impact Assessments are of particularly great importance. Not only are they concerned with Performance Legitimacy and aim to assess the prospects of performance of particular proposals in order to secure the highest quality and effectiveness of the outcomes,<sup>210</sup> but they become fundamental role for regime legitimacy – namely reason giving and the public justification.<sup>211</sup>

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the focus still remains on the effectiveness, which pushes considerably to the forefront those stronger in the market.

<sup>202</sup> Towards a reinforced culture of consultation and dialogue - General principles and minimum standards for consultation of interested parties by the Commission, Commission communication - COM(2002)704 (2002) A more proactive role for the institutionalised advisory bodies.

<sup>203</sup> Ibid.

<sup>204</sup> We will look at what is meant by a 'clear document' and the importance of the consultation documents and questionnaires for the legitimacy of the procedures. We will equally look at the possible objections to the way in which the Commission designates the groups, and the way it weighs its voices – in particular with regard to the goals it is interested in. Even a seemingly undemanding requirement of sufficient time for participation proved however very problematic in the field of EPL. Finally, we will also look at the kind of dialogue (or multilogue) the Commission establishes with the stakeholders. All these fields will show significant set backs – often related to the narrow conception of the performance.

<sup>205</sup> Collection and use of expertise by the Commission: principles and guidelines - "Improving the knowledge base for better policies", Commission communication - COM(2002)713 (2002).

<sup>206</sup> See [http://ec.europa.eu/governance/better\\_regulation/index\\_en.htm](http://ec.europa.eu/governance/better_regulation/index_en.htm) (last visited 13/03/12)

<sup>207</sup> Ibid.

<sup>208</sup> Ibid.

<sup>209</sup> Ibid.

<sup>210</sup> See [http://ec.europa.eu/governance/better\\_regulation/impact\\_en.htm](http://ec.europa.eu/governance/better_regulation/impact_en.htm).

<sup>211</sup> Its importance may be demonstrated by the UK House of Commons Reasoned Opinion regarding the CESL, which underlines the importance of the impact assessment for enabling the National

### 3.2.3.2. *New Modes of Governance*

A parallel story with that of consultations and better lawmaking is that of New Modes of Governance. The New Modes of Governance in Europe were mostly prompted by the need for coordination in certain fields because of the mutual influence between the market and the ‘cross-cutting’ issues (such as employment policy or social policy), however, where the EU lacked competence.

The start of the debate however can be linked to the failures of the traditional lawmaking in the process of technical standardisation. The New Approach to Technical Regulation outsourced setting the standards to the standardisation bodies (private or public-private parties) because of the need for prompt reactions to the technological development, which was not possible in the framework of traditional lawmaking.<sup>212</sup> The NMG debate then continued with the introduction of Comitology procedure (and later Lampfalussy procedure) justified as a means to control the delegated lawmaking of the Commission (implementation measures) equally a means to secure sufficient knowledge basis in the lawmaking processes. The Open Method of Coordination on the other hand was motivated by the need to coordinate the policies which fell outside of the EU competencies.

The democratic potential of the New Modes of Governance, lies in their tendency to be conducive to deliberation.<sup>213</sup> To put it in the words of some of its advocates, the NMG ‘(...) insist on the non-coercive processes based on the will of the participants to agree, by way of collective deliberation, on procedural norms, modes of regulation and common political objectives and, at the same time, to preserve the diversity of national and even local experiences’<sup>214</sup>

The NMG are based on less hierarchical modes of governance, when the decisions are based on the deliberation of the participants, who then – for the reason that they have

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Parliaments to fulfil their role as guardians of the Subsidiarity Principle and holding that the Commission failed its procedural obligations in this regard.

<sup>212</sup> M.P. Egan, *Constructing a European Market: Standards, Regulation, and Governance* (Oxford University Press, USA, 2001), 78 – 81.

<sup>213</sup> C. Joerges, “‘Deliberative Supranationalism’: A Defence,” *European Integration Online Papers (EIoP)*, no. 5 (2001): 7.

<sup>214</sup> James A. Caporaso and Joerg Wittenbrinck, “The New Modes of Governance and Political Authority in Europe,” *Journal of European Public Policy* 13, no. 4 (June 2006): 472–3.



accepted the grounds in the deliberative process - voluntary comply. This element of knowledge accumulation along with the improvement of compliance is what they have in common with the consultation procedures.

The non-hierarchical deliberation (at least in theory), and the 'rule by conviction' are then important messages of the NMG. While the potential of the NMG lies in the combination of horizontal deliberation, openness to goals and values and tolerance to diversity, their challenge lies in the *participation* and *representativeness*.

### **3.2.3.3. Democratic Experiments**

Final route for boosting participatory democracy in the EU are more experimental approaches supported by the Commission. Most importantly, in 2006 and 2007 the Commission has sponsored two large-scale EU-wide *deliberative* events within the framework of a 'Plan D for Democracy, Dialogue and Debate'.

The 'European Citizens Council' and 'Tomorrow's Europe' aimed at creating so called *mini-publics*, which would be representative of the European Popoli through sharing certain social characteristics (rather than being delegated as representatives of the people). These mini-publics would engage in deliberation about issues of general concern, and so deliberatively developed opinions would be channelled into policy-making. Now, even if the contribution of such mini-publics may be less successful with regard to the concrete guidance of the policy processes, it may imagine that they could inform the public opinion on general welfare and policy orientation of the EU. They may also become a tool for the politicisation of the most basic questions with regard to the direction of the polity.

However, some scepticism is at place.<sup>215</sup> Even if such procedures may be a good indicator of what the people would think if they deliberated and developed informed

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<sup>215</sup> This is how Culpepper et al discuss the process.. *'the first round in a series of experiments with forms of popular engagement which supporters hope will improve both the **quality of European policy-making** and the **political legitimacy of the EU**. (...) These projects have demonstrated the feasibility of constructing European mini-publics. But they have not yet established whether such public engagement projects will amount only to political curiosities, or whether they could eventually contribute to the quality of EU policy-making and the legitimacy of EU institutions. The widespread observation of shortcomings in the democratic underpinnings of the European Union*

opinions, such processes are in threat of various kinds of pressures and influencing insofar the basic public control (in particular the watchdog medias) would be missing.

A more traditional forms of direct democracy (European referenda) have also been explored and advocated by many as a tool for mobilisation of European public, equally as more convincing way how to bring the popular will in the policy making. Even if popular referenda suffer of the significant problems of their own, which may be even increased in the context of the EU with a parallel national public spheres, this still remains the most realistic method of direct democracy. The Treaty of Lisbon then introduces a ‘European Citizens Initiative’, however, so far without any practical impact thanks to the rather demanding conditions that need to be fulfilled if the mechanism is to be put in practice.

I will conclude this outline of the building blocks of the Political Authority in the EU with a outlining a question, which I will try to respond in the rest of the thesis. Namely, how successful are these three pillars of democratic legitimacy in the EU in removing two levels of democratic deficit in the EU – the lack of republican dimension of democratic governance, equally as liberal bias of the institutional framework – and how prospectively we may think of them in a way which would be more successful in ensuring the democratic legitimacy of the EU. The latter point will be elaborated on a more theoretical level in the Chapter 6, while the Second part of the thesis will empirically test the success in removing two levels of democratic deficit in the EU on the example of private law.

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*underscores the importance of further empirical research in this area’* P. Culpepper et al., “Beyond Elections? Deliberation and Democracy in the European Union”, n.d., [http://pepperculpepper.com/images/stories/delib\\_democracy\\_europe\\_v4\\_final.pdf](http://pepperculpepper.com/images/stories/delib_democracy_europe_v4_final.pdf), 33.

## **4. LEGITIMACY IN PRIVATE LAW**

### **4.1. From Form to Substance in Private law**

When lawyers think of Legitimacy, they usually associate it with constitutions, which set down basic rules for the legitimate exercise of political power. We should not forget, however, that private law can also be considered a constitution - a constitution of everyday life,<sup>216</sup> which sets a framework for interactions between private parties. The core importance of private law lies in its capacity to create a bridge between the economy and the society, to contribute to re-embedding the economic system into the society through mediation between individuals with varying power resources. It is a framework of crucial importance for the kind of society we live in.

#### **4.1.1. The Legitimacy in Classical Private Law**

Modern private law, as we know it today, emerged after the democratic revolutions which started at the end of the eighteenth century. The values of ‘*Liberté, égalité, fraternité*’ have found noticeable expression in the process of transformation of private law. The codification processes, which had already begun, aimed at several objectives. The first objective was securing the cognoscibility of law,<sup>217</sup> which from that time should have become accessible to everyone, not just a selected few. The legitimization of private law through the enactment of the code by the (democratic) national legislator then highlighted the elements of commonality and *fraternité*, as well as reaffirming a national legislator as a main source of political authority.<sup>218</sup>

The societal relations as endorsed by the liberal codifications, however, do not diverge significantly from medieval private law thinking. The ideological core of the codifications remained in individualism, and the principle of freedom of contract was interpreted in line with the concept of ‘free will,’<sup>219</sup> which gave it individualistic and formalistic interpretation- freedom as ‘self-reliance’. The framework was complemented by a then-modern principle of formal equality (equality before the law) - itself possibly the

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<sup>216</sup> H. Collins, *The European Civil Code: The Way Forward* (Cambridge University Press, 2008).

<sup>217</sup> J.M. Smits, *Private Law 2.0: On the Role of Private Actors in a Post-national Society* (Eleven International Publishing, 2011), 13.

<sup>218</sup> Ibid.

<sup>219</sup> D. Kennedy, “The Political Stakes in ‘Merely Technical’ Issues of Contract Law,” *European Review of Private Law* 10, no. 1 (2001): 19.

greatest achievement of the bourgeois revolutions. ‘*Fraternité*’, or solidarity, was reserved to the ‘private sphere *stricto sensu*’, to families and other purely voluntary organisations (charities).

Even if private law could have been interpreted as leaving room for certain substantive considerations to enter through the general clauses (such as immorality, *ordre public* or good faith), it was only at later stages, with the appearance of ‘social’ legal thought<sup>220</sup>, that these clauses started to be used not only for the protection of community values<sup>221</sup>, but also as gateways to substantive consideration aimed at the protection of individuals against private power.

The legitimacy of private law then lies in the interaction between two elements – the legitimacy of the private law framework, and legitimacy stemming from consent. While traditionally, consent is considered private law legitimisation *proprio sensu*, its borders were set in the framework of private law. Private law thus sets the framework for the exercise of private autonomy (and private power), as well as its borders, and it is thus fundamental for shaping relations amongst the individuals who make up society. As such the private law framework needs to enjoy legitimacy of its own.<sup>222</sup> This structure is not dissimilar to the classical ‘public’ constitutions, where constitutions sets the framework for the control of public power, so as to secure the enjoyment of public autonomy and the right to self-government.

In the times of so-called classical contract law, the legitimacy of the private law framework was grounded in the principle of formal equality. Namely, the construct of the framework beginning with formal equality implies that we are all equally free and equally responsible, and thus this freedom would be unnecessarily restricted by making anyone (legally) obliged to take the interests of another person into account (freedom as self-reliance).

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<sup>220</sup> D. Kennedy, “Three Globalizations of Law and Legal Thought: 1850-2000,” *The New Law and Economic Development: A Critical Appraisal* 19 (2006).

<sup>221</sup> See Chapter 11.

<sup>222</sup> This is the legitimacy I am interested in in this thesis.

Such ‘settled’ background value systems – formal equality and freedom as self-reliance – were sufficient normative bases to build a whole system of private law, which claimed ‘value neutrality’ because of the universal validity of the values it stood on, along with the fact that the purpose of private law lay in corrective justice. Constructing private law around those values which claimed universal validity made the elaboration of private law an apolitical, neutral exercise, which could claim its legitimacy on the basis of *quality* (all Civil Codes were proud of the quality of their content).<sup>223</sup>

From the beginning of the twentieth century, the relationship between the private law framework and consent started to be increasingly contested. Private Law seemed to be paying lip-service to both freedom and equality, on which it relied for its justification. It became increasingly obvious that the framework was then very insensitive, or even blind, to factual inequalities, and did not have the mechanisms to control the abuse of private power which made freedom for some parties only illusory, and thus put the ‘legitimizing’ strength of the consent into question.

What is more, it became abundantly clear that the claims emerging from a basis in private law could use the enforcement mechanisms of the state, which increasingly prevented states from renouncing responsibility for the outcomes, but rather made them co-responsible for those outcomes.<sup>224</sup> Thus neither private law nor the state would be considered neutral in such circumstances. The breaking point in this respect was democratic governance.

#### **4.1.2. *The Shift from Form to Substance in Private Law - and Beyond***

Max Weber was one of the first to describe the process of ‘materialisation’ or ‘substantivisation’ of private law associated with the rise of democracy in the nation states. The edges of classical private law, the formalism and individualism that denote it, began to

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<sup>223</sup> This is the kind of ‘Informal’ Authority that Niels Jansen discusses in Jansen, “Legal Pluralism in Europe-National Laws, European Legislation, and Non-Legislative Codifications.”

<sup>224</sup> R.L. Hale, “Coercion and Distribution in a Supposedly Non-coercive State,” *Political Science Quarterly* 38, no. 3 (1923): 470–494; R.L. Hale, “Force and the State: A Comparison of Political and Economic Compulsion,” *Colum. L. Rev.* 35 (1935): 149.

blunt in a serious way at the beginning of the twentieth century.<sup>225</sup> Two phenomena are behind this change - what Keneddy calls the rise of the 'Social' in legal thought on the one hand,<sup>226</sup> accompanied by the shift from 'Form to Substance' on the other.<sup>227</sup>

Both the shift from 'form to substance'<sup>228</sup> and the 'materialization of private law'<sup>229</sup> denote the change of perception between the desirable frame set by private law, and the kind of order it promotes.<sup>230</sup> The (private) law opens up to the 'facts',<sup>231</sup> i.e. non-legal considerations, which were normally seen as part of policy making rather than part of legal reasoning. By incorporating them into private reasoning, the aim is to achieve two basic things – to justify the divergence from outcomes of formalist classical private law, and more fundamentally then to preserve the legitimacy of the legal system in the context of a changed discourse ('the social').

Even if this gradual 'opening up' of legal reasoning can be explained in a number of ways, most significant is the evidence that the positive law and authority that support it have ceased to suffice as automatic reasons for action in an increasing number of cases. The evidence shows the emancipation of individuals and their demand for the justification of law vis-à-vis their own case, vis-à-vis them as human beings in their own right.<sup>232</sup> It is thus an

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<sup>225</sup> P.S. Atiyah and P.S. Atiyah, *The Rise and Fall of Freedom of Contract*, vol. 398 (Oxford Univ Press, 1979).

<sup>226</sup> Connected with the raise of political parties which have aggregated the interests of the parties, mainly the workers and farmers. Keneddy, D., "Form and Substance in Private Law Adjudication," 2.

<sup>227</sup> Ibid.

<sup>228</sup> Ibid

<sup>229</sup> Weber, *Economy and Society*, 886.T. Wilhelmsson, *Critical Studies in Private Law: A Treatise on Need-rational Principles in Modern Law*, vol. 16 (Springer, 1992), 87.

<sup>230</sup> 'How much do we owe to each other?' On the continuum from individualism/self-reliance to. Altruism/solidarity...

<sup>231</sup> Habermas, *Between Facts and Norms*.

<sup>232</sup> Hugh Collins underscores the importance of a 'policy' element in the decision-making for the justification of the decisions in private law. "(...) my first point about the character of hybrid legal reasoning is that without the reference to policy, lawyers and judges apparently think today that the legal reasoning would not provide a sufficient justification for a particular decision. (...) To put the point more bluntly: a legal decision reached in accordance with strict fidelity to principle that violate important policy considerations which are already reflected in social regulation in now regarded not just as an unfortunate decision but one that is probably a wrong decision in law.' Hugh Collins, "Utility and Rights in Common Law Reasoning: Rebalancing Private Law Through Constitutionalization," *LSE Legal Studies Working Paper No. 6/2007* (September 2007): 11.

It seems however that Hugh Collins considers any departure from the formalist private law as a reflection of 'collective' policy interest, rather than the reflection of 'reasoning of principle'. Chantal Mak on the other hand shows that the shift was often understood as a shift in

expression of self-governance, of public autonomy, when the state has to justify what it supports within the framework of private law relations. We can link it more broadly to the concept of ‘public justification’.

The shift to the Social is generally connected to the realisation of political equality of individuals from all social backgrounds in the framework of universal suffrage. It led to the opening to democratic contestation of the values on which private law rested. This did not happen through proposing new values that would inform private law, but rather by raising the question as to what extent the founding values were actually secured in the framework of private law. If equality and freedom justified private law, what about those instances in which they were not substantively realised? It was in the areas with typically structurally unequal relations that the democratic legislator ‘supported’ individualist private law with mandatory regulation. This concerns in particular the fields of labour law, tenant law, consumer law, antidiscrimination law etc., where structural inequality regularly leads to unjust outcomes.

At the level of the courts, a similar development took place, just in a more individuated way. The shift from formalism to substance in private law, from formal rationality to factual reality, the ‘Proportionality-like’ reasoning, along with the public autonomy which accompanies the extension of democratic governance, have all led to a new wave of emancipation of the individual.<sup>233</sup>

This paradigm shift is, from a sociological perspective, a fundamental acknowledgment of the changed position of the individual vis-à-vis the public (and private) power. The achievement of formal equality in the bourgeois revolutions has evolved beyond the bourgeois revolutions, towards the substantive equality of the democratic and social revolutions. On the macro level, this shift refers to the change in legal and political discourse culture, and the fundamental alteration of the expectations of those who demanded the justification, as well as the (legitimate) authorities which felt obliged to provide the justification.

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understanding of the principle – thus protecting a substantive conception of party autonomy and reasoning from justice rather than collective interests. See Mak, *Fundamental Rights in European Contract Law*, 251.

<sup>233</sup> For an interesting parallel see H. Rösler, “Protection of the Weaker Party in European Contract Law: Standardized and Individual Inferiority in Multi-Level Private Law” (2010).

The courts began to give substantive meaning to the values on which private law is based through application of blanket clauses, correcting the outcome of classical private law. Later, along with the traditional private law reasoning on rights and duties,<sup>234</sup> the additional level of justification becomes influenced by policy reasons – such as market failure in the US, or social justice in Europe, which turns private law reasoning into ‘hybrid reasoning’.<sup>235</sup> *‘Without the reference to policy, lawyers and judges apparently think today that the legal reasoning would not provide a sufficient justification for a particular decision.’*<sup>236</sup> Thus the policy reasoning compliments the reasoning based on rights and duties, and becomes another layer in the justification which gives expression to the idea of self-governance of individuals.<sup>237</sup>

A new impetus for moral reasoning in private law came after World War II with the rise of Human Rights. In the process of ‘constitutionalisation’ of private law, Human Rights reasoning penetrated private law reasoning.<sup>238</sup> Chantal Mak argues that national courts in the process of constitutionalisation have accentuated the traditional private law values and principles, however, giving them a substantive (thick) rather than formal understanding. The national courts stress the need for genuine autonomy and the potential for self-determination for weaker parties too, with the intention of providing just outcomes, particularly in situations of structural inequality.<sup>239</sup>

It is important to highlight what this had implied for legitimacy in private law. The materialisation and substantivisation of private law has shifted our perception of the state’s responsibility for the framework of private law. The ‘justice’ thus delivered by private law stops being inherent to private law, or ‘universal’, and instead becomes the responsibility of the state – the legitimacy of which is hereafter tied to delivering a ‘just social order’ and

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<sup>234</sup> Collins, *The European Civil Code*, 113–4. Hugh Collins, the ECC, 113–4

<sup>235</sup> Hugh Collins 113.

<sup>236</sup> Collins, “Utility and Rights in Common Law Reasoning,” 11.

<sup>237</sup> This is not to say that it the hybridity of reasoning does not serve also other purposes, such as justification of the court’s authority toward a broader public, equally as justification of the authority of the polity that stands behind the law it applies.

<sup>238</sup> For an illuminating discussion from the public law perspective see R. Uitz, “Yet Another Revival of Horizontal Effect of Constitutional Rights: Why and Why Now? An Introduction”, in *The Constitution in Private Relations: Expanding Constitutionalism*: 1–20.

<sup>239</sup> Mak, C. (2008), *Fundamental Rights in European Contract Law: A Comparison of the Impact of Fundamental Rights on Contractual Relationships in Germany, the Netherlands, Italy and England*, Alphen aan den Rijn: Wolters Kluwer, p. 323.



(social) justice through private law. The role of ‘consent’ remains fundamental in liberal democratic states – what is changing, however, is the framework of private law, which acquires additional ‘control of power’ mechanisms, and thus becomes a true constitution of private relations.

Many have lamented these developments as the ‘fall of contract law’<sup>240</sup> and the ‘paternalism’<sup>241</sup> of the new social legislation, which destroys the ‘coherence’ in classical private laws. These views, however, neglect to acknowledge that this coherence was based on values which no longer correspond to the vision of a just society, and the position of the individual within it. A new era will dawn, with the challenge posed to private law by postnational lawmaking, when we will see a number of old arguments return.<sup>242</sup>

#### **4.2. Of what Colour European Private Law?<sup>243</sup>**

Now, what both classical private law and social private law had in common was their primary rationale of achieving *justice among parties*. In broad terms, the intervention of the democratic legislator was mainly intended to address the question of unequal or asymmetrical relations and (bargaining) power of individuals, and was particularly concerned with remedying these inequalities. The Legislator has done so through ‘mandatory’ or ‘regulatory’ private law. On the other hand, the motivation of the courts which started to use macro (welfare) reasoning was primarily to *add a further layer* of legitimisation to the self-governing individual (and the self-governing collective), rather than to pursue collective goals or to address particular concerns about justice amongst parties.

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<sup>240</sup> Atiyah and Atiyah, *The Rise and Fall of Freedom of Contract*, 398:.

<sup>241</sup> A.T. Kronman, “Paternalism and the Law of Contracts,” *The Yale Law Journal* 92, no. 5 (1983): 763–798.

<sup>242</sup> H. Eidenmüller et al., “The Common Frame of Reference for European Private Law—policy Choices and Codification Problems,” *Oxford Journal of Legal Studies* 28, no. 4 (2008): 659–708; H. Eidenmüller, “Party Autonomy, Distributive Justice and the Conclusion of Contracts in the DCFR,” *European Review of Contract Law* 5, no. 2 (2009): 109–131.

<sup>243</sup> Reference to S. Grundmann, “European Contract Law (s) of What Colour?,” *European Review of Contract Law* 1, no. 2 (2005): 184–210.

The European Communities (Union) has entered into the scene with *regulatory* private law, similarly as democratic legislator who aimed to remove the consequences of classical private law by mandatory (regulatory) private law. There was, however, something fundamentally different about *European Regulatory Private Law*. While national regulatory private law was motivated by the need to remedy inequalities, often resulting from the operation of the free market economy, European regulatory private law was motivated by diametrically opposite concerns, namely market integration and removing obstacles to trade, thus concentrating on *enabling*, rather than *restricting* the market. The Union was concerned with ‘justice *qua* market’ (welfare) rather than justice among parties.

This fundamental difference is neatly tied to the kind of polity the EU is, and the performance that it is expected to deliver. As we have said, the responsibility of nation states in private law has developed, and these have become responsible for delivering the ‘just social order’ or social justice in relation to private law. Now, the responsibility of the EU is very different. The foremost responsibility of the EU is the creation and operation of a common market, and its activities in private law need to be justified in the light of this purpose (in particular if we consider that almost all private law measures were taken under an Internal Market Legal Basis).

Even if at first, the EU conceived of private law measures (consumer law) as a means of ‘democratisation’ and getting closer to the citizens,<sup>244</sup> it soon became clear that the inner (political and legal) limitations of its discourse had shaped the outcomes and turned them into market building measures. Thus when the EU considers consumer protection, it is usually in terms of ‘consumer welfare’ through competition and the reduction of prices.

This difference of rationality between national and European legislation had a significant impact on the kind of consumer (private) law produced by either side.<sup>245</sup> On a

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<sup>244</sup> Christoph U. Schmid, “The Instrumentalist Conception of the *Acquis Communautaire* in Consumer Law and Its Implications on A European Contract Law Code,” *European Review of Contract Law* 1, no. 2 (July 2005): 216.

<sup>245</sup> Rösler, “Protection of the Weaker Party in European Contract Law.” Norbert REICH and Hans-Wolfgang MICKLITZ, “Crónica De Una Muerte Anunciada: The Commission Proposal for a ‘Directive on Consumer Rights,” *Common Market Law Review* 46, no. 2009 (n.d.): 471–519; H.W. Micklitz, *Social Justice and Access Justice in Private Law* (EUI Working Paper 2011, forthcoming, 2011).

more general level, the EU is primarily concerned with market efficiency, and consumer protection will be acceptable insofar as it is understood as a market failure, which needs to be addressed so as to improve *market efficiency*. A perfect example is that of information requirements, which are basic tools of EU consumer protection measures. However, information requirements need not have consumer justification at all – they are perfectly justifiable with reference only to market transparency and thus market efficiency. At the level of consumer protection however, opting for information rules will have a significant social impact – they will favour those more and better educated of consumers.

The national legislator, on the other hand, will be mainly concerned with poor (incapable) consumers, who – as is often reported by national media<sup>246</sup> – are tricked or cheated by dishonest enterprises. This was clearly different in the case of nation states, which started with the most vulnerable consumers,<sup>247</sup> creating a safety net for those consumers who would be unable to cope with the market challenges, often in cases where these challenges came under public scrutiny.

Now, the compound system of private law in Europe is based on two different rationalities, revolving around different end objectives and different values.<sup>248</sup> Their coexistence was enabled by the minimum harmonisation, which allowed both sides to further their goals and eventually complement one another. This had even an overall beneficial effect on the level of consumer protection (it is likely that the overall level of consumer protection in the EU was higher with European involvement), while at the same time, the goals of market transparency and market efficiency interesting to the EU were reasonably approximated.

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<sup>246</sup> This clearly does not imply that national officials are more altruistic, because their officials enjoy higher moral standards. The difference lies in a different self-understanding of the purpose and the expected performance,

<sup>247</sup> Recall the example of Mrs. and Mr. Bates, See Introduction.

<sup>248</sup> I endorse the position that European Regulatory Law and many national private laws create one system of European multi-level private law, not characterised by uniformity but by incorporation of two diverse rationalities, which relate to the different kind of performance expected from each level, and which allows the coexistence of both. This is fundamental for the overall legitimacy of the system. As EU legitimacy also draws on the democratic legitimacy of the MS, and their capacity to engage non-market rationality and thus ensure social justice, we deal here with the built on synergy between the EU and the nation states.

This coexistence was regularly disturbed by the CJEU,<sup>249</sup> with from the perspective of consumers often arbitrary decisions. The existential threat, however, of entirely removing the whole regulatory capacity from the MS came only with the ‘maximum harmonisation’ efforts of the Commission.

It is important to realise that such a shift would threaten not only national autonomy (which often is – perhaps for nationalist reasons- the most popular theme), but more significantly, it would endanger the delicate division of responsibilities of the two levels of government regarding the ‘social’ sphere.<sup>250</sup> It would remove the nation states’ capacity to deliver the performance expected from them - to retain the ‘safety net’ for the incompetent, challenged or otherwise vulnerable consumers.<sup>251</sup> This would not only endanger the legitimacy of the nation states and the potency of their democratic processes, but it would also endanger the legitimacy of the EU, insofar as the ‘social’ element would be significantly reduced.

The ‘Social’ in the EU cannot be achieved by the EU *without* the Member States. The EU rationality is built around different objectives and goals in private law than is the case at nation state level – namely the goal of the EU is ‘justice qua market’ (macro ‘welfare’ level) instead of ‘justice among the parties’ (concern with micro level). Thus the EU will subordinate private law to the grand plan of delivering welfare by market-efficient private law instruments, while the MS are concerned with (and responsible for) delivering ‘just’ (even if less efficient) resolutions of disputes between individuals. The social rationality of MS is motivated by more varied goals than mere efficiency (such as justice, protection or charity), rationality that is closely related to democratic governance and the existence of public sphere (remember Mr. and Mrs. Bates).

If the EU is to be able to come up with self-standing ‘social’ rationality (similarly as is the case at nation state level), it has to be able to set out non-market ‘first order’ goals in private law. This requires politicisation so as to enable alternative visions of human beings

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<sup>249</sup> H. Unberath and A. Johnston, “The Double-headed Approach of the ECJ Concerning Consumer Protection” (2010).

<sup>250</sup> Ibid.

<sup>251</sup> We should not forget the CJEU, which has curtailed these possibilities for the MS, but only partially. Unberath and Johnston, “The Double-headed Approach of the ECJ Concerning Consumer Protection.”

and good life to be expressed in the framework of the ‘social constitution’ (private law) and finally establish democratic mechanisms which are sufficiently responsive to ‘opinion-formation’. If this is not the case, the EU has to be bound to the national democratic processes if it is not to lose a significant social dimension of private law.

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Along with maximum harmonisation of consumer law, the EU has also entered into the field of general private law by way of the DCFR and its political version, the CESL. We will discuss various facets of the DCFR and the CESL in the two chapters of the thesis dedicated to this in part II. Two points will suffice at this time.

The Commission presents the project of the DCFR as a technical task, which is most suited to administration by experts.<sup>252</sup> The ‘technicality’ of the exercise was perhaps less motivated by a belief in certain universal characteristics of private law, and more so by pragmatic considerations with regard to the limited competences of the EU in the field of private law.<sup>253</sup>

Unlike PECL or UNIDROIT principles however, the DCFR is an instance of semi-public law-making, and it draws on ‘formal authority’<sup>254</sup> by its incorporation in the official discourse of the EU. Secondly, the content of either of the instruments (DCFR or CESL) is not sufficient to make either of them be seen as *good* or *bad* law. It is of crucial importance to

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<sup>252</sup> European Commission, “Commission Communication on European Contract Law and the Revision of the Acquis: The Way Forward, COM (2004) 651 Final.”, October 11, 2004.

<sup>253</sup> S. Vogenauer and S. Weatherill, *The European Community’s Competence to Pursue the Harmonisation of Contract Law—an Empirical Contribution to the Debate* (Oxford: Hart Publishing, 2006); S. Weatherill, “European Contract Law: Taking the Heat Out of Questions of Competence”(2004),” *European Business Law Review* 15. Hans-Wolfgang MICKLITZ and Norbert REICH, “The Commission Proposal for a “Regulation on a Common European Sales Law (CESL) – Too Broad or Not Broad Enough?,” Working Paper, 2012, <http://cadmus.eui.eu/handle/1814/20485>.

<sup>254</sup> Jansen, “Legal Pluralism in Europe-National Laws, European Legislation, and Non-Legislative Codifications,” 4.

understand that the institutional framework in which it will be placed is fundamental, as the possibility of amendments and the rationality will be imputed to it.<sup>255</sup>

A final note should be made regarding the broader political framework. The simultaneous appearance of maximum harmonisation on the one hand, and the DCFR on the other, suggests certain impatience with the different ‘social’ rationalities in the overall system of private law. This indicates structural changes in how the EU sees its role private law. Commission documents suggest that this change is related to the newly assumed responsibility of the EU to make the EU economy more competitive in the face of globalisation.

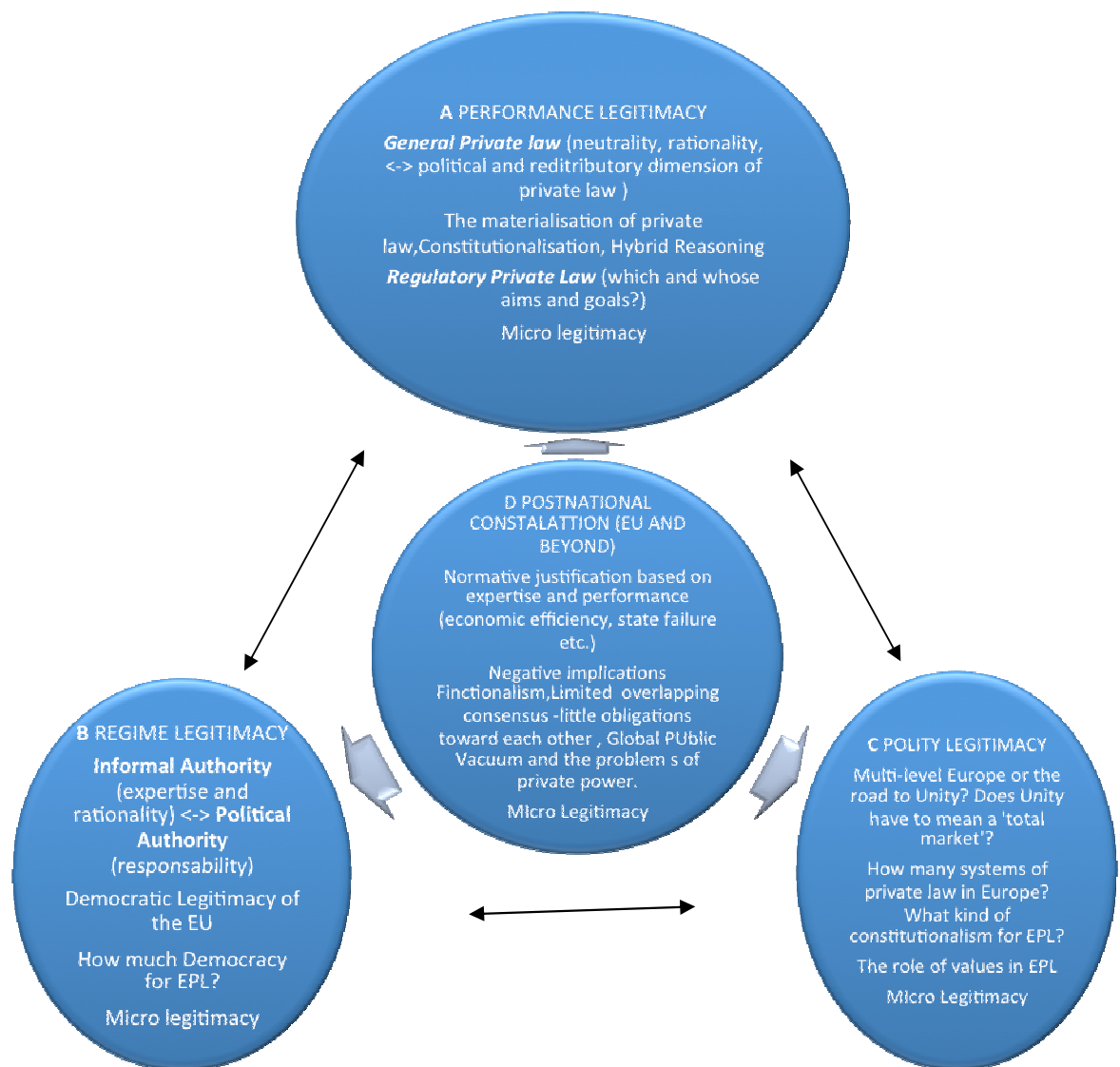
Citizens will most likely expect the EU to serve as a buffer against the eventual negative effects of globalisation on the social and welfare systems in the EU. However, if we take the EU ‘response’ in private law as a point of reference, it would be more likely to lead to an increase in the speed at which the ‘Social’ is ‘dismantled’ in order to better prepare for globalisation within the frame of market logic and competitiveness. This would happen entirely without or with little democratic deliberation of what the ‘most appropriate response to the global market’ at the EU level would be.

#### ***4.3. Legitimacy of the European Private Law: Let’s draw it!***

Looking at private law through the prism of Walker’s framework, and in light of the discussion above, we may try to depict the problem of legitimacy in the EU in the following way.

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<sup>255</sup> Schmid, “The Instrumentalist Conception of the Acquis Communautaire in Consumer Law and Its Implications on A European Contract Law Code.”



*\*black arrows stand for interrelations between different dimensions of legitimacy, but also for a normative response of this thesis: Micro Legitimacy<sup>256</sup>*

We have seen that the justification of the private law framework in place at the national level has shifted from ‘performance’ legitimacy, whereby the private law was justified on the basis of its *quality*, to justification on the basis of ‘regime’ legitimacy, connected to the fact that it was enacted by a particular formal and more soundly democratic authority.

<sup>256</sup> See Chapter 6.

The objection that the democratic legislator has only partially intervened in general private law, which has remained -in part- a product of academic or expert endeavours, does not much change the fact that it monitors general private law and intervenes where it deems necessary. It is a step towards acknowledgement of the political dimension of private law, and the responsibility of a democratic legislator for the ‘justice’ of the social order established by private law.

The EPL then has entered the scene sometime later, and was already a product of such ‘formal’ authority, however without the same democratic quality as would be the case at nation state level. EPL is then employed to achieve objectives which are relevant to the EU. On the other hand, EU general private law again shifts the discussion back to the more ‘informal’ authority of the experts – for reasons of easier justification of the project- as it resonates with the ‘traditional’ approach to private law and would secure the ‘quality’ of outcomes.

The shift towards not-quite informal authority may be perceived as being not-quite a negative step, insofar as it shields the result, at least partially<sup>257</sup>, from the functional rationality of the Commission (which has been shown to have detrimental results for levels of consumer protection, thanks to its market zeal). However, we should also be aware that this influence stops once the instrument is put into function in the institutional framework.

The debate on EPL can be further viewed from a background of Polity Legitimacy- the nascent European identity and nascent political community, with their values and social order. The way in which Democracy, the ‘Social’ (values) and Identity are interlinked in private law, as well as the impact of the Functional character of the EU on each of these elements, will be discussed throughout the Second and Third Part of the thesis.

There is, however, a more constructivist edge to this question. In particular, how should we envisage the ‘system’ of private law in Europe? Should the system be viewed as 28 (soon to be 29) separate legal orders, or as one? If it is one legal order, it is necessarily a multi-level legal order, and thus we need a constitutional meta-principle to guide its inner

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<sup>257</sup> The Commission has still created such ‘stakeholder expert groups’, where business interest was overrepresented.



structure.<sup>258</sup> Should it be the principle of ‘Unity in Diversity’, which expresses the idea of constitutional pluralism, and institutional awareness and tolerance? Or is (a preference for) ‘Unity’ the meta-principle which would express the idea of hierarchical constitutionalism and EPL with one set of values and one leading rationality? The discussion is taken up in the last chapter through the prism of the *European Ord Public*, which exemplifies the fact that multi-level private law needs to do more than strive for ‘autonomous’ provisions.

Finally, the need to respond to globalisation shapes the involvement of the EU in private law. The prevalent functional orientation of the EU, along with elite governance, has led to the overly eager acceptance of the challenges of globalisation on its own terms, with stress on ‘performance’ in market terms (competitiveness). This has resulted in the adjustment of the internal dimension of the EU to cope with the need to be more ‘competitive’ externally. In private law this has led, in effect, to the undermining of the coexistence of two competing rationalities, with likely negative impact on the social dimension of private law. It has further prioritised performance legitimacy (or more precisely, what is considered good performance by the elite) at the expense of regime legitimacy. Thus the pull to increase the democratic legitimacy of the EU is compromised on account of ‘performance’, understood as external competitiveness.

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<sup>258</sup> For the discussion about the connection between private law and constitutionalism see Ch. Mak, *Europe Building through Private Law*, Forthcoming.



## **5. MORE 'COMPETITIVENESS' AS A RESPONSE TO GLOBALISATION? ON THE EXTERNAL FACE OF THE EU.**

The aim of this Chapter is manifold. First of all, it aims to draw a comparison between the EU and another fundamental functional entity with supranational dimension, the WTO, in order to demonstrate the impact of functionalist reasoning, in the postnational context, on the breadth of public autonomy and democracy. The main concern is thus the alarm raised by the German Constitutional Court in Lisbon judgment regarding the 'hollowing' out of democracy.

Secondly, it will aim to demonstrate why we see two – rather than only one - level of Democratic Deficit in the EU (liberal bias, along with the lack of republican democratic institutions). We will concentrate on the interrelation between functional logic centred around the market and its impact on the democracy in the EU. Thirdly, we will try to understand why this is important for our discussion about the legitimacy of the EU action in private law, and how private law looses through this its capacity to re-embed the market in a polity which is restricted to economic rationality..

We will do this by looking at the implications of applying functional rationality to the 'cross-cutting' areas ('diagonal conflicts') in the context of the WTO, and then progress to discussing the European Private Law case - *Axa Royal Belge*, where we can follow the same patterns of reasoning as in the case of the WTO, and the same prioritisation of the values inherent to the functional regime.

The third subchapter then tries to give the abovementioned discussion a theoretical underpinning, by discussing the legitimacy of the supranational production of law in functional entities, and the borders of commitment that stem from the concern of normative commitment to democracy and the threat of 'hollowing out' democracy and the right to self-government. It also suggests that Micro Legitimacy (the normative approach suggested in this thesis) is also a theoretically sound concept with which to look at the legitimacy of postnational entities beyond EU borders.

What do we mean by Globalisation? Globalisation is a complex process, with a whole range of effects which include the diminishing of the importance of borders (de-territorialisation), increased interconnectedness through means of communication and transportation, and the ever-accelerating rate of change.<sup>259</sup> As has already become clear, our main concern will be a subset of a problem, even though it is one of the most important subsets, namely the relation between globalisation (under the flag of functional trade entities) and democracy, between law and politics, which have a fundamental impact on the ‘Social’, including the social dimension of EPL that is of direct concern here.

What is the impact of the weakening state, or its changing role,<sup>260</sup> on the role of democracy<sup>261</sup> and the ‘social’<sup>262</sup> in the world? In the simplest terms, globalisation has done two things. It has rendered states increasingly incapable of providing solutions to global collective action problems, and has also misappropriated the capacity of states to engage in re-embedding markets through social policies.<sup>263</sup> Many of what would previously have been functions of the state are now taken up by inter/supranational organisations, and increasingly by private parties (‘privatisation’<sup>264</sup>). The effects of such a transfer of competences are becoming more difficult thanks to the lack of appropriate democratic arrangements on the global level, which leads to further liberalisation and deregulation, even though the power balance between the state (public) and the market (private) is reversing.

In this setting, many of us will come to see the EU as a mechanism for the protection and maintenance of democracy and Social provision as values on which the EU is based. However, the preservation of either of these requires us to understand the starting point of the EU, which is essentially still a functional ‘polity’, and the limitations that stem from its

<sup>259</sup> William Scheuerman, “Globalization,” in *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta, Summer 2010, 2010, <http://plato.stanford.edu/archives/sum2010/entries/globalization/>.

