Law and Economics United in Diversity:

Minimalism, Fairness, and Consumer Welfare in EU Antitrust and Consumer Law

Fabrizio Esposito

Thesis submitted for assessment with a view to obtaining
the degree of Doctor of Laws of the European University Institute

Florence, 17 September 2018

European University Institute
Department of Law

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Examining Board

Professor Stefan Grundmann, EUI (EUI Supervisor)
Professor Miguel Poiares Maduro, EUI
Professor Daniel Markovits, Yale Law School
Professor Simon Deakin, University of Cambridge

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Department of Law – LL.M. and Ph.D. Programmes

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Abstract

This dissertation proposes a form of collaboration between legal and economic research called Minimalist Law-and-Economics. This approach acknowledges the core commitments of both disciplines and promotes a division of labour based on their comparative advantages.

While lawyers expect an analysis that is grounded in legal reasons and respectful of the fairness and wrongfulness theses, economists expect efficient market relations, analysed from an *ex-ante* perspective respectful of epistemological and normative minimalism.

The collaboration proposed in this dissertation improves the lawyers' understanding of market relations and thus enhances their ability to regulate them effectively. Conversely, economists can strengthen the empirical foundations of their research by considering legal reasons as evidence. This is attractive for value choices especially, since their justification is not central to economists' expertise.

To support Minimalist Law-and-Economics, this dissertation warrants three claims: 1) the economic claim holds that consumer welfare is a maximand used in market efficiency analysis in alternative to total welfare; 2) the translation claim holds that with consumer welfare rather than total welfare as the maximand, it is possible to offer a plausible economic account of fair market relations; and 3) the doctrinal claim holds that the efficiency hypothesis, which has consumer welfare as maximand, explains the reasons given in EU antitrust and consumer law better than the traditional efficiency hypothesis based on total welfare.

The dissertation is divided into three parts. Part I clarifies the conditions for collaboration considered by Minimalist Law-and-Economics. Part II builds the theory that warrants the economic and translation claims. To do this, it gives an account of market relations that are compatible with the fairness and wrongfulness theses and the *ex-ante* perspective. Part III narrows the focus to EU antitrust and consumer law in order to warrant the doctrinal claim and to show how the analysis of legal reasons can be epistemologically and normatively minimalist.

United in diversity, economic and legal research may well have a brighter future.

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I also owe much to the EUI community. Stefan Grundmann has been an optimal supervisor to me. I could spend many words to explain this claim. Instead, I find sufficient to point out that in a dissertation about welfare maximization, the word "optimal" is never used lightly. I have benefitted in so many ways from the interaction with other professors, and especially Hans-W Micklitz, Giorgio Monti and Giovanni Sartor. I have met bright minds from all departments with whom I have enjoyed light and heavy chats at lunchtime, while having a coffee, drinking a beer or playing calcetto *at Bar Fiasco. I am particularly thankful to have shared parts of my path with Agnieszka, Filipe, Javier, Liam, Magdalena, Marcìn, Mihail, Milena, Przemek, Robert, Stavros, Virginia. To a large extent, "EUI" means "you" to me. Being the EUI a hub, I have also benefitted from the many scholars coming here every year as visiting or to give presentations. In this long list, three names stand out: Guido Calabresi, Hanoch Dagan, and Anne-Lise Sibony. It is fair to say that but for the EUI, my relationship with these outstanding scholars would not be as strong as it.*

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Secondly, I am thankful to Peter Cserne for having had the brilliant idea of founding MetaLawEcon, where I have met inspired and inspiring scholars. Thirdly, I shall mention the "Cesare Beccaria" department at the University of Milan: while my stay was shorter than expected, it was long enough to meet Profs. Mario Ricciardi and Francesca Poggi and Dr. Francesco Ferraro. Moreover, they organized the event where I met Guido Calabresi for the first time—a privilege I will always be thankful for. I shall also thank the legal theorists I have met at

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It might be unusual, but I intend to thank seven authors whose research has been particularly consequential for the writing of this dissertation. First, Richard Posner, because I always found his efficiency hypothesis a fascinating project and it always struck me how, with a powerful prose, he could formulate arguments that at times are so outrageous and flawed and at times so wise and full of insight. To a large extent, I became an academic to make sense of this puzzle. Second, Guido Calabresi, who inspired me to search for a different relationship between law and economics. Third, Cass Sunstein for his research on minimalism and for showing to legal scholars that making economists listen is possible. Fourth, William Hutt because the concept of consumer sovereignty is the sparkle behind this dissertation. Fifth, James Gordley's scholarship is the reason why this Dissertation advances the translation claim. Finally, Damiano Canale and Giovanni Tuzet's research on legal inferentialism has laid the ground for the doctrinal claim defended in Part III.

