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STATECRAFT, THE MARKET STATE AND THE DEVELOPMENT
OF EUROPEAN LEGAL CULTURE

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Abstract

We consider whether the theory of the market-state can explain the features of a common European legal culture. Our thesis is that there is an extant EU legal culture, one which developed through the Europeanisation of law. The distinct European feature of this legal culture is the enforcement of market-state features in EU law. The concept of legal culture needs to be untied from a communitarian view by which culture “*provides this group with its identity by establishing internal coherence and external difference, as well as relative consistency over time*”. Culture hence needs to be viewed through a decentralized lens. As a nation-state heritage, EU law has developed a legal culture which does not follow purely market-state rationales, but rather balances these rationales against nation-state features such as human rights.

Keywords

Legal Culture, Market-State, Statecraft, EU law, interpretation, legal theory

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Statecraft, the Market State and the Development of European Legal Culture

Introduction

In this essay, we consider whether the theory of the market-state can explain the features of a common European legal culture. Our thesis is that there is an extant EU legal culture, one which developed through the Europeanisation of law.¹ The distinct European feature of this legal culture is the enforcement of market-state features in EU law. When we use the term “culture,” we refer to Kant’s term as the products of a rational acting agents to achieve a certain purpose.² With legal culture, we investigate a subcategory of Kant’s conception within the area of law. In this respect, we understand legal culture in the way Senn understands it, that is, as those features of the legal order which cannot be enforced.³ As such, EU legal culture describes the factors that influence “hard” EU law but can never be subject to direct legal control.

We can describe legal culture positively as the sum of non-enforceable prerequisites that a legal society within an autonomous legal system has developed to make, find, interpret, and confirm law. As such, the European legal culture we describe largely resembles what R. Sacco has called the “legal formants”⁴.

Legal Culture has internal and external dimensions.⁵ “Internal legal culture describes the attitude towards law of legal actors such as judges and lawyers; external legal culture describes the attitude towards law of the general population.”⁶ Both of these interact and have diverging impact over the course of societal development depending on the degree of autonomy of a legal system from society.⁷

The very existence of such a legal culture has been strongly denied in the past. A unique European legal culture, it is submitted, does not exist as the legal systems, legal formants, people and expectations are just too different in Europe.⁸ The pluralism of Europe and its cultures have become a shield to protect nationalistic thinking.⁹

¹ For a description of this view, see Ralph Michaels, *Legal Culture* in: Jürgen Basedow, Klaus Hopt & Reinhard Zimmermann (eds.), *Max Planck Encyclopedia of European Private Law* (University Press, Oxford, 2011).

² Immanuel Kant, *Kritik der Urteilskraft*, § 83.

³ Marcel Senn, *Recht und Kultur – ein dialektisches Verhältnis*, in: Marcel Senn & Dániel Puskás (eds.), *Rechtswissenschaft als Kulturwissenschaft? Kongress der Schweizerischen Vereinigung für Rechts- und Sozialphilosophie*, 15. und 16. Juni 2007, Universität Zürich, *Archiv für Rechts- und Sozialphilosophie Beiheft* 115, pp. 13-21 (15 et seq.).

⁴ Rodolfo Sacco, *Legal Formants* 39 *American Journal of Comparative Law* (1991) 1 et seq. (I); 344 et seq. (II.).

⁵ For the differences between external and internal feature of legal culture, see Lawrence Friedman, *The Legal System: A Social Science Perspective* (Russel Sage Foundation, New York, 1975).

⁶ Ralph Michaels, *Legal Culture* in: Jürgen Basedow, Klaus Hopt & Reinhard Zimmermann (eds.), *Max Planck Encyclopedia of European Private Law* (University Press, Oxford, 2011).

⁷ Ralph Michaels, *Legal Culture* in: Jürgen Basedow, Klaus Hopt & Reinhard Zimmermann (eds.), *Max Planck Encyclopedia of European Private Law* (University Press, Oxford, 2011).

⁸ Pierre Legrand, *Against a European Civil Code*, 60 *The Modern Law Review* (1997), 44 et seqq.

⁹ See the Bundesverfassungsgericht’s Lisbon judgment, BVerfG, 2 BvE 2/08 vom 30.6.2009, Absatz-Nr. (260), http://www.bverfg.de/entscheidungen/es20090630_2bve000208en.html. Critical to this end Gabriele Britz, *Vom kulturellen Vorbehalt zum Kulturvorbehalt in der bundesverfassungsgerichtlichen Demokratietheorie des Lissabon-Urteils?*, *Europarecht-Beilage* (2010), p. 158.

This view clashes with the characterization of the EU law as an autonomous legal order, which also necessarily requires an autonomous legal culture.¹⁰ If these critiques were correct, neither law-making nor jurisprudence would be possible without opting for one predominant legal culture in Europe to “rule them all”. We think that these critics are wrong. They link the concept of legal culture to a view to a community (frequently a nation-state) by which culture “provides this group with its identity by establishing internal coherence and external difference, as well as relative consistency over time.”¹¹ Hence, they view culture through a centralized lens. Ralph Michaels has already pointed out that “all of these elements –focus on the nation-state, internal coherence, external isolation, lack of change- have in the meantime become very doubtful in anthropology and sociology.”¹² Indeed, the tensions between Member State’s cultural features and the need for uniform cultural harmonization reflect a tension between integration and the protection of sovereignty that are typical of the nation-state era. However, the acceleration of European integration, in particular in the latter part of the 20th century, is consistent with the transition from a nation-state to a decentralized “market-state”¹³ which possesses likewise a “market state” culture. The legal culture we see developing encompasses two features: first, the goal of regulation changes from the aim to provide welfare-state features to the creation and management of a market, where market-features become dominant. Second, the regulatory tools change from those of top-down regulation to tools that deliberately use market-mechanisms to influence behavior. Both of these, we argue, have developed to become cornerstones of a decentralized European legal culture.

Most recently, the Lisbon Treaty gives concrete legal and political form to European experimentation with institutions that respond, in large part, to market-state challenges.¹⁴ European Courts and legislators, especially in areas dedicated to nation-state private legal systems, increasingly use or interpret European legislation in the light of the features identified by market-state-theory in order to manage the tension between Member State sovereignty and European legislation. The debt crisis and other recent challenges to Europe and their legal responses also reflect tensions that are characteristic of a market-state age where states are interdependent and where financial and other crises reverberate throughout an enlarged, deeply integrated market.

We begin our essay with a brief overview of European legal culture and our understanding of it. We then proceed to weaving a narrative of the European integration project that is infused with analysis of European legal culture. Our contention is that European legal culture cannot be properly understood without examining it in the light of the challenges to the European integration project. We do not purport to present an all-encompassing theory explaining why and how European legal culture has evolved. It is obvious that a single theoretical tool cannot explain such a vast and complex enterprise. Rather, we posit that market-state theory is one indispensable tool in explaining how the European legal culture has been constructed, how it addressed its existential crises, and the challenges and difficulties that it may encounter in the future.

¹⁰ For the links between a „uniform“ law and legal culture, see Ralph Michaels, *Legal Culture* in: Jürgen Basedow, Klaus Hopt & Reinhard Zimmermann (eds.), *Max Planck Encyclopedia of European Private Law* (University Press, Oxford, 2011).

¹¹ Ralph Michaels, *Legal Culture* in: Jürgen Basedow, Klaus Hopt & Reinhard Zimmermann (eds.), *Max Planck Encyclopedia of European Private Law* (University Press, Oxford, 2011).

¹² Ralph Michaels, *Legal Culture* in: Jürgen Basedow, Klaus Hopt & Reinhard Zimmermann (eds.), *Max Planck Encyclopedia of European Private Law* (University Press, Oxford, 2011).

¹³ As we detail later, the legitimacy of the market-State is grounded in its ability to provide economic opportunity for the citizenry. This is its purpose and its ethos.

¹⁴ Some see the “end” of the State marked by a transition to other, more complicated organizing forms. See Martin Van Creveld, *The Rise and Decline of the State*, (University Press, Cambridge, 1999), p. vii (“Globally speaking, the international system is moving away from an assembly of distinct, territorial, sovereign, legally equal states toward different, more hierarchical, and in many ways more complicated structures.”). See also Anne-Marie Slaughter, *A New World Order*, at 32. (University Press, Princeton, 2004) (“The conception of the unitary state is a fiction.”).