<sup>260</sup> S. Sassen, “The State and Globalization,” *Cambridge Studies in International Relations* 85 (2002): 91–114.

<sup>261</sup> Schmidt, “Re-Envisioning the European Union.”

<sup>262</sup> D.M. Patterson and A. Afilalo, *The New Global Trading Order: The Evolving State and the Future of Trade* (Cambridge Univ Pr, 2008).

<sup>263</sup> Jürgen Habermas, *Zur Verfassung Europas: Ein Essay*, Orig.-Ausg., 1. Aufl., Sonderdr., Edition Suhrkamp 6214 (Berlin: Suhrkamp, 2011).

<sup>264</sup> Ralf Michaels and Nils Jansen, “Private Law Beyond the State? Europeanization, Globalization, Privatization,” *The American Journal of Comparative Law* 54, no. 4 (October 1, 2006): 843–890.

functional limitations. These are crucial elements in the debate on the democratisation of the EU and the role of the EU in the global context.

### **5.1. *Functionalism<sup>265</sup> and Legality in the Postnational Context***

In order to understand the ‘quality’ of the functionalism of international organisations in the postnational setting, we shall look at a ‘distilled’ version of a functional entity, the WTO. Even if one believes that the comparison made with the EU is limited, because the EU has achieved a higher level of political integration, this is obviously only part of the story. There are sufficient similarities to make it a valid inquiry.

Both of these international organisations were created to solve collective action problems related to market integration. They were both equipped with an institutional structure which favours negative integration (this is still the case in the EU). What is more important, however, is their self-understanding as primarily ‘market entities’, which gives them their main purpose and imputes the economic rationality.

The strengthening of the ‘political’ dimension of the EU has along with institutional changes usually meant the incorporation of new ‘concerns and responsibilities’ into the framework of the EU. Those ‘new’ concerns have however been (more often than not) incorporated into the rationality that the EU already entertains – they were not understood as possible ‘oppositions’ to the primary market performance, but rather as an ‘addition’ to the EU general direction. Moreover, the EU did not usually carry the primary responsibility for

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<sup>265</sup> I use the term functionalism in a much narrower sense than that in Integration (IR) Theories (see e.g. P.C. Schmitter, “Neo-neofunctionalism,” *European Integration Theory* (2004): 45–74.), in order to denote an entity defined through a *task*, without drawing any implications for the dynamics or future prospects of integration.

these concerns.<sup>266</sup> The outcome is that those possible alternative rationalities to the market could not compete with it – just fitted into it.

*The World Trade Organization (WTO) deals with the global rules of trade between nations. Its main function is to ensure that trade flows as smoothly, predictably and freely as possible.*<sup>267</sup> When exercising its autonomous authority, the main criticism that the WTO faces is that it neglects or disregards non-economic values.<sup>268</sup> The classic response to this critique is that the WTO has a mandate to decide ‘trade disputes’ and has to apply ‘trade law’, and that there are limited grounds on which exceptions are allowed.<sup>269</sup> If the institution is faced with a case wherein the dispute concerns values other than trade, or if a balance between trade and a different value has to be struck, this must be done in the framework of trade law.<sup>270</sup> This means that trade law determines both the framework of the dispute and the lens of the *deciding* institution. Each issue that comes before it is measured from the perspective of trade, and in cases where an issue conflicts, it is considered a disturbance, an incomprehensible rationality which needs to be managed. The tool for this has been found in the concept of ‘exception’.

The idea of the ‘exceptions’ suggests that the system will ‘tolerate’ other rationalities (rather than respect them) under the conditions set by the main rationality. The competing rationality is translated into its internal order of values, and it has to comply with a number of trade requirements if it is to earn the exception. Now, this ‘tolerance’ has been a means by which to manage legitimacy and avoid conflicts on the most salient issues. With the increase of powers, the dominant rationality threatens to subordinate ever larger fields of policy making insofar it forces them to be ‘free trade friendly’, which excludes number of (in fact most desired) actions which aim to counter the market (re-embed the market).

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<sup>266</sup> I have assumed that the environment was the only area where the EU has incorporated a rationality alternative to the market, however, most of the environmental measures are reported to be very embodied in the economic market rationality.

<sup>267</sup> See [www.wto.org](http://www.wto.org). (emphasis added)

<sup>268</sup> See e.g. H. Nordström and S. Vaughan, *Trade and Environment*, 4 (WTO, 1999); Tilman Santarius et al., “Balancing trade and environment; an ecological reform of the WTO as a challenge in sustainable global governance” (Wissenschaftszentrum Nordrhein-Westfalen Wuppertal Institut fuer Klima, Umwelt, Energie GmbH, Wuppertal (DE), 2003).

<sup>269</sup> GATT Art. XX.

<sup>270</sup> J. Cameron and K.R. Gray, “Principles of International Law in the WTO Dispute Settlement Body,” *International and Comparative Law Quarterly* 50, no. 02 (2001): 265.

In different words, the idea of ‘exception’ may seem quite expedient and rational (thus ‘natural’), however, it also implies that any competing rationalities (to the rationality of a functional entity) are, at best, not competing from the same starting point. Trade is here a legitimate, uncontested value, and any competing value would be trailed by the rules set by trade rationality. From a pluralist perspective, that may be a natural way of dealing with conflicts, of achieving ‘understanding’ between the legal orders through the translation of the values of one to the values of another. This however also implies the prioritisation of values, which is increasingly problematic if a particular ‘legal order’ is increasing its powers while the ‘exit options’ of political communities are decreasing.

The crucial problem for democracy here is that by constitutionalising trade, unlike ‘Human Rights’ or the ‘Principle of Democratic State’,<sup>271</sup> we constitutionalise – and thus remove from the democratic debate – a particular vision of the economic system, a substantive economic policy. This vision is, however, at the core of democratic contestation at the national level, and in fact at the core which is considered the absolute basis of democratic struggle. Thus we are faced with increasingly powerful supranational decision-making at the international level, which is spreading to ever increasing field of public action along with prioritisation of substantive values, and a response to the question ‘what kind of economic order’ - not only for the international plane but also the national plane.

This ‘constitutionalisation’ would hardly be possible in the democratic context at the national level, but for all the particularities of the international trade regime (relatively slow start and the increasing pace of economic globalisation), it was possible at the international level. Thus we see the gradual hollowing out of democracy at the national level without the provision of a democratic forum at international level. The same kind of legitimacy gap touches both the WTO and the EU.

‘Functionalism’ is often understood as a means by which to *limit the power* of these entities, insofar as it assigns them only limited tasks. However, as we have already seen in the framework of the EU, and as applies equally in the framework of the WTO, the unavoidable interconnectedness of the market and society will make all spheres of public action susceptible to market scrutiny. Each regulatory measure has the potential to restrict trade, and

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<sup>271</sup> A. Sajo, *Militant Democracy*, vol. 1 (Eleven Intl Pub, 2004).

if we adopt the right point of view, we can turn functionalism into a tool for the extension of power through its limited rationality, rather than its constraint.

A pluralist objection - that those subjected to such decision-making may refuse to obey, and pay instead a fine<sup>272</sup> - may be too easy a response, as it neglects the dynamics of power relations between the levels of governance, as well as the changing power balance between the global market and comparatively smaller political communities. It increasingly imposes a particular vision of 'good life' outside of any democratic framework, without an honest attempt to impartially assess all competing perspectives and with the simultaneous decrease of serious exit options.

It is important to underline that the democracy-threatening claims of trade regimes are based on *formal* arguments, which become a basis for the extension of inherent regime rationality to cross-cutting spheres. These however are not supported by a thicker legitimacy basis than the one connected to formalist interpretation of their constitutional documents.<sup>273</sup> For this reason it does not come as surprise that trade regimes are facing serious challenges to their legitimacy.<sup>274</sup>

For this reason, in deciding the dispute between trade and the protection of health, the trade regimes should not be able to recourse to the use of trade law solely on the basis of the formal constitution argument ('because they are legally obliged to apply trade law'), but instead, such decision-making should be considered as leaving the substantive legitimising frame of their constitutions, thus requiring them to seek legitimacy ad hoc.

From the perspective of this thesis, such ad hoc legitimacy is placed in the framework of Micro Legitimacy, and it may be sought through *deferral* (principle of Subsidiarity),<sup>275</sup>

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<sup>272</sup> GMO EU case

<sup>273</sup> See further 5.1.2.

<sup>274</sup> Michael Zürn, "Global Governance and Legitimacy Problems," *Government and Opposition* 39, no. 2 (April 1, 2004): 260–287.

<sup>275</sup> J. Rollo and L.A. Winters, "Subsidiarity and Governance Challenges for the WTO: Environmental and Labour Standards," *The World Economy* 23, no. 4 (2000): 561–576; R. Howse and K. Nicolaidis, "Enhancing WTO Legitimacy: Constitutionalization or Global Subsidiarity?," *Governance* 16, no. 1 (2003): 73–94.



variants of Institutional Awareness<sup>276</sup>), or through the internalisation of other values (in the case of the WTO in particular, other international norms)<sup>277</sup> or by seeking democratic legitimacy in some other way.<sup>278</sup> The main goal, however, should be to adopt a more impartial, less arbitrary or biased position toward competing values and conceptions of good life, in order to at least partially mitigate the legitimacy deficit.

## **5.2. Functionalism and the European Union: The Case of European Private Law**

The EU, and in particular its Court, have transgressed the constitutional documents on numerous occasions, extending the functional rationality at the expense of competing rationalities. The reactions to this transgression came in many forms, from covert defiance to the decisions of the CJEU, the dialogue under the threat of defiance, as well as public protests when it came to issues of broader public interest, such as public health or education.<sup>279</sup> From a pluralist perspective these conflicts may be conceived as legitimising in themselves, insofar as they establish the dialogue between various levels of governance.

For the reasons similar to those mentioned in relation to the WTO regime (the question of power dynamics), we cannot be content with such a conclusion while avoiding the need to address the fundamental clash between functionalism and democracy, which significantly reduces the space for democratic self-determination. In particular because the EU itself aims to become a democratic polity.

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<sup>276</sup> N.K. Komesar, *Imperfect Alternatives: Choosing Institutions in Law, Economics, and Public Policy* (University of Chicago Press, 1994). Also Maduro Global Constitutionalism

<sup>277</sup> The most famous exchange on this subject is Pettersmann - Alston debate. E.U. Petersmann, "Time for a United Nations 'Global Compact' for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration," *European Journal of International Law* 13, no. 3 (2002): 621–650; P. Alston, "Resisting the Merger and Acquisition of Human Rights by Trade Law: a Reply to Petersmann," *European Journal of International Law* 13, no. 4 (2002): 815–844.

<sup>278</sup> I. Kapoor, "Deliberative Democracy and the WTO," *Review of International Political Economy* 11, no. 3 (2004): 522–541; J. Bacchus, "A Few Thoughts on Legitimacy, Democracy, and the WTO," *Journal of International Economic Law* 7, no. 3 (2004): 667–673.

<sup>279</sup> S. Garben, "The Belgian/Austrian Education Saga," *Cambridge: Harvard Law School* (2008).

A famous case which illustrates the implications of functional rationality from the field of European Private Law is the CJEU's *Axa Royal Belge*<sup>280</sup> decision, concerning the implementation of the Third Life Insurance Directive into Belgian legislation. The Belgian legislation reacted to a common problem- the misrepresentation by insurance agents of the costs and benefits of the termination of insurance contracts. In advanced insurance markets (such as the Belgian one), convincing consumers of the need to change insurance provider is perhaps the most important manner in which to gain new customers, thus insurance agents have avoided passing along information regarding the full advantages of changing insurance provider, and also the possible financial implications of premature termination of insurance contracts.

Belgium has thus decided to enact an information requirement that will protect consumers against such misconduct with reference to the explicit authorisation of the Directive in Art. 31/3. The providers of life insurance were thus obliged to ***'inform the policy-holder that cancellation, reduction or surrender of an existing life-assurance contract for the purposes of subscribing to another life-assurance contract is generally detrimental to the policy-holder.'***<sup>281</sup>

The Court has, in essence, held that the 'generality and 'vagueness' of this provision is more likely to dissuade consumers from changing insurance provider, which would have a negative effect on the objective originally sought by the directive – namely, market opening.<sup>282</sup>

The information required by Belgium clearly falls within the scope of the exceptions provided for under Art. 31/3, which allows the MS to add further information if they are *'necessary for a proper understanding by the policy-holder of the essential elements of the commitment'*. It provides the policy holders with necessary information allowing them to understand the key elements of the contract. The information is simple and timely. But that was also the major problem of Belgium legislation. It was too effective, clear and simple (in the Court's view, 'too vague and too general'), and would thus effectively warn consumers

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<sup>280</sup> CJEU, *Axa Royal Belge*, C-386/00 [2002] ECR I-2209 (ECJ).

<sup>281</sup> Ibid, Para 6.

<sup>282</sup> Ibid, Para 27, 28.

about the risks, which might have dissuaded them from changing insurance provider - and thus would have negatively impacted on foreign insurance companies' potential business.

Obviously, this market-opening zeal carries some redistributive issues. Who should carry the costs of opening up the markets? In the Court's view, this burden should lie with the consumers, particularly those who are less educated and so could have a greater likelihood of failing to understand the pitfalls of insurance contracts. While consumers have carried the costs of this opening of the market, the insurance companies have benefited considerably from this judgment. Henceforth, they will need to invest much less effort to convince consumers that it is worthwhile changing, and they can offer worse conditions than was the case previously since there many more potential customers, who unaware of the potential losses, will be more content with small advantages. In the market building rationality, it is 'naturally' businesses which receive the most support, because they are the main engines of market integration. We will see the same tendencies in the empirical part of the book in numerous places.

It is not difficult to show the 'bias' in the Court's reasoning *in concreto*. The Court argues that, once being informed of the pitfalls of the premature termination of insurance contracts, consumers would be too lazy to ascertain for themselves the real benefits and advantages of changing contract:

*Given its generality and vagueness, such a warning is therefore inappropriate for the purposes of informing the policy-holder as to the choice to be made and, given its **reference only to the disadvantages** resulting from cancellation, reduction or surrender, **is more likely to dissuade the policy-holder from terminating an existing contract**, even though the conclusion of a new contract might, in fact, be to his advantage).*<sup>283</sup>

However, while consumers would, by this logic, be too lazy to act having been provided with the information, they would *not* be too lazy to select the contract best suited to their requirements and thus benefit from the single assurance market:

*The warning in question thus also risks **jeopardising the objective sought by Article 31 of the directive**, which, as the preamble states, is to provide the policy-holder with*

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<sup>283</sup> Ibid. para 27.

*the information necessary to enable him to select the contract best suited to his requirements so that he can profit fully from the greater choice of contracts and the increased competition in the single assurance market.*<sup>284</sup>

A consumer would thus not be according to the Court inclined to check his/her one insurance contract to ascertain the financial consequences of prematurely terminating their contract, having been given the information as is required by Belgian legislation. If this is the case, how likely is it that this consumer would also be inclined to behave diametrically differently to this, and ‘shop around’ to compare the offers of *various* companies, having not received this information?

The teleological interpretations then strengthen the capture of the Court in the functional rationality. The ‘constitutional *telos*’ (at the centre of which is ‘market building’ in the broadest area of EU action – Internal Market) then becomes the underlying *lens* through which any problem that lands in front of the Court will be viewed. The building of the market thus becomes a value framework in which the Court operates (as do other EU institutions). The ‘ill-fitting’ rationality (for example, ‘consumer *protection*’) is seen almost as a disturbance, which will be allowed, at the very most, as an exception n- a sign of tolerance. How ‘permissive’ the Court will be can depend on a number of factors (such as the political orientation of the judges), but this changes nothing regarding the background rationality, which is built into the system through the interaction of the institutional framework and the principle of the rule of law.

The MS have tried to minimise the negative effects of functional logic by (the introduction of) the principle of Subsidiarity, the use of various legislative techniques (exceptions from the Free Freedoms, the introduction of different values such as Human Rights or Social concerns), as well as by the case law of the CJEU (regarding mandatory requirements, deferral in issues which relate to sensitive ethical questions). This is surely a laudable effort, however it only slightly dulls the sharpest edges of functional logic, and does not dismantle it. If no further significant structural changes take place, the outcomes will always be biased in this way. This makes the scrupulous observation of the principle of Subsidiarity unequivocally crucial, in particular in its democratic dimension.

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<sup>284</sup> Ibid. para 28.

As we will see further, Micro Legitimacy is designed to disturb this functional rationality and disturb the inbuilt order of values (without necessarily changing the Treaties). It is an attempt for legitimating Europe by democratising (opening to debate and contestation) its aims and objectives on a small scale. With regard to the judicial institutions, the aim is to arrive at a more holistic understanding of the constitutional *telos*, incorporating objectives of the EU and the MS, thus make the decision-making bodies truly *impartial*. This holistic *telos* incorporates both the purposes and the objectives that are in the Treaty, but also those which were left out of the Treaty as well as the rationale for their exclusion, internalising thus the multi-level character of the EU. For a deeper discussion of points related to the decision-making of the CJEU one would be well advised to read Chapter X on Product Liability.

### **5.3. A New Impetus for the Law / Politics debate...**

We have already touched on the question of the role of law (basing the extension of the functional rationality on the basis of *formal* argument), and the limits of the ‘rule of law’ in the postnational context several times, particularly with regards to functional polities such as the WTO or the EU. Yet, it is respect for the principle of legality and a rule of law that has played an important part in the story of ‘integration through law’ in the EU, or by the same token, in the WTO context, showing its dangerous edges as the powers of the functional polity increase. It is in this context that the suitability of the rule of law principle needs to be rethought.

But, first things first, we will recall here the distinction, made at the beginning of the thesis, between normative and social legitimacy. We have stated that some authors are sceptical regarding the sharp distinction between social and normative legitimacy.<sup>285</sup> This claim is both empirical and theoretical.

Weber can be read as understanding the ‘descriptive account’ of legitimacy as being a possibility only from an external point of view. His references to ideology, to charisma, and to tradition, which refer to sets of *normative* beliefs regarding the qualities of a charismatic person, a rightful claim of an established tradition or normative appeal of a (coherent) set of

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<sup>285</sup> See Chapter 2.

ideas implies, from the internal point of view, that legitimacy always has a normative dimension, insofar as the claims for legitimacy and the reasons for their acceptance are normative (at least in part).

The whole machinery of propaganda in authoritarian regimes can be seen as evidence of a perceived need to create a set of normative ideas among the populace (such as the legitimacy of the dictatorship of proletariat), fundamental for securing support for a system (its social legitimacy) and the stability of the system.

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The same scepticism as touches the sharp distinction between normative and social legitimacy relates to legal positivism as a purely descriptive account of ‘what the law is’. Legal Positivism cannot respond to the question of why law is considered to be law in a society – it can perhaps capture what the law is at a particular moment (external dimension), but not the deeper question of why this is so.

In order for law to fulfil its stabilising function, the discourse must incorporate the normative dimension of law, the question ‘why obey’, which relates to the legitimacy of the political authority behind the law, and thus allows the people to justify why they should obey the law in their system of beliefs. This is also the reason why even the most oppressive regimes try to justify their exercise of power/authority in some normative framework, as the normative acceptability of law is considered to be a fundamental element of voluntary compliance.

The formal claims of legal positivism then depend on the acceptance of the normative legitimacy of the authority that issues the commands (law). This position could be ascribed to normative positivism, which makes the validity of law reliant on the normative acceptance of the legitimacy of the authority behind the law, and positivism a plausible theory only insofar

as it acknowledges this normative component. Legal validity in this view is, from the internal perspective, dependant on the acceptance of the background authority.<sup>286</sup>

Waldron then usefully elucidates on why the idea of normative positivism is consistent with our experience at the nation state level.<sup>287</sup> In his view, this acceptance of legitimacy happens at the ‘wholesale’ level (the level of political systems, or the ‘macro’ level in the words of this thesis), when this evaluation need not, and shall not, enter the analysis of law on retail, or micro level.<sup>288</sup>

This is exactly what changes in the case of postnational lawmaking.

The international trade regimes were usually established in order to enable trade and to deal with protectionism – thus the anti-trade actions of the participating states which however function on the same underlying logic. That is broadly set their constitutional frame, the frame in which their authority is again broadly conceived as legitimate. The principle of legality has been interpreted, however, in the postnational context in such a way so as to enable the trade regimes to decide on the issues wholly unrelated and motivated by a different logic, such as health, environment, social policies etc. Not only however have they been allowed to decide on issues outside of their constitutional mandate, but moreover the principle of legality was supposed to ‘oblige’ them to do so from the baseline of trade (sic!). thus in effect subordinate all these issues outside of its constitutional mandate to its own purpose.<sup>289</sup>

This is clearly one step farther than the substantive reading of the ‘constitution’ of the trade regimes reaches, and hardly any plausible interpretation of their constitutive documents would lead to such an outcome. The reading of their constitution can not be such so as to give them carte blanche to subordinate or eliminate alternative rationalities for public action – what is happening in the system of ‘exceptions’.

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<sup>286</sup> There are also different understandings of what ‘normative’ may refer to in the subjective attitude of a person who understands herself to be a positivist. See e.g. B. Kingsbury, “Legal Positivism as Normative Politics: International Society, Balance of Power and Lassa Oppenheim’s Positive International Law,” *European Journal of International Law* 13, no. 2 (2002): 401–437.

<sup>287</sup> J. Waldron, “Normative (or Ethical) Positivism,” *Hart’s Postscript* (2001).

<sup>288</sup> *Ibid.*, 415.

<sup>289</sup> See part 5.1.

If we take the claims of normative positivism seriously, when the trade regime encounters a different rationality, it can not any more rely on formal arguments derived from their limited constitution (formal obligation to apply ‘trade law’). In such case the trade regime loses its ‘macro’ (or in Waldron’s terminology wholesale) legitimacy and thus the normative grounds for the exercise of authority, as well as its claim to legality.

This attenuating (to the point of disappearing) ‘legitimacy’ of the authority behind the authoritative claims of the trade regimes will have an important implication – namely, that legitimacy can no longer be claimed at the macro or institutional level. In different words, if these regimes are to take any action, they cannot rely on the ‘formal’ arguments anymore (as the claim to legal validity has vanished with the disappearing legitimacy<sup>290</sup>), and must base their claim to legality on the *legitimacy* of the particular outcomes (rules, decisions, cases), and the procedures that lead to them.<sup>291</sup> The normative implications of this shift will be discussed extensively in the section on Micro Legitimacy.

It is only with the increase of power of the trade regimes, along with the economic globalisation, that we have witnessed the overall disempowerment of (even very powerful) nation states, who not only have to become more ‘competitive’ but are obliged by ‘legal’ commitments to international trade regime to make their policies ‘free trade friendly’ – and thus to give up any capacity to re-embed the global market.

This shows that the international legality forces the migration of power away from any sort of ‘public’, to the ‘private’, and to the global market players. Without condoning in any way prior setting in international relations, this development seems to be a proof for all that the allegiance to the formalist understanding of the Rule of Law in the international arena is illegitimate, and thus should be held illegal (and not other way round – legal and thus legitimate - as was the case so far).

Coming back to the principle of Rule of Law, in the context whereby macro legitimacy is practically non-existent, the floor is open for discussion of whether the norms

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<sup>290</sup> The illegitimacy of subjugating all alternative rationalities for public action to economic rationality.

<sup>291</sup> I do not exclude that the ‘legitimacy inquiry’ will and should spread into areas of lawmaking by traditional polities – which at a certain level is already happening within the shift from form to substance, and the general stress on public justification as a condition of validity.



produced by such bodies can be ‘legitimately’ considered law – on the ad hoc, micro level. Solely in the narrow ambit of the constitutional mandate (where they deal with the same kind of rationality as their own), the trade regimes may enjoy the normative legitimacy of their claim to legality *a priori*, insofar as only in this limited field do they enjoy some (even if indirect) legitimacy.<sup>292</sup> Beyond that, this will not be the case.

The rule of law has so far served the extension of powers of the postnational entities significantly beyond their constitutional mandate and what their ‘indirect legitimacy’ allowed for.<sup>293</sup> The process was described in Part 5.1. In essence, the expansion of the economic rationality happened on the basis of *formal argument*, which ‘requires’ a trade entity to assess any issue that lands in front of it on the basis of its own rationality, which is *legally* imputed to it on the basis of constitutional documents, (paradoxically) as a tool to restrain their powers. Yet the effects are quite the opposite.

The extension of powers, or more appropriately the extension of economic rationality on the basis of the ‘formal’ character of law (the *legal* obligation to apply trade *law*), will have a number of additional, significantly negative impacts. Entities of this kind will tend to hold onto *formalism*, as the formal quality of law becomes a main legitimising factor of the power they exercise. This not only undermines the emancipating push of the move from ‘form to substance,’ but the idea of maintaining the impression of legality will make them even more inclined to hold to their economic rationality (objectives and values), and thus every extension of powers will come with an extension of the rationality into ‘neighbouring fields’. The whole concept of ‘integration through law’ in trade regimes is based on the integration through the integrating force of the economic rationality.

The concept of micro legitimacy proposed here reflects upon this reality, and translates the lack of normative legitimacy of trade regimes - if compared to their actual power - to the need to justify their decisions on micro (decisional) level. The question of how

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<sup>292</sup> This deserves a deeper discussion of the principle of political equality, which cannot be undertaken here. In essence, the postnational lawmaking – similarly to what is underlined by the BVG in Lisbon judgment – shall not be able to hollow out the democratic processes in the democratic polities without providing for the similar possibility for democratic governance at the postnational level. Thus there are limits to their ‘indirect’ legitimacy as it stands by now.

<sup>293</sup> Michael Zürn discusses the impact of the lack of normative legitimacy of the International Trade Regime on the social legitimacy in the context of the increasing powers. Zürn, “Global Governance and Legitimacy Problems.”

will depend on the polity in question. If we are able to achieve an acceptable level of legitimacy on the micro level, we might altogether avoid bringing up the question of recognising legal validity. On the most general level, however, there can be no presumption of legality (without legitimacy) in the framework of these regimes since that would be in a direct conflict with the basic commitments to democracy, principle of public autonomy and self-governance.

To conclude, there are number of objectionable effects of the Rule of Law in the postnational context. The combination of the exercise of power through *law* with little or no legitimacy leads to holding to formalism in order to extend powers beyond their proper scope; the re-formalisation of law so as to cover up lack of legitimacy; and finally, the colonisation of neighbouring fields by functional rationalities and pre-set orders of values. The call is thus for the *re-politicisation of 'law'* in the context of functional trade entities beyond nation state borders, requiring legal claims to prove ad hoc, micro legitimacy, and thus subdue these norms and rules which claim legal normativity to an additional layer of legitimacy check.

The concerns of the hollowing out democracy through functionalism of international trade regimes, and its normative consequences related to the need to remove the presumption of legality from the norms produced by such regimes, have large significance for the field of EPL. First of all, the preference for the market in functional entities removes the capacity of the democratic processes to make use of market-re-embedding capacity of private law – both by constitutionalising one vision of economic order (thus by limiting the options of lower levels of governance), or even more so (in the case of the EU) by transferring the whole regulatory competence to a such functional entity. The functionalism of the EU, which is one level of its democratic deficit, and at root of its social deficit, makes the minimum harmonisation in private law a necessary regulatory paradigm, if we intend to preserve the ‘social’ dimension of private law.

## **6. ON MICRO LEGITIMACY AS THE FOURTH PILLAR OF DEMOCRATIC LEGITIMACY IN THE EU**

As was made clear above, the shift from Performance to Regime Legitimacy has proven increasingly necessary if the increasing powers of the EU were to be considered legitimate. It has been done so, first of all, by improving the credentials of Representative Democracy; secondly, by the introduction of the Subsidiarity Principle and its consequent elaboration, so as to make it a tool of shared EU and MS democratic legitimacy; and finally, by introducing elements of Participatory Democracy.

In my view, an additional fourth step is necessary. We need to direct our attention to a different scale of observation – not to the macro or wholesale level, but rather to the micro, decisional level, and seek the ad hoc legitimacy of political authority in particular processes. Such a conception of Micro Legitimacy reflects and incorporates in a creative manner the post-national character of the EU, along with the democratic aspirations implemented through the principles of Subsidiarity and Participatory Democracy. Legitimacy here has to be fought for and won on an ad hoc basis, instead of relying on the ‘integration through law’ approach, which is not supported by sufficient legitimacy resources. The postnational condition, which is at root of legitimacy deficit, prevents the authority from gaining acceptance as a ‘*cheque blanche*’ at the wholesale level, which would then be blindly followed and obeyed at the micro level.

EU legitimacy is perhaps at best described as staged, where those issues closer to the core of its constitution (such as customs union or common commercial policy) may enjoy higher levels of macro authority, and may thus be considered as requiring less stress on the Micro level. These domains, however, remain in the minority in the increasing pool of actual powers of the EU.

Micro Legitimacy, however, enjoys sufficient merit to become part of EU governance more broadly. The reason is that it mitigates the ‘reformalisation’<sup>294</sup> towards which functional entities have a natural tendency, undermining in this way the shift from form to substance as a means of emancipating the individual - not in a liberal sense of private autonomy, but in a more complex framework of the expression of public autonomy as a right to public justification of authority exercised upon the individual.<sup>295</sup>

In the concrete context of the EU, Micro Legitimacy is concerned with the processes of democratisation and re-politicisation of the goals, objectives and performance of the EU at a micro level. This should take place by enlarging the issue publics and allowing different voices, conceptions of good life and rationalities to be heard in the stage of preparation of the legislation, leading to the breaking up of the inherent functionality of EU decision-making, with its order of goals and values, and the opening up of these goals to democratic contestation. Making the decisions and processes run as ‘micro legitimately’ as possible will decrease the risk of questions being raised about their legality. This is ever more important in the areas where the EU goes beyond a narrow understanding of its constitutional mandate.

The broader concern for democratisation is motivated by the vision of the EU as our major voice in the global processes, which shall aim to protect democracy and welfare in the EU, and beyond. This, however, cannot be achieved without democratisation, which is conditioned by the de-constitutionalisation of the substantive policy preference for the free market, and opening this issue up to democratic contestation. Otherwise, we are leaving EU development to the clutches of functional conditioning, which will act as propulsion for the dismantling of democracy and European model of welfare, rather than eventually acting as their shield.<sup>296</sup>

## **6.1. *Micro Legitimacy: Bringing Politics Lower?***

### **6.1.1. *From macro...***

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<sup>294</sup> See the previous chapter 5.

<sup>295</sup> Thus, no increasing transfer of powers by means of ‘integration through law’ without justification (sufficient legitimacy) to support it.

<sup>296</sup> See chapter 5.

The major problem for the legitimacy of EU action at the macro level is the gap between the power concentrated at European Level, and the actual level of its democratic legitimacy resources. While this concentration of power implies the disempowerment of national democratic institutions, it does so without providing for a similarly effective outlet for public autonomy and democratic accountability at the European Level, leaving integration predominantly in the hands of elites, with significant normative consequences.

As has been made clear in several instances previously, the most important step that needs to be taken in order to create the preconditions for democratic governance in the EU (at both macro and micro level) is the removal of economic determinism. In a democratic EU, ‘free markets’ and liberalisation of trade should be an *outcome* of the democratic political struggle, not its starting point. Thus, Democracy in the EU starts with de-constitutionalising the markets and the ‘politicisation’ of the EU and its objectives. This is more likely to happen in small steps.

Insofar as the EU lacks democratic legitimacy at the macro level (empirical claim), we need to turn our attention away from the macro to the micro level, in order to secure its self-standing democratic legitimating action. Thus it does not mean that legitimacy at the macro level is not possible or desirable – but until it has actually taken place, ‘integration through law’ comes without legitimacy, and the only level where the EU can gain such legitimacy is at the micro level. Most of the institutional devices necessary are already in its hands.

The micro legitimacy proposed here then aims to render the decisions of the EU as ‘micro legitimate’ and thus avoid opening up questions of their legality. Only to the extent that the EU has legitimated its decisions ad hoc is it authorised to go beyond the narrow confines of its constitutional mandate. The more ‘diagonal’ the character of EU action, the more ‘cross-cutting’ with other areas it entails, the more fundamental becomes the self-standing micro legitimacy.

Politicisation at the micro level may be also considered as a tool to trigger more visible macro political processes at later stages. It is quite fundamental, though, that there can be no presumption of legality without legitimacy, because that allows production of laws with

contradiction to the most fundamental constitutional principles of democratic governance and political equality.

### **6.1.2. ...to Micro Level**

The main idea behind the shift to micro level is that those issues that can not be achieved at the macro level in the postnational context can be (perhaps) achieved at micro level. Micro Legitimacy is concerned with democratisation and politicisation of the decision-making processes in the EU at the micro level, which would supply it with self-standing legitimacy. This shall happen through broadening of the “issues” and thus broadening of ‘issue publics’, so as to open up the possibility for alternative conceptions of human beings and human life, as well as various competing values to the market, to be brought forward and given ‘impartial’ consideration. It shall concern the ways in which to motivate and channel (more successfully than thus far) public opinion into the law-making processes at the EU level, despite the serious limitations that are faced – in particular the non-existence of a more integrated public sphere.

Micro Legitimacy builds on passive and active pillars. The passive pillar refers to decisions taken before action – namely, deciding whether to act – and it is based in the scrupulous observance of the principle of Subsidiarity. The ‘active’ pillar then refers to the process itself, how the action is actually carried out.

The Principle of Subsidiarity may be described as a jurisdictional constitutional principle, with a significant impact on the substantive outcomes of the policies – performance legitimacy - since it aims to bring forward all potential costs and benefits of an action, in economic and democratic terms, and thus allow a reflected, responsible decision. In particular, it aims to articulate those alternative rationalities and values which may be put into danger by moving the issue to the higher level of governance, such as alternative conceptions of a good life and substantive policies worthy of pursuing along with -or preferably to- the free markets. The principle is passive, insofar as it should come before the decision to

legislate – but the procedure is always active in order to articulate all potential costs of an action we need large participation.<sup>297</sup>

The active element of Micro Legitimacy – or how to construe the procedure - is what will concern us here. As already mentioned, we will often need active ‘consultation’ procedures in order to ascertain whether action should be taken. I will draw here on Art. 11 of the TEU on participatory democracy in order to develop such a procedural account, which would be able to claim fairly democratic credentials. Some inspiration will be drawn from what is already going on in the debate on the New Modes of Governance or Better Lawmaking.

## **6.2. On the procedure: Improving the republican credentials of EU policy making**

What is the general picture? What is it that hinders the capacity of the EU to adapt into a more democratic polity? Fritz Scharpf has offered a rather convincing diagnosis in his later works. While the regimes in national constitutional democracies stand on the combination of both liberal (human rights, constitutionalism, representation of interests), and republican legitimating discourses (public deliberation, majority rule, shared identity), this is not the case in the EU. According to Fritz Scharpf, the EU *...appears as the extreme case of a polity conforming to liberal principles which, at the same time, lacks practically all republican credentials.*<sup>298</sup>

Now, even if we rely on Habermas, who tries to bridge between liberal and republican traditions through the concept of communicative action in communicative spaces, the element that still appear to be fundamentally missing from the EU is the provision or availability of sufficiently unconstrained communicative space(s), where opinion formation could take place, along with the mechanisms to channel public opinion effectively into the processes of ‘will formation’.

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<sup>297</sup> Unsimilar to the (non)articulation of those costs in the CRD and the DCFR-CESL process.

<sup>298</sup> Scharpf, “The Double Asymmetry of European Integration–Or.”

This ‘republican deficit’ is indeed hard to cure, in particular at the macro level. The micro level on the other hand would offer us numerous and repeated opportunities to create small but increasingly ‘republican’ processes in the EU. We will see in the second part of the thesis that the ongoing policy initiatives create around themselves certain ‘issue publics’.<sup>299</sup> These, however, remain largely limited because of ontological closure and functionalism in the EU.<sup>300</sup>

As an example, we turn again to the discussion on the Consumer Rights Directive, which mainly aimed at creating internal online market. The discussion has been centred on issues such as how long the withdrawal period should be, what the definition of consumer is, etc., and the main participants in the discussion were thus businesses and consumers (along with academics and MS).

However, questions must be asked regarding the goals themselves – shall we give ‘public support’ to distance selling? Is it a goal worth pursuing, in particular if we take into account the impact on social inclusion, psychological and health impacts, as well as environmental impacts? Questions posed in this way will immediately enlarge the issue public, because the issue itself is enlarged. Such discussion would be more inclusive, more democratic – and most importantly it would break up the functional logic and question the self-evident goals (the question of ‘how’, rather than ‘whether’ there should be more market – and what the costs will be).<sup>301</sup>

One may object that this ‘opening’ up of goals could actually raise even stronger legitimacy objections because, through limiting the debate to what the EU can argue constitutionally, we prevent its competence creep. In my view this is a very unconvincing argument, which entirely overlooks the empirical reality. So far, we have seen EU powers grow beyond any optimistic predictions thirty years ago, which has also meant that its ontological preferences were extending further, justified by loosely satisfying the legality

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<sup>299</sup> G.A. Hauser, “Vernacular Dialogue and the Rhetoricity of Public Opinion,” *Communications Monographs* 65, no. 2 (1998): 86.

<sup>300</sup> See Chapter 5.

<sup>301</sup> Thus it has fundamental theoretical and practical importance in dealing with the ‘democratic deficit’ in Europe.



criteria for its action. If legality does not constrain the EU action, it should at least not exacerbate the extension of its rationality and value preferences.

Thus, the dilemma that we are facing in the EU is not which is the most ‘legitimate public’ that shall discuss these broader issues, since the issues are not opened to any public. It would be an improvement if we could create a forum whereby alternative conceptions of good life could be raised and discussed.<sup>302</sup> Additionally, there is also a ‘slippery slope’ argument, and we may see the arguments raised in such micro processes reaching European Parliament, stirring eventually also broader public debate, and leading from a web of enlarging issue publics to the emergence of a more general public sphere in the EU.

The second important republican element that we need to consider is the provision of sufficient conditions for deliberation. My aims will remain very modest here. The first step in the creation of such conditions seems to be to the adaptation of the structure of the ‘dialogue’ or ‘multilogue’ in the consultation procedures to enable communication and participation in a more ‘interactive way’,<sup>303</sup> in order to achieve deliberation in a narrower sense and approximate the ‘equality’ of the participants. The necessary minimum then requires the abandonment of the Commission’s vertical, one-way consultations, in favour of taking inspiration from the NMG and the horizontality of setting.

The most fundamental question then is that of participation. It is worth mentioning at this point that openness is surely a crucial but insufficient condition for a *fair* balanced discussion. Different groups will have different stakes and thus different levels of motivation for getting involved in any public deliberation – thus there will be considerable divergence between the individual stakes of consumers and citizens in the legislation and those of

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<sup>302</sup> We shall not forget that the enlarged public would be discussing the aims of the consumer rights directive, thus it would not imply extending the will of that particular public on the whole breadth of EU action. Additionally, there is still the proxy of the ‘public institutions’ which make the decisions.

<sup>303</sup> This does not seem impossible in particular thanks to the possibilities of Cyberspace. These extend from dedicated websites (RSS, email alerts), social networks, blogs to Skype conferences and workshops, where people could interactively engage, discuss and support (by click) some opinions and disapprove of others. Of course, this should be not to the exclusion of public ‘hearings’ and stakeholder meetings, but such fora could crystallise the amount of relevant information regarding the interests and values at stake, as well as opening access to those less privileged (national or regional) public interests groups to access European Lawmaking in questions that are of their concern – to raise their interests but also bring local knowledge.

individual multi-national corporations.<sup>304</sup> This is somewhat mitigated through ‘group representation’, however this initial imbalance of motivation (and resources) remains, without (alike to national states) further mitigation through the democratic accountability of the national legislators, and the responsibility for ‘general good’.

This means that (in this case) the Commission should guard the non-arbitrariness of deliberation - in particular when it comes to sufficient representation of the opinions of those who could be deemed to be ‘structurally weaker’. However, it appears that empirically, the situation has been thus far quite the opposite of this ideal. The functionality of the Commission’s thinking, centred on ‘market building’, had the effect of favouring the representation of those who better served its own economic objectives.<sup>305</sup> The second part of the thesis will offer us plenty of examples of this problem. Thus, this is yet another instance when the openness of goals, aims and values becomes crucial for the democratic credentials of the processes – even at the micro level.

### **6.3. What Micro Legitimacy cannot do...**

Micro legitimacy has rather clear limits regarding its capacity to generate legitimacy. Namely, the micro approach provides a framework which can render the law-making processes more democratic and perhaps also more effective. It can, however, only fulfil its democratic and stabilisation functions insofar as it can plausibly accommodate the interest of citizens to participate. Once the issue becomes of great social concern (as is the case of economic crisis), the active elements of this approach can no longer supply sufficient legitimacy, insofar as the premises of micro legitimacy – however normatively attractive they may appear – cannot enable those 500 million Europeans to participate and co-create policy in a meaningful way.

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<sup>304</sup> In the first half of the twentieth century, Cole comes out with a theory of a Pluralist State, a radical democratic theory, which is linked to current ideas about issue publics and direct citizen participation. He does not, however, deal satisfactorily with a core issue of inequalities among the participants. See Paul Q. Hirst, *The Pluralist Theory of the State: Selected Writings of G.D.H.Cole, J.N.Figgis and H.J.Laski*, New ed. (Routledge, 1993).

<sup>305</sup> See Chapter 7, 8 and 10.

This underlines that in issues of large social relevance, where all citizens truly care, the EU shall fall back on the passive element of Micro Legitimacy and defer to the *democratic* dimension of the principle of subsidiarity. In other words, the EU should defer action - unless it provides for some macro legitimacy tool (similar to general elections) for effective and convincing accountability mechanisms. Yet, this response becomes unsatisfactory because the EU has so many active powers that MS can hardly respond to the crisis themselves. What's more, it is also normatively desirable that the EU becomes a place for responding to the challenges of globalisation, to the extent that it has sufficient leverage to do so.

The MS have truly taken up the fight against the economic crisis together, however in a spectacularly undemocratic way, with the exclusion of the 'political' (there is practically no left-right contestation at EU level - the response has been all the way down 'more competitiveness'). So far, we see the combination of austerity imposed on economically threatened MS and the overall dismantling of any social achievements in the states of the Union, under the guise of the need to increase competitiveness internally and externally.

