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DOI
10.1017/elo.2022.23

Publication date
2022

Document Version
Final published version

Published in
European Law Open

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Link to publication

Citation for published version (APA):
Tagiuri, G. (2022). How EU Law Politicizes Markets and Creates Opportunities for Progressive Coding. *European Law Open*, *1*(2), 390-401. https://doi.org/10.1017/elo.2022.23

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Download date:07 Feb 2023

European Law Open (2022), **1**, 390–401
doi:10.1017/elo.2022.23

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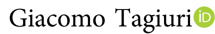
DIALOGUE AND DEBATE: A SYMPOSIUM ON MARTIJN HESSELINK'S RECONSTITUTING THE CODE OF CAPITAL

How EU law politicises markets and creates spaces for progressive coding

Giacomo Tagiuri



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(Received 6 May 2022; accepted 21 May 2022)

Abstract

This comment starts from a reading of Katharina Pistor's *The Code of Capital*, together with Martijn Hesselink's proposal for a progressive European code of private law in this issue. I emphasise how Pistor brings to legal debates a renewed awareness about markets as historically contextual and legally structured socio-legal configurations where hierarchies are pervasive. This awareness points at a path for action, which I understand as a project of market democratisation. I see Hesselink's proposal as contributing to this project. However, I offer a tweak to his argument by drawing on a pool of normative and empirical sensitivities developed by literature on governance and democratic experimentalism. On my reading, Hesselink's progressive code would be difficult to realise through democratic deliberation in the public sphere alone. The project would have better prospects for success if it relied on iterative destabilisation and redesign of existing market arrangements through platforms that allow for their contestation, the voicing of both popular and expert input in their redesign, and the monitoring of the new solutions. Thus understood, a progressive European code may rely on institutions and processes available in European Union (EU) law which create spaces for contestation of existing dominant assemblages of the modules of capital as well as their progressive rearticulation.

Keywords: EU law; progressive private law; markets; democratisation

1. Introduction

This comment starts from a reading of Katharina Pistor's *The Code of Capital*,[1] together with Martijn Hesselink's proposal for a progressive European code of private law in this issue. First, I emphasise how Pistor brings to legal debates a renewed awareness about markets as historically contextual and legally structured socio-legal configurations where hierarchies are pervasive. This awareness points at a path for action, which I understand as a project of market democratisation aimed at reconciling emancipation and material progress in various spheres of social life. I see Hesselink's proposal as contributing to this project. However, I offer a tweak to his argument by drawing on a pool of normative and empirical sensitivities developed by literature on governance and democratic experimentalism. On my reading, Hesselink's progressive code would be difficult to realise through democratic deliberation in the public sphere, be it in a legislature or in something like a convention. The project would have better prospects for success if it relied on iterative destabilisation and redesign of existing market arrangements through platforms that allow for their contestation, the voicing of both popular and expert input in their redesign, and the monitoring of the new solutions, which can also inform revision of the general rules.

[1] K Pistor, *The Code of Capital: How the Law Creates Wealth and Inequality* (Princeton University Press 2019).

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This contributes to a private law which I see as robustly democratic, but at the same time is prone to reconfigure the relationship between democracy and technocracy.

I then argue that European Union (EU) law, or if you want the European economic constitution, can be seen as supportive of Hesselink's project, or my reading of it. EU law exposes the diversity of forms of market participation which exists in Europe and offers platforms to deliberate interests and identities, as well as potentially reasons, including moral reasons of justice, implicated in different forms of market organisation. This points at a permanent politicisation of market-making, which is prone to include and emancipate larger and larger pools of citizens at every iteration of market design. If markets are robustly politicized, concerns that emancipation via market participation is too thin a basis for democracy may be dispelled: on this view markets are *fora* where identities are voiced and negotiated, not only material needs satisfied. Furthermore, EU law spurs interventions that already go in the direction of a materialised and constitutionalised private law. Hence, parts of Hesselink's progressive code may already be with us. My tweak also goes onto questioning the claim that Hesselink's project is or could ever be radical rather than incremental.

2. How *The Code of Capital* opens a path for action

The market as a natural and a-historical reality does not exist. Rather, there are *markets* which are historically situated and variable socio-legal configurations, plural and ever-evolving. Various scholarly traditions, from historical institutionalism[2] to science and technology studies[3] and economic sociology,[4] have been well aware of this fact. Legal scholarship has also explicitly explored the theme.[5] Pistor's *The Code of Capital* brings this awareness to the mainstream of legal scholarship, including European legal studies. As this dialogue issue illustrates, Pistor's work engages lawyers beyond critical and Marxist traditions in debates about how to reign in the present level of inequality and how to regain democratic control over markets and our future. Even more so, the book offers a language to do so, the language of *coding*, and various helpful metaphors that come with it, for example, one of the *modules* of private law and their *assemblages*, that I also employ throughout this essay.