We contend that Europe is a unique phenomenon. It is a theater where *sui generis* historical *rebondissements* have mixed with cultural evolution to engender a “new legal order” that reflects the hallmarks of the legal culture of its age but also goes beyond it. We believe that, by and large, history can be explained through ideas and intellectual history rather than the random confluence of events. Throughout this essay, we articulate and describe how European historical particularism is consistent, and has coalesced, with the evolution of a European legal culture to produce the European integration area.

European Legal Culture: An Overview

We start with a brief overview of the evolution of legal culture through its various epochal iterations and introduce concepts that are relevant for the balance of our exposition. Legal culture is not a static entity, for it develops according to the degree of autonomy of a legal system from society.¹⁵ For example, as we argue below, the European “state-nations” of the 17th and 18th century sought to solidify the metropolis, drew on their subjects and on external resources to foster the consolidation enterprise, and minimized collaboration with other states. Thus, legal culture was used as a regulatory tool to form a community of the society of the respective state-nation.¹⁶ The “nation-states”, which in the 20th century succeeded the state-nations, unleashed their resources to ensure the welfare of the nation, and were better suited to collaborate in a free trade and integration enterprise with other states. In such an environment, individual legal cultures developed in the era of the state-nation were now confronted with other legal cultures, which resulted in the much-discussed “clash of civilizations.”¹⁷ Market-states then incorporate a decentered starting point, by which the “nation” as the locus of legal culture is supplemented by the “market”. This “market state” faces a diffuse, interdependent and intertwined larger market that cuts across boundaries and, while formally sovereign to establish their welfare systems, those states are in practice required to coordinate entitlements and regulation with other market-states. Whether certain features are part of the legal culture will depend on their ability to protect the foundational stability of the globalized markets that have grown out of the nation-state era thereby enabling and fostering economic opportunity. The features of legal culture are hence not tied to whether they reflect or create certain identities of (national) communities, but whether they function to create and govern markets.

Pre-Modern Era: No Possible Europe

We posit that the pre-modern era started with the French Revolution, spanned the Industrial Revolution, and ended with World War I. In this age, legal culture focused on the consolidation of the state and its economy. Internally, the pre-modern era involved a foundational *laissez-faire* policy coupled with the growth of a legal system designed to protect private property and contract rights. Externally, the State played a zero-sum game intended to amass wealth. Taken together, these policies had the design and purpose of strengthening the industrial base of the developing states.

¹⁵ Ralph Michaels, *Legal Culture* in: Jürgen Basedow, Klaus Hopt & Reinhard Zimmermann (eds.), *Max Planck Encyclopedia of European Private Law* (University Press, Oxford, 2011).

¹⁶ Daniele Caruso, *Private Law and State-Making in the Age of Globalisation*, 42 *New York University Journal of International Law and Politics* (2006), 24 et seqq.; James Gordley, *Myths of the French Civil Code*, 42 *American Journal of Comparative Law* (1994), 459 et seqq.

¹⁷ Samuel P. Huntington, *The Clash of Civilizations?*, 72 *Foreign Affairs* (1993), pp. 22-49 and the subsequent books Samuel P. Huntington, *The Clash of Civilizations and the Remaking of World Order* (New York, Simon & Schuster, 1996; with special emphasis to the cultural impact Harrison, Lawrence E. and Samuel P. Huntington (eds.), *Culture Matters: How Values Shape Human Progress* (Basic Books, New York, 2001).

The state-nation legitimated itself by bringing unity out of diversity. It arose from the unification into one entity of largely unrelated territories, such as dukedoms, feudal territories, and princely states. The state-nation founded a single entity within discrete boundaries. Economically, it saw the rise of capital investment in the industrial base. Its ethos was to increase the power of the emerging sovereign. The state-nation adopted an economic legal structure designed to protect contractual and private property, rather than to extend entitlements to its subjects. Internally, legal culture was used as a regulative tool to justify these essential purposes. Legal codes such as the Napoleonic Code were drafted,¹⁸ formally drawing on the presumption of the common legal culture of the French nation. In fact, this presumption was used as a shield to protect the expectations of capital holders, and they did so by ensuring that in the common cycles of “boom-and-bust” (policies that later in history came to be known as “Keynesian”) did not interfere with the free evolution of the market.

Externally, the state-nation followed trade and strategic foundational policies that furthered a similar purpose: the consolidation of the state-nation. The state-nations of Europe colonized foreign territories and drew upon their resources to bolster their own commercial and industrial base.¹⁹ These foreign territories were viewed as resources with respect to which they were in competition with their neighbors. The colonial map of Africa bears witness to those struggles. It was comprised of states that carved through traditional tribal boundary lines, lumping together ethnic groups that historically had never been part of the same polity, reflecting territorial struggles and compromises among Belgium, England, France, Germany, Italy, the Netherlands and other European colonial powers.²⁰ The European state-nations also followed a predominantly mercantilist trade policy, seeking to sell as much as possible and buy as little as possible from their trading interlocutors.²¹

In this environment, there was no foundation for a European legal culture as such. Each entity comprising the whole dedicated itself to consolidating its own base. The very ethos of the state-nation was antithetical to any kind of cultural unity. States could not engage in an economic and strategic zero-sum game to strengthen themselves while at the same time seeking collaboration. Whether in the colonial battlefield or in the realm of economic competition, the development of state-nations called for mustering the available resources to build a unified legal culture within the state-nation.

The state-nation needed to build its industrial and commercial base. It achieved that goal, and in the course of its enterprise it also created a nation associated with its physical boundaries. The Schuman Declaration may be read to perceptively understand that the European enterprise was not a matter of destiny. It described the failures of the nations of Europe, after World War I, to begin creating a unified whole. Further, it acknowledged that the tragedy of Europe lay in its failure to recognize that, after World War I, a “united Europe was not created and we had war”.²²

Of course no one could have accurately predicted whether World War II, and the rise of fascism and Nazism, would have been avoided had the Weimar Republic been brought into the fold of a collaborative Europe including France, Italy and possibly Great Britain. However, much as the global

¹⁸ Alexander I. Grab, *Napoleon and the Transformation of Europe* (Palgrave Macmillan, Basingstoke, 2003), pp.50-51. Peter van den Berg, *The politics of European codification: a history of the unification of law in France, Prussia, the Austrian Monarchy and the Netherlands* (Europa Law Publishers, Groningen, 2007), pp. 4-5, 206.

¹⁹ Francois Crouzet, *A History of European Economy, 1000-2000* (University Press, Virginia, 2001) , pp. 50-54, 165.

²⁰ Thomas Pakenham, *The Scramble for Africa*, p.21 (Avon Books, New York, 1991). Henk Wesseling, *Imperialism and Colonialism, Essays on the History of European Expansion*, pp.12-20 (Greenwood Press, San Francisco, 1997). On colonization of Africa see also Vincent Khapoya, *The African Experience: An Introduction*, (Prentice Hall, Upper Saddle River, 2009).

²¹ Peter Mathias & Sidney Pollard, *The Cambridge Economic History of Europe* (Volume VIII, University Press, Cambridge, 1989), p.103.

²² The Schuman Declaration was delivered by Robert Schuman, then French Foreign Minister, on May 9, 1950, announcing the creation of the European Coal and Steel Community (ECSC). For the full text of the declaration, visit http://www.robert-schuman.eu/declaration_9mai.php

trade wars of the *entre-guerre* came at a time when modern liberal democracies needed to structure their commerce based on comparative advantage to solidify their economic base, the fracture of Europe certainly created fertile ground for the rise of totalitarian forces opposed to modern liberal democracies.

Scholars such as Philip Bobbitt view the “modern”, 20th century period as a “Long War,” one that featured a struggle among three competing ideologies for domination of the nation-state: democracy, fascism, and communism.²³ Their common denominator was adherence to a theory that gathered the power of the State to serve the nation. Communism did so by theoretically granting all subjects a joint and undivided interest in the whole. “From each according to his abilities, to each according to his needs,”²⁴ would ensure that each member of society would, in theory, enjoy a minimum level of entitlements. Fascism provided a corporatist organization to those who, racially, managed to become part of the nation. It gave its subjects an expansionist and dominating ideology whereby they would rule over inferior nations.²⁵ Modern liberal democracies followed suit with the welfare, administrative state that gave its subjects regulatory and entitlements welfare.