The extent to which these developments are the result of the increasing economic determinism of the nation states themselves,<sup>306</sup> or are eased by the favourable, economically oriented framework of the EU, becomes irrelevant. What matters is that democracy in this setting becomes captive and unreachable, at both national and European level. The nation states seem to be able to renounce any responsibility thanks to the inescapable impact of global market forces, while the EU is economically driven and undemocratic anyway, thus it does not offer the cure.

Not only do we lack sufficient communicative spaces in which to discuss issues of common concern at the EU level, but what is worse still is that the 'topics' are also severely limited when it comes to the issue of economic governance. And yet, the crisis also has incredible potential to change the EU. The response to such broad policy questions as which personally touch each and every European cannot, however, be found in Micro Legitimacy, but need to be developed in a different, democratic Europe. Democratising Europe with its

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<sup>306</sup> Colin Leys, *Market-driven Politics: Neoliberal Democracy and the Public Interest* (Verso Books, 2001).

welfare state experience could lead to a mobilisation of Europe that has not been seen before, with the market-re-embedding social measures with global impact – starting a new era of embedding global market.

## **PART II: MICRO LEGITIMACY AND EUROPEAN PRIVATE LAW**

## ***Introduction***

This part of the thesis will look at three dimension of the normative legitimacy of the EU action in EPL. The analytical categories come from the framework developed by Neil Walker, which comprises three dimensions of normative legitimacy which are presumably present in all polities. In particular, these are Performance Legitimacy, Regime Legitimacy and Polity Legitimacy – or more specifically in this thesis Micro Performance, Micro Regime and Micro Polity. The discussion shall demonstrate not only how we can conceive of three dimensions of legitimacy in private law at the micro level, but also what interdependencies exist between the various normative justifications, and how they work together or against each other.

The first chapter deals with Micro Performance in the framework of the discussion on the Consumer Rights Directive. The second dimension is the ‘Micro Regime’, and the discussion will follow the procedural aspects of the development of the Draft Common Frame of Reference and the Optional Instrument the Common European Sales Law. Finally, we will discuss polity legitimacy and the questions of identity and values in the framework of the debate about the European Civil Code.

## 7. MICRO PERFORMANCE

### 7.1. Performance Legitimacy and Private Law

Performance as a criterion of the legitimacy of a political authority refers, on the most general level, to certain qualities and characteristics of the output the political authority creates. The Performance of the nation states (liberal constitutional democracies) will be usually identified with the broad scale of goals (internal and external security, economic welfare, justice, equality, redistribution etc.). Finding balance among those presumably equally significant objectives, as well as setting the course of action are core functions of their democratic processes.

This is fundamentally different in the postnational entities. The ‘goal setting’, which is a fundamental part of the democratic process, is not present in their framework, insofar as the ‘responses’ may be understood as *a priori* given (constitutionalised) in terms of their purposes and functions. Thus, when any such functional entity (as the EU still is) looks at any field of policy making, it will do so through the lens of pre-established goals and aims, and thus the performance expected from it.

Now, how can we understand the ‘performance’ of the private law framework, and how does it relate to different performances expected from the various levels of government? As was already discussed in Chapter Four, performance in private law (both classical and social private law<sup>307</sup>) has been primarily concentrated on achieving ‘justice’ among private parties. While classical private law relied on the performance through the quality of the rules articulated, the claim to ‘justice’ was based on the universal values inherent to private law, the ‘social’ private law moves the responsibility for the just framework of private law to the democratic legislator.

On the other hand, the justification for EU involvement in private law (and beyond) has been primarily concerned with justification through the EU’s expected performance – namely the building and efficiency of the internal market.

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<sup>307</sup> See Chapter 4.

The various performances expected from the different levels of government in compound European Private Law lead to the emergence of truly *sui generis* private law, with the coexistence of differing rationalities and reasons for action - the economic motivation of the EU was pursued alongside the social rationality of the MS. This has led to numerous synergies, and consumers have overall benefited from the multi-level structure.

This structure comes into question when the EU stops being patient with the dual rationalities, which are bound to two different kinds of performance that each level of governance was expected to deliver into private law. From the turn of the century, the Commission steadily aimed to push the competing rationality out of the system - first through Maximum Harmonisation and then by the softer means of ‘backdoor’ harmonisation by the Optional Instrument.

We will approach Performance Legitimacy in this thesis by jurisdictional analysis – namely, by assessing the costs and benefits that can be achieved by the appropriate designation of the level of governance through the principle of Subsidiarity, understood as means to uncover the costs of action and thus ensure a responsible decision. It is presumed however that more context-specific performance criteria (such as the quality of drafting) would be brought about through sufficiently inclusive participatory procedures (the epistemic dimension of the procedure), thus I will be more concerned here and in the following chapters with the general framework rather than the performance assessment of each and every rule.

## **7.2. The Character of European Private Law**

### **7.2.1. Minimum Harmonisation: Or why everything went smoothly until 2008.**

The basic characteristics of European Private Law (before the maximum harmonisation agenda) can be captured by three words: patchwork, regulatory, minimal. The EU efforts in private law, as is the case of EU lawmaking more broadly, were oriented towards the integration of the market (Internal Market Legal Basis), to which end the EU has enacted a set of directives aimed at removing obstacles to trade and levelling the playfield for competition. So emerges the ‘consumer *acquis*’, which includes numerous instruments (Doorstep Selling Directive (85/577), Package Travel Directive (90/314), Unfair Contract Terms Directive (93/13), Timeshare Directive (94/47), Distance Selling Directive (97/7),



Price Indication Directive (98/6), Injunctions Directive (98/27), Consumer Sales Directive (99/44). Further private law measures were the Product Liability Directive (85/), Unfair Commercial Practices Directive (2005/29), Distance Marketing of Financial Services Directive (2002/65), Consumer Credit Directive (2008/48) etc.

The standard regulatory technique was so-called ‘minimum harmonisation’.<sup>308</sup> Minimum harmonisation sets the common minimal regulatory standard at the EU level, which the MS could choose to introduce or else keep the higher regulatory standard. Minimum harmonisation secures only a certain level of uniformity of the internal market, while at the same time it allows for diversity and for national normative preferences to subscribe to the kind of regulatory framework that emerges,<sup>309</sup> incorporating concerns beyond those surrounding the creation of the common market into the regulatory framework – such as social justice, or other specific local socio-economic and cultural concerns. Fundamental freedoms have remained at the same time the ceiling<sup>310</sup> above which the MS could not have gone in pursuing their regulatory objectives, ensuring thus that the objectives of the EU are not hampered by the national ‘protectionist’ measures.

The inability of minimum harmonisation to ensure the uniformity of the regulatory framework may have various effects – it may cause higher transaction costs than would be the case if the regulatory framework was uniform (in private law and elsewhere), but it may also raise some broader concerns, such as the impact of the lack of uniformity on European legal culture or legal education. The jurisdictional question would then be whether these benefits outweigh the costs of preserving diversity.

To exemplify it in practical terms the impact of minimum harmonisation we may look at who was protected by EPL under this framework. While *Acquis Communautaire* defined the consumer as a ‘natural person’ who acts outside her business or profession, the MS were free to extend the protection to a much greater number of people, which many of them indeed

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<sup>308</sup> This turned out not to be the case in regard to the Product Liability Directive. See Chapter 10.

<sup>309</sup> In the same vein see Bernard, *Multilevel Governance in the European Union*; or Joerges, ‘Challenges of Europeanization in the Realm of Private Law’.

<sup>310</sup> P.P. Craig and G. De Búrca, *EU Law: Text, Cases, and Materials* (Oxford University Press, USA, 2008), 626.

did.<sup>311</sup> The grounds for this extension have often been based on concerns for social justice, insofar as it seemed unfair to exclude from the protection those who find themselves in a situation similar to that of consumers. The Commission's 2008 Proposal of the CRD, which aimed to achieve maximum harmonisation, however, intended to abolish this freedom of the MS and instate the narrow EU definition of a consumer as the only possible one.

But social justice is of course not the only concern. From the economic standpoint, minimum harmonisation allows particular socio-economic conditions to be reflected in the final shape of the regulation. Thus while the 'New' MS, which are the countries in transition from central market planning often did not go into the regulation beyond these minimum standards, the 'old' MS have massively used these options. Such (constrained) reflection of local circumstances and social-economic conditions in regulation make the regulation a better fit to local conditions, which should in effect increase of the performance of the economy.<sup>312</sup>

A further advantage of minimum harmonisation is that it allows innovation and experimentation, as well as regulatory competition, while at the same time preventing the regulatory race to the bottom.<sup>313</sup> As for innovation and learning, the EU itself has drawn extensively on national regulations as resources of knowledge and ideas, selecting the best national solution, and from that premise, proposing European legislation: *'the European Commission chooses the best out of the different national legal orders and condensed it in a European bottom line rule.'*<sup>314</sup>

From the constitutional perspective then, minimum harmonisation seems to be particularly sensitive to concerns for 'unity in diversity'. While the EU gets space to fulfil its mission, the MS maintain space to fulfil their mission. The EU policy goals need to be pursued in harmony with other goals and values, and minimum harmonisation seems to enable just that. The centralisation in functional polities, on the other hand, leads to the removal of decision-making from the constituency.

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<sup>311</sup> H. Schulte-Nolke, Ch. Twigg-Flesner, and M. Ebers, eds., "EC Consumer Law Compendium - Comparative Analysis -" (University of Bielefeld, February 2008).

<sup>312</sup> Ibid.

<sup>313</sup> Bernard, *Multilevel Governance in the European Union*, 74 ff.

<sup>314</sup> Micklitz, "The Targeted Full Harmonisation Approach." 77.

Now, as is the case with EU functional objectives, there is obviously an economic dimension to private law. But there is a social dimension in private law as well, as became clearly evident over the course of democratic contestation of private law in the twentieth century. While these two dimensions of private law could coexist in EPL with minimum harmonisation, the shift from minimum to maximum harmonisation implied, according to the 2008 proposal, that a major part of consumer law (thanks to the horizontality of the measure) would become regulated solely at the European level, without the possibility for MS to engage their normative preferences.

### **7.2.2. The Shift to Maximum Harmonisation**

The idea of ‘maximum harmonisation’ was born sometimes at the end of 1990s, when the Commission ordered the first studies.<sup>315</sup> A renewed impulse then came from the CJEU in its Tobacco Advertising decision,<sup>316</sup> a case which has been read as disapproving of the minimum harmonisation technique.<sup>317</sup> Publicly then, the abandonment of the minimum harmonisation was announced then in the 2002 Communication on the Consumer policy strategy 2002-2006, whereby the Commission concluded that minimum harmonisation was a ‘failure’ and that there was need for the full harmonisation of consumer law – in order to help both businesses and consumers.

The first ‘maximum harmonisation’ measure saw the light of day in the same year.<sup>318</sup> The conviction that the right track had been taken was reaffirmed in the 2003 Action Plan for European Contract Law<sup>319</sup>, as well as in the Communication of 2004<sup>320</sup>, followed then by the

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<sup>315</sup> Ibid.

<sup>316</sup> Case C-376/98, *Tobacco Advertising*, [2000]

<sup>317</sup> M. Dougan, “Minimum Harmonization and the Internal Market,” *Common Market Law Review* 37, no. 4 (2000): 853–885.

<sup>318</sup> Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directives 90/619/EEC, 97/7/EC and 98/27/EC

<sup>319</sup> European Commission, ‘An Action Plan for a More Coherent European Contract Law, COM (2003) 68 final.

<sup>320</sup> European Commission, “Commission Communication on European Contract Law and the Revision of the Acquis: The Way Forward, COM (2004) 651 Final.”

fully harmonised Unfair Commercial Practices Directive of 2005<sup>321</sup>, Directive on Consumer Credit of April 2008<sup>322</sup> and the 2009 Timeshare directive<sup>323</sup>. I will touch on these other directives before moving on to discuss the Consumer Rights Directive, so as to highlight the differences and the aggregate effect of what could have been the root of considerable outcry in regards to the 2008 Commission Proposal of the CRD.

The Directive on the distance marketing of financial services, equally as the Timeshare directive, at first glance pose little legitimacy controversy – at least in terms of the appropriate level of governance. The narrow scope of legislation, which is easy to see in light of Internal Market objectives,<sup>324</sup> as well as the narrow scope of (and thus interest in) the measure, proves sufficient to protect the EU from major (social) legitimacy challenges.

The Unfair Commercial Practices Directive is then a somewhat different story. It is Directive of larger legal and political significance,<sup>325</sup> which makes it greatly more prone to scrutiny. In its scope, equally as in its justification, it comes close to the grand Proposal on the Consumer Rights Directive.

Thomas Wilhelmsson has undertaken an insightful analysis of the ‘Performance legitimacy’ of the UCPD.<sup>326</sup> In essence he tries to place the reasons for the action, the costs and benefits of the action at the EU level in a framework which approximates a full Subsidiarity analysis (proposed also in this thesis). We will look at his analysis, not only to

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<sup>321</sup> Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005, concerning unfair business-to-consumer commercial practices in the internal market.

<sup>322</sup> Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008, on credit agreements for consumers.

<sup>323</sup> Directive 2008/122/EC of the European Parliament and of the Council of 14 January 2009, on the protection of consumers in respect of certain aspects of timeshare, long-term holiday products, resale and exchange contracts.

<sup>324</sup> The Timeshare Directive was a measure that aimed to facilitate the acquisition of timeshares by mainly German citizens in Spain, while the sole fact of ‘Distance’ marketing *prima facie* makes a case for regulation at the EU level.

<sup>325</sup> G.G. Howells, H.W. Micklitz, and T. Wilhelmsson, *European Fair Trading Law: The Unfair Commercial Practices Directive* (Ashgate Pub Co, 2006), 94.

<sup>326</sup> Content wise, the analysis is not dissimilar to the Subsidiarity Analysis I propose here. *Ibid.*, 241 – 261.

learn about the UCPD itself, but also to demonstrate that the concerns we deal with here are much more broadly disseminated in academic and the public arena.

Wilhemsson proposes to look at the UCPD from several angles. We shall first analyse the *purposes* the measure was intended to achieve, secondly we should assess the impact of the UCPD on *unrelated purposes*, and finally we may *criticise the purposes* themselves. To employ the terminology of this thesis, Wilhelmsson suggests that we first assess the performance of the measure against the ‘purposes’ it aims to fulfil from the perspective of goals of the polity (economic dimension of Subsidiarity). Secondly, he suggests that we assess the performance against other performance criteria and goals which could have been pursued by the measure (‘unrelated purposes’) which stands for the democratic dimension of subsidiarity. Finally, we should place these inquiries into the broader framework of the EU constitution and analyse them in light of the normative justifiability of EU action.

What are the ‘purposes’ that Wilhelmsson identifies? The UCDP is justified mainly on the basis of:

- a) The increase of consumer confidence,
  - b) High level of consumer protection,
  - c) The lowering of transaction costs
- and
- d) The increase of Legal certainty.

Wilhemsson starts with what could be understood as an analysis of the economic dimension of subsidiarity. His analysis of the ‘purposes’ of the directives shows that, in each of these criteria, the Directive has a rather unconvincing record.<sup>327</sup> For consumer confidence, the importance of the uniformity of legal rules is limited, and where they could have some influence (prohibition of clearly unfair practices), it is clear that minimum harmonisation would suffice.<sup>328</sup> In terms of lowering transaction costs and increasing legal certainty, which are the core objectives of the directive, the maximum harmonisation will not remove diversity completely, and may even increase legal uncertainty, insofar as it is not clear which national

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<sup>327</sup> Ibid.

<sup>328</sup> Ibid.

rules are to be abandoned and which not.<sup>329</sup> Finally, the Directive has not adopted the highest level of consumer protection, which means that in a number of MS, the level will be lowered, even if in others it may be increased.<sup>330</sup> From the perspective of higher levels of consumer protection, the most worrisome thing appears to be the fact that maximum harmonisation bars the MS from prompt reaction in cases of new kinds of harmful commercial practices, which leaves the consumer with only individual redress.<sup>331</sup>

If the Directive shows a weak record with regard to the ‘purposes’ (i.e. performance) against the self-set group of economic objectives, it performs even worse with regards to ‘unrelated purposes’, such as social justice. The Directive is clearly oriented toward market transparency, and even if it claims to aim for a high level of consumer protection, that concern remains, at best, secondary. What is more interesting from the perspective of this thesis is that very few alternative goals are articulated – we mainly remain with consumer protection, which is of such importance to the debate that it can hardly be overlooked, even by the Commission, which thus incorporates it into the debate. But there may be many more issues out there that remain outside the restricted frame of the debate.

Finally, there are good reasons to criticise the purpose of the Directive and the way it fits into the normative framework of the Constitution. It is questionable as to what extent the ‘strength’ of the economic arguments can outweigh the losses in the more holistic understanding of the performance in the EU, along with the losses in terms of the removal of competence from the democratically more legitimate levels of government.

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<sup>329</sup> Ibid.

<sup>330</sup> Ibid.

<sup>331</sup> Ibid.

### 7.3. The 2008 Proposal for a Consumer Rights Directive

After ‘successfully’ *fully harmonising* the abovementioned consumer law fields, in 2008 came the crown effort of the Commission – The Proposal for the Directive on Consumer Rights.<sup>332</sup> The Consumer Rights Directive was supposed to be a *horizontal directive*, setting common standards for the large area of consumer law. It was at first meant to cover the whole consumer *acquis* (eight directives), but later was restricted to cover only four directives – directives, nonetheless of major significance. In particular, these are the Distance Selling Directive,<sup>333</sup> Doorstep selling Directive,<sup>334</sup> Directive on Unfair terms<sup>335</sup> and Sale of Consumer Goods Directive.<sup>336</sup>

Two large innovations have occurred – the attempted horizontality of the measure, aimed at the unification and simplification of consumer law, and secondly, the shift from minimum to full/maximum harmonisation. As it concerns the former, the driving force was the Better Regulation policy and the aim was for the simplification of the regulatory framework.<sup>337</sup> The latter was then related to the Lisbon Strategy of increasing the competitiveness of the EU and making the EU fit for globalisation.<sup>338</sup>

The public outcry that the Proposal caused was exceptional for the area of private law.<sup>339</sup> The concerns raised were substantive and procedural. In particular, the impact on the

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<sup>332</sup> European Commission, “Proposal for a Directive of the European Parliament and of the Council on Consumer Rights, COM (2008) 614 Final”, October 8, 2008.

<sup>333</sup> “Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the Protection of Consumers in Respect of Distance Contracts.

<sup>334</sup> “Council Directive 85/577/EEC of 20 December 1985 to Protect the Consumer in Respect of Contracts Negotiated Away from Business Premises”.

<sup>335</sup> “Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts”, n.d.

<sup>336</sup> “Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on Certain Aspects of the Sale of Consumer Goods and Associated Guarantees” (Official Journal L 171 , 07/07/1999 P. 0012 - 0016.

<sup>337</sup> See Chapter 3.

<sup>338</sup> Micklitz, “The Targeted Full Harmonisation Approach.”

<sup>339</sup> Just a few examples: Stefan Vogenauer and Stephen Weatherill, *The Harmonisation of European Contract Law: Implications for European Private Laws, Business and Legal Practice* (Hart Pub., 2006); P. Rott, “Maximum Harmonisation and Mutual Recognition Versus Consumer Protection: The Example of Linked Credit Agreements in EC Consumer Credit Law,” in *The European Legal Forum*, vol. 6, 2006; G. Howells and N. Reich, “The Current Limits of European Harmonisation in Consumer Contract Law,” in *ERA-Forum*, 2011, 1–19; Norbert REICH and Hans-Wolfgang MICKLITZ, “Crónica De Una Muerte Anunciada: The Commission Proposal for a ‘Directive on

social dimension of private law was raised.<sup>340</sup> Procedurally, it was particularly the abuse of the legitimising capacity of the consultation procedure in order to justify matters that had been decided on previously.<sup>341</sup>

The outcry resulted in the European Parliament's rejection of the Proposal, and adoption of a considerably narrower instrument.<sup>342</sup> Despite the failure of the measure<sup>343</sup>, however, the constitutional significance of this step of the EU institutions, and the framework for action which it forms part of, warrant our deeper analysis. We will examine the legitimacy of the Proposal and the roots of its failure.

#### **7.4. *Subsidiarity Analysis: Is there a reason to act?***

To analyse the compliance with the Subsidiarity Principle and consequently assess the preconditions for the performance legitimacy of action, we need to look at two dimensions of subsidiarity. First, we need to examine the economic performance justification put forward by the Commission, or to paraphrase Wilhelmsson, the 'purposes' of the measure. This, however, will not be sufficient in concluding that a certain measure complies with the Subsidiarity Principle, insofar as we still have not been able to assess the whole breadth of costs that the action implies.<sup>344</sup> Thus we need to take a second constitutive step in the Subsidiarity Analysis, which in this thesis is referred to as the 'Democratic dimension' of the principle. We need to address the issue of proximity of decision-making, the difference in democratic legitimacy of the two levels of governance, but also the question of costs of the alternative goals, values and visions of good life, which may be lost in the rationality of the functional polity.

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Consumer Rights," *Common Market Law Review* 46, no. 2009 (n.d.): 471–519; P. Rott and E. Terry, "The Proposal for a Directive on Consumer Rights: No Single Set of Rules," *ZEUP: Zeitschrift Für Europäisches Privatrecht*, no. 3 (2009): 456–488; G. HOWELLS and R. SCHULZE, "Overview of the Proposed Consumer Rights Directive," *Modernising and Harmonising Consumer Contract Law, Sellier European Law Publishers, München* (2009): 3.

<sup>340</sup> Rott, "Maximum Harmonisation and Mutual Recognition Versus Consumer Protection." REICH and MICKLITZ, "Crónica De Una Muerte Anunciada."

<sup>341</sup> Micklitz, "The Targeted Full Harmonisation Approach."

<sup>342</sup> Ibid.

<sup>343</sup> REICH and MICKLITZ, "Crónica De Una Muerte Anunciada."

<sup>344</sup> See Chapter 3. For the similar interpretation see Davies, "Subsidiarity."



Now, the 2008 Commission's Proposal of the CRD was characterised by important elements - the horizontality of the measure and the maximum harmonisation regulatory rationale. In the following analysis, we will however concentrate on the performance legitimacy of the maximum harmonisation of consumer law, when the horizontality (in itself unproblematic) becomes rather an 'aggravating' factor.

The 'economic' justification of the measure stands on two objectives – decreasing the transaction costs for businesses<sup>345</sup> (including legal certainty<sup>346</sup>) and the improvement of 'consumer confidence'<sup>347</sup>. Even though consumer protection is often relied upon in the justificatory discourse, it would be a misunderstanding to think of a high level of consumer protection as the aim of the Directive in its own right – the aim is consumer *welfare*,<sup>348</sup> which in essence, aims to benefit consumers only indirectly, through establishing the functioning market, which should allow them to 'reap up' the benefits of the market through *increased choice and lower prices*.<sup>349</sup>

#### **7.4.1. Economic Dimension of Subsidiarity**

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<sup>345</sup> European Commission, "Proposal for a Directive of the European Parliament and of the Council on Consumer Rights, COM (2008) 614 Final."

<sup>346</sup> Ibid, Recital 8.

<sup>347</sup> Ibid, Recitals 6 and 7

<sup>348</sup> The impact assessment puts forward these possible effects of legislation – the effects evidently aim at macro economic benefits rather than micro economic justice. European Commission, "Commission Staff Working Document Accompanying the Proposal for a Directive on Consumer Rights. Impact Assessment Report.," 25, 26.

*The assessment of each Policy option is presented in an assessment grid which rates and summarises the expected effects. Additional issues that have been taken into account include:*

- *Lower prices as a result of enhanced competition*
- *Greater consumer choice*
- *Higher quality products*
- *Business growth as a result of increased cross-border trading*
- *Benefits resulting from the simplification brought about by proposed measures (in line with aspects of 'Better Regulation')*

<sup>349</sup> The only direct concern for consumer confidence is the argument regarding conducting pan-European campaigns about consumer rights, something that hardly any consumer association (not to mention individual consumers) would consider of high benefit.

We shall start with the words of the Commission, in which it describes the problem, or ‘disease’ of the current system, and prescribes a cure. Note the full concentration on the performance expected from the EU, without any accommodation of the broader purpose the EU pursues conjointly with the MS.

*The Directives under review contain minimum harmonisation clauses meaning that Member States may maintain or adopt stricter consumer protection rules. Member States have made extensive use of this possibility. **The outcome is a fragmented regulatory framework across the Community which causes significant compliance costs for businesses wishing to trade cross-border.** The conflict-of-law rules like those included in the Regulation on the law applicable to contractual obligations ("Rome I") **do not address this problem.** Under Rome I, consumers contracting with a foreign trader cannot be deprived of the protection stemming from the non-derogable rules of their home country. **The internal market effects of the fragmentation are a reluctance by businesses to sell cross-border to consumers which in turn reduces consumer welfare. If consumers are precluded access to competitive cross-border offers they do not fully reap up the benefits of the internal market in terms of more choice and better prices.***

*The level of consumer confidence in cross-border shopping is low. One of the causes of this phenomenon is the fragmentation of the Consumer Acquis. The fragmentation and the related uneven level of consumer protection make it **difficult to conduct pan-European education campaigns on consumer rights and to carry out alternative dispute resolution mechanisms.** The objective of the proposal is to contribute to the better functioning of the business-to-consumer internal market by enhancing consumer confidence in the internal market and reducing business reluctance to trade cross-border. **This overall objective should be attained by decreasing the fragmentation, tightening up the regulatory framework and providing consumers with a high common level of consumer protection and adequate information about their rights and how to exercise them.** To this end, the European Commission will put in place a process in order to look for the most appropriate way to inform consumers on their basic rights at the point of sale.<sup>350</sup>*

The main argument behind the proposal is decreasing the transaction costs for businesses. Legal ‘fragmentation’ (or ‘legal diversity’) imposes transaction costs on companies insofar as it obliges the businesses to adapt its activities depending on the consumer protection legislation in each of these countries, which creates barriers to cross-border trade and an un-even playing field (it becomes more expensive for foreign businesses

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<sup>350</sup> European Commission, “Proposal for a Directive of the European Parliament and of the Council on Consumer Rights, COM (2008) 614 Final,” 2.

to trade).<sup>351</sup> These obstacles in turn prevent market integration (chiefly through means of distance selling), and so reduce overall economic welfare.

Even though minimum harmonisation has been in place, it has done a poor job at reducing costs. Although the level of diversity was reduced, a number of differences remained in place. The only possible solution to the problem of legal fragmentation was then to abandon the approach of minimum harmonisation and adopt a full or maximum harmonisation of consumer *acquis*. Full Harmonisation should bring the desired uniformity, by preventing the MS from keeping or introducing more stringent consumer protection measures and thus impeding internal market objectives.<sup>352</sup> The only level suitable for bringing about this uniformity is the EU - inasmuch as the MS cannot tackle the problem of legal diversity ('fragmentation') themselves.<sup>353</sup> But how convincing is this argument?

#### **7.4.1.1.      *Argument 1: Transaction Costs***

##### **7.4.1.1.1.      *Discussing Evidence ...***

There is no doubt that legal diversity imposes some costs. A significant question, then, is how serious the costs that it imposes are<sup>354</sup> – and for this reason we need to look at the evidence for ***the gravity of the problem*** put forward by the Commission, to substantiate the need to intervene in order to remove 'legal fragmentation'.<sup>355</sup> The argument of reducing transaction costs then relies on the capacity of the harmonisation to achieve ***uniformity and legal certainty***. On the other hand, if we admit that legal fragmentation imposes costs, we may also accept that harmonisation will impose some costs, thus the ***economic costs of***

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<sup>351</sup> Ibid., 2,3.

<sup>352</sup> Ibid.

<sup>353</sup> Ibid.

<sup>354</sup> It is important to note that when we are discussing the Economic Dimension of Subsidiarity, we remain in the framework where the EU will have generally 'stronger' claim. Yet, it is exactly here that the measure has failed.

<sup>355</sup> Stefan Vogenauer & Stephen Weatherill, 'The European Community's Competence to Pursue the Harmonisation of Contract Law – An Empirical Contribution to the Debate', in Vogenauer and Weatherill, *The Harmonisation of European Contract Law*, 105.

*harmonisation* are the next at niche. Finally, I will look at the *constitutional dimension of the maximum harmonisation*.

### ***Gravity of the Problem***

The main evidence for the need to enact the CRD is based on the Eurobarometer special surveys from 2008, as interpreted in the Impact Assessment and the Explanatory Note to the Proposal. In the Impact Assessment, the Commission claims that *‘compliance costs resulting from the legal fragmentation of the EU consumer Acquis are rated by respondents to the 2008 Eurobarometer survey as being more important than additional costs arising from language differences, costs in ensuring an efficient cross-border after sales service, delivery costs or cross-border complaint resolution.’*<sup>356</sup>

This seems to be a very strong reason to believe in the gravity of the problem and the need to address it. Nonetheless, after a more careful examination of the arguments in the supporting evidence, this statement appears to be in direct contradiction of the Eurobarometers. Disregarding whether we look in the Eurobarometer Analytical Report 2008, the Summary of that Report, or the Joint Summary of Businesses and Consumers attitudes, there is *no evidence of what the Commission is claiming*. This is what is being said in all of these documents:

*The perceived cost of the insecurity of transactions (potential fraud or non-payment) was seen as the main obstacle to cross-border trade identified by retailers: 63% of respondents that answered the question considered these costs to be a fairly important or very important obstacle (up 2 percentage points, slightly beyond sampling error, from 2006). Other obstacles were almost equally important with retailers being concerned about:*

- the perceived cost of complying with different national fiscal regulations (up 4 points to 62% compared to 2006, EU25)*
- the perceived cost of complying with different national laws regulating consumer transactions (60% vs. 55% in 2006)*
- the perceived cost of the difficulty in resolving cross-border complaints and conflicts (59%, only a nominal change since 57% in 2006)*
- the extra costs arising from cross-border deliveries (57% vs. 51% in 2006)*

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<sup>356</sup> European Commission, “Commission Staff Working Document Accompanying the Proposal for a Directive on Consumer Rights. Impact Assessment Report.,” 7.

- the cost of ensuring an efficient after-sales service (55%; no change from 2006).

*The costs arising from language differences stood out as being somewhat less important (45%)*

The picture becomes even more distorted as the various types of potential obstacles to cross-border trade are discussed (so called ‘practical’ as opposed to ‘regulatory’ obstacles<sup>357</sup>). In order to show the relevance of the intended full harmonisation of substantive consumer law, the Commission interprets the evidence in a manipulative way, so as to underscore the importance of obstacles which were considered by the stakeholders to be of *practical* nature (language, costs of delivery etc.), as opposed to *regulatory* obstacles (obstacles stemming from regulatory burden).<sup>358</sup> But also within the subgroup of ‘regulatory obstacles’, the Commission has misinterpreted the results so as to highlight the significance of fragmentation of consumer law as opposed to, for example, tax regulation or redress mechanisms.<sup>359</sup>

Such practices rather clearly underline the instrumental use of the consultation procedure – not to come to a well founded conclusion on the basis of the democratic procedures, but rather to push forward the Commission’s own point of view.

What is more, if one really wants to look for evidence of ‘what really matters’ for cross-border trade, it seems that one may find plenty, even in the Eurobarometers themselves. My attention was drawn to the championing of the Czech and Slovak Republics in cross-border ‘advertising’, with a significant cross-border trade element - contrary to a number of other New Member States.<sup>360</sup> What is the reason for this? Some data in the Eurobarometer (namely, the number of EU MS to which they direct their activities, or are willing to extend their activities), along with basic knowledge of the socio-economic conditions, will help us to draw some conclusions.

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<sup>357</sup> See Part 7.4.1.2.

<sup>358</sup> European Commission, “Commission Staff Working Document Accompanying the Proposal for a Directive on Consumer Rights. Impact Assessment Report.”

<sup>359</sup> Ibid.

<sup>360</sup> European Commission, “Flash Eurobarometer: Retailers’ Attitudes Towards Cross-border Trade and Consumer Protection; Analytical Report”, March 2011, 23.

The two countries have supra-standard relations to each other – not only with regard to the overall trade balance *but in particular, retail trade in both goods and services*<sup>361</sup> - which is the main objective of the Commission's efforts. Even though the legal systems of these two countries have, over the years, grown significantly apart- including consumer protection law (which was actually introduced only after the split of the countries)- cross-border trade has been steadily increasing.

The 'success' so seems to lie elsewhere than in the 'uniformity' of legal regulation. While 'legal fragmentation' has increased significantly in all fields of regulation, including those rated as much more dissuasive by the Commission, the 'practical obstacles' (linguistic and cultural proximity, but also path dependency in issues like cheaper postal services) between these countries are virtually non-existent, and cross-border retail distance trade flourishes in a rather remarkable way.

To sum up, the Commission has failed to come up with a convincing set of reasons which would show that a problem of sufficient gravity is caused by the fragmentation of substantive, consumer law.

### ***Savings***

The second set of evidence which justifies the need for full harmonisation put forward by the Commission is of the numerical kind. That is to say that we refer here to the estimated savings per business which intends to engage in cross-border shopping with one or more MS. These are expected to range from circa. 5000eur – 70000eur (depending on how many

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<sup>361</sup> Czech Republic is the second most important business partner of Slovakia - after Germany, which is thanks to the size of the two countries and two economies, and in comparison with other EU MS can be considered above the standard relation. See Slovak Statistical Office <http://portal.statistics.sk/showdoc.do?docid=33118>. As it concerns the online retail trade, even though I was not able to find official data on either of the countries, after some empirical inspection it seems that many major online retailers direct their services to both countries (this may also be understood as one of, if not the single most important reason for high rates if compared to other MS).

countries the seller trades in).<sup>362</sup> This argument will clearly depend on the fact that the gravity of the problem is as great as the Commission suggested in the previous argument.

Now, even if for many of us the cost of understanding the data presented by the Commission is too high, what is not difficult to conclude, however, is that as with all estimations, the results will differ according to the preference of those creating or interpreting them. Thus they will be more or less optimistic – depending on who the author is, and what the followed aim is.<sup>363</sup>

The Commission estimates the costs and savings from the full harmonisation of consumer law as follows:

*Given the full harmonisation of the proposal, for existing distance sellers the additional burden generated by the proposal (the cost of change) is 2153 Euros per company. For existing doorstep sellers, the cost of change is 3653 Euros per company. No additional burden is envisaged for face-to-face retailers. By incurring this cost of change, existing businesses will comply with the relevant legal requirements across the EU and will be able to trade freely in 27 Member States. This will result in a significant reduction of the burden for companies wishing to sell cross-border in the EU.*

*For example, a distance seller already trading in his home country will be able to sell to 27 Member States by incurring a cost of 2153 Euros instead of 70.526 Euros. Similarly, a doorstep seller already trading in his home country will be able to expand his operations to 27 countries for 3653 Euros instead of the sum of 71.625 Euros that he would have to incur under the current, fragmented regime.*<sup>364</sup>

Notwithstanding the plausibility of the arguments regarding the possibility of doorstep sellers expanding their business to all 27 MS, we may ask ourselves whether there is any benefit (as opposed to compliance costs) for the majority of sellers in MS, who do not trade cross-border? And how we should understand the statement of the Commission that ‘no additional burden’ will be faced by face-to-face sellers? Does it mean to say that these

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<sup>362</sup> European Commission, “Commission Staff Working Document Accompanying the Proposal for a Directive on Consumer Rights. Impact Assessment Report.,” 12.

<sup>363</sup> As it must be clear from the previous discussion, this need not be a case of ‘dishonesty’, but rather of the lenses adopted, equally as the ‘performance’ expected from those interpreting the data.

<sup>364</sup> European Commission, “Commission Staff Working Document Accompanying the Proposal for a Directive on Consumer Rights. Impact Assessment Report.,” 38.

businesses will not incur any compliance cost – which hardly seems credible – or that any cost will be less than that incurred by distance/doorstep sellers? Where lies the added value for the majority of retailers, who have no capacity to trade cross-border?

More importantly however, the Impact assessments, as well as the Eurobarometers, discuss basically only costs/savings for distance sellers, and (more problematically for) doorstep sellers. It is difficult then to see how such justification of full harmonisation could support the full harmonisation of the whole of consumer law, of which the distance and doorstep trade is only small fragment.<sup>365</sup>

#### **7.4.1.1.2. Uniformity and Legal Certainty**

So far, we have assumed that the harmonisation of consumer law would actually lead to the uniformity of legal regulation in the field of consumer law. But is this really a plausible assumption? Let's try to imagine the system of private law in the EU in more popular, technological terms. As it stands thus far, European Private Law is of patchwork character, and relies on the background support of national private law.<sup>366</sup> The *Acquis Communautaire*, can thus be compared to 'software' operating on the 'hardware'<sup>367</sup> of national private law.

This 'interactive' principle remains in place also in the case of maximum harmonisation – it could possibly reduce the importance of the 'hardware' of national private law, but it could not remove its importance altogether, insofar as a number of questions were still left to the national law (such as how to terminate a contract of sales or the consequences of the termination etc.). Of course (as one of the 'backdoor harmonisation' arguments

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<sup>365</sup> This will be explained when looking at the Consumer Confidence argument below, but foremost in the following discussion on the consultation procedure that preceded the Proposal.

<sup>366</sup> While the directives would operate with various private law concepts, their meaning and implications are getting shape depending on the underlying system of private law.

<sup>367</sup> This illustration is not quite precise, insofar as I do not intend to imply that national private law and European private law are essentially different, such as one may imply from reference to hardware as 'physical object', while software may refer to the data sequence/information. Rather, what I have in mind is the complementary relation between the hardware, as a basis of operation, and the software as a complement of the basic unit. However, while software can not operate without hardware, hardware can operate without 'a particular' software – (it must have some software to be capable of being self standing – which national private law is).



implies) the European general contract law instrument, whatever its status,<sup>368</sup> could often be expected to fill in the gaps thanks to the 'completionist mood'<sup>369</sup> of the CJEU.

The second fundamental dimension that calls into question the desired legal certainty is the issue of the 'scope' of the harmonisation measure. Thanks to the hardware – software duality, the questions of 'what is inside' and 'what is outside' of the maximally harmonised framework would create uncertainty and cause difficulties to the national legislators in implementing the measure (what they must change and what they cannot, which new measures they can or cannot introduce). This uncertainty may lead also to litigation.

The institutional side of the story amplifies this negative effect. The existence of the numerous blanket clauses and open concepts in the Proposal left space for considerable variations of interpretations related to differing national legal cultures. This problem called for an institutional solution, however, the solution was yet again found in the CJEU and its preliminary references procedure.

This 'non-solution' would cause difficulties in the administration of private justice thanks to the predictable delays in adjudication – by this I do not imply the two-year timeframe the procedure usually takes today, but the eventual prolongation of the procedure thanks to the shifting of the significant burden of private law adjudication to the CJEU. The rather modest EU court structure was not designed to take over the largest litigation field – matters of private law. In particular, if both projects (CRD and the Optional Instrument) had succeeded in their full splendour, the capacity of the CJEU would have been stretched to its limits, if not beyond.

#### **7.4.1.1.3.                    *Economic costs of harmonisation.***

The third promised argument that will be put forward is that of the economic costs of harmonisation. There is no doubt that legal diversity creates some costs, but harmonisation also creates costs – as broadly understood and asserted by the stakeholders in the consultation

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<sup>368</sup> Hesselink, "A Toolbox for European Judges."

<sup>369</sup> S. Weatherill, "The 'principles of Civil Law' as a Basis for Interpreting the Legislative Acquis," *European Review of Contract Law* 6, no. 1 (2010): 74.

procedure.<sup>370</sup> Thus any advantages of harmonisation need to be compared and balanced against the costs of harmonisation, making sure that the costs will not outweigh the benefits.

Interestingly, although raised by a number of stakeholders, the question of the cost *of harmonisation* was not taken up by the Commission. Neither the Proposal nor the Impact Assessment address the question of the economic costs attributed to the harmonisation process- such as the heterogeneity of preferences and problems, knowledge and Innovation, political economy problems such as rent seeking difficulties, or forfeiting the benefits of regulatory competition, in particular if measures are taken (such as minimum harmonisation) to prevent the race to the bottom.<sup>371</sup> To exemplify this omission, we will look at several instances where the costs of harmonisation are high and thus at least worthy of discussion on the Commission's side.

In numerous enlargements, the EU has become increasingly more diverse in social and economic terms. We have seen the on one hand the increase of the variety of problems, as well as the increase of the variety of preferences. Partially for this reason, we see that the most recently added MS often keep the minimum level of harmonisation, which may fit better with their need to create the market in their territories, while the older MS have made extensive use of the possibility of providing for higher-level or additional protection in various cases.<sup>372</sup> The minimum harmonisation thus allows the accommodation of such divergences in an economically justified way.<sup>373</sup>

While consumer law is, in many instances, the response to particular problems and actions taken, for example, by the consumer authorities or consumer NGOs, removing the possibility of reacting at the national level would have detrimental effects on the level of

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<sup>370</sup> Consumer Policy Evaluation Consortium, "Preparatory Work for the Impact Assessment on the Review of the Consumer Acquis", November 6, 2007, 49–52.

<sup>371</sup> Ibid, 76 – 85.

<sup>372</sup> H. Schulte-Nolke, Ch. Twigg-Flesner, and M. Ebers, eds., "EC Consumer Law Compendium - Comparative Analysis -."

<sup>373</sup> Faure contends that disregarding deeply rooted preferences increases the tendency to default on enforcement. See Faure, M, Economic Analysis of Tort Law and European Private Code; in A.S. Hartkamp (Editor), Martijn Hesselink (eds.) Towards a European Civil Code, Third Fully Revised and Expanded Version, Kluwer Law International, 2004.

consumer protection<sup>374</sup> (thus directly impacting on the responsibility of the MS to deliver the performance expected from them in the social order instituted by both private and consumer law).

