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Internal Market Rationality, Private Law and the Direction of the Union: Resuscitating the Market as the Object of the Political

*Marija Bartl**

Abstract: *This paper proposes a concept of ‘internal market rationality’ for the analysis of the political, legal and economic consequences of European integration. Internal market rationality refers to a specific pattern of political action in the field of internal market, which has emerged gradually due to the confluence of three main factors: first, the EU’s functional institutional design; second, the processes of post-national juridification; and third, a more contingent influence of ideas. In the interplay of those three factors, the interpretation of internal market has become overdetermined, restricting thereby the space of (democratic) politics in its regulation. This reification of internal market rationality has had a direct influence on the content of European law, as I demonstrate through the example of European private law. Internal market rationality has transformed the very concept of justice underpinning private law, the concept of the person or subject of law, the (re)distributive pattern of private law as well as the normative basis on which private law stands. I argue, finally, that a close examination of the legal, institutional and ideological arrangement behind internal market rationality provides clues for the democratisation of the EU.*

I Introduction

This article advances a new concept—that of internal market rationality—to explain how the key aim of European integration, the establishment of internal market, has come to shape both the substance and processes of private law-making in Europe today.

The processes of economic liberalisation and privatisation that followed the Single European Act have increased the centrality of private law in the EU. Private law has become the principal juridical framework for a growing number of social and

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economic relations. Yet the more the EU has boosted the role of private law, the more it has transformed—or distorted—its internal normativity.

Posing the construction of the single/internal market as the key task of private law has transformed radically its key tenets: the concept of justice underpinning private law, the concept of the person or subject of law, the (re)distributive pattern of private law, and the normative basis on which private law stands. While the transformation might have been invigorated by ‘neoliberal’ thought, I argue that a fundamental role has been played by the original ambivalence of the European integration project, and most particularly by its institutional and substantive functionalism.

In the following section (Part II), I propose a theoretical framework for understanding the processes of reification of political action in functionalist entities. I explore how the confluence of EU legal-institutional arrangements and a broader ideological constellation made the emergence and the reification of internal market rationality possible. The subsequent section (Part III) analyses the implications of internal market rationality for the transformation of European law. I seek to demonstrate that internal market rationality has fundamentally transformed the very idea of private law. The final section (Part IV) investigates a particular division of labour among the EU institutions, as an unexpected consequence of EU functionalist institutional design. While this division of labour among the EU institutions has been pivotal to the ongoing reification of political action in the EU, it may at the same time hold the seeds for its containment.

II The Reification of Political Action in the EU: The Emergence of Internal Market Rationality

I understand internal market rationality as a specific pattern of political action in the EU—EU’s political rationality. Internal market rationality may be said to comprise various normative and cognitive (knowledge) components, such as laws, values, principles, ‘common sense’, economic doctrines, political expediency, responses to public opinion, policies or notions of human rights.¹ These elements lend the structure to the field of possible political action in the EU and provide language for conducting policy debates.

In a functionalist entity of economic integration, such as the EU, the primary normative component of political action has been supplied by its economic purpose: the construction of the common/internal market. This European goal has in turn motivated the production of an enormous body of knowledge, which has, over time, supplied the cognitive foundation of its political rationality.

Yet, while we understand ‘rationality’ and ‘knowledge’ are positive notions, which should enable political institutions to act in a normatively desirable *rational* way, I will be interested here in a certain pathogenic interaction between politics and knowledge production in functionalist entities, captured by the term ‘reification’.

As an example of the reification in the EU, in Part IV I discuss the way in which the main goal of European private law—the *online internal market*—has been established. In this process of European private law-making, the relationship between the online internal market and other EU goals (such as economic growth or employment) has

¹ M. Beeson and A. Firth, ‘Neoliberalism as a Political Rationality: Australian Public Policy since the 1980s’, (1998) 34 *Journal of Sociology* 215–231.

not been an issue of political debate. Instead, the desirability of the goal of online internal market has been *assumed*. Such ‘shortcuts’ (assumptions), which replace political debate with regard to ‘what the internal market is’ and ‘what it needs’, can be ascribed to the reification of political action in the field of the internal market, ie the reification of EU’s internal market rationality.

The concept of ‘reification’ thus embraces those conditions and mechanisms that facilitate the emergence of ‘isles’ of uncontested knowledge (assumptions) in the EU policy and law-making, which substitute political debate on socially and economically salient matters. It is simply ‘obvious’ that the EU, whose main function is to build the internal market, should also create the online internal market. Yet such *depoliticisation of EU goals qua settled knowledge* (assumptions) both restricts the space for democratic determination of what kind of internal market Europeans want and constrains the possibility to control for the possible mistakes (biases) in those assumptions, which may in turn translate unhampered into the EU law.

To unpack the reasons for the reification of the EU political action in recent decades, such as the previously mentioned case of online internal market, we need to understand, first, the relation between governance and knowledge in general, and second the role of the EU institutional structures for the production of knowledge in particular. The cornerstone of my theoretical account is the idiom of ‘co-production’ developed in science and technology studies.² As an analytical tool, the idiom of co-production suggests that the relationship between governance and knowledge is one of dependence, when the two *co-produce* each other in a dynamic and co-evolutionary fashion.³

For example, from the beginnings of EU integration, the EU institutions needed to interpret what they ought to do: ‘what the common market is’ and ‘what the common market needs’.⁴ This demand for the interpretation of the internal market prompted a production of knowledge (reports, impact assessments, policy documents, expert opinions, consultations, euro-barometers, etc.),⁵ which helped identify the ‘problems’ in the internal market (for instance, what is a ‘barrier’ to trade or what constitutes a ‘transaction cost’⁶) and suggests possible ‘solutions’ (‘harmonisation’, ‘learning’, ‘empowerment’ and so on).

The accumulated knowledge regarding the needs of the internal market, however, has not been separate from the objectives that motivated the production of that body of knowledge in the first place. Rather, it has been infused with certain normative proclivity towards the positive articulation of EU objectives: we will find, for instance, little knowledge produced in the EU that does not commend market integration.⁷ The process of co-production of knowledge and governance is in addition circular: just as

² S. Jasanoff, *States of Knowledge: The Co-Production of Science and Social Order* (Routledge, 2004).

³ *ibid.*, 2–4.

⁴ In different words, why, when and how to intervene in the market.

⁵ The production of knowledge as a response to a certain goal may be seen as one side of the ‘co-production’ cycle. The production of new normative objectives, on the basis of accumulated knowledge, is the other side of the ‘co-production’ cycle.

⁶ A.T.F. Lang, ‘Reconstructing Embedded Liberalism: John Gerard Ruggie and Constructivist Approaches to the Study of the International Trade Regime’, (2006) 1 *Journal of International Economic Law* 81–116.

⁷ See also A.L.S. Clair, ‘Global Poverty the Co-Production of Knowledge and Politics’, (2006) 6 *Global Social Policy* 57–77.

the normative objectives infuse knowledge, so does the accumulated knowledge, both cognitively and normatively, shape the creation of new normative objectives.⁸

Without contestation, the processes of co-production of knowledge and governance will result in the reproduction and spread of bias present in either knowledge or the normative objectives that motivate its production. Likewise, where the objectives behind the knowledge production remain unchallenged, their political disposition will over time imprint deeply into the body of knowledge produced on their impulse, which will at the same time become more formalised (ie the emergence of assumptions).

The reification of political action (governance *qua* knowledge) in political communities is made possible provided that two legal-institutional conditions are present:

1. the (de-)politicisation of material goals of a polity (to which I refer here as the process of (post-national) juridification)⁹; and
2. the (de-)politicisation of institutions producing knowledge.

The original functionalist legal-institutional design of the EU, oriented towards the technocratic execution of uncontroversial goals,¹⁰ importantly impacts on the realisation of either of these two conditions. At the same time, this is not to say that the functionalist design alone has been a sufficient condition for the reification of the EU political rationality. Rather, we need to advance a non-essentialist account, which will consider both the role of time and ideas.

Designing the EU as a functionalist entity required the *juridification* of certain substantive political choices. Even if not determinative on its own, such constitutionalisation influences the level of contestation of normative objectives in functionalist entities.¹¹ First, the higher density of juridification constrains the use of language. Thus, the EEC/EU treaties have introduced the core concepts like

⁸ Jasanoff, *States of Knowledge*, 4.

⁹ See also an excellent contribution by T.S. Veitch, 'Juridification, Integration and Depoliticisation', in D. Augenstein (ed), *'Integration through Law' Revisited: The Making of the European Polity* (Ashgate, 2012), at 85–97.

¹⁰ In international relations, 'functionalism' denotes an approach to international cooperation, which seeks to overcome the world's division by means of cooperation in relation to practical goals and problems. In contrast to international power politics, this cooperation should take place within technocratic international institutions. The design of the European Economic Community was guided by some of these functionalist ideas, which emerged in the interwar period (Mitrany) and were politically very influential after the horrors of World War II. The 'function' of the communities was to build a common market within which the economic interdependence of the European states should serve peace on the continent.

Yet, even if the communities/the EU have gradually enlarged the scope of its purpose, it has not freed itself entirely from this functionalist legacy, which remains imprinted in some of the original institutional choices. For instance, the institutional design of the EU 'government' (the European Commission) is premised on the *possibility* of uncontroversial common goals, insofar as these are established through expertise. The same fallacy is also a thread in the EU legal order: it underlines, for instance, the principle of subsidiarity directed at comparative efficiency, which presupposes that it is means rather than goals that are controversial. The same fallacy underlines the institutionalisation of EU competences, as recently discussed by Gareth Davies.

While this paper does not argue that the EU functionalist legal-institutional design *determines* the EU action in any exhaustive way, we need to avoid both the trap of essentialism and the entire disregard of phenomenon when investigating the EU governance today.

¹¹ The more 'positivist' attitude one adopts, the more trust one places in the power of law to constrain political action, the more prone one would be to accept this proposition.