World War II was a catalyst for the adoption of the treaties and programs that shaped the world in the second half of the 20th century. Those treaties, as we explain below, are consistent with the concept of a nation-state. The GATT was signed at Bretton Woods and ushered in the trade liberalization enterprise, rejecting mercantilism and protectionism.²⁶ It “embedded liberalism” in that each state participant enjoyed, at least in theory, the sovereign right to establish and operate a welfare system of its choice, and at the same time removed barriers to trade and created a more efficient trading system. France could stay France and maintain programs ranging from universal education to the supply of subsidized *metro* tickets to large families, all the while participating in a liberalized system of trade that generated more global resources to share. The Marshall Plan ensured that European trading partners had sufficient economic strength to be meaningful commercial interlocutors for the United States. The new modern order relied on balance of powers, alongside liberalized trade and integration among sovereign equals, and the Marshall Plan fostered European powers so as to bring about greater balance.

Because of its unique suffering during World War II, Europe engaged in a deeply integrationist enterprise that went well beyond what any other free trade area would aspire to accomplish. Legal culture, as we will explain below, played an important role in this integration enterprise. Just as legal culture had been used during the state-nation to construct a nation and in the nation-state era to engender individual rights of citizens, it is now used to construct and govern a European market and may also be used as a means to govern this market, once it is achieved.

²³ Philip Bobbitt, *The Shield of Achilles: War, Peace and the Course of History* (Knopf, New York, 2002), pp. 24-33.

²⁴ The phrase was first elucidated in Karl Marx’s “*Critique of the Gotha Program*”. The article was first published in the journal *Die Neue Zeit* (Bd. 1, No. 18, 1890-91).

²⁵ See Benito Mussolini, *Fascism Doctrine and Institutions* (Ardita Publishers, Rome, 1935), pp. 7-42.

²⁶ After the initiation of Bretton Woods, international trade proliferated six-fold from 1948-1973. See <http://econ2.econ.iastate.edu/classes/econ355/choi/bre.htm>

European Legal Culture: The Early Years

In the course of the state-nation building process, a nation associated with the boundaries of the state was formed. The state-nation had drawn on its subjects and created institutional systems to administer its building enterprise. The consolidation of the State contributed to the creation of a nation. Administrative control mechanisms were put in place. Power became centralized in a bureaucracy.²⁷ The *laissez-faire* policies of the state-nations, coupled with industrialization and urbanization, left substantial segments of the citizenry in precarious economic and social circumstances. Legal culture had played an important role in this respect. Rather than “drawing” on common features of state subjects, they have been subsumed under the label of a “common legal tradition”. The codifications of that time bear witness to this fact. These alleged “common legal cultures” enshrined in codifications or other systematized law have been, alongside other nation-building enterprises such as heroic legends, used as a means to create a common nation, a community that was assigned certain features that supposed to be typically “French”, “Italian”, or “German”. Indeed, these regulatory efforts succeeded insofar as the dividing features formerly assigned to disparate kingdoms, dukedoms etc. diminished for the sake of typically national features. This was especially true for legal culture. French judgments became short in order to limit interference with parliamentary decisions. German law was codified in a neat and orderly system by the legislators and professors, while the development of English law remains being a judicial exercise of single, highly personalized judges.²⁸ Hence, to a large extent, legal culture contributed to the identity-creation of state-nations.

With the change of inner and external state-systems, the economic and social conditions of the participating states changed from the state-nation to the nation-state. After legal culture succeeded in constructing certain features of the nation as a community, it increasingly served as a tool to conserve these features. At the same time, the external features began to change. An increasingly globalized economy based on free trade marked new challenges to the state-nation. The stock market crash on “Black Thursday” in the USA and the “Great Recession” in Europe, particularly in Germany, bore witness to the fact that the global economy started to influence and challenge the concept of the state-nation. By the end of World War I, after the adoption of the Treaty of Versailles, the European states had graduated to the early stages of the nation-state era. During that era, the State would marshal its power to provide for the welfare of its nation. Legal culture started to increasingly serve the function of distributive justice, to provide entitlements to the citizens of the nation-state which reflected the “values” of the nation. Under fascism, which deliberately carried the notion of national-*socialism*, the development of nation-state welfare-systems grew more intense. However, fascism excluded those individuals from this trend who did not match certain racial requirements. At this time, legal culture fulfilled two purposes: to strengthen the entitlements-system of the nation-state towards its citizens and to deny “citizenship” to those who did not meet racial criteria.

After World War II, the seeds had been sown for the establishment of a European collectivity based on free trade and common political institutions that yielded a collectivity of states ready to engage in the European endeavor.²⁹ This collectivity gave birth to European legal culture. The European Union was

²⁷ Alexis de Tocqueville, *L'Ancien régime et la révolution* (Paris 1856), (Stuart Gilbert trans., *The Old Régime and the French Revolution*, New York: Doubleday 1955), Part II, chapter 2; Peter Lindseth, ‘Always Embedded’ *Administration: The Historical Evolution of Administrative Justice as an Aspect of Modern Governance*, in Christian Joerges, Bo Stråt and Peter Wagner (eds), *The Economy as Polity – The Political Constitution of Contemporary Capitalism* (London: UCL Press 2005), pp. 117 et seqq., at pp. 119 et seqq.

²⁸ Richard C. v. Caenegem, *European Law in the Past and the Future* (University Press, Cambridge, 2002), pp. 44 et seqq.

²⁹ Anthony Sutcliffe, *An Economic and Social History of Western Europe Since 1945* (Longman, New York 1996), p. 106.

ready to proceed as a project of integration of discrete nations into a whole that would be inextricably bound but would at the same time respect national sovereignty.³⁰

The historical basis of Europe is succinctly expressed in the Schuman Declaration: “A united Europe was not achieved, and we had war”. By binding France and Germany to a union and partnership for coal and steel, the resources for war, the community of Europe would make war not only “unthinkable but materially impossible.” Europe would not be achieved overnight. It would focus on concrete achievements and, in leaps and bounds, become a polity that could, in time, fairly be labeled the “United States of Europe.” Legal culture was assigned a key role in this endeavor. The enforcement of political peace solutions such as international peace treaties were believed to be unfit for the purposes of these ideas. Putting the task of peace into the hands of nation-state politicians who were as ‘decision-makers (...) influenced by various pressures’³¹ stemming mainly from national interest³² would indeed undermine the collectivity needed to make the European idea come true. Solutions were needed to disconnect the peace-building endeavor from national politics, a solution that started beyond nationalism, the literal meaning of supranationalism.

A common solution was found, one we can still see today, in Art. 3 sec. 3 s. 1 TEU, in the creation of a common market, which erases economic barriers between the Union’s Member States. In short: those who trade don’t fight! As the achievement of such a common market could not draw on national politics, law and especially a new, supranational legal culture was assigned a regulatory function that shall work towards this end. A whole new and autonomous legal culture was to be developed that aimed at establishing a common market through economic integration.³³ Elsewhere, this idea has been described as functionalism,³⁴ which aimed at a depoliticisation of the European integration process for the sake of technocratic law.³⁵ Law is used as a regulatory instrument to create a common market where politics is ineffective.³⁶

The development of a common, market-oriented European legal culture massively contributed to the functional integration enterprise. When, in 1964, the ECJ decided that, if the term “workers” in EU primary law would be interpreted according to national law, the freedom of workers would be ‘deprived of all effect and the (...) objections of the Treaty would be frustrated’ and hence ‘(t)he concept of ‘workers’ (...) does not therefor relate to national law, but to community law’³⁷, it acknowledged that there is a distinctively European legal culture, one rooted in market-oriented EU

³⁰ Damian Chalmers, Gareth Davies and Giorgio Monti, *European Union Law. Cases and materials.*, pp.7-9 (University Press, Cambridge, 2010); Neill Nugent, *The Government and Politics of the European Union*, pp. 9-16 (University Press, Duke, 5th ed., 2003).

³¹ Ian Bache, Stephen George & Simon Bulmer, *Politics and Policy in the European Union* (3rd ed., University Press, Oxford, 1996), p. 36.

³² See in this respect Paul Craig, *Integration, Democracy and Legitimacy*, in: Paul Craig & Gráinne de Búrca (eds.), *The Evolution of EU Law* (University Press, Oxford, 2011), 14, who names bureaucratic actors, societal interest groups but also multinational cooperations.

³³ This harmonizing function of legal culture was recently explicitly acknowledged by the EU legislator: Regulation (EU) No. 1094/2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority) devotes a whole article (Art. 29) on the task of EIOPA to establish a “common supervisory culture”.

³⁴ Paul Craig, *Integration, Democracy and Legitimacy*, in: Paul Craig & Gráinne de Búrca (eds.), *The Evolution of EU Law* (University Press, Oxford, 2011), p. 14.