Maximum harmonisation would impact on the possibility of speedy reactions to the newest problems that occur in the consumer sector. This slow reaction would occur, on the one hand, because of the locality of knowledge of both the problem and the adequate solution, but also because of the cumbersome nature of the legislative process at the European level, whereby changes may enter into effect when the story is long *pase*.<sup>375</sup> Finally, the lawmaker did not find it appropriate to address the question of learning and experimentation – from which it alone had benefited extensively in the past.<sup>376</sup>

These omissions are serious not only in substantive, but also in procedural terms. Even if the points were raised by stakeholders from various groups, they did not find resonance in the ears of the Commission. Legitimation through participatory mechanisms, such as consultation, however, can only be claimed if one sincerely engages with all arguments; selectively choosing the ones that seem to support the desired outcome undermines the legitimacy (maybe more than no consultation whatsoever).

#### **7.4.1.1.4. Scope of the Proposal and the Constitutional Concerns**

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<sup>374</sup> To that end see e.g. very good response of BEUC on the Green Paper. Bureau Européen des Unions de Consommateurs (BEUC), “Mapping the Future of Europe’s Consumers... Comments on the Green Paper ‘Review of the Consumer Acquis’ (COM (2006) 744 Final)”, May 21, 2007, 12, 13.

<sup>375</sup> Scharpf, “The Joint-decision Trap.” Scharpf, “The Joint-Decision Trap Revisited.”

<sup>376</sup> “*The directives of the nineties were the result of a maximization policy. The European Commission chooses the best out of the different national legal orders and condensed it in a European bottom line rule. (...) Often national legal experimentalism has a clear cut background which results from national or even regional grievances. Maximum harmonization will and shall set an end to national legal experimentalism. Language is telling. Experimentalism has a positive connotation,<sup>2</sup> fragmentation has a negative one. Experimentalism implies a bottom-up, fragmentation a top-down perspective.*” Micklitz, “The Targeted Full Harmonisation Approach.”

The implications of maximum harmonisation for private law have a significant *constitutional*<sup>377</sup> dimension, although this is hidden in the debate about the Consumer Rights Directive.<sup>378</sup> The constitutional dimension relates to the change in the constitutional division of tasks in private law, hence upsetting the rationale behind that division - without robust discussion.

The minimum harmonisation preserves the regulatory competence of the MS, which can act in order to increase the scope of the protection, or add protection in case the European regulation does not fully correspond to the need. As the Impact Assessment underlines, this has happened extensively.<sup>379</sup> This means that, first of all, the MS could have increased the level of protection to where they deemed *just*, or they could *react* (comparatively) much more *flexibly* to the occurring threats, but also that they could *remove the deficiencies* of the EU regulation. The Commission, however, bluntly asserts the negative impact of such interventions – the increase of legal *fragmentation* – without engaging in any evaluation of positive dimension or even the synergies created by the interventions of the MS.

The proposed full harmonisation then implies that, within the 'scope' of the directive, the 'pre-emptive effect applies',<sup>380</sup> thus all issues that were fully harmonised at European Level cannot be 'touched' by the MS - for no reason. How far this prohibition should have gone is far from clear. Thanks to the specific interaction between different levels of EPL, the breadth and the depth of the prohibition would have been open to interpretation. The CJEU however, to whom the interpretation will be left in the end, is still caught up in the functional rationality and the self-understanding as the agent solely of the EU.<sup>381</sup>

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<sup>377</sup> Concerning the underlying of powers division between the 'social' and 'economic' in the EU in general, and private law in particular.

<sup>378</sup> Gert Brueggemeier, Mauro Bussani, Hugh Collins, Aurelia Colombi Ciacchi, Giovanni Comandé, Muriel Fabre-Magnan, Stefan Grundmann, Martijn W. Hesselink, Christian Joerges, Brigitta Lurger, Ugo Mattei, et al., "Social Justice in European Contract Law: A Manifesto," *European Law Journal* 10, no. 6 (n.d.): 653–674.

<sup>379</sup> European Commission, "Commission Staff Working Document Accompanying the Proposal for a Directive on Consumer Rights. Impact Assessment Report.", p 11.

<sup>380</sup> See the discussion in Weatherill, "The 'principles of Civil Law' as a Basis for Interpreting the Legislative Acquis."

<sup>381</sup> See the discussion of Axa Royale Belge in Chapter 5, or the Product Liability in Chapter 10

The importance of full harmonisation lies not only in changes of the division of tasks between the different levels of government, but also in changing the *dominant rationality* behind consumer and private law. Most significantly perhaps, the ‘social’ as a rationality which may be dominant at the national level (but must not be – depending on the outcome of the democratic processes) loses its potential to be (at times) a *primary* goal in private law. The aggregate effect of this change, along with removing the possibility of sufficiently prompt action in cases of need, would have negatively impacted on democratic processes in consumer and private law.

That may have more negatively affected some groups than others – in particular those who were less competent and had so far profited from the different rationality of national private law. This is a significant political element of the full harmonisation, which remains hidden in the un-political discourse revolving around the best manner in which to achieve pre-set goals and objectives (market integration (online market in this case) and competitiveness), the *raison d’être* of the EU.

#### **7.4.1.2.      *Argument 2: Consumer Confidence***

The consumer confidence argument has been the second pillar of the Commission’s justification of the Proposal. The Commission argues for the need to increase consumer confidence in the internal market, in order to encourage consumers to shop cross-border. This should lead to market creation and to benefits for consumer welfare – in the form of better prices and greater choice. This part of the argument has been considered unproblematic; it is only *the means with which to achieve the increase of consumer confidence* which was called into question, and finally contributed to the rejection of the 2008 Proposal.

There is indeed an easily perceivable problem with the internal online market. Divisions exist along linguistic or national lines, but those same lines are highly diversified in terms of prices for consumer goods. On the basis of (admittedly limited) research into consumer prices in the EU, the Commission establishes that the same products are being offered to consumers in different countries with considerable price differences - up to a 60%

disparity between the cheapest and most expensive EU MS.<sup>382</sup> Of course, most striking in this regard is the differential pricing of multinational companies in various MS.<sup>383</sup>

Now, the Commission could have tried to address this problem at the supply side or at the demand side. The supply side would try to find and address the causes of differential prices, which could eventually lead to public regulation. Such action could, in effect, redistribute the profits, and in that case, this would also benefit consumers.<sup>384</sup> However, that is not in line with the market rationality and the free markets paradigm that the EU constitution endorses – thus this path was never discussed or raised, even though it may actually be much more effective for the creation of the internal market (many multi-nationals profit from the internal increasingly imaginary borders).<sup>385</sup>

Thus the Commission has decided to concentrate on the opening of the market through focusing on consumers' will to shop cross-border. In the Impact Assessment, it analyses what the obstacles are that prevent consumers from shopping across borders, dividing them into three groups:

1. *Reasons of a practical and regulatory nature (e.g. language, geography, tax regimes etc.) which are unrelated to EU consumer law*
2. *Reasons of a practical and regulatory nature, which are affected by EU consumer law (e.g. delivery and complaint handling problems);*
3. *Other factors that are linked to EU consumer law, such as insufficient knowledge of the law by consumers, difficulties in obtaining redress and poor enforcement.*

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<sup>382</sup> European Commission, "Commission Staff Working Document Accompanying the Proposal for a Directive on Consumer Rights. Impact Assessment Report.," 10. Also Annex 2 to the Impact Assessment.

<sup>383</sup> See <http://www.eumonitor.net/category/area/eu-institutions?page=809>.

<sup>384</sup> There is one instance where this has happened, and that is the Roaming Regulation. This however appears to be fundamental for the free movement of persons, thus it is close to the goals and objective of the Communities. Interestingly, Maduro in Vodafone opinion argues that this is justified because the EU is responsible for the removal of democratic externalities which adversely fall on the 'mobile' actors, insofar as these are not sufficiently represented in the national democratic processes. Kumm on the other hand believes that the purpose of the EU intervention should be the problems of collective action and removal of democratic externalities of the national democratic processes which, in order to attract mobile actors in the internal market, tend to transfer the costs in to the immobile actors. While the latter function is more desirable for the EU, the former is the one the EU assumes. Kumm, "Constitutionalising Subsidiarity in Integrated Markets."

<sup>385</sup> The same free market paradigm will also advise us to attract the capital and mobile actors by lowering their obligations and moving costs to those immobile economic actors. Ibid.

As it concerns the first group, these in Commission's view refer to the '*lack of physical or psychical proximity*'.<sup>386</sup> There is, admittedly, very little that can be done about this group. The second group is however – according to the Commission - of a different kind. Obstacles such as after-sales services, delivery (delay and damage), guarantees and request for refunds, as well as complaint handling problems which are considered by the consumer stakeholders to be practical, and understood by the Commission as a regulatory aim which is removable (at least in part) by the removal of the fragmentation of the consumer framework.

*Even though (...) factors are perceived by consumers as being of a practical nature, they all have a regulatory dimension and are relevant under the Consumer Sales Directive or distance Selling Directive.*<sup>387</sup>

Now, how relevant is the 'regulatory dimension' to these problems? Consumers are dissuaded from engaging in cross-border shopping mainly by fears which relate to the potential difficulties in resolving problems which could arise in connection with delivery, returning goods, after-sale service or complaints.<sup>388</sup> The practical obstacles are often related to the question of language – all problems could be much more burdensome in instances where the consumer does not (sufficiently) speak the (foreign) language of the seller. The willingness to shop cross-border will of course depend on the type of product (these problems will be considered less salient in relation to books than in connection with complex electronic equipment).

Further considerations which might dissuade the consumer from shopping cross-border could be technical standards (such as differing electric plugs)<sup>389</sup>, environmental concerns, the positive experiences with, and trust in, the local seller/service provider, and finally, access to 'after sales services'<sup>390</sup> and lower costs should the goods eventually need to

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<sup>386</sup> European Commission, "Commission Staff Working Document Accompanying the Proposal for a Directive on Consumer Rights. Impact Assessment Report.," 13.

<sup>387</sup> Ibid.

<sup>388</sup> Summary of 2008 Eurobarometers, p 15.

See [http://ec.europa.eu/consumers/strategy/facts\\_eurobar\\_en.htm](http://ec.europa.eu/consumers/strategy/facts_eurobar_en.htm)

<sup>389</sup> M.B.M. Loos, "Full Harmonisation as a Regulatory Concept and Its Consequences for the National Legal Orders. The Example of the Consumer Rights Directive," *European Review of Private Law* 1 (2010): 108.

<sup>390</sup> Ibid.

be returned. To paraphrase the Commission, the practical obstacles relate to the ‘physical and psychological proximity’ of the provider.

There is additionally ample evidence to show that consumers are not interested in substantive legal rules. Arguments from psychology, behavioural economics, and sociology of law suggest that the Commission’s conclusions are very remote from reality. Low shows that consumers care little about the (diversity of) legal rules<sup>391</sup>. Rather, what seem to be of interest to them are the issues that the Commission calls ‘practical’ obstacles, eventually the ‘practical dimension’ or second (and third) group of obstacles.

What is, however, even more surprising is that the Commission has not only taken up those few legal issues which could have an impact on consumer confidence, but at times has acted in ways which would be more likely to dissuade the consumers from cross-border shopping.<sup>392</sup> Thus, making ‘sellers’ (instead of ‘producers’) solely responsible for the defective goods is a considerable impediment to cross border shopping, insofar as it may not make use of the after-sale services in the country where the consumer lives – which would address the practical obstacle of geographical accessibility of after-sales services. Eventually, the preservation of the two level system of responsibility for defective products, which conditions the refund with a prior replacement-or-repair stage (to be chosen by the seller), becomes considerably more difficult in cases of cross-border transactions<sup>393</sup>. Equally, the introduction of notification of the seller seems to defeat the purpose of the increase in number of the cross-border transactions<sup>394</sup>.

The third group of obstacles then relates to the insufficient knowledge of law and cross-border enforcement. Here the Commission intends that the full harmonisation should lead to the possibility of addressing the low levels of consumer confidence by means of ‘conduct[ing] pan-European education campaigns on consumer rights, carry[ing] out

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<sup>391</sup> G. Low, “The (Ir) Relevance of Harmonisation and Legal Diversity to European Contract Law: A Perspective from Psychology” (2010),” *European Review of Private Law* 18 (n.d.): 285.

<sup>392</sup> J. Smits, “Full Harmonisation of Consumer Law? A Critique of the Draft Directive on Consumer Rights,” *European Review of Private Law* (2009): 5–14.

<sup>393</sup> Ibid.

<sup>394</sup> Ibid.



*mediation or other alternative-dispute resolution mechanisms.*<sup>395</sup>

The argument related to the campaigns is not only of limited (if any) practical importance but it is also hardly convincing in abstract terms. Is legal fragmentation truly a serious impediment to conducting such campaigns? These tend to be limited to very small amounts of information anyway, and while translated into the languages of the Union, the adjustment with regard to their content could still be made. But even if the aim is to make one set of posters, then these differences could be accommodated by statements such as ‘the withdrawal period all over the EU is at least...’.

#### **7.4.2. Democratic Dimension of Subsidiarity**

To set the goal at EU level we shall not only take into account the economic arguments, but also the democratic argument. In particular, we will examine the extent to which particular issues ‘cross-cut’ other areas of public action, which may be motivated by non-economic rationality, and articulate the full breadth of costs of the action. It is utterly undesirable to leave assessment of costs to the Commission, which acts in a very purposeful, goal-oriented way (its own goal, of course).

Before we delve more deeply in this question, it is important to note that in the framework of the EU subsidiarity, we are not faced with the classical federalist concern which relates to the distance between the rule-maker and the addressee, when both levels are democratically legitimate (as is the case in Germany, the USA, Switzerland or India). Rather, in the EU, the difference is that the local level is democratically legitimate, while the ‘central’ level suffers from democratic deficit. The threshold to be passed in such proposals should therefore be considerably higher than would be the case in federal states.

The analysis itself than has two elements. The first of these relates to the consideration of possible alternative conceptions of a good life, of ‘*what ought to be done*’, which are at core of the democratic process and *which should already figure as alternatives*

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<sup>395</sup> European Commission, “Commission Staff Working Document Accompanying the Proposal for a Directive on Consumer Rights. Impact Assessment Report,” 14.

*when setting any goals at the EU level.* Otherwise we would overlook the linearity of the values, goals and objectives of the EU legislative processes. Secondly then, the harm to the capacity of the democratic self-government (which happens to be more at the national level) has to be addressed, and any shift in competences explicitly justified in this regard.

In the case of the Consumer Rights Directive, the main aim of this measure is the creation of the internal market, and more specifically internal online market. These goals however should not be accepted without discussion about their merit. Such goals should be the outcomes of public deliberation in these areas, not the starting points. The possible counter-argument that that could slow down the decision-making process is unconvincing on a number of accounts – one of them being that goal-setting is not the right place to try to save time.

The most significant question that should be given a response in a democratic polity is the desirability of such scenarios as are envisaged by the Commission, with reference, for example, to different conceptions of the value and purpose of human life. Is it truly desirable to give public support and encouragement to those consumers who sit apathetically at home in their armchairs, cut off from other human beings and shopping online (and preferably cross-border so as to contribute to opening of the market)?

The market rationality endorses rather limited value system, and it presupposes that the primary concern in the life of a consumer is paying a lower price for electronic equipment.<sup>396</sup> This limited value system however has limited understanding for other values (urbanism, social interaction etc.). Additionally, it seems unable to take into account other potential costs that may stem from such visions of human beings (such as healthcare costs for increasingly obese and depressed populations) if we do not make conscious institutional arrangements to bring these into fore - in the EU in particular since it has not taken over the responsibility for these fields, thus it does not associate its own performance with these goals.

Yet, these institutional arrangements are missing in the EU, and there is little debate about the goal itself, about ‘one right conception of the good life’ which is embodied in the

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<sup>396</sup> Yet, as some examples of ‘irrational consumers’ in CESL Impact Assessment show, these may not be the only values. See the following chapter.

*raison d'être* of the European Union (market integration, market efficiency, competitiveness and free markets). The abovementioned questions belong more to the 'citizen' oriented (*homo publius*) conception of human beings, while the EU *raison d'être* embodies the '*homo economicus*' conception of a human being, at least in private law, and is not concerned with the social and societal dimension of human beings, but only with human beings as maximisers of economic utility. On the other hand, it would be a mistake to understand EU action as some form of libertarian ideal of less regulation or less interference with 'liberty', rather, there is vast intervention, however this intervention is centred around a very limited conception of human being.

The problem is that all participants in the discourse are broadly subservient to this limited game, and at first glance, this seems to be for a good reason. This limitation of the debate is legally imposed on the EU, in order to limit its powers, which is deemed desirable taking into account its democratic deficit. But is it truly the limitation of the powers of the EU that we are achieving? Is playing by the 'formalist' rules of the game truly having a constraining effect on EU power? Or is the effect exactly the opposite— the extension of the EU value system to an ever-broader range of issues?

To sum up, even within the narrow frame of 'purposes' followed by the EU, the proposal was hardly justified. The capacity of the Proposal to ensure the lowering of transaction costs was not supported by sufficient evidence, and at times it appeared that the Commission quite bluntly misrepresented the arguments in order to prove its point. The proposal would likewise be incapable of achieving full harmonisation thanks to the particular interaction between EPL and underlying national private law. The Commission has at the same time avoided engaging in discussions of the costs of harmonisation- even if these matters were raised by stakeholders, these were not discussed. Finally, the way the Proposal intended to deal with the increase of consumer confidence was utterly unconvincing; in simple words, the Proposal was not a suitable means of achieving the ends proposed.

When we look outside of the purposes of the EU, the picture we see is even less positive. The extension of the powers of the EU goes without debating the broader goals of the polity, thus it not only extends the 'undemocratic' governance to a broader range of

issues, but more importantly, its limited rationality and impoverished value system are extended to cover the wider variety of issues.

While democratic debate is mainly concerned with establishing what constitutes the good life, and what ought to be done, the debate at the EU level is not concerned with ‘what constitutes a good life’, insofar as it is set by its *raison d’être*. The debate in the EU is concerned with *how* to achieve the objectives of market integration, efficiency and competitiveness (the pre-set goals), as opposed to being concerned with the goals themselves. Yet, this value linearity is something which could be countered by the open consultation procedure, which would fulfil the micro legitimacy (or any better) procedural requirements. We will thus look at the procedure to see what interaction occurs with the content.

### **7.5.            *Chicken – Egg Problem: Or Why the Procedure (Regime Legitimacy) Matters for the Performance.***

The progress of the 2008 Proposal from the discussion stage to the stage of legislative *proposal*, despite its apparent lack of justification, can be reasonably ascribed to the deficient procedure. Procedure will interest us more in the chapters on *Regime Legitimacy*. Here we will give it more restricted attention, focusing on the interplay between the procedure and the outcomes, in order to establish its relation to the failed performance of the measure.

The Proposal – as was claimed by the Commission- builds on several years of discussion with the stakeholders, which was completed in the grand consultation following the Green Paper,<sup>397</sup> complemented by separately organised workshops, conferences, meetings etc. This was supposed to lead into a measure of high quality on the one hand, and high level of participatory legitimacy on the other.

I will discuss two elements of the procedure, which are at core of the possible discontent with the way in which the procedure was organised. Firstly, I will examine the connection between the setting out of questions for the consultation, and their impact on the

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<sup>397</sup> European Commission, “Green Paper on the Review of the Consumer Acquis, COM (2006) 744 Final”, February 8, 2007.

Policy options discussed by the Impact Assessment, the outcome of which was presented as a winning solution in the 2008 Proposal. Secondly, I will address a curious outcome of the consultation for a group unrepresented in the process – namely those ‘almost consumers’ who were protected in a number of countries. This leads to the question of representativeness, and thus the ‘fairness’ of outcomes for the groups.

### **7.5.1. Consultation Procedure**

The Green Paper on the Revision of Consumer *Acquis* structured the consultation questions in the following way.

#### **1. General Legislative Approach**

**Question A1: In your opinion, which is the best approach to the review of the consumer legislation?**

*Option 1: A vertical approach consisting of the revision of the individual directives.*

*Option 2: A mixed approach combining the adoption of a framework instrument addressing horizontal issues that are of relevance for all consumer contracts with revisions of existing sectoral directives whenever necessary.*

*Option 3: Status quo: no revision.*

First of all, the stakeholders have been asked as to whether, as a matter of overall approach, they favour the vertical approach, mixed approach or staying with the status quo. The analysis of the outcomes of the consultation show that a majority expressed preference for the shift away from the status quo because of the poor state of Consumer *Acquis*. Thanks to the expectations of the simplification of the framework, the preference for a mixed approach (a horizontal directive, along with few vertical measures in cases where the field requires so) was expressed.

#### **2. Scope of a Horizontal Instrument**

**Question A2: What should be the scope of a possible horizontal instrument?**

*Option 1: It would apply to all consumer contracts whether they concern domestic or cross-border transactions.*

*Option 2: It would apply to cross-border contracts only.*

*Option 3: It would apply to distance contracts only whether they are concluded cross-border or domestically.*

The second question was then interested in the scope of the measure, namely, whether the measure should be directed at all contracts, at cross-border contracts or at distance contracts. Motivated primarily by the need to simplify the regulatory environment, the majority of the stakeholders chose (with various reservations) the option of general applicability, for two reasons – the simplicity of the framework for consumers, and legal certainty for businesses.

The surprising turn then comes with the third ‘option’:

### **3. Degree of Harmonisation**

**Question A3: What should be the level of harmonisation of the revised directives/the new instrument?**

*Option 1: The revised legislation would be based on full harmonisation complemented on issues not fully harmonised with a mutual recognition clause.*

*Option 2: The revised legislation would be based on minimum harmonisation combined.*<sup>398</sup>

What seems surprising is that the ‘minimum harmonisation’ has disappeared altogether from the options. These could possibly be justified on the formal level if the Commission is seen to understand it as a ‘contradiction in terms’ with the need for newness in the framework, and this could be indicated by the terms *revised directives*<sup>399</sup>, however the political motivation behind this is clear. What is striking, though, is that in this way the Commission completely disregards the opinion of the main re-distribution groups and the majority of EU citizens in their capacity as consumers, insofar as the consumer associations have been long advocating *horizontal minimum harmonisation* measures.

This ‘omission’ however did not ‘shut up’ the stakeholders presented with the options – a majority of consumer stakeholders, and a number of academics and MS, expressed preferences for this non-existent option. To cite just one stakeholder:

***Test-Achats ne soutient aucune des options proposées. Nous sommes en faveur d’une harmonisation minimale accompagnée de l’application du principe du pays de destination. Nous regrettons que cette option n’ait pas été envisagée par la Commission dans son Livre vert.***<sup>400</sup>

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<sup>398</sup> Ibid., 14.

<sup>399</sup> Even if the consultations have clearly indicated the minimum harmonisation deserves some considerations among the seven alternatives offered there, the Impact Assessment did not reflect on it. The only plausible explanation is that the Commission is in some way biased.

<sup>400</sup> ‘Test Achat does not support any of the proposed options. We are in favour of minimal harmonisation, together with the country of destination approach. It is regretful that this option is not

The division of the Questions in such a manner also had, in effect, a tendency to cover up the connections between the questions – and this is perhaps what has been done in the end. Some stakeholders have also reacted to that pre-emptively - which suggests that it is difficult to maintain legitimacy by ‘unfair’ practices. As an example, this was put forward as the response by the Swedish consumer association - which was one of few which actually supported full harmonisation<sup>401</sup>:

*(Q2) The connections to both the above and the below questions are obvious: we do favour a horizontal approach (as well as maximum harmonisation, see below), but only if it ensures sufficient levels of protection. If this cannot be guaranteed, we cannot accept that a horizontal approach is necessarily preferable, nor that it should be extended to apply beyond cross-border contracts.*

Now, even if the attempt to ‘hide’ the minimum harmonisation as an alternative was unsuccessful, the Commission has not changed much on the course taken. In the analysis of the responses, the Commission states that the great majority of the stakeholders favoured a horizontal measure (in response to the first question), with regard to all consumer contracts (second question), and that the majority of stakeholders favoured maximum harmonisation (third question), even though there were ‘diverging views’.<sup>402</sup> Basically the consumers were ‘outvoted’.

Even formally, such a positive outcome was possible thanks purely to the way in which questions were dissected and ‘disconnected’ from one another. Consumer stakeholders would surely not support the broadest scope of measures if these were bound to the maximum harmonisation, or had insufficient levels of consumer protection (as the Swedish consumer association had already made clear in the consultation). We can only guess that this will also be the case with a number of other stakeholders – as even the reaction of the Community Institutions such as Committee of Regions, European Parliament, or Economic and Social Committee would suggest.

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*envisaged by the Green Book’* (author’s translation) See Test Achat, Réponse de Test-Achats au Live vert sur la révision de l’acquis communautaire en matière de protection des consommateurs opinion, 2.

<sup>401</sup> European Commission, Report On The Outcome Of The Public Consultation On The Green Paper On The Review Of The Consumer Acquis, p4.

<sup>402</sup> Ibid, p. 3, 4.

The final aspect of this story which we will touch on, which showed that the consultation was not meant to *consult*, comes with the official proposal and the Impact Assessment attached to it. The Impact Assessment then addresses the policy options in the following way:

*In this context, stakeholders were consulted extensively from December 2007 to March 2008. The consultation yielded important information on the problem definition and assessment of the policy options. Stakeholders' views were incorporated into the definition of the policy options.*<sup>403</sup>

(...)

*This section describes the policy options. These include, as required by the impact assessment guidelines, the Status Quo and a non-legislative option together with four legislative policy options. Given the many individual legislative sub-options under consideration (more than 20), clusters or Policy Options (POs) **have been constructed on the basis of overall consensus on their 'acceptability' and 'certainty', based on the outcomes of two extensive consultation exercises** (See Section I).*<sup>404</sup>

(...)

*These policy options are:*

*Policy option 1 (PO 1) Status Quo or baseline scenario, including the effects of Rome I and forthcoming legislation.*

*Policy option 2 (PO 2) Non legislative approaches, including information campaigns and financial contributions and the effects of Rome I.*

*Policy option 3 (PO 3) c (harmonisation of basic concepts where benefits clearly outweigh costs), including the effects of Rome I.*

*Policy option 4 (PO 4) Medium legislative changes (including PO 3 plus and the effects of Rome I).*

*Policy option 5 (PO 5) Maximum legislative changes (including PO 4 plus far-reaching proposals granting new consumer rights as well as the effects of Rome I).*

*Policy option 6 (PO 6) Minimum legislative changes (PO 3) or Medium legislative changes (PO 4) combined with an internal market clause applying to the non-fully harmonised aspects (such as general contract law aspects outside the scope of the Consumer Acquis).*

The 'minimum harmonisation' option then gets its only chance for 'consideration' in the context of Policy option 1 – maintaining the Status Quo<sup>405</sup> – when status quo was obviously considered to be unattainable by practically all participants. It does not even figure among 'discarded policy options'! How is it possible to explain that the prevalent opinion of

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<sup>403</sup> Commission Staff Working Document Accompanying the Proposal for a Directive on Consumer Rights. Impact Assessment Report., 6.

<sup>404</sup> Commission Staff Working Document Accompanying the Proposal for a Directive on Consumer Rights. Impact Assessment Report., 16.

<sup>405</sup> Ibid., 17.



the main redistributive group – consumers – did not even get a chance to be considered as a serious policy option?

This is even more curious in the situation when not a single policy option of the seven proposed is a serious competitor to the Full Harmonisation (Option 4), insofar as they are either too mild, or too extreme. Thus we must consider the options closest to the winning Option 4. Option 3 is described as ‘*Minimum legislative changes*’, *harmonisation of basic concepts*, indicating its *prima facie* inappropriateness to solve the serious trouble that EU consumer law was in. On the other hand, Option 5 has been described as proposing *far-reaching changes (including PO 4 plus far-reaching proposals granting new consumer rights)* which immediately indicates the inappropriateness and touches on fears of competence creep. And in the middle of all that is Option four – mild but efficient.

The second dimension of the procedure which is worth discussing is that of the consequences of non-representation in the process – for the ‘almost’ consumers, who are not natural persons. First of all, the consultation did not raise the question of non-natural persons at all – even though the scope of maximum harmonisation would limit the possibility for MS to maintain their broader definition. This has met strong criticism from the side of the stakeholders.<sup>406</sup>

The consultation inquired only about ‘mixed purpose’ contracts, and here the majority of stakeholders expressed the preference for narrow definitions. If we look at the detailed analysis of responses, the main argument with regard to the questions on mixed contracts was that of legal certainty – namely, that it is rather difficult to define such vague notions as ‘acting primarily’ outside their trade or business.<sup>407</sup> We may dispute the outcomes of the debate and wonder whether such formalist arguments may justify the exclusion, however, at least the question was raised.

What is even more interesting, however, is the lack of an ‘option’ in the consultation to extend the notion of consumer also to the non-natural persons (such as NGOs, small entrepreneurs etc.) This serious ‘omission’ has met with considerable criticism from the side

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<sup>406</sup> Consumer Policy Evaluation Consortium, “Preparatory Work for the Impact Assessment on the Review of the Consumer Acquis,” 55.

<sup>407</sup> Ibid.

of stakeholders more generally,<sup>408</sup> and this time we could not even justify it with reference to the ‘impossibility’ or ‘vagueness’ of such legislation, insofar as the MS have adopted and implemented various models rather successfully.<sup>409</sup>

In both cases, it was predominantly academics arguing for the extension of the definition of consumers to those like them,<sup>410</sup> as perhaps the only group not directly aligned to any of the redistributory. We should not, however, mistake this kind of comparative (institutional) neutrality with the neutrality of the subject matter *per se* (a common mistake in private law).

Consumer associations on the other hand, which could be considered a natural ally of ‘weaker parties’ in contractual relations, have expressed their preference for a narrow definition of the consumer. They feared that the extension of protection might ‘blur the distinctions between B2B and B2C relations’,<sup>411</sup> and could potentially have harmed consumers more broadly. Such loss would affect their expected performance, inasmuch as they are judged predominantly on the basis of fulfilling their primary task of lobbying for consumer interests. Businesses almost completely preferred keeping the narrow definition.<sup>412</sup>

Of course, we could assume that the MS should have represented (maybe somewhat naively) ‘general interests’, however it seems that states which themselves had a much more expansive notion of consumers also did not discuss the issues to a large degree. They concentrated on the notion of mixed contracts, and addressed only in a limited way the extension of the definition of consumers to non-natural persons. Whether this was due to the exclusion of the question from the consultation sheet, or because less experienced administration staff worked on the responses, eventually because of the political expediency of the moment, is difficult to answer.

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<sup>408</sup> Ibid.

*‘many have criticised the fact that neither the options nor the explanatory comments on the Green Paper made any allusion to situations in which some small entrepreneurs are just as weak in the negotiation of the contract as the consumer. In that case the entrepreneur is indeed a professional but also the weaker party and he would therefore be entitled to the same protection as a consumer.’*

<sup>409</sup> H. Schulte-Nolke, Ch. Twigg-Flesner, and M. Ebers, eds., “EC Consumer Law Compendium - Comparative Analysis -,” 721.

<sup>410</sup> Consumer Policy Evaluation Consortium, “Preparatory Work for the Impact Assessment on the Review of the Consumer Acquis,” 54.

<sup>411</sup> Ibid., 55.

<sup>412</sup> Ibid., 54.

The outcome was clearly a conservative one. Academics had little influence once both of the major redistributory groups agreed. This has happened at the expense of the group whose voice was not heard, the low institutionalised group not represented by the ‘lobbyists’, even though they would have had strong interest in the outcome. This group would have seen the legislation as unjust – and for good reason – insofar as it does not reflect their interests in the same way as it does the interests of others.

The overall final impression is that the consultation cannot be considered genuine, fair or democratic, and it does not come as a surprise that the Proposal was rejected in the end – after the furious critique of a number of stakeholders. We should learn an important lesson from this procedure. Once the process was opened to this extent, such purposive action could have harmed the action more than the absence of any consultation.

## **7.6.            *Consumer Rights Directive: The Outcome***

What is the final outcome of the story? Despite the claims of the Commission about the large levels of support for this unavoidable step to further the market, the opposition to the Proposal seems to be substantially larger. This opposition ranged from the EU institutions (The Committee of Regions<sup>413</sup> as well as the European Social and Economic Committee,<sup>414</sup>) to academic commentary and consumer advocates. While the full harmonisation seemed acceptable if targeting some particular issues (such as withdrawal periods<sup>415</sup>) or certain areas (such as long distance contracts), it nonetheless seemed undesirable for the whole body of consumers.<sup>416</sup>

The European Parliament was not deaf to these arguments, and finally, after long negotiations with the Council, adopted the curtailed CRD. The CRD now covers basically only two directives – Doorstep selling Directive and Distance selling Directive, which appear more relevant for the particular aim of the Commission proposal – namely to enable the

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<sup>413</sup> Committee of Regions, Opinion on Consumer Rights Directive, 22 April 2009, DEVE-IV-038.

<sup>414</sup> European Economic and Social Committee on the Proposal for a Directive of the European Parliament and of the Council on consumer rights COM(2008) 614 , 2008/0196 (COD).

<sup>415</sup> REICH and MICKLITZ, “Crónica De Una Muerte Anunciada.”

<sup>416</sup> Ibid.

online market. The Directive is based on the principle of full harmonisation, however the MS do not have to apply it to contracts worth less than 50 euro. The Directive uniformly regulates the information that is due to consumers, the length of the withdrawal period from off-premises contracts to 14 days (max one year), as well as passing of the risk to the consumer, the refund of the delivery costs, and who is to carry them the costs for the return of goods.<sup>417</sup> Importantly, it also stipulates that consumers shall be free from any ‘consideration’ in cases of inertia selling of any type of good or service covered by the Directive.

The result seems to take on board much of what has been criticised by a number of circles. The general objections that we may have against maximum harmonisation have not disappeared, but have been limited to the areas where it seems most justifiable.<sup>418</sup> The final version has, however, benefited from the decreased public interest. It remains though an important proof, firstly of the capacity of the different publics in the EU to engage in meaningful institutional and legislative criticism, as well as of the willingness of the Parliament to present itself as a representative of ‘democratic Europe’.

The Commission’s Proposal suffered a considerable lack of Performance Legitimacy – the arguments on which it was based (either related to the appropriate level of harmonisation or to the method of harmonisation) were substantially flawed. This was true with regards to the purposes it was based on, as well as the more broad criticisms regarding the negligence of important values in private law, within the framework of EU functional economic law.

Within the broader constitutional context, the proposal was of great constitutional significance insofar as it unsettled the division of powers among the different levels of governance in the creation of social order with regards to consumer law – in particular with the intention to push the MS out of the co-creation of the social order in this field. This element made it very important for the proposal to enjoy high levels of micro legitimacy. However, the Proposal seems to have violated not only the principles of Subsidiarity and Proportionality, but also its commitment to Participatory democracy. The latter has not only

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<sup>417</sup> DIRECTIVE 2011/83/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 25 October 2011 on consumer rights

<sup>418</sup> Such as the constitutional concern regarding the capacity of the EU to ensure the ‘social’ dimension of private and consumer law.

been neglected, but it has been used to add legitimacy to a decision that had been taken long before the consultation has started.

The lesson the 2008 Proposal has given us is noteworthy. On the one hand we could have realised that there is some potential in the new form of democratic legitimacy, and in case it is taken seriously, it can ‘do the job’– even if it could tire more quickly. On the other hand, it was an important lesson for all institutions in the process, and should serve as a warning against similar actions.

The jurisdictional analysis through the principle of Subsidiarity serves to articulate the costs and benefits of the action at a certain level of governance, and as such, to secure the quality of the output – the performance. Respecting the ‘performance’ of the MS, along with their democratic processes, allows the EU to draw on their democratic legitimacy and thus increase the overall legitimacy of the EU.



## **8. MICRO REGIME**

While Performance Legitimacy is concerned with the substantive outcomes as a ground of political legitimacy, the Regime legitimacy refers to the procedure – to the way in which decisions are made. This normative legitimation is connected to both formal and informal dimension, the institutional structure and the political culture in which the decisions are made.

Regime legitimacy has become increasingly important in the EU with the extension of EU powers, making the questions of who makes the decisions, and how they are made all the more important. The stress on procedural legitimacy in the EU has then, thanks to constitutional tradition of the MS taken the shape of aiming for democratic legitimacy. The Micro Regime Legitimacy then looks into the regime legitimacy of micro procedures in the EU.

### **8.1. Regime Legitimacy and European Private Law**

What does Regime Legitimacy mean in the framework of private law? The problem of proper regime (governance) in private law has been argued for many centuries. In particular the role of ‘democracy’ has been a difficult one. The dimension of performance legitimacy in private law relates to the stress on the ‘quality of drafting’, which was, in the past, derived from the unquestionable universal values behind private law, which made expert governance (with academics creating the private law rules) the prevalent form of governance. This idea of balance between the ‘performance’ and ‘regime’ legitimacy has been challenged by the rise of democratic governance.

The twentieth century has strongly challenged the ideas of neutrality and rationality of private law, founded on the value of formal equality.<sup>419</sup> Theoretically, the attacks were led by the Legal Realists and Critical Legal studies. Practically the (and much more successfully) by democratic legislators in the framework of democratic processes, so that later in the twentieth century, private law appears to be an important tool for re-embedding the markets, guided by the principles of substantive freedom and equality.<sup>420</sup>

There are three reasons why democracy may be considered important in Private Law in Europe. The first reason is that democracy has a powerful capacity to uncover the truth, and this has shown its strength rather convincingly in private law during the twentieth century, in terms of uncovering the redistributive consequences of private law (that it had served some social groups more than the others). Secondly, democratic ‘politics’ have served as a counter force to the logic of the market (thanks to its broader value basis), and thus a democratic process was a precondition for the ‘de-commodification’ of labour and ‘re-embedding’ of the markets.<sup>421</sup> If we so understand private law as having significant re-embedding functions (which seems to be the case at least –and not only- for Polanyi), we shall not renounce the importance of democracy in private law. The example of Mr. and Mrs. Bates reaffirms this. Finally, if we understand private law as having significant redistributive consequences, the politicisation and democratisation become ‘musts’ because of the control of the exercise of ‘public’ redistribution of resources and power in a society which is premised on the principle of (political) equality.

By democracy in private law, we may not necessarily mean that the MPs should sit together around the table and create (European) Civil Codes, even if their involvement is desirable. What I am referring to by democracy in private law is rather the democratic elaboration of values on which private law relies, monitoring function of democracy, the opinion formation which is channelled through media into the law-making processes of private law, hinged on the responsibility of the democratic legislator (performance) to correct the ‘unjust’ outcomes created by private law.

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<sup>419</sup> P.S. Atiyah and P.S. Atiyah, *The Rise and Fall of Freedom of Contract*, vol. 398 (Oxford Univ Press, 1979).

<sup>420</sup> Polanyi, *The Great Transformation*.

<sup>421</sup> A. Ebner, C. Joerges, and J. Falke, “Transnational Markets and the Polanyi Problem,” *The Social Embeddedness of Transnational Markets* Hart Publishing: Oxford (2010): 19–42.



Micro Legitimacy then aims to secure those to the best possible extent under the current circumstances in the EU. It stresses sufficiently participatory process in development of rules, which strengthens two (missing) dimensions in the EU. The first of these is the need to open the goals and values of EU action to democratic contestation (questions such as ‘what shall be the objective of the ECC?’), and secondly, the republican element of the process, by which issues are actually enlarged, thus creating larger issue publics around that particular issue as well as the possibility of horizontal deliberation about the issue. The design of the process is however left to the ad hoc design.

## **8.2. On the way to the 'Common European Sales Law'**

The debate about European General Private Law starts in the 1980s with the call of the European Parliament to develop a European Civil Code.<sup>422</sup> The Parliament then repeated its call in 1994, suggesting at that point that Lando's Commission<sup>423</sup> should be involved in the project. Another important milestone is the 1997 conference on the European Civil Code organised by the Dutch Presidency of the Council. Soon after, we see contract law groups and networks popping up throughout Europe (e.g. The Acquis Group, The Study Group, The Common Core Group, The European Group on Tort Law, The Commission on European Family Law), allowing (comparative) private lawyers to finally enjoy the pleasures which had previously been reserved predominantly for European and International Law lawyers – namely, academic tourism.

Although these groups had different focuses, the central idea was that of finding the similarities amongst the legal orders, indirectly implying the possibility of harmonisation. The opposite camp, those scholars who did not believe that the similarities were greater than the differences, or those who believed that private law was due to be a product of democratic process (or even, presumably, those who did not like travelling) stayed outside of this process.

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<sup>422</sup> *Resolution of 26 May 1989, 1989 OJ C 158 400*

<sup>423</sup> This began in 1982 with the constitution of the Commission on European Contract Law (CECL) under the chairmanship of Ole Lando. Fuchs ERA Forum 2008, p 1

The Tempere European Council requested in its Resolution a *study on the need for the approximation of national legislation in civil matters*. The Commission responded by publishing a 2001 Communication on European Contract Law<sup>424</sup>, where it aimed to open the debate on what action would be needed in European Contract Law.<sup>425</sup>

The 2001 Communication outlined four possible options for EPL. The first of these would be to keep the status quo. The second would be to develop non-binding common contract law principles, useful for contracting parties in drafting their contracts, national courts and arbitrators in their decisions and national legislators when drawing up legislative initiatives (i.e. not yet the CFR). The third is to conduct a review, and an improvement, of existing EC legislation in the area of contract law (to become the CRD) and the final option would be to adopt a new instrument at EC level (now the Optional Instrument).<sup>426</sup> As we may see, the questions are concentrated more on collecting knowledge on the question of *how*, rather than asking *whether* and/or *what*.

In two years time, in the 'Action Plan for a More Coherent European Contract Law', the Commission still poses 'questions' regarding the future of EPL.<sup>427</sup> In the 2004 Communication<sup>428</sup> it already comes complete with answers, and outlines the steps to be taken in European Contract Law. These are namely:

- *The commencement of preparatory works on **Common Frame of Reference (CFR)** as a 'toolbox' for the increase in the quality and coherence of the EC acquis in the areas of contract law*

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<sup>424</sup> Brussels, 11.07.2001 COM(2001) 398 final

<sup>425</sup> Rather than the broader notion of Private Law, as proposed by the European Parliament.

<sup>426</sup> European Commission, "Communication from the Commission to the Council and the European Parliament on European Contract Law (2001/C 255/01)", September 13, 2001, 2.p.2

<sup>427</sup> European Commission, 'An Action Plan for a More Coherent European Contract Law, COM (2003) 68 final.

<sup>428</sup> European Commission, "Commission Communication on European Contract Law and the Revision of the Acquis: The Way Forward, COM (2004) 651 Final."