The awareness that markets are plural and historically contextual configurations is ripe with political and reform possibilities. First, in current political landscapes, it does not seem trivial to reiterate that a normative judgement on the desirability of the market as such is impossible.[6] In turn, through institutional and legal design, as well as more informal bottom-up processes of politicisation, society can aspire to markets that work to the benefit of more participants than their current instantiations do. I read Martijn Hesselink's piece and his project for a progressive European code of private law as part of this renewed awareness about the market, its political dimension and reforms potential. More specifically, I read the project as aspiring to democratise private law and markets, by steering them towards more plural, emancipatory and inclusive social outcomes. This is a shift of focus for a European private law scholarship that, as Hesselink elsewhere observed, has been visibly constrained by *acquis positivism*,[7] and even in its more normative declinations, albeit with

[2]Eg, W Streeck and K Thelen (eds), *Beyond Continuity: Institutional Change in Advanced Political Economy* (Oxford University Press 2005). See more broadly the Varieties of Capitalism literature.

[3]See mostly M Callon (ed.), *The Laws of the Market* (Blackwell 1998).

[4]See in particular the work of P Di Maggio and V Zelizer: eg, P Di Maggio, *Culture and Economy*, in N Smelser and R Swedberg (eds), *Handbook of Economic Sociology* (Princeton University Press and Russell SAGE 1994); V Zelizer, *Economic Lives: How Culture Shapes the Economy* (Princeton University Press 2010); See also N Fligstein, *Markets, Politics, and Globalization* (Uppsala University 1997).

[5]See eg, H Dagan and D Markovits (special editors), 'The Market as a Legal Construct' 83 (2020) Law and Contemporary Problems. See also the law and political economy project: <https://lpeproject.org/>

[6]On this point see M Callon, 'Introduction: The Embeddedness of Economic Markets in Economics' in M Callon (ed) *The Law of Markets* (Blackwell 1998) (a 'choice between the denunciation and the celebration of the market' is impossible).

[7]M Hesselink, *Justifying Contract in Europe: Political Philosophies of European Contract Law* (Cambridge University Press 2021).

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exceptions,[8] primarily concerned with the justice of interpersonal relations, not society or the polity more broadly.[9] Hesselink, however, helpfully clarifies how interpersonal inequalities reinforce and structure societal ones.[10]

What stands in the way of markets that emancipate and include – or if you want where participation and voicing of interests and identities are possible for – the many rather than a few? In Pistor's diagnosis, the problem with contemporary capitalism lies in the original legal modules of private law (including property, contract, trust and collateral), which are prone to be creatively assembled to code ever-newer forms of capital. Hesselink, who fundamentally agrees with the diagnosis, clarifies that this predisposition of the modules has to do with the purely formal nature of the legal entitlements they provide, which makes them impermeable to substantive considerations about their justice, either at the interpersonal or social level.[11] The State willingly offers protection to new declinations and legal assemblages of the modules, in a process that solidifies well-established wealth, and allows those with access to good lawyers, multinational companies and the 1 per cent, to take the lion's share of new opportunities for wealth generation.

These processes work to the detriment not only of workers and consumers in the rich world and, even more so, dispossessed and racialised communities in the global south, but also, arguably, of entrepreneurship or, if you want, access to capitalist self-improvement. Indeed, as Pistor reiterates, not all capitalists are the same: there is a hierarchy of capital and capital holders. From this perspective, the type of inequality that seems best captured by Pistor's work is the growing inequality between the merely rich and the exorbitantly so: between the top 1 per cent and the rest of the top 10 per cent, or between the top 0,1 per cent and the rest of the top 1 per cent. This is compatible with Thomas Piketty's findings[12] – the bulk of the increase in inequality happens at the top of the income and wealth distribution – and reflected in a growing body of scholarship and reporting investigating the rise of high-end inequality,[13] and the drivers of middle-class decline.[14] On this view, the middle-class dream of markets that enable economic as well as personal and moral growth may be effectively shattered by the dynamics of capital coding. Preserving and expanding this dream is an important part of what I refer to as market democratisation. All in all, Pistor sees capitalism as endangering its very own foundations: capitalism is, in a certain way, self-destructive. Not a new argument,[15] but one which Pistor enriches and makes more plausible, by lucidly uncovering the legal micro-mechanisms through which inequality is reproduced and increased under advanced capitalism. Ultimately, such features of contemporary capitalism are also a risk for democracy, as power and privilege are prone to spill over from the economy into the polity.

Pistor possibly overstates the role of law in the processes of capital accumulation and inequality generation she describes: isn't cultural change, for example, of ideas and attitudes about acceptable

[8]H Micklitz, *The Politics of Justice in European Private Law: Social Justice, Access Justice, Societal Justice* (Cambridge University Press 2018); M Bartl, 'Internal Market Rationality, Private Law and the Direction of the Union: Resuscitating the Market as the Object of the Political' 21 (2015) European Law Journal 572.

[9]Hesselink, Justifying Contract in Europe (n 7).

[10]MW Hesselink, 'Reconstituting the Code of Capital: Could A Progressive European Code of Private Law Help us Reduce Inequality and Regain Democratic Control?' 1 (2) (2022) European Law Open 316–43.

[11]Ibid.

[12]T Piketty, *Capital in the 21st Century* (Harvard University Press 2014).