³⁵ See critical to this end William Wallace & Julie Smith, *Democracy or Technocracy? European Integration and the Problem of Popular Consent*, in: Jack Hayward (ed.), *Special Issue 18 West European Politics: The Crisis of Representation in Europe* (1995), p. 140.

³⁶ Mauro Cappelletti, Monica Seccombe & Joseph Weiler (eds.), *Integration through law* (Walter de Gruyter, Berlin, New York, 1985).

³⁷ Case 75/63 *Hoekstra v Bedrijfsvereniging Detailhandel* [1964] ECR 177.

law. The ECJ had brought forth nothing less than the principle of autonomous interpretation,³⁸ which presupposed the existence of a European legal culture. By acknowledging such a market-oriented legal culture, the ECJ used legal culture to create a common European market which, while respecting nation-state sovereignty, could possibly also work against nation-state interests. As it had helped to create a nation in the state-nation, legal culture has now been used to create the common market.

In the meantime, foundational treaties were designed to shelter the sovereign right of Member States to engage in regulatory and entitlements welfare. The treaties did not specifically state that European law would have direct effect, and they did not include any supremacy clause. While the European treaties were bolder and more ambitious than any international treaty in force at the time, this overall design still provided a substantial level of protection of the Member States' ability to legislate both regulatory and entitlements welfare. Each Member State could, to a certain extent, remain a "black box" in which it had freedom to determine how best to support the welfare of its nations, free from interference by European law.³⁹ In the Member States, legal culture was now used to preserve the cultural, community-features developed in the state-nation. Art. 79 sec. 3 of the German Grundgesetz, for example, seeks to guarantee fundamental features of the German nation-state in perpetuity: "Amendments to this Basic Law affecting the division of the Federation into Länder, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible." This provision is nowadays used by the German Bundesverfassungsgericht to define the definite limits of the European integration process.⁴⁰ In its Lisbon judgment, the Bundesverfassungsgericht expressly linked the provisions of Art. 79 sec. 3 of the German Grundgesetz to national culture and its integration-limiting feature.⁴¹ Hence, national "principles" such as the ones mentioned in Art. 79 para 3 GG, special characteristics of the national legal systems⁴², the elementary laws of national private law,⁴³ or the "competition of national legal orders"⁴⁴, each rooted in the legal culture that has been developed to serve the needs of the identity-creating state-nations are used as a shield to protect exactly these features of national legal culture against the European.⁴⁵ "Culture" was linked to "Identity", which allowed the use of norms such as Art. 79 para 3 GG to this end. The

³⁸ Peter Rott, What is the Role of the ECJ in EC Private Law? A Comment on the ECJ Judgments in *Océano Grupo*, *Freiburger Kommunalbauten*, *Leitner and Veedfald*, 1 *Hanse Law Review* (2005) 6, 7-8.

³⁹ For quite some time the constitutional courts of the Member states contested the European Court of Justice's position on fundamental rights issues. Thus, in 1970 the German and Italian constitutional courts stated they would not apply provisions of EU Law that failed to respect the fundamental rights and values set out in their national constitutions. See in this respect *Internationale Handelsgesellschaft*, [1974] 2 CMLR. 540 and *Frontini v. Ministero delle Finanze* [1974] CMLR 386.

⁴⁰ Bundesverfassungsgericht's Lisbon judgment, BVerfG, 2 BvE 2/08 of 30.6.2009, Leitsatz-Nr. 4, http://www.bverfg.de/entscheidungen/es20090630_2bve000208en.html.

⁴¹ Bundesverfassungsgericht's Lisbon judgment, BVerfG, 2 BvE 2/08 of 30.6.2009, para 260, http://www.bverfg.de/entscheidungen/es20090630_2bve000208en.html. This para was rightfully criticized by one judge of the Bundesverfassungsgericht Gabriele Britz, *Vom kulturellen Vorbehalt zum Kulturvorbehalt in der bundesverfassungsgerichtlichen Demokratietheorie des Lissabon-Urteils?*, *Europarecht-Beilage* 2010, p. 158 and by Hans-W. Micklitz, *German Constitutional Court (Bundesverfassungsgericht BVerfG) 2 BvE 2/08, 30.6.2009 – Organstreit proceedings between members of the German Parliament and the Federal Government*, 7 *European Review of Contract Law* (2011), pp. 531 et seq.

⁴² Stephen Weatherill, *The principles of civil law as a basis for interpreting the legislative acquis*, 6 *European Review of Contract Law* (2010), pp. 74 et seqq.

⁴³ Bundesgerichtshof, *Neue Juristische Wochenschrift* 2007, 357, 360 para 42; in this sense also Stephan Lorenz, *Ein- und Ausbaupflichtung des Verkäufers bei der kaufrechtlichen Nacherfüllung*, *Neue Juristische Wochenschrift* (2011), p. 2243.

⁴⁴ Carsten Herresthal, *Die teleologische Auslegung der Verbrauchsgüterkaufrichtlinie - Der EuGH auf dem Weg zu einer eigenständigen Methode der Rechtsgewinnung*, Anmerkung zum Urteil des EuGH vom 17.4.2008, Rs. C-404/06 – Quelle, *Zeitschrift für Europäisches Privatrecht* (2009), p. 602.

⁴⁵ With respect to European legal method Holger Fleischer, *Europäische Methodenlehre: Stand und Perspektiven*, 75 *The Rabel Journal of Comparative and International Private Law* (2011), pp. 706 et seq.

competence to regulate “The Economy” and “The Social” was “put into the basket of the identity clause”⁴⁶. This connection sits uneasily with the developments of decentralized, multi-level and market-oriented systems such as the EU.

However, as we will observe later, the nation-states’ liberalized trading system brought about a globalized economy that slowly eroded the association between the nation and its state’s boundaries, resulting also in an erosion of national legal culture.

The initial challenges of Europe involved the familiar questions attendant to integrating discrete nation-states into a single market. The early crises of Europe reflected the classical tension between preservation of sovereignty and opening borders to trade. Not unexpectedly, states operating under a black box model have disparate levels of regulation. France may choose a higher pesticide or worker protection level than the Netherlands. Italy may choose to permit the marketing of a certain type of wheat only under the “pasta” label. Germany may have alcohol content laws that ban the marketing of light liquors. In all instances, disparate regulations have the effect of hindering trade among Member States. When borders are open to trade, although formally regulatory welfare remains unaffected, the disparate regulatory levels travel with the goods.

European judicial and political institutions reacted to this challenge of integration with a significantly greater pro-trade oriented approach than other integration projects that did not feature the European commitment to creation of a new legal order.⁴⁷ The European judiciary established a genuine European legal pro-trade culture in order to fulfill their duty to “establish” (Art. 3 para 3 TEU) an internal market. In its famous “Dassonville”- decision, the European Court of Justice made certain that any measure that actually or potentially, directly or indirectly, hindered trade, would be subject to judicial scrutiny.⁴⁸ This brought before the Court a wide array of domestic laws, ranging from health measures to pornography, store closing laws, worker safety, consumer protection, product safety, and virtually every regulation of the marketplace with the potential to slow trade. If France did not permit the marketing of apples exceeding its allowed pesticide level, any apple coming from a European state adhering to laxer regulatory standard would be excluded from the French market. If Britain followed stringent obscenity rules, materials produced under more permissive Danish standards would not be allowed access to the British market. If Germany relied on worker training to ensure operator safety with respect to particular machinery, and France chose an automation philosophy, then German machines would not satisfy standards necessary to be operated in France.

In all cases, barriers to trade arose out of the disparity among national regulations. The nation-state’s welfare ethos directly conflicted with the European drive to integration. The European Court scrutinized a wide array of national measures and in all instances (until it retreated in 1990 from its initial, aggressively pro-integration stance), the Court found that the measure at issue was a non-tariff barrier requiring review to evaluate whether the State purpose at issue justified the burden on trade. In so doing, the European Court adopted a “presumption of mutual reciprocity” holding that a measure that satisfied the laws of the exporting Member State should be presumed to be satisfactory to the importing State.⁴⁹ The European Court found many national measures to be in violation of European

⁴⁶ Hans-W. Micklitz, German Constitutional Court (Bundesverfassungsgericht BVerfG) 2 BvE 2/08, 30.6.2009 – Organstreit proceedings between members of the German Parliament and the Federal Government, 7 *European Review of Contract Law* (2011), p. 532.

⁴⁷ See Michelle P. Egan, *Constructing a European Market*, ch.4 (University Press, Oxford, 2001).

