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# Internal market rationality: In the way of re-imagining the future

Marija Bartl\*

## 1 | INTRODUCTION

Europe's dissolution has become a major subject of academic debate, suggesting that the EU may be beyond rescue.<sup>1</sup> The economic crisis is continuously met with unsolidaristic, and often irrational austerity policies,<sup>2</sup> undermining the support for the EU in the European South. The migration crisis is met with only traces of solidarity among the EU's Member States,<sup>3</sup> while the current plans to repatriate migrants to Greece promise only to aggravate the situation.<sup>4</sup> In the European North, in a full break of solidarity with the EU, Britain is heading inexorably towards Brexit, putting at stake not only the unity of the EU but also of the UK itself.

The question as to *why* the European project has not “spilled over” to the more robust forms of solidarity and political integration has haunted commentators on Europe for decades.<sup>5</sup> Is the lack of solidarity simply a consequence of building Europe as a market instead of building a political union, or culture—as Monnet would have it?<sup>6</sup> Or, could we have built a different Europe within the framework of the European Treaties, were we only to give different meaning to its provisions?<sup>7</sup>

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<sup>1</sup>For instance, Euromemorandum Conference on Alternative Economic Policy in Europe 2016: The European Union: the Threat of Disintegration, available at [http://www.euromemo.eu/annual\\_workshops/2016\\_coimbra/index.html](http://www.euromemo.eu/annual_workshops/2016_coimbra/index.html).

<sup>2</sup>Marija Bartl, ‘Contesting Austerity: On the Limits of EU Knowledge Governance’, (2017) 44 *Journal of Law and Society*, 150.

<sup>3</sup>Agustin Menéndez, ‘The Refugee Crisis: Between Human Tragedy and Symptom of the Structural Crisis of European Integration’, (2016) 22 *European Law Journal*, 388.

<sup>4</sup>EU Observer, <https://euobserver.com/migration/136201>.

<sup>5</sup>Scholars have grappled with many aspects of this question. One history concerns the CJEU, aided by private parties (A. Stone Sweet, *The Judicial Construction of Europe*, vol. 6 (Wiley Online Library, 2004)), who furthered the “negative integration” and allowed the expansion of the EU “social deficit” (F.W. Scharpf, ‘The European Social Model’, (2002) 40 *Journal of Common Market Studies*, 645.). Another strand of scholarship underlines that the axiology of EU Treaties, which places economic freedoms first, and which has led to the marginalisation of non-economic or social concerns in EU law (C. Joerges and F. Rödl, ‘Informal Politics, Formalised Law and the “Social Deficit” of European Integration: Reflections after the Judgments of the ECJ in Viking and Laval’, (2009) 15 *European Law Journal*, 1; Floris de Witte, ‘EU Law, Politics, and the Social Question’, (2013) 14 *German Law Journal*, 581; Gareth Davies, ‘Democracy and Legitimacy in the Shadow of Purposive Competence’, (2014) 21 *European Law Journal*, 2). Finally, a different strand discusses the consequences of the “social” aspects of the EU, such as non-discrimination and inclusion/access to the market, which have come to be seen as being promoted at the expense of the concerns for social justice or redistribution (Alexander Somek, ‘From Workers to Migrants, from Distributive Justice to Inclusion: Exploring the Changing Social Democratic Imagination’, (2012) 18 *European Law Journal*, 711; H.W. Micklitz, ‘Social Justice and Access Justice in Private Law’ (EUI Working Paper 2011).

<sup>6</sup>“If we were to do it all again we would start with culture”, quoted in C. Shore, ‘Inventing the “People's Europe”: Critical Approaches to European “Cultural Policy”’, (1993) 28 *Man*, 779.

<sup>7</sup>Clemens Kaupa, *The Pluralist Character of the European Economic Constitution* (Bloomsbury Publishing, 2016).

In 2015, I published an article in the *European Law Journal* titled 'Internal market rationality, private law and the direction of the Union: Resuscitating the market as the object of the political',<sup>8</sup> that aimed to shed some new light on this important question. In that article, I argue that the EU's institutional design has indeed played an important role in a peculiar de-politicisation of the EU, rendering it difficult to contest the neoliberal framing of intervention in the Internal Market. This de-politicisation has taken place due to a confluence of the EU design of knowledge production processes on the one hand, and neoliberal discourse on the other. I coin these reifying frames of political intervention as 'Internal Market Rationality' (IMR). The article's added value, as it were, was to expand on an intuition shared by many EU lawyers, while not resorting to essentialism with regard to either the Treaties or the Internal Market.

In recent issues of the *European Law Journal*, two interesting critiques of this article have appeared. Leone Niglia, in a direct response to this piece,<sup>9</sup> points out that there is nothing like an 'all-encompassing' IMR in European private law. According to Niglia, the concept of IMR does not give sufficient credit to the resistance of courts and national legislatures to the Commission's efforts to advance its internal market projects. In fact, he suggests, a much better starting point for the academic inquiry is to focus on resistance to such EU Commission-driven political rationality. In the following issue, Yane Svetiev critiques the account from the 'experimentalist' perspective.<sup>10</sup> Svetiev suggests that if there is any comprehensive rationality in the EU, it is a 'problem-solving rationality'. He believes that the EU market regulation exhibits experimentalist tendencies, whereby EU goals are put in action in local contexts in a way that partially detracts from, or enriches, the EU's market orientation with other normative concerns, ultimately transforming the EU objectives themselves.

I would like to use this opportunity to respond to these critiques by first unpacking the concept of IMR.<sup>11</sup> After explaining the theoretical origins of the concept (Section 2), I break the discussion down into four integral components: the *telos* of IMR (Section 3), the *technologies* of IMR (Section 4), the mechanisms of *reification* of IMR (Section 5) and the *effects* of IMR (Section 6). Once I have set out this theoretical framework, I will respond to the core critiques raised by Niglia and Svetiev, namely the position of "resistance" (Niglia) and "problem solving" (Svetiev) in the framework of IMR (Section 7). I conclude with an invitation to exploit the IMR's institutional analytics to study the interactions between discourses and institutions in functionalist integration beyond the state.

## 2 | ON THE THEORETICAL ORIGINS AND THE CONTRIBUTION OF "INTERNAL MARKET RATIONALITY"

The concept of IMR may be seen as building on two distinct theoretical apparatuses. On the one hand, IMR is presented as a political "rationality", and an instance of neoliberal political rationality, drawing thus on a body of literature that originates with Michel Foucault.<sup>12</sup> On the other hand, IMR also incorporates the words "internal market" in order to emphasise the importance of the EU *institutions* for understanding the role of the concept. Together, the original article offers an institutional analytics, which allows us to acknowledge how the design of knowledge production processes may influence the appropriation of broader "ideological" discourses. I will discuss these two different analytical components of IMR in turn.

<sup>8</sup>Marija Bartl, 'Internal Market Rationality, Private Law and the Direction of the Union: Resuscitating the Market as the Object of the Political', (2015) 21 *European Law Journal*, 572.

<sup>9</sup>Leone Niglia, 'On the "Rationalities" of European Private Law—Between the Internal Market and Law's Discourse', (2016) 22 *European Law Journal*, 566.

<sup>10</sup>Yane Svetiev, 'The EU's Private Law in the Regulated Sectors: Competitive Market Handmaiden or Institutional Platform?', (2016) 22 *European Law Journal*, 659.

<sup>11</sup>I focus here on the theoretical elaboration of the concept, leaving the empirical part fully to the previous article.

<sup>12</sup>Michel Foucault, *The Birth of Biopolitics: Lectures at the Collège de France, 1978–1979* (Palgrave Macmillan, 2004); Michel Foucault, *Security, Territory, Population* (Springer, 2007).

