ON THE LEGITIMACY OF EUROPEANISING PRIVATE LAW: Considerations on a Justice-making Law for the EU Multi-level System

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Introduction

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

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

I Three competing patterns of legitimation

1 Translated by Iain F. Fraser, EUI Florence. A preliminary German version of this essay was presented at a workshop on private law theory organised in co-operation with Gunther Teubner (Frankfurt a.M.) at the European University Institute in April 2002. That text was rewritten for the Ius Commune Conference in Amsterdam on 28-29 November 2002, and subsequently revised again. I would like to thank many participants of the Amsterdam conference and the contributors to the workshop in Florence for their comments and suggestions. I am in particular indebted to Christoph Schmid (Florence/Munich), much more than the references to his work in my footnotes can indicate.

The artificially created term in the subtitle is a translation of the German construct Recht-Fertigungs-Recht, a notion used by Rudolf Wiethölter in a recent essay: ‘Recht-Fertigungen eines Gesellschafts-Rechts’ (forthcoming in Christian Joerges and Gunther Teubner (eds.), Rechtsverfassungsrecht. Recht-Fertigung zwischen Privatrechtstogmatik und Gesellschaftstheorie, Baden-Baden: Nomos). Iain F. Fraser suggests the translation ‘just-ifications of a law of society’, adding that the German Recht-Fertigung can be etymologised as making/manufacturing law/right. ‘Justi(ce)-fication’ or ‘justice-making law’ may retain a touch more of the German term’s message. But it needed a connoisseur of Roman law, namely Wolfgang Ernst (Bonn), to remind me that justum facere is the common root of Recht-Fertigung and justification.

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

And, in fact, legal science did ask the question of the basis of the validity of European law ‘from the outset’, namely, in the very stage of the establishment of the EEC. It is my impression that this happened more fundamentally in Germany than elsewhere - not necessarily for good reasons, but certainly for compelling ones: the Federal Republic was still a very young democracy at that time and could not be expected to call this achievement into question. At the same time, it was dependent on being included in Europe. The Basic Law of 1949, however, had anticipated such dilemmas and provided a sibylline and prudent response: it had constitutionalised both principles, the inviolability of democracy (in Article 79 III) and its openness to integration (in Article 24). Is this a paradox documenting the intrinsic contradictoriness of all law? It is, at any rate, a challenge around which all European law to date must turn and which keeps its interpreters so restless. I wish to distinguish between three sets of attempts to find fixed points here and give the European process a firm normative basis.

I.1 Market rationality as a principle of (constitutional) law?

The first, ‘ordo-liberalism’ (a German version of neo-liberalism), was ready even before the EEC existed. It had been developed in the turmoil of the Weimar Republic, and posited that a free order for economic life must be legally shaped (‘constituted’) so as to be protected from

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the opportunistic, discretionary encroachments of politics. This tradition survived the Third Reich, and marked the Federal Republic’s sensibility in relation to economic policy as Ordnungspolitik. In the course of European integration, ordo-liberalism became the German ‘dominant theory’, with a peculiar double meaning for both components of the term: it ‘dominated’ among professors of economic law and in many unofficial and officious policy statements; but the practice of law and of politics looked different. The same holds true for the Community and its law: The ‘four freedoms’ guaranteed in the EEC Treaty, the opening up of the national economies, the bans on discrimination and the competition rules, were understood as a ‘decision’ in favour of an economic constitution which met the conceptions of the ordo-liberal school with regard to the framework conditions for a competitive market system. And the very fact that Europe was set in motion as a mere economic community conferred plausibility on the ordo-liberal argument: through the interpretation of the economic law provisions in the EEC Treaty as a legally established order committed to guaranteeing economic freedoms, the Community gained a legitimacy of its own, which was independent of the institutions of the democratic constitutional state, and from which legally binding policy commitments of this Community followed. This was a framework which left room for alternatives. For many years, in fact, until the internal market programmes of 1985 and the Single European Act of 1987, private law was left to itself. In the course of these initiatives, the legal principle of mutual recognition was discovered for private law, thus establishing the hope that the mechanisms of regulatory competition would promote an

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7 Again (see note 1 supra) a notion which tends to lose its meaning in translation. 'Economic governance’, the term used in pertinent documents of the European Convention website (<http://european-convention.eu.int>) may be as close as one can get.


9 Admittedly, the many important policy fields exempted from Ordnungspolitik in the EEC Treaties were then to be understood as mere exceptions from the governing ordo.


‘economic’ rationalisation of private law in Europe. At any rate, a European code of private law was also envisaged in the early 1990s. The newest version of this idea is now, however, called the ‘privatisation of private law’.

I.2 Integration functionalism

The ordo-liberal assignment of constitutional validity to the ‘system of undistorted competition’ was never dominating, certainly not beyond German borders. On the one hand, the normative yardstick it provided seemed simply to narrow to provide guidance for the broad range of activities in which the European Economic Community was involved. Equally important, the idea of an ‘economic constitution’ was not accepted, or was simply unheard of, in the legal disciplines which started to explore the ‘nature’ of that new phenomenon. That is certainly true for international law. But even in German constitutional law (law of the state, Staatsrecht), the economic policy was widely held to be the responsibility of the - democratically elected - government. This exactly was the challenge for the new discipline: since this type of legitimacy, i.e., one based on a parliamentary majority, was not available for supranational political governance, it became imperative to find an alternative basis for legitimising supranational governance. Hans Peter Ipsen succeeded in developing a particularly interesting response. He characterised the (then) three European Communities as ‘special purpose associations for functional integration’ (Zweckverbände funktioneller Integration). The term ‘special purpose associations’ denoted areas not foreseen in the ordo-liberal concepts - without, however, exposing Community law to democratic requirements. As a special purpose association, Europe was supposed to deal with questions of ‘technical realisation’, i.e., administrative tasks that could - and had to - be conveyed to a supranational

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


15 For an instructive account of the legal history, see Ch. Tietje, Internationalisiertes Verwaltungshandeln, Berlin: Duncker & Humblot 2001, 50 ff., 86 ff., 155 ff.

bureaucracy.  

That all this has to do with private law may seem a far-fetched assertion, but it is, perhaps, easier to understand if one bears in mind that Ipsen’s functionalism was a continuation at the European level of the second tradition in German economic law, which K.W. Nörr has called the concept of ‘organised economy’. This tradition is agnostic as to the ordo in its economic policy. To put this in a constitutionally positive way: it leaves the ordering of the economy to the democratically certified legislator. But, once again, the question arose how politics is to be legitimised if it outgrows this framework without being able to find a basis in international law? Ipsen’s ingenious answer: Europe should be understood as institutionalising technocratic, functionalist rationality as the basis of and contents of its law. And this type of output legitimacy seemed, for a considerable period of time, to be an adequate cause for what integration policy was actually doing. However, this ceased to be the case when the by now legendary programme to ‘complete’ the internal market by 1992 was implemented. Europe then witnessed its own ‘re-regulation’. It started to complement its market building efforts with new regulatory strategies that, according to Giandomenico Majone, would lead to the transformation of the European Community into a ‘regulatory state’.

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

I.3 Europe as a Sozialstaat (welfare state) and codifier of private law?