- *The review of consumer directives for the sake of their improvement (including eventual merger)*
- *Support for the elaboration of **European wide standard contract terms** by the social and economic partners and*
- *The investigation of the possibility of having an '**Optional Instrument**' in contract law (while the Commission make a reservation that it does not aim at the European Civil Code<sup>429</sup>).*

In its 2004 Communication, the Commission also establishes the procedure and the deadline for the development of the *Common Frame of Reference*. The task of developing the 'Common Frame of Reference' - the set of principles, definitions and model rules which would be used by the EU institutions as a 'toolbox' - was assigned to the Study Group on European Civil Code and its 'Network of Excellence'. Interestingly, the tender was won by the group with a clear commitment to the possibility and desirability of harmonisation, thus avoiding the further politicisation of this issue within the group.

The Network of Excellence was led by the 'Study Group on European Civil Code' (lead by Ch. Von Bar), joined by Acquis Group and Insurance group, altogether approximately 200 academics. This main network was then split, with the academics assigned different 'evaluative groups', which were supposed to comment on the Interim Edition of the Draft from different angles. These evaluative groups were Association Henri Capitan, Economic Analysis Group and Common Core of EPL group.

The Commission then engaged in what we may view as 'interest representation', by designating a group of 'stakeholders' as the so-called 'CFR net', which consisted of 176

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<sup>429</sup> Ibid, 8.

people who were to reflect the different legal traditions and different economic interests involved. They were supposed to bring *technical* expertise to the process.<sup>430</sup>

The ‘political input’ was reserved then for the political institutions, by providing information to the EP and the Council on a regular basis. Equally, the political input into the process was meant to happen at the ‘high level events and workshops’ for the representatives of the Member States.

How effective this political input was in the process of the preparation of the CFR remains open to debate. The whole process strikes as having a rather evident gap between ‘technical’ work on the one hand, and the political part on the other – where each side seems sealed off from the other rather than fused together in one process. Already in the Commission’s 2004 Communication (and in the debate after), the Commission divides the tasks into ‘parallel’ strands – unpolitical CFR, and the (eventually political) Optional Instrument, which becomes a ‘governance tool’ with which to prevent more troubling procedural questions.

The technical CFR, which is nothing more than a ‘toolbox’, a sort of dictionary for the institutions, should serve the internal use of the institutions, as better drafting needs relatively little procedural legitimisation – any initiative has to be welcomed and applauded. However, the Optional Instrument – in the Commission’s words the ‘Second Legal Order’ - would inevitably lead to troubling questions being asked regarding the appropriate procedure, the actual people who should develop this new ‘legal order’, directly binding for the EU citizens. This juggling had diverted attention from a fundamental relation between the goal of the academic exercise and the procedure used.

The Interim Outline edition of the DCFR was published at the beginning of 2008. Over the course of that year, the evaluative groups presented their comments. After the

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<sup>430</sup> Thus their contribution was not seen as political (which the interest representation intends) but as expert challenge to the opinion of the academics. Commission Staff Working Document Accompanying the Proposal for a Directive on Consumer Rights. Impact Assessment Report.,” 62. The Commission continues in the same line with regard to the ‘Expert Stakeholder Group’ in the Feasibility Study preparation, who are mainly supposed ‘*to provide a practitioner’s perspective on the work of the Expert Group, thereby ensuring the instrument developed was user-friendly and practical*’.

'incorporation of the comments', the academics published the final version – the (Academic) Draft Common Frame of Reference- in 2009. In 2010 the Group additionally presented a six volume set of notes on comparative research.

In the meanwhile, the Consumer Rights Directive, based on maximum harmonisation principle,<sup>431</sup> was strongly criticised and finally rejected in its initial version by the European Parliament. Once it became clear that the Commission could not save the Consumer Rights Directive in its entirety (March 2010)<sup>432</sup>, it redirected its attention to the Optional Instrument. Throughout the years of the parallel development of the Consumer Rights Directive and the Common Frame of Reference, their relationship was quite ambiguous, thus finally, it became crystal clear.<sup>433</sup>

The Commission soon after established the Expert group,<sup>434</sup> set up to '*assist the Commission in selecting those parts of the DCFR which are directly or indirectly related to contract law, and in restructuring, revising and supplementing the selected provisions*',<sup>435</sup> and to help '*in making further progress on the development of a possible future European contract law instrument*'.<sup>436</sup> The Expert Group was composed of 'legal practitioners, former judges and academics', when the latter cited by the Commission were actually in the (vast) majority (13 out of 17) of the members. What's more, the majority of the Expert Group had also participated in the preparation of the DCFR.<sup>437</sup>

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<sup>431</sup> This is discussed in the previous chapter.

<sup>432</sup> See Commissionaire Reding's statement of 15<sup>th</sup> March 2011 that the full harmonisation is not an option, and Guisepppe Abbamonte's statement at the conference in Trier on the 18<sup>th</sup>/19<sup>th</sup> March 2011 that the Optional Instrument is a target now. See e.g. <http://www.law.ed.ac.uk/epln/blogentry.aspx?blogentryref=8169>

<sup>433</sup> In particular, that the former took little inspiration from the latter. Martijn W. Hesselink, "The Consumer Rights Directive and the CFR: Two Worlds Apart?," *European Review of Contract Law* 5, no. 3 (August 2009): 290–303.

<sup>434</sup> COMMISSION DECISION of 26 April 2010 setting up the Expert Group on a Common Frame of Reference in the area of European contract law (2010/233/EU)

<sup>435</sup> Green Paper from the Commission on policy options for progress towards a European Contract Law for consumers and businesses, COM/2010/0348 final, 2.

<sup>436</sup> A European contract law for consumers and businesses: Publication of the results of the feasibility study carried out by the Expert Group on European contract law for stakeholders' and legal practitioners' feedback, part 1, 2. Available at [http://ec.europa.eu/justice/contract/files/feasibility\\_study\\_final.pdf](http://ec.europa.eu/justice/contract/files/feasibility_study_final.pdf)

<sup>437</sup> See [http://ec.europa.eu/justice/contract/files/expert-group\\_en.pdf](http://ec.europa.eu/justice/contract/files/expert-group_en.pdf).

The task of the Expert Group was to create the Optional Instrument – with the exception of the ‘chapeau’, the more political provisions of scope, opt-in, and the legal basis. In September 2010 the Commission had established also a so-called ‘Stakeholder Experts Group’, which was to be consulted in the course of the preparation of the Feasibility Study by the (other) Expert Group. Again this group was mainly to provide ‘practical’ input into the process. Considering the nature of the participants, it would seem that this practical input was needed much more from the side of business, insofar as it consisted of ten representatives of business associations (including two from legal associations and two from the banking and insurance industries) – and one representative of a consumer association.<sup>438</sup>

On the other hand, the Commission also launched a general consultation on the Green Paper on the 1st July 2010,<sup>439</sup> which lasted until 31st January 2011, and resulted in 320 responses. As the Commission itself summarises, the consultations made clear that there is great interest in European Contract Law, however it was also shown that these consultations *in abstracto*, without giving the interested parties sufficient information allowing meaningful participation, were considered to be highly unsatisfactory, or even futile. The Commission summarises:

*‘While many respondents were interested in participating in this work, some did not want to provide in-depth comments on the nature, form and scope of the potential European contract law instrument without more detail on the policy options. (...) The opinions on option 4 (the introduction of an optional instrument) were more varied. Several Member States and a large number of other respondents said they could support an optional instrument, provided that it fulfilled certain conditions (...) A large number of respondents did not want to take a position at that time, because they did not know the detail of the work of the Expert Group.’*<sup>440</sup>

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<sup>438</sup> It included representatives of the main European organisations of business (*Businesseurope, UEAPME, Eurocommerce, Eurochambres and the International Chamber of Commerce*), consumers (*BEUC*), representatives of the legal professions of lawyers and notaries (*CCBE and CNUE*) and representatives from the banking and insurance sectors (*EBIC and CEA*). European Commission, “Commission Staff Working Document Accompanying the Proposal for a Directive on Consumer Rights. Impact Assessment Report.” 60.

<sup>439</sup> Green Paper from the Commission on policy options for progress towards a European Contract Law for consumers and businesses, COM/2010/0348 final.

<sup>440</sup> Ibid, 2,3.

This again points to the pitfalls of the division of the ‘political’ and ‘expert’ parts of the process where this division is least necessary.

The Expert Group itself had barely a year to produce the Optional Instrument, which is not an easy task considering the need to develop an ‘autonomous’ European contract law code. In May 2011 the Expert Group published the Feasibility Study. Minor consultation took place afterwards and on the 11<sup>th</sup> of October 2011, the Commission published the Proposal for a regulation of the European parliament and of the Council on a Common European Sales Law,<sup>441</sup> with *chapeau* and some alterations of the text of the Feasibility Study.

### **8.2.1. Rationale of the European Codification**

As outlined in the Green Paper, the broader context for the action of the EU in the field of general contract law,

***‘This ‘instrument of European Contract Law’ could help the EU to meet its economic goal and recover from the economic crisis. The Stockholm Programme for 2010-2014 states that the European judicial area should serve to support the economic activity in the internal market.’<sup>442</sup>***

These goals should be achieved by the creation of the European Civil/Contract Code which shall serve to overcome the barriers posed by legal fragmentation and the transaction costs (acquiring legal advice, legal uncertainty) for businesses on the one hand, and increase consumer confidence in the internal market on the other.<sup>443</sup> These are identical to the ones used in the Maximum Harmonisation debate, so it does not come as surprise that many consumer organisations oppose it on account that it is a CRD by the back door. If opted into, the regime implies the full harmonisation. And it will be businesses that will be opting into it.<sup>444</sup>

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<sup>441</sup> Brussels, 11.10.2011, COM(2011) 635 final 2011/0284 (COD) Proposal for a regulation of the European parliament and of the Council on a Common European Sales Law.

<sup>442</sup> Green Paper from the Commission on policy options for progress towards a European Contract Law for consumers and businesses, COM/2010/0348 final, 2.

<sup>443</sup> European Commission, “Impact Assessment Accompanying the Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law”, n.d., 57.

<sup>444</sup> See BEUC

<http://www.beuc.org/BEUCNoFrame/Docs/4/LHKIKACCKEMCJHFNKHFDKMCGLPDWY9DBKC19DW3571KM/BEUC/docs/DLS/2011-00485-01-E.pdf>, p.1.

### **9.3. Common European Sales Law: Is there a Reason to Act?**

To the great pleasure of academics working on European Private Law, this area has not come to a standstill during the last decade. The last part of the puzzle (thus far) is the Subsidiarity Challenge to the Optional Instrument. After the Commission put forward the proposal on the Regulation on Common European Sales Law on 11<sup>th</sup> October 2011, the national parliaments had eight weeks to make their objections regarding the respect of the Subsidiarity Procedure known in so-called ‘yellow’ card procedure.<sup>445</sup> Thus we will examine the performance legitimacy with the aid of the opinions of the national parliaments.

Four national parliaments have objected to the ESL: The House of Commons (UK), German Parliament (both chambers), Belgian Parliament and the Austrian Parliament.<sup>446</sup> The national parliaments have, to greater or lesser extents, put forward all dimensions of subsidiarity, which we discussed in Chapter IV. This number was insufficient to produce legal consequences. Nonetheless, it does not leave the opinions bereft of political importance.

There is a positive trend of increasing awareness among the national parliaments that there is ‘more’ to the principle of subsidiarity than just the economic justification, and they seem to be slowly starting to articulate the democratic dimension to that principle (in particular in the opinions of the Belgian Parliament and the House of Commons – see below).

The recurring themes in these opinions were the issue of Competence, the questions related to the economic dimension of subsidiarity (the issue of necessity and the clear benefits of legislative action), the democratic dimension of the principle– the closeness of decision-making, the priority of legislating at the lower levels of governance, the procedural obligations of the agenda setter (the Commission), and finally, the issues related to values and possible alternative actions that could have been taken.

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<sup>445</sup> Art. 5.2 TEU, Protocol II to the Treaties

<sup>446</sup> All opinions of the national parliaments can be found on the <http://www.ipex.eu/IPEXL-WEB/dossier/document.do?code=COM&year=2011&number=0635>.



Examination of the respect of the principle of subsidiarity<sup>447</sup> is an important element of the Regime Legitimacy. It gives us an insight into the substantive part of the argument (including articulation and reflection on the costs of action), and the expected performance stemming from the correct choice of the level of governance, which both conditions and is conditioned by the appropriate micro procedure.

### **8.3.1. Competence and Subsidiarity**

The lower chamber of German Parliament, *Bundestag*, started its reasoned opinion by postulating that the ‘competence’ analysis is part of the subsidiarity analysis as broadly understood,<sup>448</sup> and it is here where the analysis should start. Competence, according to Bundestag, gives a framework for the Subsidiarity analysis, and thus forms its most integral part.<sup>449</sup>

The question of competence has, for the first time, caused a significant headache in the area of private law, with the EU’s intention to intervene in general private law (both first the Common Frame of Reference, or today the CESL). The ‘pointillist’ consumer private law before did not pose large problems for different reasons - either because it was straightforwardly an internal market issue (distance selling), because of the institutional setting in which it was enacted (doorstep selling directive was enacted by the unanimity) or because there was a favourable political climate (consumer sales directive). It did not also cause too of a big headache for those concerned with ‘justice’, insofar as some capacity has been left to the MS to fulfil their ‘expected performance’.

The case of the General private law instrument was different, however, because of the constitutional concerns regarding the breadth of regulatory powers of the EU and the structural importance of private law for framing the social order, along with nationalist

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<sup>447</sup> The right assignment of the level of governance, with regard to the costs and benefits of such assignment, is a precondition, but not a sole requirement, for the performance of a measure.

<sup>448</sup> Reasoned Opinion of the German Parliament to the CESL, 2. <http://www.ipex.eu/IPEXL-WEB/dossier/document.do?code=COM&year=2011&number=0635>.

<sup>449</sup> At a certain level we may also understand the principle of Proportionality as integral to the Principle of Subsidiarity, which carries the idea of the ‘light touch’ of the EU.

sentiments that were attached to the national codifications.<sup>450</sup> Now, even if the counterarguments that have been raised throughout the debate are motivated by nationalist sentiments or based on irrational fears, this does not make otherwise valid constitutional or democratic arguments weaker, insofar as they have standing in their own right. The same goes for the argument that past practices were not too different, respectively that in the past the EU constitutional law was not substantively followed.

The EU does not have a general competence in private law, which makes sense in the framework of its functional orientation and the need to tailor private law, along with its ‘purposes’ or ‘objectives’.<sup>451</sup> Equally the harmonisation of private law as the whole did not seem necessary to complete the objectives of the Treaties.

The current Treaties include a number of competences, which cover certain aspects of private law such as the Internal Market, Consumer Protection, Transport, Energy, Non discrimination, Cooperation in Civil and Commercial Matters etc. The two main options however for the legal bases were then Art. 114 TFEU (the Internal Market Legal Basis) and Art. 352 TFEU (Flexibility Clause).

The use of Internal Market legal basis (art. 114 TFEU) was somewhat complicated in the case of the European Cooperative Society, however, where the CJEU states

*In those circumstances, that regulation, which leaves unchanged the different national laws already in existence, cannot be regarded as aiming to approximate the laws of the Member States applicable to cooperative societies. Consequently, Article 95 EC could not constitute an appropriate legal basis for the adoption of the regulation, which was thus correctly adopted on the basis of Article 308 EC.*<sup>452</sup>

If compared to its ‘company law’, general contract law seems to be even less suitable to be enacted under the Art. 114 TFEU than its company law sibling. The default and facilitative rules of general private law can be avoided through the choice of law and/or by different provisions in the contract, thus having these *optional* rules once more *optional* may

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<sup>450</sup> For the debate about the possible ‘advantages’ that could stem from this attachment see the following chapter.

<sup>451</sup> See Chapter 4 for more details.

<sup>452</sup> Case C-436/03, *European Parliament v Council of the European Union* [2005], para 46.

appear problematic from the perspective of the approximation of laws. A more standard objection is that if we enact an ‘alternative’ European instrument which runs alongside national contract law, it will imply that the current legal framework (the ‘fragmentation’) will only increase rather than decrease the complexity – thus is hardly likely to lead to ‘approximation’.<sup>453</sup>

The argument concerning the impossibility of an ‘optional’ instrument achieving approximation is also the one on which Bundestag relies in its Reasoned opinion about the CESL. The only appropriate legal basis it claims is then Art. 352 TFEU (former art. 308), whereby the legislative procedure is bound to the unanimity of the Council and the consent of the Parliament – which in general, and in this case in particular, would be difficult to achieve. A similar objection to the legal basis has also been raised by the Belgium parliament.

Now, from the perspective of Micro Legitimacy, the Formal Argument regarding the ‘approximation’ Legal Basis in 114TFEU is not a convincing one, insofar if taken to its logical end, it would lead to the constitutionally objectionable outcome of the preference for more interventionist measures, rather than less interventionist. Thus such argument prioritises formal argument as opposed to underlying constitutional principle, which does not respond to our concern for substantive justification.

On the other hand, opting for the Internal Market Legal basis is problematic for another reason. Such selection of legal basis has formally binds the discourse surrounding the CESL to the market building objectives and economic rationality, which is problematic if we view private law as one of the elements of the legal framework that should re-embed the market (based on economic rationality) into the broader social matrix. The selection of the legal basis has also had further negative impacts on the design of the procedure (in which stakeholders were the ‘main’ group to be consulted and listened to), equally as it will likely

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<sup>453</sup> For the possible justification of the use of the art. 114 TFEU through the reinterpretation of the term “approximation” see Gary Low, “A Numbers Game – The Legal Basis for an Optional Instrument in European Contract Law,” *SSRN eLibrary* (January 24, 2012), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1991070](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1991070).

matter for the future interpretation of the measure by the CJEU, and the teleological analysis of its provisions.<sup>454</sup>

### **8.3.1.1      *The Economic Dimension of Subsidiarity***

The economic arguments behind the Commission's proposal for the Optional Instrument are similar to that of the CRD – 'differences between national contract laws may entail additional *transaction costs* and *legal uncertainty* for businesses and lead to *the lack of consumer confidence* in the internal market'<sup>455</sup>, which may discourage cross-border trade and cause welfare losses, while the Commission wants the citizens to reap the benefits of the internal market.<sup>456</sup>

This time, however, the Proposal (and its Impact Assessment) is more rich in its numerical justification of the potential economic 'impact' of the proposed legislation, as well as being complete with moving stories about consumers facing various obstacles which cause some impediments to the quality of their romantic experiences, or the self-development chances of young creative people, all suffering somehow from high prices, or inaccessibility of goods.<sup>457</sup>

I will look at the economic dimension of subsidiarity in a similar way as in the chapter on the CRD. That is to say that we will first examine evidence of the main justifications of the measure (the savings and the gravity of the problem), before further looking at the problem of uniformity and legal certainty, the costs (as opposed to benefits) of the harmonisation and finally, the argument on consumer confidence. As some of the arguments

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<sup>454</sup> At least insofar as it concerns the 'chapeau'; the impact on the instrument is somewhat lowered by the involvement of the 'comparatively' less partial experts/academics, even if there – as will be discussed in the following sub-chapter – the market determinism could not have been avoided.

<sup>455</sup> Green Paper from the Commission on policy options for progress towards a European Contract Law for consumers and businesses, COM/2010/0348 final, 2.

<sup>456</sup> Ibid. What's interesting is the shift in argument from consumers to citizens – market citizenship?

<sup>457</sup> European Commission, "Commission Staff Working Document Accompanying the Proposal for a Directive on Consumer Rights. Impact Assessment Report."

partially overlap, I will discuss them to the extent that something new is added to the debate, particularly looking at the arguments raised by the national parliaments.

#### **9.3.1.1.1. Evidence supporting the Transaction Cost Argument**

The Commission has produced large ‘quantitative evidence’ in its Impact Assessment. It estimates that the cumulative transaction costs stemming from legal fragmentation are 6-13 billion euro,<sup>458</sup> that it would create 159300-315900 new jobs,<sup>459</sup> or potentially allow businesses to save circa 90000 euro in the case that they already trade with ten MS,<sup>460</sup> or up to 310 000 euro if trading with all the MS. The Commission evidence, however, stands on rather questionable presumptions. BEUC manages to capture the issue in a very clear way, thus it is worth citing in entirety:

***‘1) Transaction costs - Hold on: what are we talking about?’***

*The Commission indicates that transaction costs for a SME offering products throughout the EU would be approximately €310,000. The Commission includes within this amount:*

- a) The adaptation of contract terms and conditions to the legislation of 26 countries – for each potential country of habitual residence of the consumer;*
- b) The translation of those contract terms and;*
- c) Costs for software which identifies the country of residence of the consumer and retrieves the relevant set of pages displaying them in the relevant language.*

*BEUC considers this calculation - which, according to the Commission’s oral comments in the sounding board meeting of June 9th, 2011, is based on a submission by the FSA (Federation of Small Businesses, UK) – to be unrealistic. A business offering goods in the EU would not follow such a complex procedure because there is no (legal) obligation to do so. Selling to all countries of the EU can be done simply on the basis of the trader’s law. This is what most companies de facto currently do. As such, the Commission’s calculation is simply not relevant. By suggesting that an estimated €310,000 is the normal transaction cost for a business who wishes to sell across the EU, the Commission simply misrepresents the legal environment applicable to crossborder b to c contracts.*

*(...)*

***The Commission’s presentation of the impact of Article 6 of the Rome I regulation is inaccurate. When selling cross-border, businesses are not obliged to adapt their contract terms to the legislation of the country of the consumer’s habitual residence. They can choose their own law as the basis of the contract with the consumer. Only in instances of court litigation would the judge have to assess –***

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<sup>458</sup> Ibid., 15.

<sup>459</sup> Ibid., 42.

<sup>460</sup> Ibid., 33.

*according to the conditions indicated in Article 6 of the Rome I regulation - whether the trader pursues or directs its activities to the consumer's country and, if applicable, make an equivalence test between the law chosen by the trader and the legislation of the consumer's country of habitual residence in order to determinate that the consumer is not deprived of the better protection granted by the rules of his legislation which cannot be derogated by agreement.*<sup>461</sup>

The overall impression then is that the Commission misrepresents and/or exaggerates not only the economic arguments, but also misrepresents the opinions of consumers and businesses. Thus it does not surprise us when we find in the Impact Assessment that

*Firstly, they dissuade some companies from trading cross-border. 61% of companies involved in B2B and 55% in B2C transactions and affected by contract law differences were often or at least occasionally deterred by contract law related barriers.*<sup>462</sup>

On the other hand, the national parliaments read the Eurobarometers in a different way. This is how the House of Commons reported

*'in a recent Eurobarometer 80% of companies said they were never or not very often deterred by consumer contract law-related obstacles. 72% of companies said that the need to adapt and comply with different consumer protection rules in foreign contract laws has no impact or only a minimal impact on their decision to sell cross-border to consumers from other EU countries. Furthermore, 79% of companies said that one single European consumer contract law would not change or only increase their cross-border operations a little'.*<sup>463</sup>

The House of Commons believes that the Commission overstates the rather marginal importance of the barriers which relate to the diversity of national contract law. Such conduct by the Commission impedes the capacity of the national parliaments to assess the impact of the measure, and thus assess whether there is reason to move the decision-making further away from the constituency. The Commission fails to treat the 'stakeholders' or interested

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<sup>461</sup> BEUC's response to the Commission expert group's Feasibility study for a future Instrument in European contract law, Ref.: X/2011/072, as of 28/06/2011, p. 2  
(<http://www.beuc.org/BEUCNoFrame/Docs/2/LHKIKACCKEMCJHFNKHFDMCGPDWY9D7NCY9DW3571KM/BEUC/docs/DLS/2011-09682-01-E.pdf>)

<sup>462</sup> European Commission, "Commission Staff Working Document Accompanying the Proposal for a Directive on Consumer Rights. Impact Assessment Report.," 11.

<sup>463</sup> House of Commons Reasoned Opinion on the CESL, para 20.

communities as subjects in the debate, and the House of Commons therefore claims that the Commission fails to fulfil its procedural obligations when putting forward the Proposal.<sup>464</sup>

#### **8.3.1.1.2. Uniformity and Legal Certainty**

##### ***Institutional Objection***

All national parliaments which have challenged the Proposal were concerned about the capacity of the instrument to fulfil the objectives of uniformity, decreasing complexity, and legal certainty (which, along with being valuable in themselves, also figure as pre-conditions for the fulfilment of the above discussed objective to lowering transaction costs). Even if anticipated as an autonomous instrument, the Optional Instrument (CESL) will not exist in a vacuum. It will be put to use in a complex multi-level system of governance, embedded in the broader legal and societal context, and as such it raises a number of questions which make this solution somewhat more problematic than it may appear at first glance.

The first strand of concerns relates to the insufficient, or practically lacking, institutional framework. Even in culturally much more integrated states, the institutional framework is considered fundamental for ensuring the uniformity of private law. The Commission proposal, on the other hand, is relying on the CJEU and its preliminary procedure, along with the *database* of the decisions of national courts. The national parliaments were rightly concerned about how the database would actually work in practice - without any 'precedential' value or judgments, or eventually what would happen in the case of conflicting interpretations.

Furthermore, the question of jurisdiction remains regulated by the Brussels I Regulation, thus consumers throughout Europe can still sue merchants in their own country. This could be considered a considerable threat to the newly acquired legal certainty by the businesses – for all the matters regarding unknown legal orders (procedural law) and practical

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<sup>464</sup> See Reasoned opinion of the House of Commons, part *ii*.

barriers (language and legal cultures) re-appear. The interpretation of the instrument itself is formulated on the process of interpretation and interplay between the different provisions, and here the legal culture and social context come into bearing, and give shape to the outcome.<sup>465</sup> Thus they still lack certainty when being sued by, or suing, the consumer.

Paradoxically then, it would be the success of this instrument that could potentially cause the greatest ‘migraine’ in institutional terms. The success raises fears over the inability to guide the development of a coherent line of cases (in particular because of the dependence on national courts for referring the judgments), the incompetence of the CJEU as a private law court, and/or the possible overload of the CJEU.<sup>466</sup>

### *Autonomous character of the instrument*

A second strand of concern relates to the question of the ‘autonomous’ character of the instrument. All national parliaments consider the elements of contract law which were excluded in the Recital 27 (the plurality of creditors and debtors, transfer of ownership, or immortality clause) to the Proposal as significant impediments to the capacity of the instrument to be self-standing.

The interpretation of the CESL is dealt with in article four, which states:

#### ***Interpretation***

1. *The Common European Sales Law is to be interpreted **autonomously** and **in accordance with its objectives and the principles underlying it**.*
2. *Issues within the scope of the Common European Sales Law but not expressly settled by it are to be settled **in accordance with the objectives and the principles underlying it and all its provisions, without recourse to the national law** that would be applicable in the absence of an agreement to use the Common European Sales Law or to any other law.*

The instrument should be interpreted in line with the objectives of the EU, as well as in line with the principles which underlie the instrument. What are these objectives on which the instrument should stand? The main objectives of the Instrument are to reduce transaction

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<sup>465</sup> This should in no way be understood as a call for the further harmonisation – on the contrary, it illustrates the slippery slope argument if the underlying constitutional rationale is overlooked.

<sup>466</sup> The fact that an instrument raises concerns with regard to its practicability both in case of success and failure is a sign of significant structural problems about the instrument rather than the problems with the argument.



costs and increase ‘consumer confidence’ so as to open up and build the internal market. On the other hand, the traditional objectives of general private law are much broader, and aim to establish justice among parties. How then should these particular EU objectives impact on the decision-making of the courts? It is worth to keep in mind the CJEU decision in the *Axa Royale Belge*, which demonstrates the consequences of the market objectives.<sup>467</sup>

Secondly, the instrument should also be interpreted in line with the *Principles that underlie the instrument*, which are Freedom of Contract, Good Faith and Fair dealing, and Cooperation. Again, the principles seem to provide, at first glance, a well struck balance between individualistic and more solidaristic understandings of private law, however it is the courts which interpret these clauses by incorporating them into the structures they have built around aims and objectives, the ‘purposes’ worth pursuing, and the performance expected from the courts and the polity.<sup>468</sup> If the CJEU is the final interpreter, or even if a new court is created, we will see decision making which gives the impression of having in mind a rather limited normative content, and is particularly concerned with achieving the ‘telos of the measure’, which refers to the ‘internal market objectives’. This means that the CJEU will have yet another venue to ensure the ‘horizontal effect’ of internal market concerns.

The self-standing, autonomous, instrument stirs the hopes that the EU is able to generate an autonomous vision of a just social order, independent of the MS and their democratic processes. But who shall develop this vision of the social order? And can we have a ‘just social order’ in private law without democracy? And for whom will it be seen to be ‘just’?

#### **8.3.1.1.3. The costs of Harmonisation**

The saving grace in relation to the possible objections to the costs of harmonisation has been found is in the ‘optionality’ of the instrument. This makes it, in effect, unnecessary to show any *real* problems that the harmonisation should solve, or the *relevance* of harmonisation in addressing the problem. Relying on the intuitive ‘non-dangerousness’ of

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<sup>467</sup> See the discussion by Schmid, “The Instrumentalist Conception of the Acquis Communautaire in Consumer Law and Its Implications on A European Contract Law Code.” For the later and more comprehensive discussion see Christoph U Schmid, *Die Instrumentalisierung Des Privatrechts Durch Die Europäische Union: Privatrecht Und Privatrechtskonzeptionen in Der Entwicklung Der Europäischen Integrationsverfassung*, 1. Aufl., Schriftenreihe Des Zentrums Für Europäische Rechtspolitik Der Universität Bremen (ZERP) Bd. 61 (Baden-Baden: Nomos, 2010).

<sup>468</sup> The combination of these three principles suggests that there was an intention to secure a middle ground position between individualism and altruism.

both the Optional Instrument or the Common Frame of Reference, their apparent ‘softness’, makes the proposal an ideal type of instrument.

From the economic perspective, Gomez<sup>469</sup>, Faure<sup>470</sup> and Wagner<sup>471</sup> claim that such an instrument would not impose a number of the costs of uniformity, while at the same time would allow us to reap (some) benefits from harmonisation. The economic analysis will see the Instrument as not hampering learning, experimentation and regulatory competition, while in the case of the Optional Instrument, the opt-in variant can be seen as ideal insofar as it leaves the choices to the market actors making it economically the most ‘efficient’ option. And if no one uses it – what is the danger?

As the UK and the Austrian parliaments underline, the instrument may not be (constitutionally) so innocent as it may appear at first. The threat of backdoor harmonisation, or pushing the CRD by a different means, was one of the major concerns. This is how the UK parliament puts it:

*“There is a real risk that the Common European Sales Law could replace national consumer laws as the Commission’s proposal gives Member States the option to make the Common European Sales Law applicable to domestic contracts. Moreover, if traders use it when selling cross-border then it would make sense for them to start applying it to domestic contracts, as allowed under the draft regulation, to avoid operating under two different legal regimes. Additionally, if companies trading cross border have a competitive advantage (because they’re using the Common European Sales Law) compared to companies just trading domestically, it might effectively force the domestic companies to migrate to the Common Sales Law as well. Either outcome would de facto lead to back-door harmonisation of contract law.”*<sup>472</sup>

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<sup>469</sup> Fernando Gómez / Juan José Ganuza, *An Economic Analysis of Harmonization Regimes: Full Harmonization, Minimum Harmonization or Optional Instrument?*, presented at the SECOLA conference in Leuven, 15<sup>th</sup> January 2011. Professor Gomez was also a member of the Expert Group.

<sup>470</sup> Faure, M, *Economic Analysis of Tort Law and European Private Code*; in A.S. Hartkamp (Editor), Martijn Hesselink (eds.) *Towards a European Civil Code, Third Fully Revised and Expanded Version*, Kluwer Law International, 2004

<sup>471</sup> Wagner, G., *The Economics of Harmonisation*, *Common Market Law Review*, 2002, p. 995-1023. or Faure, M, *Economic Analysis of Tort Law and European Private Code*; in A.S. Hartkamp (Editor), Martijn Hesselink (eds.) *Towards a European Civil Code, Third Fully Revised and Expanded Version*, Kluwer Law International, 2004

<sup>472</sup> Reasoned Opinion of the Austrian Parliament on the CESL, para. 35.

The second important cost of harmonisation by the Optional Instrument may be the covering up of non-action in other areas. The Austrian Parliament has underlined in its Reasoned Opinion that engaging in so much ‘action’ may actually hide non-attention to those actions that could have positive effects, even if it fails to outline which actions. It stresses what many consumer advocates emphasise - namely, the need to focus on real problems- and expresses the fear that such action risks bringing harmonisation to a standstill in areas where EU action is urgently needed.

What are these issues that the Austrian Parliament could have had in mind? Here we could think of ADR/ORD, standard contract terms, or digital content, however, it rather points to the reality that concentrating entirely on manners of improving trade will inevitably leave some other issues unattended.

The Austrian Parliament seems to imply that the EU should, from time to time, concentrate ‘primarily’ on different issues – such as how to protect consumers more efficiently, on vulnerable consumers, or even on issues like environmentally friendly transport of goods etc. What the Austrian parliamentarians overlooked is that, although these issues may be their primary concerns at times because of the broader responsibility it assumes, this is not the case (the primary concern) for the EU. The EU is doing what it understands itself to be responsible for – taking care of creating the internal market.

Finally, the most convincing objection concerning the cost of harmonisation by the CESL is the level of inflexibility that harmonisation brings. Even if we have secured today a high level of consumer protection, we may see that protection ‘frozen’ at the level we see it now. This is not only because of the more cumbersome legislative procedure at EU level, but also because of the lower levels of sensitivity to local problems and, more importantly, because of the handing over of the legislative initiative to the European Commission.

The Commission is an institution which is -willingly or not- motivated by a different set of concerns than national governments, and it has different reasons for action – as the Product Liability Directive has rather convincingly demonstrated,<sup>473</sup> along with lower levels of democratic responsiveness. If the change happens to be needed only on account of social

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<sup>473</sup> See Chapter 10.

concerns, one may wonder how serious it would have to be to motivate the Commission to act – in particular if these concerns do not happen to coincide with its market concerns.

#### **8.3.1.1.4. Consumer Confidence Argument**

The arguments here largely coincide with the ones discussed with regard to the CRD. Perhaps the only additional point of departure is the idea of the ‘Blue Button’,<sup>474</sup> which could serve as guarantor of the ‘quality’ of the European Law regime. This major counterargument – which seems corroborated by the Commission’s focus on getting on board in particular businesses – is that the Optional Instrument will not be an option for consumers, who will be faced with only the option to ‘take it or leave it’.

#### **9.3.2. Democratic Dimension of Subsidiarity**

The Democratic Dimensions of Subsidiarity deals with two different things – firstly with the breadth of values, goals, responsibilities and alternative conceptions of good life, and secondly with the proximity of the decision-making – in the context of postnational functional polity. It shall serve to articulate the full breadth of costs of taking action at the higher level of governance. Now, if the costs are too high, it will suggest that the action should be left to the nation state level.

It needs to be highlighted that the active Micro Legitimacy offers an alternative solution, which may put the action at a higher level of governance in a more favourable light in circumstances when the costs – benefit analysis does not offer a full support. It aims to increase ad hoc micro legitimacy by minimising the two levels of democratic deficit at the EU level – the value and goal closure, as well as the lacking republican aspects of EU governance (public sphere, democratic institutions), and thus engage in collective action in a comparatively legitimate manner despite the subsidiarity concerns. Yet, such legitimate action requires genuine debate about both levels of subsidiarity (economic and democratic) – whatever its outcome.

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<sup>474</sup> H. Schulte-Nölke, “EC Law on the Formation of Contract from the Common Frame of Reference to the ‘Blue Button’,” *European Review of Contract Law* 3, no. 3 (2007): 332–349.

The democratic dimension of Subsidiarity was explicitly raised by Belgian and UK parliaments. The Belgian parliament understands the Subsidiarity Principle as both a legal and political principle. It proceeds then to analyse these dimensions of subsidiarity alongside the question of power (issue of competence), the question of relevance (the economic dimension) and finally the question of *closeness*, which refers to the proximity of the decision-making to the citizens. Even if the parliament senses the salience of the democratic dimension (closeness), it does not develop further what is meant by ‘closeness’, but rather falls back on discussing the economic justification.

The House of Commons also underlines this democratic dimension of the principle of subsidiarity, but it restates the question in a pragmatic way. Namely, the principle of closeness refers to the preference for regulation at the lower level of governance, which should be a default position unless the transfer is justified to a sufficient degree. The action may be taken if a certain threshold of justification has been passed – although which one, we do not learn.

Thus even if neither of the national parliaments develop more deeply what the democratic dimension could imply- what is at stake- there seems to be an increasing awareness that there is significantly more to the principle of subsidiarity than merely economic justification. We can expect the democratic dimension to crystallize through the yellow card procedure in not so remote future.

First of all, such a concept will likely include the procedural requirements on the action of the EU institution. This is mirrored in the opinion of the House of Commons, which considers that the Commission has **failed in its procedural obligations** when putting forward this proposal, which did not allow national parliaments to assess the impact of the measure and thus assess whether there is enough reason to move the decision-making further away from those to whom it is addressed.

Secondly, if we recall the important BVG Lisbon judgment and the idea of ‘hollowing out’ the democracy, the analysis would likely incorporate the requirement that the MS should have retained sufficient space to fulfil their *responsibilities* toward the citizens – unless the higher level of governance is not taking over the responsibilities. Here in particular we may have in mind the social or redistributive dimension of private law, and the need to fulfil the

(legitimate) expectations of the citizens.<sup>475</sup> This resonates with the previous constitutional analysis, which requires higher thresholds of justification in cases where the EU has more limited competence – and thus more limited responsibility – as will be the case in the field of the ‘social’.<sup>476</sup>

Thirdly, and more broadly, is the requirement that the societal order is regulated on the basis of what is considered just. The conceptions of just and good should be developed in as much of a democratic fashion as possible, debating *all issues* in the most *inclusive* way possible. It should not rely on an impoverished set of values (such as economic efficiency only) on the pretext that its competences do not reach further, since that is also a decision – a negative one with respect to those values.

#### **8.3.2.1.      *Alternative Aims and Goals That Could Have Been Discussed...***

As it has been shown on the CRD debate, the way process is designed at the European Level does not allow for a broader contestation of goals and objectives, and this is a major element of the democratic deficit of the EU. The EU constitution - like many other constitutions<sup>477</sup> - is not ‘value neutral’. However, the ‘value-partiality’ at the EU level is to be found at a much *less abstract level* than is the case in generalist polities. It is centred on the values which are usually below the constitutional level, and open to democratic contestation – such as what the role of the market is. At the EU level, the ‘economic model’ – market integration and market liberalisation (free markets) – is not a debated issue. It has long time ago become the ontological, deontological and epistemological frame for the EU self-understanding.

Now, if we are to exit the ‘market determinism’ of the EU action, we shall ask ourselves, what could be the competing objectives to the market in private law? The charm of

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<sup>475</sup> Hans-W. Micklitz, “German Constitutional Court (Bundesverfassungsgericht BVerfG) 2 BvE 2/08, 30. 6. 2009 – Organstreit Proceedings Between Members of the German Parliament and the Federal Government,” *European Review of Contract Law* 7, no. 4 (November 2011): 528–546.

<sup>476</sup> Scharpf, “The European Social Model.”

<sup>477</sup> Matthias Kumm, “Who Is Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law,” *German Law Journal* 7, no. 4 (2006): 341–369.

democratic forms of governance, of course, lies in the fact that they do not pose boundaries to the debate and contestation regarding the proper goals (and the means to achieve them), thus it is beyond the capacity of one human being to come up with a comprehensive list.

Thus I have decided for this reason to look at the Impact Assessment to learn what the Commission itself considers to be ‘impacted fields’, those issues that may compete for the attention alongside market, and thus presume that these are the issues that would have been the object of democratic discussion. With each Policy Option, the IA discusses several issues, particularly the overall economic impact and impact on specific economic operators, but it also devotes two paragraphs to Social and Environmental Impacts. With regards to the social impact, it claims that the Optional Instrument may create up to three hundred thousand new jobs, while also admitting that the increase in deliveries will have some environmental impact because of transport.

But is this all that is to be said and discussed – if the EU purports to be a democratic entity? First of all, the Green Paper failed to pose any questions with regard to the impacts on these two areas of public action - all the debate started and ended up with the possible economic effects on cross-border costs, or whether businesses would be using the instrument, and how much it would impact on cross-border shopping and lower prices.

Secondly, the IA suggest another line of thinking about the alternatives to the ‘market’ in private law. The ‘moving’ stories that the Commission tells us in the IA may not suggest the irrationality of the people whose behaviour it describes in this way, but rather a different conception of what constitutes a good life. Thus a Finnish Lady, despite the lower prices on internet, prefers to go to the city centre to buy her shoes. This is of course not how she is expected to behave. To be considered rational in the market, or in economic efficiency logic, she should be sitting in her room, searching online for cheaper shoes, or preferably purchasing more shoes (for an altogether higher price).

Yet, she may not be content with such conception of good life, which may seem to her (and number of others) rather reductionist conception of what is important in life. Would it not be considered more desirable that the Finnish Lady goes out, has a walk in the fresh air, engages in communication with the neighbours she meets, talks to the shop assistant about

the shoes and about life in general before trying the shoes on to see whether they feel good and going home with a purchase if everything is fine? And it might be true that she buys only two pairs of shoes instead of three this year, but maybe they would be more comfortable, and perhaps she would have enjoyed herself in a different way than by possessing more cheaper pairs of shoes.

EU citizens, however, did not get a chance to express their views on whether the policy to give public support to online shopping is in fact the conception of good life to be furthered by public action, or discuss whether such public support may have (and which) harms as opposed to underlined benefits (cheaper prices, larger choice). The policy in question can be seen to have many costs – environmental costs, urbanism, the increasing isolation of human beings, which negatively impacts on mental and physical health, and one may wonder whether balancing between these issues should not be done in a broader and more democratic discussion.

If we leave that to the Commission to decide – alone, since it did not open these questions in consultation procedures – we find out that ‘jobs’ will only be created by the increase of cross-border shopping, but curiously neglected to mention the jobs that would also be lost. In particular the jobs in small and medium-sized family shops and businesses, which would be driven out of business, because their customers would be able to purchase cheaper goods on the internet.