First, viewing IMR as an instance of “(neoliberal) political rationality” opens IMR to similar critiques as this broader concept on which it draws. Since Niglia and Svetiev have pointed to some of these critiques (stating, for instance, that the IMR suggests itself as an all-encompassing rationality), I will spend a few words on the theoretical foundations and the limits of the concept of “neoliberal political rationality” insofar as they partially extend to the concept of IMR.

The concept of “neoliberal political rationality” builds on the work of Michel Foucault. It stands for a particular conception of the practice of government. On this view, the core function of liberal government is to bring about economic security and welfare. Neoliberal governmentality aims to achieve this purpose by making various social institutions operate more efficiently (a “telos” of political rationality), by introducing elements of competition in their internal organisation (technologies of government).<sup>13</sup>

Today, illustrations of such forms of governmental intervention can be found in wide range of institutional environments. For example, at the beginning of the 1990s, the Dutch government decided to improve the functioning of Dutch universities. This improvement was to come from introducing competition for students, which in turn should have resulted in better quality of university services and student satisfaction that would make Dutch universities more competitive, nationally and internationally (political rationality). In order to achieve this goal, the government transferred various real estate property into the ownership of universities, and now remunerates universities per student/graduate—in all other respects, universities became economically independent (“technologies of government”).<sup>14</sup>

This neoliberal political rationality has two distinctive features. First, competition functions mainly as a rationalisation technique, which means that its application is not restricted to arenas traditionally seen as “economic”. Instead, the principle of competition becomes a tool to improve and rationalise almost everything, from institutional practices to individual behaviour.

Second, neoliberal political rationality certainly should not be understood as anything like a comprehensive *ideology*, or a full blown vision of the what the market should look like.<sup>15</sup> Instead, it has an epistemic focus: it aims to capture how various actors talk about, or *frame*, issues of public relevance. The best way to understand neoliberal political rationality is as a set of such “frames”, a paradigm so to say, which (explicitly or implicitly) shares a common assumption that introducing elements of competition improves institutional efficiency.<sup>16</sup>

Given that neoliberal political rationality has a rather thin “content”, being mainly a set of frames linked by an underlying assumption, the concept brings together many governmental practices. It often includes anything from the liberalisation of public utilities to the flexibilisation of labour relations or market incentives in public and private institutions.

This breadth, however, brings with it an important critique. The concept of neoliberalism is often charged with being over-inclusive and thus analytically unhelpful. Furthermore, this breadth of coverage has an additional negative consequence: by implying that we are enmeshed in “ideology”, the concept may suggest that there is too little space for political intervention.

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<sup>13</sup>Political rationalities are historically specific instances of governmentality; see also T. Lemke, “‘The Birth of Bio-Politics’: Michel Foucault’s Lecture at the Collège de France on Neo-Liberal Governmentality”, (2001) 30 *Economy and Society*, 190.

<sup>14</sup>The results of these interventions were mixed. While the Netherlands has indeed become an important academic hub in Europe, and the correlation between the governmental interaction and the development cannot be excluded, the introduction of competition has also brought many negative effects. One such effect is that the dependence on student numbers has periodically put many Dutch universities into grave economic difficulties, and in need of subsequent reorganisation. See also E. Engelen, R. Fernandez and R. Hendrikse, ‘How Finance Penetrates its Other: A Cautionary Tale on the Financialization of a Dutch University’ (2014) 46 *Antipode*, 1072.

<sup>15</sup>See, for instance, M. Beeson and A. Firth, ‘Neoliberalism as a Political Rationality: Australian Public Policy since the 1980s’, (1998) 34 *Journal of Sociology*, 215; M. Dean, *Governmentality: Power and Rule in Modern Society* (Sage, 2009); M. Dean and B. Hindess, *Governing Australia: Studies in Contemporary Rationalities of Government* (Cambridge University Press, 1998); W. Brown, ‘Neo-Liberalism and the End of Liberal Democracy’, (2003) 7 *Theory & Event*.

<sup>16</sup>Beeson and Firth, above, n. 15.

The first charge, namely, that the concept is analytically unhelpful, is unjustified. Part of the problem here is the success of neoliberal political rationality: the concept may bring together many governmental practices because the basic frame has become ubiquitous. That does not detract, however, from its clear analytical contribution, namely, to highlight a specific pattern of de-politicisation that entrenches market form and competition as the main modalities of rationalisation of life.

The second charge, namely that the concept lacks critical bite, is a more serious one. Neoliberal political rationality captures a particular discursive frame (bring in more competition, things will work better), which can be appropriated across very different institutional contexts. Yet, given that institutional contexts may differ considerably—with diverse actors, distributions of power, languages, values and legal structures—this basic discursive frame becomes something more or less “different” in each of these contexts. Therefore, a critique that a certain practice is “neoliberal” often becomes too general, missing ultimately a specific target.

The concept of IMR may be seen as an attempt to (partially) overcome this problem. The theoretical framework sets out a number of interfaces between the EU institutional framework and this broader political discourse. IMR thus becomes a more specific, *institutionalised*, articulation of a neoliberal political rationality, which takes seriously the EU legal-institutional context, actors, language, Treaties and so on.

However, the concept still remains relatively broad. Even if the original paper takes European private law as a case study, the institutional analytics are applicable to the study of the entire “Community Method”. To this extent, IMR suffers from some of the same problems as neoliberal political rationality. Many different legal fields and institutional contexts, with different actors, power distributions, languages, narratives, strategies and values fall under the Community Method. This means that we may expect some less than perfect “fit” between IMR and the realities in some of these various specific policy fields. Equally, alleging that something is a consequence of IMR may not always be the most effective strategy of critique. Instead, addressing more context-specific incarnations of IMR may prove more effective.

Understanding the two limitations set out above is not, however, to say that the concept is without merit. First, descriptively, the account provides a general explanation of the pattern of appropriation and success of neoliberal discourses in the EU that broadly fit the EU empirical realities. The account does so by focusing on the appropriation of neoliberal framing through the processes of knowledge production, avoiding essentialising (attributing any particular meaning) either the EU Treaties or the Internal Market.<sup>17</sup> Whether the explanatory value of the account compensates for the two limitations mentioned above must be left to the reader.

Secondly, and perhaps even more importantly, the article develops an analytics for studying the interfaces between institutions and discourses in functionalist entities beyond the state. Drawing further inspiration from new institutionalism<sup>18</sup> and Science and Technology studies,<sup>19</sup> the framework allows us to unpack the inter-relation between the neoliberal discourse and EU institutions at a micro level of the EU Treaties, the meso level of institutional

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<sup>17</sup>I discuss the role of “resistance” to the Commission’s framings of the internal market in Section 7.

<sup>18</sup>I rely both on the tradition of “rational institutionalism”, which focuses on the strategic behaviour of actors in institutionalised contexts, and “organisational institutionalism”, insofar the framework operates with concepts such as language and institutional culture. On “rational institutionalism”, see, for instance, N. Fligstein and A.S. Sweet, ‘Constructing Politics and Markets: An Institutional Account of European Integration’, (2002) 107 *American Journal of Sociology*, 1206. On “organisational institutionalism”, see, for instance, W.W. Powell and P.J. DiMaggio, *The New Institutionalism in Organizational Analysis* (University of Chicago Press, 2012); J.L. Campbell and O.K. Pedersen, *The Rise of Neoliberalism and Institutional Analysis* (Princeton University Press, 2001).

