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Europeanization as Process
Thoughts on the Europeanization of Private Law*

Christian Joerges**

The present efforts in Europe to achieve more uniformity in private law and the debates on a European civil code need to be understood in a wider context. Europe is plagued by concerns over its problem-solving potential and its acceptance amongst citizens. The response is ambitious projects: Eastern Enlargement, a Constitution, a Code. The project of a European civil code is the least visible among the three—and yet specifically instructive. Europe has to learn how the openness of national markets can coexist with differences in legal cultures, differently shaped relations between state and society. In its multi-level system of governance none of the established legal disciplines can provide guidance for the denationalization and Europeanization of private law. The Europeanization process needs to be understood and organized as a process of discovery and learning. Only then can Europe make productive use of its diversity.

INTRODUCTION

European law is affecting more and more areas within national legal systems. The processes of change that it initiates are complex and diverse, to an extent that there are good reasons to concentrate in their analysis on the discipline one feels most at home with. Hence, constitutional lawyers observe and comment on the constitutionalization of Europe, administrative and commercial lawyers primarily on the emergence of complex European governance arrangements throughout the fields of regulatory politics. At the same time, an autonomous epistemic community is engaging in a discussion on the Europeanization of private law with a growing number of individual themes, *fora*, organisa-

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tions and publications. Leading in terms of literary productivity are German-speaking academics. The most recent habilitation thesis I am aware of was submitted in Munich. It looks beyond the traditional borders between legal sub-disciplines and focuses instead on the transformation of private law in the light of the integration process. It is 740 pages long (single spaced).[1] But its German speaking predecessors (there are around 10 of them), albeit more limited in scope, are not significantly shorter.[2]

This is no coincidence. A tradition of legal science that understands the systematic analysis of the law as its core commitment, will naturally feel challenged by the manifold impacts of the Europeanization process, and the less it becomes possible for legal science to comply with its own systematic expectation, the more its scepticism towards that process will be fostered. To pose the question in an ironically sounding, but nonetheless serious, form: should Europe be about to take suit, to proceed, against our law (bring the law to trial)?[3] Taking the question seriously also means not to condemn Europe just because it does not correspond with our inherited notion of the law. The challenge flowing from the Europeanization process could be that it will force us to redefine the normative *proprium* of the law.

This, in fact, is the thesis of my contribution. It sets out to show, for one, that the Europeanization of private law should be seen as a process that triggers disintegration within national private law systems and affects their systematic consistency. But I also wish to demonstrate how that process manages to uncover productive and innovative opportunities. For this, as I suggest by way of conclusion below, it merits recognition: Europeanization must derive its legitimacy from the normative quality of the processes within which it takes place. There are three steps to my argument. The first is fundamental, in the literal sense; the legal disciplines instructing the Europeanization process assume each in their own way that legal systems are organized nationally; Europe on the other hand constitutes a post-national constellation; it is no longer an aggregation of nation States, but a multi-level system (part A). The second part examines three different patterns of juridifi-

1. Christoph Schmid, *Die Instrumentalisierung des Privatrechts durch die Europäische Union*, 2004.

2. Since Drexl, *Die wirtschaftliche Selbstbestimmung des Verbrauchers*, 1998.

3. The formulation can be found by Wiethölter, 'Ist unserem Recht der Prozeβ zu machen?', in Honneth et al. (eds.), *Zwischenbetrachtungen im Prozeβ der Aufklärung*, 1989, 794. I have previously thought to show, referring to the emergence of 'new modes of governance', that it should be addressed to the European process; see Joerges, 'Law, Economics and Politics in the Constitutionalisation of Europe,' 5 (2002-2003) *The Cambridge Yearbook of European Legal Studies*, 2004, 123.

cation, of *Recht-Fertigung* ('justification'), induced by Europe, to document the opportunities and risks borne by the Europeanization process—and to demonstrate why the process itself cannot but disappoint the dogmatic and systematic expectations of legal science (part B). In the final part, I will further elucidate the normative perspectives that can be associated with my title, 'Europeanization as Process' (part C).

A. THE CONTEST OF LEGAL DISCIPLINES AND THE MISERY OF METHODOLOGICAL NATIONALISM

Three legal disciplines are trying to unravel and understand the process of Europeanization: European law, private international law and comparative law. They all have different perspectives and introduce contesting criteria of law. How are we to resolve the contest between those legal disciplines[4]? Should European law Europeanize private law, replace national private laws with a European private law? Is it for comparative law to guide the quest for a suitable system of legal rules for Europe? But surely, it is private international law's vocation to instruct Europe as to how it can reconcile its legal differences, to combine the construction of a functioning European private law system and the respect for national legal traditions? None of them, it is my claim, can win the contest of the disciplines. None is equipped to deal with the Europeanization process.

To be sure, the intention is not to pass judgment on the capabilities or disabilities of entire legal subjects. My argument, which proposes the insolubility of the contest of legal disciplines, rather follows the specific tradition that underlies the statement, indicated above, that legal science should be prepared to acknowledge Europe's postnational constellation.[5] To follow up on a concretisation of this term, first coined by Jurgen Habermas[6] and analysed by the political scientist Michael Zürn: the individual legal disciplines must overcome their 'methodological nationalism,'[7] their adherence in terms of concepts and method-

4. In his famous treatise in 1798, which this section`s heading alludes to, Kant referred not only to the sub-disciplines of one faculty. Alluding to Kant`s valuation of philosophy is justified: jurisprudence, much to the contrary of Kant's derisory remarks, cannot limit itself to a function that serves given authorities, but must become productive and make use of what Kant names 'reason.' See Joerges. "The Europeanisation of Private Law as a Rationalisation Process and as a Contest of Disciplines—An Analysis of the Directive on Unfair Terms in Consumer Contracts," 3 ERPL 3 (1995) 175.

5. Above, pre A.

6. "Die postnationale Konstellation und die Zukunft der Demokratie," in: Habermas, *Die postnationale Konstellation, Politische Essays*, 1998, 91.

7. Zürn, "Politik in der postnationalen Konstellation," in Landfried (ed.), *Politik in der entgrenzten Welt*, *2001*, 181. Not only Zürn uses the term (see e.g. Beck, *Beyond Methodo-*

ologies to national shapes; these shapes are being eroded as a consequence of European integration together with 'globalization' (de-territorializing (*Entgrenzung*) and denationalising) processes. Again: I do not wish to pass judgment on the state of those disciplines; the intention is rather to highlight and reinforce the developments that are verifiably taking place within the law and that should also be reflected by legal science.