[13]D Shaviro, *Literature and Inequality: Nine Perspectives from the Napoleonic Era Through the First Gilded Age* (Anthem Press 2020).

[14]D Markovits, *The Meritocracy Trap: How America's Foundational Myth Feeds Inequality, Dismantles the Middle Class, and Devours the Elite* (Penguin Press 2019); D Markovits, *How McKinsey Destroyed the Middle Class* (*The Atlantic*, 3 February 2020) <https://www.theatlantic.com/ideas/archive/2020/02/how-mckinsey-destroyed-middle-class/605878/>

[15]I understand this to be a Marxist argument. For a contemporary version see W Streeck, *How Will Capitalism End?: Essays on a Failing System* (Verso 2016).

https://doi.org/10.1017/elo.2022.23 Published online by Cambridge University Press

levels of wealth and luxury, or the role of money in public life,[16] likely to be an important driver of inequality, as much as creativity in legal assemblage? What about the direction of technological change? Pistor may also not give enough credit to redistribution policies and various forms of economic regulation that arguably brought a large majority of the population in the West,[17] and larger and larger shares of those living in the developing world, to partake in the enjoyment of the wealth generated through capital coding. How otherwise to explain what would seem the enthusiasm with which many of those who are excluded from capital coding support capitalism? While these questions certainly stay beyond the scope of this contribution, they may inform my take on Hesselink's proposal.

But let me return to the point of hierarchy among capital holders, which I take to be one of the key analytical contributions of Pistor's work and one which helps my argument in this essay. As Pistor makes clear, there is a hierarchy of capital and capital holders, and the root cause of the present level of inequality appears to lie in the way in which these hierarchies are created and reproduced. To clarify, these hierarchies are not so much the product of factual power imbalances, a typical concern of private lawyers in the field of labour or consumer law, but are coded into the system and receive support through state law. In earlier work, Pistor had already detailed these hierarchies as they exist in, and even structure, financial markets[18]; *The Code of Capital* somewhat generalises the validity of this finding. All in all, the markets Pistor describes are not flat, but hierarchical: their workings ruled by power and legally encoded privilege, more so than by voluntary exchange, free choice, and persuasion. I take Pistor's book to uncover the pervasive role of hierarchies and power in markets as possibly the defining feature of advanced capitalism. Hesselink would add that these hierarchies are unjust as they are contrary to the notions of social justice that underpin most contemporary political theories.[19]

This awareness, however, need not be demoralising. As mentioned, Pistor shows that hierarchies are the product of deliberate legal and political choices to extend state support to ever more extravagant capital coding strategies. Hence, Pistor's analysis opens a path for action, one which Hesselink undertakes with his proposal for a progressive European code of private law. The awareness that markets are plural and contextual, together with the realisation of the pervasive role of legally constituted hierarchies in markets, exposes the proneness of markets to be politicised and democratised. If Pistor is right about the preponderant role of law and legal coding as drivers of the current level of capital accumulation and inequality, there may be reason for optimism. Changing the law may not be easy but would seem easier than changing ideas, the direction of technological change or law-like tendencies of capitalism.

3. Ways forward: constrain, code for the many, or redesign?

Pistor's discussion of possible ways to fix the system and to make it more equal and democratic is enlightening. I see three distinct grounds for intervention or strategies for improvement emerging in her discussion. The first strategy is *constrain* the ability of lawyers and capital holders to freely and creatively code capital. Most of the concrete proposals Pistor mentions go in this direction, for example, limiting access to arbitration or restricting private autonomy in the choice of conflict of law rules.

The second strategy is expanding the ability to *code* in the interest not of capital and capitalists, but of other categories. This strategy relies on existing modules of private law and uses similar coding strategies as employed by capitalists in the interest of the losers of globalised capitalism.

[16]On this see T Judt, *Ill Fares the Land: A Treatise on Our Present Discontents* (Penguin Press 2010). I thank M Hesselink for this suggestion.

[17]See A Baghci, 'The Challenge of Radical Reform in Pluralist Democracies' 1 (2) (2022) European Law Open 374–79.

[18]K Pistor, 'A Legal Theory of Finance' 41 (2013) Journal of Comparative Economics 315.

[19]Hesselink (n 10). See more broadly Hesselink (n 7).

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Pistor's story of how indigenous groups in Guatemala use property rights to advance collective claims on their land goes in this direction.[20] The modules of capital, to be sure, could also be assembled in the interest of more familiar losers: workers and consumers, small businesses, ethical financial investors, and the non-human world. Some of the contributions in this issue explicitly focus on this ground for action. Beckers accounts for how progressive strings of the code already emerge in the private sphere.[21] Leone shows how 'coding for the 99 per cent', by awarding the attributes of capital (eg, convertibility and durability) on the entitlements of workers and consumers, can also initiate in the public sphere through legislation that creatively assembles the traditional modules of private law.[22] I read Pistor as ultimately sceptical about these strategies and their transformative potential, including because they rely on the same formal legal entitlements that structure capitalism, thus ultimately reproducing its logic.[23] While I would intuitively be more charitable about some of these strategies, I recognise the limitation of focusing on them alone, including because of the difficulty in filling the gap in expertise and legal advice that weaker groups are able to procure, as well as the difficulty in making their potential gains permanent rather than ephemeral.