If we think of the environmental expenses, is it truly only the transport and delivery that is a cause for concern? Isn’t the increase of consumerism itself (thus far facilitated by the availability of cheaper goods) going to cause further environmental harm? The additional packaging, waste, the abuse of natural resources? And would these not be issues which would raise the interest of environmental advocates and interested citizens as well, if the consultations were structured in a way that allows these issues to be discussed? And isn’t such enlarging ‘issue public’ desirable for the democratic legitimacy of the EU action (CESL) and the EU itself?

One may object that there is no necessary framework at EU level to address these concerns. There are legal limitations to the kind of issues which can be debated at the EU



level, limited to the purposes and objectives of the EU, and even if there were a will to debate these issues, there is no sufficiently developed framework where such a debate could take place. But shall we believe that the EU somehow offers sufficient space to give response to these questions, without any debate?

Substance and Procedure are interdependent – democratic debate cannot be pre-determined by pre-set goals, and finding the space and inducing such debate must be the aim of the EU. The EU cannot legitimately rely on legality in order to have these issues be pushed out of the debate, when it effectively decides about them. Instead of constraining its powers, legality serves to expand its limited rationality and values ingrained in the economic constitution into different fields – without any democratic deliberation.

#### **8.4. On the Democratic Credentials of the Procedure: Active Dimension of Micro Legitimacy**

##### **8.4.1. The Code That Dare Not Speak Its Name....<sup>478</sup>**

The whole period of preparations that lead us to the Optional Instrument, the 28<sup>th</sup> legal order or 2<sup>nd</sup> *legal order*, has been marked by the ambiguity of where the EU initiative is heading. This could have been a good sign, of the openness of the process and a certain democratic quality to the debate behind the policy action. Unfortunately, this ‘ambiguity’ was prompted by the need to cover up, rather than uncover, what was actually going on.<sup>479</sup>

##### **8.4.2. The Exclusion of the Political**

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<sup>478</sup> Collins, *The European Civil Code*.

<sup>479</sup> G. Brueggemeier, M. Bussani, H. Collins, A.C. Ciacchi, G. Comandé, M. Fabre-Magnan, S. Grundmann, M.W. Hesselink, C. Joerges, B. Lurger, and others, “Social Justice in European Contract Law: A Manifesto,” *European Law Journal* 10, no. 6 (2004): 653–674.

It has been made clear in the part on the ‘Road to the Common European Sales Law’ that the process of creation of the CFR and later the Optional Instrument were conditioned by the limitations stemming from the Treaties, which were part of the reason why the Commission engaged in a difficult masking exercise.

In particular, the pressure of squeezing such a broad measure in the internal market legal basis required a lot of gymnastics - marginalising the broader implications and constitutional significance of what was going on, juggling with the different ‘toolboxes’, ‘instruments’ and ‘frames’, but also preventing broader participation and debate, in order to prevent the impression that something important might have been going on.

By the division of the process into technical and ‘more’ political parts, with diverging logics and justificatory mechanisms, the Commission could achieve the neglect of the political in the technical, and generally undermine the relevance of the political sphere within the process.

Thus on the one hand, we had a technical CFR, which is nothing more than a ‘toolbox’, which should serve the internal use of the institutions for better drafting. This kind of instrument needs relatively little procedural legitimacy, and seems rather like an act of goodwill from the side of the Commission to take up on advice from academia.

On the other hand, we have the potentially much more ‘political’ ‘Optional Instrument’ - a ‘second legal order’ - which would require much more procedural legitimacy and risk a number of troubling questions regarding the appropriate procedure, or the people who should develop this new ‘legal order’ which would be directly binding on EU citizens.

However, the trick with the Optional Instrument is that it remained only a ‘possibility’ - until it was too late.<sup>480</sup> In the meantime, the interest in the initial procedure had been

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<sup>480</sup> *The Action Plan concluded, inter alia, that at this stage there were no indications that the sectoral approach followed thus far leads to problems or that it should be abandoned. It was nevertheless considered appropriate to examine whether non-sector-specific-measures such as an optional instrument may be required to solve problems in the area of European contract law. The Commission intends to continue this process in parallel with the work on developing the CFR and taking into account the comments received so far from stakeholders about their*

partially lost – it had been with us, debated and critiqued for way too long. In addition, after the decision was taken, we were immediately faced with a new procedure and a new Expert Group, and the debate now turns on the substance of work of this group. We have almost resigned on discussing the procedural shortcomings, and its potential impact on the substance - there have been too many groups and too many drafts. Yet, I believe that we have to discuss foremost the beginnings and the creation of the DCFR, since it has structured the debate from that moment on.

#### **8.4.3. A Few Remarks on Actual Procedure**

If we look back at the creation of CFR, we can detect several important procedural drawbacks. The first of these was, of course, the exclusion of the political, and understanding the process as an academic exercise, with purpose to *‘improve the quality and consistency of the acquis in the area of contract law and emphasised that the CFR could contribute to that goal’*. How could anyone possibly object to such an innocent and highly desirable aim to improve the drafting, through an academic contribution to the legislative process? Is such assistance not often a result of the work of private law scholars, done in different books, commentaries and articles, and directed to the courts and the legislators? Yet such academic exercise at once gets political recognition – despite the fact that no one ‘bothered’ with legitimacy of the procedure, by the nature of the academic character of the project reduced to minimum.

The first question that should interest us is as to who prepared the CFR, and how this designation took place. The document (which was to become a CESL) was prepared by a research group, which won the research from the Commission within the Sixth Framework for Research. The Commission does not put forward any requirements with regard to the inner composition and organisation of the groups. It does put forward some criteria for the stakeholder ‘Technical Input’ – such as: *Diversity of legal traditions, Balance of economic*

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*preferences for the parameters of any such instrument, if the need for it were to arise. The process of developing the CFR and in particular the stakeholder consultation may well provide relevant information in this regard.* European Commission, “Commission Communication on European Contract Law and the Revision of the Acquis: The Way Forward, COM (2004) 651 Final,” 8.

*interests, Commitment and Technical expertise.*<sup>481</sup> This attempt to secure a certain degree of balance, or the overall impartiality of the process, suggests that the input is not so technical in the end.

But why no requirements applies to the researchers? Is 'excellence' such an uncontested category? Yet, the fact that the exercise was 'technical' and 'academic' meant that the question of representativeness was never seriously brought up. Posing the question seriously would imply tackling the inner structure and the composition of the groups, as well as eventually the representativeness in political, gender, regional and geographical terms.

What does the form of a 'research group' mean for the content of such measure? Depending on size, research groups will usually be comprised of the core group- the people who are in proximate personal and/or professional relation toward each other- and those more external ones who are designated (again for the same reasons) by those members closer to the core of the group. Such affinity is surely necessary for the successful operation of a research group, however it is hardly desirable in terms of representativeness in the law-making process. In addition, along with the hierarchy on the basis of personal authority, hierarchy also exists in the funded research groups based on money – namely, those who have 'won' the money have a different weight of authority and a different say (and responsibility of course!) to those who are more external to the core group.

Even if the researchers themselves have tried to maintain the geographical balance inasmuch as this was possible, in order to be able to take careful consideration of each national solution, it is difficult to overlook that certain legal cultures are better represented than others in the result. This underlines the importance of the inner organisation of such groups, including the differing levels of authority enjoyed by various members, for the outcome of the process.

The more formalised 'inputs' in the CFR process also did not work in a desirable way, and thus offered hardly any supervision of the work of the groups. The 'technical' input of the stakeholders during the workshops did not succeed in bringing about fruitful discussion

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<sup>481</sup> European Commission, "Commission Communication on European Contract Law and the Revision of the Acquis: The Way Forward, COM (2004) 651 Final."

and sufficient engagement, and the participants from both sides - academics and stakeholders<sup>482</sup> – were frustrated. The 'political input' from the MS was coming mainly from the lower administration, which could be partially put down to the low political salience that had been ascribed to the exercise.

The so-called evaluative groups (e.g. Law and Economics Group) were also frustrated, insofar as first of all, they were presented with the full blow code, which allowed little space for conceptual discussion. Secondly, they had very limited time for making comments and suggestions.<sup>483</sup> The same objections could have come from the broader public, which had also been presented with a full blow code, no space for more conceptual discussion, and little time to say anything anyway. Finally, the Network of Excellence itself had too little time to incorporate the comments of the evaluative groups or broader public.

With regard to the openness of the process, several things can be said. The Network of Excellence has 'worked' mainly behind closed doors, with the exception of a few conferences, organised predominantly by the ERA in Trier,<sup>484</sup> and so, can clearly have only limited effect on the content.

The Commission has created a website for the ongoing work, however only for the use of selected participants, invisible to the broader public. It could also have been the venue for the ongoing comments on the work of both groups, which would have thus increased transparency, openness and participation, and been a promising development in the debate on the Constitutional Treaty. However, had participation been invited in a manner similar to that of the Constitutional Treaty, this would have not corresponded with the picture of a purely technical and insignificant exercise, and could have raised suspicions regarding the political and social significance of the project.

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<sup>482</sup> The UK Stakeholder in the DCFR process, who took floor at the conference at ERA DCFR Conference in Trier in March 2008, was very critical toward the involvement of the stakeholders in the process. Two other stakeholders from the public supported his opinion.

<sup>483</sup> At the conference in Trier in March 2008. at the wake of the process, when the evaluative groups were first to express their opinion to the project, Prof. Gomez expressed discontent with the significant time restraint. ERA DCFR Conference in Trier, March, 2008.

<sup>484</sup> See <http://www.copec.org/>.

A broader point relates to accountability, when the *closeness* of the process and the emphasis placed on a speedy delivery allowed the Groups to benefit from public opinions and peer-reviews only to a limited extent. It is true that there have been many books written about the project. However the criticism has not been voiced *within* the project, at the place and time when it could actually have influenced the decision. This will influence not only the democratic, but also the epistemic qualities of the process.

Nevertheless, if you push the academic participation out of the discussion, it may find a way back in through academic writings and academic criticism.<sup>485</sup> But what happens to the voices of those participants who do not use such avenues? In other words, why did the process not benefit from the potential voices of those who might have been convinced about the marginal importance of the exercise? Or do we really believe that, for example, national judges, domestic scholars, politicians or lawyers would have no interest or opinion with regards to a *de facto* ‘European Civil Code’ (be it optional or not) – contrary to the ‘toolbox’ for the Commission?

The ‘optionality’ of the final instrument cannot compensate for these procedural omissions. It could possibly lower the potential negative effects of the threat of failure, but it cannot remove the fact that the process was designed in such a way as offends the constitutional commitment to participatory democracy.

There are two reasons which could have led to such outcomes. The less significant of these, which explains the haste with which the measure was prepared (with plenty of space for the debate), is perhaps the institutional motivation of the Commission to show performance quickly and efficiently.<sup>486</sup> The more important of the two is the need to ‘blind’ the Treaty, and cover up the weak or non-existent justification for EU action.

If we understand the provisions of the EU Treaty regarding the *competences* and *subsidiarity/proportionality* as means by which to constrain the power of the EU, what was

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<sup>485</sup> M. Hesselink, “‘If You Don’t Like Our Principles We Have Others’; On Core Values and Underlying Principles in European Private Law: A Critical Discussion of the New ‘Principles’ Section in the Draft CFR” (2009).

<sup>486</sup> Hans W. Micklitz, “A ‘Certain’ Future for the Optional Instrument,” in Reiner Schulze, Jules Stuyck, *A European Optional Contract Law: Policy Choices* (Forthcoming, n.d.), 181–194.

the ‘effect utile’ of these provisions? Did they constrain the EU powers in any way? Or did they just lead to the perversion of the lawmaking procedure itself? Essentially, the need to ‘formally respect the EU Treaties’ has led to the worst possible combination – the Treaties were shown no substantive respect, while also a more legitimate micro procedure could not have taken place.

As has been stated on numerous occasions in this thesis, if the EU has to -or wants to- step outside of its narrow constitutional mandate, it should not rely on the hypocritical respect for the principle of legality – for that will not render its decisions legitimate, or protect them from contestation.

The EU in such cases has three options on the table. The EU can avoid undertaking actions which are not within its constitutional mandate. Or it can adjust its constitutional framework and only then take steps in the desired direction. Finally it can try to acquire *ad hoc*, micro legitimacy for its action, even if the action is outside of its constitutional mandate (i.e. engaging in issues which implicate rationalities which it does not share). I will discuss this third way – ‘comparatively legitimately’ stepping over the constitutional mandate, in the following part.

#### ***8.4.4. A Few Remarks On The Way in Which To Improve The Procedure.***

What does the Micro Legitimacy, and in particular Micro Regime require from a procedure such as this one? As has already been mentioned, this question can never be discussed *in abstracto*, as it will depend on the assessment of what the best way is to achieve micro legitimacy. This is not a contradiction, for what we are seeking is *legitimacy*, thus it would be self-defeating to start out with an attempt to abuse this freedom - for no claim to legality is guaranteed.

How then would a micro legitimate procedure be construed in order to remedy the fact that the EU is stepping over its constitutional mandate? Bearing in mind that it is

particularly the *democratic deficit* of the EU that makes problematic stepping over its constitutional mandate (i.e. its incapacity to generate in democratic processes different rationalities for public action), the first step that the EU needs to take is to try to lower the salience of this element of the ‘democratic deficit’ by opening up the objectives and goals of the polity to contestation. This step is vital already for the subsidiarity analysis, which requires the contestation if the full articulation of costs of action is to be spelled out – both with the prioritisation of certain *goals* and *objectives* for public action in front of the others, and its broader relation to the alternative conceptions of good life and values implicated by pursuing any public action.

With regards to the democratic contestation of the goals and objectives, and their prioritisation, questions can be asked such as what the scope of public intervention into the economy and its purposes would be, whether it is desirable to concentrate on online shopping (for reasons different than establishment of the internal market) for e.g. environmental and social reasons, or whether it would possibly be more desirable to concentrate on allowing the consumers to select more effectively on the basis of *fair trade* or the *environmental* standards used in the production of certain goods. This would also extend to the kind of ‘stakeholders’ interested in the process – extending the debate to incorporate environmental or social rights advocates, but also to labour unions and unorganised citizens – which will have a democratising effect on the process.

It needs to be underlined that the perceived deficiency of participation in the fora for the debate is the *lesser evil* when compared with *deciding on these issues without any debate*. At least what has been assumed so far would be now open to contestation - and in the longer run could perhaps lead to the development of the broader participation in public spheres and thus more satisfactory fora.

With regards to the broader conceptual questions (such as whether the form of code is preferable, the question of responsibility or the role of private law in the process of embedding the internal market, or eventually what the role of private law in the face of globalisation is), these should have been opened up in order to attract a much broader group of possibly interested ‘experts’ in private law, those who, for various reasons, did not think the harmonisation was necessary or desirable. But it would also have attracted political



economists, social theorists or philosophers who may have had something to say regarding the role of private law in the economy.<sup>487</sup>

Thus indeed the 2001 Commission Communication could have started the debate on European Contract Law, but this debate should have been centred on these broad questions about the direction in which to go, rather than on the assumption of central goals, with little public discussion. The Commission would then have a (somewhat more democratically) elaborated picture of what are the costs and benefits of certain goals and objectives, which moreover would motivate further deliberation of these broader issues in front of the European Parliament.

The second issue to turn then to is the question of an appropriate institutional framework for a particular public action. This indeed may be best achieved through a ‘group of experts’, yet such steps should not overlook the broader epistemic community and essentially contested nature of expertise.<sup>488</sup> Normatively, it is quite evident that the Commission has sought a certain balance, in order to come closer to the impartiality of process and the outcomes of lawmaking.<sup>489</sup> It has done so by first designating the presumably neutral experts to lead the process, by ensuring balanced ‘interest representation’ through the ‘Expert Stakeholder Group’, and finally it has insisted on geographical balance amongst the interest-stakeholders.

However, the rigour invested in this question would possibly have been sufficient for an academic exercise, but little beyond this. The Optional Instrument, the ‘second legal order’ nonetheless required considerably more. Firstly, again, articulating the normative requirement would be fundamental. If such a requirement is that of impartiality, then the Commission

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<sup>487</sup> The last time that I have come across the broad understanding of the importance of private law for the deeper understanding of interaction of the law and society is through the anecdote told by Jurgen Habermas, in J. Habermas, “Ein Avantgardistischer Spursinn Fur Relevanzen. Die Rolle Des Intellektualen Und Die Sache Europas.,” in *Ach, Europa*. (Kleine politische Schriften XI, Frankfurt aM, 2008), 77.

<sup>488</sup> Interestingly, the Commission Better Regulation debate strictly divides between the rules for consultation of public, and rules for the use of expertise, when the ‘representativeness’ is reserved for the former. Yet, given the contested nature of expertise, this is more than questionable assumption. Thus it should not only be the ‘schools of thought’ that should be of interest, but much broader political and value preferences of the involved experts. See

<sup>489</sup> Habermas, *Between Facts and Norms*, 310–312.

should have concentrated on appropriate institutional design, along with sufficient openness to further participation, and transparency of the rulemaking processes.

*The more interest certain process is able to raise, the more inclusive participatory procedures have to be provided. If those interested are not able to have ‘voice’ (which may be objected to the DCFR and CESL process) the legitimacy of the process will be put in question.*

Such sensation of illegitimacy may be expressed in various ways. The epistemic communities have reacted in perhaps rather constructive way to the failures of the DCFR/CESL process. It has come up with its own response to the problem of the lack of transparency of expert processes, in the form of the European Law Institute.<sup>490</sup> Even if we are speaking only about a limited fragment of the public sphere here, it is an important contribution insofar as it aims to come much closer to the ideal of ‘impartiality’ through creating an open procedure for membership (including cross-disciplinary membership) and aiming for considerable transparency in its functioning. Thus openness and the potential for participation are crucial for securing some legitimacy of the process.

Now, even if the selection of the Network of Excellence had to take place through the research tender, given the importance of the project, the procedural (normative) requirements on the composition of the group and the design of the process should have become a matter for all European Institutions, and most notably for Parliament. The EP should have been more involved in the selection process, including the setting of procedural criteria and rules, as well as ‘having more say’ on the inner structure of the group.

Equally, in the name of overall balance, the impartiality of the ‘stakeholder expert groups’ should have been a much bigger concern. We see that in the Feasibility Study process, the consumer association was greatly outnumbered by business associations. This is, of course, a natural consequence of the market focus behind all internal market measures in general, and the Optional Instrument in particular – but that is something that needs to be counteracted through the appropriate procedure. This is not to mention that there are many

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<sup>490</sup> See <http://www.europeanlawinstitute.eu/eli/index.php>. See also Francis Jacobs, “The European Law Institute,” *European Law Journal* 18, no. 2 (March 1, 2012): 175–176.

more stakeholders which should have been let into the process by adequately designed consultation procedure (asking broader questions related to goals and objectives, and their costs).

Now, the way the Commission has selected the Network of Excellence, and its insensitivity towards the internal structure of the group, was exemplary. The Expert Group members were at least appointed by the Commission – thus they can draw on Commission’s legitimacy. This has happened however with little or no justification for its selection, or already articulated need to involve European Parliament. In addition it appear that the same people are appointed, who were present already in the DCFR process, and thus the space for the internal critique of the predecessor of CESL is minimized.

These procedural failures cannot be removed in the process before the European Parliament. First of all, the debate remains concentrated on the proposal, which carries little procedural legitimacy. Secondly, the same questions are further debated in front of the EP, with the same people, and within the frame set by the Commission and the outcome of prior procedures with questionable legitimacy. In such a setting we cannot witness any democratic deliberation about the appropriateness of the goals or disturbance of market rationality – and thus the removal of at least one dimension of the democratic deficit of the EU.

It is often claimed that the EU has moved beyond the reliance on performance legitimacy, to the field of regime legitimacy and much broader range of values. If this is to hold true, we cannot renounce on the procedural (regime) legitimacy even if the content of the public action is impeccable. The CESL is however in direct contraction to the aspirations of the EU to develop a different, more political, culture and increase its democratic legitimacy.

No comparison with the national level (‘codifications have always been developed it this way’) can lower the salience of the failure – in particular since the EU and EPL do not dispose of an ‘institutional’ framework similar to that at the national level, which would allow the space for democratic correction of the outcomes, but foremost, which enjoys much higher normative legitimacy and thus needs less micro legitimacy than the action at the EU level.



## **9. MICRO 'POLITY'**

The final ground for normative legitimacy, that Walker suggests we should consider when thinking about legitimacy in the EU, is the Polity Legitimacy. As we will see it is of a somewhat different nature - it naturally has more 'macro' outreach, but nonetheless it is still worthy of incorporation into our thinking about micro legitimacy. This is not only because of the aggregate effect of the micro legitimacy on the macro legitimacy, but first because of alternative values and conceptions of good life that need to be articulated in the subsidiarity analysis, as well as in order to explicate how the participation and socialisation in the legitimate micro procedures (in particular if we aim to enlarge the issue publics) may impact on the creation of values and shared identity through socialisation in public fora.

### **9.1. Polity Legitimacy and Private Law**

Polity Legitimacy in Walker's framework has two dimensions. Firstly is a vertical dimension referring to the overall polity legitimacy, or the extent to which the political authority is embedded in the society with all its legitimisation discourses – performance, regime and identity.<sup>491</sup> On the other hand the polity legitimacy has a horizontal dimension, related to shared identity and shared values, the feeling of 'sameness', 'belonging', common 'origin', and shared 'fate' or 'destiny'. It denotes the deepest and the most stable dimension of legitimacy of a particular polity – shared identity and the values that feed it.

This chapter will concentrate on the second, horizontal dimension, and the question of how such a feeling of 'sameness' (shared identity and common values) emerges – and the potential of the European Codification to contribute to the creation of a deeper connection among Europeans. This is motivated by the assertion of many protagonists that the creation of such a Code could contribute to building the European Polity, laudably on a deeper normative basis. Our belief regarding what effect such a code may have will, of course, depend on our understanding of what identity stands for, and its relation to the code.

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<sup>491</sup> This is what Walker calls the vertical dimension of polity legitimacy. See Walker, "The White Paper in Constitutional Context."

The chapter thus addresses the question of what identity is, and how it emerges, and what its relation is to the shared values which are so often cited in support of the national codifications. I will further link the debate on the European Codification, and the way it could have achieved the idea of European Identity Building.

## **9.2. *Identity and Micro Legitimacy***

The core idea that informs my understanding of identity is Habermasian, in that both shared identity and values are the product of democratic processes, and emerge through communicative interaction in public spaces (here ‘socialisation’), which is channelled in a effective way into the lawmaking processes (here ‘voice’). This democratic circle has both an emancipating dimension for human beings, who express themselves through the exercise of their public autonomy, while at the same time having the socialising effect of repeated interaction (and recognition of one another as participants in the debate), which shall enable them to strengthen common identity at the level of ‘feeling’.

### **9.2.1. *On European Identity, Private Law and Micro Legitimacy***

Ideas about full blown democratic governance at the EU level (the democratisation of macro structures) have crushed the hurdle of shared identity- the *demos*- innumerable times. The failure of democratisation has been ascribed precisely to this lack of common bond amongst Europeans.

The German Constitutional Court, in its Lisbon judgement, summed up why the EU is inappropriate to develop ‘real’ (representative) democratic governance. The lack of common European identity inhibits the development of political life as embodied in common public spheres, party politics, and the democratic accountability of government through elections. This will remain the case, according to the BVG, even if the EU is partially successful in developing other (second best) options - such as participatory democratic methods. Thus in the view of the BVG, not only the desirability, but also the prospects of the democracy are bound to the existence of a sufficient bond among Europeans.

On the other hand, we often hear the optimistic accounts of people with a cosmopolitan worldview, who argue that the difficulties faced in overcoming the importance of national identity in the development of postnational governance should not be too great, insofar as we are born into and create numerous identities and loyalties throughout our lives.<sup>492</sup>

As is usually the case, each of these opposing accounts overlooks the accurate elements of the other. With regard to the latter account, even if I am sympathetic to such a claim, this cosmopolitanism does not resolve the fact that we are not looking for just any kind of identity, but ‘political’ identity, the kind of identity which motivates the people to engage in political association and the joint administration of common affairs (including redistribution).<sup>493</sup> Only the emergent political identity at the EU level could enable us to achieve this ‘political closure’ at a higher level than that of the nation state.<sup>494</sup>

With regard to the former, it may imply that political identity, a substantial version of it, is a pre-condition for political organisation.<sup>495</sup> The republicans (a group which, in all likelihood, includes some of the judges of the BVG) would consider a thick identity a condition for reaching a sufficient level of understanding and establishing what the common good requires, in order to engage in collective action.

In *Between Facts and Norms*,<sup>496</sup> Jurgen Habermas challenges both liberal (individualistic) and republican (deterministic) understandings, and offers a perspective on how the common good (as well as collective identity) can be achieved through communication in public spaces. There is no need for a pre-established set of common values, or ‘thick identity’, as a precondition for mutual understanding, for these are debated and

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<sup>492</sup> S. Amartya, *Identity and Violence: The Illusion of Destiny* (Allan Lane, 2006).

<sup>493</sup> I may feel my gender identity very strongly, but that does not determine what form of political association I would prefer – a nation state or world government - insofar as there are many factors, including my various identities, which will influence my political identity.

<sup>494</sup> J. Habermas, *The Postnational Constellation: Political Essays*, 2001, 19.

<sup>495</sup> The Input Legitimacy seems to ‘presuppose’ such thick political identity. Scharpf, *Governing in Europe*.

<sup>496</sup> Habermas, *Between Facts and Norms*.

established in the course of communicative interaction.<sup>497</sup> The identity is thus a product of communication and interaction- the product of democracy, rather than its precondition.

From this perspective, the problem of identity (or *demos*) becomes rather a problem of scale – *how much common identity do we need in order to mobilise people to enter into communicative action*, so as to develop a conception of common good as a basis for collective action.<sup>498</sup> Habermas proposes the idea of ‘constitutional patriotism’,<sup>499</sup> which could give a focal point around which communication might be built.

As the identity is co-produced in communicative interaction, in order to create political identity around shared constitutional principles as Habermas desires, we need to have the space (figuratively) for communication to happen in the first place. The elite projects, as the EU has so far been, have not resulted in the creation of the desired political identity, for the ‘debate’ has remained too limited to the elites, not sufficiently political to capture the imaginations of the people, and finally, too undemocratic to give them a voice if they were to become interested.<sup>500</sup>

In addition, it is important to realise that, even if we do see people increasingly acknowledging their European Identity along with their national one, such additional identity may correlate to a greater or lesser extent with their support for integration (a political identity *proprio sensu*), insofar as they may desire a different kind of European Integration.

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<sup>497</sup> Ibid, 147-8.

<sup>498</sup> The ideas of Habermas have been taken up by deliberative democrats who develop them in several different directions. Most importantly they propose an alternative model to the traditional representative democracy, the ‘deliberative democracy’. The deliberative democracy stresses the deliberative element of democratic governance, complemented by the participatory democracy (either grass-root or elite).

<sup>499</sup> Habermas, *Between Facts and Norms*, 465.

<sup>500</sup> A particular chance to mobilise the EU people offers itself in the form of the need to respond to globalisation, and in particular in offering a ‘left’ response to the global market – something that MS are too disempowered to attempt. However, the economic rationality of the EU needs to be broken down by opening the core question of whether it is truly the ‘market’ which is the right response to the globalisation.



Insofar as the public sphere, in a more conventional understanding, is missing from the EU, it seems necessary to look for functional substitutes which could account for this defect. Several have been proposed for the EU and beyond. Thus distinguishing between general ('weak') and institutionalised ('strong') publics,<sup>501</sup> when the strong publics are, for example, the European Parliament or the ECJ,<sup>502</sup> can mitigate the absence of the public sphere.<sup>503</sup> Depending on the kind of communication that is taking place, the EP or the Court can be seen as providing adequate fora for the discussion (as we have seen with regard to the CRD, and now with regard to the Optional Instrument).

Perhaps the most promising conception of the public sphere in the postnational context is the concept of 'issue publics', first proposed by Gerard Hauser, who considers that '*publics were formed by active members of society around issues*'.<sup>504</sup> Such publics fulfil a double role – they both directly participate in political processes within the institutionalised frameworks for participation, as well as serving as the instruments of criticism against institutional action, thus deterring uninformed or badly reasoned policy decisions.

Of course, even if this seems to be one of the more promising approaches in the EU, and in EPL in particular, the questions surrounding inclusion and the parity of the participants remain major challenges.<sup>505</sup> We have discussed these challenges at some length in the previous part, and concluded that a normative requirement in the making of EPL has been the implicit goal of the 'impartiality' and non-arbitrariness of the issue publics. Still, much more needs to be investigated and discovered.

In what way does 'micro legitimacy' link to this discussion? Micro Legitimacy tries to overcome the missing elements at the 'macro' level – such as the missing 'political identity' or absence of a public sphere in the traditional sense – by concentrating on the micro

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<sup>501</sup> N. Fraser, "Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy," *Social Text*, no. 25/26 (1990): 56–80.

<sup>502</sup> While Fraser (Ibid.) does not consider the courts as 'strong' publics, Jezlperger makes a case for the CJEU as a strong public. C. Jezlperger, "Legitimacy Through Jurisprudence? The Impact of the European Court of Justice on the Legitimacy of the European Union" (EUI WP 2003).

<sup>503</sup> E.O. Eriksen and J.E. Fossum, "Democracy Through Strong Publics in the European Union?," *JCMS: Journal of Common Market Studies* 40, no. 3 (2002): 401–424.

<sup>504</sup> Hauser, "Vernacular Dialogue and the Rhetoricity of Public Opinion," 92.

<sup>505</sup> Nancy Fraser, *Transnationalizing the Public Sphere*, <http://eipcp.net/transversal/0605/fraser/en>.

level. It is indeed at the micro level where such issue publics are under certain conditions normatively acceptable.

The fundamental part lies in the opening up of ‘goals and aims’ at a micro level to more democratic contestation and much broader debate.<sup>506</sup> By opening up the ‘issues’, we should be able to engage a much broader public in the micro processes and thus, bottom-up, through the proliferation of the enlarging (and increasingly political) issue publics, create preconditions for the creation of a more expansive general public. Furthermore, Micro Legitimacy aims to increase people’s motivation to get engaged with each other, and with the EU, by ensuring non-oppressive<sup>507</sup> institutional frameworks, where voices can be sufficiently heard, and knowledge and criticism channelled into the lawmaking process. The limits of Micro Legitimacy are set by its success – once we create a more robust communicative public space, we may need to concentrate more on the macro level.

### **9.2.2. On Values, European Private Law and Micro Legitimacy**

Shared identity and shared values can be considered two sides of the same coin. As with identity, values are the product of democratic processes, which emerge through communicative interaction in public spaces, and they can be created at the postnational level in sufficiently communicative settings. Values (objectives) also underpin and inform the rationalities of various systems, thus by changing these values, it is possible to change the ‘thinking’ of the system, its goals and objectives and thus its rationality.

The particularity of European Private Law, when conceived as one single system, is its mirroring of the EU as a whole, with its *sui generis* character. It can be characterised by the ‘co-existence’ of two diverging rationalities, and two sets of values underpinning them, which are

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<sup>506</sup> Thus it has fundamental practical importance for dealing with the ‘democratic deficit’ in Europe.

<sup>507</sup> ‘Financing’ becomes a significant means of control of ‘issue publics’. The financing of ‘research groups’, along with the prestige, become significant power leverages from the side of the Commission toward those researchers who expect to be repeat-players. This will be even more valid for the businesses (such as consultancies preparing Impact Assessments), the primary aim of which (financial profits) are dependent on repeated cooperation.

generated in different ways. National private law is connected to the performance expected from the nation (welfare) states, and related to the responsibility to deliver a just social order. This performance informs the values which motivate the intervention (either in the form of collective concern through the legislation, or individualised concern through the judiciary), both aiming at securing justice between parties, even if by different institutional means.

The rationality of the EPL is also based on the performances expected from the EU, which primarily in this case concern market integration and market efficiency. This objective informs the set of values which underpin the rationality of its action. The central ‘values’ of much of the ‘first pillar’ lawmaking are market efficiency and market integration.<sup>508</sup>

The *sui generis* multi-level EPL system is/was based on these two parallel rationalities. While the pointilistic and minimal European Intervention allowed objectives that the EU had set for itself to be fulfilled, the system remained still based on a sufficiently thick normative basis since it included also national democratic processes (thus not only efficiency but a much broader notion of justice, which is open to democratic contestation at the national level). Such a system of EPL has also ensured rather broad consumer protection and thus worked rather well for consumers.

The EU has, however, decided to change course. It has decided to take over all lawmaking in the field – because this seemed necessary for the fulfilment of its own, internal market objectives. Yet, this exact thing goes against the whole idea behind the *sui generis* character of the polity (and its private law). The EU understands the ‘objectives’ in the supranational sense, rather than in any compound or holistic manner, which would allow the limitations of one level to be compensated for by the other level. It is rather obvious as well that it is not going to be consumers or citizens who will profit - for the market rationality in a most general sense will favour mobile actors and pass the costs to those less mobile actors that cannot leave the jurisdiction.

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<sup>508</sup> It could be questioned to what extent ‘values’ such as efficiency are values in the Weberian sense (Weber, *Economy and Society*, 24 ff.), insofar as they inform purposive rather than value rationality. However, it has figured among the values in the 2008 edition of the DCFR.

Questions abound as to whether such a development is actually a necessity. The first question is whether it is necessary to break up multi-level EPL. If a positive response is given to this question, the second issue then is whether this can be done without renouncing the democratic contestability of the set of values that underpin private law. Can we maintain the social order based on a normatively more robust set of values which underpin private law in the EU - despite the harmonisation? How can we develop the set of values at the EU level in a more democratic fashion? This is the moment when the question of values touches upon the question of democracy, and where the micro legitimate procedures (which have been more deeply developed in the previous sections) aim to offer a response.

### ***9.3. European Civil Code and Identity Building***

Many have understood the development of European Civil Code as a means to strengthen European Identity, and to build Europe on more traditional values of ‘justice’, as opposed to the prevalent functionalism of today. My scepticism about this idea is based on two grounds. The first is that the Code would be placed in the institutional framework of the polity which is based on different values and different self-understanding, thus we would be unlikely to see the Code ‘civilising’ Europe, but rather more likely to see Europe functionalising the Code. The second ground is that it is doubtful that the positive articulation of European Civil Code has sufficient mobilisation character to contribute significantly to the building of identity in the short to medium term.

On the other hand, the Code would not be devoid of any effect on Identity building in the long term, due to the legal education (including its easier transnationalisation of private law studentships and faculty) but also the use of the Code in practice (in particular the hard core Code). This would, however, not be without the costs which could be ascribed to the social and democratic deficits of the EU.

Speculatively then, the potential for identity building in the short to medium term could have come from the mobilisation potential of the negative reactions to the proposal of

the European Civil Code, if these negative reactions had in turn been transformed into ‘trust’ by offering a spectacularly inclusive and democratic process for the development of the Code at the European Level.

The potential for identity building of this ‘negative mobilisation’ of the European Civil Code stems from the importance attached by the MS to their Civil codifications. The French *Code Civile*, German *Bürgerlichesgesetzbuch* and Austrian *Allgemeinesbürgerlichesgesetzbuch* are considered to be ‘constitutions of private ordering’, and often have been in force considerably longer than their public counterparts. They were perceived as much more than codifications. They were the outcomes, or the crowns, of the long term processes of transformation of the societies, from feudal to bourgeoisie, from monarchies to democracies.

The Civil Codes have often embodied an outcome of the *common project* to get rid of the old order and bring about a new, more just social order, based on modern values such as ‘formal equality’ and freedom, and the abolition of the status differences between people. The national codifications were the expressions of this great message of the new times (at least in Code Civil).<sup>509</sup> Their importance thus lies in the ‘moment’ and the ‘message’, rather than in the text of various rules. This is what has turned them into icons of the ‘national consciousness’. A very similar story follows the civil codifications in Central and Eastern Europe – both communist makeovers of ‘liberal codifications’, as well as liberal makeovers of ‘communist codes’ a few decades later.

As has been mentioned on several occasions, a sufficiently strong ‘message’ that may mobilise the broader EU public is the opening of EU policy-making to non-market rationalities – in particular in relation to the problem of the day – the economic globalisation. The European Civil Code is however too indirectly linked to this question to stimulate the imagination of the broader public, thus we can expect little in terms of positive mobilisation.

Now, there is certain potential for larger (-not massive!) mobilisation linked to the importance that is placed by national communities on the national civil codifications. A

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<sup>509</sup> The critique of the work of Jürgen Habermas on public sphere stands on the prime question of inclusiveness and thus the legitimacy of the public opinion so created.

project to create a European Civil Code, Optional or otherwise, could have a significant effect on the mobilisation of the *opposition* and the rather broad ‘issue publics’, going beyond the established transnational scholars, with a very likely overspill into the general public spheres (with media headings such as ‘ *Our Civil Code to be abolished by Europe...* ’).

Now, this tactic of opposition could be effective if the EU in turn succeeds in convincing the participants in the debate about its own sincerity, that it could turn the rage and initial shock into trust. This could be accomplished only through enabling sufficiently democratic procedures for the development of the Code. The creation of the opposition against the initiative has to be counterbalanced by the trustworthy democratic procedure.

Such a procedure would have to take the micro legitimacy seriously. It would have to open up the goals and aims of EPL immediately at the beginning, putting forward the questions with broad relevance (and thus, at a certain level, allowing the politicisation of the internal market agenda), easing the participation and allowing more Europeans to have their say in questions that actually concern them. Which truly ‘different options’ can Europe offer? What kind of market relations and what kind of justice?

Along with opening the debate of ‘goals, aims and values’, the EU has to offer an institutional framework which would allow broad but relatively low-profile participation, horizontal and interactive debate of the issues of common concern, and the meaningful channelling of opinions in policy making. To this end, all the possibilities of information society should be put in action.<sup>510</sup>

Yet, the main path to developing a more united Europe and European Identity is for Europe to offer something that goes beyond the capacities of the MS. Such a message is conceivable in terms of the response to economic globalisation. The MS have thus far been reducing their liberalisation and making various concessions to, and shields against, the incomparably stronger global markets. The EU however has more leverage to contest

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<sup>510</sup> Mini publics could serve perhaps as a better indicator (than the Eurobarometer) regarding the problems citizens encounter with regard to private law, insofar as they acquire more information about what they are actually asked, and can deliberate about the problems and solutions before they come up with an answer. The institutional guarantee of deliberative conditions approximating ideal speech situation is of course a precondition for the validity of the outcomes.

International trade policy externally, thus it can offer alternatives that the MS cannot. That is the message of the day, and insofar as the debate about the ECC would touch the question of ‘what kind of economic order’ in the EU, it could potentially find the message necessary to turn it into a social constitution of the European Society.





# **PART III: MICRO LEGITIMACY AND THE INTERPRETATION OF EUROPEAN PRIVATE LAW**



## 10. MICRO LEGITIMACY AND THE COURT OF JUSTICE

The administration of justice is one of the core functions of each polity, and has significant impact on its legitimacy. The courts have a major role to play in the process of legitimisation – not only do they justify their authority and their decisions vis-à-vis the parties and vis-à-vis the community, but they also engage (knowingly or not) in justifying the political authority that stands behind them, and behind the law that they apply.

Even if we might be less concerned about this second element of justification in the nation states, where the political authority has a high level of macro legitimacy,<sup>511</sup> the situation would be diametrically different in the postnational context. There the courts could become the single most important actors in the process of legitimating the authority that stands behind them. Their responsibility in this regard would increase in correlation with how perceptibly the courts assumed lawmaking functions.

The case of the CJEU, and its importance for the legitimacy of the EU, is extraordinary on a number of different accounts. The Court has not only been engaged in justifying the political authority of the EU, but has in fact created its political authority.<sup>512</sup> Several of its landmark judgments have set the contours of the EU legal order, raised claims to autonomous political authority, and set the way in which this authority should be applied and enforced, including by designating the responsible institutional actors.<sup>513</sup>

This success was possible for various reasons.<sup>514</sup> The most important perhaps being the limited scope of ‘autonomous’ and ‘supreme’ political authority which had been appropriated by the CJEU and the EU in that period. This, however, has changed. The powers of the EU (and the CJEU) have expanded into much broader societal and social spheres

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<sup>511</sup> This will come to the fore in private law cases, in particular in the use of general clauses which protect the understanding (of a community) of what constitutes a just/fair social order.

<sup>512</sup> Maduro, *We the Court*, 7,8.

<sup>513</sup> See E. Stein, “Lawyers, Judges, and the Making of a Transnational Constitution,” *Am. J. Int’l L.* 75 (1981).

<sup>514</sup> *Ibid.*

(pensions,<sup>515</sup> education,<sup>516</sup> health,<sup>517</sup>), leading to surprising consequences and mounting concerns, escalating to calls for disobedience of the CJEU – and the political entity it represents.<sup>518</sup>

Now, the main reason why this seems to have only started to become an issue recently is the paradox that the extension of powers entails. The justification and mechanisms of the political authority of the EU was modelled by the CJEU so as to effectively achieve its main performance criterion, namely the economic objectives of the Treaties. Soon after however, once it became apparent that distinction between the economic and non-economic does not hold, the justification started to be contested.

The functional delineation of competences enabled the CJEU to claim control over an ever-larger part of the process of societal ordering. These claims were prompted by the self-understanding of the Court as the agent of the polity, the legitimacy of which rested on the performance expected from it. From the Court's point of view so, all matters were viewed through the lens of the performance that was expected from the EU, and everything else was almost 'naturally' viewed as either complementary to this or as standing in opposition - either as a hindrance or an advancement of EU objectives.

The problem, however, is that with its increasing powers, the EU has entered policy fields which still retain (perhaps more significant) non-economic dimensions,<sup>519</sup> which are defined as such by the MS (and its peoples), and where 'performance' would be likely to be assessed along quite different lines than those for market building objectives and economic

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<sup>515</sup> See e.g. A.P. Van der Mei, *Free Movement of Persons Within the European Community: Cross-border Access to Public Benefits*, vol. 30 (Hart Publishing, 2003).

<sup>516</sup> Dougan, "Fees, Grants, Loans and Dole Cheques."