I. European Law

My claim, that legal science rather stubbornly adheres to national categories of thought, must sound surprising, if not strange, in relation to the discipline I discuss first, namely European law. Is not the European construction exactly the negation, the *Überwindung*, of the nation state? Is not the specific characteristic of European law precisely that, a claim to supranational validity[8] without any need for Europe to become a state first? And could not maybe private law, even though it is a 'late comer' of the integration process, become somewhat of a test case for transnational state-free law, in particular when it would require no more of private law than to revise its own traditions?

A dominating and most instructive topic currently under discussion within legal science and legal policy concerns the case for—or rejection of—a European Civil Code. Numerous institutional and academic groupings have contributed to the debate on the codification project, in manifold ways.

The European Parliament (EP) in its resolutions of 1989 and 1994 pleaded for a European Civil Code.[9] They did not have an immediate impact,[10] but did help to keep the idea alive. By now, the EP has become more cautious, or at least more patient.[11] The Commission is more sibylline. In its Communication on contract law in 2001,[12] it presented four options and asked: Should the European private law be generated through a contest between legal orders? Should Europe draft *Restatements* following the American model? Should it 'consolidate' first what

logical Nationalism, *Towards a New Critical Theory with a Cosmopolitan Intent*, Constellations 10 (2003), 453), but I keep to Zürn's interpretation sketched out at IV below.

8. ECR [I963], 24 f. Van Gend en Loos.

9. OJ C 158/1989, 400 and C 205/1994, 518.

10. Cf. Tilmann, 'Eine Privatrechtskodifikation für die Europäische Gemeinschaft', in Müller-Graff (ed.), *Gemeinsames Privatrecht in der Europäischen Gemeinschaft,* 1993, 485.

11. See the Decision of the European Parliament on the approximation of Member States' civil and commercial law, [COM(2001) 398–C5-047I/2001–2001/2187(COS)] of 15 November 1001, A5-0384/2001.

12. Commission Communication on European Contract Law, COM (2001) 398 final, 11 July 2001.

it has accomplished in terms of existing elements of European private law? Or should Europe embark on further legislative measures? The Commission summarized responses to these questions in its Action Plan of 12 February 2003.[13]

The Commission carefully avoids taking a definitive position. But the project of a European Civil Code has had a mobilising effect throughout legal science.[14] The most prominent academic writer and also one of the most ardent advocates in favour of a European code is Christian von Bar.[15] Which of the arguments expressed in his views seem to suggest a position of methodological nationalism? Von Bar more than others emphasizes that legislation should draw on the authority of science and scholarly deliberation rather than politics. His views quite accurately reflect the self-understanding of German scholarly thought in the 19th century during the construction of the German Civil Code.[16] The German Civil Code put into effect the uniformity of the German Reich and thus symbolizes the emergence of a German nation state. A European Civil Code could play a similar part, as contribution towards European state-building, supplementing the political constitution of Europe.

II. Comparative Law

The process of European integration has brought about a renaissance of comparative law. For long decades it was—in Germany and elsewhere—virtually self-evident that comparative research would focus on American law, and only on American law. In the meantime, the *Common Core* project alone attracts, year after year, a growing number of comparative lawyers from all over Europe and the rest of the world to Trento.[17] Comparative case books are available.[18] European universi-

13. Communication of the Commission and the European Parliament and the Council: A Coherent European Contract Law, Action Plan, OJ C 43/2003, 1.

14. See summary by Schmid. *Juristenzeitung*, 2001, 694, updated in his habilitation thesis (note 1), part 3, section 2; especially on the expert working groups on the Europeanization of private law, see: Riedl, *Vereinheitlichung des Privatrechts in Europa*, 2004.

15. See programmatically Von Bar, 'From Principles to Codification: Prospects for European Private Law,' Columbia Journal of European Law 9 (2002), 379.

16. See poignantly Jakobs, *Wissenschaft und Gesetzgebung im bürgerlichen Recht nach der Rechts- quellenlehre des 19, Jahrhunderts*, 1983, 160: the German Civil Code is '… a code of law, the sources of which can be found not in itself, but in the legal science that has created it; a code of law seeking to be dominated by, rather than to dominate, science...' (my translation); see for closer analysis Joerges, *Kritische Justiz*, 1987, 166.

17. Bussani/Mattei (eds.), The *Common Core of European Private Law, Essays on the Project,* 2002; on this and with a further impressive summary of the discipline's *status quo*, Gambaro, 'The Trento Theses,' *Global Jurist* 4 (2004), No. 1, Article 2.

18. Von Bar, *The Common European Law of Torts,* vol. I, I998; Van Gerven/Lever/

ties have extended their intra-European comparative research with some enthusiasm, provoking not only quantitative but also qualitative improvements—a real renaissance.

Again, it would be adventurous to try to force what has become a rich and diverse theoretical debate into a uniform agenda. And just as is the case for European law, the claim that comparative law is pervaded by methodological nationalism may alienate the reader at first. But it holds true, in my view, as shall be demonstrated by turning to the views of two important exponents and opponents. Reinhard Zimmermann, on the one hand, reveals in his numerous works that the common European legal heritage, the *ius commune europaeum* continues to have a considerable impact in continental civil law systems and throughout the English (but not the American) common law. He seems to be sketching out the foundations of a position in favour of transnational and non-state private law.[19] But in his theoretical approach, Zimmermann combines historical studies and practical work on law. His writings on legal history are meant to provide support to non-legislative codification movements. It comes as no surprise that the title of the first section of the Introduction to the Historical-Critical Commentary on the German Civil Code reads: 'The European Codification Movement'.[20] The section reads further: 'the codifications have not rendered learned jurists redundant, nor have they led to a permanent consolidation (or fossilisation) of private law. But they did facilitate, on the one hand, national fragmentation of legal traditions…on the other, the codifications ended the 'second life' of Roman law, the history of its direct practical application… .'[21] The Europeanization of private law cannot and should not rewind the clock of history. But historical legal scholarship is trying to feed into it an awareness of its pan-European foundations—to boost the European codification project which would create and symbolise a uniform European legal space.

At the opposite end of the spectrum of comparative contributions is Pierre Legrand.[22] His non-convergence thesis, his rigid opposition

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Larouche/von Bar/Viney, *Cases, Materials and Text on National, Supranational and International Tort Law, Scope of Protection*, 1998.

19. See Zimmermann, *Archiv für die civilistische Praxis,* 193 (1993), 122–169: *idem*, Roman Law and European Legal Unity, in Hartkamp/Hesselink/Hondius/Joustra/Du Perron (eds.), *Towards a European Civil Code*, 2nd ed. 1998, 21; *idem*. 'Savignys Vermächtnis,' in Caroni/Dilcher (eds.), *Norm und Tradition*, *Welche Gerschichtlichkeit für die Rechtsgeschichte?*, 1998, 281.