‘Hard Code Now!’ This title sounded a bit like a battle cry and was meant to. Ugo Mattei, who inscribed it on his banners, is more conciliatory and circumspect in reality than the slogan he chose is. A European civil code ought to lay down binding provisions, but be

20 For an interim balance, see G. Majone, Regulating Europe, London: Routledge 1996. Since then, the conceptual edifice has been steadily refined, for example, in id., Non-majoritarian Institutions and the Limits of Democratic Governance: A Political Transaction-Cost Approach, Journal of Institutional and Theoretical Economics 157 (2001), 57 ff.
21 For more details, see Ch. Joerges and G. Brüggemeier, Europäisierung des Vertrags und Haftungsrechts (note 2 supra); Ch. Joerges, The Impact of European Integration on Private Law (note 2 supra).
content with a minimal programme and be process orientated. Only in this way could it fit the ‘social fabric of European capitalism’. Would this, then, mean a code ‘with deep enough foundations and high enough vaulting’ to include these social matters ‘in its conceptual edifice’ to a sort of Otto von Gierke redivivus?23 Otto von Gierke may be forgotten outside Germany, but his critique of the formalism of the German code still seems to be alive and topical.24

Would the ‘social’ dimensions of private law be in a safe harbour in a European civil code? This is a question that does not concern private law alone, but is connected with the fate of the welfare state as a whole. We shall come back to this.25 The difficulties that such a vision faces are, however, so massive that there is no sense in putting them off. To anticipate the argument that we are developing: the normative quality of the constitutional ‘social private law’ is dependent on the interplay of parliamentary legislation and the non-parliamentary production of law, on regulatory policy, special statutory law and codification, on expert communities and on the general public.26 These circumstances are not present in the European context, and will not emerge in any near future. That this is the case follows simply from ‘state of the (European) Union’: this polity is not unitary, but plural27 (‘heterarchical’, as some call it;28 or ‘mixed’, as others do29). In it, there are - relatively - autonomous political units, none of which are empowered with the Kompetenz-Kompetenz which would be needed for an authoritative resolution of jurisdictional conflicts. The result is a very specific disjunction of ‘society’ and ‘state’, of economic freedoms and political rights, market citizenship and political citizenship. Let us distance ourselves from the two approaches initially dealt with: Europe has never become a ‘market without a state’ in which a supranational economic constitution can structure the systems of private law; and it is even less the European transformation into a statal entity with comprehensive political powers. Instead, it is a tertium which finds itself in a ‘constitutional moment’ that will continue to last

25 Sections II.3 and III infra.
II Three sets of examples

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

II.1 Centros and Überseering: The transformation of the freedoms of market citizens into political rights, and the obsolescence of traditional private international law

Centros31 may be regarded as the ECJ’s most interesting judgment on European market building since the legendary Cassis de Dijon decision of 1979,32 it is, at any rate, the most intensively debated one.33 Expectations about the subsequent Überseering litigation were correspondingly tense.34 So much has been written that it would seem appropriate to start with the three theses that are to be established below: (1) This case law transforms economic freedoms into political rights. (2) It strives towards a juridification (proceduralisation) of regulatory competition. (3) It has the potential of ‘constitutionalising’ the Europeanisation process through a law of just(ce)-fication that reaches beyond both orthodox supranationalism and traditional private international law.

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


32 Rs. 120/78, Slg. 1979, 649 - Cassis de Dijon.


II.1.1 Centros

The judgment in Centros concerns the core of the European legal acquis, namely the freedoms of market citizens which apply directly and ought therefore to take primacy over national law. Moreover, the decision is widely perceived as a step towards a long expected new type of ‘negative integration’, because it seems to expose the national company laws to regulatory competition. But Centros is more sophisticated than such interpretations suggest.  

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

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

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

II.1.2 Interpretation

The ECJ is seen by some as cautiously continuing its earlier case law on freedom of


36 This is how the maître penseur of private international law, G. Kegel, interpreted what the Brydes were doing in his Editorial in Europäisches Wirtschafts und Steuerrecht (9) 1999 (‘Es ist was faul im Staate Dänemark und anderswo …’ - ‘There is something rotten in the State of Denmark’).

37 Para. 13.


establishment⁴⁰ or radicalising it in a questionable fashion.⁴¹ The incorporation theory (Gründungstheorie) is seen as having won through against the Sitztheorie (company seat principle) with the help of the ECJ.⁴² None of this is true, it is argued by others: in Denmark, the incorporation theory applied anyway, and recognition of the seat of the company principle through the Daily Mail decision⁴³ does not come into it: hence, it is business as usual for private international law (PIL).⁴⁴ Again, the ECJ is seen as opening the road to regulatory competition, so one would now have to expect Delaware effects in Europe.⁴⁵

My first thesis⁴⁶ seeks to demarcate itself from the doctrinal dichotomy between European law and PIL, between thinking in terms of primacy and linkage and the associated policy dualism of ‘negative’ and ‘positive’ integration. The way the ECJ treated the conduct of the Brydes seems to me to make this sort of interpretation plausible. European law, says the criticism of the ECJ, has no business interfering with a purely internal Danish matter. The Brydes, who were pursuing no business interests in England, ought to have bowed to their home sovereign. But are the Brydes only Danes? May they have the ‘right to the most favourable legal system’,⁴⁷ just because they are not merely citizens of Denmark, but also citizens of the EU? This is the way that I, in fact, read the ECJ: there is nothing in itself abusive in a citizen of a Member State founding a company in accordance with another Members State’s provisions which are more favourable for him. That is simply his right.⁴⁸

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

[T]he fact that a national of a Member State who wishes to set up a company chooses to form it in the Member State whose rules of company law seem to him the least restrictive and to set up branches in other Member States cannot, in itself, constitute an abuse of the right of establishment. The right to form a company in accordance with the law of a Member State and


⁴¹ An opinion to be found in E. Steindorff, Centros und das Recht auf die günstigste Rechtsordnung, Juristen Zeitung 1999, 1140 ff.

⁴² Cf., for example, P. Behrens, Das Internationale Gesellschaftsrecht nach dem Centros-Urteil des EuGH, Praxis des Internationalen Privat und Verfahrensrechts 19 (1999), 323 ff.; this was the question the Federal High Court submitted to the EJC on 25 May 2000; cf. the Überseering decision, II.1.4 infra.


⁴⁵ It was especially paragraph 20 in Advocate General La Pergola’s Opinion that inspired this sort of interpretation.

⁴⁶ Above text before section II.1.

⁴⁷ E. Steindorff, Centros und das Recht auf die günstigste Rechtsordnung, note 41 supra.