‘common/internal market’ or ‘free movement’, setting a linguistic framework in which the EU political rationality could develop over time.

This linguistic framing becomes particularly important in the light of the system of EU competences, which offer legal basis for the EU action. For instance, throughout the existence of the EU, most its legislation has been enacted pursuant to the internal market legal basis. Yet the reliance on this legal basis, as Davies has recently argued, comes at a price.¹² The clear-cut ‘added value’ of the EU in building the internal market gives an incentive to the EU institutions to translate various social problems into internal market language, bringing them thus into the normative and cognitive domain of the internal market.¹³

Second, and perhaps the most important effect of juridification in functionalist entities, is the existence of a thin set of normative and causal beliefs, which *justify the existence of the functionalist entity itself*. Thus, in the EU, which has emerged as an entity of economic integration, such a thin interpretative layer relates to the constitutive belief in the mutually beneficial character of market integration, free movement and competition.¹⁴ This normative layer is on its own not capable of steering the interpretation of the EU main purpose in any conclusive way. Yet, as I argue further below, it may predispose the EU to be more open to some ideas rather than other ideas.

Despite the aforementioned legal constraints on political action, the EU has over time created a set of democratic institutions, where the EU governance could be politically constructed and contested. It is in this political space that the EU citizens, through EU institutions, should be able to set the ‘conditions’ in which they want free movement, competition or market integration to take place. It is here that they should be capable of deciding that they want a particular kind of internal market: the one with the highest level of labour protection or, to the contrary, with no protection at all. Without constraining this institutional space for the politicisation of EU objectives, the reification of political action in the EU would be less probable.

Yet the functionalist institutional design has been deliberately directed at the depoliticisation of EU goals.¹⁵ The most important institutional choice was to designate a technocratic institution—European Commission—as responsible for both the articulation of EU normative objectives (the ‘guardian’ of EU interest) and as a main producer of knowledge in the EU. The Commission’s institutional technocratic design, premised on the separation of ‘knowledge’ and ‘politics’, depoliticises the setting of EU goals (EU interest). Moreover, it also gives the European Commission an incentive both to marginalise the political and contentious character of knowledge and to frame salient political issues as merely technical ones.¹⁶

¹² G. Davies, ‘Democracy and Legitimacy in the Shadow of Purposive Competence’, (2015) 1 *European Law Journal* 2–22.

¹³ Davies has recently argued that the political fixation of EU goals through the system of competences has a depoliticising effect. Davies suggests that purposive competence deprives the EU political processes from essential choices of direction, divests it from expressive qualities and ultimately endangers the EU social legitimacy. G. Davies, ‘Democracy and Legitimacy’.

¹⁴ See also D. Kukovec, ‘A Critique of the Rhetoric of Common Interest in the EU Legal Discourse’, *SSRN Scholarly Paper* (2012).

¹⁵ J. Steffek, ‘Tales of Function and Form’, *Normative Orders Working Paper*, 2014. Accessible at http://publikationen.uni-frankfurt.de/files/19795/steffek_tales_of_function_and_form.pdf.

¹⁶ G. Brueggemeier *et al.*, ‘Social Justice in European Contract Law: A Manifesto’, (2004) 10 *European Law Journal* 653–674; B. Kohler-Koch, ‘How to Put Matters Right? Assessing the Role of Civil Society in EU Accountability’, (2010) 33 *West European Politics* 1117–1141.

An unexpected, yet equally important institutional consequence of the EU functionalist design is the way in which it impacts on the democratic self-understanding of the EU 'political' institutions. As I discuss in Part IV, these often apprehend their role less as that of directing the development of the polity by constructing and contesting goals and objectives, and more as supervising the effectiveness of proposed laws and policies, or arbitrating between various interests within the framework of a proposal. This functionalist self-understanding, which distinguishes for instance the European Parliament from its Member States' counterparts, permits the reification of EU's political (internal market) rationality.¹⁷

Finally, it was only with the emergence of a relatively comprehensive set of harmonic ideas that we become able to discern the reificatory potential of the (EU's) functionalist legal-institutional design in the context of economic integration.¹⁸ Such intellectual framework of reference has been supplied by (analytically admittedly rather blurred) a body of thought referred to as 'neoliberalism'.¹⁹ Neoliberalism has contributed to the reification of internal market rationality in a threefold manner. First, it has offered a set of ideas harmonious with the basic causal and normative beliefs behind the EU economic integration (the mutually beneficial character of market building); thus, it seemed to further the EU cause. Second, neoliberalism has also made available a convincing language to justify the need for the growth of the EU regulatory powers through market creation and market deepening.²⁰ Finally, this body of thought buttressed the Commission's search for technocratic modes of legitimation.²¹

The stimulus for the incorporation of neoliberal thought into the cognitive structures of the internal market rationality stemmed from several political endorsements of these ideas at a macro-political level. The foundational moment was the White Paper on Completing the Internal Market, and its political follow-up the Single European Act, which represented the internal market as a single, grand technical project. They shored up the need for the technocratic governance of the internal market and strengthened the dominance of the Commission over its interpretation. The Maastricht Treaty, in fleshing out the concept of the Monetary Union, juridified *proper* monetary and fiscal policies. The Lisbon Strategy, a response to the uncontrollable global market, presented the latter as a natural entity and competitiveness as

¹⁷ Even in cases where we see such politicisation—such as the one we have seen with the Services Directive—this may not be sufficient to prevent reification provided that a growing mass of 'assumptions' is still reproduced in the EU political processes. Whether this is the case is an empirical question, which goes beyond the scope of this article. What Part IV shows, however, is that this self-understanding of EU political institutions prepares ground for such reproduction and the impending reification of EU political action.

¹⁸ One has to be reminded at this place of the visionary work of Friedrich Hayek on the dynamics of economic international integration. F. Hayek, 'The Economic Conditions of Interstate Federalism', in F. Hayek (ed), *Individualism and Economic Order* (University of Chicago Press, 1948), ch. 12.

¹⁹ Neoliberalism is a term coined to designate a set of economic, social and political ideas associated with San Montpellerini society, the Chicago school, 'Washington consensus' and the ideas underlying Thatcher's and Reagan's governments in the UK and the US respectively. See, for instance, D. Harvey, *A Brief History of Neoliberalism* (Oxford University Press, 2005).

²⁰ The promotion in the European Commission is often distributed on the basis of 'projects completed' by its various members.

²¹ The Commission has increasingly relied on the *economic analysis* in its policy making, which promises a formal constraint on the exercise of public power. See influential C.R. Sunstein, 'Congress, Constitutional Moments, and the Cost-Benefit State', (1996) 51 *Stanford Law Review* 247–309.

the only response to economic globalisation. The current economic crisis and the accompanying policy of austerity further solidified these naturalistic representations of market forces: ironically, the social achievements of the Lisbon Treaty, such as its commitment to ‘full employment and social protection’,²² nowadays serve as the basis for EU economic regulations, which represent the European Commission’s role as apolitical in the enforcement of fiscal discipline and surveillance.²³

These political endorsements of neoliberal ideas were not only *constitutive* but were also *constituted* by previous political decisions, and importantly by vast knowledge produced by the EU’s executive. For instance, the role of the EU Commission can hardly be overestimated in shaping the contours of Single European Act, the follow-up of the White Paper on Completing the Internal Market.²⁴ Even more importantly, these various macro-political endorsements have been further developed and translated into operative goals and objectives of the EU—as we have already mentioned with regard to the online internal market—in a depoliticised manner and by giving way to those ideas that justify the expansion of EU powers through market creation and technocratic governance.

Lastly, the reason why we may consider this institutional, legal and ideological conundrum to go beyond a simple ‘political choice’ as we see in so many EU Member States today is threefold. First, it is the EU institutional design where a *technocratic* institution is a main guardian of *unequivocal* EU interest. Second, the confluence of juridified normative objectives and the status of the European Commission changes a democratic self-understanding of EU political institutions, which in many instances do not see themselves as competent for deciding politically on the direction of a polity. Finally, the creation of the EU as an entity of international economic integration engenders the receptiveness towards those ideas that are both in harmony with a thin set of normative and causal beliefs justifying the EU integration and at the same time can legitimate the expansion of EU powers.

III Internal Market Rationality and the Transformation of Substantive Law: The Example of European Private Law

In this section I argue that the reification of internal market rationality has an important impact on the content of European law. More specifically, I will show how it has changed the very idea of private law. In the first part, I identify four major transformations: the shift in the normative basis of private law, a transformation of the concept of a person, the regressive patterns of redistribution and finally the transformation of the concept of justice in European private law. While these transformations occur at a ‘meta’ level, restructuring the very ‘rules of the game’, their normative strength has been only partially realised in the concrete rules of European

²² Art 9 TFEU: In defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health.

²³ The Regulation of the European Parliament and the Council 472/2013, on the strengthening of economic and budgetary surveillance of member states in the euro area experiencing or threatened with serious difficulties with respect to their financial stability.

²⁴ See, for instance, N. Jabko, *Playing the Market: A Political Strategy for Uniting Europe, 1985–2005* (Cornell University Press, 2006).

private law due to the various forms of resistance. The second part turns then to various forms of resistance mounted against the transformation of private law, discussing both potential and limits of resistance within the current legal-institutional framework of European private law.

A Transformation of Private Law

a) *The Normative Basis of Private Law: From Justice to Low Prices*

The first transformation of private law that interests us here concerns private law's normative basis, and in particular its output²⁵ or performance legitimacy.²⁶ What substantive choices legitimise private law? Upon which values does it stand? While private and contract law had been associated with the rise of market capitalism,²⁷ from the internal perspective, the legitimacy of private law rested elsewhere.²⁸ Modern civil codes such as the Code Civil, ABGB or BGB speak of liberty, emancipation, equality, autonomy, the 'universal' essence of private law.