The third avenue is reinventing the modules: radically redesigning the institutions that underpin capital and capitalism. Pistor, at least analytically, appears to place most of her hopes on this ground, but she does not spell out what such redesign would entail. The radical markets of Weyl and Posner,[24] and Menke's temporary rights,[25] are offered not as solutions she is especially committed to, but as illustration of what redesigning the modules may require.[26] Given the purely formal nature of the dominant existing modules of private law, any insertions of social justice considerations in private law relationships currently need to come as external correction or check, either in the form of public regulation (the first strategy above) or countervailing powers (the second strategy). If unchecked, the current modules and resulting dominant assemblages cannot incorporate social justice concerns, hence, the need for redesign. Redesigned modules, I understand, would make it possible to align market outcomes to public interest short of continuous correction. As I argue later in this essay, similar solutions may already be nascent in existing law, and it may be practical and promising to describe and understand these interventions, which may offer a template for redesign.

While Pistor may prefer some strategies to others, she advocates for 'permanent incrementalism' as the best prospect to correct the route of contemporary capitalism. I take this as an invitation to pragmatically and gradually combine actions on the three grounds identified above. Hesselink claims that his proposal would amount to more than Pistor's *incrementalism* and that it is more *progressive* as it is forward-looking rather than focused on rolling-back the grounds gained by capital over countervailing interests. Still, his more concrete indications of what this would entail seem to include interventions on all grounds identified above.

The core of Hesselink's proposal as it advocates for a quite radical redesign of the modules of private law, 're-structuring the code of capital' as he puts it, seems to lie within Pistor's third ground for action above.[27] While he does not say too much to avoid the charge of an expert-driven

[20]Pistor (n 1) 23–30.

[21]A Beckers, 'A Societal Private Law' 1 (2) (2022) European Law Open 380–89.

[22]C Leone, 'Coding for the 99 Per cent? Principles and the Preconditions of Capital Minting' 1 (2) (2022) European Law Open 351–62.

[23]This intuition would seem confirmed by the work of H Lindhal, *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (Oxford University Press 2013) (indigenous people should distrust institutions not made for and by them). I thank an anonymous reviewer for this literature suggestion.

[24]EA Posner and G Weyl, *Radical Markets* (Princeton University Press 2018).

[25]C Menke, *Critique of Rights* (Polity Press 2020).

[26]However, Menke's proposal would contribute to the re-politicization of social and economic life, a project to which both Pistor and Hesselink seem committed to.

[27]Hesselink (n 10), 16.

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project, Hesselink clearly expresses a preference for legal entitlements which are never purely formal, but always substantively oriented, or based on a 'strongly materialised conception of private autonomy.'[28] These would point at private law rights whose enforcement is conditioned to aims that pursue interpersonal and social justice. But his progressive European private law would also recur to more conventional constraining strategies. For example, it would require reversing some of the CJEU decisions about freedom of establishment, such as the *Centros* jurisprudence[29] which by liberating companies from the real seat principle is arguably enabling a lot of capital coding. As Hesselink favours constitutionalisation of his code by enshrining its fundamental principles in EU treaties, such constraining strategies could turn particularly effective. How about coding for the many, or the left behind? Hesselink's proposals do not explicitly refer to these strategies. The 'radical' nature of his project would seem to marginalise these types of interventions, especially as they originate in the private sphere. Not unlike Pistor, Hesselink may think that these strategies are prone to stabilise the existing modules, thus making the prospects of more radical reform less likely. But Hesselink may welcome the coding of traditional private law modules in progressive legislation along the lines of what Leone describes, especially if this is the outcome of deliberation by those at various peripheries of EU society.

All in all, I take Hesselink's and Pistor's ways forward as largely congruent and relying on a mix of constraining, recoding and redesign strategies. Indeed, as I try to show later in the essay, while analytically separate, the three strategies above can build upon and mutually enable, if not reinforce, each other. While redesigning or rearticulating the modules of private law in the abstract may not be a viable solution to our problems, challenges to the existing dominant assemblages as articulated by various outsiders, including by means of the usual modules of capital, are essential for the emergence of spaces for deliberating any more radical redesign of the modules. I argue this would contribute a more robust democratic basis for the code than the one Hesselink proposes. Here comes my tweak or objection to his argument, which I articulate in the rest of the article: while I share the substantive orientation of the progressive code project to achieve a more robustly materialised private law, and a democratic basis for it, I partly disagree with Hesselink's characterisation of how such progressive private law should or could emerge in Europe.