20. Zimmermann, *Historisch-Kritischer Kommentar*, paras. 1 ff. before § 1 (2003).

21. My translation.

22. Poignantly, e.g.: 'European Legal Systems are not Converging,' *International and Comparative Law Quarterly*, 45 (1996), 52; 'Against a European Civil Code,' *Modern Law*

against functionalism in comparative law and against codification movements is based upon the assertion that common law and civil law cannot communicate because the law is a cultural phenomenon and European legal cultures have developed, quite simply, in an incompatible way. Both Zimmermann and Legrand loosen ties between law and the nation state. Yet, both remain themselves tied to a methodological nationalism. Zimmermann in that he seeks to follow the example of historical legal science in the codification movement, Legrand in that he deduces from the cultural features of common law and civil law their political autonomy.[23]

III. Private International Law

European and Private International Law (PIL) lived separate lives for a long time, encouraged by a culture of non-communication where European lawyers were part of public law and PIL-lawyers part of private law. Thus, for a long time it went practically unnoticed that the European Court of Justice (ECJ) adjudicated constellations that had already been thoroughly thought through by PIL. Nowhere did overlaps receive greater attention and were discussed earlier than in Germany. Discussions can be separated into several stages: One phase, where PIL was recommended as an alternative to projects suggesting unification of law.[24] A second one, still ongoing, where European law—in particular its fundamental freedoms and the ban of discrimination, but also its provisions on mutual recognition of binding law—was and is used to correct PIL.[25] A third phase is approaching. This phase will see the choice-of-law methodology pulling away from its traditional home discipline and in particular from its orientation towards a geographical idea of justice. This is happening in two ways. For one, inconsistencies

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Review 60 (1997), 44.

23. These are no more than cursory remarks. Hein Kötz, representing the leading—functionalist—school of comparative law, has always been sceptical towards the idea of codification, see his *Gemeineuropäisches Zivilrecht*, Festschrift Konrad Zweigert. 1981, 481; methodologically strict exponents of the common core project are agnostic in terms of legal policy: e.g. Bussani, ibid. (note 17), but also Mattei, 'Hard Code Now!', *Global Jurist Frontiers*, Vol. 2, No. 1 (2002), Art. 1. The *Gretchen* question, however, remains whether comparative law can give up its perception of autonomous legal systems. How can we conceptualise their interdependencies and the emergence of multi-level systems with interconnected competences?

24. See e.g. Kreuzer, 'Die Europäisierung des internationalen Privatrechts—Vorgaben des Gemeinschaftsrechts,' in: Müller-Graff, *Gemeinsames Privartecht in der Europäischen Gemeinschaft*, 1993, 273.

25. See Grundmann, *Rabels Zeitschrift für ausländisches und internationals Privatrecht* 64 (2000), 457. Summary and analysis of current developments in Schmid (note 1), especially in part 3, section 1.

within and between national law[26] and European law[27] will be reconstructed as 'collisions' and conflicts arising from the institutionalization of different rationality criteria. Accordingly the idea that law could be set up as a stable, permanent and 'uniform' system will be done away with. Contributions describing the law of a multi-level system and in particular European law as a *Kollisionsrecht*, a 'collision law', increasingly demonstrate a thinking of law in constantly recurring collisions.[28] More on this will be said below.[29]

IV. Interim Conclusion and Anticipation: the Misery of Methodological Nationalism in Europe's Postnational Constellation

The claim that our categories of legal science and our individual disciplines attach themselves to the nation state is anything but exciting. Equally, it should not come as a surprise that legal science—in constitutional and administrative as well as private law—draws on national and federal examples. The connected question, however, whether—in legal sociological terms—it is possible to halt the evolution of law beyond the nation state, and—in legal theoretical terms—the debate surrounding the normative legitimacy of these developments, bear some potentially explosive issues.

The situation in the European Union inevitably requires a look, as indicated above, into the political science research on integration. For a long time, we have been reading that Europe is more than an international organization, but less than a federation.[30] To understand its posi-

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26. Intellectually groundbreaking but little noticed: Wiethölter, *Begriffs- oder Interessenjurisprudenz—falsche Fronten im IPR und Wirtschaftsverfassungsrecht: Bemerkungen zur selbstgerechten Kollisionsnorm*, Festschrift Kegel, 1977, 223; analysis by Teubner. 'Der Umgang mit den Rechtsparadoxien: Derrida, Luhmann, Wiethölter,' in: Joerges/Teubner (eds.), *Rechtsverfassungrecht, Recht-Fertigung zwischen Privatrechtsdogmatik und Gesellschaftstheorie*, 2003, 22.

27. See Joerges, 'Legitimationsprobleme des europäischen Wirtschaftsrechts und der Vertrag von Maastricht,' in: Brüggemeier (ed.), *Verfassungen für ein ziviles Europa*, 1994, 91.

28. Joerges, 'The Impact of European Integration on Private Law: Reductionist Perceptions, True Conflicts and a New Constitutionalist Perspective,' European Law Journal 3 (1997), 378; Furrer, *Zivilrecht im gemeinschaftsrechtlichen Kontext. Das Europäische Kollisionsrecht als Koordinierungsinstrument für die Einbindung des Zivilrechts in dax europäische Wirtschaftsrecht*, 2002; Amstutz, *Zwischenwelten, Zur Emergenz einer interlegalen Rechtsmethodik im europäischen Privatrecht,* Joerges/Teubner, *ibid.* (note 26), 213; Vesting, *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* 63 (2004), 41, 65 ff.; Schmid (*ibid.* note 1) part 3, section 1; Teubner/Fischer-Lescano, 'Regime-Collision: How the Emergency of Private Governance Regimes Changes Global Legal Pluralism,' Michigan Journal of International Law, 2004 (forthcoming).

29. Below B. II. and C. I.

30. W. Wallace, `Less than a Federation, More than a Regime: The Community as a Political System,' in H. Wallace/W. Wallace (eds.), *Policy-Making in the European Commu-*

tion between these two poles as a 'multi-level systems sui generis' is somewhat of a dominating view in political science[31] which is being further substantiated in respective studies. Before introducing the idea into legal science, it should be reconstructed in normative categories. But this is anything but easy. In his essay introducing the 'postnational constellation' as a term of art,[32] Jürgen Habermas posed the crucial question whether there was a future for democracy. Democracy was institutionalised in (national) constitutional states.