<sup>19</sup>In this contribution I rely foremost on the American branch of Science and Technology Studies (STS), based at Harvard around Sheila Jasanoff. This school of thought (unlike its European counterpart) engages directly with legal and constitutional issues of governance through knowledge, science and technology. Some of the most relevant contributions for legal public thought are S. Jasanoff, *States of Knowledge: The Co-Production of Science and Social Order* (Routledge, 2004); D. Winickoff, S. Jasanoff, L. Busch, R. Grove-White and B. Wynne, ‘Adjudicating the GM Food Wars: Science, Risk, and Democracy in World Trade Law’, (2005) 30 *Yale Journal of International Law*, 81; S. Jasanoff, ‘In a Constitutional Moment: Science and Social Order at the Millennium’, in B. Joerges and H. Nowotny (Eds.), *Social Studies of Science and Technology: Looking Back, Ahead* (Springer, 2003), 155; S. Jasanoff, *Science at the Bar: Law, Science, and Technology in America* (Harvard University Press, 2009).

design and, finally, a macro level of the embedding in a broader political context. As I develop further in the forthcoming sections, at the micro level of the *telos* of EU action, I ask how the EU objectives and competences have been mobilised through neoliberal discourse (Section 3). At the meso level of institution design, I explore how the institutional design of the European Commission has influenced the “technologies” of discourse reception in the EU (Section 4). At the macro institutional level, I inquire how the embedding of the European Commission in a broader political context has laid the ground for the contestation of its framings and knowledge it produces (Section 5). Finally, I discuss important effects of IMR (Section 6).

### 3 | THE *TELOS* OF IMR: EU OBJECTIVES AND COMPETENCES

Many scholars have observed that the EU suffers from a certain “economic bias”.<sup>20</sup> The market has been, and still is, all over EU policy documents and legislation. The EU has been undertaking ever more “market-making” projects, internally and externally. It has driven the liberalisation and privatisation of public services in many EU Member States, while at the same time it has addressed its citizens as consumers, often very one-dimensional consumers.<sup>21</sup>

The first to be “blamed” for this development was the Court of Justice, which has been critiqued for being a driver of *negative* integration that worked to corrode national welfare states and regulations.<sup>22</sup> Somewhat paradoxically in this regard, the “green light” to positive (political) integration, which came with majority voting after the Single European Act, has not seen the concerns about the EU economic bias diminish. Instead they multiplied.

Legal scholars have often argued that the EU economic bias has to do with the EU Treaties, and the EU's main goal to build the Common/Single/Internal Market.<sup>23</sup> Since the European Communities have emerged as a functionalist entity, whose main practical goal was to create the Common Market,<sup>24</sup> this economic bias was bound to emerge. Such accounts, however, had some troubles responding to important questions.

First, why did the concern with economisation grow in recent decades? Even if partial response could refer to “growth” of the EU qua expansion of its competences, the competence creep itself was often linked to the processes of market expansion.<sup>25</sup> Second, and more importantly, these accounts could hardly show that the EU goal itself would actually dictate any more specific interpretation of the internal market. What the (internal) market *is* and what it *needs* has had very different interpretations in different historical periods, depending on the contemporary understanding of economic life, economic theories, common sense, but also on what was politically possible or expedient.<sup>26</sup> Thus, if there was any influence of the EU objectives on the EU functioning, the mechanisms of its operation remain unclear.

This is something that my paper set out to clarify. Indeed, I concede that the first important element that has facilitated the emergence of IMR (i.e. the uptake and selling of the neoliberal recipes qua the European Commission's

<sup>20</sup>Above, n. 5.

<sup>21</sup>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’ (EUI Working Paper 2012); M. Hesselink, ‘European Contract Law: A Matter of Consumer Protection, Citizenship, or Justice?’ (2007) 15 *European Review of Private Law*, 323; Bartl, above, n. 8.

<sup>22</sup>Most famously by Scharpf, above, n. 5; F.W. Scharpf, ‘The Asymmetry of European Integration, or Why the EU Cannot Be a “Social Market Economy”’, (2010) 8 *Socio-Economic Review*, 211.

<sup>23</sup>See, for instance, Davies, above, n. 5. Political scientists have adopted a less essentialising approach to studying the EU. See, for instance, N. Jabko, *Playing the Market: A Political Strategy for Uniting Europe, 1985–2005* (Cornell University Press, 2006); J.H. Haahr and W. Walters, *Governing Europe: Discourse, Governmentality and European Integration*, vol. 24 (Routledge, 2005); Fligstein and Sweet, above, n. 18. Except for the Alec Stone Sweet's scholarship, who has been very interested in the CJEU, the normative implications of EU treaties and the EU institutional design were at best in the background of this scholarship.

<sup>24</sup>Treaty of Rome, Art. 2.

<sup>25</sup>C. Joerges, ‘Challenges of Europeanization in the Realm of Private Law: A Plea for a New Legal Discipline’, (2004) 14 *Duke Journal of Comparative & International Law*, 149.

<sup>26</sup>Kaupa, above, n. 7.

knowledge production) relates to the purpose of EU integration. The role of this purpose has been, however, somewhat more subtle than many of the previous accounts would have it.

Imputing to the EU the purpose of the creation of a common market has, first, influenced the language in which the EU institutions were expected to operate. The economic register such as “market”, “common market”, “cross-border trade” or “free movement” became a register in which the EU political action has developed over time.

This register has also played a very important role thanks to the system of EU competences, which requires “legal bases” for EU action. To be precise, most EU legislation in previous decades has been enacted pursuant to the *internal market legal basis*. Yet, reliance on this legal basis, as Davies has argued, has come at a price.<sup>27</sup> The clear-cut “added value” of the EU in building the internal market has given an incentive to EU institutions to translate various social problems into the (internal) market register.<sup>28</sup>

Third, the material constitution of the sort that the EU possesses also comes with a higher density of “juridification”. This fact will influence the division of powers between various institutions, tilting it towards the judicial institutions, and the Court of Justice in particular, which has had an important role in particular in the beginnings of integration.<sup>29</sup>

Finally, imputing a primary purpose to a particular institution will influence the expertise that this institution will seek, as well as the knowledge that it will (be expected to) produce, which will influence inter- and intra-institutional hierarchies. It may likely be that the “economic” DGs (such as DG Internal Market, or DG Trade) will have more power in the EU Commission than social DGs (such as DG Labour or DG Environment), or that “economic” committees are more attractive chairs in the European Parliament than “non-economic” ones.

#### 4 | TECHNOLOGIES OF IMR: ITS FUNCTIONALIST INSTITUTIONAL DESIGN

Once the European Communities were imputed a purpose, a *telos* for their action, they needed a set of institutions to perform what they were expected to do. The CJEU has had a crucial role in moving the EU integration forwards since its inception—a process captured by the famous epitaph of integration through law.<sup>30</sup>

The focus of my article was, in contrast, on the “integration through knowledge”. In this regard, I paid particular attention to the main driver of positive integration, the European Commission, which has been conceived by the founding Member States as both the agenda setter<sup>31</sup> and the guardian of EU interest, operating freely from the influence of its Member States.<sup>32</sup>

The main source of legitimacy of the European Commission was in its independence from national governments and politics in general. In order to be able to act in the *general* interest, the Commission had to rely on some source of legitimacy. This was to be supplied by knowledge (expertise), which offered the soundest basis to establish general interest—in the absence of democratic process<sup>33</sup> (or lacking trust in such a process).<sup>34</sup>

<sup>27</sup>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. See Davies, above, n. 5.

<sup>28</sup>*ibid.*

<sup>29</sup>M. Cappelletti, M. Secombe and J. Weiler, *Integration through Law: Europe and the American Federal Experience* (Walter de Gruyter, 1985); D. Augenstein (ed.), *Integration Through Law Revisited: The Making of the European Polity* (Ashgate Publishing, 2012).

<sup>30</sup>*ibid.*

<sup>31</sup>Treaty of Rome, Art. 100.

<sup>32</sup>Treaty of Rome, Art. 157.

<sup>33</sup>On the limits of the last round of politicisation of the European Commission, see M. Goldoni, ‘Politicising EU Lawmaking? The Spitzenkandidaten Experiment as a Cautionary Tale’, (2016) 22 *European Law Journal*, 279.