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I acknowledge by debt of gratitude to all of you. Obviously, the mistakes the reader will find in the following pages are mine, and mine only.

Louvain-La-Neuve, 6 September 2018

Fabrizio Esposito

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1. "Fairness or Efficiency?" This is the Wrong Question

"Ought market relations to be fair or efficient?" This short question encapsulates the core of the conceptual disconnect between legal and economic research. The tensions between the two disciplines ultimately rest on the divergent answers to this question. The present research shows that this never-ending disagreement rests on a false assumption, namely that fairness and market efficiency are necessarily different concepts. Another account is possible. An efficient allocation of resources maximizes consumer welfare, and not total welfare. Moreover, an efficient allocation of resources ensures the exchange of performances of equal value between the contracting parties and therefore the fairness of market relations. Accordingly, a fair market allocation is efficient and an efficient market allocation is fair.

This finding interlocks with the formulation of an efficiency hypothesis that is different from the one seminally proposed by Posner. While for Posner the "efficiency" of the law is about total-welfare maximization ("total-welfare hypothesis"), this dissertation explores the implications of assuming consumer welfare as the maximand in an efficiency analysis of the law ("consumer-welfare hypothesis"). The opposition between these efficiency hypotheses is at the core of the present inquiry. But the inquiry is not limited to extending Posner's original research.

The dissertation takes the analysis of the opposition between total- and consumer-welfare hypotheses as an opportunity to propose, articulate and apply a novel approach to the relationship between legal and economic research: Minimalist Law-and-Economics. Minimalist Law-and-Economics aspires to introduce a more fruitful interdisciplinary approach, where the core commitments of both disciplines are respected, and the division of labour is inspired by a reflection on their comparative advantages. It thus represents the kind of mutually beneficial collaboration between economic and legal research that has so far failed to inform academia. United in diversity, economic and legal research may well have a brighter future.

The economist's typical way of thinking irritates the lawyer. And the economist does not get why lawyers do things the way they do. Frankly, both groups are often uninterested in the perspective of the other. The relationship between the two communities falls short of the ideals of mutual respect, goodwill, and openness that are foundational, not only to academia, but to the way of life we celebrate more generally in democratic societies committed to the rule of law and respect for human rights. I am sure that, like me, the reader has anecdotal evidence to support this account of the relationship between the disciplines.

Garoupa has been reflecting on this issue for a decade, at least. He has been particularly interested in explaining why the economics of law is successful in the US and in Israel, but much less so in Europe, Asia and South America. Garoupa characterizes the economics of law as an innovation in the market of legal ideas and finds the various explanations of the different degree of success advanced in the literature unpersuasive.[1] Against this background, he advances an analogy between trade protectionism and legal communities:[2]

> [Garoupa's] theory is that legal parochialism operates like protectionism in trade. We can envisage a global market for legal innovations in scholarship. The protection of the local market is important for local producers (i.e., legal scholars). It increases their return on local human capital, including providing for important network effects. Therefore, they have an interest in avoiding foreign competition.

Garoupa's account is indeed insightful. However, it also describes a dismal reality for academic research in Europe. If Garoupa is right, legal research in Europe fails to reap the benefits of the economics of law and does so for institutional reasons against which a single researcher can little, if anything. The disconnect between legal and economic research is particularly alarming in the context of the European Union, where market integration is a primary objective. It is thus imperative that legal scholars incorporate economic insights in their analyses of EU law, and of its relation with the law of the Member States. It is equally imperative for economists to understand the rationale of the law of the European Union in order to contribute with their expert knowledge to make the integration project as successful as possible.