Therefore, postnational constellations are highly ambivalent; they constitute not an achievement but rather a challenge. The thesis in which Michael Zürn diagnoses the misery of methodological nationalism[33] suggests that we cannot avoid the challenge, because our entry into the postnational constellation is not at our disposition. His diagnoses affect mostly the contextual conditions of political action:[34] The nation state is no longer in a position to define its political priorities autonomously (as sovereign), but instead is forced to coordinate them transnationally. Not only must their members (national citizens) recognise their political action; states have also become accountable to transnational bodies where their politics are being subjected to evaluation. To be sure, national governments continue to vehemently defend their fiscal powers. "Whilst resources remain (in most part) at national level, the formulation of politics has been internationalised and recognition transnationalized."[35]

How will this type of multidimensional disaggregation of statehood affect the law? First of all, we should be prepared to find the transnational (European) level of politics confronting national law with a range of demands arising from the interconnectedness of nation states (in other words, the logic of integration of societal sub-systems), and from the project of integration and its institutionalised political telos manifested in the European Treaties. Neither the national nor the transnational dimension gives a firm halt; both are instead themselves in a state of contingent development. The thesis suggesting that we are and will be witnessing tensions between a functionalist logic of market integration institutionalised in the Treaties and a normative logic of justification, of *Recht-Fertigung*, institutionalised at national level, in

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nity, 1983, 403.

31. Instructive are contributions to Jachtenfuchs/Kohler-Koch (eds.), *Europäische Integration*, 2nd ed., 2003.

32. Above note 6.

33. Above note 7.

34. Ibid., 188-191.

35. My translation; ibid., 188.

my view continues to have much persuasive force as a starting point and basis for approximation.[36] It implies: law has to learn how to accommodate disaggregated competences of action and the fact that in a European multi-level system the 'higher' level's competences are restricted to the fields enumerated in the Treaty, that Europe hence cannot form a hierarchical system but instead relies on a plethora of policy networks and on cooperative problem solving. Any attempt to illustrate or concretise these formulae is bound to fail the systematic expectations and traditional thought patterns.

B. EXEMPLA TRAHUNT: THREE PATTERNS OF EUROPEANIZATION OF PRIVATE LAW

'Less than a "system", but more than just a set of contingent case law'—thus the claim of the following analyses of the practice of Europeanization of private law. It would be unrealistic to accredit to the law the power to assert itself as a 'system' within the complex and conflict ridden territory of the European multi-level system. But any suggestion to break the law down into a string of individual cases would be equally far from reality. Three sets of examples are being introduced, exemplifying in turn some significant patterns of Europeanization of private law. Their 'exemplicity' is manifested particularly in the range of options they uncover for integration policy. In saying this, I implicitly suggest that these options include diverse, even opposite perspectives. I also assert that their contest will not come to a rest, that we should not expect any one pattern to acclaim a monopoly at any time in the future. Rather, each individually will be subjected to a range of experiences that in turn will provoke further learning processes. Here is not the place to advocate normative agnosticism. Having said that, it should be stressed that the law will have to be prepared to deal with colliding concepts of Europeanization.

I. Product Liability Law: on the Destitution of Orthodox Supranationalism

The European Community Product Liability Directive was adopted unanimously, under (the old version of) Article 100 TEC, on 25 July 1985.[37] This explains why it records product liability law so incompletely,[38] why it disappointed expectations especially of those who ex-

36. See Joerges/Brüggemeier, 'Europäisierung des Vertrags- und Haftungsrechts,' in: Müller-Graff (ed.), *Gemeinsames Privatrecht in der Eurupäischen Gemeinschaft*, 1993, 233.

37. OJ L 210/1985. 29.

38. Koch, *Zeitschrift für das gesamte Handels- und Wirtschaftsrecht* 152 (1988), 537.

pected it to be the flagship of European consumer protection law.[39] Intense debates surrounded the Directive's implementation. It was widely considered a marginal piece of legislation with little impact on the general law of obligations because Article 13 of the Directive evidently did not respect claims pursuant to other legal bases.[40] There was, at any rate, broad agreement that the Directive would preclude further advances in consumer protection law by establishing a set of conclusive minimum standards.

For a long time, these expectations appeared justifiable, until, in three relatively recent judgments of 25 April 2002,[41] the ECJ shattered them quite dramatically. The Court recognised to the great surprise of most observers that the Directive's consumer protection provisions were not intended to introduce protective minimum standards, but rather to achieve 'complete harmonisation' As a consequence, the Directive enjoys the standing of fully-fledged European law: it is supreme to national private law, takes precedence over subsequent national legislation and creates a duty for national courts to refer to the ECJ.

The three decisions just mentioned concern the French, the Greek and the Spanish implementation of the Directive. The Spanish case is particularly frightening.[42] Mrs. Gonzalez Sanchez had to have a blood transfusion in the hospital run by the defendant institution (Medicina Asturiana SA). As a consequence of the transfusion, she was infected with the Hepatitis C virus. She based her action on the law by which Spain had transposed the Directive into Spanish law and, in addition, on the general liability provisions of Spanish civil law, and on the Spanish General Law for the Protection of Consumers and Users of 19 July 1984, under which the claimant had only to prove damage and a causal connection. Under the Product Liability Directive, implemented 10 years after the 1984 law,[43] she also had to prove that the hospital had produced the blood conserves, which she failed to show. Therefore, the success of her claim depended on the relationship between the three legal bases. Article 13 of the Directive provides that the Directive "shall not affect any rights which an injured person may have according to the

39. See Brüggemeier/Reich, *Wertpapier Mitteilungen* 1986, 149.

40. E.g. Brüggemeier, *Zeitschrift für das gesamte Handels- und Wirtschaftsrecht 152 (1*988), 511, 531.

41. Case C-52/00, ECR [2002] I-3827 *Commission v. France*; Case C-183/00, ECR [2002] I·3901 Mari}: *MarÍa Victoria González Sánchez v. Medicina Asturiana SA;* Case C-154/00, ECR [2002] I-3879 *Commission v. Greece*.

42. On the following, see analyses by Arbour, ELJ 10 (2004), 87 and Schmid (*ibid*., note 1), especially part 2, section 4, chapter 5.