⁴⁸ Case 8/74 *Procureur du Roi v Dassonville* [1974] ECR 837.

⁴⁹ This presumption is also known as the principle of equivalence or mutual recognition. For its application see, for instance, Case 272/80 *Frans-Nederlandse Maatschappij voor Biologische Producten* [1981] ECR 3277; Case 120/78 *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein*, 1979 E.C.R. 649.

law and, even when it upheld a national measure, it required the defending State to justify it and over the presumption of mutual reciprocity.⁵⁰

The unbridled integrationist purpose of the European Court of Justice thrust it into the midst of a European review of national measures. At the same time, the Court developed a precise vision of European legal culture. It found that European law would have direct effect as long as it was clear and unconditional.⁵¹ It implied a supremacy clause in the Treaties.⁵² It also found an implicit “Bill of Rights” in the common traditions of the Member States, thereby assuaging the national judicial fears that an all-powerful European law would trump national constitutional basic or human rights provisions.⁵³ Altogether, in its early work, the Court used a unique understanding of European legal culture to frame and constitute the European integration enterprise.

As Professor Weiler observed in his seminal article “The Transformation of Europe”⁵⁴, the political institutions of the Member States (in particular, France) did not expect that the Treaties would be interpreted in such an aggressive, integrationist manner. As construed by the Court, European law went a long way toward infringing the sovereign regulatory welfare rights of the Member States. This is precisely why France threatened to withdraw from the integration enterprise and precipitated the so-called “empty chair crisis” or “Luxembourg crisis”, and the subsequent Luxembourg accords or Luxembourg compromise.⁵⁵ It feared the evolving, trade-related legal culture cultivated by the European judiciary.

As we explain below, every modern trade-liberalizing system ultimately erodes single national legal cultures and sows the seeds of its own demise. While each trade system will naturally seek to balance conflicting cultures, over time the diffuseness and interloped nature of liberalized integrated markets erodes the “black box” nature of the participating states. This destroys the conditions that made modern trade interaction desirable, and necessitates a new system which, when it is based on the rule of law, also requires a new legal culture.

Owing to its unique history, Europe experienced this phenomenon earlier than other nation states (at the height of the modern era). The Member States rejected the combination of aggressive economic constitutional jurisprudence, passage to less-than-unanimous voting, and closure of selective exit through hardening of the law because they could not fathom a situation where other States would outvote them and dictate “domestic” welfare policy. The sensitivity to welfare and sovereignty, however, was no accident: it was a unique product of the modern age. As we explain later, the Member States had no problem abandoning the Luxembourg compromise (whereby each State could veto European legislation that it disliked) later in the 20th century because, by then, they had graduated to a post-modern, market-state age. The protective reflex that led to the Luxembourg accords, thereby saving the European enterprise, stemmed from fundamental nation-state constitutional principles: preservation of regulatory welfare, sovereign right to legislate in that area free from international and supranational interference, and sovereign limitation on the import of foreign standards into the domestic market.

⁵⁰ Sacha Prechal, *Free Movement and Procedural Requirements: Proportionality Reconsidered*, pp. 201-216, 35 *Legal Issues of Economic Integration* (2008).

⁵¹ See Case 26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administratio*, [1963] ECR I.

⁵² See Case 6/64 *Flaminio Costa v ENEL* [1964] ECR 585; C-106/77, *Simmenthal II* [1978] ECR 629; C-106/89 *Marleasing* [1991] ECR I-7321.

⁵³ Case 29/69 *Stauder* [1969] ECR 419.

⁵⁴ Joseph Weiler, *The Transformation of Europe*, 100 *Yale Law Journal* (1991), pp. 2401 et seqq.

⁵⁵ Nicholas Piers Ludlow, *De-commissioning the empty chair crisis: The community institutions and the crisis of 1965-6*, pp. 79-96, in Helen Wallace, Pascaline Winand & Jean-Marie Palayret (eds.) *Visions, votes and vetoes :The empty chair crisis and the Luxembourg compromise forty years on* (Peter Lang, Brussels, 2006).

The aggressive jurisprudence of the European Court of Justice would have been acceptable to the Member States, albeit reluctantly, if it had not been joined with the planned transition to unanimous voting and the possibility of a group of nations imposing binding law on others. The European Court dealt with issues that came to be characteristic of trade, centering on the extent to which a state should be required to accept goods that meet the regulatory standards of the country of export but not of the import jurisdiction. While the European Court took a much more aggressive stance than, say, the GATT panels, it still operated under a constitutional system that recognized sovereign regulation to implement welfare. Europe did not unify fiscal or budgetary policy, and allowed each Member State to adopt its own welfare system on any issue not harmonized or preempted by European law. The European Court formally recognized the right of the Member States to adopt laws furthering any of the specified exceptions to the free movement of goods, and other “mandatory requirements” recognized by the Court. Protests may have been launched against what some criticized as European “judicial activism”, but sovereignty would not have been threatened on an existential level had the Member States retained their ability to, in Weiler’s words, “selectively exit” the system.⁵⁶

The closure of selective exit was unpalatable because it would have established a foundational system more characteristic of the market-state, where sovereignty is subordinate to international measures to solidify and protect markets. The European plan for such a system was scheduled to take effect in the thick of the era of the modern nation-state. But this was inconsistent with the legitimacy demands on the State, and with its need to provide welfare unimpeded by international regulatory schemes. This explains why France among other Member States viewed the combination of low Exit and low Voice as an existential crisis.

From Luxembourg to Maastricht: Accession to the Age of the Market State

The Luxembourg crisis both saved and tempered the integration enterprise of Europe. Bargaining “in the shadow of the veto”⁵⁷ sheltered sovereignty but slowed the adoption of European integration measures. By the 1980s and 1990s, however, Europe picked up speed and moved rapidly ahead with the harmonization of its laws on a greater scale. Complementing the more perfect unification of its single market, Europe then proceeded to several institutional and political breakthroughs that pushed Europe significantly further along the integration road. As we will show later, in the long run, these changes would only have been successful if the EU adopted changes which were consistent with market-state-theory. Whenever the EU adopted top-down regulation in order to create a common market, it failed.

We posit that while other factors surely contributed to it, the acceleration of the integration of Europe was made possible by the accession to the age of the market-state. Nation-states are bound to evolve into market-states over time. Their inner ethos, welfare for the nation, corresponds to their outer face: integration through trade while preserving sovereignty. Trade in goods and services inevitably leads to capital flows and interloping ownership of global assets. This is true especially in an integrated area like Europe, where the movement of capital, people, goods and services is ensured and encouraged to a much greater extent than in other trade regulatory schemes. The integrated area will then tend to become more diffuse and use its “black box aggregation character.” Industries and other commercial sectors will tend to be dissociated from the nation. Regulatory welfare will be disrupted by the growing import of goods manufactured under other regulatory conditions. In time, jobs and production will be increasingly outsourced.

⁵⁶ See Joseph Weiler, *The Transformation of Europe*, 100 Yale Law (1991) p. 2457.

⁵⁷ Joseph Weiler, *The Transformation of Europe*, 100 Yale Law Journal (1991), p. 2450

In this environment, the State loses control over regulatory and entitlements welfare. Traditional tools such as exchange rates become regulated by the market to a much greater extent than by the State. States gradually lose their ability to incur national debt because foreign debt holders gradually displace nationals. The free flow of goods carries with it disparate regulations. With the aging of a population that boomed after World War II with renewed birth rate and immigration, budgets for entitlements welfare come under excessive strain. In turn, the nature of sovereignty changes as the ethos of the State shifts away from providing top-down regulatory and entitlements welfare to fostering and preserving market conditions where economic opportunity can be maximized.

This is the legitimating ethos of the market-state. Instead of providing top-down welfare, the post-modern Market State unleashes its power to engender and support the market and maximize the enablement of economic opportunity for its citizens. This may translate into legislation similar to that which obtained in the nation-state. Securities disclosure or bank capitalization laws, for example, protect consumer welfare while fostering market stability. Even entitlements such as aid to education may belong to both epochs, although vouchers and other market-based solutions may be more appropriate to the market-state era. In the changed post-modern globalized terrain, market failures in one segment of the market can travel rapidly to threaten and infect other segments across borders. The collectivity of states must dedicate itself to create conditions that stabilize and solidify the enlarged market, while using market-related regulatory tools. The process is not unlike that of the state-nation; even if it infringes on what would have been viewed as unassailable welfare sovereign rights in the middle of the 20th century, it is necessary to maintain the architecture of the 21st. This is the pattern that Europe needed to follow in order to successfully integrate its market.