While Garoupa describes a dismal reality, I find hope in two elements of his account. First, the direction of adaptation is unilateral—legal research must incorporate the economics of law. But what about the failure of legal research to penetrate the market of economic ideas? Second, framing the question in terms of protectionism casts the attitude of the legal community towards the economics of law in a poor light.[3] However, the success of an innovation is to a large extent

[1] Garoupa and Ogus 2006, Garoupa and Ulen 2008.
[2] Garoupa 2016: 179.
[3] Liam McHugh-Russell has drawn my attention to the fact that Garoupa chooses between two possible analytical frameworks typical of market analysis, namely supply and demand curve shifts versus rent-seeking. The difference is

measured by its capacity of attracting new consumers—in this case, consumers of the economics of law. It might be that there are good reasons explaining why the economics of law fails to penetrate the legal communities of Europe, Asia and South America.

In truth, not all the economists of law share Garoupa's positive attitude about the state-of-the-art in the United States. Schwartz observed in 2011 that there are two cultural problems in the relationship between law and economics. The first is that legal specialists of a certain area (say contracts) and the economists of that area do not engage in dialogue. Second, there are generalist economists of law, "who tend to work in a number of legal fields; their goal is to solve problems with modern techniques".[1] Like Garoupa, Schwartz seems to place much of the blame for the state-of-the-art on legal scholars, but he nevertheless calls for "more collaborative work", "more bridge-building institutions" and more attempts at bilateral understanding. The economists of law, in particular, should pay more attention to legal institutions. To this end, the proposal of giving more credit to legal theorists does not make it to the conclusions of Schwartz's article, because he finds more promising "to treat rational actor political science as a part of law and economics".[2]

An even more radical critique of the sense of disciplinary superiority that pervades Garoupa's explanation is enshrined in Calabresi's distinction between "Economic Analysis of Law" and "Law and Economics". According to this founding father of the discipline, the Economic Analysis of Law moves from the acceptance of a certain economic theory and "if it finds that the legal worlds does not fit, it proclaims that world to be 'irrational'".[3] In contrast, the core of the Law and Economics method is to start the inquiry with "an agnostic acceptance of the world as it is, as the lawyer describes it to be".[4] In other words, Law and Economics aims first at understanding legal reality, second at explaining it in economic terms[5] and only then moves the focus to normative questions. In a lucid synthesis, Calabresi distinguishes the two approaches as follows: "while in Economic Analysis of Law economics dominates and law is its subject of analysis and criticism, in Law and Economics the relationship is bilateral".[6] Without actually saying it, Calabresi thus qualifies Economic Analysis of Law as an instance of economic imperialism.[7]

Markovits, a prominent former student of Calabresi, defends a distinction between contract as collaboration and fiduciary relation as cooperation that allows us to illuminate the conflict

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consequential because the former approach describes an interaction as a consequence of a normal (natural, even) market interaction, whereas rent-seeking incorporates a negative value judgement. Chapter 3 can be understood as a way to give an explicit account of why rent-seeking is a criticisable behaviour.

[1] Schwartz 2011: 1548.

[2] Schwartz 2011: 1543, 1549.

[3] Calabresi 2016: 2.

[4] Calabresi 2016: 3.

[5] On the difference between the explanations given by economists of law and law and economics, see pp. 57-58.

[6] Calabresi 2016: 6.

[7] On the concept of scientific imperialism, see the essays in Mäki, Walsh and Pinto 2018.

between the unilateral attitude of economists in the Economic Analysis of Law and the bilateral relationship Calabresi is calling for. In a fiduciary relation, the trustee undertakes duties of care and loyalty towards the beneficiary.[1] These duties operate as standards, and their content is specified over the course of the relation. Markovits finds an element of paternalistic[2] cooperation to be central to fiduciary relations. In a contract, instead, there is a collaboration. As Markovits explains,[3]

> [t]he hallmark of this collaborative form of community is that it replaces a concern for other persons' interests … with a concern for other persons' intentions and, ultimately for their points of view. The morality of contract therefore identifies and elaborates a form of respect that does not rely on affection.