From the late 19th century onwards, many contested the legitimacy of private law and the values on which it rested. Private law was criticised as merely paying lip service to both freedom and equality from which it ostensibly took its justification. The state was complicit in those injustices²⁹—lending the state enforcement (legitimate use of force) to the enforcement of private arrangements, often appalling from the perspective of social justice. The claims to neutrality, of 'a science of law', either of state or of private law, became unsustainable. As the 19th century drew to a close, the state, the *public*, took over part of the responsibility for such outcomes.

Legislators have enacted mandatory private law in structurally unequal relations in order to balance the material inequality among private parties. The legislation first developed in the fields of labour law and tenancy law, and after World War II in consumer law.³⁰ A similar development also took place in the courts, but in a more individuated fashion through general clauses.³¹ This process has been called the 'materialisation'³² of private law, a shift from form to substance, or the rise of the 'social' in legal thought.³³ A new impetus for the materialisation of private law

²⁵ F.W. Scharpf, *Governing in Europe: Effective and Democratic?* (Oxford University Press, 1999), *passim*.

²⁶ D. Beetham and C. Lord, *Legitimacy and the European Union* (Longman London, 1998); N. Walker, 'The White Paper in Constitutional Context', in *Symposium: Mountain or Molehill? A Critical Appraisal of the Commission White Paper on Governance* (NYU WP, 2001).

²⁷ M. Weber, *Economy and Society*, new ed. (University of California Press, 1992), 666 ff.

²⁸ J. Gordley, *The Philosophical Origins of Modern Contract Doctrine* (Oxford University Press, 1991), 214.

²⁹ R.L. Hale, 'Coercion and Distribution in a Supposedly Non-Coercive State', (1923) 38 *Political Science Quarterly* 470–494; R.L. Hale, 'Force and the State: A Comparison of Political and Economic Compulsion', (1935) 35 *Columbia Law Review*.

³⁰ C. Schmid, *Die Instrumentalisierung Des Privatrechts Durch Die Europäische Union*, 25ff; also H. Rösler, 'The Transformation of Contractual Justice—A Historical and Comparative Account of the Impact of Consumption', in H. Micklitz (ed), *The Many Concepts of Social Justice in European Private Law* (Edward Elgar, 2011), at 327.

³¹ R. Schmid, *Die Instrumentalisierung Des Privatrechts Durch Die Europäische Union*, 28.

³² M. Weber, *Economy and Society*, 886.

³³ D. Kennedy, 'Three Globalizations of Law and Legal Thought: 1850–2000', in D.M. Trubek (ed), *The New Law and Economic Development: A Critical Appraisal* (CUP, 2006), at 19–73.

came after World War II, with the spread of human rights and the process of ‘constitutionalisation’ of private law, which have accentuated traditional private law values and principles giving them a substantive (thick) rather than formal reading.³⁴

All these processes of ‘democratisation’ of private law have never amounted to contesting the normative basis of private law—the justification of private law as a body of law focused on the individual and the individual justice, and the values of freedom and equality. What has been contested is the realisation of those values within the framework of a particular interpretation of the market.

The EU, however, changes this private law narrative. Even if introduced as a ‘social’ law aimed to bring the EU closer to its citizens, the central justification of European private law has been the internal market.³⁵ This is partially a consequence of the reliance on the internal market legal basis in European contract law,³⁶ in liberalised public utilities where the markets were directly *created*,³⁷ as well as in the field of EU labour law, where the security of workers becomes *inherent* in the proper functioning of the internal market.³⁸

With time, however, the ‘spell’ of the internal market over European private law has strengthened.³⁹ There is an important difference in the ethos underlying the Unfair Terms Directive, written in the 1980s and centred on the substantive control of contracts and weaker parties, as opposed to the Consumer Rights Directive (CRD) of the late 2000s, concerned with procedural rights and empowering consumers to contribute to the internal market.⁴⁰ The traditional private law values of freedom and equality offer ever less reason for action in European private law, while the arguments for the well-functioning of the internal market increasingly dominate the normative programme.⁴¹ Some commentators have lamented this process as the *expulsion* of the concept of ‘protection’ from consumer law.⁴²

³⁴ C. 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* (Wolters Kluwer, 2008), 323.

³⁵ Schmid discusses the transformation of the normative basis of private law as the ‘instrumentalisation’ of private law. See Schmid, *Die Instrumentalisierung Des Privatrechts Durch Die Europäische Union, passim*. For an English summary, see Ch. Schmid, ‘The Instrumentalisation Thesis in a Nutshell’, in Ch. Joerges and T. Ralli (eds), *European Constitutionalism without Private Law—Private Law without Democracy* (RECON Report No. 14).

³⁶ eg European Commission, ‘Impact Assessment Accompanying the Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law’, ((COM(2011) 635 final, Brussels, 11th Oct 2011)), 7.

³⁷ M. Bartl, ‘The Affordability of Energy: How Much Protection for the Vulnerable Consumers?’ (2010) 33 *Journal of Consumer Policy* 225–245.

³⁸ H. Micklitz, *Social Justice and Access Justice in Private Law*.

³⁹ D. Caruso, ‘The “Justice Deficit” Debate in EU Private Law: New Directions’, *BU Law Working Paper 2012*.

⁴⁰ The potency of the ‘substantive control’ for ensuring equality in the markets—as opposed to the procedural rights granted for instance by the Consumer Rights Directive—is considerable. See to this effect H.-W. Micklitz, N. Reich, ‘The Court and Sleeping Beauty: The revival of the Unfair Contract Terms Directive (UCTD)’ (2014) 51 *Common Market Law Review*, Issue 3, 771–808.

⁴¹ D. Caruso, ‘The “Justice Deficit” Debate in EU Private Law’.

⁴² 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), *EUI LAW 2012/03*.

b) From a Subject to a Vehicle: One-Dimensional Consumer

A parallel development has also taken place with regard to the concept of a *person* in the European private law. The enlightenment and the bourgeois revolutions of the 18th and 19th centuries brought the idea of private law built around the idea of a *person* as a free moral agent.

Jeder Mensch hat angeborne, schon durch die Vernunft einleuchtende Rechte, und ist daher als eine Person zu betrachten (ABGB 1811 in Article 16).

He is rational, self-reliant, mature and responsible; he enjoys civil rights and can bind himself within the sphere of his private autonomy. Any interference in the private sphere of the individual by the state is limited and has to be justified, while interference by others is conditioned by his consent. A shift to the period of the ‘social’ onsets the process of de-differentiation⁴³ typical of the classical period. Private law tackles the threats to the foundational values (autonomy and equality) posed by private power and material inequality.

The EU diverges from this line of conceptualising the individual in private law:

The civil law has traditionally addressed human beings as ‘persons’. In such an approach matters of contract law are regarded quite naturally as matters of justice in the fullest possible sense. However, European contract law does not address us as persons who should be treated with justice nor as citizens who have fundamental rights, but, most of the time, as consumers. Moreover, as we saw, in the European Union consumer protection is often regarded as a policy, which is instrumental to the construction of the internal market. The combination of reducing persons to citizens, citizens to consumers, regarding the latter as instrumental to market building and moving towards horizontal and full harmonisation brings us very far away from contract law as a matter of justice.⁴⁴

A first departure of European private law from the ‘modern’ private law lies in a novel objectification of person(s). Private law is no longer directed to persons, but rather persons become vehicles for achieving a greater objective—market integration.⁴⁵ A second departure from the heritage of ‘social’ private law, in particular, lies in a return to the *de-differentiated* understanding of individuals (itself a phenomena linked to the consolidation of the market in the industrialising economies of the 19th century), which seems to take on a renewed importance as a tool for consolidating the internal market.⁴⁶ There is an important standardising tendency in European private law,⁴⁷ linked to the concept of ‘average consumer’,⁴⁸ which deliberately leaves out a material condition of under-average consumers and prompts a re-formalisation of private law. Likewise, the stress on procedural rights, instead of substantive protection, has ultimately the effect of de-differentiation among individuals.

⁴³ 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’, (2008) 18 *European Review of Private Law* 729–756.

⁴⁴ M. Hesselink, ‘European Contract Law: A Matter of Consumer Protection, Citizenship, or Justice?’ *SSRN Scholarly Paper* (SSRN, 2006), 41.

⁴⁵ See also Schmid, *Die Instrumentalisierung Des Privatrechts Durch Die Europäische Union, passim*.

⁴⁶ H.-W. Micklitz and D. Patterson, *From the Nation State to the Market: The Evolution of EU Private Law* (SSRN, 2012).

⁴⁷ H. Rösler, ‘Protection of the Weaker Party in European Contract Law’.

⁴⁸ H. Unberath and A. Johnston, ‘The Double-Headed Approach of the ECJ Concerning Consumer Protection’, (2007) 44 *Common Market Law Review* 1237–1284.

A third departure from a modern private law lies in the *construction* of the ‘internal market useful’ subjectivities,⁴⁹ who shall ‘*make informed choices which reward competition*’ and ‘*drive forward the European economy*’.⁵⁰ While private law and its subjects have been instrumentalised for market building purposes in the EU from the start, the pressure for the construction of subjectivities that are useful for the market, also by means of private law, has gained currency only with a progressing reification of the internal market rationality after the Lisbon Strategy.

A telling example may be found in the Impact Assessment study, which accompanied the proposed Common European Sales Law (CESL). In this Impact Assessment, the European Commission presents several cases of consumers who are prevented from shopping online and thus do not manage to ‘reap’ the benefits of the internal market. For instance, the example is presented of a Finnish lady who disregards the advice of her daughter to purchase shoes cheaper online and still prefers to shop in a high street shop. Such consumer behaviour is, according to the Commission, unsound since the lady loses out—a situation that apparently needs to be remedied by investing public funds into the creation of the CESL.

Yet is the Finnish lady really so irrational in the end? What if the price is not her primary consideration? Perhaps trying the shoes on, making sure that they feel good, getting a walk in the city, talking to acquaintances on the way and onsite at the shop can be rationally prioritised. Or the lady may be even concerned with some broader public/‘citizen’ preferences, which the price does not capture (for instance, environmental concerns).