⁴⁸ Para. 27; cf. para. 29.
to set up branches in other Member States is inherent in the exercise, in a single market, of the freedom of establishment guaranteed by the Treaty.\textsuperscript{49}

Is this, then, ‘negative integration’, interference with Denmark’s constitutional autonomy, and a new confirmation of the deregulatory effect of the freedoms?\textsuperscript{50} Is the ECJ sending Europe’s constitutional law off on the road to Delaware? Not really. For Denmark remains entitled to impose regulatory requirements on both its own - and on foreign - citizens, but has to adduce ‘compelling grounds of public interest’. European law does not push Danish law aside, but places it under pressure of justification. It was this pressure that Denmark could not stand up to; it was completely unable to achieve the protection of creditors which, according to the Danish government’s presentation, was the object of the Danish regulation - that was the ECJ’s finding.\textsuperscript{51} The ECJ acted as a constitutional court. It assumed the right to test Danish law according to whether it respects rights guaranteed at the European level. However, the limits imposed on Denmark are limited. Denmark remains entitled to protect creditors and act against fraud - but in accordance with the provisos familiar to the readers of the case law on Article 28 (ex 30).\textsuperscript{52} Denmark very soon, in May 2000, adopted a new regulation according to which companies wishing to do business in Denmark and having their main centre there, must either deposit a caution amounting to DK 110,000 with the Danish bank authorities in the form of cash, government bonds or bank guarantees (which in the event of insolvency serve exclusively to meet tax demands), or else it must be clear that minimum assets of at least DK 125,000 are available.\textsuperscript{53}

Merely putting new gloss on the old provisions? At least some Danish commentators think so.\textsuperscript{54} In its judgment of 3 February 2002, the Danish Supreme Court was silent on the issue of Centros’s tax liability; it simply reprimanded the company that the forms had not been completed correctly.\textsuperscript{55} What, then, is so ‘rotten’ - in the State of Denmark - or elsewhere?\textsuperscript{56} Denmark has to justify itself before its own citizens in the forum of the ECJ. It is entitled to pursue its regulatory interests, but it also has to show that the means it chooses

\textsuperscript{49} Para. 35.

\textsuperscript{50} M. Baudisch discusses and contests this point in a very comprehensive study: From Status to Contract: An American Perspective on Recent Developments in European Company Law, MS New York (Columbia Law School) 2002 (on file with the author).

\textsuperscript{51} Paras. 34-36.


\textsuperscript{53} Cf. B. Trefil (note 35 supra), at 31 ff., with references to \url{www.retsinfo.dk} and a survey of the debate on the questionability in European law of the new regulations.


\textsuperscript{55} Ugeskrift for Rettsvæn 2002.1079H; Laurits Christensen (Copenhagen) and Hanne B. Jensen (Florence) kindly pointed me to the judgment.

\textsuperscript{56} G. Kegel, note 36 supra.
serve the ends it pursues. What sort of law, then, are we dealing with here? With provisions that subject the case to the ‘geographically’ best-suited jurisdiction? A legal innovation supported by comparative studies? What is at stake - rather a European ‘conflict of laws’ to the extent that it involves dealing with legal differences or a conflict of laws that seeks to reconcile Denmark’s political autonomy with the granting of European citizenship rights to Danish citizens? In reshaping economic freedoms as rights to political participation, I see the constitutional core of the decision: private autonomy and political rights in democracies, as Jürgen Habermas has continually argued since Between Facts and Norms, have to be conceived as both having an equivalent original dignity. What does this mean in the European context? According to the Centros judgment, it means that a Danish citizen can bring his sovereign to court with the argument that the latter has no good reasons for denying him the use of the regulatory alternatives offered by another Member State. Rudolf Wiethölter’s Recht-Fertigungs-Recht seems to capture this type juridification of the Europeisation process quite well.

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

II.1.3 The impact of Centros, and ‘Überseering’

What will the impact of Centros be on European company law? Will the courts of the Member States ‘implement’ its deregulatory potential? Will Europe’s small firms flee to British law? Will increasingly outlandish services be offered by limited companies

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61 This is discussed and disputed by M. Baudisch, From Status to Contract: An American Perspective on Recent Developments in European Company Law, MS New York (Columbia Law School) 2002 (on file with the author).
incorporated in the UK? Will the German model of company law that seeks to protect the public interest through mandatory organisational provisions and regulation be replaced by Anglo-Saxon corporate governance philosophies?

Can the ECJ be expected to have the answers to all these questions? To start with, it has had to face the legal ‘logic’ of its views. In a reference for a preliminary ruling by the Federal High Court of 30 May 2002 (Überseering), the ECJ was asked whether German law could prevent a Dutch plaintiff from suing for over 1,000,000 DM by, firstly, restricting in § 50(1) of its Zivilprozessordnung locus standi to those legally competent (rechtsfähig) companies, and secondly, by prescribing that a company incorporated according to Dutch law could lose its legal capacity once it transferred its activities to Germany in a way which constitutes, according to German law, a transfer of its ‘seat’ (Verwaltungssitz). In an internal market, such legal principles seem downright incredible - if they were indeed as rigid or as stringent as the Federal High Court insinuates. As Advocate General Colomer noted, the German government had argued in the oral hearings that a company in the plaintiff’s position could, in fact, continue to assert its rights under German law; and that, in German law, Überseering’s passive locus standi continued to exist despite the new ‘seat’ of the company. But even if the ECJ had kept strictly to the preliminary question submitted to it, it would have been sufficient to rule that German law must not foreclose the Dutch company’s rights to sue in Germany, and that German international civil procedural law, if prescribing such effects, was not discriminatory, but unreasonable. The arguments of the Advocate General are noteworthy in one further respect: the general reasons in favour of the ‘seat’ theory (protection of creditors; protection of subsidiary companies; co-determination; avoidance of double taxation), which all have to be acknowledged as compelling reasons of general interest, simply are of no concern here.

Advocate General Colomer’s arguments and recommendations fit in with a Europeanisation practice that would respect the autonomy of Member States while nevertheless insisting on the compatibility of national policies with Community values. By contrast, in its judgment of 5 November 2002, the ECJ used much stronger language. Its criticisms of German private international law and international procedural law leave the possibilities addressed by Advocate General Colomer out of account, and sound

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64 Cf. para. 45 in Advocate General Colomer’s opinion of 4 December 2001 in Case C-208/00 - Überseering.
65 Para. 55; cf., more generally, Bundesverfassungsgericht, decision of 2 September 2002 (1 BvR 1103/02), Neue Juristische Wochenschrift 48 (2002), 5333.
66 Para. 46.
67 Paras. 50 ff.
correspondingly self-confident, if not self-righteous: ‘A necessary precondition for the exercise of the freedom of establishment is the recognition of those companies by any Member State in which they wish to establish themselves.’ German law ought not to disregard the point that the Dutch company never actually intended to transfer its seat. Is one to understand the statement to the effect that, in the EU, it cannot be tolerated that each Member State determines ‘unilaterally’, according to its lex fori, what legal significance it attaches to border-crossing actions, without taking into account the legal views of the Member States concerned and/or the interests of other Community citizens? This sort of civilising admonition is one thing. An unconditioned comprehensive conversion of German PIL to the incorporation theory would be another problématique.