Applying this distinction to the relation between legal and economic research suggests that legal scholars take issue with the patronizing attitude of economists. Lawyers do not want economists' "affection"—and it is also quite unclear economists are indeed acting out of affection towards lawyers. If this is the case, the reason why legal scholars are not "buying" the economics of law is that they do not want to be in a fiduciary relation with economists.

Lawyers might want, instead, a bilateral relationship or a collaboration, where there is an exchange between peers, an arm's length relation,[4] with a division of labour in which each side focuses on its strengths and relies on the strength of the other. Focusing on their comparative advantages, both disciplines could gain from collaboration.

Asking the right question, philosophers say, is more important that finding the right answer. The central feature of the question we need to ask capitalizes on the metaphor of trade between academic communities. However, the trade is not between legal communities of different jurisdictions, but between disciplinary communities. Once the problem is framed in this way, it becomes obvious that the position of the legal community is placed on par with that of the economic one. If this is all true, I think that the right question is: Is it possible to have a bilateral relationship or collaboration between legal and economic research?

2. A Minimalist Strategy for Collaboration between Law and Economics

The dissertation answers the research question of whether it is possible to have a bilateral relationship or collaboration between legal and economic research in the affirmative. Bilateral relationships and collaborations between legal and economic research are not only possible, but

[1] Markovits 2014.
[2] I doubt that "paternalism" is the right word here because it is unclear whether the beneficiary has preferences or beliefs the trustee disregards out of care or loyalty towards that beneficiary. However, the point is not central for current purposes. For an excellent discussion, see Shiffrin 2000. For a further discussion on paternalism, see pp. 144-147.
[3] Markovits 2004: 1451.
[4] Markovits 2011.

highly desirable. This section introduces the concept of Minimalist Law-and-Economics and shows how it helps to clarify the conditions for collaboration between lawyers and economists.

Minimalist Law-and-Economics is a type of interdisciplinary research that offers benefits to both economists and lawyers. United in diversity by Minimalist Law-and-Economics, legal and economic scholars can collaborate to exploit their respective strengths and therefore offer an approach superior to either pure legal or economic research. There are gains from interdisciplinary trade that have yet to be reaped. Yet the challenge of realizing these returns through bilateral relationships and collaboration between legal and economic research is a multidimensional problem. The proposal formulated by Minimalist Law-and-Economics is the result of a careful identification of the main conceptual and methodological obstacles that stand in the way of a more open, fruitful and charitable engagement between the two disciplines.

As will become clearer in this chapter and the two that follow, Minimalist Law-and-Economics owes a lot to the scholarship of Calabresi, Posner and Sunstein, three of the most influential scholars currently working on the relation between legal and economic discourse. Calabresi has made a powerful case for the type of bilateral relationship this dissertation proposes. In this regard, his critique of economic methodology is greatly instructive. Moreover, he has also understood the appeal and the limit of Posner's efficiency hypothesis of the common law. Posner's efficiency hypothesis is not meant to justify the common law by reference to an external normative theory, but simply to explain it. The hypothesis hinges upon what can be called a "fitness-as-justification" approach to legal materials. Posner presupposes that the common law is justified and aims at explaining it as a means to efficiency. From a legal point of view, the main problem with Posner's approach is his failure to consider legal reasoning as part of the *explanandum* of his hypothesis. All these themes are fruitfully clarified and organized by Sunstein in his work on minimalism.

"Minimalism" is a term that is central to the research Sunstein has been conducting over the last three decades on how judges should decide cases. Should they decide on the grounds of reasons that are deep and broad, as advocated by Dworkin,[1] or should they be humbler? Sunstein believes that, for a number of reasons, judges normally do a better job if they give shallow and narrow reasons. For the most part, this section of the dissertation is devoted to a reconstruction of Sunstein's minimalist strategy. Three important points have to be emphasized at the outset, because the purpose of this section is not merely to offer a review of Sunstein's judicial or decisional minimalism. The purpose is instead to build the foundations of a minimalist approach to the relation between law and economics. First, Sunstein stresses that minimalism is not only a judicial project.

[1] Dworkin 1978, 1986.