Legal culture plays a significant role in this respect, one which is even likely to increase. Its main feature, its unenforceability and antipathy to top-down legal regulation, makes it a good fit to regulate within market-states. We will sustain our thesis through analysis of core EU policy areas: product safety, competition law, consumer law, contract and administrative law. The “new approach”, which the EU adapted as a means of regulating product safety issues, will serve as the textbook example to explain the impact of market-state theory on EU regulation.

Regulation of Product Safety: The “New Approach” as a Textbook Example on the Success of Market-State Related Regulation

EU product safety regulation is a textbook example of the success of market-state culture over traditional nation-state tools. The EU started to engage heavily in the regulation of consumer goods in the 1970s. A fundamental development in the ECJ’s judicature, triggered through the ‘Dassonville’⁵⁸ and ‘Cassis de Dijon’⁵⁹ judgments on the freedom of movement of goods, facilitated this development.⁶⁰ As there was great uncertainty about the basis of European product regulation, the only method that seemed justifiable at that time was the application of classic, problem-related command-and-control measures, which harmonised existing Member State regulation in this respect. The first acts and their successors stipulated classical command-and-control mechanisms, which

⁵⁸ Case 8/74, Judgment of the Court of 11 July 1974, *Procureur du Roi v Dassonville*, [1974] ECR, 837.

⁵⁹ Case 120/78, Judgment of the Court of 20 February 1979, *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein, Cassis de Dijon* [1979] ECR 649.

⁶⁰ Christian Joerges/Josef Falke/Hans-Wolfgang Micklitz/Gert Brüggemeier, *Die Sicherheit von Konsumgütern und die Entwicklung der Europäischen Gemeinschaft* (Nomos, Baden-Baden, 1988), pp. 307 et seqq.; the rationalisation process triggered by this development still harkens back to date, see Hans-Wolfgang Micklitz, *Some Considerations on Cassis de Dijon and the Control of Unfair Contract Terms in Consumer Contracts*, in: Katharina Boele-Woelki & Willem Grosheide (eds.), *The Future of European Contract Law: Essays in Honour of Ewoud Hondius* (Wolters Kluwer Aspen Publishing, New York, 2007) pp. 387 et seqq.

regulated the product's lifecycle to different extents.⁶¹ The removal of technical trade barriers was intended to be achieved by the setting of detailed, obligatory substantial and procedural standards, which prescribe actions required from special target groups instead of setting performance standards, which had been the dominant governance mode in the EU for almost 30 years.⁶²

Such a method was at that time undoubtedly justified by Art. 36 EEC (now Art. 36 TFEU), which allowed the Union to establish measures that hindered the free trade of goods which were harmful to the health and life of human beings.⁶³ The harmonising measures were to be adopted according to Art. 100 EEC (now Art. 114 TFEU), which then 'europeanised' these protective measures.⁶⁴ However, as these measures basically aimed at the harmonisation of existing national standards, such a problem-oriented and product-related approach principally adopted regulation methods taken from the nation-state era and also at the European level.

This approach to regulation, although in line with the classic European command-and-control method originally envisaged by Art. 100 EEC (now Art. 114 FEU), was subjected to withering criticism from several quarters. For some, this traditional harmonisation approach was ill-suited to achieving the objective of market integration, as these Directives regularly covered only one of a wide range of aspects in the respective product sectors.⁶⁵ For others, the 'Europeanisation'-approach, despite being the designated method for this kind of regulation in Art. 100 EEC (now Art. 114 FEU), resulted in the use of these command-and-control-regulation to an extent never exercised even in national law.⁶⁶ In their view, 'it produced 'Europroducts', which alienated the consumer'.⁶⁷ Either way, there was wide agreement that the classical standard setting approach envisaged by Art. 100 EEC (now Art. 114 FEU) was not suitable to achieving the goals set by the respective Directives.⁶⁸

As a response, in 1985 a 'new approach' to product safety regulation was introduced to first cover electrical and industrial machinery, later widened to apply to nearly all regimes of consumer

⁶¹ See for a comprehensive study on the the regulative practice at that time Christian Joerges, Josef Falke, Hans-Wolfgang Micklitz & Gert Brüggemeier, *Die Sicherheit von Konsumgütern und die Entwicklung der Europäischen Gemeinschaft* (Nomos, Baden-Baden, 1988), pp. 252 et seqq.

⁶² See Ray Tricker, *CE Conformity Marking and New Approach Directives* (Butterworth-Heinemann, Oxford, 2000), p. 1; Christian Hey, Klaus Jacob & Axel Volkery, *Better regulation by new governance hybrids? Governance models and the reform of European chemicals policy*, 15 *Journal of Cleaner Production* (2007), p. 1861.

⁶³ See for the contrast between Art. 30 EEC (now Art. 28 FEU) and Art. 36 EEC (now Art. 36 FEU) Laurence Gormley, *Prohibiting Restrictions on Trade within the EEC. The Theory and Application of Articles 30-36 of the EEC Treaty* (Elsevier, Oxford, 1985); Peter Oliver, *Free Movement of Goods in the EEC under Articles 30 to 36 of the Rome Treaty* (European Law Centre, London, 1st (old) ed., 1982).

⁶⁴ To this end, see Christian Joerges, Josef Falke, Hans-Wolfgang Micklitz & Gert Brüggemeier, *Die Sicherheit von Konsumgütern und die Entwicklung der Europäischen Gemeinschaft* (Nomos, Baden-Baden, 1988), p. 273.

⁶⁵ For a comprehensive overview of this criticism, see Christian Joerges, Josef Falke, Hans-Wolfgang Micklitz & Gert Brüggemeier, *Die Sicherheit von Konsumgütern und die Entwicklung der Europäischen Gemeinschaft* (Nomos, Baden-Baden, 1988), pp. 273 et seqq., who also provide a comprehensive account of data to substantiate the criticism.

⁶⁶ Lord Cockfield hit the nail on the head in a speech delivered in London on 22 February 1988 to the Federation of British Electrotechnical and Allied Manufacturers, where he described the concept of this European command-and-control regulation as 'If it moves, harmonise it!', cited after Andrew McGee & Stephen Weatherill, *The Evolution of the Single Market: Harmonisation or Liberalisation*, 53 *The Modern Law Review* (1990), pp. 583.

⁶⁷ Andrew McGee & Stephen Weatherill, *The Evolution of the Single Market: Harmonisation or Liberalisation*, 53 *The Modern Law Review* (1990), pp. 582.

⁶⁸ Commission White Paper, 'Completing the Internal Market', COM (85) 310 final; Commission Communication on the Development of European Standardization ("Green Paper") of 16 October 1990, OJ C20/1, 28.1.91 and Commission Communication on Standardization in the European Economy, OJ C96/2, 15.4.92. In a larger context from today's view: David Trubek & Louise Trubek, *New Governance & Legal Regulation: Complementarity, Rivalry, and Transformation*, 13 *Columbia Journal of European Law* (2007), pp. 539 et seqq.; David Hanson, *CE Marking, Product Standards and World Trade* (Edward Elgar, Cheltenham, 2005), p. 37.

products.⁶⁹ The ‘new approach’ was modelled after Directive 73/23/EEC (hereinafter Low Voltage Directive).⁷⁰ Although issued in 1973, it did not follow the classic command-and-control method of Art. 100 EEC (now Art. 114 FEU). Moreover, it formulated general and abstract goals of consumer safety and left it to private standardisation organisations to define specific standards. If these standards were complied with, the meeting of the safety goal was presumed (Art. 5 I of Dir. 73/23/EEC). However, only the goal of consumer safety was legally binding. If it could be achieved by other means, the marketing of the product was still permissible.

The ‘new approach’ thus responded to the EU’s failure to adopt top-down-regulation for the regulation of consumer product safety goods for the benefit of an incentive system. It thereby acknowledged the failure of traditional nation-state regulatory models for the benefit of market-state incentives regulation. In addition, the regulatory design was typical for the market-state. The “new approach” was not introduced by a top-down binding “frame-work”-legislation via a Directive or Regulation, but rather through a principally non-binding resolution⁷¹. By doing so, the humble EU story of product regulation began to enjoy success.

European Competition Law: Market, Market, Market!