In the post-2000s European private law, such presentations of the individual purpose multiply in the documents produced by the European Commission, as the internal market (ie its interpretation) seems to exert ever more pressure on the production of ‘correct’ subjectivities also by means of private law. The reifying internal market rationality pushes us all the way from the concept of a person as a self-reliant moral agent, or a weak party in need of protection, to that of a person whose thinking needs to be reshaped by public authority in order to contribute to the internal market.⁵¹

c) *Regressive Redistribution*

The internal market is an open-ended and ongoing project that calls for great efforts in its establishment. To this end, it needs actors who will carry its goals through. One example of such an actor is the one-dimensional consumer mentioned above who behaves in a market-rational (market useful) way if she considers price as the only determinant of shopping behaviour.

A first, deep, redistributory pattern put in place by a body of law comes about through designing laws around a dominant ‘model’ individual or a group (*the standard of evaluation*).⁵² Such model may be anything from a white male, a member

⁴⁹ For an excellent analysis of the constitutive role of law for the construction of subjectivities, see A.T.F. Lang, ‘The Legal Construction of Economic Rationalities?’ (2013) 40 *Journal of Law and Society* 155–171.

⁵⁰ European Commission, ‘Consumer Agenda 2012–2014: Boosting Confidence and Growth by Putting Consumers at the Heart of the Single Market’, 2.

⁵¹ As I discuss in Part III b, this process is resisted perhaps most importantly by the European courts, who rely on an ‘old’ (pre-neoliberal) horizontal consumer directive on Unfair Terms in Consumer Contracts so as to reintroduce the concept of weak consumer and substantive protection in European consumer law.

⁵² C.A. MacKinnon, *Toward a Feminist Theory of the State* (Harvard University Press, 1989).

of a particular social class or a mobile actor, but the bias introduced in the legal system in this way will benefit the ‘model’ group in both an overt and a covert manner.⁵³

Generally, market integration is considered to be more advantageous to both *mobile* actors and *mobile* capital (a well-educated workforce speaking foreign languages, big businesses, middle-aged as opposed to older people and so on.).⁵⁴ The advantage enjoyed by such mobile actors tends to be paid for by those less mobile actors and capital that remain at home.⁵⁵ A well-documented example is the Court of Justice of the EU’s opening up of national public services and social systems (education, health, social security) to the mobile actors—thereby often running the risk that such an opening would lead to undermining a public provision of services in general.⁵⁶

The question that will interest us here is whether there is a particular ‘model’ actor behind the European private law, who she is, and which redistributive pattern this model puts in place.⁵⁷ The Commission indeed does not miss a single opportunity to present to us its image of a market-useful consumer.

Empowered consumer choices will have a positive impact on economic growth (. . .) Consumers who are prepared to change provider of goods and services are a prerequisite for effective competition between market players. Competition keeps businesses under pressure and makes them more effective. Consumers who are active in the market and act consciously foster competition, save money, and receive better goods and services.⁵⁸

Regardless of who this competent consumer making ‘informed choices that reward competition’ and ‘drive a smart, sustainable and inclusive economy’ might be, one thing is certain: s/he is not an uneducated or poor consumer and citizen. As the Commission has noted, EU empowerment measures miss the weakest consumers:

Redress systems are mostly used by those least likely to suffer detriment; the most disadvantaged in society who need to improve their skills or need help are less likely to do so, even if they are aware of their weakness. (. . .) Further econometric analysis of the CEI data shows that poor living conditions and low educational levels are key factors contributing to low empowerment.⁵⁹

The ‘normative leitbild’ of the European Private Law (EPL) is, according to Micklitz, ‘a dynamic, open-minded, flexible, well-informed, self-standing and self-conscious mobile worker or consumer who is seeking the best job opportunities and the best prices on the market of consumer goods and services so as to reap up the benefits of the internal market’.⁶⁰ Yet building the EU legislation in EPL around this

⁵³ *ibid.*

⁵⁴ M. Kumm, ‘Constitutionalising Subsidiarity in Integrated Markets: The Case of Tobacco Regulation in the European Union’, (2006) 12 *European Law Journal* 503–533.

⁵⁵ F.W. Scharpf, ‘The Asymmetry of European Integration, or Why the EU Cannot Be a “Social Market Economy”’, (2010) 8 *Socio-Economic Review* 211–250.

⁵⁶ M. Dougan, ‘Fees, Grants, Loans and Dole Cheques: Who Covers the Costs of Migrant Education within the EU?’ (2005) 42 *Common Market Law Review* 943–986; S. Garben, ‘The Belgian/Austrian Education Saga’, *Harvard European Law Working Paper No. 01/2008*.

⁵⁷ For instance, the private law of the EU MS was modelled around a weak or incompetent consumer, worker or tenant.

⁵⁸ European Commission, ‘Commission Staff Working Document: On Knowledge Enhancing Aspects of Consumer Empowerment, SWD (2012) 235 Final’, 6.

⁵⁹ *ibid.*, 4.

⁶⁰ H. Micklitz, *Social Justice and Access Justice in Private Law*, 17.

'model' may lead to an aberrant consequence of 'regressive' redistribution: the redistribution from poor to rich.⁶¹

On the one hand, creating a regulatory framework around more privileged consumers takes time, space and public money away from actions benefiting other (vulnerable) groups of consumers.⁶² On the other hand, as economic analysis points out, consumer protection measures are reflected in the price of goods. To the extent that consumer legislation raises prices, it serves to benefit more privileged consumers at the expense of those less privileged ones (regressive cross-subsidisation).⁶³

The same pattern of regressive redistribution may be observed at the level of policies where it is widely acknowledged that the EU prioritises *information duties*. For instance, the last Consumer Agenda⁶⁴ consists of 16 pages, while the Commission Staff working document on 'Knowledge enhancing aspects of consumer empowerment' runs to a mere 32 pages. But even in the Consumer Agenda itself, information duties receive several times more space than 'vulnerable consumers' for example. The concern for providing information is unshakable by any counter-arguments. For instance, to the extent that the findings of behavioural economics are considered, they are presented as new challenges and areas for improvement.⁶⁵

Yet the stress on information duties benefits a particular kind of consumer—a consumer who can take on board, process and react to the information received. For less educated, weaker or poorer consumers, those measures are largely ineffective.⁶⁶ Prioritising information duties again disadvantages weak consumers twice—on the one hand, the information duties are prioritised and financed instead of consumer policies that may benefit weaker consumers, while at the same time this leaves them having to pay a higher price for consumer legislation they cannot benefit from.⁶⁷ Despite a considerable criticism from the side of scholars or consumer associations, the CRD is for instance still mainly about information duties. With the reification of the internal market rationality, market concerns (in this case market transparency) has become a central concern, making the Commission deaf to the arguments regarding its effects on consumers—interestingly, disregarding the side of the political spectrum from which they may be said to originate.⁶⁸

There is, however, one concept in the European private law that could be a more systematic instance of a *progressive* redistribution. Thus, some authors believe that the

⁶¹ For a general point on regressive redistributive patterns of EU integration, see D. Kukovec, *Whose Social Europe?* (SSRN, 2011); and D. Caruso, 'The "Justice Deficit" Debate in EU Private Law'.

⁶² H. Micklitz, *Social Justice and Access Justice in Private Law*.

⁶³ O. Bar-Gill and O. Ben-Shahar, 'Regulatory Techniques in Consumer Protection: A Critique of European Consumer Contract Law', (2013) 50 *Common Market Law Review*.

⁶⁴ European Commission, 'A European Consumer Agenda—Boosting Confidence and Growth, COM(2012) 225 Final'.

⁶⁵ European Commission, *On Knowledge Enhancing Aspects of Consumer Empowerment*.

⁶⁶ BEUC, 'EU Consumers' 2020 Vision', accessible at <http://beuc.eu/publications/2012-00316-01-e.pdf> (last visited 6 October 2013). See also G. Howells, 'The Potential and Limits of Consumer Empowerment by Information'. (2005) 3 *Journal of Law and Society* 349–370

⁶⁷ In private law, the reification of the internal market rationality has been marked by a shift away from a more substantive protection in the 1980s and early 1990s, to European private law based on formal, procedural and access rights more recently.

⁶⁸ H. Micklitz, 'The Expulsion of the Concept of Protection from the Consumer Law and the Return of Social Elements in the Civil Law'.

concept of ‘vulnerability’ could indeed present such a ‘game changing’ concept—in particular, if it is linked to the concept of ‘affordability’ as is the case of the former public utilities.⁶⁹

While its systematic elaboration is beyond the scope of this paper, an examination of one crucial sector—energy regulation—reveals that the regulatory mixture of ‘vulnerability’ and ‘affordability’ presents only potential gains so far. The concept of ‘affordability’ in public utilities remains linked to the idea of effective competition. If there is such competition, the price is affordable. The concept itself is tautological. Those consumers that cannot afford reasonably priced energy (market price) may be helped in the framework of ‘vulnerability’ measures.

The third energy package then defines the obligations of Member States (MS) towards vulnerable consumers in the following way. The MS are obliged to:

- **define** the concept of vulnerable consumer
- prohibit the disconnections of vulnerable consumers **in critical times**
- ensure the **transparency of contractual terms**;
- ensure that an **independent dispute settlement** mechanism is put in
- ensure a **single point of contact** for any problems consumers might face.⁷⁰

It is striking that the only *substantive* obligation towards vulnerable consumers is the prohibition of disconnection in critical times. Even in this case, EU regulation does not go beyond the British model—where two elderly persons paid with their lives before the Office of Fair Trading (OFT) licence conditions were changed—which is not in the premises very far.⁷¹ As for the rest, we are again in the (safe) haven of providing formal rights of access, the transparency of contract terms, contact points or dispute settlement mechanisms—measures that are less than ideal (as the Commission itself notes) for addressing the needs of *vulnerable* consumers. To the extent that MS are encouraged to take measures to protect vulnerable consumers, they are instructed to rely on *social protection* systems or energy efficiency improvements, provided they do not harm the openness of the market.⁷²

Measures that are potentially more effective for ensuring the ‘affordability’ of energy supply—such as ‘social tariffs’ or ‘default tariffs’—do not appear as conceivable alternatives in the cognitive framework of the internal market rationality. They rely on a political, as distinct from a market redistribution, which seems to have ceased to be a viable alternative. Yet, as a recent Bulgarian case shows,⁷³ political intervention and redistribution may be at times crucial for the socially just provision of such services.⁷⁴

⁶⁹ H.W. Micklitz, *Universal Services: Nucleus for a Social European Private Law* (European University Institute, 2009).