On the one hand, it is a strategy used in our ordinary life.[1] On the other hand, minimalism is the common ground of the three main pillars of Sunstein's wide-ranging scholarship: judicial minimalism, deliberative democracy and libertarian paternalism. These research themes have in common a "minimalist strategy": "To the extent possible, we should attempt to bracket our deep differences and to see if we can decide what to do, even as we are uncertain, or disagree about why, exactly, we ought to do it".[2]

Second, Sunstein has failed to recognize that his scholarship—especially on law and behavioural economics—illustrates a further form of minimalism, which I call interdisciplinary minimalism. Interdisciplinary minimalists believe that different disciplines can dialogue fruitfully if they show mutual respect to each other's disciplinary core. Third, Sunstein's research already integrates many insights from economics and from behavioural sciences. This offers additional evidence that successful interdisciplinary research in law and economics is possible.

This sketch gives already a glimpse of the fact that minimalism can indeed offer an organizing framework for a mutually respectful and beneficial—genuinely bilateral—collaboration between law and economics.

2.1 Sunstein on Judicial minimalism

The concept of judicial or decisional minimalism represents an evolution of Sunstein's research on incompletely theorized agreements. An incompletely theorized agreement is a degree concept because completeness is itself a degree concept. The key dimensions of incompleteness are depth and width. In particular, decisions can be shallow and broad, or deep and narrow. The "most elaborate discussion of the basic point" related to narrowness is found, according to Sunstein, in Justice Frankfurter's concurring opinion in the Steel Seizure case.[3] In EU law, especially in recent years, reasons given in preliminary references on the fundamental freedoms have tended to be narrow, in that the specificities of National measures play an important inferential role. An obvious exception, and therefore example of a broad reason, is found in the *Keck* judgment, where the CJEU reconsidered its case law on the scope of application of Article 34 TFEU.[4]

[1] For an example, see Sunstein 1996: 43.
[2] Sunstein 2012b: 94. See also Sunstein 2005: 22: "Minimalists believe that a free society makes it possible for people to agree when agreement is necessary, and unnecessary for people to agree when agreement is impossible" and Sunstein 1999:8: "Let us describe the phenomenon of saying no more than necessary to justify an outcome, and leaving as much as possible undecided, as 'decisional minimalism'."
[3] Sunstein 2006a: 364, citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 594-97 (1951) (Frankfurter, J., concurring).
[4] C-267/91. In this dissertation, given the high number of references to cases in Part III, I do not follow the convention of citing EU case law fully (authority, parties, date, case number and ECLI). Instead, I cite only the case number. I find

The concept of incompletely theorized outcome requires some clarification. The basic idea is that often we can agree on a particular outcome while disagreeing on the high-level theory justifying it. In a judicial setting, "outcome" means "who wins and who loses a case".[1] Examples of high-level theory given by Sunstein include Kantianism, egalitarianism and utilitarianism. At the low-level of theoretical abstraction, we find "the general class of principles and justifications that are not said to derive from any large theories of the right or the good, that have ambiguous relations to large theories, and that are compatible with more than one such theory".[2] Pivotal components of this class included rules and also "the ordinary material of legal doctrine".[3]

Sunstein distinguishes two main types of incompletely theorized agreements: incompletely specified agreement on a general principle and incompletely theorized agreement on particular outcomes. In the first case, "people who accept the principle need not agree on what it entails in particular cases".[4] In this dissertation, like in Sunstein's own research, the most important incompletely theorized agreement is the one about particular outcomes, or incompletely justified outcomes.[5] In these cases, there is agreement on the lower-level abstractions, but disagreement about the theory that justifies them. For example, it might be that libertarians and egalitarians agree that normally granting access to the market is desirable.[6]

The minimalist strategy about justification consists in identifying agreements at lower theoretical levels, which leave unsettled the precise high-level justification of the outcome. Minimalists "want to allow people who disagree on the deepest issues to converge"—they want all hands on deck.[7] Put differently, the minimalist justification of outcomes has to be as shallow as possible. Minimalism has also another dimension, narrowness. In this regard, minimalism requires decisions to be justified by reasons that are as narrow as possible.[8] Sunstein offers various reasons in favour of a minimalist approach. They can be grouped in two categories: consequentialist and pluralist reasons. Consequentialist reasons have to do with the costs of deciding and the costs of a mistaken decision. Costs of deciding include the costs of deciding the case at hand for the judge, but

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this sufficiently clear to identify the case unambiguously but, in any event, the full list of EU case law can be found in the List of Cases.