This issue arises once again in connection with the ECJ’s discussion for the reasons adduced for the ‘seat’ theory. To be sure, according to para. 92 of the judgment, it is ‘not inconceivable that overriding requirements relating to the general interest, such as the protection of the interests of creditors, minority shareholders, employees and even the taxation authorities, may, in certain circumstances and subject to certain conditions, justify restrictions on freedom of establishment’. But the next paragraph goes on to say: ‘Such objectives cannot, however, justify denying the legal capacity and, consequently, the capacity to be a party to legal proceedings of a company properly incorporated in another Member State in which it has its registered office. Such a measure is tantamount to an outright negation of the freedom of establishment conferred on companies by Articles 43 EC and 48 EC.’ Did the ECJ wish to indicate that it seems no longer necessary to say anything about the rationale underlying the ‘seat’ theory; that there is no longer any reason to take co-determination commitments seriously, because the regulation on the societas europa will come into force on the 8 October 2004, and that, alongside, there is a Directive on Employee Participation? An interpretation of the judgment which takes its practical outcome in the decision, and not its generalising doctrinal framework, as its rationale would suit the Court’s authority better.

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

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69 Case C-208/00, para. 59.
70 Case C-208/00, paras. 62, 63.
74 E. Schanze and A. Jüttner, Anmerkung und Kontrolle ausländischer Gesellschaften. Rechtslage und Perspektiven nach der Überseering-Entscheidung des EuGH, Die Aktiengesellschaft 2003, 36 ff., consider these concerns exaggerated and rather unhelpful for the development of a control theory moderated by European law (‘europärechtlich moderierte Kontrolltheorie’) (cf. P. Ulmer, Schutzinstrumente gegen die Gefahren aus der Geschäftstätigkeit inländischer Zweigniederlassungen von Kapitalgesellschaften mit fiktivem Auslandsbesitz, Juristen-Zeitung 54(13) 1999, 662 ff.). The more one believes in the benefits of competition between regulatory systems or in the competence and capacity of a European judiciary, the more one would agree with their views. This is, to cite Theodor Fontane, a vast field, cf. Ch. Joerges, Interactive Adjudication in the Europeanisation Process? A Demanding Perspective and a Modest Example, European Review of Private Law 8 (2000), 1 ff. and infra III.5.
and Courage

The second set of examples has to do with the tensions between private law and economic law, and between general and statutory private law. Such conflict constellations have been widely and intensively discussed, especially in Germany. These tensions cannot be adequately understood as doctrinal problems which arise from imperfectly systematised legal fields. They usually relate to regulatory functions of legal provisions, especially of economic law, which are in conflict with the background assumptions of ‘classical’ private law. Déjà-vu reactions are not, however, appropriate when one encounters such conflicts in the course of Europeanisation processes. It is a specific feature of the European multi-level system that, particularly in the course of the programme to ‘complete’ the internal market being pursued since mid-1980s, practically the whole of economic law was Europeanised. Consumer protection fits into this pattern. This explains why the academic European law community could ignore private law for so long. Yet, the de-couplings of (European) regulatory law and statutory private law, on the one hand, from general (national) private law, on the other, were all to produce ever more disintegrative side-effects in national legal systems, the more resolutely the internal market policy was pursued.

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

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

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77 See sections I.1 and I.2 supra.

made the strengthening of the Member State level inevitable.\textsuperscript{79}

The need to co-operate across the levels of governance in the EU has ‘always’ existed in relation to the civil law implications of antitrust violations. To be sure, national legal systems, too, have to decide how far the objectives of antitrust law take primacy over private law. But in the EU context, the division of competences between the two levels of governance renders this issue more complex: to what extent can antitrust powers ‘intrude’ on the realm of private law where that law remained national. Neither the principle of the supremacy of European law - a ‘vertical’ conflict of law rule - nor PIL with its ‘horizontal’ conflict rules are equipped to handle such constellations: what is involved here are ‘diagonal’ conflicts.\textsuperscript{80}

\textit{II.2.1 Dodging the conflict: Pronuptia}

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


\textsuperscript{84} § 817, 2 BGB does not run counter to this view as any \textit{connoisseur} of that provision will confirm.
This was the position that Pronuptia sought with extraordinary stubbornness to defend.85 The Pronuptia suit, originally launched in Hamburg in December 1981, went through all the German courts, then to the ECJ and back again until, in 1994, the Oberlandesgericht Frankfurt allotted Pronuptia precisely the amount that the Hamburg district court had already awarded in 1981. ‘Justice delayed is justice denied’? ‘Postponed does not mean suspended’? Both questions can be answered in the affirmative. The German judicial system was not prepared to enrich Ms Schillgalis *sine causa* in the name of an antitrust *effet utile*. However, from the viewpoint of EC antitrust law, there is in fact nothing wrong with Germany’s law of unjust enrichment. Antitrust law is not really interested in interfering with way Pronuptia seeks to further the sales of wedding dresses in the region outside Hamburg or even abroad. Nor is it intended seriously to disrupt the pricing polity of a franchise system as long as that system is exposed to the competition by other distribution strategies. What the ECJ’s *Pronuptia* judgment achieved was the removal of uncertainties in antitrust law which had impeded the development of contractual arrangements that seemed thoroughly pro-competitive.86 This did not concern a ‘true’ conflict but only a false one.87 The fact that it took so many years to get it straight is a high tribute levied by EU practice in the manufacture of law on its citizens.

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

The annulment of an agreement under European competition law was also at issue in the *Courage* case,88 a case which certainly deserved the attention it attracted:89 Bernhard Crehan, licensee of a Courage pub, not only refused to pay £ 15,266 for beer supplied, but in a counter suit asked to be compensated for the drawbacks he had suffered because the ‘tied house’ contract imposed an exclusive supplier obligation upon him for beer at prices considerably

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above those asked from free houses which were not tied to a sole brewery. The Court of Appeal (for England and Wales) that made the submission stated that, in English law, a party to an unlawful contract was not entitled to claim compensation for damages.\(^9\) The legal position is, as it were, a mirror of the one in *Promptia*: there, EU antitrust law had to be enriched by law of contract; but here antitrust law had to equip itself with sanctions that were non-existent in English law. The judgment treats this as a matter of course: ‘As regards the possibility of seeking compensation for loss caused by a contract or by conduct liable to restrict or distort competition, it should be remembered from the outset that, in accordance with settled case-law, the national courts whose task it is to apply the provisions of Community law in areas within their jurisdiction must ensure that those rules take full effect and must protect the rights which they confer on individuals.’\(^91\) This statement is accompanied by an emphatic reference to the Community guarantees of subjective rights and the direct effect of the competition rules.\(^92\) Yet the matter is not simply a sort of European command. The ECJ pays its respects to the procedural\(^93\) and substantive\(^94\) autonomy of national law. It takes account of the fact that the innovations that European law requires differ from country to country, and tolerates legal divergences. It is manifestly concerned not to homogenise the legal systems, but to have each of the private law systems learn what they have to learn in order to lend European competition law its validity. And, as in *Centros*, it is individual rights that can be asserted by the citizens of the European Union in order to achieve a reshaping of their own law in each case.

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

It is always a delight to re-read: ‘Tucked away in the fairyland Duchy of Luxembourg and blessed, until recently, with benign neglect by the powers that be and the mass media, the Court of Justice of the European Communities has fashioned a constitutional framework for a federal-type Europe’,\(^95\) and even now that the ECJ has definitely become visible, respect has remained high: criticisms like those which national courts are accustomed to are exceptional

\(^9\) References on the English law can be found in A. Komninos (note 89), at 462.

\(^91\) Case C- 453/99, *Courage*, para. 25.

\(^92\) Case C-453/99, *Courage*, paras. 19, 20, 23.