4. How to make the code democratic?

Hesselink insists on the need for democratic deliberation as the right, and only possible way in which his progressive code could come about. Democracy is a normative ideal for the code and a purely expert-driven code would inevitably fail; that is why Hesselink does not provide specific indications about how the modules of such new code ought to look like. While I agree that democracy is a normative ideal in the design and functioning of markets, I find the opposition between democracy and expertise, which structures Hesselink's argument, not very helpful to advance his project. Both narrowly technocratic or expert-driven and the product of democratic deliberation seem to describe very little of existing private law, at the national, and even more so at the EU or translational level. Between these two highly idealised opposites, there exist concrete strategies and institutions that allow to voice, mediate, and reconcile different interests and identities in the governance of markets, while also allowing for expert insight, including about moral arguments of justice and injustice, to shape markets. The balance may often be off, meaning for example too skewed towards technocratic input or ignoring, if not harming, the interests of specific groups, as well as moral reasons. Yet, most existing law in Europe is the product of both expert and popular input, and the coexistence of these two sources of input is generally desirable. While Hesselink's generally pluralist stance on the justice of EU law as articulated elsewhere would seem receptive to this point,[30] his

[28]Ibid.

[29]C-212/97 *Centros* [1999] ECLI:EU:C:1999:126.

[30]Hesselink (n 7).

https://doi.org/10.1017/elo.2022.23 Published online by Cambridge University Press

arguments as presented in this issue may overstate the potential of the traditional institutions of parliamentary democracy to produce the progressive code.

Indeed, I want to question the idea that democratic *deliberation* adequately captures what is most needed for a progressive code, a code which is socially just and democratic, to emerge. The deliberation Hesselink seems to favour happens in the public sphere, mostly within the legislature, and it is chiefly deliberation of the answers that specific theories of justice would provide to various social problems. This type of deliberation, including in the legislature, in a convention, or potentially also through the direct involvement of citizens[31] should certainly be part of the recipe for the progressive code. It may even be a very important part of the recipe if we equate the progressive code with a charter of private law justice to be inserted in the EU treaties. But any more complex understanding of the progressive code – as aimed at creating spaces for the redesign of private law modules, which I believe to be what Hesselink ultimately advocates – would be poorly served by deliberation of different reasons (including of justice) in the public sphere. This type of deliberation points at rules or principles that can be designed *ex ante*, at a certain fixed moment in time, and, at best, periodically revised. Arguably, instead, the ways in which progressive solutions to the governance of markets and private law relations emerge are through iterative destabilisation and redesign of existing market arrangements. From this perspective what we may need for a progressive code to emerge is robust and sustained questioning of both the existing modules and their currently dominant assemblages, *fora* for voicing interests and identities that may be erased by existing laws nor adequately recorded by dominant political narratives, as well as institutions that allow to monitor the effects of the new modules or assemblages.

My position here is rooted in a dose of intuitive scepticism about the potential of deliberating different normative arguments to produce progressive policy solutions.[32] But it also draws on a different pool of normative sensitivities and empirical investigations which can be very roughly ascribed to the tradition of democratic or governance experimentalism,[33] in turn inspired by Dewey's philosophical pragmatism.[34] I take this tradition to show that especially under conditions of increased social and economic complexity and factious political landscapes, any progressive, which is emancipatory and inclusive, solution to the governance of markets must be the product of tailoring general rules to local conditions, monitoring their effects, including through opening the rules to the input of stakeholders whose interests we may not know, and subjecting the designed solutions to iterative redesign based on experience learned. While experimentalism is problem-oriented and pragmatic, it is not a form of technocratic governance, as some critics may suspect. Many writing in its tradition are acutely concerned with democracy. For example, Mangabeira Unger, one of its early proponents, sees practices 'of repeated and cumulative institutional reconstruction' as the only way to realise democracy which, understood as the aspiration to combine emancipation and material progress in the various fields of social life, is the only viable alternative to conservative resignation to the status quo or revolution.[35] Here, to be sure, the terms democracy and democratisation capture more the substantive responsiveness of the law to the material circumstances of citizens, its ability to emancipate and include, than the citizens political agency as free and equal subjects. Arguably, however, the former can be seen as precondition to the latter.

This version of the progressive coding project may require not so much more limits to coding, but more challenges to the existing codes, including by means of minoritarian or utopian assemblages of the existing modules of private law, as ways to figuring out what the necessary limits to

[31]This is in line with one of Pistor's proposals 'Legal Coding Beyond Capital?' 1 (2) (2022) European Law Open 344–50.

[32]Hesselink more strongly believes in this potential as signaled at various points in his scholarship. See eg, Hesselink (n 7).

[33]See for example MC Dorf and CF Sabel, 'A Constitution of Democratic Experimentalism' 98 (1998) Columbia Law Review 267.

[34]J Dewey, *The Public and Its Problems* (Holt Publishers 1927).

[35]R Unger, *Democracy Realized: The Progressive Alternative* (Verso 1998).