If we turn our attention to the area of competition law, market-state features also prevail over traditional nation-state measures. Since the introduction of the “more economic approach”, the Commission has set consumer protection as the main priority for the enforcement of competition law. Although it “officially” largely relies on “law and economics” arguments, it in fact adopts a nation-state rhetoric, which targets the individual consumer as a citizen of the welfare state, hiding behind the shield of law and economic arguments.⁷² To this end, the Commission’s enforcement priorities for ex-Art. 82 TEU (Now Art. 102 TFEU) first highlight that “(t)he emphasis of the Commission’s enforcement activity in relation to exclusionary conduct is on safeguarding the competitive process in the internal market”. In the subsequent paragraph, however, the Commission stipulates that “(c)onduct which is directly exploitative of consumers, for example charging excessively high prices or certain behavior that undermines the efforts to achieve an integrated internal market” is also a reason to intervene. This passage may be understood as a vestige of nation-state regulation, where the welfare of consumers still takes priority. However, as these efforts are connected to “market integration”, the Commission’s “more economic approach” might nonetheless already qualify as an example of market-state regulation. To view competition law through the lens of the market-state rationale becomes even more clarifying when the Commission’s consumer protection rhetoric is brought to Court. The ECJ has stressed repeatedly that the maintenance of effective competition is so essential “that without it numerous provisions of the Treaty would be pointless.”⁷³ As such, “the (...) competition rules of the

⁶⁹ For an in-depth analysis on the influence of the low voltage Directive on the construction of a European market, see Michelle Egan, *Constructing a European Market* (University Press, Oxford, 2001), pp. 118 et seqq.; see on the development of the ‘new approach’ in general *inter alia* Noreen Burrows, Harmonisation of Technical Standards: Reculer Pour Mieux Sauter?, 53 *The Modern Law Review* (1990), pp. 597 et seqq.; Andrew McGee & Stephen Weatherill, The Evolution of the Single Market: Harmonisation or Liberalisation, 53 *The Modern Law Review* (1990), pp. 578 et seqq.

⁷⁰ See for a full account of the regulatory design of the Low Voltage Directive Christian Joerges/Josef Falke/Hans-Wolfgang Micklitz/Gert Brüggemeier, *Die Sicherheit von Konsumgütern und die Entwicklung der Europäischen Gemeinschaft* (Nomos, Baden-Baden, 1988), pp. 327 et seqq.

⁷¹ Council Resolution of 7 May 1985 on a new approach to technical harmonization and standards [Council Resolution (85/C 136/01) - Official Journal C 136 of 4 June 1985].

⁷² Anne Witt uses the same rationale when she “redefines” the “more economic approach”, see Anne Witt, *From Airtours to Ryanair: Is the more economic approach to EU merger law really about more economics?*, 49 *Common Market Law Review* (2012), 217 et seqq.

⁷³ Cases C-241&242/91P *RTE ans ITP v. Commission* (“Magill”) [1995] ECR I-743, paras 72 et seq.

Treaty, (...are) designed to protect not only the immediate interests of individual competitors or consumers but also to protect the structure of the market and thus competition as such.”⁷⁴ Even if individuals’ interests are at stake, such interests are only protected by European competition laws if a violation of these interests also endangers the market as a whole.⁷⁵ A judgment of the court of first instance, which stipulated “the welfare of the final consumer” as the goal of ex-Art. 81 (now Art. 101 TFEU)⁷⁶ and therefore required proof that the agreement at issue entails a disadvantage for final consumers as a prerequisite for a finding of anti-competitive object, was declared an “error of law” by the ECJ⁷⁷. From this it becomes evidently clear that European legal culture in competition law has switched from securing individual protection, which was typical to the nation-state, to securing the proper functioning of the market.

A “Market State” rationale is also evident in European unfair competition law. When judging whether a certain market behavior is unfair, the ECJ does not balance the interests of the respective individual competitors. Rather, the aim of the respective underlying Directive needs to be taken into account.⁷⁸ Even if the purpose of the Directive such as Directive 84/450/EEC concerning misleading advertising⁷⁹ “is to protect consumers, persons carrying on a trade or business or practising a craft or profession and the interests of the public in general against misleading advertising and the unfair consequences thereof” (Art. 1 Directive 84/450/EEC), these consumer-protection-oriented Directives need to be viewed through the general internal market aim to establish the freedom of goods.⁸⁰

European Consumer Protection (?) Law: Nothing Goes Without the Market

Consumer protection is a classic concern of welfare nation-state regulation.⁸¹ The state provides individuals with entitlements in order to re-distribute the wealth of the society. When we view consumer protection law in the EU, a different picture emerges. When we think of the EU first as a “Market Union”, the market reduces individuals to their economic role as market actors, who are determined to realize the internal market.⁸² The main argument to introduce consumer protection, information requirements and distant selling regulations in the EU was not to ensure social justice per

⁷⁴ Case -8/08 T-Mobile Netherlands BV and Others v. Raad van bestuur van de Nederlandse Mededingingsautoriteit, para 38.

⁷⁵ See in this regard Friedrich Wenzel Bulst, in: Eugen Langen/Hermann-Josef Bunte (eds.), *Kommentar zum deutschen und Europäischen Kartellrecht* (Vol. II, 11th ed. Luchterhand, Neuwied, 2011), Art. 82, para 9.

⁷⁶ Case T-168/01 Glaxosmithkline Services Unlimited, Formerly Glaxo Wellcome Plc v Commission [2006] ECR II 2969, para 118. See as to the revolutionary impact of this phrase Okeoghence Odudu, Editorial – Competition: Efficiency and Other Things, 6 *The Competition Law Review* (2009), pp. 1 et seqq.

⁷⁷ Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, Glaxosmithkline Services Unlimited, Formerly Glaxo Wellcome Plc v Commission, para 64.

⁷⁸ See on the “precarious” relationship between the internal market concept and the general interest in unfair competition law Hans-Wolfgang Micklitz, Unfair commercial practices and misleading advertising, in: Hans-Wolfgang Micklitz/Norbert Reich/Peter Rott (eds.), *Understanding Consumer Law*, (Antwerp, Intersentia, 2009, 72 et seq).

⁷⁹ Council Directive 84/450/EEC of 10 September 1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising, OJ L 250, 19.9.1984, pp. 17–20.

⁸⁰ C-47/90, Delhaize et Le Lion, Slg. 1992, I-3669, Randnr. 26; Rs. C-315/92, *Verband Sozialer Wettbewerb („Clinique“)*, Slg. 1994, I-317, para 13.

⁸¹ See Martijn Hesselink, *CFR & Social Justice* (Sellier, München, 2008), p. 15.

⁸² Martijn Hesselink, *CFR & Social Justice* (Sellier, München, 2008), p. 15. Hans-Wolfgang Micklitz, *Vorbemerkungen zu §§ 13, 14*, in: Franz Säcker & Roland Rixecker (eds.), *Münchener Kommentar zum BGB* (C.H. Beck, München, 6th ed., 2006), para 95; Norbert Reich, *Zur Theorie des Europäischen Verbraucherrechts*, *Zeitschrift für Europäisches Privatrecht*, 1994, p. 389.

se. Rather, the reason for these regulatory steps was the idea of the creation of a common market.⁸³ Nearly all EU acts in consumer law have been based on Art. 114 TFEU and its predecessor, which explicitly links its scope to the internal-market-clause Art. 26 TEU.⁸⁴ Contract law, and especially the individual contractor, was identified as having a powerful function that may be used to foster market integration in Europe.⁸⁵ It is therefore no surprise that distant selling contracts, which have a big potential to become transnational, have always been among the first contracts to be regulated by the EU.⁸⁶

The driving forces of EU consumer law are not nation-state welfare arguments, but a purely market-state rationale. In the 'market state', individuals evolve from nationals as subjects of nations to consumers or producers as subjects of the market.⁸⁷ This market-state view allows us also to cope with European pluralism as a main feature of EU law: As the 'market state' is process-oriented (toward providing better means of achieving material well-being), it is also in principle accessible to all societies which has the consequence of disregarding the concept of the individual as state-national.⁸⁸

European Contract and Administrative Law: Unequal Competition of Procedures

If we view recent and not-so recent developments in European administration and contract law, we see the incentives-based market-state rationale prevailing over nation-state regulation. The introduction of European administrative and contract law likewise do not follow classical top-down regulation such as the nation state's mandatory civil and administration codes. Instead the EU uses incentives such as access to a bigger market to foster harmonization via a spill-over effect.⁸⁹ Let us explain this development first in European administration law with the example of the centralized pharmaceutical approval procedure.

⁸³ To this end also Nils Jansen and Ralph Michaels, *Private Law and the State: Comparative Perceptions and Historical Observations*, 71 *The Rabel Journal of Comparative and International Private Law* (2007), pp. 355-356.