<sup>517</sup> K. Sieveking, *ECJ Rulings on Health Care Services and Their Effects on the Freedom of Cross-Border Patient Mobility in the EU* (Springer, 2006).

<sup>518</sup> See the opinion of the Roman Herzog on Mangold decisions of the CJEU. <http://euobserver.com/9/26712>.

<sup>519</sup> It would be rather unrealistic to believe that Art. 2 TEU, or other similar proclamations of the aspirations and values of the EU, could change the underlying rationale of the polity in any significant way – at least so far.

value.<sup>520</sup> This paradox is the core problem that needs to be addressed if the legitimacy of the EU is to be sustained along with its increasing powers.

The only ‘cure’ that seems to be available would be the redefinition of EU interpretation techniques (in particular the *teleological*<sup>521</sup> method of interpretation) and what is understood under the ‘constitutional *telos*’. The constitutional *telos* cannot be seen as being limited to EU functions, objectives and values, but must also be seen as incorporating awareness of the functions and objectives which were left *out* of the constitution, as well as the reasons and rationale for these exclusions. The decision-making of the court should then include all of this information in a more holistic understanding of the *telos*, whereby all the *legitimate* objectives, functions, values and rationalities become absorbed into an understanding of the EU as a joint, unitary project of both the EU and the MS, in which each takes into account the responsibilities of the whole.

The following chapter will discuss the practical implications of the proposed redefinition of the understanding of the constitutional *telos*. The need for redefinition will be justified on the basis of the legal requirements imposed on the Court (respect for the principle of Subsidiarity), as well as the Court’s political function in the framework of the EU, which as for any other institution, surrenders it to the obligation to guard the Legitimacy of the Polity.<sup>522</sup>

I will discuss here how the CJEU should incorporate thinking about Performance Legitimacy and Polity Legitimacy, and particularly the various objectives and values that are legitimately being pursued within the compound framework of the EU. What makes this

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<sup>520</sup> See Scharpf, “The European Social Model.” F. Scharpf, “Monetary Union, Fiscal Crisis and the Preemption of Democracy,” *LEQS Paper No. 36* (2011).

<sup>521</sup> The teleological interpretation carries with it one significant problem and that is the imposition of the market or economic rationality in fields where they are normatively not desirable (as is also reflected in the underlying constitutional division of ‘the economic’ and the ‘social’ between the EU and the MS.) For opposite view see M.P. Maduro and Instituto de Empresa. Law School, *Interpreting European Law-Judicial Adjudication in a Context of Constitutional Pluralism* (IE, 2008).

<sup>522</sup> Given its bite in the exercise of political authority, as well as its impact on the legitimacy of the EU, it is not difficult to argue that the CJEU should also assume the responsibilities of the legislator and be responsible for the legitimacy of a polity. This means that it should engage implicitly (if not explicitly) in a modified Micro Legitimacy Inquiry before its own pronouncements of what the law is in the EU.

notion less controversial, perhaps, is that I consider Performance Legitimacy to be best understood in the framework of the Subsidiarity principle, by which the court is obliged to respect the principle and incorporate its ratio into its decision-making<sup>523</sup>, legally on account of Art. 5 TEU and Annex 2 to the Treaties, as well as politically in the framework of responsible decision/law making.

The analysis will concern itself with the (in)famous line of Product Liability cases, whereby the Court turned a Product Liability Directive, one of the few European tort law measures, into a full harmonisation measure.

Now, given that the Product Liability Directive is a private law measure, one last note is needed. The function of private law is to see that justice is done between private parties. The CJEU, in pursuing the objectives of the Treaties, generally pays less consideration to the private law paradigm than would be the case in private law courts. Given the fact that its only responsibility in the preliminary reference procedure is the interpretation (or making) of European law, it seems justified that it would be concerned only with the overall, rather than the particular, impact.

Yet, in a holistic understanding of the Treaties, the performance expected from the MS also becomes the grounds for the performance legitimacy of the EU. Thus, the Court should strive to deliver ‘justice among parties’ in private law cases, in a kind of a reversal of the Marleasing doctrine. The Court should not remain so predominantly concerned with the macro picture and the objectives of the EU (market building and market efficiency), as the parties and citizens of the EU (whose expectations would be built into the discourses of national welfare states) expect the administration of justice to bring about different goals, namely justice. If the Court understands this task as being difficult because of systemic effects, it should attempt to defer the decision to the national level and avoid sacrificing the pursuit of justice for some macro market goals.

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<sup>523</sup> De Búrca, “Re-appraising Subsidiarity’s Significance After Amsterdam.”

## **10.2. Product Liability: Context**

The intensification of consumer consumption came hand in hand with the increased need for protection of consumers against harm caused by defective products. Product Liability laws then aim to grant compensation for the harm caused by defective products – harm to property or to the health of those affected by the product. It was particularly the courts that provided the framework, by tort or contract law means.

The building of a common market and free circulation of goods motivated the Commission to propose the first European Product legislation (in the mid-1970s). It was more than ten years before the Directive<sup>524</sup> was enacted. The primary purpose of the regulation was different to what was (or would have been) the case at the national level, when instead of consumer protection the aim was specifically to remove the distortion of competition that could affect the free movement of goods.<sup>525</sup> Initially, as a political compromise, it had also exempted from liability the producers of primary agricultural products. This had to be rethought after the mad cow crisis, however, and Directive 99/34/EC extended the scope of this kind of product liability to unprocessed primary agricultural products.

The main elements of the EU product liability framework comprise:

- strict liability of the producer
- burden of proof on the victim with regards to the damage, the defect and the causal relationship between the two
- only surrogate responsibility of the supplier
- a 500 Euro threshold regarding damages suffered, in order to avoid litigation in an excessive number of cases (deductible – in many countries treated in this way).

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<sup>524</sup> Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products.

<sup>525</sup> Ibid.

- exoneration of the producer (e.g. the state of scientific and technical knowledge)
- liability limited in time: ten years from putting the product into circulation.

The Directive has been considered as an attractive model across the globe, for its protective and modern outlook, however, both regionally and globally it remained of marginal impact in practice.<sup>526</sup> The reason for this may be that it poses significant hurdles to the ‘users’ (victims), which made these seek other means of compensation for harm suffered. In other words, such heavy emphasis was placed on not burdening the businesses that no model has been delivered that would be ‘useful’ for the victims.

What are the hurdles posed by the Directive? First of all, the 500eur threshold has been particularly onerous for consumers – not only it is considered as a threshold limiting the consumers’ potential to sue for damage if the damage does not meet this threshold, but this sum is understood in most of the MS as a sum *deductible* from the real damage.<sup>527</sup> A further problem lies in the overly high burden of proof required vis-à-vis the consumers, particularly with regard to causation and the need to provide technical details about the nature of the defect. The limitation of ten years on producers’ product liability is also considered problematic, insofar as many risks may only show up later than this. In addition, it was suggested that the ten-year period could have alternatively have been counted from the date of purchase or acquisition of the product. Perhaps the most fundamental difficulty is then that the Directive did not postulate the alternate liability of the supplier, which also gave rise to the 2002 cases.

The consumers have refrained from using the Directive, and have usually made use of the court-developed tort liability mechanisms, developed before or alongside the Directive,

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<sup>526</sup>See M. Reimann, “Liability for Defective Products at the Beginning of the Twenty-first Century: Emergence of a Worldwide Standard?,” *The American Journal of Comparative Law* 51, no. 4 (2003): 751–838.

<sup>527</sup> Report Lovells, Annex 2.  
[http://ec.europa.eu/enterprise/policies/single-market-goods/files/goods/docs/liability/studies/lovells-study\\_en.pdf](http://ec.europa.eu/enterprise/policies/single-market-goods/files/goods/docs/liability/studies/lovells-study_en.pdf)



which were considerably more favourable for the victims.<sup>528</sup> For example, in France and Germany<sup>529</sup>, the fault requirement in tort law became so relaxed with regard to product defects cases that it turned into *de facto* strict liability - with no limitation of damage of the kind we find in the Product Liability Directive. In Denmark, the product liability regime developed by the judiciary (from the inter-war period) allows for the alternative liability of the producers and suppliers.<sup>530</sup>

The possibility of using alternative routes so as to receive compensation for harm suffered- considered to be allowed by Art. 13 of the Directive- minimised the negative impact of the Directive on consumers. This ‘peaceful’ co-existence was however called into question by the CJEU decisions.

### **10.2.1.        *The Decisions of the CJEU***

On the 25<sup>th</sup> of April 2002, the CJEU decided three cases that started a new chapter in the history of product liability law in the EU. These were *Commission v Greece*,<sup>531</sup> *Commission v France*<sup>532</sup> and *Maria Sanchez v Medicina Asturiana*.<sup>533</sup> I will concentrate only on the last of these, insofar as it encapsulates the most relevant points of dispute surrounding Product Liability. First, however, we need to look at the facts of the case.

The plaintiff, Maria Sanchez, received a blood transfusion in a medical establishment belonging to Medicina Asturiana. The blood used for the transfusion had been treated by a

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<sup>528</sup>For the description of the state of art in France, and the impact of the ECJ ruling in *Commission v. France* on the level of protection see Debouzy, O. & Por, D., *Recent Evolutions and Foreseeable Trends of the French Product Liability Rules: Apocalypse later?*; *Revue internationale de droit compare*, Volume 2, Avril -Juin 2002

<sup>529</sup> Report From The Commission To The European Parliament, The Council And The European Economic And Social Committee, COM(2011) 547 final

<sup>530</sup> Ibid.

<sup>531</sup> Court of Justice of the EU, *C-154/2000, Commission of the European Communities v Hellenic Republic*, April 25, 2002.

<sup>532</sup> Court of Justice of the EU, *Case C-52/00, Commission of the European Communities v French Republic*, April 25, 2002.

<sup>533</sup> Court of Justice of the EU, *Case C-183/2000, María Victoria González Sánchez v Medicina Asturiana SA*, April 25, 2002.

transfusion centre. Ms. Sanchez claimed that in the course of the transfusion she was infected with Hepatitis C. Under the general provisions of the Spanish Civil Code and Articles 25- 28 of Law No 26/84, Ms. Sanchez could seek compensation from Medicina Asturiana for the damage suffered. The defendant challenged however the use of national law in light of Law No 22/94, which transposed the Product Liability Directive into Spanish Law, and outlaws the liability of the supplier if the producer is known.<sup>534</sup>

The referring court regarded both laws applicable to the dispute both *ratione materiae* and *ratione personae*, concluding that the rights which consumers and users may rely on under Law No 26/84 are more extensive than those which the victims of damage may rely on under Law No 22/94 and that, consequently, the transposition of the Directive into domestic law under Law No 22/94 served to curtail the rights enjoyed by the persons concerned at the time when the Directive was enacted. The Spanish court thus asked whether this 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?*”

The CJEU notes that, given that the level of harmonisation cannot be inferred from the Treaty (understand legal basis), it must be inferred from the Directive, ‘from its wording, purpose and structure’.<sup>535</sup> The Court then builds the argument in four steps. It first notes that the Directive establishes that ‘*a harmonised system of civil liability on the part of producers in respect of damage caused by defective products is to ensure **undistorted competition between traders, to facilitate the free movement of goods and to avoid differences in levels of consumer protection.***’<sup>536</sup> Secondly it notes that the Directive does not contain the minimum harmonisation provision (such as the Unfair Terms directive)<sup>537</sup> and that it is also very specific about the derogations the MS may make.<sup>538</sup> The Court infers therefrom that in such circumstances, neither Recital 13<sup>539</sup> nor “*Article 13*<sup>540</sup> *of the Directive can be*

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<sup>534</sup> See also 10.4.

<sup>535</sup> Para 25

<sup>536</sup> Para 26

<sup>537</sup> Para 27

<sup>538</sup> Para 28

<sup>539</sup> Recital 13: ‘*Whereas under the legal systems of the Member States an injured party may have a claim for damages based on grounds of contractual liability or on grounds of non-contractual liability other than that provided for in this Directive; in so far as these provisions also serve to attain the objective of effective protection of consumers, they should remain unaffected by this Directive; whereas, in so far as effective protection of consumers in the sector of pharmaceutical*

*interpreted as giving the Member States the possibility of maintaining a general system of product liability different from that provided for in the Directive.*”<sup>541</sup>

Without much hesitance, the Court then concludes that the purpose of the Directive was to remove the distortions of competition, free movement of goods and *equal* level of consumer protection, and that this objective (per definition) could not be achieved in the framework of minimum harmonisation. The objective of EU Product Liability law cannot be achieved without full harmonisation by the directive.

These cases have caused an outcry. Many questions have been raised. Is it possible for full harmonisation of product liability to be achieved at all? Do we need this harmonisation in the first place? What has happened to the consumer protection objectives? And what about Maria Sanchez?

Neither legal practice, national authorities (at the time of creation or after) nor academic commentary considered the Directive to be a measure requiring full harmonisation. The CJEU nonetheless interpreted the law as meaning the effective reversal of social practice, which in the positivist account of law effectively means changing *the law*. One may expect that the Court should have good reasons for this.

#### **10.2.1.1.                    *The Reasoning of the Court***

The fact that courts engage in lawmaking is hardly questioned anymore.<sup>542</sup> If we accept this premise, the only conclusion that could follow is that they should do so in a

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*products is already also attained in a Member State under a special liability system, claims based on this system should similarly remain possible;’*

<sup>540</sup> Article 13 ‘*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.*’

<sup>541</sup> *Medica Asturiana*, para 30.

*responsible* way. First of all then, beyond the ambit of unambiguous textual interpretation, the courts should not engage in formalist analysis since the sole fact of *lawmaking* eliminates the *raison d'être* of the formalist analysis (ascertaining the 'intention of the legislator').

Using this as a strategy to cover up the real intentions of the court would leave it open to the criticism that other participants in the discourse are not treated as equal (and rational) interlocutors.<sup>543</sup> Secondly, the constitutional '*telos*' should be extended so as to incorporate both the objectives and purposes included in the constitution of a functional entity, as well as those that were excluded from its purposes and also the rationale for their exclusion.

What exactly a 'responsible decision' is taken to mean will differ in different cases. In principle, the Court shall always take the Micro Legitimacy of the measure into account. This would include the performance or capacity of the legislative measure to achieve EU objectives, the polity *stricto sensu* meaning the alternative non-economic rationales might figure as legitimate justifications, equally as the possible procedural (regime) requirements. In this case then, a responsible CJEU decision would be one which would draw upon the interplay between the performance legitimacy, or lack thereof, the alternative values, goals and objectives that may be legitimately pursued by the measure, and the question of social justice - before making a Product Liability legislation a full harmonisation measure,.

#### **10.2.1.2. Objectives of the Measure**

The Court should have commenced its analysis by looking at how successfully the measure puts into practice those objectives that it was designed to further. In this case the Court's position was indeed particularly favourable. All the empirical material was readily available. This was not confined solely to academic commentary, but more importantly

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<sup>542</sup> Last Ingo Venzke, *On Words and Deeds. How the Practice of Interpretation Develops International Norms*, forthcoming OUP, 2012.

<sup>543</sup> A pragmatic contra-argument that formalism is a strategy, a clever strategy, can stand only if the benefits of such a strategy would outweigh the costs, namely the loss of legitimacy of the EU and the CJEU in the eyes of the addressees of law (who are not treated as subjects in the discourse by the Court). This does not seem an easy condition to fulfil.

included the Commission's Report on the Product Liability Directive,<sup>544</sup> a comprehensive assessment of the 'success' of the legislation.

This is how the Commission summarises the success of the legislation:

### *2.1.1. The functioning of the Directive in practice*

*Many observations indicate that the Directive functions properly in practice. This is considered to be due to the fact that it has created a well-balanced and stable legal framework which takes into account the concerns of both the consumers and the producers. However, it is important to note that only little information about the application exist and statistics, if available, are not complete. In most Member States, the national rules implementing the Directive are applied alongside other liability regulations in the majority of the cases. In Austria nearly all product liability cases are solved on the sole basis of the system provided by the Directive. **Plaintiffs use other liability systems (contractual or tort law) mainly because they provide for compensation which is more protective (it covers namely damages under 500 Euro, non-material damages, damages to the defective product itself and to property intended for professional use; prescription periods are longer).***

*In Germany case law constantly interprets applicable provisions of tort law in such a way that they come close to a no-fault based liability. Another reason for parallel application is that the "traditional" legislation is better known given that settled case law exists. **This co-existence of different product liability rules, which is permitted under Article 13 of the Directive, is perceived in various ways: the variety of rules has not discouraged the marketing of products in the Community, nor has it had any effect on insurance companies; it permitted a higher level of consumer protection which, on the other hand, might restrict the application of the rules under the Directive.***

***For these reasons, most of the observations are opposed to the Directive becoming the common and sole system of liability for defective products, but in favour of maintaining the present situation under Article 13.6** It was also asked whether each Member State should be able to adopt stricter liability with regard to the provisions of the Directive by introducing a "minimum clause". For some, such a minimum clause should be introduced given that all other Directives in the field of consumer protection follow this model. Another group of replies disagree with this proposal: such a provision would decrease the level of harmonisation which results from the*

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<sup>544</sup> Report from the Commission on the Application of Directive 85/374 on Liability for Defective Products COM(2000) 893 final.

*Directive in its present form and create potential obstacles to the free movement of products.*<sup>545</sup>

The Court could easily have drawn a number of conclusions from this official document of the EU institution. At minimum, it could have inferred that

- There are no economic reasons for legislation, and it neither improved nor impeded the operation of the market, however, it is advisable that the regulation remains in place insofar it covered the legal lacunae (even if deficiently) at least in some MS (Austria).
- If there are very few economic reasons for minimum harmonisation, there are even fewer for maximum harmonisation.
- The directive is consumer unfriendly, but the national alternatives provide for avenues which remedy this (again without any burden to the market)
- Harmonisation is considered to be minimal, and so should it remain.

The Court could also have looked further into academic commentary. A swift inspection would have revealed that the conclusions of the Commission were practically unavoidable. The legislation was of severely limited practical importance,<sup>546</sup> and as expected the commentary, there are a number of reasons for this lack of success<sup>547</sup>, or even destiny to be unsuccessful<sup>548</sup>.

Law and Economics scholars have suggested that the legislation has very little or no potential to lower transaction costs or secure ‘undistorted competition’, as the impact of product liability on the behaviour of businesses is minimal because of the low number of cases. In addition, given the numerous gaps and references to national law (be they in

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<sup>545</sup> Ibid, 8-9.

<sup>546</sup> Reimann, “Liability for Defective Products at the Beginning of the Twenty-first Century.”

<sup>547</sup> Ibid.

<sup>548</sup> Faure, M, Economic Analysis of Tort Law and European Private Code; in A.S. Hartkamp (Editor), Martijn Hesselink (eds.) Towards a European Civil Code, Third Fully Revised and Expanded Version, Kluwer Law International, 2004

minimal or maximal harmonisation), the measure could not have brought about the desired harmonisation effect, and so the lowering of transaction costs was unlikely to happen.<sup>549</sup>

Other potential economic arguments were also flawed. The 'race to the bottom' argument for harmonisation does not stand, insofar as product liability legislation is usually applied in the place where accidents have been caused by the defective products, thus in the state of use, which is not necessarily the state that they were produced in. It is therefore unlikely that states will attract producers by enacting lenient product liability laws. The analysis is different with respect to suppliers, however the EU Product Liability does not apply to suppliers.<sup>550</sup> If the legislation cannot be effective on this basis, whether it is minimal or maximal harmonisation is of no significance.

An additional argument for suspicion of this piece of legislation is the discrepancy between the success of product liability legislation, insofar it was one of the major models adopted worldwide, and despite this global success, its practical application worldwide remained very limited.<sup>551</sup>

#### **10.2.1.3.                    *A Responsible Decision?***

Seeing that the legislation could be viewed as a harmless failure, we would have expected the Court to keep performance losses to a minimum. Instead, the Court seized the opportunity to *increase the impact*, and thus the costs, of the failed measure by interpreting the provision (the textual interpretation was truly ambiguous) in a manner which aggravated the situation and seriously undermined the other, even if from the EU perspective secondary objective – consumer protection.

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<sup>549</sup> Faure claims that almost all authors agree on this (and cites Tebbens, Storm, Van Wassenaar van Vattwijck and Martin Casals and Sole Feliu). See Faure, M, *Economic Analysis of Tort Law and European Private Code*; in A.S. Hartkamp (Editor), Martijn Hesselink (eds.) *Towards a European Civil Code, Third Fully Revised and Expanded Version*, Kluwer Law International, 2004, p 665.

<sup>550</sup> Van den Bergh, "Subsidiarity as an Economic Demarcation Principle and the Emergence of European Private Law," 139.

<sup>551</sup> Reimann, "Liability for Defective Products at the Beginning of the Twenty-first Century."

The court has failed on several different levels to behave as a responsible law-maker:

- Firstly, it did not assess the performance legitimacy of the measure, i.e., the extent to which the measure brings, or can bring, the economic objectives it is designed for. This analysis should be undertaken with regard to both minimum (-does it bring?) and full harmonisation (-can it bring?), and a positive response must be a precondition for considering the aptness of the measure for maximum harmonisation in the first place.
- Secondly, the court did not reflect (at least if we look at the text of the decision) on the alternative purposes for such legislation – namely, the considerations of justice, the compensation of victims of often serious harms, the deterrent effect on producers' negligence, in particular given the incapacity of the European legislation to secure any of these. In other words, it did not take into account the broader context of the measure or its impact on the 'societal' order.
- Thirdly, the CJEU should have looked at the democratic dimension of subsidiarity, namely the costs imposed by the pre-emption and removal of decision-making from the level closest to the citizen. In particular, what are the costs and benefits of the restriction of the rights of MS to co-create the societal order in such an important field? From a holistic understanding of the constitutional *telos*, the Court should care that this is an area which has significant social impact, in which the MS have considerably responsibility to deliver 'justice', and thus incapacitating them there must be very strong reasons.
- Fourthly, the court should have considered what the imposition of the maximum harmonisation might mean for the underlying values. What will be the impacts of subduing a field of law with a strong social dimension to the economic rationality, as opposed to any alternative non-market rationalities?
- Further, justice among the parties appears not to have been addressed. Did the Court not consider that aspect to be relevant to its decision?



- Finally, the court should have justified why it was the proper institution to make this law. The Court not only removes decision-making from the lower levels of government (with more democratic institutions) and moves them to the higher level of government (where the institutions suffered from double democratic deficit), but it does so as a branch of government which is not considered to be particularly democratic itself. It shall be necessary in such cases to make a strong case as to why this is necessary.

We must now ask what the Court did instead. It had taken the objectives of the legislation as granted, without engaging with them substantively, and proceeded from there with the argument that legal differences (by definition) create obstacles in the harmonisation efforts which were motivated by market objectives. It did not take pains to discuss the additional costs and benefits of harmonisation, which the ‘political’ legislator would not have been exempted from.

The Court has further neglected to acknowledge the democratic losses that such centralising decisions could have. Later, the Lisbon Treaty would put into practice the so-called ‘yellow card’ in order to protect the values standing behind the democratic dimension of subsidiarity, however, this does not apply to the Court of Justice, which must bear the responsibility for the legitimacy of its decisions itself. Finally, the Court decided the case without recognising the other values and objectives that may have legitimately stood behind such legislation, and according to which the MS, and thus also the overall EU performance, will be measured.

These cases demonstrate a serious threat posed by the interpretation ‘techniques’ the Court uses, in particular formalism and teleological interpretation, which further the ‘*telos*’ of the Treaties in a way which endangers the legitimacy of the whole EU. The complete neglect of the Performance Legitimacy (Economic Dimension of Subsidiarity), and imposition of unjustified costs of uniformity, undermines the overall Performance Legitimacy of the EU. It also disregards the Democratic Dimension of Subsidiarity, insofar as it does not deal with alternative values and goals (rationalities) that may legitimately claim to ground the

legislation (social justice, or consumer protection) – for the sake of ‘main EU objectives’, which, however, were in no way successfully furthered by the EU legislation.<sup>552</sup>

There has been much speculation about the reasons for these decisions, and perhaps the most convincing explanation comes from the interaction between the CJEU and the Commission, which at approximately the same time stipulated the necessity of maximum harmonisation in consumer law in the 2001 Communication,<sup>553</sup> followed by the two measured consumer directives on the basis of maximum harmonisation<sup>554</sup>, which might have increased the Court’s enthusiasm for full harmonisation.<sup>555</sup>

As we will see, the Commission on the other hand did not disappoint the Court, insofar as it did not accept the Council’s call to make legislative changes to at least minimise the negative impact of the decisions. The case of Product Liability then leaves an impression of the self-supporting dynamics between the two Institutions with the strongest functionalist self-understandings. To whose benefit this takes place will be discussed further below.

### ***10.3. Revision of Product Liability: Elements of the Active Dimension of Micro Legitimacy***

The decisions of the Court also surprised the Council of the European Union which, in the aftermath of these decisions, issued a Resolution calling for the reconsideration of the Court’s case law.<sup>556</sup> The Council in essence states that it was clear from the political negotiations surrounding Product Liability, and the agreement between the Council and the

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<sup>552</sup> Collins, “Utility and Rights in Common Law Reasoning,” 11.

<sup>553</sup> European Commission, “Communication from the Commission to the Council and the European Parliament on European Contract Law (2001/C 255/01).”

<sup>554</sup> See Chapter 7.

<sup>555</sup> Joerges, Ch., The Challenges of Europeanisation in the realm of Private Law: A Plea for a New Legal Discipline, *Duke Journal of Comparative and International Law*, 2004, p. 149-196.

<sup>556</sup> Council Resolution of 19 December 2002 on the amendment of the Directive concerning liability for defective products [Official Journal C 26 of 04.02.2003], para 5

Commission, that the MS could keep the alternate liability of suppliers if they wished to do so.<sup>557</sup> As was also clear from the previous Commission's report, this would do no harm to the market, and additionally would be of great benefit to consumers.<sup>558</sup> Thus the Council calls the Commission to consider whether the Directive should be modified.<sup>559</sup>

The power of legislative initiative rests in the hands of the European Commission. In its 2006 Report to the Council, which was due as part of the regular review of the Product Liability Directive, the Commission responded that there was no need for any of the modifications that had been suggested by the Council.<sup>560</sup>

What is of interest here is how the decision of 'no action' has been reached – in different words the micro legitimacy of the decision. The 2006 Report of the Commission draws on the reports of two consultancies (Lovells and The Fondazione Rosselli Reports). These commissioned reports were based mainly on the collection and analysis of the responses of a 'stakeholder group', consisting of four subgroups: Consumers, Producers, Insurers and Legal. As is evident from the Report of the Commission, each group had an equally weighty voice.

Immediately this fact seems quite striking. What were the criteria for designating the groups, and assigning weight to their voices? If we look at the Product Liability Directive, it stipulates that it aims to achieve a *fair balance* between the interests of *consumers* and *producers*. This means that the main redistribution groups are consumers and producers. Giving equal 'weight' to the voices of other groups could lead to the emergence of a distorted picture, insofar as it would neglect the reality of the pattern of redistribution.

Whether intentionally or not, the groups seemed to be designed in a manner which left the consumers rather lonely, and which finally allowed the Commission to state that 66% of

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<sup>557</sup> Ibid, para 4.

<sup>558</sup> Ibid, para 8.

<sup>559</sup> Ibid, para 9.

<sup>560</sup> 'As an overall conclusion, the report will demonstrate that the Directive works by and large in a satisfactory way and that there is no need for amendments at present. Also, that there are some circumstances where the application of the national laws leads to different outcomes, but without affecting the functioning of the Internal Market. Those circumstances will continue to be closely monitored by the European Commission.' Report From The Commission To The Council, The European Parliament And The European Economic And Social Committee, COM(2006) 496 final

the stakeholders considered the balance struck by the Directive to be *fair*. Can this be seen as conclusive evidence? How can a conclusion be seen to have legitimacy when it neglects the voice of the overwhelming majority of one of the major redistribution groups, where up to 80% of consumer stakeholders *strongly* disagree?

Although the Commission did admit to the discontentment of large numbers of the consumers,, it nonetheless marginalises the importance of their objections. The Report states that *‘It is worth noting that whilst most consumer representatives and a minority of other participants suggested that the Directive did not strike an appropriate balance, **no single deficiency was cited**. This does not, of course, discount the validity of the views expressed, but it does **make it difficult to conclude that the Directive is fundamentally flawed in any significant respect**.’*<sup>561</sup> [emphasis added]

Thus, the more deficiencies the Directive has, the less reason there is to change anything. The fact that the consumers did not ‘pool’ their opinions and agree on a common position is evidently a problem for their arguments. The overall mixture of the provisions was prohibitive for consumers – all of the consumer stakeholders entertained this opinion. The fact that some provisions caused more problems in one jurisdiction and others in another is due to the specificity of the interaction between national and European private law, and it definitely does not affirm that Product Liability is a good law.

Finally, the outline of what may come in the future can be found in Lovell’s report, which suggests that in the future ,regulatory compliance may be a desirable defence to the Product Liability claims:

*About a quarter of the Producers who expressed a view said that the Directive did not adequately protect the needs of producers/suppliers. The factors cited most frequently were the application of the Directive to defects relating to product design or warnings, and its failure to provide a defence of **regulatory compliance in highly regulated industries**.*

*A number of participants (from the pharmaceutical industry in particular) suggested that the Directive should provide **a defence for producers in industries where the***

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<sup>561</sup> Report From The Commission To The Council, The European Parliament And The European Economic And Social Committee, COM(2006) 496 final, p 6

*safety of a product is closely regulated, if products comply fully with applicable regulations. As EU product safety regulation continues to expand, it might be expected that this issue will assume even greater importance.*<sup>562</sup>

The question raised by Lovell's analysis touches on the impact of private lawmaking in the field of private law. Most of product safety regulation is developed in the framework of a 'New approach to technical standardisation' by private or semi-private regulators on either European or Global level. This rule-making remains, to a large extent, in the hands of bodies with considerably lower levels of public control. The adjustment to the product liability framework in this manner would then mean that a producer's responsibility for damage sustained by a consumer (not only property but also bodily injury) would depend on standards set by bodies, which are dominated by industry, or in which the industry is at least overwhelmingly present.

Thus, the standards for pharmaceuticals (this being the major group asking for the regulatory compliance defence) will mainly be developed by the pharmaceutical industry,<sup>563</sup> which will thus set its own standards, on which its liability will be assessed. Yet, we should be wary of such provisions. The US case on the safety of blood products can serve us as an illustrative example.

The professional organisation representing the industry did not make higher standards for HIV blood testing obligatory because of the costs it would impose on the industry, despite the knowledge of the risks posed. This has resulted in the infection of a number of patients.<sup>564</sup> Now, would this imply that the industry should not be liable because it had complied with the standards? The purpose of product liability regulation, however, seems to be to protect against such collusive avoidance of safety standards by highly specialised industries, as

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<sup>562</sup> Report Lovells, vii 7.

[http://ec.europa.eu/enterprise/policies/single-market-goods/files/goods/docs/liability/studies/lovells-study\\_en.pdf](http://ec.europa.eu/enterprise/policies/single-market-goods/files/goods/docs/liability/studies/lovells-study_en.pdf)

<sup>563</sup> As Schepel argues, each standardisation is an anticompetitive practice. See fn. below.

<sup>564</sup> Harm Schepel, a paper presented at the conference in the framework of the Project the Architecture of Postnational Rule-Making, Amsterdam September 2011.  
See <http://www.jur.uva.nl/architecture/about.cfm>

opposed to condoning them. But as the report makes clear, *it might be expected that this issue will assume even greater importance.*<sup>565</sup>

#### **10.4. Epilogue: How much protection for consumers by 'consumer' legislation?**

In the years following the 2002 decisions, the Court had a possibility to reconsider its judgments. The first time was in the *Skov v Bilka* case.<sup>566</sup> The facts of the case are as follows: the applicant had been infected with salmonella by eggs purchased at Bilka. The eggs were supplied to Bilka by Skov. The applicant brought a suit against both defendants, and the court ordered Bilka to pay the damage, with the right of recourse to Skov. On appeal, the appellate court sent the preliminary reference to the ECJ, with the question of whether the Danish Legislation was compatible with the Product Liability Legislation, insofar the supplier is held jointly responsible with the producer for the product in circulation (both in case of strict liability and fault of the producer), when the supplier maintains the right to recourse against the producer or its own supplier (other intermediaries in the chain).

The Danish government argued with the legislative intent (also put forward in the Council 2003 Resolution<sup>567</sup>): “... *With regard to the interpretation of Articles [3] and [13], the Council and the Commission are in agreement that there is nothing to prevent individual Member States from laying down in their national legislation rules regarding liability for intermediaries, since intermediary liability is not covered by the Directive. There is further agreement that under the Directive the Member States may determine rules on the final mutual apportionment of liability among several liable producers (see Article 3) and intermediaries;*”<sup>568</sup>

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<sup>565</sup> Report Lovells, vii 7.

[http://ec.europa.eu/enterprise/policies/single-market-goods/files/goods/docs/liability/studies/lovells-study\\_en.pdf](http://ec.europa.eu/enterprise/policies/single-market-goods/files/goods/docs/liability/studies/lovells-study_en.pdf)

<sup>566</sup> Case C-402/03 *Skov v Bilka* [2005].

<sup>567</sup> Council Resolution of 19 December 2002 on the amendment of the Directive concerning liability for defective products [Official Journal C 26 of 04.02.2003], para 3.

<sup>568</sup> *Skov v Bilka*, para. 17, refer to the *The minutes of the 1025th meeting of the Council of Ministers of 25 July 1985*.

The Court reiterated the previous case law on the full harmonisation effect of the Product Liability Legislation – with all the abovementioned problems - and then added that in line with these findings, enlarging the number of persons primarily liable to the injured persons would violate the balance set by the legislator between the risks carried by injured persons and businesses. The legislator was motivated by the will to reduce the possible costs of insurance, which the suppliers could take in case they were made jointly responsible.<sup>569</sup>

In addition, the court also made the consumers who had already received compensation return it to Bilka and wait for payment from Skov, as it refused the requests of the applicants to limit the temporal application of its decision for the already large number of indemnified consumers. The reason was that, with the right to recourse against Skov, no serious difficulties would emerge in enforcing the claim. Indeed, no difficulties emerged, with the exception of one detail, namely that it would be the consumers who would carry the burden of returning the compensation to Bilka and claiming it again from Skov.

After the Skov Judgment, and in line with previous court's case law (in particular *Medica Austeriana*), the Danish product liability legislation was changed in such a way that it now allows suppliers to be held jointly liable in cases where the producer has acted negligently, but not in cases of strict liability. One might wonder, if the national courts consider the decisions of the ECJ to be illegitimate, how will they interpret these provisions? Given the 'incompleteness' of 'maximum' harmonisation in the area of private law, the courts have a number of possibilities for avoiding the application of such law – in this case it could be a very low threshold for proving the fault – thus subjecting the issue to the other 'contractual or non-contractual' liability systems.<sup>570</sup>

A further ironic turn came in another case, the preliminary reference from the Cour de Cassation in *Moteurs Leroy Somer v Dalkia France and Ace Europe*<sup>571</sup>. Lyon hospital purchased a hospital generator for the purpose of providing health services, and this generator had gotten damaged in the course of this use. The Hospital received an amount of damages

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<sup>569</sup> The Commission's 2002 Report however does not give any evidence for the support of this view.

<sup>570</sup> Joerges, "Challenges of Europeanization in the Realm of Private Law."

<sup>571</sup> Case C-285/08, *Moteurs Leroy Somer v Dalkia France* [2009].

from the maintenance company and its insurer, which made use of their right to recourse to Moteurs Leroy Somer as the producer on the basis of product liability legislation.

The defendant claimed that the Product Liability directive had barred the MS from maintaining the system of liability for the parties not mentioned in the Directive, given its complete harmonisation character. They claimed that, given that the Product Liability Directive is a full harmonisation measure which exhaustively regulates the field, and as it is applicable only to consumers, the MS are barred from maintaining a similar system which would allow for compensation of professional parties for the damage occurred from products intended and employed for business purposes, with no further requirements than the defect, damage and causal link.

The logic of the defendants was not faulty – if the MS had kept such legislation, it would mean that the professional parties would have been entitled to a higher level of protection than consumers – being able to claim damage simultaneously from producers and intermediaries, lacking the (deductible) threshold of 500 EUR and the ten year limitation on liability from the introduction into circulation.

This of course does not make sense in what we can call social or protection rationality in consumer law, but it probably makes much more sense in the functional market rationality, which sees the consumer law as serving different purposes, not protection *per se*.

The Court employs the textual interpretation of the Directive in order to conclude that the 'damage' under the directive does not cover the type of damage which occurred in the case at hand, thus it falls out of the scope of the directive and the MS can maintain a system similar to that of the Directive.

The consumers, whose interests are the object of protection by the Product Liability Directive, are in a considerably worse position in France than professional claimants. If an expensive machine is damaged because of a defect, without hurting anyone or causing any other material damage, the consumer has no right to claim damages from the producer beyond the standard guarantees. The consumer has also no claim against the intermediaries in



case these correspond with the producer of the product. So consumers better try to prove that they are professionals.

In the recent decision on *Centre hospitalier universitaire de Besançon Thomas Dutrueux*,<sup>572</sup> the Court again returned to the provision of medical services. It did not however make use of the possibility of extending the application of the Product Liability Directive to the damage caused by products used in the course of the provision of health services in medical establishments. The Court reasoned that this kind of damage falls outside of the scope of the Directive.<sup>573</sup> One might wonder to what extent this case is, from the perspective of the patient, truly distinguishable from *Medica Austeriana*.

The formalist approach adopted by the Court in both *Medica Austeriana* and *Dutrueux* cases leaves the impression of arbitrariness – something formalism is ‘formally’ designed to prevent, rather than exacerbate. A broader implication then is that the Court need not worry about any of these, as it still fulfils the main performance criteria of the EU – furthering the *telos* of the measure and the Treaty. Or does it?

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<sup>572</sup> *Case C-495/10, Centre Hospitalier Universitaire De Besançon v Thomas Dutrueux, Caisse Primaire D’assurance Maladie Du Jura*, [2011].

<sup>573</sup> *Ibid.* para 41.



## **11. IN THE SEARCH FOR CONSTITUTIONAL META-PRINCIPLE: SUI GENERIS PRIVATE LAW FOR A SUI GENERIS POLITY.**

### **11.1. Polity Legitimacy and Ordre Public**

This final chapter aims to bring to conclusion our discussion by looking at the question of Polity Legitimacy, not in its narrow definition of shared identity, but rather at a more comprehensive meaning as the overall legitimacy of the polity, the ‘embeddedness’ of the political authority in the society. I will do this through one private law clause, which can be understood to incorporate the whole constitutional framework of the EU in a micro format. In particular, it exemplifies the constitutional locus of competence and responsibilities, and their interaction in the EU, and enables us to portray the consequences of the economic rationality of the EU on the example of one private law clause, and through it on all law-making in the EU.

The reason for this is the unusual character of the *ordre public* clause, which expresses the collective dimension in what is otherwise rather individualistic private law. It comprises “the complex of norms at the very heart of a political entity expressing and protecting the basic options taken by that entity in respect of its political, economic, social and cultural order”.<sup>574</sup> In short, it protects the core ‘public interests’ in the fields where applied. The definition suggests that the clause is dependent on the ‘public’ or ‘political’ in a community. This makes the European Ordre Public (EOP) a concept worth exploring in the EU context.

Let’s start from the DCFR. In II. – 7:301, the CFR provides:

A contract is void to the extent that:

(a) it infringes a principle recognised as fundamental in the laws of the Member States of the European Union; and

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<sup>574</sup>Corhaut, T., EU Ordre Public, Dissertation, Katholieke Universiteit Leuven, 2009, p 12.

(b) nullity is required to give effect to that principle.

The DCFR and PECL are the only two sets of international private model rules which include this form of autonomous *Ordre Public* clause.<sup>575</sup> This clearly suggests a certain degree of ambition in the authors. It implies that there is enough of a common ‘public’ that we Europeans have and that enables us to have such a clause. The authors suggest various sources from which such principles, common to the MS, can be drawn: Human Rights, Rule of Law, Fundamental Freedoms, Non-discrimination etc.<sup>576</sup>

First striking issue, if we look at the ‘values’ and ‘principles’ that the DCFR puts forward as examples of a common basis, is that these enumerated principles and values are already present in the legal system of the MS, and also surely beyond, however, all these states still have significantly different ‘*ordre publics*’. This suggests that the question must be somewhat more complex.

The autonomous *order public* presupposes rather the ‘institutional’ structure where the interpretation and articulation of such values will take place. Such institutional structure in nation states is the democratic process on the one hand, and the court system on the other. On a most general level, when it comes to the division of tasks between the legislation and the courts, we may observe that national courts tended to be reluctant to make progressive decisions, leaving the novel issues to the more inclusive political processes.<sup>577</sup>

Now, since the EU lacks the full democratic infrastructure for public deliberation of many issues comprised by the *ordre public*, the balance between the political processes and the judiciary would be tilted toward the judiciary. The European Court of Justice has indeed, on several occasions, engaged in defining which European issues deserve the same protection as nationally protected ‘*ordre public*’ values, thus indirectly articulating ‘European *ordre*

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<sup>575</sup> The autonomous character of the clause is, however, affirmed by the Notes and Comments, Evaluation Group Report, and some other sources. Notes and Comments explain the use of novel terminology as a tool to avoid nationally loaded concepts such as *ordre public*, attempting to create an autonomous European conception. H.L. MacQueen, “Illegality and Immorality in Contracts: Towards European Principles,” *Towards a European Civil Code* (2004).

<sup>576</sup> Ibid.

<sup>577</sup> Mak, *Fundamental Rights in European Contract Law*.

*public*'. These were the competition law<sup>578</sup>, protection against unfair terms<sup>579</sup> and protection of commercial agents<sup>580</sup>. These articulated values seem to be closely tied to the EU action, more concrete and focused on European issues than the ones proposed by the DCFR.<sup>581</sup>

The fundamental question then is what would be the impact of introducing the 'autonomous European *ordre public*' in the context of the EU? Would it actually lead to the enrichment of the thin '*European Ordre Public*' as articulated so far by the CJEU, or would it, on the contrary, lead to the impoverishment of the values protected by such an autonomous clause in comparison to a multilevel EOP (whereby the EU protects some values, and the MS others)?