⁷⁰ M. Bartl, ‘The Affordability of Energy’.

⁷¹ *ibid.*

⁷² Art 3/8 of Dir 72/2009.

⁷³ Tens of thousands of Bulgarian citizens have protested against the raise of market energy prices, which sometimes became higher than the monthly income of Bulgarian pensioners. See, for instance, <http://www.reuters.com/article/2013/02/17/us-bulgaria-protests-electricity-idUSBRE91G0C520130217> (last visited 4 October 2013).

⁷⁴ A controversy regarding the appropriate way to regulate energy prices has not escaped the attention of the old Member States either. See <http://www.theguardian.com/business/2013/sep/25/shares-energy-firms-miliband-energy-price-freeze> (last visited 4 October 2013).

Thanks to the gradual reification of internal market rationality (the accumulation of knowledge exalting the benefits of competition, while discounting the alternatives), we may give up the tools to ensure a socially just provision of these public services. This is particularly worrisome for the crisis-hit MS, which are often required to liberalise markets and privatise public utilities as part of their economic recovery programmes, yet with few guarantees that privatisations will be balanced by a framework for a socially just provision of these existential services.

In sum, the reification of internal market rationality increases the threat of regressive redistribution in European private law. We observe this trend at the systemic level, with the augmented reference to the ‘model’ actor on which the recent initiatives in European private law rely. We note this tendency at the level of policies, which are increasingly focused on achieving market integration objectives. The reification of internal market rationality is finally then particularly hazardous if it blocks the channels of political redistributive action in those fields where the provision of services is an essential requirement for social inclusion.

d) Justice as Access to the Markets

The conception of justice in private law has changed considerably over the past centuries. The classical contract law was founded on the idea of commutative or corrective justice, justice between parties. This type of justice is said to focus on the relationship between the parties to a contract, disregarding the social context in which the relationship is embedded.⁷⁵ A second transformation comes with the so-called social private law, which broadens the spectacles of justice so as to consider contractual relationships in its broader socioeconomic context (social justice). For this reason, social private law has been blamed for the *instrumentalisation* of private law for wider social purposes: the correction of market inequalities or the ‘materialisation’ (de-formalisation) of private law, which takes into account particular material circumstances of contract parties.⁷⁶

The transformation of private law by the EU transcends the previous two stages in a twofold manner—it *instrumentalises* private law for a particular formal goal: the building of a market. This is different from the period of the ‘classical’ private law, whose formality is linked to the formal understanding of equality and corrective justice. It is also a departure from the period of the ‘social’ private law, which instrumentalises private law for material goals, de-formalising and re-embedding the market.

At the same time, justice in European private law abandons the ‘materialisation’ understood as taking into account a particular context of a contractual relationship. Instead, it re-formalises private law by creating new average groups and by stressing procedural rights rather than substantive protection. In different words, *European* private law aims to deliver justice to everyone by ensuring competition, jobs, low prices and greater choice.

The concept of justice in European private law encompasses, however, a different concern—namely the issue of market *access*.⁷⁷ Access justice is a concept of justice,

⁷⁵ For a contemporary example, see E.J. Weinrib, *Corrective Justice* (Oxford University Press, 2012).

⁷⁶ M. Weber, *Economy and Society*.

⁷⁷ H.W. Micklitz, ‘Social Justice and Access Justice in Private Law’, *EUI Working Paper 2011*; A. Somek, ‘From Workers to Migrants, from Distributive Justice to Inclusion: Exploring the Changing Social Democratic Imagination’, (2012) 18 *European Law Journal* 711–726.

which merges the liberal concern with the equality of opportunity with the concern for well-functioning markets. While rhetorically ‘not leaving anyone behind’, it contributes to the internal market, which needs many participants to keep it going. Ideally, all consumers should be ‘confident consumers’ reaping internal market benefits, part of the mobile workforce moving flexibly where market needs are, or learning skills that the market requires.⁷⁸

What makes the concern with access complementary to the concern for the market is that the access justice is essentially a procedural device that endorses a ‘hands off’ approach from the market itself. As Somek observes, ‘what matters is that nobody is barred from availing oneself of an opportunity while it is taken for granted that the existence of the opportunity itself does not raise any questions of justice’.⁷⁹

In the European private law, the concern with *access* is to be found explicitly in the former public utility sectors, such as telecom, gas, electricity, postal services and public transport.⁸⁰ A second source of the access justice in EPL is a horizontal dimension of the principle of non-discrimination—present across the sale of goods, provision of services or labour market.⁸¹ Finally, access justice offers the justification for the transformation of individuals so as to become useful internal market participants (discussed in Part III.A.b.), since it is their ‘market competence’ that ensures they have access to the market and thus to the only kind of private justice on offer.

With the progressing reification of internal market rationality, we have seen a mounting stress on the market as a main allocatory (distributive) mechanism.⁸² This is noticeable in former public services, where the regulator is increasingly distrustful towards political redistribution, or in the building of the *online* internal market, which has been a main goal in recent European private law initiatives. Access to markets then becomes a main ‘social’ device in the framework of internal market rationality. The question remains, however, whether this kind of justice does not remain somewhat too thin.

B Resistance to the Transformation of Private Law

Changing the rules of the game in (European) private law has not remained, at least implicitly, without a challenge. Perhaps the most important counter-movement has come from courts, both national and European. On the one hand, the courts have relied on an older horizontal directive on unfair terms,⁸³ which offers substantive protection (as opposed to procedural rights) to European consumers so as to counter some of the formalising transformative pressures.⁸⁴ On the other hand, the national

⁷⁸ M. Keune and M. Jepsen, *Not Balanced and Hardly New: The European Commission's Quest for Flexicurity* (ETUI-REHS, 2007). Available at <http://library.fes.de/pdf-files/gurn/00281.pdf> (last visited 6 October 2013).

⁷⁹ A. Somek, ‘From Workers to Migrants, from Distributive Justice to Inclusion’.

⁸⁰ P. Rott, ‘A New Social Contract Law for Public Services?—Consequences from Regulation of Services of General Economic Interest in the EC’, (2005) 1 *European Review of Contract Law* 323–345.

⁸¹ H.W. Micklitz, ‘Social Justice and Access Justice in Private Law’.

⁸² See also G. Comparato and H. Micklitz, ‘Regulated Autonomy between Market Freedoms and Fundamental Rights in the Case Law of the CJEU’, in F. Schulyok, U. Bernitz and X. Groussot (eds), *General Principles of EU Law and European Private Law* (Kluwer Law International, 2013), at 121–153.

⁸³ Unfair Terms Directive 93/13/EEC.

⁸⁴ For an overview of the recent case-law of the Court of Justice of the EU, including further development of the concept of *weak* consumer by the Court, see H.-W. Micklitz and B. Kas, ‘Overview of Cases

courts as the main enforcers of EU law have often remained normatively grounded in their national private laws rationalities, which has had a significant impact on the way they interpret European private law.⁸⁵

Second, and somewhat more surprisingly, the resistance has found its way directly to the drafting of European private law. National private law scholars, who were asked by the European Commission to draft the CESL, have inevitably remained anchored in their national private law paradigms, importing a different concept of a person or a different concept of justice into this European instrument. Finally, a significant resistance to some of the Commission's efforts has come also from the European Parliament, which has paid significant attention to the interests of consumers vis-à-vis European businesses,⁸⁶ while the most articulated dissent to some of these transformations has come from legal scholarship.⁸⁷

While this resistance has been of crucial importance for weakening the transformative pressures and slowing down the makeover of private law, it has remained unavoidably piecemeal, unorganised and hardly sufficient to respond adequately to the new 'rules of the game' introduced at the meta level. Moreover, as I discuss in Part IV, both the EU political institutions and many 'stakeholders', who struggle for their interests, value or argue about the redistributive impacts of Commission's proposals, at the same time sanction the meta transformation of European private law on which these proposals draw. They thus directly contribute (even if unintentionally) to the reification of political action in European private law. Of course, these actors are only partially to be blamed. The reification of political action may be ascribed in part also to the functionalist legal and institutional structures, in which the European private law debate takes place.

IV The Mechanisms of Reification of Internal Market Rationality

Thus far, we have discussed the processes of reification of political action in the EU, emerging in the interplay between the EU functionalist legal-institutional design and the current ideological constellation. In Part II, we have discussed the processes of reification of internal market rationality at the theoretical and macro-institutional level, while in Part III we have analysed the impact of reification of EU political action on a substantive field of law.

We turn now to examine one unintentional consequence of functionalist institutional design, which has hampered the democratisation of the EU qua political

before the CJEU on European Consumer Contract Law (2008–2013)–Part I', (2014) 10 *European Review of Contract Law* 1–63; H.-W. Micklitz and B. Kas, 'Overview of Cases before the CJEU on European Consumer Contract Law (2008–2013)–Part II', (2014) 10 *European Review of Contract Law* 189–257.

⁸⁵ R. Manko, 'Weeds in the Gardens of Justice? The Survival of Hyperpositivism in Polish Legal Culture as a Symptom/Sinthome', (2013) 7 *Pólemos—Journal of Law, Literature and Culture* 207–233.