⁸⁴ See Martijn Hesselink, *CFR & Social Justice* (Sellier, München, 2008), p. 15. Critical regarding this link with respect to the Commission's proposal on consumer rights Thomas Ackermann, *Buying Legitimacy? The Commission's Proposal on Consumer Rights*, 21 *European Business Law Review* (2010), pp. 587 et seqq.

⁸⁵ The role of consumers should, however, not be overemphasized. As Stefan Grundmann correctly highlights, the consumer is only one of several actors that contribute to the creation of the common market, see Stefan Grundmann, *Verbraucherrecht, Unternehmensrecht, Privatrecht – Warum sind sich UN-Kaufrecht und EU-Kaufrechtsrichtlinie so ähnlich?*, 202 *Archiv für die civilistische Praxis* (2002), p. 43.

⁸⁶ See Directive 97/7/EC, which has been among the first Directives directly targeting contracts. Also within the current debate on the review of the consumer acquis, distance selling is the first contract area that will most likely be subject to full harmonisation, see Carsten Frölich, *Endlich Vollharmonisierung im Fernabsatzrecht? Auswirkungen der geplanten Europäischen Verbraucherrichtlinie*, *Multimedia und Recht* (2009), pp. 75-80. On the discussion of the switch to full harmonisation in EU consumer law in general see Thomas Ackermann, *Buying Legitimacy? The Commission's Proposal on Consumer Rights*, 21 *European Business Law Review* (2010), pp. 587-602; Hans-Wolfgang Micklitz and Norbert Reich, *Crónica de una muerte anunciada: The Commission Proposal for a Directive on Consumer Rights*, 46 *Common Market Law Review* (2009), pp. 471-519; Jan Smits, *Full Harmonisation of Consumer Law? A Critique of the Draft Directive on Consumer Rights*, 18 *European Review of Private Law* (2010), pp. 5-14.

⁸⁷ See especially Philip Bobbitt, *The Shield of Achilles – War, Peace, and the Course of History* (Knopf, New York, 2002), p. 230. For an in-depth analysis of this phenomenon and further criteria of this 'market consumer' as 'market citizen' see Kanishka Jayasuriya, *Economic Constitutionalism, Liberalism and the New Welfare Governance*, in: Richard Robinson (ed.), *The Neo-Liberal Revolution – Forging the Market State* (Palgrave Macmillan, Houndmills/New York, 2006), pp. 237 et seqq.

⁸⁸ Philipp Bobbitt, *The Shield of Achilles – War, Peace, and the Course of History* (Knopf, New York, 2002) p. 230.

⁸⁹ See Paul Craig, *Integration, Democracy and Legitimacy*, in: Paul Craig & Gráinne de Búrca (eds.), *The Evolution of EU Law* (University Press, Oxford, 2011), p. 14.

Instead of introducing an all-embracing European pharmaceutical approval procedure, the EU introduced (in Regulation (EC) No. 726/2004) a centralised procedure as its own regulatory system that competes with other national authorisation procedures.⁹⁰ If the EU designs its approval system to be sufficiently attractive, which is to say more attractive than that of a Member State, companies seek authorisation from the EU legal procedure rather than the Member State's. In order to remain attractive, Member States then need to adjust their systems to the European features. This spillover effect is meant to ultimately harmonize authorization procedures in the EU. The ultimate trigger for this spillover effect is, however, not top-down legislation but the incentive to have access to a larger (European) market when using the European approval procedure.

The same market-related harmonization tools of incentives and spillover effects is currently being introduced in European contract law. The proposal for an optional instrument is meant to govern European contract law as a legal regime, which enters the "legal market" as a product⁹¹ in addition to the national contract regimes. It achieves validity only via a so-called opt-in mechanism, thereby entering into force when contracting parties chose for its application. In order to be chosen, it needs to provide sufficient incentive when compared to national contract law. Such an approach has been introduced by deliberately increasing the consumer protection rules in national contract law via Directives, while simultaneously lowering these rules in the optional instrument. Such an approach, it is submitted, would make the use of national contract law more attractive for entrepreneurs (which are in fact the only ones with a true opt-in choice⁹²). Until now, this method has not been applied (yet). If it were, it would be a typical market-state approach.

Even without exercising such deliberative incentive-models, market-state features are also in line with the current regime of European contract law. The optional instrument as it stands has to provide an incentive to use it instead of national contract law. Thus, the same market-state rationale applies as with the introduction of the centralized pharmaceutical approval procedure.

In Memory of the Nation-State: The "Constitutionalised Market State"

As we can see, the power of EU law, which is built first and foremost upon the pillar of market-integration, accelerated the erosion of nation-state features for the sake of market-state features in Europe. Its deliberate supranational, trade-oriented feature created a legal culture that allowed the market-state to grow in Europe. However, this technocratic, market-driven idea of European law has come under attack from several fronts. Nation-state rhetoric that asked for the implementation of fundamental rights⁹³, social justice arguments in contract law⁹⁴ and the like has gained popularity the more the market integration exercise was successful. Today, the EU has developed several nation-state features such as a charter of fundamental rights and a European citizenship, which adds to its core as market-citizenship several political rights. Even in competition law, which from the outset realizes typical market-state features, calls for a "more judicial approach", which re-implements nation-state fundamental rights protection into competition law, has become louder⁹⁵. However, as the Treaties and

⁹⁰ See Thomas Groß, *Die Kooperation zwischen europäischen Agenturen und nationalen Behörden*, *Europarecht* (2005), p. 57.

⁹¹ Horst Eidenmüller, *Recht als Produkt*, *Juristenzeitung* (2009), pp. 641 - 653.

⁹² Gary Low, *Will firms consider a European optional instrument in contract law?*, *European Journal of Law and Economics* (forthcoming), who, without questioning it, only investigates the readiness of firms to choose for the optional instrument, see also Norbert Reich & Hans-Wolfgang Micklitz, *Wie "optional" ist ein "optionales" EU-Vertragsrecht?*, *22 Europäisches Wirtschafts- und Steuerrecht* (2011), p. 113.

⁹³ BVerfGE 37, 271 ff., Leitsatz 1 (Solange I).

⁹⁴ Martijn Hesselink, *CFR & Social Justice* (Sellier, München, 2008), p. 59.

⁹⁵ See Editorial Comments, *Towards a more Judicial Approach?*, *48 Common Market Law Review* (2011), pp. 1405 et seq.

past case law have shown, each of these nation-state features of the EU have to be evaluated in a market-state manner. Fundamental rights need to be balanced against the aims of fundamental market-freedoms, whereby market-rationality has the potential to trump nation-state ideas.⁹⁶ Social justice arguments only come in the guise of market-arguments by providing “feeder objects” to market integration.⁹⁷ EU anti-discrimination law, for example, is principally used to “maximise the productivity of the workforce, to ensure that as many people as possible could become good economic actors.”⁹⁸ The EU “market state” does not exist in its pure sense. As in so many ways, the EU has developed its own model, which is uniquely responsive to its needs. We describe this model as a “constitutionalized” market-state, where the rapid forces of globalized trade meet the nation-state’s heritage. This hybrid approach might hence best describe the nature of decentralized European culture.

Conclusion

Legal culture is a constitutive feature of a legal system. Like culture itself, legal culture is difficult to isolate and describe. Yet, no account of a legal system is complete without identification of the ways in which legal culture meshes with legal doctrine and the players in the system. We contend that European legal culture is in the process of changing from a nation-state culture to one that puts markets at the center of legal discourse. We have not argued that the EU legal order is a slave to markets. Rather, we have made the case that legal culture in the EU has evolved in ways that evince a changing ethos. Whether expressed as the move from regulation to incentivisation or as underwriting citizen access to economic opportunity, the legal culture of Europe no longer reflects a singular commitment to the ideals of the nation-state. We have not claimed that market-state theory is a complete explanation of this phenomenon. Rather, it is one way to make sense of the evolution and development of the EU legal order.

⁹⁶ Case C-112/00 Schmidtberger, para 77 et seqq.

⁹⁷ On anti-discrimination laws Charlotte O’Brian, *Equality’s False Summits: New Varieties of Disability Discrimination, - Excessive Equal Treatment and Economically Constricted Horizons*, 27 *European Law Review* (2011), p. 28.

⁹⁸ Charlotte O’Brian, *Equality’s False Summits: New Varieties of Disability Discrimination, - Excessive Equal Treatment and Economically Constricted Horizons*, 27 *European Law Review* (2011), p. 28.