43. Case C-183/00 para. 7, 8.

rules of the law of contractual or non-contractual liability or a special liability system existing at the moment when this Directive is notified." Does this mean, the Spanish court asked the ECJ, that the 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?"[44] To the unversed reader, the question may sound rhetorical. But the Court responded: "Article 13 of the Directive cannot be interpreted as giving the Member States the possibility of maintaining a general system of product liability different from that provided for in the Directive."[45]

The provision that Article 13 does not affect claims on a different basis cannot "be relied on in such a case in order to justify the maintenance in force of national provisions affording greater protection than those of the Directive."[46]

In its analysis of the Community law provisions, the ECJ refers to Recital 1 in the preamble of the Directive, according to which "approximation is necessary because legislative divergences may distort competition and affect the movement of goods within the common market and entail a differing degree of protection of the consumer against damage caused by a defective product to his health or property."[47] It had been necessary at the time to introduce this sentence, in order to 'establish' the Community's (functional) legislative competence. Since then, the paragraph has become neither more empirically relevant, nor normatively more correct. Nevertheless, the Court's judgment reaffirmed its value as a virtually teleological motivation for restricting Member States' legislative autonomy.[48]

European law, understood this way, does not contribute much to the Europeanization process. The preliminary rulings procedure has good institutional sense because it links the judiciary in Member States to the jurisdiction of the ECJ. But it can bear painful consequences for those who seek justice in a case that would not normally seem problematic.[49] After long years of litigation, Mrs. Sanchez finally knew whom she would have had to sue in order to enforce her rights. A result such as this one would be easier to accept, if we could see in the ECJ's judg-

44. *Ibid*., para. 13.
45. *Ibid*.. para. 30.
46. *Ibid*., para. 33.
47. *Ibid*., para. 3.
48. *Ibid*., paras. 24, 25.
49. More generally Joerges, 'The Bright and the Dark Side of the Consumer's Access to Justice in the EU,' Global Jurist Topics 1 (2001): No. 2, Article 1.

ment a constructive contribution to the development of product liability law. But this is hardly possible.[50]

II. Company Law: Economic Freedom and Political Rights of European Citizens—and their Bars

The judgments in *Centros*,[51] *Überseering*[52] and *Inspire Art*[53] are part of a single complex which should be discussed in unity, but at this point I will focus on a particular aspect often shaded by a plethora of literary analysis. From the interplay between the economic freedoms, the legislative and the judiciary, emerges the right to hold the national sovereign to account for its legislation and to confront it with the legal rationality of its European neighbours—this to me is the normative significance of the *Centros* case law, but equally its practical weakness.[54]

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. The decision was widely praised as a milestone in the realization of the market freedoms, as a contribution to the so-called negative integration and the opening up of regulatory competition; but it also has wider implications.

A Danish married couple, Marianne and Tony Bryde, wished to import wine into Denmark. For this they planned to set up a company, but did not want to pay the fee of the DK 200,000 (28,000 Euro) that Denmark required for the registration of companies. In May 1992 they founded 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 need the money that a regular registration in Denmark would have required. Unsurprisingly, the Danish authorities refused registration. The Brydes went to court. Seven years later, the ECJ handed down the following judgment to the referring Danish Højesteret. It found, rightly, that:

> 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

50. See below C. III.

51. Case C-212/97, ECR [1999] I-1459 *Centros Ltd. v. Erhvervs- og Selskabsstyrelsen*.

52. Case C-208/00, ECR [2002] I-9919 *Überseering BV v. Nordic Construction Company Baumanagement GmbH (NCC).*

53. Case C-167/01, *Kanter van Koophandel en Fabrieken voor Amsterdam v. Inspire Art Ltd, U*. of 30 September 2003.

54. See Joerges, 'Zur Legitimität der Europäisierung des Privatrechts. Überlegungen zu einem Recht-Fertigungs-Recht für das Mehrebenensystem der EU,' in Joerges/Teubner, *ibid*. (note 26), 183, 189–194.

> 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.[55]

Did the Court permit the Brydes, in Gerhard Kegel's well phrased words,[56] to 'cock a snoot' at the law? Or, and this may be the case's most popular reading, was it the ECJ's intention to allow for a more efficient legal framework for company law in Europe?[57]

Maybe the truth lies in the middle? What is so abusive, really, about setting up a company in another Member State with a seemingly more beneficial regulatory system? Should we not simply understand it—as the ECJ does—as the exercise of a right afforded to European citizens, a right which however will cede to legitimate regulatory concerns—foreclosing the concerns of those who warn against the superiority of economic against political reason. The ECJ did not push aside Denmark's right to enact compulsory provisions dealing with company law. It placed Denmark under pressure to justify why Danish registration fees would better serve the protection of creditors, which, according to the Danish government's presentation, was the object of the Danish legislation. The Court remained unconvinced, partly because foreign companies were allowed to set up branches in Denmark without having to pay a registration fee.

There are obvious parallels to the jurisdiction on Article 28 TEC, which since Cassis de Dijon, thus for the past 34 years, has repeatedly found that Community law must preserve and respect national autonomy ('*autonomieschonend*'), whilst national laws must pursue their legitimate regulatory interests in conformity with Community law ('*gemeinschaftsverträglich*'). In other words: Danish citizens have the right to test their national sovereign in a European court—the Brydes made use of their right. In case it is found to be in breach of European law, the Danish legislator is given the chance to amend its laws—and it

55. Sentence 1 of the tenor of the judgment, ECR [1999] I-1947.

56. In his editorial in *Zeitschrift für Europäisches Wirtschafts- und Steuerrecht* (8) 1999 (`Es ist was faul im Staate Dänemark und anderswo...`).

57. See Eidenmüller, 'Wettbewerb der Gesellschaftsrechte in Europa,' ZIP 2002, 2233.

has done so.[58] The new regulation, justified by legitimate concerns of the Danish government to secure tax demands, may be called into question again. It remains to be seen—e.g. whether the Brydes are again prepared to invest 10 years to challenge existing Danish law.

Centros has not remained without consequences. The possibility that interested actors would try to test how far their new freedoms would reach and how much money they would save, was easily predictable yet little investigated.[59] Debate about the implications of *Centros* in terms of legal *systematique* was however, dense; it helps us in better understanding the two following decisions. In a reference for a preliminary ruling by the Federal High Court of 30 May 2002 (*Überseering*),[60] 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' or legal headquarters (*Verwaltungssitz*).[61] In an internal market where freedom of establishment exists as a right, such legal principles seem downright incredible.[62] In *Inspire Art*[63] the ECJ continued its line of reasoning, and established: the right of a company set up under English law to carry on business in the Netherlands should be respected in principle; only for 'good' reasons, not accounted for in European secondary legislation, may this fundamental freedom be restricted.

The *Centros* judgment found Denmark's regulatory interests per se legitimate. In the follow-up decisions, there was no need for the

58. See Trefil, *Centros und die Niederlassungsfreiheit von Gesellschaften in Europa,* EUI Working Paper Law 2003/9, http://www.iue.it/PUB/law03-9.pdf, 3l ff., referring to www.retsinfo.dk and the doubts about the solidarity of the Danish 'Sonderweg.'