⁸⁶ The lowering of consumer protection has been one of the major reasons for the refusal of the 2008 Commission's proposal of Consumer Rights Directive.

⁸⁷ To mention just the few Ch. U. Schmid, *Die Instrumentalisierung Des Privatrechts Durch Die Europäische Union: Privatrecht Und Privatrechtskonzeptionen in Der Entwicklung Der Europäischen Integrationsverfassung* (Baden-Baden, 2010); H.W. Micklitz, *Social Justice and Access Justice in Private Law* (EUI WP Law, 2011/02); G. Brueggemeier *et al.*, 'Social Justice in European Contract Law'; H. Collins, *The European Civil Code: The Way Forward* (Cambridge University Press, 2008); D. Caruso, "'The Justice Deficit' Debate in EU Private Law'; M. Hesselink, 'European Contract Law: A Matter of Consumer Protection, Citizenship, or Justice?' *SSRN Scholarly Paper* (SSRN, 2006).

institutions. In particular, we will discuss how a functionalist design of the EU impacts the self-understanding of EU political institutions and processes.

To do so, we will scrutinise how the ‘medium range’ goals⁸⁸ are set in the EU, and European private law in particular. This question will allow us to understand how a general political impulse, such as that presented by Lisbon strategies, translates into political action in the EU. At the same time, this will allow us to examine the role played by the EU institutions and comprehend the mechanisms and consequences of replacing the political debate by formalised cognitive structures (assumptions). In other words, we will look at the processes of reification of internal market rationality ‘in action’.

A The Role of the European Commission: Why We Need the Politicisation of Goals in the EU

Until the beginning of the 2000s, private law in the EU was a system based on two different rationalities, revolving around different objectives and different values. On the one hand, most Member States endorsed ‘protectionist’ private law,⁸⁹ modelled around weak and incompetent parties and a concern for social justice. On the other hand, European private law was organised mainly around market-useful actors and market-building purposes. The coexistence of these two rationalities was made possible by ‘minimum harmonisation’, in which the Member States had to respect minimum EU standards but could also go above those standards and pursue different normative concerns.⁹⁰

Even if the Member States’ ‘protectionist’ rationality has been dented continually by the Court of Justice of the EU (hereafter CJEU) and its concept of ‘average consumer’,⁹¹ a frontal attack occurred only at the time of the ‘minimax’ debate, shortly after the 2000 Lisbon Strategy. The commitment to become the world’s most competitive knowledge economy made the Commission impatient with the different rationalities of Member States. Legal diversity in private law was therefore framed as a problematic ‘fragmentation’, which harms the internal market, and the solution is full harmonisation, or a full transfer of powers over a large body of private law to the EU.⁹²

In the recent year, the Commission’s goal has become more specific. In particular, the main justification for the harmonisation efforts—most notably for the CRD and even more strongly the CESL—was the need to create the ‘online internal market’.

⁸⁸ The concept of medium range goals will refer to those goals that may be perceived as *internal* to the main EU objectives (eg the internal market), yet they present their major interpretations. More generally, this paper abandons an essentialising understanding of EU objectives. The ‘internal market’ on its own mandates little. What we need to uncover are the mechanisms in which such ‘needs’ of the internal market are established.

⁸⁹ Even though the Court of Justice has significantly curtailed the capacity of the Member States to protect below-average consumers. See H. Unberath and A. Johnston, ‘The Double-Headed Approach of the ECJ Concerning Consumer Protection’.

⁹⁰ H. Schulte-Nolke, Ch. Twigg-Flesner and M. Ebers, eds, *EC Consumer Law Compendium—Comparative Analysis* (University of Bielefeld, 2008).

⁹¹ H. Unberath and A. Johnston, ‘The Double-Headed Approach of the ECJ Concerning Consumer Protection’.

⁹² H.W. Micklitz (2009) in G. Howells and R. Schulze (eds), *Modernising and Harmonising Consumer Contract Law*, Muhich, Sellier European Law, 47–86.

The importance of online internal market has grown over time, becoming even an instrument that should boost economic growth and help the EU out of the economic crisis.

Consumer expenditure accounts for 56% of EU GDP and is essential to meeting the Europe 2020 objective of smart, inclusive and sustainable growth. Stimulating this demand can play a major role in bringing the EU out of the crisis. To make this possible, the potential of the Single Market must be realised. Data show that **consumers shopping online across the EU have up to 16 times more products from which to choose, but 60% of consumers do not yet use this retail channel.** As a result of this reluctance, they do not fully benefit from the variety of choice and price differences available in the Single Market. **Improving consumer confidence in cross-border shopping online by taking appropriate policy action could provide a major boost to economic growth in Europe.** Empowered and confident consumers can drive forward the European economy.⁹³

If measured by the significance and the role that the online internal market plays for the justification of harmonisation efforts in this field of law, but also in broader terms of addressing the economic growth in the times of crisis, we would expect a correspondingly robust political debate about the merits of the all-important goal. Thus, how was this goal set? Who participated in this goal-setting process and how? How does the 'online internal market' relate to economic growth or the macro-political endorsements of competitiveness?

The Commission's rationale for the online internal market can be characterised as perfunctory. Since we need economic growth, we need to boost the internal market, and thus also the internal online market. The positive correlation, for instance, between the *economic growth* and the *online internal market* is assumed. Yet, even on these terms, is there really nothing to be questioned, and is the online internal market truly such a 'win-win' option for 'smart, inclusive and sustainable growth'?

While the Impact Assessment accompanying the CESL concentrates on the savings for businesses that come from *harmonisation* of the relevant body of law undertaken to realise the online internal market, it presupposes the benefits of the goal itself. The Impact Assessment devotes two paragraphs to the social and environmental impacts of harmonisation. With regard to the social impact of the measure, the Commission claims that the harmonisation through the Optional Instrument may create between 650,000 and 1,300,000 new jobs, while it concedes that increased delivery will incur some environmental costs.⁹⁴

One may wonder whether those conclusions—even from the perspective of economics—do not warrant some debate. Is it not possible that online shopping is in fact less labour-intensive than its high street alternative? How many jobs will be created and how many lost through the public support of the online internal market? Investing public funds into retail 'economies of scale' (such as Amazon), which rely extensively on technologies and less on people, may in fact undermine the EU economic objectives of recovering economic growth, employment and strong demand.

The second question concerns the existence of 'non-economic' normative concerns, which may be affected by the online internal market. The Commission devotes one paragraph to the negative environmental impact of online shopping. The Commission only admits to increased transport as a possible cost of harmonisation (and implicitly

⁹³ European Commission, A European Consumer Agenda—Boosting Confidence and Growth, COM(2012) 225 Final, 2.

⁹⁴ European Commission, The Impact Assessment on the Common European Sales Law, SEC(2011) 1165 final, 47.

the online internal market), but this cost is easily dismissed without engaging in any argumentation. The Commission does not mention other, rather obvious, environmental costs. Anyone who orders a product online cannot fail to see that online shopping comes with double or triple packaging, an immediate environmental cost of this type of consumption. Packaging is linked to the problem of overproduction of waste on the one hand, and the overuse of natural resources on the other (wood, fuel and water). Yet the environment seems to have little weight when it is in competition with the online internal market, which in the eyes of the Commission is the incarnation of economic growth—without a need to establish this link.

Yet the environment is not the only normative concern that will be impacted by investing public funds into the online internal market. What will be, for instance, the impact of online internal market on urban life—something that fundamentally influences the quality of our life and our free time? What will the impact be on our actual possibility to go to the centre of any city and visit a bookshop, sports shop, etc.? Shall we invest further public funds to speed up the ‘emptying’ of the cities?⁹⁵

Online shopping normally presupposes armchair shopping. Is this desirable from the public health perspective? What about the effects of Online internal market (OIM) on physical and mental health, obesity, lack of movement, or the social isolation of individuals?⁹⁶ The isolation of individuals is indeed worrisome also from democratic perspective—it impedes the interactions, which are fundamental for the public sphere, and perhaps also the European public sphere.

These normative concerns are not recognised by the Commission when thinking about the goals of European private law, even if they are impacted by the impending harmonisation. If the internal market integration and liberalisation are always positive, since they are indiscriminate about economic growth (itself endorsed at the macro-political level), then other normative concerns cease to exert much normative guidance in the regulation of the internal market.

B Consultation Procedure

While the reificatory pressure from the side of the European Commission may be strong, it cannot be carried further if there are other political instances where the Commission’s assumptions are questioned. One of such institutional spaces for questioning the desirability of the online internal market could be the consultation procedure. The Treaty of Lisbon (and Constitutional Treaty beforehand) places a great hope in participatory democracy as a means to democratise the functioning of the European Commission (Article 11 TEU).

Both CESL and the CRD were built on several years of discussion with the stakeholders. For each of the measures, we have seen large-scale public consultations in Green Papers (2007 and 2010), complemented by separately organised workshops, conferences, meetings and so on. On the one hand, the consultations were supposed

⁹⁵ Granting public support to online shopping may undermine the influential ‘new urbanism’ principles. See <http://www.cnu.org/>.

⁹⁶ An ongoing heated debate concerns the impact of new technologies at the level of social isolation of individuals. Compare, for instance, the Stanford-based authors I. Stepanikova, N.H. Nie and X. He, ‘Time on the Internet at Home, Loneliness, and Life Satisfaction: Evidence from Panel Time-Diary Data’, (2010) 26 *Computers in Human Behavior*, with Pew’s Institute study by K.N. Hampton, L. F. Sessions, E. Her and L. Rainie, *How the Internet and Mobile Phones Impact Americans’ Social Networks* (Pew Institute, 2009).

to lead to a measure of high-quality drafting, and on the other a high level of participatory legitimacy, by opening the EU and its cognitive framework to voices from the outside—for both epistemic and normative reasons.⁹⁷

A closer degree of scrutiny reveals, however, that the Commission has framed the consultation procedures in European private law in a way that prevents a democratically relevant discussion about goals from taking place. First of all, the consultations do not open the debate regarding the objectives of harmonisation. Those goals were posited in the consultation documents, and the Commission asked essentially for more information with regard to their successful implementation.⁹⁸ Second, the consultations were framed in a *narrow* way,⁹⁹ both with regard to the constituency that the consultations aim to address (direct interests) as well as the breadth of issues being asked (they are too field-specific).¹⁰⁰ Official consultation procedures have certainly not designated to play a role in discussing the broader implications of EU action or setting the goals of the European private law.¹⁰¹

C The Role of the European Parliament

The follow-up question is whether political institutions, such as the European Parliament, have provided the space for the democratic politicisation of the online internal market. In particular, the European Parliament has successfully opposed the first version of the CRD, finally adopting a considerably narrower version directed mainly at online purchases.