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coding are and where the existing modules actually need redesign. I may be wrong, but I see this as a refinement of Hesselink's agenda and how to realise it, not as a radically different project. This path to a progressive code is closer to Pistor's 'persistent incrementalism' than Hesselink's more radical aspirations, and it may be a more viable strategy to politicise and democratise markets, a project to which I think both Pistor and Hesselink are committed. Arguably, this refinement to Hesselink's agenda makes it not only more normatively desirable, including because of more robustly democratic at least under some conceptions of democracy, but also more feasible. Its enhanced feasibility rests on the fact that EU law, or if you want the EU economic constitution, possesses structures and processes, as well as a language and experience that favour the bottom-up emergence of different models of market organisation, different pieces of which could be seen as emerging modules of a progressive code. As I have argued elsewhere and as I report in the next section, this can be construed as pointing at a permanent politicisation of market-making which is ultimately prone to the democratisation of markets.[36]

5. EU law as market democratising: an emerging progressive code?

In this section, I briefly illustrate how the structure and process of EU law especially in the areas of internal market and competition, which is a large part of what is often referred to as the EU economic constitution, offers platforms for politicising markets and thus creates the preconditions for more progressive private law modules or assemblages to emerge. This awareness is inspired by a scholarship that emphasises the deliberative qualities of EU executive law-making,[37] adjudication,[38] as well as administrative settings,[39] which cannot be captured by narrow labels of technocracy while innovating the structures of representative democracy.

As I have elsewhere argued, a key element of the propensity of the EU economic constitution to create spaces to politicise and democratise markets can be described as a process of pluralisation.[40] The possibility of such a pluralisation is particularly visible in EU internal market adjudication: it derives from the fact that EU integration proceeds through constant destabilisations of habitual modes of organising markets and participating in them at the local level, typically through the challenges of market participants that adopt alternative or innovative models of economic participation. Local modes of organising markets can be framed as obstacles to free movement and thus become objects of scrutiny and deliberation through comparison with other existing models and arrangements. Member States in internal market cases need to provide objective reasons for the entrenchment of such economic arrangements, reasons that are typically accepted only when considered to be rational, salient and tailored enough to justify the application of the local market rules and regulations also to foreign business and their products. A similar justification framework applies to private businesses in competition law cases; their business practices and agreements subject to a form of scrutiny akin to proportionality analysis in internal market cases, especially when semi-public interests are involved.[41]

[36]G Tagiuri, *Can Supranational Law Enhance Democracy? EU Economic Law as a Market-Democratizing Project*, 32 (2021) European Journal International Law 57.

[37]C Joerges and J Neyer, 'From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalization of Comitology' 3 (2002) European Law Journal 273.

[38]O Gerstenberg, 'The Justiciability of Socio-Economic Rights, European Solidarity, and the Role of the Court of Justice of the EU' 33 (2004) Yearbook of European Law 245 (referring to the absence of a final decider in judicial review). See more broadly Oliver Gerstenberg and Charles Sabel, 'Directly-Deliberative Polyarchy: An Institutional Ideal for Europe' in C Joerges and R Dehousse (eds), *Good Governance in Europe's Integrated Market* (Oxford University Press 2002) 289.

[39]HW Micklitz and Y Svetiev, 'The Transformation(S) Of Private Law' in HW Micklitz, Y Svetiev and G Comparato (eds), *European Regulatory Private Law – The Paradigms Tested*, EUI Working papers, LAW 2014/04, 69–97; See Y Svetiev, 'The EU's Private Law in the Regulated Sectors' 22 (2016) European Law Journal 659.

[40]Tagiuri, Can Supranational Law Enhance Democracy? (n. 36)

[41]See most recently C-230/16 *Coty Germany* [2017] ECLI:EU:C:2017:941.

https://doi.org/10.1017/elo.2022.23 Published online by Cambridge University Press

It is possible to construe at least some of these local forms of organising markets as challenges to entrenched forms of capital coding, and the outcomes as constraining opportunities for capital coding. Think of the collision between EU competition law and a regulation by the Dutch bar to prohibit all multidisciplinary partnerships between members of the bar and accountants.[42] These types of private regulations were defended as needed to preserve the quality and independence of legal advice but constrained the creation of economies of scale in markets for legal services and opportunities for multinational interdisciplinary firms to expand abroad. The CJEU validates these restrictions, not by recognising that competition does not extend to them,[43] but by subjecting the arrangements to intense scrutiny, which results in a finding that they may be proportionate restriction of competition justified in the public interest. Inviting competition law to destabilise such arrangements is what triggers the deliberative potential. Think also of recent debates about sustainability agreements and their compatibility with EU competition law. Some have discussed the possibility of their exemption from competition law altogether,[44] but again, scrutiny, not *ex-ante* exemptions, triggers a space for deliberation and may allow for more progressive rearticulations of these private law assemblages. On the subject of sustainability agreements, competition law may offer a framework to figure out whether the said agreements entrench the market power of ever more powerful producers and retailers, or genuinely aim at improving environmental or animal welfare standards.[45] The above are questions where Hesselink's progressive code may want to have a bearing: it seems very hard to imagine which principles would the progressive code be codifying in order to contribute to such questions, if not by observing these types of collisions or destabilisations as well as encouraging their emergence.