<sup>34</sup>Some of this discussion is well articulated in M.P. Maduro, *We the Court: The European Court of Justice and the European Economic Constitution* (Hart Publishing, 1998).

The European Commission has become a primary locus of *knowledge production* in the Communities: the institution, which frames what Europe and its market *is* and what it *needs*.<sup>35</sup> The burning questions behind such a governance qua knowledge model are manifold. Can we “govern” on the basis of knowledge? Is government/ance reducible to best knowledge? Where is political conflict and disagreement gone?

Over the years, the Commission has lived up to its obligation for the interpretation of the Common/Single/Internal Market by the production of vast amounts of knowledge through various documents (reports, impact assessments, policy documents, expert opinions, consultations, euro-barometers, legislative proposals, etc.), which helped to identify the “problems” in the European market (for instance, what is “level playing field”, what are barriers to free movement) and suggests possible “solutions” (“harmonisation”, “learning”, “empowerment”, etc.).

Leaning on the Science and Technology Studies’ concept of “co-production”, the original article explains why regulatory knowledge is always deeply political. On the one hand, one cannot separate the production of knowledge from the reasons for which it is produced. On the other hand, the produced knowledge shapes the ways in which we imagine acting on the world. As Sheila Jasanoff has famously stated, “the ways in which we know and represent the world (both nature and society) are inseparable from the ways in which we choose to live in it.”<sup>36</sup>

In the original article, I suggest that the considerable political power enjoyed by expert institutions in general, and the European Commission in particular, has not been fully appreciated in European legal theory. The Commission could shape how the other (EU) institutions see and understand the world, while its institutional position—its independence, expertise, objectivity, or the assumption that it acts in the general EU interest—has reinforced rather than made contestable its various framings.

Now, this Commission’s power to “deep-govern” qua knowledge may have caused little concern in times when (a) the Commission had relatively little power in comparison with other institutions and (b) the ideological consensus around a particular interpretation of a market was not firmly established. Both changed when neoliberalism gained ground.

Institutionally, the power of the European Commission increased in the mid 1980s, with the White Paper on the Completion of the Internal Market, and its political follow-up, the Single European Act. These documents represented the internal market as a single, grand technical project, which requires particular technical steps to be achieved. The expert Commission (self-)appointed itself to effectuate this project.

Content-wise, the growing consensus around neoliberalism has inadvertently become an opportunity for the European Commission to expand and consolidate its—and the EU’s—power.<sup>37</sup> Not only did the hegemony of neoliberal discourse legitimise the uptake of certain economic ideas without major challenges, but it also rendered sensible many ideas that seemed particularly “in line” with EU interests and objectives.

Thus, to the extent that neoliberal discourse favours the market as the most opportune organising principle for social institutions and relations, it seemed to support the expansion of the EU powers qua such market-building projects. Second, neoliberal discourse has also made available a convincing language to justify the need for the growth of

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<sup>35</sup>The Commission has been, over time, complemented by other “independent institutions” that contribute to the articulation of the meaning of EU market qua knowledge (most notably the European Central Bank). For an excellent contribution on the topic, see A. Vauchez, ‘The Appeal of Independence: Exploring Europe’s Way of Political Legitimacy’ (<https://ssrn.com/abstract=2881913>).

<sup>36</sup>Sheila Jasanoff (ed.), *States of Knowledge: The Co-Production of Science and the Social Order*, (Routledge, 2004), 2.

<sup>37</sup>The inspiration with neoliberal ideas has been the case not only in the European Commission officials: neoliberal political rationality was well and healthy in several EU Member States, as well as at the level of international financial institutions. Several political endorsements at a macro-political level in the EU have lent legitimacy to the rethinking of the economy. 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 strongly advocated for technocratic governance of the Internal Market and strengthened the dominance of the Commission regarding its interpretation. The Maastricht Treaty, by fleshing out the concept of 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 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”, nowadays serve as the basis for EU economic regulation. Importantly, these political endorsement were co-constituted by knowledge produced the EU’s knowledge producing institutions.

EU regulatory powers through market creation and market deepening. Finally, the stress on measurable efficiency gains buttressed the Commission's search for technocratic modes of legitimation through its stress on the de-politicisation of decision-making, for instance through monetisation and cost-benefit analysis.<sup>38</sup> The neoliberal political rationality and technologies thus become a core inspiration to the European Commission.

Admittedly, the Commission's engagement with neoliberal framings in the EU should not be seen as that of some linear uptake: the appropriation of this discourse has been shaped by the EU institutional specificities of each and every policy field as well as its embedding in a broader political context.

## 5 | THE REIFICATION OF INTERNAL MARKET RATIONALITY AND THE IMAGINARIES OF EU "POLITICAL" INSTITUTIONS

It should be clear by now that while all institutions produce political rationalities and frames, such rationalities become a problem only if they reify—if they engender a particularly deep form of de-politicisation. In order to prevent reification, institutions come equipped with various mechanisms for contestation built in the institution itself, and even more importantly imminent in their embedding in a broader political and social context.<sup>39</sup>

Internally, as discussed in the previous section, such safeguards have been particularly weak in the case of the European Commission, which had numerous institutional incentives to draw on neoliberal language. The crucial question then becomes how far have other actors—and the broader political and social context of the EU—served to politicise framings proposed by the Commission. In order to respond to this question I have looked in the field of EU consumer law: a field long thought of as a signpost of the EU "social" face.<sup>40</sup>

European consumer law developed from the 1980s onwards, in a piecemeal fashion, and through minimum harmonisation. From the early 2000s, however, when the Lisbon Strategy promised to make the EU *the most competitive knowledge economy* in the world, we see a shift in the regulatory approach.<sup>41</sup> Legal diversity in private law was re-framed as a problematic "fragmentation", which harms the internal market (a conclusion supported by various impact assessments) and the solution was the full harmonisation of consumer law. From around 2006, the Commission's initiatives take on a more substantive goal, namely, the Commission starts justifying its harmonisation efforts (i.e. Consumer Rights Directive (CRD), Common European Sales Law (CESL) and now Digital Market directives (DMD)) on the basis of the need to create the "*online internal market*", which was seen as a tool to boost growth and even counter the economic crisis. Even if the major initiatives on its basis—the CRD and CESL—have largely failed, the Commission has never abandoned this goal, which expanded in importance, becoming a basis of a Commission's policy priority: the Digital Market Agenda.<sup>42</sup>

Where did this goal come from? As I show in the original IMR article, this goal appears a few years after the beginning of the push for full harmonisation in order to give a new justification to ongoing efforts. Very little inquiry goes into examining the appropriateness of this goal itself, either by the European Commission or other political institutions. The Commission's rationale for the online internal market could 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 economic growth and the online internal market is more assumed than argued, while little to no evidence is supplied in order to show that it will have no difficult environmental or social consequences.

<sup>38</sup>The Commission has increasingly relied on economic analysis in its policy making, which promises a formal constraint on the exercise of public power. The Better Regulation Agenda has gained further impetus with Juncker's Commission. See also M. Bartl, 'Regulatory Convergence through the Back Door: TTIP's Regulatory Cooperation and the Future of Precaution in Europe', (2017) 18 *German Law Journal*, 969.

<sup>39</sup>For discussion of the epistemic role of embeddedness of expert institutions in a democratic political context, see Bartl, above, n. 2.

<sup>40</sup>D. Caruso, 'The "Justice Deficit" Debate in EU Private Law: New Directions' (BU Law Working Paper 12-42, 2012).

<sup>41</sup>H.W. Micklitz, 'The Targeted Full Harmonisation Approach: Looking Behind the Curtain', in G. Howells and R. Schulze (eds.), *Modernising and Harmonising Consumer Contract Law* (Sellier European Law Publishers, 2009), 47.