If we examine, however, the debate regarding the CRD, it seems to have revolved around minimum and full harmonisation and the level of protection and the scope of this directive. In this debate, the goal of online internal market has been, at best, a proxy for ‘European added value’,¹⁰² while parliamentarians have not questioned the assumptions that buttress this goal.¹⁰³ Furthermore, EU citizens were reduced to consumers and businesses in this debate, even by the political ‘left’,¹⁰⁴ while other

⁹⁷ The ‘Better Regulation’ agenda considers consultation to be important for both epistemic and democratic reasons. See, eg, European Commission’s ‘European Governance: Better Lawmaking, COM (2002) 275’, or ‘Smart Regulation in the European Union, COM(2010)543’.

⁹⁸ European Commission, ‘Green Paper on the Review of the Consumer Acquis, COM (2006) 744 Final’, or ‘Green Paper of the Commission on Policy Options for Progress towards a European Contract Law for Consumers and Businesses COM (2010) 348 Final’.

⁹⁹ Bartl, ‘Legitimacy and European Private Law’, *EUI Thesis* (SSRN, 2012). Accessible at <http://cadmus.eui.eu/handle/1814/22455>.

¹⁰⁰ Such as ‘how to review and improve the existing EC legislation in the area of contract law?’ (COM(2001)0398), or ‘what to do with the Expert Group instrument?’ (COM(2010)543) The questions presuppose an ‘internal perspective’ on European private law, and do not encourage public debate beyond bargaining among the ‘direct interests’ (businesses and consumers in the case at hand).

¹⁰¹ It has been alleged that the industry has a constitutive role in shaping the Commission’s (and thus the EU’s) goals and policy objectives. Evidence has been presented in numerous forms, when one of the most effective has been a documentary ‘Brussels Business’, accessible at ARTE TV, at <http://brusselsbusiness.arte.tv/fr/film>.

¹⁰² The Plenary Debate in the European Parliament on the Consumer Rights. Accessible at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20110323+ITEM-020+DOC+XML+V0//EN&language=EN> (speech Raffaele Baldassarre, on behalf of the PPE Group).

¹⁰³ *ibid.*

¹⁰⁴ *ibid* (speech Emilie Turunen, on behalf of the Verts/ALE Group).

categories, such as employees or publicly minded citizens (concerned with environmental, social or ethical consequences of the online internal market), have not been considered at all. In this constellation, *Les Verts* are more concerned about the length of the withdrawal period, while not noticing the possible environmental consequences of the online internal market. The single issue that transgressed the narrow framework set by the Commission was the question of the inclusion of social, health and gambling services within the scope of the directive.¹⁰⁵

The debate surrounding the CESL offers even less grounds for confidence. The proposal has been discussed first by two parliamentary committees, and both recommended its adoption (with amendments).¹⁰⁶ The Legal Affairs Committee, which was responsible for the proposal, has organised several workshops in order to discuss various substantive elements of the proposal. It has engaged with numerous European private law scholars, the representatives of businesses and consumers, as well as the representatives of the European Commission.¹⁰⁷ Whereas the Committee replicates the Commission's 'direct interests' consultation and the disciplinary narrowness of consulted scholars (private lawyers), its final report entirely ignores the broader impacts of the goal pursued (environmental, social or economic) or the constituencies beyond consumers and (small) businesses.¹⁰⁸

The Internal Market and Consumers Committee has been more sceptical of the proposal, approving by a relatively tight vote.¹⁰⁹ The two main objections of the Committee were, first, the 'optionality' of the CESL, which is not suitable for consumer affairs, and second the quality of the Commission's Impact Assessment.¹¹⁰ The Committee has criticised the methodology for the calculation of transaction costs, 'which seriously detract from the meaningfulness of the impact assessment and call into question its value'.¹¹¹ Yet, while the critique of impact assessment could have offered space for the politicisation of the assumptions behind the proposal and the goal that moves it, this has not been the case. The Committee's substantive critique has remained restricted to the optionality of the instrument, and it has sidelined any debate regarding the broader social or economic consequences of the goal that underpins this proposal.¹¹²

In February 2014, the Parliament finally accepted the amended proposal for the CESL, as drafted by the Committee on Legal Affairs. The general debate has brought forward few new arguments with regard to the goals of European private law: the discussion remains limited to whether the proposal is able to achieve the online

¹⁰⁵ See *ibid* (speech Kyriacos Triantaphyllides (on behalf of the GUE/NGL Group)).

¹⁰⁶ European Parliament Legal Affairs Committee, Minutes JURI_PV(2013)0916; European Parliament Internal Market and Consumers Committee, Minutes IMCO_PV(2013)07-08-1.

¹⁰⁷ European Parliament, Committee on Legal Affairs, Minutes: JURI_PV(2012)03-01-1, JURI_PV(2012)05-30-1 or JURI_PV(2012)07-09-1.

¹⁰⁸ European Parliament, Committee on Legal Affairs, Report on the proposal for a regulation of the European Parliament and of the Council on a Common European Sales Law (COM(2011)0635—C7-0329/2011-2011/0284(COD)).

¹⁰⁹ The decision was taken by 22 votes in favour, 17 votes against and 1 abstention. See the Internal Market and Consumers Committee, Minutes, IMCO_PV(2013)07-08-1.

¹¹⁰ European Parliament, Internal Market and Consumers Committee, Opinion on the proposal for a regulation of the European Parliament and of the Council on a Common European Sales Law (Brussels, 11 July 2013) IMCO_AD(2013)505986.

¹¹¹ *ibid*, 2.

¹¹² *ibid*.

internal market, and how advantageous (or not) it is for consumers.¹¹³ Until the very end, the Parliament has mechanically accepted the framing of the issue: the lack of online internal market was regarded as an obstacle to the completion of the internal market. In both cases, thus, the Parliament has mechanically accepted the framing of the issue: the lack of online internal market is regarded as an impediment to internal market, which is an impediment to economic growth. The debate in the Parliament has remained limited to the question whether the Commission has devised *proper means* to achieve what it has set out to achieve, and whether the correct balance between consumers, businesses and Small and Medium Size Enterprises (SMEs) is struck by the proposed measure. The online internal market itself is perceived as a natural continuation of the internal market or, to reiterate Economic and Social Committee, as the *consolidation* of the internal market.¹¹⁴

Is this all we can expect from the post-national democracy?¹¹⁵

Why do Members of European Parliament (MEPs) not enquire into the environmental or social costs of the goal, or even the measure? Is it so clear that environmental costs revolve only around transportation, and that jobs will only be created and not destroyed? While the Internal Market and Consumers' Committee has objected to the quality of the Impact Assessment, it has done so without politicising it. Even if the Committee has pointed out the insufficiency of Commission's methodology, it did not problematise the political undercurrents that inform the Commission's methodological choice.

The functionalist legal-institutional design changes the self-understanding of the European Parliament, bringing its operation closer to the executive rather than genuinely legislative tasks. If the Parliament finds its role somewhere, it is to protect the citizens (weaker parties) in the implementation of goals, in which neither the Parliament nor the EU citizens have much say. The Parliament so readily consents to the assumptions that support the goal of online internal market: acknowledging that there is only one route for political action, accepting the Commission's simplistic vision of the world where internal market integration and economic growth (if this is in the end the ultimate goal) neatly correspond to each other, accepting the concept of person, justice and regressive redistributive pattern at a meta level, while focusing all its attention to small gains and losses of the European consumers. By failing to problematise these assumptions, the European Parliament contributes to the reification of political action in European private law.

D *The Role of the Council of EU*

The Council has discussed the CRD on several occasions. It has focused on the question of full harmonisation and the balancing of interests between traders and consumers in the online internal market.¹¹⁶ The online internal market, which is for

¹¹³ The Parliamentary debate is accessible at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20140226+ITEM-004+DOC+XML+V0//EN&language=EN> (last visited 24 June 2014).

¹¹⁴ European Economic and Social Committee, Opinion on the Common European Sales Law, CESE 800/2012—INT/600.

¹¹⁵ For the analysis of the democratic consequences of the reification of internal market rationality, see M. Bartl, 'The Way We Do Europe', (2015) 21 *European Law Journal* 23–43.

¹¹⁶ Council of the European Union, 2982nd Council Meeting, Brussels, 3–4 December 2009, Press release, 9. Accessible at http://europa.eu/rapid/press-release_PRES-09-365_en.htm?locale=en.

the European Commission a tool to boost economic growth, was understood by the Council as an unavoidable consequence of technological progress.¹¹⁷ Yet, puzzlingly, this inescapable end point of the historical trajectory still deserved to be legislatively assisted by nothing less than the full harmonisation of contract law.¹¹⁸

In case of the CESL, the Council was ‘invited’ to consider the legal basis, the capacity of the proposed CESL to achieve the internal market objectives and the scope of the measure.¹¹⁹ In the policy debate, the Council has failed to investigate broader implications of the online internal market—how it impacts on other EU goals, interests and concerns, or the constituencies beyond consumers (such as employees, or citizens with their environmental, social and ethical concerns).