\(^93\) ‘However, in the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to designate the courts and tribunals which have jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding the rights which individuals derive directly from Community law, provided that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and that they do not render practically impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness)’; Case C-453/99, *Courage*, para. 29.

\(^94\) ‘Similarly, provided that the principles of equivalence and effectiveness are respected . . . Community law does not preclude national law from denying a party who is found to bear significant responsibility for the distortion of competition the right to obtain damages from the other contracting party’; C 453/99, *Courage*, para 31.

phenomena. There are many reasons and explanations for this.\(^{96}\) Assessments of the ECJ’s performance usually refer to, and appreciate, its role as a promoter of integration project. But this is not the only conceivable yardstick. The Court is exposed to very diverse expectations: its case law is not just to promote integration but also to guarantee the normative integrity of the integration process, to respond sensitively to political concerns. Can such a court at the same time operate as a court of ultimate review, earning the respect of the specialised courts of Member States? And with all that, can it alleviate the pangs of citizens seeking justice in courtrooms?

Specifically, consumer protection, which has been the pioneer and engine for the Europeanisation of private law, raises such questions. The two examples dealt with here concern two very prominent instances of European legislation, namely, the Clause Directive of 1993\(^{97}\) and the Product Liability Directive of 1985.\(^{98}\) Let us once again recall the outcome of the analysis: in the Océano decision\(^{99}\) on the Directive on unfair terms in consumer contracts, the ECJ managed to implement the Directive’s provision in national (Spanish) law by redefining the functions of courts in such a way that Spain’s legal system could transform that intervention into an innovative reform. One can, in contrast, attribute to the decisions on the Product Liability Directive of 25 April 2002\(^{100}\) the much more ambitious goal of taking on product liability law in the European system - an undertaking that, admittedly, would, in all likelihood, fail thoroughly.

II.3.1 Océano

**Océano Grupo Editorial SA**\(^{101}\) was the first legal pronouncement, urgently awaited by the protagonists of European consumer policy, on the Directive about unfair terms in consumer contracts, adopted in 1993 after long preliminaries.\(^{102}\)

The defendants to the underlying cases had entered into contracts for the purchase, by instalments, of an encyclopaedia for personal use. The instalment purchase contract was signed in 1995 but the instalments had not been paid. The purchaser filed suit in 1997 with

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\(^{100}\) Case C-52/00, Commission v. France; Case C-183/00, María Victoria González Sánchez v. Medicina Asturiana SA; Case C-154/00, Commission v. Hellenic Republic; see, also, Case C-203/99, Henning Veedfeld v. Århus Amtskommun - (2000) ECR I-3569.

\(^{101}\) See note 99 supra.

the Juzgado de Primera Instancia No. 35 in Barcelona. This was in line with the conferral of jurisdiction on the courts in Barcelona in the contractual terms. The defendants, who came from all over Spain, did not turn up for the hearing scheduled in Barcelona.

Not a very tough story in itself, one might think. Yet the Juzgado saw itself barred from rejecting the suit. The ‘juicio di cognición’ is a summary procedure for legal cases with a small sum in dispute (between 80,000 and 8,000,000 Pesetas).\footnote{Admittedly, the Tribunal Supremo had repeatedly declared such venue clauses to be unfair. What was disputed, however, was whether the Juzgado was also entitled to make this finding when it had not been brought up in the proceedings by the defendants themselves. The question whether it could pronounce nullity ex officio had been presented to the Juzgado by the Spanish Attorney General, and had received a negative answer.\footnote{Undaunted, it approached the ECJ with a preliminary ruling question as to whether Directive 93/13 required verification ex officio.}

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

\textbf{II.3.2 Product liability}

In its three judgments of 25 April 2000,\footnote{In its three judgments of 25 April 2000, the ECJ seems to have enhanced the value of the, so far quite dormant, Directive 85/374/EEC\textsuperscript{110} on product liability by asserting that this product liability} the ECJ seems to have enhanced the value of the, so far quite dormant, Directive 85/374/EEC\textsuperscript{110} on product liability by asserting that this

\begin{footnotesize}
\textsuperscript{103} Para. 16 in Advocate General Saggio’s Opinion of 16 December 1999.

\textsuperscript{104} \textit{Ibid.}

\textsuperscript{105} \textit{Id., para. 20.}

\textsuperscript{106} ECJ (note 99 \textit{supra}), paras. 21 ff.

\textsuperscript{107} \textit{Id., paras. 20-27.}

\textsuperscript{108} \textit{Id., paras. 25-29.} In 1995 (the time when the encyclopaedias were being sold), Spain had not complied with its obligation to implement the Directive. This, according to the ECJ (\textit{id., para. 31}), could, in the present case, be compensated for by an interpretation of Spanish law ‘in accordance with the Directive’; cf. the interpretations by J. Stuyck in his annotation, \textit{Common Market Law Review} 38 (2001),719 ff.

\textsuperscript{109} See note 100 \textit{supra.}

\textsuperscript{110} \textbf{See note 98 \textit{supra.}}
\end{footnotesize}
legislative act did not merely lay down minimum standards but instead aimed at ‘complete harmonisation’. This came as a surprise: at the time, the very modest harmonisation effects had been minutely elaborated, and the Directive was characterised as a product with limited effect in terms of integration policy and rather defective in terms of liability law. There was, at any rate, broad agreement that the Directive did not affect the general law of delict in the Member States.

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

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

The submitting court found that the provisions of Law No. 22/94 that implemented Directive 85/374 were more restrictive than the older 1984 law. The lex posterior states that the older provisions ‘do not apply to liability for damage caused by products defective within the meaning of the (new) law’.

This perception brought it to the preliminary ruling question whether Article 13 of the Product Liability Directive could ‘be interpreted as precluding the restriction or limitation, as a result of transposition of the Directive, of rights granted to consumers under the legislation of the Member State.’

Oddly, there is no further mention in the sequel of the temporal conflict provision of the Spanish law just cited. Instead, the court employs the traditional principles on full harmonisation of the directives enacted under Article 100, old version, with its pre-emptive


113 Id., at 531.

114 Case C-183/00, judgment of 25 April 2002, María Victoria González Sánchez v. Medicina Asturiana SA.

115 Case 183/00, para. 8.

116 Case 83/00, para. 13. Article 13 states: ‘This Directive shall not affect any rights which an injured person may have according to the rules of the law of contractual or non-contractual liability or a special liability system existing at the moment when this Directive is notified.’
effects: Hence, ‘the margin of discretion available to the Member States in order to make provision for product liability is entirely determined by the Directive itself and must be inferred from its wording, purpose and structure’. 117 And, accordingly, it is not some self-correction of Spanish law but the supremacy claim of Community law that is the basis for lowering the standard of protection in Spain. Is this then also to lead to the ‘petrification’ of the general civil law which was forewarned in the early debate on the Product Liability Directive? 118 The ECJ pronounced:

The reference in Article 13 of the Directive to the rights which an injured person may rely on under the rules of the law of contractual or non-contractual liability must be interpreted as meaning that the system of rules put in place by the Directive, which in Article 4 enables the victim to seek compensation where he proves damage, the defect in the product and the causal link between that defect and the damage, does not preclude the application of other systems of contractual or non-contractual liability based on other grounds, such as fault or a warranty in respect of latent defects. 119