<sup>42</sup>See European Commission, Digital Single Market, [https://ec.europa.eu/commission/priorities/digital-single-market\\_en](https://ec.europa.eu/commission/priorities/digital-single-market_en)

The goal of an online internal market is an excellent example of the EU's IMR. The need to expand and support markets, rather than regulate them (considering for instance the environmental impacts of online trade), fits neatly into neoliberal political rationality. The need to create an online *internal* market is a reflection of the EU institutional context. The fact that to my knowledge no EU Member State ever tried to pursue a similar goal within their own territories (even if they did regulate this form of trade) shows the distinctiveness of the EU's political rationality, the IMR.

Now, if the problematisation of the goal of "online internal market" did not appear in Commission documents, we might have expected other institutions to raise some debate as to the environmental, social, economic or urbanistic consequences of the online internal market. Astonishingly, however, the European Parliament's factions, including the green parties, which have been very active in the debate, have failed to do so. Ultimately the EP has mechanically accepted the Commission's framing of this issue (the problem and the solution). The debate has remained limited to the question of whether the Commission has devised the proper means to achieve what it has set out to achieve, and whether the correct balance between consumers, businesses and small- and medium-sized enterprises (SMEs) is struck by the proposed measure. The goal of an online internal market has been, at best, a proxy for "European added value". It has been perceived as a natural continuation of the internal market or, to reiterate the Economic and Social Committee, as the consolidation of the internal market. At no point did the EP problematise economic, environmental, social, urbanistic or public health effects of pursuing this goal.

The Council has also discussed European consumer law on several occasions. When it comes to the online internal market, it was seen as an unavoidable consequence of technological progress, while European intervention is perceived as the natural thing to do.<sup>43</sup> No one seemed puzzled, however, that this inescapable point on the historical trajectory still deserved to be legislatively assisted by nothing less than the full harmonisation of contract law.

While the EU may be tasked with removing "cross-border" obstacles in its integrating market, what to frame as a relevant market to intervene in, and what is identified as a cross-border obstacle, is left to the interpretation of the Commission.<sup>44</sup> The question that I pose is, then: *Why did the political institutions so easily accept the framings proposed by the European Commission, while only the appropriateness of means was disputed?*

The acceptance of the goal has certainly been aided by the skilled framing of the Commission. The Commission's "online internal market" relies on a credible socio-technological imaginary:<sup>45</sup> the imaginary of the online world, which offers new attainable technological and economic futures. These futures, of course, also open up the possibilities to create and expand markets.

There are two important institutional features of the EU that facilitate the reification of IMR, and which have eased the acceptance of this goal. First, thanks to the juridification of the "internal market" in the EU, to which all parties have clearly agreed, it becomes natural for the EU to pursue its legally agreed goals (removing cross-border obstacles to trade) also in this newly available online space. The "online internal market" is seen as the consolidation, or a natural continuation of the internal market.

Secondly, perhaps the most serious consequences of the EU functionalist legal-institutional design is that it changes the self-understanding of EU political institutions. These institutions will be positively predisposed to accept the interpretation of the world as presented by an authoritative and independent technocratic body that has EU's interest in mind, especially if drawing on credible socio-technological imaginaries and Treaty commitments. Thus, if the European Parliament has found a role somewhere, it has been to protect consumers (weaker parties)<sup>46</sup> in the

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<sup>43</sup>See Bartl, above, n. 8.

<sup>44</sup>In this case, framing online national markets as "fragmented" (rather than Amazon and Ebay being champions all over Europe anyway), it is particularly striking to justify the harmonisation of "consumer" law as means to overcome fragmentation—in particular if the relevant obstacles identified by the Commission's research are largely non-contractual, and including everything from costs of transport to language barrier. For discussion, see M. Bartl, 'Legitimacy and European Private Law' (EUI PhD thesis, 2012). Available at <http://ssrn.com/paper=2142798>.

<sup>45</sup>S. Jasanoff and S.-H. Kim, *Dreamscapes of Modernity: Sociotechnical Imaginaries and the Fabrication of Power* (University of Chicago Press, 2015).

<sup>46</sup>This was the main reason for rejecting CRD and the CESL. Bartl, above, n. 8.

implementation of futures outlined by the Commission, which are seen as following naturally from how the world is and what Treaties demand.

## 6 | THE EFFECTS OF IMR: THE CREATION OF INTERNAL PERIPHERIES

The lack of political contestation of goals such as the “online internal market”, and the imaginaries on which they rest, has long-term consequences for the legitimacy of the EU. As I have previously shown, pursuing an “online internal market” may have considerable consequences for several alternative normative concerns: economic, social, environmental, urbanistic or public health.<sup>47</sup> If the programme of furthering the online internal market is in the end successful, qua whatever means the Commission chooses, the lack of problematisation of any of these consequences will leave the EU, and its Member States, unprepared.

Yet, I would like to argue that the problem goes even further. IMR operates so as to create various “internal peripheries”. In the previous article I discuss the transformation of private law that stems from IMR. Some of the typical “by-products” of IMR are the creation of particular *subjectivities* (flexible, technologically savvy, price-sensitive rational worker, consumer, entrepreneur), *changing redistributive patterns* (lacking compensation for lost jobs, urban space or social interaction), and transforming existing normative discourses (what *justice* stands for, or what are the desirable *futures*), etc.

Many scholars have also argued that the EU-led re-creation of social order qua its internal market imaginaries leaves many excluded.<sup>48</sup> What happens to weaker consumers? To inflexible and low educated workers? What happens to people who are older, and not technologically savvy?<sup>49</sup> Is there a future for those who are not online “at home”? Do those people have value? What happens with the Daniel Blakes<sup>50</sup> of today?

This is in no way to suggest that the EU’s political rationality, IMR, has had no positive effects. In many areas, introducing markets has had overall positive results for large numbers of Europeans. The challenge that the IMR presents in the EU is that of reification: *the EU as a political entity, which reproduces certain assumptions without problematisation of its possible effects.*

There are broadly two main reasons why we should be worried about such de-politicisation. First, by making any framing of the world a default, normal or natural, we impede the imagination of alternative orderings of government or economy. Second, the reification of a particular frame, or the way we talk about the world, will have redistributive consequences. Reified frames are entrenched outcomes of political struggles, which may result in certain actors or groups becoming more consistently the losers of public policy (structural peripheries).<sup>51</sup>

## 7 | THE RESPONSE TO CRITIQUES: THE STRANGE “NON-DEATH” OF INTERNAL MARKET RATIONALITY<sup>52</sup>

### 7.1 | Resistance

After setting out the contours of the theoretical framework of IMR, I can now respond to the critiques. Niglia’s core point is that if the original article paid sufficient attention to the *resistances* of courts and Member States to the political rationality of the European Commission, or instances of political resistance at the EU level such as the Services

<sup>47</sup>*Ibid.*

<sup>48</sup>For instance, Micklitz, above, n. 21; Somek, above, n. 5.

<sup>49</sup>Micklitz, above, n. 5.

<sup>50</sup>A film by Ken Loach, *I, Daniel Blake*, 2016. [https://en.wikipedia.org/wiki/I,\\_Daniel\\_Blake](https://en.wikipedia.org/wiki/I,_Daniel_Blake)

<sup>51</sup>D. Kennedy, *A World of Struggle: How Power, Law, and Expertise Shape Global Political Economy* (Princeton University Press, 2016).

<sup>52</sup>A reference to C. Crouch, *The Strange Non-Death of Neo-Liberalism* (Polity, 2011).

Directive, the image of “all-encompassing” IMR would disintegrate. He suggests, instead, that resistances should be studied in their own right. The response to this critique should then incorporate both a response to a positivist critique, namely, how many empirical instances of challenge would we need to “refute” the IMR, as well as the concern with the political ontology of resistance and the question of change, namely, what it takes to challenge and “defeat” the IMR.