59. Instructively Baudisch. 'From Status to Contract? An American Perspective on Recent Developments in European Company Law,' in Snyder (ed.), *The European Union and Governance,* 2003, 24, 44 ff., who considers a 'race to the bottom' unlikely, because of existing interests for businesses in their reputation.

60. German Federal Court, *BGH Europäische Zeitschrift für Wirtschaftsrecht* 2000, 412.

61. See para. 45 of the Opinion of Advocate-General Colomer on 4 December 2001 for Case C-208/00 *Überseering BV v. NCC GmbH*.

62. Eventually the representation made by the German government, that the plaintiff could have acted as a company without legal personality under German law (cited in AG Colomer`s Opinion at para. 55: see also Roth, *Praxis des Internationalen Privat- und Verfahrensrechts* 2003, 117, 123 f.), will not suffice; poignantly Schanze/Jüttner, Die Akteingesellschaft 2003, 30.

63. Case C-167/01, *U. v. 30.09.2003*, *Kamer van Koophandel v. Inspire Art Ltd., Neue Juristische Wochenschrift* 2003, 3331.

Court to discuss the bars to the fundamental freedoms. But these questions have become increasingly pressing: how are the general reasons in favour of the 'seat' theory (*Sitztheorie*)—protection of creditors and of subsidiary companies; co-determination; avoidance of double taxation—to be accounted for in the future? Not by invoking the seat theory! In Europe's multi-level system, the latter is equally as obsolete as its counterpart, the 'incorporation' theory (Gründungstheorie). Both have no place in Europe's postnational constellation.[64] Their objectives must be expressed in different terms[65] and addressed in a way so as to conform with Community principles.[66]

III. Altmark Trans: Public Services after Privatization

One of the most important characteristics of the Europeanization process is that it disconnects what is traditionally considered 'private law' from its regulatory context. This is one of the inevitably disintegrative effects of integration, legally rooted in one of the Community's core principles: the EU's competences are restricted to the fields enumerated in the Treaty. Amongst them we find practically the whole field of regulatory law, and the Community has used those competences extensively.[67] The real world, however, continuously brings up constellations where the demarcation of competences in the Treaty does not correspond with real existing and interconnected regulatory problem constellations. Typically, the European level is competent to regulate one aspect of a problem, whereas Member States remain competent to

64. Clearly Schanze/Jüttner, *Die Aktiengesellschaft* 2003, 681, 685.

65. Especially Schanze/Jüttner, ibid., and Ulmer, *Juristenzeitung* 999, 662 and *Neue Juristische Wochenschrift* 2004, 1201 illustrate convincingly how this is possible.

66. The German co-determination rules are the most complicated, because they lack any functional equivalent elsewhere (see Dammann, 8 Fordham J. Corp. & Fin. L. 607). Co-determination may not be imposed on an undertaking simply because it uses its right to establishment—and vice versa: Community law may not dispense with an institution such as the German co-determination procedure, simply because it disturbs companies' freedom of establishment. It is instead left to initiate political processes through institutionalisation of existing tensions. An example, at first sight a little remote: the practices engaged by Microsoft in the US and in the EU are judged differently in either legal order. But where the EU, as was declared by the Commission on 24 March 2004, imposes its law in Europe, then it takes away de facto rights and freedoms Microsoft enjoys under US law. The EU can avail itself of a legal framework that does not leave these types of dilemmas to lie [with expected effects: see Sadowski/Junkes/Lindenthal, Labour Co-determination and Corporate Governance in Germany, in: Schalbach (ed.). *Corporate Governance, Essays in Honor of Horst Albach*, 2nd ed. 2003. 144].

67. Jacques Delors in a slightly outdated but much cited statement announced that 80 per cent of the economic law in Member States should be determined by the Community. Delors. 'Europa im Umbruch. Vom Binnenmarkt zur Europäischen Union.' in Kommission der EG (ed.), *Europäische Gespräche,* vol. 9. 1992, 12.

regulate another one. The term 'diagonal' is used to distinguish such constellations from, on the one hand, 'vertical' conflict resolutions where Community law trumps national law, and from 'horizontal' conflicts which arise from differences among the Member States' legal systems and which belong to the domain of PIL on the other.[68] The term 'diagonal conflicts' captures a structural characteristic of the European multi-level system. Neither the European level nor the national level is in a position to address a specific problem in its entirety: European and national actors are forced to coordinate.

Examples are legion, even though they do not always appear in the literature under the heads I have just indicated.[69] I restrict myself to one: The *Altmark Trans* judgment of 24 July 2003[70] illustrates the implications of the privatization[71] of public services, induced by European law; these Europeanized so-called 'Services of General Interest' or '*Daseinsvorsorge*' are controversial because they meet with firmly embedded national regulatory traditions, expectations and interests. The regulations they affect are not as much intertwined with private law as they may be in constellations where national private law pursues regulatory goals that may collide with some goals of European regulatory law. However, privatization initiatives are a major concomitant of integration; they affect the realm of private law as they determine to what extent services can be brought by and in conformity with the market.

'*Daseinsvorsorge*' was brought under the auspices of public law on the basis that it affected basic human requirements in industrialised times. The German term was coined by no less than Karl Jaspers *before* 1933. The fact that Ernst Forsthoff in 1938 re-applied the term in the context of administrative law[72] is no argument as such. In any case, it is correct to say that in the first place *Daseinsvorsorge* had to gain the social and democratic legitimacy used today in its defence. Those who acknowledge its value, e.g. the British social philosopher Steven Lukes, must fear the 'invasions of the market'[73] in Europe; those who find no

68. See also Schmid (note 1), part 3, section 1, sub-section 1, chapter 2.

69. But see Schmid (note 1), part 3, chapter 2.

70. Case C-280/00, *Altmark Trans GmbH v. Regierungspäisidium Magdeburg und Nahverkehrsgesellschaft Altmark GmbH, nyr*.

71. On this process see 'Communication on Services of General Interest in Europe' (COM (1996) 443 final of 11 September 1996), 'Report on Services of General Interest' (COM (2001) 598 final of 17 October 2001) and the 'Green Paper on Services of General Interest' (COM(2003) 270 final of 21 May 2003).

72. 'Daseinsvorsorge als Aufgabe der modernen Verwaltung,' *idem.*, *Die Verwaltung als Leistungsträger*, 1938.