What is more, it seems that the online internal market is not intended to be the order of the day also in the future discussion: the Council has turned to discuss the content of the proposal. But even if the more contentious question of legal basis would not be left aside,¹²⁰ the only question that it legally mandates is to ask whether the online internal market and its expression of the CESL are internal market issues,¹²¹ which they ‘apparently’ are. The anticipated debate on the legal basis of the CESL will, at best, test the effectiveness of the proposal to achieve the (online) internal market.

The debate in the Council, therefore, remains anchored in the functionalist division of labour. The guardian of the EU interest (the European Commission) illuminates what the EU interests are, while the Council focuses on the effectiveness of particular proposals to give effect to EU goals, which however were previously articulated by the European Commission itself. Similar to the European Parliament, the Council thus contributes to the reification of political action, and the elimination of political alternatives, in European private law-making.

V Conclusion

The lack of politicisation of EU goals may have far-reaching consequences for the democratic mobilisation in the EU. If the reification of political action forecloses the emergence of political controversy vis-à-vis much of the internal market ‘day-to-day’ business, it may prepare grounds for the antagonistic¹²² politicisation of the EU at more extreme ends of the political spectrum.¹²³ Such tendency could have been

¹¹⁷ *ibid.*, 9.

¹¹⁸ Council’s ‘general approach’ to consumer rights counts with full harmonisation of online transactions. Council of the European Union, 3063rd Council Meeting, Brussels 24 January 2011.

¹¹⁹ Council of the European Union, 3172nd Council Meeting, Brussels, 7–8 June 2012, Press release, 20. Accessible at http://europa.eu/rapid/press-release_PRES-12-241_en.htm?locale=en.

¹²⁰ *ibid.*

¹²¹ The EU Court of Justice has pronounced on this issue in a famous tobacco advertising line of cases. For the critique of the idea of purposive competences in the EU legal order, see G. Davies, ‘Democracy and Legitimacy in the Shadow of Purposive Competence’.

¹²² While in agonistic politics the participants recognise that their opponents generally hold legitimate views, the antagonism seeks instead the destruction of the other. Typical for various discriminatory political strategies, antagonism relies on judging their opponents in moral (good—evil) rather than political terms. See Ch. Mouffe, *The Democratic Paradox* (Verso, 2000), 102.

¹²³ In a recent article, Christoffer Green-Pedersen argues that the EU, extensively politicised by extreme parties, remains uninteresting for the majority of the mainstream political parties in the EU. Yet it is only those mainstream parties that are able to spur a meaningful politicisation and secure the mobilisation of larger numbers of EU citizens around the European issues. He sees the reason for this level of

identified already in a rather narrow politicisation of the EU in recent years, focusing foremost on the issues of immigration (free movement of persons): be it a ‘Polish plumber’ at the background of the Constitutional Treaty and the Services Directive, or a ‘social services abuser’ condemned at the end of the transitory period for Romanian and Bulgarian citizens.¹²⁴

This paper has elaborated on the legal, institutional and ideological preconditions, which enabled the depoliticisation of internal market through the reification of EU’s internal market rationality. At the same time, by exposing some of those mechanisms that stifle political action in the EU, the article has suggested the path for an institutional change. I have argued, first, that the processes of post-national juridification constrain the language in which policy debate in the EU is conducted. This constraint is further reinforced by the system of functional competences, which grant the EU the right to act.¹²⁵

Second, the possibility for reification of political action stands and falls on the existence of an institutional framework where normative objectives and the knowledge that underpins them can be problematised. This is where the EU functional institutional design has done the most harm. I have discussed two such institutional arrangements. On the one hand, assigning the agenda-setting role and the ‘guardianship’ of the EU interest to a technocratic institution has depoliticised the production of knowledge in the EU. The European Commission has often framed salient political issues as technical, marginalising thus the political dimension of knowledge, while the need for technocratic legitimation has fuelled Commission’s enthusiasm for economic (cost-benefit) analysis. On the other hand, the subsequent reforms of the European governance (eg the empowerment of the European Parliament) have failed to bring sufficient democratisation qua politicisation in the EU. The functionalist institutional design frames the self-understanding of the EU political institutions very differently from their counterparts in the EU Member States. As the case of online internal market shows, the EU political institutions often see themselves as called upon to discuss the *means* (how effective a certain piece of legislation is, or eventually the distribution of gains and losses within a given legislative framework), while they remain deferential as regards the interpretation of EU goals themselves.¹²⁶

Third, while establishing the Communities as an entity of functional economic integration may have impelled a certain proclivity towards those ideas that were harmonic with the rationale of the EU integration, this predisposition could have come to fruition only in favourable ideological circumstances. Such an opportunity arose with a growing prominence of neoliberal ideas. This body of thought has offered a relatively coherent set of ideas harmonic with a thin set of causal and

disinterest as being the lack of a left-right distinction in EU decision making and the way in which the EU issues are framed—both at the European and national level. Christoffer Green-Pedersen, ‘A Giant Fast Asleep? Party Incentives and the Politicisation of European Integration’, (2012) 60 *Political Studies* 115–130.

¹²⁴ *ibid.*

¹²⁵ G. Davies, ‘Democracy and Legitimacy in the Shadow of Purposive Competence’.

¹²⁶ This is also to say that those actors (and ideas) that succeed to capture the Commission ‘intellectually’ have a considerable power over the EU law-making. See, for instance, ‘Brussels Business’, accessible at ARTE TV, at <http://brusselsbusiness.arte.tv/fr/film>. Also M. Green Cowles, J.A. Caporaso and Th. Risse-Kappen, *Transforming Europe: Europeanization and Domestic Change* (Cornell University Press, 2001), 163; or A. Baker, ‘Restraining Regulatory Capture? Anglo-America, Crisis Politics and Trajectories of Change in Global Financial Governance’, (2010) 86 *International Affairs* 647–663.

normative beliefs behind the EU integration, while at the same time they presented a compelling justification for the impending growth of EU powers through marketisation.

The reification of political action in the EU has not remained without consequences also for the content of European law, as I show through the example of European private law. While reinforcing private law as an instrument of privatisation, the EU has transformed the very idea of private law. The new 'social contract' for European private law is based on a different understanding of the relationships between the individual, society and the market, and their respective roles and hierarchies.

The relevance of the theoretical framework proposed here for the broader EU studies deserves some mention. I contend that, in the fields where the internal market rationality operates, we should expect the convergence on elements that marked the transformation of private law. In particular, we may see the convergence on output legitimacy and values, the regressive patterns of redistribution, the change (reduction) in the concept of justice, as well as a shift in the understanding of a 'subject'. Moreover, we should expect a gradual acceleration of the transformative pressures along with the reification of the internal market rationality.

Further empirical enquiry would be necessary to ascertain the level of 'radiation' of internal market rationality outside the internal market, to fields where other normative concerns should dominate. Such an influence on the part of the internal market rationality may come by means of reliance on a body of knowledge accumulated so as to give meaning to the internal market rather than by pursuing market objectives directly.¹²⁷ This knowledge may operate, for instance, through the use of 'market techniques' to advance different normative concerns—such as environmental goals in an emissions trading scheme. Another example is apparent in the field of EU external relations and a recent initiative to engage in economic integration with the US (Transatlantic Trade and Investment Partnership). Not only the European Commission, but also the vast majority of the parties in the European Parliament, accepts rather uncritically the assumptions regarding the benefits of further market integration while offering a deaf ear to a call for a more pluralist economic debate.¹²⁸ Likewise, many other institutions could be productively analysed in the framework proposed here. While we have seen a compelling analysis of the role of CJEU from the perspective of neo-functionalism,¹²⁹ some newer European institutions, such as the European Council or the European Central Bank,¹³⁰ are still awaiting similar scholarly attention.

¹²⁷ The normative impact of the export of market techniques has been addressed so far mainly by the literature engaging Foucault's concept of governmentality. See, eg, A. Neale, 'Organising Environmental Self-Regulation: Liberal Governmentality and the Pursuit of Ecological Modernisation in Europe', *Environmental Politics* 6, no. 4 (1997), 1–24; K. Mitchell, 'Neoliberal governmentality in the European Union: education, training, and technologies of citizenship', (2006) *Environment and Planning D: Society and Space* 24 (3) 389–407. J.H. Haahr and W. Walters, *Governing Europe: Discourse, Governmentality and European Integration*, vol. 24 (Routledge, 2005).

¹²⁸ M. Bartl and E. Fahey, 'The Postnational Market Place: Negotiating the Transatlantic Trade and Investment Partnership', in E. Fahey and D. Curtin (eds), *Transatlantic Community of Law: Interactions between the EU and US legal orders* (Cambridge University Press, 2014), 210–234.

¹²⁹ A. Stone Sweet and T. Lloyd Brunell, *The Judicial Construction of Europe* (Wiley Online Library, 2004); N. Fligstein and A. Stone Sweet, 'Constructing Politics and Markets: An Institutional Account of European Integration', (2002) 107 *American Journal of Sociology* 1206–12043.

¹³⁰ See, however, an excellent recent contribution by K. Tuori and K. Tuori, *The Eurozone Crisis: A Constitutional Analysis* (Cambridge University Press, 2013).

To conclude, this paper has aimed to problematise the suggestion that the alleged neoliberal bias of the EU is solely a consequence of a broader ideological shift to the neoliberal political rationality,¹³¹ or the strategy played by the EU institutions.¹³² Rather, I have argued that a significant role has been played by the EU functional design, which prepared the EU to embrace, and hold onto, a broader ideological turn towards the neoliberal interpretations of the market. Neither the legislative empowerment of the European Parliament nor the introduction of new values to the EU treaties, which have prompted much optimism in legal scholarship, proved capable of effectively challenging these tendencies. Ultimately, the critique presented here insinuates both institutional and cultural change (for instance in the self-understanding of the European Parliament) necessary to democratise the EU politics.

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¹³¹ This seems to be the assumption of many commentators; see, for instance, the reports of influential EuroMemorandum group at <http://www.euromemo.eu>.

¹³² N. Jabko, *Playing the Market*.