As a preliminary point, it is important to note that showing empirical instances of challenges to a particular discourse, such as IMR, misses the mark. As I explain in Section 3, at no level does the framework of IMR presuppose a straight-jacket of either discourse or the institutional process. In fact, it presupposes a certain level of resistance to, and re-negotiation of, political rationalities and technologies of government, which is the very condition of rational government.<sup>53</sup> The question, however, in which the IMR framework is interested in is *what kind of challenges to IMR do we see, and how they impact the institutional discourse.*

In general, accounts such as that of IMR can be “refuted” at least at three levels. First, one may be overall sceptical about the types of theorisation that are concerned with discourse. To do so, effectively, one should offer to the marketplace of ideas a better, more convincing, framework for the interpretation of “what is going on”. Svetiev's project seems to be trying to do exactly that (I discuss that contribution below). Second, if one in principle accepts this type of theoretical enterprise, but aims to show that my particular theorisation is deficient, it requires engaging with IMR on its own terms: qua its framing and/or effects. Finally, claiming that a certain political rationality (discourse) in general, or IMR in particular, has been “defeated” requires more than counting challenges: it ultimately requires us to show what it has been replaced with. Niglia's critique seems to fall somewhere between the latter two critiques, so I take them in turn.

To challenge the concept of IMR as deficient theorisation then, one should strike either at the level of institutional analysis or at the level of effects. With regard to the former, I have developed three levels of *institutional* analysis, which I claim worked in confluence in the appropriation of neoliberal political rationality. One may show that this interpretation as unconvincing by showing that there is no such thing as (neoliberal) discourse or that I do not “get” the institutions “right”. With regard to the latter, the *effects* of IMR, I have argued that the EU has changed the underlying grammar of private law across the field in which it has intervened<sup>54</sup> and narrowed the space to develop alternative visions of a good life. This thesis opens itself to more traditional empirical avenues of refutation. Yet again, such enterprise could not only count empirical instance of “social” legislation. The framework was never meant to suggest that the IMR requires the adoption of “anti-social” rules: in fact the original argument discusses many instance of social legislation. The undermining of my approach would be to show that the EU has either left the underlying grammar of private law intact, or transformed it with a very different image of private law in mind.<sup>55</sup>

Now, in order to challenge the institutional account I propose, Niglia argues that national courts and scholarship in the implementation phase resist the Commission's rationality. Yet, at which level and to what effect when it comes to the way the EU transforms the fundamentals of private law? How did this resistance revert not only a rule here and there, but a deeper transformation of private law that has been taking place for a couple of decades already? If national private law actors (such as national courts, as individuals or consumer associations) wanted to influence European private law, they had to approach the Commission or the CJEU, with rare exceptions,<sup>56</sup> in the language of European private law. If there was a role for (critical) private law scholarship, including myself, our impact has been

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<sup>53</sup>T. Lemke, ‘Foucault, Governmentality, and Critique’, (2002) 14 *Rethinking Marxism*, 49; J. Malpas and G. Wickham, ‘Governance and Failure: On the Limits of Sociology’, (1995) 31 *Journal of Sociology*, 37.

<sup>54</sup>Including the concept of person on which private law builds, the concept of justice, normative orientation and redistributive patterns.

<sup>55</sup>For instance, H. Micklitz, ‘The Visible Hand of European Regulatory Private Law’ (EUI Cadmus, 2008).

<sup>56</sup>One example here could be the resistance of German private law actors, who aligned with industry interest to defeat a more “political” version of the Unfair Terms Directive in the 1980s. See H.E. Brandner and P. Ulmer, ‘The Community Directive on Unfair Terms in Consumer Contracts; Some Critical Remarks on the Proposal Submitted by the EC Commission’, (1991) 28 *Common Market Law Review*, 647).

at best peripheral.<sup>57</sup> Neither has impacted the gradual re-writing of the underlying grammar of private law through EU intervention.

Is this to say that resistance to Commission rationality does matter? Not at all. The concept of IMR captures a certain reified framing of the internal market. To destabilise such deeply entrenched ways of representing the internal market, a qualified set of challenges is necessary.

First, and most importantly, the challenges need to be directed at the *framing* of political intervention rather than solely at its effects. This would importantly include proposing alternative frames for governmental interventions in the internal market. Such frames should be built around a different *telos* for the internal market (e.g. sustainability or solidarity, citizenship or values—instead of efficiency) and/or a different technology of government (e.g. the commons—instead of competition). Such re-framing does not imply, however, doing something different instead of the internal market, but rather framing what the internal market is and what it needs differently. Secondly, if the destabilisation is to bear fruit, the challenge requires a sustained effort. Such resistances may come from within or without relevant political institutions. At times they will put the institutions themselves in question.<sup>58</sup> Ultimately, with such challenges mounting, a certain discourse may “empty”<sup>59</sup> itself once it becomes meaningless to “talk” in a particular way, thus making space for new ways of thinking about governing, with different purposes for, and technologies of, political intervention.

Let us now look in this light at some of the challenges to the IMR mentioned by Niglia. The challenge to the Consumer Rights Directive in its ambitious form could be seen as an example of challenge to IMR *from within*. The resistance to CRD has done little, however, to problematise the framing of this governmental intervention (fragmentation—online internal market). Instead, the instrument was rejected on the basis of its effects, that it would have lowered the level of consumer protection. Since the frame remained the same, the Commission could moderately modify the form of intervention and come up with new variations of the older proposals, all of which were accepted once the most egregious effects of the previous political programme were removed.<sup>60</sup>

The challenge to the way we “do business” in the EU via the Services Directive was of very serious kind. The opposition mobilised the frame of “social dumping”, accompanied by a picture of the Polish plumber, in order to oppose the Commission's proposal. The politicisation of the EU in its wake may have even contributed to the French rejection of the Constitutional Treaty. What was the nature of this resistance in the framework of IMR? Colin Hay has compellingly argued that, even after the “country of origin” was purged and many exceptions added, the framing of the Service Directive remained the same: namely, price competitiveness. This is how he describes what I would tag as the reification of IMR: “[O]pposition was never couched in terms of an alternative understanding of competitiveness. (...) Nowhere in the debate were the anticipated efficiency and employment gains arising from service liberalization challenged; nowhere was the conception of competitiveness on which these in turn were predicated scrutinized and interrogated. (...) It was, in short, the social costs, not the economic advantages of service liberalization that were contested”. While very serious qua its political consequences, such resistance may have further entrenched, rather than undermined, IMR.

There are, however, some important sustained challenges to IMR “from within” in some well-established fields of EU law. For instance, in the field of information law, the “data protection” rationality has been a strong countervailing

<sup>57</sup>G. Brueggemeier et al., ‘Social Justice in European Contract Law: A Manifesto’, (2004) 10 *European Law Journal*, 653.

<sup>58</sup>In their recent book, Vivien Schmidt and Mark Thatcher discuss the resilience of neoliberal discourse. On the basis of their diagnosis they suggest five possible avenues for such change. A dominant discourse can be “emptied” from within (actors progressively cease to use certain framings and words), it can be subverted and replaced from without (new actors/groups force the change), it can be replaced with alternative discourses, the discourse may further lose support of important groups, and finally the discourse's institutions cease to exist. See M. Thatcher and V.A. Schmidt, *Resilient Liberalism in Europe's Political Economy* (Cambridge University Press, 2013); V.A. Schmidt and M. Thatcher, ‘Why Are Neoliberal Ideas so Resilient in Europe's Political Economy?’, (2014) 8 *Critical Policy Studies*, 340.

<sup>59</sup>P. Kolar and M. Pullmann, *Co byla normalizace? Studie o pozdním socialismu* (Lidové noviny, 2016).