[1] Sunstein 1996: 50.

[2] Sunstein 1996: 50.

[3] Sunstein 1995: 1741 and 1996: 50.

[4] Sunstein 1996: 35.

[5] Sunstein does not use the expression incompletely justified outcome, but the term captures well the relation between the justification and the outcome. It also resonates well with the name "incompletely specified abstraction" which Sunstein occasionally uses to refer to the first type of incompletely theorized agreement (Sunstein 1999: 13) and with the "keep it simple" principle of disclosure he has contributed to popularizing.

[6] Hesselink 2016.

[7] Sunstein 1999: 12. See also Sunstein 1996: 9, stating that the minimalist aims at "agreements on results and on low-level principles amid confusion or dissensus on large-scale theories".

[8] Sunstein 1999: 12: the "minimalist seeks to render decisions that are no broader than necessary to support the outcome".

also the cost for the parties to decide what the law requires them to do, and also the costs for future judges to decide future cases. For example, in some cases judges do not have to give reasons. "Full particularity" greatly reduces the costs of deciding the case at hand, but can drastically increase all the other costs involved.[1] Sunstein characterizes error costs simply as the "costs of mistaken judgments", therefore leaving the concept in need of further elaboration.[2] The guiding principle for Sunstein is thus: "good judges try to minimize the sum of decision costs and error costs".[3] This principle is apparently palatable to economists as it turns a judicial decision into a productive efficiency problem.[4] Pluralist reasons start from the observation that modern societies are heterogeneous in terms of values. In this context, it becomes important to try to give justifications that are as inclusive as possible of the core beliefs of others.[5] Thus, shallow decisions are advisable. At the same time, it is important to consider the institutional constraints of the judiciary. These considerations lead Sunstein to call for decisions that are normally both shallow and narrow.

The arguments in favour of a minimalist approach are context dependent. This means that the reasons that, in Sunstein's view, are normally in favour of minimalism sometimes call for more ambitious and sophisticated justifications.[6] Indeed, for Sunstein, "in the most glorious periods in democratic life, national decisions reflect a high degree of theoretical depth, and they are wide rather than narrow".[7]

These insights will prove very useful because they have direct bearing on the concept of interdisciplinary minimalism. To see this as clearly as possible, the next step illustrates the minimalist strategy informing the behavioural turn.

2.2 Interdisciplinary minimalism: lessons from the behavioural turn

In a cursory but theoretically significant passage in *The Future of Law and Economics*, Calabresi observes a strong connection between the reform he proposes and what the behavioural turn has done in economic theory.[8] Developing this insight elsewhere, I reached the conclusion that the post-

[1] Sunstein 2006b: 1907: "particularistic judgments … might well lead to inequality. They impose burdens on subsequent decisionmakers, in a way that might lead to errors and arbitrariness. They increase unpredictability. They reduce transparency. They might increase the number and size of mistakes at the same time that they increase the costs of decisions". See also Sunstein 1999: 14.
[2] Sunstein 1999: 31.
[3] Sunstein 1999: 30.
[4] On productive efficiency, see pp. 173-174.
[5] For example, Sunstein 1995: 1747.
[6] For the clearest summary of Sunstein's theory for choosing between minimalist and maximalist decisions, see Sunstein 1999: 35.
[7] Sunstein 2012a: 33.
[8] Calabresi 2016: 4.

turn literature in the economics of law vindicates the approach of the pre-turn New Haven School, which is mainly associated with Calabresi's own work.[1]

In this context, I intend to develop the said insight in a different direction. Behavioural evidence has contributed to the relaxation of both epistemological and normative minimalism in economics. That is, the same types of amendments Calabresi is powerfully advocating. The articulation of this observation fits better in Chapter 2. For current purposes, it is instructive to look at how behavioural analysts have been able to be accepted in the 'herd' in mainstream economic research.