Even more so in internal market cases, the justificatory framework of the EU is broad enough to allow for salient 'non-market' interests to prevail. As observed in the scholarship, *Cassis* expanded the list of public interest reasons that may justify restrictions to free movement: 'the point of Cassis, accordingly, was to unfreeze the EC's constitutional development by expanding the class of legitimate social reasons to include general-clause-like "way-of-life-reasons" – and thus to broaden the scope of, to dynamize and to adapt to changing realities and public sensibilities, the process of constitutional balancing.'[46] Take, for example, retail regulation and the protection of small shop owners. The Commission targeted national retail licensing schemes designed to assist small retailers as potential restriction to free establishment.[47] The CJEU clarified that such rules could be justified insofar as they pursue urban planning considerations and/or protect the consumer interest to a wide choice of retail channels. But the way the rules were implemented in various Member States tended instead to protect stable market demand to the benefit of powerful local supermarket chains.[48] The deliberations that EU law induces concerning such rules open possibilities for redesigning them in ways that better serve interests such as the survival of small traditional businesses. As this illustrates, EU law is permissive of regulatory schemes that seek to reverse or even out hierarchies in markets. Moreover, EU law adjudication offers opportunities to re-articulate both the objectives and instruments of national and local market rules.

I acknowledge that at present, the initial trigger for these destabilisations may be construed as liberalising: the local forms of organising markets present a *prima facie* obstacle to market

[42]C-309/99 *Wouters* [2002] ECLI:EU:C:2002:98.

[43]In a different context, this would be the type of solution adopted in C-67/96 *Albany* [1999] ECLI:EU:C:1999:430.

[44]See for example: S Holmes, Climate Change, sustainability, and competition law, 8(2020) Journal of Antitrust Enforcement 372.

[45]See for example: Dutch Authority for Consumers and Markets (ACM), Draft guidelines "Sustainability Agreements", available at https://www.acm.nl/en/publications/draft-guidelines-sustainability-agreements (Accessed June 27, 2022).

[46]Gerstenberg and Sabel (n 38) 329.

[47]Eg, Case C-400/08 *Commission v. Spain* [2011] ECLI:EU:C:2011:172 (these regulatory schemes required a specific authorization for the opening of larger stores, requiring instead no license for the opening of smaller stores).

[48]G Tagiuri, *The Cultural Implications of Market Regulation: Does EU Law Destroy the Texture of National Life?* unpublished dissertation defended at Bocconi University, June 12, 2018. On file with the author.

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freedoms or competition, which EU law irritates. This may be viewed as a limit of the potential of EU law to politicise markets, especially insofar as it stabilises a hierarchy between economic and non-economic interests.[49] But the outcome of these conflicts or collisions is seldom narrowly deregulatory or liberalising. Furthermore, and more generally, it is only these challenges and destabilisations of the local ways of organising markets that let the progressive potential of these local arrangements to emerge. Uncontested local market arrangements easily turn protectionist and exclusionary; EU law creates spaces for their rearticulation in ways that make them more inclusive and progressive. To be sure, these spaces are not immune from hierarchies and power structures, but they may be less acute than in other settings. As it has been observed, the non-outcome determinative nature of the European Court of Justice decisions and the lack of a final decider in EU law adjudication are favourable to the emergence of novel solutions and assemblages of the modules of capital through the input of firms and consumers of different kinds, their representative organisations, local government and EU institutions.[50]

Other spaces for the emergence of progressive strings of a new code may be found in the decisional practice of administrative authorities, such as financial regulators or competition authorities (CAs) in the EU. These authorities employ strategies whereby the validation or limitation of certain business practices or products is temporary and conditioned on the emergence of new evidence. Consider an ESMA (European Securities and Markets Authority) decision to temporarily ban the sale of Contracts for Difference (CFDs), a particularly risky type of derivative financial instrument, to retail investors.[49] The ban was conditioned on the emergence of new evidence, for example, evidence that for at least some type of retail investors the instrument may be beneficial. Similar strategies are also used in commitments decisions in competition cases, where CAs periodically revise and monitor the effects of remedies jointly designed with the undertakings involved.[52] Moreover, through market testing, CAs try to gauge the impact of their implementation strategies on the ground by inviting responses by affected stakeholders. These institutions and strategies have been theorised by scholars as part of an emergent experimentalist infrastructure for EU market regulation and governance.[53] While these instruments may not currently be used for particularly progressive purposes, they may also hold promise for the project of the progressive code. The point here is that through these decisional practices, spaces for deliberation are opened, where deliberation happens around a very precise decision or remedy, not in the abstract. To the extent that they are not already, problems of inequality and justice may benefit from similar approaches.

If Hesselink' project had to take ground, and we had to insert, as he proposes, operationalisable commitments to private law justice in the EU treaties, the triggers of the de-stabilisations could also be social justice-oriented rather than liberalising. On this view, individuals and firms could use EU treaty law to contest local capital coding strategies or assemblages of the private law modules that harm social justice or accentuate inequality. While this constitutionalisation would provide a more robust protection of these justice commitments, by shielding them from interference from the already constitutionalised internal market and competition rules, EU law already offers very concrete indications of what these collisions may look like. All in all, as Hesselink

[49]Although, as it has been argued, the CJEU does not always institute a hierarchy between market and social goals, and rather pursues a logic of reconciliation between the two: L Azoulai, 'The Court of Justice and the Social Market Economy: The Emergence of an Ideal and the Conditions for Its Realization' 45 (2008) Common Market Law Review 1335.