<sup>60</sup>See the Directive on Consumer Rights (2011/83/EC).

force to the “data flows” rationality, which may be seen as a progeny of IMR. Each of these rationalities build on a different idea about the role of the government, languages, values, subjectivities, etc. They clash regularly, in the European Parliament and elsewhere, more recently in the debate about the Trade in Services Agreement (TiSA).<sup>61</sup>

Within the theoretical framework proposed here, it is the mobilisation of such alternative frames that is of crucial importance for undermining IMR. Such alternative political projects present a credible alternative to IMR—a different vision of the internal market—which is vital for encouraging more robust forms of political pluralism in the EU. What is important to underline here is that the exceptionality, and the value, of such alternative political rationalities transpire only once seen in the light of the IMR.

Despite glitters of hope, challenges “from within” have not become sufficiently sustained in order to undermine IMR thus far: something that the institutional politics should ideally be able to deliver. It is perhaps for this reason that we see the IMR increasingly challenged “from without”. Challenges to mega-regional trade agreements such as the Transatlantic Trade and Investment Partnership (TTIP) or the Comprehensive Economic and Trade Agreement (CETA), austerity politics or Brexit, or the calls to turn private law making back to the national level, are some important examples at hand.

What matters for the purposes of the analysis here is, however, the response of EU institutions: how far have these challenges shifted the framings of EU intervention? The challenge to the EU trade negotiation in TTIP and CETA has prompted the EU Commission to produce the “New Trade Strategy”. Quite worryingly, however, this strategy does not even fathom a departure from the traditional framing of EU trade policy or, importantly, a (re)distribution of voice and resources.<sup>62</sup> The challenge to austerity politics in the European South (qua Syriza and Podemos) has been met with a rather pervasive subservience to powerful EU Member States,<sup>63</sup> where the expansion of power of many EU independent institutions<sup>64</sup> has been a tool to enforce various controversial policies.<sup>65</sup> The White Paper on the Future of Europe in 2025 may be seen as a response to Brexit and other “right-wing” populist challenges.<sup>66</sup> What seems striking in this document is that the options outlined by the Commission pose the question mainly in terms of “quantity” (doing more, less, the same...) of EU action in the future. The “quality” of this action—the kind of political rationality that the EU is pursuing—is not on the Commission’s horizon.

When it comes to private law, the original IMR article focuses on what guides the EU intervention in “regulatory private law” (consumer law, regulated markets).<sup>67</sup> “Traditional” national private laws (e.g. contract, tort, property) continue to exist in parallel to European private law. This includes decades- or centuries-old national civil codifications, large bodies of case law, the communities of national private lawyers and scholarship, all of which have provided an institutional basis for developing and pursuing different political rationalities to that of the EU.<sup>68</sup> While I recognise that there has been some exchange between these political rationalities in private law for the purpose of examining what guides the EU project of private law integration, the traditional private law remains a largely segregated field,

<sup>61</sup>For instance, at the presentation of a study by Kristina Irion, Svetlana Yakovleva and Marija Bartl, ‘Trade and Privacy: Complicated Bedfellows?’, Institute for Information Law (IViR) 13 (2016), in the European Parliament, <http://tacd.org/event/trade-and-privacy-complicated-bedfellows-2/>.

<sup>62</sup>See European Commission, <http://ec.europa.eu/trade/policy/in-focus/new-trade-strategy/>

<sup>63</sup>H. Schepel, ‘The Bank, the Bond, and the Bail-out: On the Legal Construction of Market Discipline in the Eurozone’, (2017) 44 *Journal of Law and Society*, 79; Agustín J. Menéndez, ‘The Crisis of Law and the European Crises: From the Social and Democratic Rechtsstaat to the Consolidating State of (Pseudo-)Technocratic Governance’, (2017) 44 *Journal of Law and Society*, 56.

<sup>64</sup>A. Vauchez, above, n. 35.

<sup>65</sup>C. Kaupa, ‘Has (Downturn-)Austerity Really Been “Constitutionalized” in Europe? On the Ideological Dimension of Such a Claim’, (2017) 44 *Journal of Law and Society*, 32.

<sup>66</sup>Micklitz, above, n. 54.

<sup>67</sup>An important disagreement between private lawyers links to the question what kind of private law (traditional or regulatory) is actually more important for the lives of European citizens.

<sup>68</sup>This is not to say, however, that the IMR has had no impact on national private law debate. In fact, the growing importance of EU “regulatory private law”, which Niglia hardly recognises in his contribution, is likely to have had a bigger impact on national private law scholarship than the other way around. In this light, see also Micklitz, above, n. 54.

challenging the IMR rather indirectly as a “fall back” option. Moreover, compared to its breadth, traditional private law rarely enters into “conversation” with the EU, and it is usually through the courts (e.g. in unfair terms directive).<sup>69</sup> When it does, however, the exchange happens mostly on EU terms.<sup>70</sup>

Finally, I fully agree with Niglia’s suggestions that the resistances should be studied in their own right—and in fact, more recently, I have done exactly this kind of work.<sup>71</sup> Yet the two projects do not exclude each other: if anything, the study of “hegemony” must be prior to the study of resistance, otherwise we may have trouble understanding what it is we are resisting. Additionally, the academic exchange on the political ontology of resistance becomes tantamount, not only to aid the discussion, but foremost to open up the possibilities of actually reaching the normative objectives that we set out for ourselves.

## 7.2 | Optimisation

While Niglia’s critique slides somewhere between problematising the concept of IMR and resistance to it, Svetiev aims to develop an alternative account to the IMR as regards what is going on in the EU:

*The experimentalist regimes are triggered as responses to concrete problems, necessitating identification of desirable goals and tailoring locally solutions subject to both local and transnational input and monitoring of effects.*<sup>72</sup>

*To the extent that [the EU] experimentalist market regulation has any underlying rationality, it is a problem-solving one. [...] Instead of prioritising negative integration through deregulation and competitive markets, experimentalist governance is particularly conducive to advancing positive socio-economic rights precisely because it promotes contextualization through disciplined differentiation, while providing (dynamic) mechanisms for peer review and monitoring of local solutions.*<sup>73</sup>

The main academic interest behind such an account must lie in how these “concrete problems”, “desirable goals” and “local solutions” are actually found. Who and how does one get the chance to frame the goals and problems, and offer solutions? In order to understand how Svetiev sees these questions, let us thus look at one of examples he discusses, namely the energy market.

In energy markets, Svetiev suggests, the experimentalist propensity of EU market governance can be witnessed through various practices. On the one hand, in cases where the competition/market does not function, the EU allows the Member States to introduce price regulation—provided that it is differentiated according to the classes of consumers and limited in time (sunset clauses). Also, to counter some problems with contracting in these new markets, national energy ombudsmen got together to form a network, and produce a code of best practices to alleviate some difficulties with contracting in these markets. On the other hand, when access to gas infrastructural networks in France appeared difficult, the Commission agreed with the incumbent to gradually open up the infrastructure network in a way that would not be harmful to its operation. This reflexive approach to regulation can be seen, in Svetiev’s view, as the advancement of positive socio-economic rights through contextualisation (reaction to local failures of market functioning), which ultimately reinterpret the EU liberalisation objectives (markets cease to be “only about the competition”).

Now, while it is quite puzzling that such a disparate set of practices (ranging from court decisions to “public-private” partnerships) all come under the umbrella of experimentalism, there are much more important objections to the

<sup>69</sup>The fact that certain references are not submitted is indeed also relevant. Yet this is the case more if we focus on the study of private law, instead of the way in which the EU itself has engaged in regulating private law.

<sup>70</sup>For an early exception, see Brandner and Ulmer, above, n. 55.

<sup>71</sup>Bartl, above, n. 2.

<sup>72</sup>Svetiev, above, n. 10, at 662.