Less dramatic questions are raised by the two parallel decisions. Both concerned the conformity with the Directive of transpositions going beyond its standards of protection: Greece had wanted to spare its citizens from the personal contribution of 500 Euro provided for in Article 9 I (b) of the Directive. 120 France additionally wanted to hold the distributor liable alongside with the manufacturer, and additionally to restrict the exemptions from liability foreseen in Article 7 of the Directive. 121

These deviations would have been unproblematic had the Directive sought to lay down minimum standards of the European consumer protection. And indeed, had the Directive been adopted after the Single European Act and accordingly based on Article 100a (now 95), then the procedure pursuant to Sections 4 and 5 of that provision would have applied. But that was, after all, an old directive, the spiritual father of which had always stressed that it was aimed at the development of the internal market and only implicitly achieved consumer protection objectives. 122 Thus, Advocate General Geelhoed - as also in Case C-183/00 - was able to bring the orthodox understanding of supremacy and pre-emption to bear. 123 The ECJ followed suit. 124 This is, after all, not particularly tragic, since Article 13 of the Directive ‘does not preclude the application of other systems of contractual or non-contractual liability based on other grounds, such as fault or a warranty in respect of latent defects. 125

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117 Cf. C-183/00, para. 25.
118 G. Brüggemeier, supra note 112.
119 Case 183/00, para. 31.
120 Case 154/00, para. 6.
121 Case 52/00, paras. 6 ff.
122 Cf. H.-C. Taschner, Die künftige Produzentenhaftung in Deutschland, Neue Juristische Wochenschrift 1986, 611 ff.; that it was also advisable to argue that way can be seen from B. Börner, Die Produkthaftung oder das vergessene Gemeinschaftsrecht, Festschrift zum 70. Geburtstag von Hans Kutscher, Baden-Baden: Nomos 1981, 43 ff.
123 Conclusions, Case C-154/00, para. 4; Cases C- 52/00 and C-183/00, paras. 27 ff.
124 Case C-154/00, para. 10; Case C-52/00, para. 14.
defects’, and because Article 9 (1) (b) means only that those harmed ‘must bring an action under the ordinary law of contractual or non-contractual liability’. Should one expect the ECJ, especially in view of the Spanish case, to hold next that e.g. Germany’s rules on the manufacturer’s burden of proof are incompatible with the European directive? Hardly so. Such a step would be damaging to product liability law - and to the ECJ’s authority.

II.4 Interim comment

Exempla trahunt? The three groups of examples are intended to demonstrate the relevance and the limited practical relevance of the legitimation patterns reconstructed in the first section. The three paradigms presented here, so we can summarise, have all left their traces but none of them applied ‘in full’ or exclusively. Centros and Überseering by no means document the exposure of company law to unrestrained regulatory competition. Neither Pronuptia nor Courage can be used to deduce primacy of European competition policy over competing conceptions of contractual justice in private law. And nowhere, and definitely not in the case law on consumer protection, can one witness anything like the formation of a European (social) state. All three paradigms are insufficiently complex analytically, and have defects in normative terms. In the seemingly incomprehensible jigsaw puzzle of viewpoints that come to bear in the Europeanisation process, one can, however, certainly also find positive messages. This, admittedly, presupposes the extension of the conceptual frameworks hitherto employed.

III. Justice-making law for the Europeanisation of private law

Back to the beginning: when conceptualising the Europeanisation of private law, we should - as was stated in our initial thesis - bear in mind the legitimation problématique that has, at times explicitly, at times less visibly, been on the agenda of the integration project from the outset, and which is now, after the success of the Human Rights Convention, the Treaty of Nice, the ‘post Nice process’ and ‘Convention process’ been met with increasing academic and public attention. ‘Europe is not a state but it needs a constitution’ - this is not exactly a communis opinio, yet it is a formula that typifies the current discourse on European

125 Case C-52/00, para. 22.
126 Case C-52/00 and Case C-154/00, both in para. 30.
127 See note 106 supra.
130 OJ C-80/2001, 1.
131 See <http://european-convention.eu.int>.
law. ‘Europe already has a constitution that now needs to be developed further, but not necessarily in writing’ - this is one of the more nuanced contrary positions. Private lawyers are hard to hear in the current legal disputes over Europe’s constitution. This indication of shortcomings is not without its ironies or its deeper significance: for, after all, it concerns a project which the founding fathers set going as an ‘economic community’. To be sure, a key piece of the overflowing debates on the Europeanisation of private law is formed by the question of the advisability of a European Civil Code. As such, this is a constitutional question par excellence. It cannot be dismissed on the model of Paolo Cecchini’s writings on the internal market, i.e., via some estimate of the ‘costs of a non-code’; nor can we rely on the German experience of a pre-republican and pre-democratic history of private law unification. Unfortunately, the booming constitutional debate going on in public law offers limited help. Certainly, any internal market policy project, any directive, however technical and functionalist it may seem, regularly sparks off far-reaching controversies. But the constitutionalists, have lost the economy and society from their vision: their readiness to embrace a ‘constitution without a state’ - a prospect which now hardly seems to offend anyone anymore - seems to promote a constitutionalism beyond and above conflicts over the economic and social conflict constellations, thereby strengthening the traditions of a non-political, economic or technocratic rationality that determine the integration process in the formative stage.

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

This is a very abstract way to describe the theme of this section. In order to alleviate its abstractness somewhat, we shall anticipate the end result in two theses. The first is that we cannot conceive of the process of the Europeanisation of private law as the construction of a private law edifice with a unitary structure. Instead, we have to accept a multi-layer process in which very different sets of problems will have to be dealt with. The second is that the Europeanisation of private law has to base its legitimacy on the quality of the processes

132 ‘Europe already has a constitution that now needs to be developed further, but not necessarily in writing’ - this is one of the more nuanced contrary positions. Private lawyers are hard to hear in the current legal disputes over Europe’s constitution. This indication of shortcomings is not without its ironies or its deeper significance: for, after all, it concerns a project which the founding fathers set going as an ‘economic community’. To be sure, a key piece of the overflowing debates on the Europeanisation of private law is formed by the question of the advisability of a European Civil Code. As such, this is a constitutional question par excellence. It cannot be dismissed on the model of Paolo Cecchini’s writings on the internal market, i.e., via some estimate of the ‘costs of a non-code’; nor can we rely on the German experience of a pre-republican and pre-democratic history of private law unification. Unfortunately, the booming constitutional debate going on in public law offers limited help. Certainly, any internal market policy project, any directive, however technical and functionalist it may seem, regularly sparks off far-reaching controversies. But the constitutionalists, have lost the economy and society from their vision: their readiness to embrace a ‘constitution without a state’ - a prospect which now hardly seems to offend anyone anymore - seems to promote a constitutionalism beyond and above conflicts over the economic and social conflict constellations, thereby strengthening the traditions of a non-political, economic or technocratic rationality that determine the integration process in the formative stage.

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135 References to Jürgen Habermas are insufficient as an explanation, yet must suffice here; cf. the references in notes 5 and 58 supra.