73. Lukes, 'Invasions of the Market,' in Dworkin et al. (eds.), *From Liberal Values to Democratic Transition*, 2003. Lukes argues within the anglo-saxon tradition: 'As Marshall

place for it in a social welfare state, such as the expert committee to the German Federal Ministry of Commerce, would regard its protection by legal norms as an encroachment of 'the citizens' subjective rights, guaranteed by the Community, to unhampered participation in the cross-border transfer of goods and services'.[74]

Altmark Trans concerned subsidies awarded to public transport undertakings in the Landkreis of Stendal in Germany. The case itself may seem insignificant, yet the ensuing questions are of fundamental importance: should availability of public transport be organised on the basis of social welfare and distributional justice or on the basis of efficiency? Is this an openly political question to be decided by the German Lander and communes, or a legal question for Community law to answer? The ECJ knew not to decide these questions definitively, but instead to design a legal framework which leaves room for political processes and decisions—and still protects European concerns. This is, it seems to me, the core message of the decision which also brought up difficult questions of law concerning the interplay between secondary Community law and the German public transport law (*Personenbeförderungsgesetz*) as amended in 1995. *Altmark Trans GmbH* and *Nahverkehrsgesellschaft mbH* both sought to organise public transport in the Landkreis of Stendal in Sachsen–Anhalt, one of the German Lander. *Altmark* had been licensed, and got the license renewed by the Regierungspräsidium, whereas the bid of *Nahverkehrsgesellschaft mbH* was rejected. The central question of law occupying the ECJ was: did the subsidies given to *Altmark Trans* after it had been granted the license to organise bus traffic in the Landkreis Stendal qualify as state aid within the meaning of Art. 87 TEC? If yes, then they would be subject to the Commission's competences under the Treaty provisions on state aid.

The Court's response sounds like old-fashioned legal formalism: following its own case law, the Court finds that an official act does not constitute state aid within the Treaty unless it includes an 'advantage' to the beneficiary undertaking. Advantages for the purpose of state aid exclude financial means provided by the state by way of compensation

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argued, the first half of the twentieth century saw the acquisition by citizens of a range of basic services to which they could claim entitlement as citizens, services funded and provided by the state and thus excluded from the scope of the market. These are sometimes seen as constituents of 'social citizenship' but they can, equally, be seen as supplying the preconditions for core citizenship by enabling citizens to acquire and maintain the capacities needed for its equal exercise.'

74. My translation; see *Expert Committee to the German Federal Ministry of Commerce [Wissenschaflicher Beirat beim Bundesministerium für Wirtschaft], 'Daseinsvorsorge' im europäischen Binnenmarkt,* 2002, 7.

for public service obligations taken on by the service provider. But the Court goes further, operationalizing its own distinction by four criteria:[75] (1) The recipient must be required to discharge clearly defined public service obligations; (2) The parameters of the calculated compensation must be established in advance in an objective and transparent manner; (3) The compensation must not exceed costs plus a reasonable profit; (4) Decisions are to be taken either after a public procurement procedure or the level of compensation is to be determined on the basis of an analysis of the costs of typical undertaking, well run and adequately provided with adequate means of transport.

These responses do bear some problems. They need to be further concretized and their implementation will be challenging. But they have high normative qualities: European law does not take a stand for or against the organisation of public services through national welfare states; it decides neither for nor against the market. Instead it puts justificatory pressure on national politics and forces those who organise public services to explain how they fulfil their social mandate. It 'constitutionalizes' the multi-level system so as to accommodate the decentralised exercise of formative (national) political freedom, whilst at the same time allowing for European concerns to afford market access to non-local suppliers. And if this were to prove a successful solution guaranteeing and manifesting some social sense in national practices, then it would be an achievement that so far has remained hardly conceivable in most integrated political systems[76]—a 'procedural' conflict solution par excellence.

C. VERBA DOCENT: ON THE PROCEDURAL LEGITIMACY OF THE EUROPEANIZATION PROCESS

What I am now trying is to bring the abstract deliberations in the first part and the analyses of the second part into a synthesis. I will proceed in three steps. The first follows the understanding of Europe as a multi-level system, to demonstrate its implications for integration policy. Normative dependencies of political action become apparent in this process and are being re-conceptualised, in a second step, in legal categories. In a final step l will sketch out the legal constitution of the Europeanization process itself, which, it is my claim, must be designed procedurally, in order to overcome the impasses of European law and the methodological nationalism in comparative law and PIL.

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75. Case C-280/00 (note 68), paras. 89–95.

76. See, Zürn/Joerges (eds.), *Governance and Law in Post-National Constellations. Compliance in Europe and Beyond*, 2005.

I. Farewell to Orthodox Supranationalism

Europe is no federation, but more than a regime. It is a heterarchically structured multi-level system. It must organise its political action in networks. Since the powers and resources for political action are located at various and relatively autonomous levels in the EU, the coping with functionally interwoven problem-constellations will depend on the communication between the various actors who are relatively autonomous in their various domains, but at the same time mutually dependent.[77] Jürgen Neyer formulated his thesis in a most concrete fashion, usually avoided by political scientists: the EU-specific conditions for political action favour a deliberative mode of communication that is bound by rules and principles and where arguments are accepted only if they are capable of universal application.[78] These considerations can help legal science to satisfy an undeniable need to afford its declarative statements some normative value. But they cannot substitute the argumentative construction of normative statements specific to law, and they leave room for additional argumentation. To translate Neyer's argument: the European legal framework is not designed merely to secure fundamental freedoms; but neither to create a new European state. The purpose of European law is instead to discipline the interactions necessary within the Community to act politically. It is to guide strategic action into a deliberative style of politics. It should leave behind 'vertical' ('orthodox') supranationalism and instead found its validity as law on the normative (deliberative) quality of the political processes that create it.[79] To which we may add:[80] No state in Europe can make or refrain from making decisions without causing 'extra-territorial' effects on its neighbours. Provocatively put, but brought to its logical conclusion, this means: nationally organised constitutional states are becoming unable to act democratically. They cannot include in the electoral processes, determining the democratic sovereign, all those who will be affected by their decisions. And vice versa: their citizens cannot influence the behaviour of those political actors who are

77. See above A. IV.

78. 'Discourse and Order in the EU. A Deliberative Approach to Multi-Level Governance,' *Journal of Common Market Studies* 41 (2003), 687; more detailed in his habilitation thesis, *Postnationale politische Herrschaft*, 2004.

79. See Joerges/Neyer, with Jürgen Neyer. 'From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalisation of Comitology,' 3 (1997) European Law Journal 273; Joerges, 'Good Governance' in the European Internal Market: Two Competing Legal Conceptualisation of European Integration and their Synthesis,' in: von Bogdandy/Mavroides/Mény (eds.), *European Integration and International Co-ordination*. *Studies in Transnational Economic Low in Honour of Claus-Dieter Ehlermann*, 2002, 219.