<sup>73</sup>*Ibid.*

account that transcend its own inclusiveness. The chief issue with the account is that it does not give us tools to determine what is the (appropriate) “context”, or “locality” where the “disciplined contextualisation” should take place. How do we determine the appropriate boundaries of such contexts, who is “in” and who is “out”? How do we establish that an energy market’s “regulatory silo” fulfils any normative demands that we may like to see from those producing rules? Certainly not all “contexts” advance socio-economic rights simply because they engage in “experimentalist” practices of peer review or monitoring.

The question of context boundaries is also crucial to the question of how we determine the problems to be solved. Every context will produce its own problems and try to solve them. Yet, these are not necessarily the problems that a democratic polity would concern itself with. Who has the power to frame certain issues as problems, and why? The account fails to engage with these questions: problems, as contexts, seem to self-define.

The lack of the conception of what is the appropriate context, or locality, translates also to an important institutional deficit. Instead of developing an institutional account, experimentalism seems to *discover* institutions (look there is a network or energy ombudsman, and there is a private-public partnership!). Yet again, how do we know that these institutions are accountable, inclusive—and actually address the problems of those excluded and vulnerable? What promises to be a “disciplined contextualisation” turns out to be a pretty unruly one.

In its sliding from descriptive to normative, from what is (we are already seeing these experimentalist practices) to what ought to be (we should have more of such experimentalist practices)—and back—the account displays a considerable status quo bias. This contraction of *ought* and *is* both gives us the vision of a happy new world, but it comes with a claim that we already living in that world. As such, the account certainly does not overflow with critical potential.

Beyond reinforcing the status quo, experimentalism also displays a technocratic bias. Focusing on “problem solving”, experimentalism in Svetiev’s interpretation tends to conceal the political and redistributive element of regulation. For instance, Svetiev presents the CJEU Aziz judgment as an example of EU problem-solving rationality, which disturbs the national (Spanish) “solutions” to regulating mortgage contracts, which seem too favourable towards banks.

Yet, is it really meaningful to talk about Spanish legislation and Aziz’s situation in the framework of “solving problems”? Is the CJEU’s decision really about “learning from experience”? Indeed, while the “problem” of Aziz may have ended with the CJEU decision in his favour, the “problem” for the Spanish banks (the fact that they would have more difficulty in enforcing their contracts) may have only just started.

“Problem solving” framing brushes over the fact that the real issue in Aziz is a redistributive conflict between banks and mortgage takers, and that there certainly is no *one* “correct” way to solve it. There are, perhaps, “better” or “worse” ways to solve it, but these will depend on our values or the normative appreciation of the situation. These questions seem to fall outside the register of experimentalism.

The same technocratic orientation becomes apparent when we question experimentalism from other perspectives and ask, for instance: where does political responsibility end up in this account? In what seems a response to my concern with the lack of problematisation of goals (online internal market) in the original IMR article, Svetiev responds:

*[T]he apparently limited (ex ante) politicisation of internal market goals in the legislative process is simply a reflection of lack of foresight about the kinds of implementation problems that might arise or the ways in which internal market rules may interact with local laws and regulations and consequently a lack of relevant collocutors (“publics”) beyond familiar ideological divides.<sup>74</sup>*

In Svetiev’s account, thus, the lack of *ex ante* politicisation of goals of the internal market is related to the lack of foresight about the implementation problems, and experimentalist governance—instead of, for instance, democratic political discussion—is the best response to this uncertainty. This is a rather important move in liberal political and democratic theory, in a two-fold manner. First, this account seems to suggest that the EU goals should be set in

<sup>74</sup>*Ibid.*, at 667.

bureaucratic procedures—by experts, stakeholders, or whoever self-identifies as participant in experimentalist governance—instead of the democratic political process. This position is a rather decisive break with any modestly democratic ideals. Secondly, by actually founding the theory of government on learning and experimentation, we largely abandon the idea of political responsibility. If governance is about trying out, experimenting, learning and improving, what is left to be responsible for?

One way how experimentalism can be “saved” is to portray it as a technique aimed at improving administrative practice: in such circumstances, no difficult questions are asked and the account focuses on delivering effectiveness in what is already considered to be a legitimate administrative framework. In fact, in the tradition of thinking about administrative practice starting from at least Max Weber, the variants of techniques such as monitoring, peer review, benchmarking, or sunset clauses, which Svetiev identifies as signposts of the experimentalist governance, would be considered as important elements of rational government—the tools for its optimisation.

## 8 | CONCLUSION

The theoretical framework of IMR provides the explanation of the “success” of neoliberal discourses in the EU. The framework locates this triumph in the interaction of the EU *institutional design of knowledge production* processes on the one hand, and the “ideological” consensus around neoliberal political rationality on the other. Entering by the backdoor of knowledge production, the thin neoliberal frame (efficiency—competition) has over time turned into an entrenched representation of the Internal Market. Moreover, due to this process of “reification” of EU political action, it has become increasingly difficult to challenge the neoliberal framings of the internal market—in spite of the fact that at certain points the ideological consensus around its technical prescriptions began waning.<sup>75</sup>

The proposed explanatory framework has been challenged by two scholars. Leone Niglia has raised the question of how various instances of resistance to IMR fit into its explanatory framework. Yane Svetiev has instead proposed a different way of thinking about the pattern of EU governance: that of experimentalist problem-solving rationality. While I respond to these critiques above, these scholars should be thanked for obliging me to articulate the IMR framework in much great detail. One issue is, however, still outstanding.

The main task of the IMR has been to provide a theoretical account of the pathways of neoliberalisation in the EU. Given the institutional “sensitivity” of the framework, it acknowledges its limits in providing a fully accurate empirical description of the dynamics of neoliberalisation in each and every specific field it covers. To compensate, however, it comes equipped with an *institutional analytics* that allows us to study the institutionalisation of discourses in functionalist entities, including the more specific instances of neoliberalisation in various institutional subcontexts in the EU. How then to apply this framework, and why?

To develop an “institutional topography” of a discourse,<sup>76</sup> the IMR’s institutional analytics prompts us to combine three levels of institutional analysis (micro, meso and macro) and identify both the institutional incentives to *appropriate*, as well as the spaces and incentives to *contest*, a particular discourse. At the micro level, we inquire into the role of language in mediating interactions between the purposes and a self-understanding of a particular institution on the one hand and a specific discursive frame on the other. At the meso level, the framework demands that we look at particular features of institutional design (everything from competences, the kinds of academic disciplines that prevail in the institution to legitimacy sources), including the “technologies” of government regularly applied (from impact assessments to opinion polls), and isolate the presence of incentives, or lack thereof, to “buy into” a particular discourse. Finally, at the macro institutional level, we examine a broader political context (not necessarily limited only

<sup>75</sup>As did, some have argued, with the last economic crisis. For a more recent account of the sort, see M. Jacques, ‘The Death of Neoliberalism and the Crisis in Western Politics’, *The Guardian*, 21 August 2016, available at <https://www.theguardian.com/commentisfree/2016/aug/21/death-of-neoliberalism-crisis-in-western-politics>.

<sup>76</sup>The framework proposed here does not give formal tools to identify a discourse itself. To that purpose, one can either turn to discourse analysis, or fall back on the work of others.

to political institutions) and explore the possibilities for the contestation of knowledge and framings put forth by governing institutions, including how much contestation we *actually* see.

The reason why we may want to engage in such an analysis is at least twofold. First, the analytics allows us to say something new about institutions. In particular, it assists us in finding out how far a particular institutional design encourages and maintains epistemic pluralism in the production of regulatory knowledge. This is particularly crucial in the institutional contexts beyond the state where “governance qua knowledge” tends to be a central tenet of their legitimacy. Second, the analytics also allows us to say something about a particular discourse. More precisely, it enables us to establish the level of penetration, and reification, of a discourse in a specific institutional context.

Ultimately, this form of institutional critique has an important constructive edge. It identifies possible forms, spaces and agents of resistance, equipping us both with tools and confidence that we can eventually change the world.

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