[50]Gerstenberg, The Justiciability of Socio-Economic Rights (n 38). See also Y Svetiev and G Tagiuri, *The Opportunities and Dislocations of Technological Change: EU Law as a Coping Mechanism* 24 (2017-2018) Columbia Journal of European Law 612.

[51]European Securities and Markets Authority Decision (EU) 2018/796 of 22 May 2018 to temporarily restrict contracts for differences in the Union in accordance with Article 40 of Regulation (EU) No 600/2014 of the European Parliament and of the Council.

[52]Y Svetiev, *Experimentalist Competition Law and the Regulation of Markets* (Hart 2019); in particular Chapter II.

[53]Ibid.

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acknowledges, EU secondary law is already constitutionalised in the Member States and local market rules can be challenged for inconsistency with EU secondary law, much of which, no matter what its legal basis, is broadly social in character.[54]

Think of the much-reported Aziz saga, which seems to offer a good example of how capital-friendly rules inserted by the Member States are offset by EU secondary social law which is for all practical purposes constitutionalised. In the *Aziz* case, mortgage owners in post-austerity Spain were able to rely on EU law to resist the foreclosure claims of local banks, claims that were being facilitated by the Spanish national law.[55] The potential of the EU consumer acquis to constitute a semi-constitutional structure for private law relations is reinforced by findings of the CJEU for which different regulatory regimes are interlinked and must be construed as a 'single, overall set of rules which complement each other.'[56] The extension of at least some of the forms of protection that consumers enjoy to business-to-business relationships through various recent initiative would seem to reinforce this social orientation and also appease concerns about EU private law having a narrowly consumerist focus.[57] In the recent directive on unfair business practices in the agricultural sector, fixing the imbalance of power between farmers and retailers in contracts, which is at the interpersonal level, is explicitly linked to the social justice dimension and the goal of preserving the livelihood of farmers.[58] A similar link seems strong in initiatives concerned with business-to-business relations in the digital sector.[59]

Do the above institutional features of EU law enforcement and substantive legal interventions count as an emerging progressive code of private law? I would say they are certainly a start. From this perspective, I would disagree that 'self-evidently, the constitutionalization of core principles of justice for European private law would mean a radical break with the current constitutional framework of the EU.'[60] The constitutionalisation of some of the progressive principles advocated by Hesselink is already here, certainly in a nascent form, but possibly also in a well-developed one. As I have already hinted at in this essay, both Pistor and Hesselink may underestimate the degree to which some of their envisaged solutions are already with us.

6. Conclusions

I have here painted a benign picture of EU law as possessing institutional and substantive features that are supportive of Hesselink's agenda for a progressive European code of private law, and, to an extent, may already be realising part of that agenda. The mechanism through which this happens is through constant destabilisation of market forms at the local level, which points at their permanent politicisation and potential for democratisation. From this perspective, I agree that a progressive code can only be European and not national. But this is not so much for reasons of political power as for the EU's uniquely transnational nature and its form of government, which are exceptionally inducive to the emergence of such a code. While I cannot argue that on balance

[54]As acknowledged in the Tobacco advertising case, the goal of EU legislation adopted based on the internal market competence (Art. 114 TFEU) can be primarily non-economic. Case C- C-376/98 *Germany v Parliament and Council* [2000] ECLI:EU:C:2000:544.

[55]Case C-415/11, *Aziz v. Catalunyacaixa* [2013] ECLI:EU:C:2013:164 (in these cases, the home owners/borrowers are protected by Council Directive (EEC) 93/13 on unfair terms in consumer contracts, OJ 1993 L 95, 21.4.1993, pp. 29–34.

[56]C-453/10, *Perenicova* [2012] ECLI:EU:C:2012:144.

[57]See for this claim M Hesselink, 'Injustice in European Private Law' (21 December 2020). EUI Department of Law Research Paper Forthcoming, Available at SSRN: <https://ssrn.com/abstract=3752748> (accessed on June 27, 2022); See also Pistor, 'Legal Coding Beyond Capital?' 1 (2) (2022) European Law Open 344–50.

[58]See Directive (EU) 2019/633 of the European Parliament and of the council of 17 April 2019 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain, OJ 1993 L 95, 21.4.1993, pp. 29–34. The fact that the legal basis is the CAP (Art. 43.2 TFEU) seems to confirm this orientation.

[59]See the Proposal for a Regulation of the European Parliament and of the Council on Contestable and Fair Markets in the Digital Sector (Digital Markets Act), COM/2020/842 final.

[60]Hesselink (n 19).

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EU law is more supportive of a progressive code than reinforcing the dynamics of capital coding described by Katharina Pistor, EU law is hospitable to, and may even encourage, solutions across the three strategies of constraining, recoding for the many and redesigning the modules of capital. It is for various legal communities in the EU – lawyers, institutions, scholars, and teachers – as well as more broadly citizens and civil society, even beyond Europe, to become more aware of these opportunities and use what is already there to complete or expand the progressive code.

Competing interests. The author has no conflicts of interest to declare.

Cite this article: Tagiuri G (2022). How EU law politicises markets and creates spaces for progressive coding. *European Law Open* **1**, 390–401. https://doi.org/10.1017/elo.2022.23

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