136 Cf. The references in note 26 supra.
through which it comes about; we have to juridify these processes; we must, to rephrase the
title of this essay, juridify the changes and innovations that the Europeanisation process
brings about; we need a procedural law of Europeanisation.

Let me develop this argument in five steps.

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

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

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

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

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

III.1 ‘Deliberative’ supranationalism

European integration research has kept on saying, for some years now, that the EU is to be
understood as a ‘multi-level system of governance sui generis.’

137 Jürgen Neyer, in particular, has enriched this debate in normative terms: if and because the powers of action and
resources for action are located at various relatively autonomous levels in the EU, then coping
with functionally interwoven problem situations will continually depend on communication
between the actors competent in their various domains. Such communication can be
achieved in manifold ways. But Neyer is now seeking to make it plausible that, in the specific
conditions of the EU, successful solutions to problems can be expected from the
‘deliberative’ mode of communication based on universalisable motivations and tied down to
rules and principles. To be sure, the multi-level approach cannot be understood as revealing
a ‘fact’ to which legal constructions would have to orient themselves. This is especially true
of Neyer’s theoretical arguments. Nonetheless, the multi-level analysis does refer to new
constellations that law and legal science too have to master, albeit in their own ways. And

137 For a summary, see M. Jachtenfuchs, The Governance Approach to European Integration, Journal of
in Europe, Scandinavian Political Studies 24 (2001), 1 ff.

138 J. Neyer, Discourse and Order in the EU: A Deliberative Approach to Multi-Level Governance,

139 Set out in the same sense and in more detail in his Habilitation Thesis ‘Politische Herrschaft in

140 And this legal reconstruction of the European postnational constellation has, of course, been under way
for quite some time; cf., for private law, A. Furrer, Zivilrecht im gemeinschaftlichen Kontext. Das Europäische
Kollisionsrecht als Koordinierungsinstrument für die Einbindung des Zivilrechts in das europäische
the normative turn that Neyer gives to the multi-level approach does, at any rate, support the assumption that Europe need not sink into chaos if it relies on deliberative interaction instead of the formation of hierarchies.

**III.1.1 Diagonal conflicts**

In delimiting and harmonising European and Member State powers, the parallels become particularly clear. Conflicts as to competencies are typified in the EU by the fact that the Member State defending its autonomy itself belongs to the Community against whose demands it is defending itself. Here, the principle of enumerated powers (Article 3-4; now 3-7), according to which the Community should act only in the areas specifically allotted to it, is quite often dysfunctional: activities oriented towards the solution of economic and social problems will often have to involve both Community and Member State powers. The resulting overlaps compel the Community and Member States de facto to complex coordination of their activities: each can block the other, but neither can arrive at solutions when acting alone.\(^{141}\) ‘Diagonal’ conflict constellations of this sort are an everyday experience in European law and European policy.\(^{142}\) The Community holds powers that relate only to one segment of interdependent issues. The Member States hold partial powers that equally do not suffice to achieve a solution of problems autonomously.

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

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

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\(^{142}\) Cf. sections II.2 and II.3 *supra*.

\(^{143}\) Cf. earlier Ch. Joerges, The Impact of European Integration (note 2), 390; and, similarly, M. Maduro Poiares, Where to Look for Legitimacy?, note 133 *supra*. 

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But it is precisely this normative core of its supranational rules and principles which legitimise European law, where it requires Member States to ‘apply’ foreign law and to refrain from insisting on their lex fori and parochial interests.144 This sort of restriction of a Member State’s political autonomy is, however, limited. In particular, the case law on Article 30 (now 28) has repeatedly indicated145 how the idiosyncrasies of individual states can be identified as such and reduced to a civilised level - ‘autonomieschonend und gemeinschaftsverträglich’.146

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

III.2 Supranational law

One of the analytical strengths of deliberative supranationalism is to conceive of the EU as a non-unitary polity in which Member States are not only ‘relatively’ autonomous but also ‘relatively’ different, in which cultural differences147 can continue to exist.148 This opens up realistic perspectives for the design of the European policy. It suggests ‘soft’ forms of control that take account of the special features of national institutions and experience. At the same time, I believe, its compatibility with democracy of deliberative supranationalism is plain to see - indeed, it can be seen as a requirement for democracy, given that it seeks to enhance the influence of European citizens who are affected by decisions which they cannot influence.149

The legitimacy of a deliberative supranationalism which seeks to give voice to

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146 F.W. Scharpf, Autonomieschonend und gemeinschaftsverträglich, note 68 supra.

147 See note 30.


149 The critique by A. Peters, Elemente einer Theorie der Verfassung Europas, Berlin: Duncker & Humblot 2001, 660, of what she calls a ‘democracy of concern’ (Betroffenheitsdemokratie) does not meet our argument, which aims to explain why a European law rule of mutual considerations would be democratic, rather than to derive participation rights from a diffuse ‘concern’.
foreigners and seeks to promote deliberative political processes in the EU is not really problematical. Instead, what is questionable is whether the EU’s institutional circumstances and configurations of interests actually do favour such solutions. The empirical dimension of this question must be left out of consideration here. However, we do wish to assert, at least, that important rules and principles of European law can be interpreted as fostering a deliberative style of politics, and thus that, in supranational European law, there is indeed a layer of law that does not merely favour deliberative interactions, but also ties these interactions to substantive and enforceable rules. This genuinely constitutional law includes the ban on discrimination in Article 12 (ex 6), the basic freedoms that have developed into civic rights, the European Human Rights Convention, and (probably in the foreseeable future) also the basic rights proclaimed in Nice. Also parts of it are the co-operation duties in Article 10 (ex 5), the ban on protectionism in Article 28 (ex 30) and the mutual recognition obligation derived from this provision. All these legal positions are important not just because of their direct, both vertical and horizontal, effects, but also because they give guidance in the production of law, including legislative and executive law-making. They can be invoked in all modern and not-so-modern governance arrangements and constitute a protective shield against strategic patterns of argument.

III.3 Reinterpretations

Whether this conceptual framework is fruitful can be tested by using it to reinterpret the situation in the cases discussed in the second section, and contrasting it with the interpretations which keep to the traditional patterns of legitimation. In the requisite brevity: Centros and Überseering confirmed the fundamental importance of the freedoms in the TEU. At the same time, they show that this supranational legal framework cannot be understood as a body of rules one may mechanically apply, or at any rate ought not to be understood that way: in the interpretation of the Centros judgment advocated above, the freedom of establishment is neither merely an economic freedom, nor some cornerstone of a European economic constitution - preordained for Member States and/or exposing their laws to processes of regulatory competition. Instead, it is more of a freedom that simultaneously acts as a political right, because it puts the citizens of a Member State in a position to place

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150 Cf. the references to the recent work of J. Neyer in notes 138 and 139 supra.