80. See Joerges, 'The Impact,' *ibid*. (note 28).

taking the relevant decisions for them. It would thus seem legitimate for Europe to require its Member States to design their national laws with a view to accommodate Community law. It would also seem sensible to afford Member States' citizens legal rights that are truly European because they allow national citizens to compare their own laws with the laws and the experiences in other Member States.

II. European Law as Choice of Law and the Constitutionalization of Transnational Governance

The normative claims identified above of 'deliberative supranationalism' should not be portrayed as some remote wish list. They are well documented and somewhat canonised in real existing European law: Member States of the Union may not enforce their interests and their laws unboundedly. They are bound to respect European freedoms. They may not discriminate. They may only pursue 'legitimate' regulatory policies approved by the Community. They must coordinate in relation to what regulatory concerns they can follow, and design their national regulatory provisions in the most Community-friendly way. What is the meaning of all this, for the relationship between European and national law in general, and the Europeanization of private law in particular?

Two complementary patterns of legalisation, of *Verrechtlichung*, and responsibilities for the law, may be differentiated. All of the above principles and rules substantiating a 'deliberative suprnationalism' affect how we deal with differences between laws. They impose a duty on Member States to take into consideration 'foreign' affairs and interests. To European law, they have assigned the task of making sure that national law is compatible with Community principles. In that sense, the law of the Community is a 'choice-of-law' ('*Kollisionsrecht*'). It does more than traditional PIL, in that its decision-making criteria are not there to identify the geographically closer or factually preferable law or decide between colliding interests in the application of the law. It does not work on the assumption that between equally involved national laws a choice should be made. Rather, it requires national laws to be made Community-compatible through innovation and modification, and the development and observance of principles and rules, in order to organise the differences between them. All these factors impose limits on national sovereignty. In addition, Union citizens are afforded rights that are directly applicable in their own as much as in foreign Member States—forcing a duty on the national legislator to justify its actions in a European forum.

Member States are being asked to make changes to their legal systems—changes that should in principle take place there, for them to effectively guarantee that Europe's innovative impact will help national legal systems to evolve sensibly.[81] However, this is but one side of the process. Building on just those measures that are promoting free trade and the Europeanization of our markets and rejecting the individual states' interests and orientations, European transnational governance structures have developed and unfolded their own logic and significance.

This holds true for all domains of regulatory policy[82]—including the traditional realm of 'private law', at least indirectly.[83] And in all those fields where private law instruments are being deployed for the organization of transnational activities, suitable arrangements are likely to establish themselves. Regulatory politics have seen an intense debate for some time on the question of how these new forms of transnational governance can be conceptualised legally ('constitutionalized'). Discussions are equally intense in the area of competition policy after its 'modernization' in Regulation 1/2003.[84] [85] It is only a matter of time for those discussions to reach private law.

III. Juridifying the Europeanization Process

Private law cannot ignore the postnational constellation it finds itself placed in. It cannot pretend there is still a set of autonomous national legal systems. It can do equally little about the fact that Europe is not a state, and is not on its way to statehood. All it can do is try to bind political processes to legal principles and to influence law making in the European multi-level system. The literature on Europeanization of private law talks too little about these framework conditions. It is not obvious which legislative institution in Europe would be competent to write a Civil Code that could absorb the rich diversity of European legal traditions. It is not obvious how any such Code could keep pace with the evolutionary dynamic of regulatory politics. There are no signs of an expansion of the European judiciary, yet an expansion seems indis-

81. See the remarks in note 28 and also Deakin, 'Regulatory Competition versus Harmonisation in European Company Law,' *Cambridge Yearbook of European Legal Studies* 2 (1999), 231.

82. See Joerges, Europarecht 2002, 17.

83. See above B. III.

84. OJ L 2003/1 of 4 January 2003. See also: http://europa.eu.int/comm/competition/antitrust/legislation/procedural_rules/comments/

85. The Commission home page gives an impression: http://europa.eu.int/comm/competition/antitrust/legislation/procedural_rules/comments/

pensable, if the new law is to enjoy effective validity.[86] The *status quo* is anything but ideal. Europeanization takes place in an incremental and fragmented fashion. Citizens seeking to enforce their legal rights are being subjected to unacceptable burdens. Yet, over all we are facing an innovative process full of opportunities.

Typically, the most problematic amongst the case law constellations analysed in part two is the one that rigorously brings to bear the principles emerging from the formative period of European law. The ECJ 's thesis that the provisions of the Product Liability Directive have effected a 'complete harmonisation', undeniably ignores that if product liability law is to be applied sensibly, it should be placed in the particular context of elements of fault and liability, objective standards of negligence, product safety legislation and self-regulation (standardization and certification). It is hard to imagine how the ECJ could not have taken these circumstances into account, but equally difficult to see how its punctual intervention could contribute sensibly to the Europeanization of product liability and product safety law.

Things are different for company law. Here the ECJ pronounced clear and consistent orientation points in a way that is manageable for secondary Community law as well as national legal systems. The ECJ has conferred political rights on the 'market citizen', without affording either the market or market citizens law-making powers. The Court's findings on the privatisation of public services appears to me equally productive. Legal traditions, social expectations, political preferences, administrative know-how and market innovation—all these are very different between Brittany and Estonia, between Faroe Islands and Sicily. Europe seems destined to institute innovation and to encourage social learning. It is not Europe's job to subject the continent to a unitary regime.

The incrementalism of the Europeanization process is challenging but also full of opportunities. Europe is no polity in the way nation states are. It will have to live with its complex diversity illustrated in the case law above: primary law granting fundamental freedoms and basic rights; transnational governance arrangements in numerous

86. 'Kommt die Geschäftswelt nicht ganz gut zurecht?'—'but isn't the business world doing quite well?'—Ernst Steindorff asked more than a decade ago (see the report of the symposium 'Alternativen zur legislatorischen Rechtsvergleichung' by Oliver Remien in Rabels *Zeitschrift für ausländisches und internationals Privatrecht* 56 (1992), 261 ff., 300 ff.], just to re-pose the question now (*Aufgaben künftiger europäischer Privatrechtssetzung angesichts deutscher Erfahrungen*, Festschrift Peter Ulmer 2003, 1393, 1407, note 63) and to add to its context: those who lobby for greater legislative ambit in Europe should also ask for a corresponding expansion of Europe's judiciary's powers which nobody will be eager to finance.

fields of regulatory politics; legislative and judicial interventions affecting only a section of the national legal systems and leading to irritation. This diversity creates by no means a comfortable situation. Maybe we will find that its complexity exceeds our learning capacities. But I am confident that it makes no sense simply to imagine a more simplistic legal landscape.