We will look at *ordre public* in several steps. Firstly, we will look at the definition of *ordre public* in the private law doctrine. Secondly, we will look at what is encompassed by the 'political', 'moral' 'social' and 'economic' orders that it aims to protect, and whether we can develop a agreed core of these orders at the EU level. If the response is no, then the question emerges, what kind of *ordre public* should the EU strive for?

## **11.2. *Ordre Public beyond the state...***

*Ordre public* 'as we know it' (and as the CJEU interprets it<sup>582</sup>) is a concept connected to the nation state, and it aims to protect the main functions or responsibilities of the nation states in the areas where states would otherwise leave considerable space to party

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<sup>578</sup> C-126/97 *Eco Swiss China Time Ltd v Benetton International NV* [1999].

<sup>579</sup> Case C-168/05 *Elisa María Mostaza Claro v Centro Móvil Milenium* [2006].

<sup>580</sup> Case C-381/98, *Ingmar GB Ltd v Eaton Leonard Technologies Inc* [2000]

<sup>581</sup> European Court of Justice, Joined Cases C-369/96 and C-376/96, *Arblade & Leloup* or European Court of Justice, Case C-319/06, *Commission v. Luxembourg* (Posted Workers Directive).

<sup>582</sup> *Ibid.*

autonomy.<sup>583</sup> Its content reflects the breadth of responsibilities and necessary performances of the nation states, which may not be interfered with by private conduct.

Lloyd, in his seminal work, traces the communitarian character of the clause, when in his view “*the basis of ordre public is said to be in effect that membership in a social group entails certain obligations of an overriding character which can not be eliminated by mere agreement with a particular individual*”<sup>584</sup>. His definition seems to stand based on two elements. Firstly it is the *membership* in a community and secondly the *obligations* that stem from such membership. Belonging to a social group then implies awareness among the members of values that are constitutive of such a group, and the respect for such values (obligations).

Basing legal obligations on the assumption of a ‘pre-knowledge’ on the part of the members of a certain community will perhaps not come as a surprise to common lawyers, when the entire legitimacy of common law is based on expressing such ‘pre-knowledge’ of the members of the community.<sup>585</sup> In practice then, even if the private parties have acted in a way which was not expressly prohibited by law, the enforcement of the contract can be refused (with retrospective effect) on the basis of this communitarian norm, which penalises crossing over the values of a relevant community.<sup>586</sup>

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<sup>583</sup> Lagarde, P., Public Policy; International Encyclopedia of Comparative Law, Volume III, Chapter 11, J.C.B. Mohr (Paul Siebeck), Tübingen and Martinus Nijhoff Publishers, Dordrecht, Boston, Lancaster, 1994, p 3.

<sup>584</sup> D. Lloyd, “Public Policy,” *A Comparative Study in English and French Law*, Londres (1953): 9. 9.

<sup>585</sup> Jansen, N. & Michaelis, R., Introduction; in N. Jansen & R. Michaelis (eds.), *Beyond the state: Rethinking Private Law*, Mohr Siebeck, Tübingen, 2008, 22.

<sup>586</sup> We can talk about two basic trends when it comes to the “scope” of public policy clauses, each of them going in opposite directions. As we have mentioned, the enlargement of the state brought many issues into the scope of *ordre public*, adding different ‘orders’ to the public policy. On the other hand, some rules of *ordre public* have been crystallized into the fixed rules of law (also Lloyd, D.; *Public Policy: A Comparative Study in English and French Law*; University of London, The Atholone Press, 1953, p. 113).

The most important changes related to private law were brought about by what in Germany was called ‘materialisation of private law’ (i.e. bringing the protectionism of weaker parties into the private law field based on private autonomy and (formal) equality of the parties, see e.g. Wilhelmsson, *Critical Studies in Private Law*, 16:87.) and the ‘constitutionalisation of private law’, i.e. the inclusion of Human Rights considerations in private law reasoning (See Mak,

*Ordre public* thus builds on the social ‘embeddedness’ of such norms and values in the polity in question, and on consensus what kind of social order should be instituted. The ‘social embeddedness’ gives a frame for the courts to refuse enforcement to those contracts which offend the fundamental principles of the political community, while at the same time reduces the dangers stemming from its ‘abstractness’, or from it becoming an ‘unruly horse’. The judge is, in this case, considered to be a “typical representative of his day and generation,”<sup>587</sup> who is to search her consciousness only insofar as it reflects the sense of the community of which she forms a part,<sup>588</sup> and exercise the responsibility placed on her to recognise and protect values considered fundamental in the polity.

Finally, it is this ‘social embeddedness’ which makes the principle sit so well with a liberal understanding of the principle of rule of law. The idea of belonging to the polity (a nation state) should automatically equip you with knowledge of these fundamental values and norms, and thus a member of the community’s obligation to respect this is not in violation of the principle.<sup>589</sup> This fiction is fictitious only to a certain extent.<sup>590</sup>

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*Fundamental Rights in European Contract Law*; D. Friedmann and D. Barak-Erez, *Human Rights in Private Law* (Hart Publishing, 2001); O. Cherednychenko, “EU Fundamental Rights, EC Freedoms and Private Law,” *European Review of Private Law* 14, no. 1 (2006): 23–61..

<sup>587</sup>Lloyd, D.; *Public Policy: A Comparative Study in English and French Law*; University of London, The Atholone Press, 1953, referring back to Paton and Cardozo, p. 127.

<sup>588</sup>Lloyd, D.; *Public Policy: A Comparative Study in English and French Law*; University of London, The Atholone Press, 1953, p. 147.

<sup>589</sup>I would agree that this is to some extent fiction – one could in the end question to what extent one can possibly know the law beforehand at all (as philosophy of language could suggest), however, not only is there some empirical basis for such a construction, but it allows us to build a framework legitimising *ordre public* norms and values. On the other hand, the problem of exclusion remains - *ordre public* rules apply to everyone who is in the territory of a polity, even if not a member of a polity.

<sup>590</sup>Although pluralism is also on the rise in nation states, it still does not undermine the claim. Respecting pluralism may be seen on the other hand in the relaxation of *ordre public* requirements in cases dealing with regulating the status of women in polygamous marriages in France or the UK. While previously, such cases were dealt with by strict application of *ordre public* prohibition, human rights considerations have led to a change of approach. Considering the liberal character of Human Rights, this means that we acknowledge the possibility that there are different conceptions of good life, we accept the premise of pluralism, excluding thus the imposition of uniformity of values, at least when the costs are too high.

If we look at the practices of the courts, they tend to be generally reluctant to make progressive decisions, leaving the novel issues to the more inclusive political processes.<sup>591</sup> Thus the courts have remained mostly conservative<sup>592</sup> - progressive ideas were introduced only as a reaction to public discussion, when a certain level of consensus had already been reached. Now, how would the EU judiciary ‘manage’ the articulation of *ordre public* values without the support of rich democratic processes?

### **11.2.1. *Ordre Public without the ‘Public’?***

When we start thinking about *ordre public* beyond the nation state, we find ourselves on rather thin ice, which was what made so many international private law instruments avoid implying the concept of ‘public’- the ‘*ordre public*’ - in postnational settings. ‘Thin ice’ refers here not only to the degree of insecurity, but also to its thin normative content.

‘Transnational Public Policy’<sup>593</sup> has been a topic of some debate in the field of international arbitration. Its content is admittedly much narrower in scope than the international public policy, or for that matter much domestic public policy, and is usually connected to the need to respect of *erga omnes* obligations in international law.

The reason is rather clear. If the global *ordre public* embodies ‘public’ concerns in this setting, embedded through certain consensus, the kind of concerns that it would address would have much narrower scope. The content thus can be reduced to *erga omnes* obligations in international law. That would mean that we could expect the clause to protect against only gross violations. On the other hand, normatively more demanding ‘social’ dimensions (social justice) would surely be omitted on account of not reaching the necessary level of consensus in the transnational ‘order’, and the courts (or for that matter the international adjudicators) are hardly likely to assert any normatively thicker conception.<sup>594</sup>

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<sup>591</sup> Mak, *Fundamental Rights in European Contract Law*.

<sup>592</sup> Ibid.

<sup>593</sup> M.A. Buchanan, “Public Policy and International Commercial Arbitration,” *American Business Law Journal* 26, no. 3 (1988): 511–531.

<sup>594</sup> IN the literature discussed as ‘transnational *ordre public*’, or truly international *ordre public*.



### 11.2.2. *European Ordre Public?*

Going a step down from a global level, we will see the ‘public’ concern being enlarged so as to embrace the particular purpose or function of the EU – its main goals and objectives – and these have been indeed already articulated by the CJEU in various decisions. It would also perhaps include some case law of the ECtHR, as has been shown in Krombach.<sup>595</sup>

However, without the support of the democratic processes, and as an agent of a functional entity, the Court of Justice in its role as an ‘articulator’ of the autonomous *ordre public* may be expected to be conservative in a rather specific way. We will look more closely at the particular ‘orders’ from which the fundamental values of the *ordre public* are inducted, in order to understand the dynamics of the interaction between the MS and EU level in articulating the values that form the EU ‘common’ *ordre public*.

#### 11.2.2.1. *Moral (Ethical) Values and European Private Law*

Morality has been one of the major ‘outlets’ for the *ordre public*, sometimes even deserving a special clause (Immorality, Gutes Sitten etc.). In national legal orders there are a number of classical issues which are dealt under this clause. Classical examples would be the non-enforcement of contracts for sexual services, non recognition of polygamous marriages or repudiations in PIL context, contracts putting at stake the institution of marriage, gambling debts<sup>596</sup> etc. The best description of the manner in which courts have treated morality in this respect is that they would “refuse to apply a law which outrages [their] sense of justice or decency”<sup>597</sup>, laws that were considered outrageous<sup>598</sup> or shocking to the human mind or

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<sup>595</sup> Case C-7/98, *Dieter Krombach v André Bamberski* [2000]

<sup>596</sup> Lloyd, D.; *Public Policy: A Comparative Study in English and French Law*; University of London, The Atholone Press, 1953, p. 59. 60. H. Beale et al., *Contract Law* (Hart, 2002).

<sup>597</sup> Collins, L., *Dicey and Morris on The Conflict of Laws*, Thirteenth Edition, Volume I; Sweet and Maxwell, London, 2000, p 82.

consciousness<sup>599</sup>. The invocation was motivated by the importance of the interest, but also left little doubt about the commonality of the shared value, i.e. the existence of a high level of social consensus about these fundamental moral and ethical questions.

It is this moral codex of the societies that has produced the majority of standard *ordre public* cases, while most of the issues dealt with under public policy with were not regulated by legal norms, but rather stemmed from moral and world-view (including religious) convictions which prevailed in the societies. Later on, with the introduction of the ‘Human Rights discourses’, one can observe a certain liberalisation in the application of *ordre public* clauses, taking into account increasing pluralisation and various human rights considerations.<sup>600</sup> The character of a clause has thus changed, shifting towards more liberal values and acknowledging the pluralist character of the communities within the nation states.

Yet, with regard to the treatment of politically salient moral issues, as opposed to more consensual issues, the courts have usually fallen back on the democratic processes of the articulation of ‘shared values’, as may be seen when faced with issues such as surrogate parenthood agreements, or the enforcement of claims based on cohabitation of same sex couples<sup>601</sup>. Such politically controversial Moral Questions are also handled with great caution by the international human rights adjudicatory bodies, such as the European Court of Human Rights. In matters which could be considered violations of one’s right to privacy or family life (gay rights, gay marriage, abortion, etc.), considerable margins of appreciation are given to such sensitive ethical and moral issues, even when one could speak about majority consensus among the Parties to the Convention.

Now, what can be seen as the core of the European Moral Order? The EU has integrated the European Convention of Human Rights into its legal order, and it has also adopted its own substantial bill of rights, a Charter of Fundamental Rights. Yet, it still

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<sup>598</sup>Collins, L., Dicey and Morris on The Conflict of Laws, Thirteenth Edition, Volume I; Sweet and Maxwell, London, 2000.

<sup>599</sup>*Ibid.*

<sup>600</sup>H.M. Watt, “Evidence of an Emergent European Legal Culture: Public Policy Requirements of Procedural Fairness Under the Brussels and Lugano Conventions,” *Tex. Int’l LJ* 36 (2001): 539.

<sup>601</sup>Mak, Ch., *Fundamental Rights in European Contract Law: A Comparison of the Impact of Fundamental Rights on Contractual Relationships in Germany, the Netherlands, Italy and England*, Wolters Kluwer International BV, Netherlands, 2008

understands itself as the agent of the entity responsible for the economic sphere, rather than other matters, which is difficult to squeeze in with the moral rationalities – in particular without the support of thick democratic processes or consensus.

The Court has been thus rather reluctant to come up with European interpretations on moral issues – even if such moral rationalities came into conflict with the freedom to provide services, as in the case of *Grogan*,<sup>602</sup> or with regard to the interpretation of human dignity in *Omega*,<sup>603</sup> but it remained relatively harmless overall to the fundamental freedoms.

This may change if the alternative values come into direct significant conflict with the main objectives of the Communities. Thus the Charter could not ‘save’ the alternative, market (or capital) restricting rationalities in the ‘right to collective action’ cases *Laval* or *Viking*.

When it comes to the most ‘prominent’ of EU ‘moral’ principles - the principle of non-discrimination<sup>604</sup> - the EU becomes more aggressive. The principle of non-discrimination is part of the main responsibility and performance of the EU since the emergence of the Communities. The principle becomes part of the ‘telos’ of the EU and its self- understanding. This European moral principle par excellence has been however incorporated in the rationality of the EU in a way which does not conflict to the prevalent economic rationality, and thus we see harmonic and self-supporting effects of the two.<sup>605</sup>

This small excursion could leave us with certain ideas about the ‘order of values’ in the EU. The Court will not enter into confrontation because of the issues less significant for its main purpose and performance, generously deferring to the national democratic processes on that matter. This however changes when it comes to the stronger conflicts with principles which are considered core of the EU performance. In particular the principle of non-

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<sup>602</sup> Case C-159/90, *The Society for the Protection of Unborn Children Ireland Ltd v Stephen Grogan and others* [1991].

<sup>603</sup> Case C-36/02, *Omega Spielhallen* [2004]. See also J. Smits, “Human Dignity and Uniform Law: An Unhappy Relationship,” *TICOM Working Paper on Comparative and Transnational Law No. 2008/2, ESSAYS IN HONOR OF SAUL LITVINOFF, Olivier Moréteau, Julio Romanach, Alberto Zuppi, Eds., Pp. 749-760, Baton Rouge, 2008* (2008).

<sup>604</sup> As you may observe, I do not distinguish one kind of ‘non-discrimination’ in particular, because I think that the story would be very similar to other provisions in its expansionist logic, equally as in lowered sensitivity toward the possible competing moral objectives. In addition, the principle has a strong market dimension as well, because it has been tightened in particular to the Fundamental Freedoms.

<sup>605</sup> Ebner, Joerges, and Falke, “Transnational Markets and the Polanyi Problem.”

discrimination on the one hand, or fundamental freedoms on the other. The fact that some of the conflicting values and objectives have been added to the Treaties does not change a lot on the order of values – they may enrich the existing ‘model’ of thinking at the outskirts (adding thus the legitimacy to the overall framework), without however changing the basic self-understanding with regard to the main expected performance and responsibility of the EU.

#### **11.2.2.2.      *The Social Order and the European Private Law***

The protection of social order by an order public clause then incorporates the protection of social values (more narrowly) or societal values more broadly (including the previously mentioned ethical issues). The shift in the public debate on private law and the core social values behind it was related to the ‘rise of social legal thought’, the emergent democracy, universal suffrage, and the rise of welfare ‘nation-state’.<sup>606</sup> This shift has gradually reshaped what the courts understand as a ‘just social order’.<sup>607</sup>

As a result of the changes of discourse in the societies, and the responsibilities that democratic states undertake, the courts started to implement a more substantive reading of freedom and equality, often using blanket clauses such as the discussed *ordre public*, Good Faith or Immorality clauses. In practice then, the implementation of the values informing the social order meant the refusal to enforce contracts (or parts of them) which were (grossly) unjust towards structurally weaker parties. This was usually the case in labour relationships<sup>608</sup>, in some occasions for consumers<sup>609</sup>, for artists bound by unfair licence agreements<sup>610</sup> or in franchise-type agreements<sup>611</sup>.

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<sup>606</sup> Patterson and Afilalo, *The New Global Trading Order*.

<sup>607</sup> Perhaps the best demonstration of the shift has been pre- and post- Lechner case law of the US Supreme Court in the 1930s

<sup>608</sup> Lloyd, D.; *Public Policy: A Comparative Study in English and French Law*; University of London, The Atholone Press, 1953, p. 78.

<sup>609</sup> Lagarde, P., *Public Policy*; *International Encyclopedia of Comparative Law*, Volume III, Chapter 11, J.C.B. Mohr (Paul Siebeck), Tübingen and Martinus Nijhoff Publishers, Dordrecht, Boston, Lancaster, 1994, p.

This development took place based on the interaction of the democratic legislator, public opinion and the courts, which gave sufficient legitimacy for these decisions, based on the ‘embeddedness’ of such social values and the community’s vision of what constitutes a just social order. It had a civilising effect on the relationships between contractual partners, departing from individualistic private law, which structurally privileges the stronger parties in contractual relationships.

The new ‘wave’ in the shift and de-formalisation of private law came in the process of ‘constitutionalisation of private law’.<sup>612</sup> ‘*The*’ example among the constitutionalisation cases is the famous German Constitutional Court *Burgerschaft* decision, which concerned the surety provided by a twenty year old daughter for her father’s business. After her father’s bankruptcy, if the surety had been enforced, it would have sentenced this young woman to live in poverty for the rest of her life. This was considered offensive to the principle of ‘human dignity’ and the ‘social state’ and thus, to the social values underlying the polity.

In the institutional framework of the EU, considering that the *Burgerschaft* case would be governed by the Optional Instrument as a truly autonomous instrument, with an autonomous *ordre public* clause, one would wonder how far the national courts and eventually the ECJ, as a final interpreter, would have gone in asserting what EU social order means in a functional polity such as the EU. One could have plausibly expected rather conservative decisions, not only because the Court lacks the support of the democratic processes, but because the EU as a polity does not carry the responsibility for the ‘social’ in its own right, thus the assertion of the ‘social’ would be rather selective – insofar as it furthers its overall rationality.<sup>613</sup>

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<sup>610</sup> Beale, H. (ed.), *Chitty on Contracts, General Principles*, Volume 1, 30th Edition, Sweet Stone and Maxwell, London, 2004.

<sup>611</sup> One could also subsume here the public policy issues raised as a protection of the restraint of trade, however, the underlying rationale of the justification suggests it belongs to the economic order as the concerns were often to do with economic efficiency rather than social justice.

<sup>612</sup> See fn 669.

<sup>613</sup> Here we may recall *Ingmar* decision, when the ‘social concerns’ of the commercial agents were furthered insofar as they contributed to the market integration, as well as the claim to authority of European Law.

This is not to say that the EU has not produced any 'social' values thus far. The equality law and policy of non-discrimination, the protection of vulnerable consumers (Services of General Economic Interest) and the principles of accessibility or affordability, could all be considered as forming the nucleus of European *social* private law.<sup>614</sup> However, not only they have not been given yet any prominent status in the jurisprudence, but we shall be aware that they represent a different conception of social justice.<sup>615</sup>

To conclude, as discussed already in the previous part, any social and societal values that might be present in this form or another in the European order will be perceived through the lens of the main EU rationality, which is market based in essence, since market integration is the basic expected performance and responsibility of the EU. This means that until something changes on the breath of primary responsibilities and performance of the EU, various values will be interpreted, prioritised or sacrificed in relation to the way in which they contribute to, or threaten, the economic order of the EU. This is not good news for the social values, whether in the Charter or not.

### **11.2.2.3.      *The Economic Order and European Private Law***

While at the national level, the protection of 'economic order' mainly referred to dealing with various evasions of tax, or interferences with the state currency,<sup>616</sup> the 'public' concerns at EU level are placed within the overall rationality of the EU, which is centred on the economic performance expected from it, with all other concerns built into this economic model. Thus we have seen and will continue to see further issues such as competition law,

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<sup>614</sup> H.W. Micklitz, *Universal Services: Nucleus for a Social European Private Law* (European University Institute, 2009).

<sup>615</sup> H.W. Micklitz, *Social Justice and Access Justice in Private Law* (EUI Working Paper 2011, forthcoming, 2011).

<sup>616</sup> H. Beale et al., *Contract Law* (Hart, 2002).

protection against unfair terms and protection of commercial agents constitute EU *economic ordre public*,<sup>617</sup> the core of the EU *ordre public*.

Since the *ordre public* clause responds to the expected performance of an entity, which needs to protect its performance against the interference stemming (in this case) from private relations, the prevalence of economic order in its order public shall not come as a surprise. The EU in essence quite naturally protects its main performances and its main responsibilities against interferences. Among those responsibilities we would foremost place the internal market, but it would also include principle of non-discrimination and perhaps some other questions where the EU assumes the primary responsibility. Yet it is the weight of its internal market responsibility, which has made all its thinking fit into a more general market rationality.

### **11.3. Multilevel Ordre Public for the Multilevel Polity**

The *ordre public* is a clause of collective character, which incorporates important public concerns and directly bases its content and legitimacy on (democratic) discourses in a certain polity. While nation states will be able to produce a thicker set of values, which may obtain *ordre public* status, since their responsibilities are articulated in the democratic processes and may get various forms, the situation will be different when it comes to functional polities. The functional polities will be able to produce a restricted pool of such values and principles, which fit its purpose, expected performance and responsibility. The kind of polity the EU is, and in particular the kind of responsibilities it assumes, will determine what kind of *ordre public* it can develop.

First of all, it is important to make clear that the values that *ordre public* protects change over time, and depend on the ‘performance/functions’ of the polity in question. Thus, for example, with the emergence of the ‘Social’<sup>618</sup>, the *ordre public* has enlarged in order to

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<sup>617</sup> See 11.1.

<sup>618</sup> Kennedy, “Three Globalisations of Law and Legal Thought.”

incorporate a broader scale of values that underpin social order, while at the same time the pluralisation of the groups, culture and worldviews in the nation states have brought about the liberalisation of the ‘moral order’ and the increase of tolerance toward ‘others’, as mediated through democratic processes.

The changing function of the states and their legitimisation will surely impact on the kind of social order their *ordre publics* protect. If the state is (or is to become) a ‘market state’<sup>619</sup> or a ‘postmodern state’, and its justification moves from the provision of welfare benefits to the enabling of economic activity, we may see the ‘liberalisation’ of the social order. On the other hand, if we will try to maintain the ‘welfare’ paradigm, the socially conscious application of the *ordre public* clause may equally become a moderating tool for lowering the social-welfare effects of globalisation and the liberalisation of public services. What impact globalisation will have on economic and social order, on the changing involvement of nation states in the provision of welfare, or on the increasing intolerance and xenophobia which can be seen as responses to states’ withdrawal of welfare, remains to be seen.

Where does the EU stand in this story? The validity of the *ordre public* can give us deeper insight not into the whole constitutional construction of the EU. By organising the way in which to look at the summation of the nation state’s powers and responsibilities, it helps us articulate the kind of desirable interaction between the EU and the MS.

There are two fundamental considerations which need to be looked at when thinking about an autonomous European *ordre public* clause. First of all, what the impact of the *autonomous* character of the *ordre public* would be on the values protected by the *order public* of a *functional* entity (an alternative perspective of how to look at the effects of functionalism), and secondly, whether such autonomous character is in line with the EU constitution. Finally, we will portray the kind of *ordre public* that fits the EU.

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<sup>619</sup>Patterson and Afilalo, *The New Global Trading Order*.



As has been repeated on several occasions, the functional and purposive character of the EU has an inbuilt order of values in its rationality.<sup>620</sup> The CJEU, in developing the EOP without the politicisation of the core of its economic order by the democratic institutions and discourses, would lead to unequal stress and the development of various ‘orders’, and slow the reduction of the values protected by the *ordre public*. We may perhaps expect the ‘liberalisation’ of the moral order through the majoritarian bias<sup>621</sup> on the one hand, and restraint (conservatism) in social matters with regard to ‘social order’ on the other. However, the MS are (still) obliged to deliver a ‘just social order’, and restraining them in this regard may have a destabilising effect on the multi-level polity.

Secondly, the meta-norm for dealing with conflicts in its constitutional order - the principle of 'Unity in Diversity' - then militates against the autonomous conception of *ordre public*. The principles of attributed powers, subsidiarity and proportionality should limit the reach of the predominantly economic union into ‘moral’ and ‘social’ fields. Both the Commission- in the Optional Instrument, and the CJEU- in various cases, seem to be conscious of this, and are unwilling to impose a European solution even if there is a majority consensus among the EU Member States, such as in the case of abortion.

In thinking about *European ordre public propre*, we need to take into account the following: the EU as a whole is an entity which is not (yet) resigned to being a welfare state. On the contrary, it has even committed itself to the ‘social market economy’,<sup>622</sup> to respecting the constitutional identities of the MS and to maintaining cultural and linguistic diversity<sup>623</sup>, and its *ordre public proper* must reflect these commitments.

The EU may however only achieve this with the support of the democratic processes at the national level – insofar as, unlike the nation states, its institutional structure does not allow it to truly embrace non-market rationality as a self-standing rationality, which are the basis of the social and moral orders. The EU misses in particular the sufficient level of politicisation of its ‘raison d’être’, which prevents it to develop such non-market rationalities.

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<sup>620</sup> See in particular the Introduction and a Chapter 5.

<sup>621</sup> Maduro, *We the Court*.

<sup>622</sup> Art. 3 (3) TFEU.

<sup>623</sup> Art. 3 (3) TFEU.

If the multilevel order public of the EU is to continue to incorporate all four orders, then these need to be taken care of at different levels of government, whereby each level cooperates and supports the efforts of the others. In cases when the EU aims to act, the ‘proof’ that action is warranted at EU level should stand the highest level of scrutiny in terms of subsidiarity and proportionality. If the action is still desirable, then the procedure to be designed for taking action has to be particularly sensitive to ensure space for the articulation of alternative goals, values and objectives, which are primarily motivated by non-market concerns.

In the ‘economic order’, where the EU has most to say, the Court will be somewhat freer to proclaim on issues belonging to the multi-level order public. This still does not relieve it of its obligation to refrain from unreflective teleological interpretation, and engage in more contextual and substantively justified decision-making.

An ‘autonomous *ordre public*’, as postulated by the DCFR and abandoned by the Optional Instrument, would violate the constitutional requirements to which the EU has committed. By this I refer not only to ‘unity in diversity’, or the principle of subsidiarity, but to the transfer of competences to articulate the *ordre public* to the level of government, which is unable to generate necessary non-market rationalities. This is so on account of the lack of politicisation which would put forward non-market alternatives, hinging on its postnational character and insufficiently democratic institutions (Democratic Deficit).

Those motivated to introduce the EOP in order to ‘humanise’ the market are mistaken, insofar as that would be yet another instance of a provision which cannot be given the desired normative content in the context of the functional polity. On the contrary, we may expect it to be populated by the main concerns of the functional polity- its own vision of what matters, while those issues that conflict with market rationality, and as such are the only ones which have the capacity to re-embed the market, in Polanyi’s understanding, would fall off.<sup>624</sup>

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<sup>624</sup> C. Joerges and N.S. Ghaleigh, *Darker Legacies of Law in Europe: The Shadow of National Socialism and Fascism over Europe and Its Legal Traditions* (Hart Publishing, 2003).

## 12. CONCLUSION

Whether we call it modernity, or already post-modernity, the fears of thinkers such as Weber or Polanyi are materialising to the extent and in ways which they could have hardly anticipated. Rationalisation and functionalism, re-formalisation and disembedded global markets, with no ‘public’ to ‘re-embed’ them, slowly undermine the very essence of humanity. This is valid both for the public autonomy and democratic self-determination on the one hand, and private autonomy on the other, since the ruminants of public in the postnational context give public support to the conception of the individual as a consumer or shopper (rather than a citizen), who is rational to the extent that his or her main value is to consume cheaply - and as much as possible.<sup>625</sup>

Private law long ago became one of the major battle fields for re-embedding the markets in a very Polanyan understanding. On the one hand, we see the re-embedding through the interventions of democratic legislators, in counteraction with the reality of market transactions and economic power through the protective rules in labour, tenancy, consumer protection, product liability, but also company law (codetermination in Germany), regulation of services, free professions et cetera. On the other hand, we see the change in the decision-making of the courts and the shift from ‘form to substance’ or ‘materialisation’ of law, followed by the ‘constitutionalisation’ of private law, which aimed at securing substantive (as opposed to formal) equality and freedom, also limiting the exposure of private relations to the purely market-centred mechanisms and the exercise of private power.

The EU as it stands, when its primary performance remains the market, and the whole discourse revolves around it, does not have the capacity to develop *market-countering* rationality in private law. Rather, as economists often show us today, these various concerns reflected in private law, which relate to the ‘social justice’ or ‘just social order’ may be incorporated into their economic models. The EU, with its economic rationality, strongly embraces this economized conception of the social environment. Thus, in European private law, we increasingly see consumer law built into the economic models and viewed within the

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<sup>625</sup> European Commission, “Impact Assessment Accompanying the Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law.”

framework of economic rationality as a ‘market failure’, which needs to be addressed in the framework of the market measures.<sup>626</sup>

Yet, as we have seen, this is not without consequences for the kind of consumer law we see in Europe.<sup>627</sup> The outcome that we see is that EU consumer law is mainly concerned with market efficiency and market transparency, which has an impact upon the content of consumer law. EU consumer law aims at the protection of the ‘average consumer’, a very different kind of consumer from the weakest market participant, which is matter of concern in nation states. In economic terms, we may even understand EU consumer law as actually forcing weak consumers to subsidize the ‘average consumers’, insofar as the measures helping just the latter group increase the costs for all consumers.

This outcome is the result of incorporating social concerns into the economic model/rationality, which influence the kind of procedure adopted for the development of legislation (who has ‘voice’), the prioritisation of values and different policy outcomes. The inclusion of the ‘social’ into the ‘economic’ rationality economizes (and de-socializes) the ‘social’ by taking away its self-standing status. It makes the social lose its capacity to ‘re-embed’ (or counter) the markets via a different rationality and different value system, than those owned by the market rationality. Thus, we see EU consumer law turning into another branch of economic law, which, instead of the protection of consumers, aims at market transparency or similar. These effects would escalate with the shift to full harmonisation.

In essence, removing the decision-making from the democratic processes of nation states - where the question ‘what kind of rationality shall be adopted’ is open to political

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<sup>626</sup> The turn to economics, and institutionalising of ‘evidence based decision-making’, pushes out the political concerns.

<sup>627</sup> Brueggemeier, Bussani, Collins, Ciacchi, Comandé, Fabre-Magnan, Grundmann, Hesselink, Joerges, Lurger, Mattei, et al., “Social Justice in European Contract Law”; T. Wilhelmsson, “The Abuse of the ‘confident Consumer’ as a Justification for EC Consumer Law,” *Journal of Consumer Policy* 27, no. 3 (2004): 317–337; G. Howells and N. Reich, “The Current Limits of European Harmonisation in Consumer Contract Law,” in *ERA-Forum*, 2011, 1–19; Micklitz, “The Targeted Full Harmonisation Approach”; H.W. Micklitz, “Concept of Competitive Contract Law, The,” *Penn St. Int’l L. Rev.* 23 (2004): 549. Schmid, *Die Instrumentalisierung Des Privatrechts Durch Die Europäische Union*; Collins, *The European Civil Code*; Schmid, “The Instrumentalist Conception of the Acquis Communautaire in Consumer Law and Its Implications on A European Contract Law Code.” H. Rösler, “15. The Transformation of Contractual Justice—a Historical and Comparative Account of the Impact of Consumption,” *The Many Concepts of Social Justice in European Private Law* (2011): 327; Rösler, “Protection of the Weaker Party in European Contract Law.” H.W. Micklitz, “The Expulsion of the Concept of Protection from the Consumer Law and the Return of Social Elements in the Civil Law: A Bittersweet Polemic” (2012).

struggle - to the EU as it is constituted at present (endorsing one kind of rationality in market related issues), will, in effect, lead to the economisation of all the social handed over to it.<sup>628</sup> This will lead to the pushing out of non-market rationalities, which have the capacity to de-commodify human beings and humanize markets - with the possibility of rather disastrous consequences for the social order instituted by private law.

In the picture set in this way, it becomes clear why the full harmonisation of European Private Law is undesirable *in Europe as it is presently constituted*. Private law has acquired an important market re-embedding function during the period of democratic governance at the nation state level,<sup>629</sup> which would be lost if the competences passed to the EU without the necessary politicisation of its '*raison d'être*'.

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The strength of economic or market rationality in the EU is closely related to the insufficient politicisation of 'market foundations', which make for the meta level of the democratic deficit in Europe, insofar as it lacks the democratic contestation and political struggle regarding the most profound question, namely 'which' rationality, which conception of human being, good life, etc. should be employed in this context. The agenda-setter (the Commission), aided by the Court, frames the debate in market terms, and if there is politicisation in the Parliament or the Council, then it comes too late down the road to counter market rationality where it is most necessary - in shaping the goals. This makes the 'democratic' and 'social' deficit in Europe go hand in hand.

The concept of Micro Legitimacy proposed here aims at breaking the inherent rationality in the preparation of the legislation by the agenda-setter, but also in the context of the decision-making of the Court – the two places where it seems most necessary. More generally, the concept of Micro Legitimacy in the post-national constellations is based on the inherent limits of the substantive policies externalized to the international arena (and thus quasi-constitutionalised as international law) in hollowing out the democracy. It relies on the contestability of the claim to legality of the trade regimes in the cases where they decide on

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<sup>628</sup> Without doubt in the areas which touch the internal market – such as private law.

<sup>629</sup> Insofar the classical contract law was connected to the state-nation era, which emphasised the strengthening of the industrial base and the accumulation of the capital through 'laissez faire' policies of the 'minimal state', it is in what Afilalo and Patterson call the 'statecraft of nation state' that the welfare dimension of the contract law could unleash. (Patterson and Afilalo, *The New Global Trading Order*.)

the non-market rationalities from the perspective of market rationality, and where their indirect legitimacy becomes, at best, doubtful.<sup>630</sup> In such cases, the trade entities can not rely on their constitutions to supply the legitimacy to their claims to legality (they lack macro legitimacy), but rather have to acquire the legitimacy *ad hoc*, at the decisional *micro* level.

In the EU, the concept of Micro Legitimacy shall apply in particular when the EU undertakes an action which reaches beyond its constitutional mandate narrowly construed, to the areas which are cross-cutting or which are in ‘diagonal relation’ with the internal market (such as private law). It builds on the Principle of Subsidiarity in the first step, which should account for the awareness and the debate about the costs of action at the EU level, both in with relation to the Economic Dimension of Subsidiarity, as well as the Democratic Dimension of Subsidiarity.

This however can not take place without designing such procedures as will bring to light the costs of the action. Leaving the determination of the costs to the Commission (as has been the case so far) has proven a mistake insofar as the Commission is the last entity which could bring out such costs. The Commission is, for both historical and institutional reasons, strongly entangled in the rationality of the EU centred around the primary performance–market integration. Insofar as it has little responsibility for other social dimensions, it is institutionally determined to downplay the costs, which become only secondary side-effects of the main purpose and the main good which it is supposed to deliver, namely market integration, or more precisely, market liberalisation.<sup>631</sup>

Thus, Micro Legitimacy aims at the politicisation of what shall be the very core of the debate – the goal - in the preparatory phase of the legislation. It aims to do so by enlarging the ‘issues’ through opening the debate about the most important questions – such as the ‘internal market’ or ‘some different kind of action’.<sup>632</sup> This shall lead to the enlargement of the ‘issue publics’, as well as opening up to politicisation the market fundamentals in the European Parliament while simultaneously increasing the reach of such more political issues in the national public spheres.

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<sup>630</sup> The division of the ‘economic’ for the international level, and the social for the nation level is an expression of the intent of the nation states to keep their own non-market policies untouched.

However, at certain point it started to seem that this division in fact gives international institutions supported by the international (supreme) law to override the non-market rationalities.

<sup>631</sup> Martin Höpner and Armin Schäfer, “A New Phase of European Integration: Organised Capitalisms in Post-Ricardian Europe,” *West European Politics* 33, no. 2 (2010): 344–368.

<sup>632</sup> Treaties have so far not proven to be a considerable obstacle for any kind of action.

The market rationality embraced in the EU, and the exclusion of the Political with regard to the ‘foundations’ of the EU (market enabling), becomes even more salient with the extension of powers of the EU internally, and the need to develop the external face of the EU vis-à-vis the global market. The constitutional self-understanding of the EU as a market-enabling polity has automatically transformed into the response to globalisation based on ‘increasing competitiveness’, which in economic rationality means further liberalisation and de-welfare-isation. What, however, is worrisome, is that this decision has been taken without any democratic debate – insofar as the democracy in Europe always jumps over the debate about foundational issues.

Yet, globalisation is also an opportunity for different, political, integration. The nation states cease to be an adequate forum where the public autonomy or democracy can meaningfully take place. To the extent that nation states are a locus of policies, they tend to refuse to assume responsibility for the choices made, insofar as these are conditioned by the uncontrollable forces of global markets. The EU thus becomes the only forum to counter this dis-empowerment of democracy and the people – which has historically been shown to be the only meaningful protection for individual rights and liberties. The goal thus has to be to Europeanise (and later eventually globalise), not policies, but democracy.

Europe is a locus of hope for the European citizens to realize their autonomy and collective self-government. Yet, these hopes can not be realized until the EU formulates a response to the globalisation without opening these goals to democratic contestation. The EU ‘naturally’ (within its economic rationality) assumes the market frame and market response. This propensity cannot be changed by adding new values and goals to the Treaties, or by transferring more competences to it. On the contrary, such a transfer will have a negative impact upon the ‘social order’ in Europe, itself a product of democracy, since the EU has displayed a tendency toward dismantling the European welfare state instead of protecting it.

We must seriously take up the challenge to break up the economic determinism of the EU, its economic rationality, by opening the ‘foundations’ of its economic policy to politicisation and democratic contestation – so as give chance to democratic governance, both internally and externally. The necessary force of democratic mobilisation lies in all those who

are carrying the consequences of the globalisation and economic crisis – and who can not anymore find the response at the national level.

The response can be found at the European Level, insofar as, unlike the MS, the European Union has sufficient leverage to resist the pull of global markets, the threats of the flee of mobile economic capital or economic actors. For that, however, Europe would have to be open to eventually embracing (crudely put) the ‘left’ response to the question of globalisation, which is so far structurally excluded.<sup>633</sup>

The Chapter on Functionalism and the anti-democratic implications of the international trade regimes have aimed to clarify the nature of legal obligations in the international arena. There are limits to the legitimacy of functional trade regimes to claim their legality, which stops once they exit their constitutional mandate *stricto sensu*. To put it another way, once the functional regimes encounter an issue motivated by a different rationality, they lose their standing (and ability) to claim the legality of their decisions unless they have not undertaken some micro-legitimate steps. In these areas, thus, their decisions are open to contestation with regard to their legitimacy.

The limits to the claims to legality are present in the relation between the MS and the EU, but also the EU and the WTO, when lower levels of governance (crudely put) enjoy generally higher level of democratic legitimacy, and thus may come in situation when they will require fulfilment of certain normative standards (micro legitimacy) from the higher level of governance.

Such contestation of the legality of a decision of the WTO for its lack of legitimacy applies in the GMO line of cases (precautionary principle), where the EU has refused to accept the decision in which the Appellate body, which has looked at the issues of health policy from the perspective of trade law and trade values, using a standard test which ‘naturally’ prioritises its own ‘performance’ (free trade) in front of the responsibility of the EU (and its MS).

Another prospective battlefield for micro legitimacy in the environmental sphere is highlighted by the recent plans for the taxation of CO2 omissions in the EU. These represent a nascent (external) non-market rationality of the EU in the area of environment, which aims

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<sup>633</sup> *More competitiveness* will, at least by some, not be considered as a meaningful response to the global market.



to re-embed the market with regard to the ‘nature’. It still should do the same for the ‘man’ – yet for that it has to break up its foundational economic determinism.

If the EU succeeds in opening up to democratic governance and thus naturally opening up to other social concerns (in the name of justice and indeed global justice), it is a sufficiently strong actor to attempt to re-embed the global markets – either through the international negotiations of social standards imposed on goods entering the market (such as labour standards in sweat shops, the prohibition of child labour, and the observance of environmental standards or human rights standards), or eventually via the threat of unilateral imposition of such standards.<sup>634</sup>

Indeed, it is not excluded that we may see ‘trade wars’ in the short term, but in the longer run we could witness the ‘re-embedding of global markets’, with somewhat more justly re-designed pattern of redistribution, which could re-establish the promise of international peace through trade once again (a peace which global markets are at present rather threatening than encouraging).

This is not an attempt (to respond to criticism before it arises) to put in question the whole international order, or to ‘abolish the UN Charter’. My concerns go against constitutionalising at the international plane the issues of substantive economic policy that could not have been possible in the democratic polities.

With the accelerating economic globalisation, this phenomenon starts to constitute a fundamental affront to democracy and the public and private autonomy of the citizens of the world - of the kind which human rights or the commitment to peace, or a healthy environment, are surely not.<sup>635</sup>

In conclusion, the potential for the democratisation of the EU lies in its capacity to influence (re-embed) global markets. This is the ‘added value’ which no MS of the EU may offer to its citizens. However, the mobilisation can not take place unless this option becomes

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<sup>634</sup> The market tools– such as the Fair Trade movement – can not substitute the public action for number of reasons, such as the scale and the impact of such social standards, equally as the collective commitments taken in the process of democratic deliberation which takes the shape of law and as such guarantees the reciprocity (we all pay higher prices for just goods).

<sup>635</sup> These are in fact often constitutionalised in the democratic states themselves – for they enable and guarantee the democracy. It may be more plausibly objected however, that we will increasingly see the calls for ‘global justice’ now, that the former imperial powers, which have so far profited from the global markets, become endangered by the global markets.

a possibility open to political debate at the European Level. The parties in the European Parliament should mobilise their courage and take up the responsibility to put in question the ‘road travelled thus far’, and should propose the new possibilities both to their constituency at home, to their colleges at the European Level, and, together with the latter, to the European Public.

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