151 Deliberative supranationalism tends to undervalue perfectly legitimate validity claims of supranational law, argues Hans-W. Micklitz; cf., e.g., his Principles of Social Justice in European Private Law, Yearbook European Law 19 (1999-2000), 167 ff. This objection is important, especially in the field of consumer protection. It seems to me, however, that our disagreement concerns the approaches to social protection in the EU, not the regulative idea of a ‘social’ private law as such (cf. Ch. Joerges, Interactive Adjudication in the Europeanisation Process? A Demanding Perspective and a Modest Example, note 74 supra). In his essay ‘Transnational Governance without a Public Law?’, in: Ch. Joerges, I.-J. Sand and G. Teubner (eds.), Transnational Governance and Constitutionalism, Oxford/Portland: Hart (forthcoming), C. Möllers distinguishes between ‘private law frameworks of public institutions’ that understand the production of law or the generation of norms as the result of spontaneous co-ordination processes) and a ‘public law framework’ that conceives of the law as the outcome of authoritative legislative acts legitimated by majority decisions. Both forms could or should complement each other. The argument in the paper goes part of the way towards meeting this demand in that it insist on the indispensability of mandatory rules and principles governing interactions in the European polity.

152 Section II.1 supra.
their sovereign under a compulsion to provide justification. In this interpretation, what is involved is indeed a procedural law of just-ification, which sets first of all the courts and then the legislator (and then, if necessary, the courts again) in motion. Is this wishful thinking? To some degree; but one ought to bear in mind the implications of a more rigid, interpretation which Überseering seems to suggest: if freedom of establishment were understood as a legal principle that could set aside the regulatory keystones of company law and historically and politically important concerns which the seat principle had defended, then this ‘right’ would not merely have disintegrative effects within some Member States but illegitimatise the Community and the integration project as a whole.

We have characterised the conflicts between European competition law and national private law in cases like Pronuptia and Courage as ‘diagonal’ conflict constellations. The ‘settlement’ of this conflict occurred in the Pronuptia saga through sheer exhaustion. This is a mechanism which all legal systems use. But it is one which by no means does justice to the issues (and parties!) involved. What is at issue in cases like Pronuptia is whether European law incorporates elements of a law of franchisee protection as part of the European ordre public or tolerates such objectives where national contract law pursues them. Again, we would then be witnessing a just-ification process emerging from the conflict between the two levels of governance in the EU; its legitimacy would rest either upon the insight that interests of franchisee protection are not discredited by competition law, although such protection need not be uniformly shaped throughout all European jurisdictions. What was merely implicit in Pronuptia came openly to the fore in Courage: here the conflict of laws has led to the justi(ce)-fication of new private law that the Member States have to incorporate in their ‘law of the land’. In this case, the prescriptive claims of Community law are certainly more rigid, even though the incorporation it requires may take doctrinally different shapes.

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

153 Section II.1.2. supra.
154 Section II.1.3 supra.
155 Section II.2 supra.
156 Ch. Joerges, Contract and Status in Franchising Law, note 86 supra, 50 ff.
157 Section II.2.2 supra.
158 Section II.3 supra.
159 Section II.3.1 supra.
comprehensive, let alone centralising, fashion.

III.4 Deliberative supranationalism II: Constitutionalising ‘transnational governance arrangements’

In many important areas of regulatory policy, Europe has built up hybrid transnational governance arrangements, structured neither in purely private law terms nor in purely public law terms, neither nationally nor European, neither purely governmental nor non-governmental, in which societal and governmental actors adapt to a transnational reality which is no longer domesticisable nationally. What is so typical of regulatory policy also has to leave its traces in private law. Among the examples listed in section II, the one in franchising law is the clearest: this law is neither purely national nor purely European. The Commission, the ECJ and the Member State courts are involved in its making - not to mention the enterprise associations that work out the contractual arrangements to transport the various franchising concepts, which, at the same time, have to be kept compatible with European competition law and many kinds of national legal systems. Yet, the field is even broader. With increasing intensity, groups of academics and associations are having their say on the Europeanisation of private law, not merely ‘portraying, but also producing’ law, and referring, for the legitimisation of their claims to involvement, not just to their scholarly reputation, but also intending their contributions to apply in legal practice and legal policy. What can be observed in legislation has long been underway in the context of judicial law finding. Public jurisdiction can play only a very limited part in settling disputes in European contexts. All of this is more than, and different from, the type of conflict of laws just described, because these transnational governance arrangements do not just mediate between different given policies and law, but are to elaborate genuinely transnational responses to transnational problem constellations. This type of governance cannot be rejected as being outright illegal or illegitimate, not just because of their factual importance, but also because of their normative potential. The need to design a law that would ‘constitutionalise’ such arrangements so that they deserve the recognition they claim is only gradually being realised - and all I wish to do here is to emphasise that we will have to face these challenges.

III.5 Bottlenecks

All this ‘may be true in theory, but does not apply in practice’, says Immanuel Kant famous

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General Maxim,\textsuperscript{163} which may be appropriate here - even if one accepts all the benevolent reconstructions of the examples presented in the preceding sections. For everywhere, bottlenecks, weaknesses and omissions have also become visible: in such a complex organisation as the ECJ, there cannot be any unitary institutional self-perception. The interactions between the ECJ and the national courts are governed by formalist prescriptions and are vulnerable to strategic behaviour, be it of powerful private players, be it of governmental actors, be it of lower or higher courts: interactive adjudication does occur in the EU, although its quality is difficult to assess\textsuperscript{164} and even more difficult to ensure.\textsuperscript{165} And however careful courts may deliberate, they are not in control of the processes of law production. They do much if they ensure the respect for Europe’s legal commitments and help to identify and to defend procedural guarantees which promote deliberative interactions. Do all these practical troubles, then, ultimately militate in favour of the project of a European civil code? First of all, they are in favour of accepting the view that, in such a project, the very difficulties that arise are those that it is supposed to solve. The ‘classical’ models of private law codification do not come into consideration for today’s Europe. First, because Europe will not become some hierarchically structured polity, but will remain heterarchical and plural; there is no legislative actor with the vocation for universal legislation that would bring Europe under a unitary codified regime. Nor, however, is Europe some sort of cultural nation able to write down its code without having to wait for the formation of a state. The mixed position we find ourselves in - a ‘primary law’ that is about to learn how to organise the interdependence of the freedoms of the ‘market citizens’ with the aspirations of political citizenship in the European Union; and a heterarchical regulatory policy organised in networks; a patchwork of specific legislation tackling concrete problems which produces a host of disintegrative effects in national legal systems - this is the ‘state of the (European) Union’. Is the normative quality of private law harmed thereby, and is the idea of equal originality (Gleichursprünglichkeit) of private autonomy and of political rights to be written off as theory? Will we be witnessing the generation of a ‘quilt’, consisting of colourful yet disparate pieces, which have to be put together by people who are colour-blind?\textsuperscript{166} This has by no means been established. The point is whether the development exceeds the learning capacities and productive imaginative power of those involved.


\textsuperscript{164} There are very many examples of a fortunate interaction in the European judiciary. And there are counter-examples and borderline cases: Überseering (see section II.1.3) and the recent judgments on the Product Liability Directive (see section II.3.2) are certainly not particularly encouraging although they are not as disappointing as Case C-481/99, judgment of 13 December 2001, Georg und Helga Heiningen v. Bayerische Hypotheken- und Vereinsbank and the critique by G.-P. Calliess, The Limits of Eclecticism in Consumer Law: National Struggles and the Hope for a Coherent European Contract Law, German Law Journal 3/8, 1 August 2002, <www.germanlawjournal.com>). Lasciate ogni speranza? Such a desperate outcry would be premature.