There are important similarities between the approach of behavioural analysts, Calabresi's own argumentative strategy, and Sunstein's minimalisms. In particular, the same consequentialist and pluralist reasons that make minimalism advisable in judicial practice apply also to interdisciplinary research. In the light of this reflection, I will characterize both Calabresi's research in *The Future of Law and Economics* and the behavioural turn as instances of interdisciplinary minimalism. My account of the establishment of behavioural analysis here will be brief and only illustrative, as I have dealt with this topic at some length elsewhere[2] and I will discuss it also in other parts of this dissertation.

The starting point is the idea associated by Sunstein to minimalism of showing mutual respect, in particular when it comes to the core beliefs of others. This standpoint is crucial also for interdisciplinary minimalism. Interdisciplinary minimalism is the view that a successful interdisciplinary dialogue must respect core commitments of all the disciplines involved. Here I will not try to give a more precise account of what these core commitments are. They are fleshed out in Part I. Instead, it is instructive to look at the way in which behavioural analysts have framed their contribution to research in economics and also in law. In all these cases, behavioural analysts have put emphasis on certain commitments enshrined in the targeted practice and on how, in the light of those commitments, behavioural evidence actually contributes to the inquiry of the targeted practice. In other words, behavioural analysts have been able to show the advantages of interdisciplinary collaboration while showing respect for the practices of the targeted discipline.

The success of behavioural research in engaging the field of economics lies in appealing to economists' overriding interest in explaining outcomes.[3] An important illustration of this comes from Kahneman and Tversky's *Prospect Theory*. The authors begin by recognizing the centrality of expected utility theory to economic theory; then, they "describe several classes of choice problems

[1] Esposito 2017c.
[2] See Esposito 2015, 2017a, 2018b, Esposito, Micklitz and Sibony 2018: 15-19.
[3] For more examples, see Esposito, Micklitz and Sibony 2018.

in which preferences systematically violate the axioms of expected utility theory" and finally "propose an alternative account of choice under risk". [1]

Basically, the same approach informs behavioural analysis of law. Sunstein himself has used this strategy in the seminal article *A Behavioral Approach to Law and Economics* co-authored with Jolls and Thaler. Jolls, Sunstein and Thaler open their analysis by pointing out that "[o]bjections to the rational actor model in law and economics are almost as old as the field itself", but they "have been much less common[ly]" made by "those who sympathize with the basic objectives of economic analysis".[2] They also add that this type of research is promising because in "other fields of economics … 'behavioural' analysis has become relatively common" and also because "law is a domain where behavioural analysis would appear to be particularly promising".[3] In fact, the behavioural approach brings "a better understanding of human behaviour" and "more adequate prescriptions about the law".[4] Hence, the behavioural approach to law and economics is a "deeply constructive" project.[5]

Ultimately, behavioural analysts have been able to show to economists in a rigorous way that while rational choice theory fits well with their commitment to epistemological and normative minimalism, it was taking them further from the phenomena they wanted to explain in the first place. At the same time, the behaviouralists reassured economists that rational choice theory could be relaxed without completely rejecting epistemological and normative minimalism. Similarly, Calabresi has shown that the commitments to epistemological and normative minimalism are not only compatible with explicit value choices by economists but are sometimes simply unavoidable. This point is developed in Chapter 2. In this way, they have been able to appeal to both types of reasons that Sunstein invokes to justify judicial minimalism: consequentialist and pluralist reasons. On the one hand, the said researchers have stressed the benefits from an interdisciplinary approach. On the other hand, they have been careful in acknowledging the reasons why certain practices existed in the targeted disciplines and have carefully shown respect for them.

The interdisciplinary minimalist approach discussed here has a feature that makes it different from judicial minimalism and, in particular, more difficult to realize. Contrary to judicial minimalism, a scholar pursuing interdisciplinary minimalism cannot suppose that his or her counterparty will be interested in the collaboration. In case of judicial minimalism, to decide cases, judges must act collectively. In the case of interdisciplinary research, parochialism—as Garoupa would say—is not ruled out by the particular institutional features of academia. Put differently, a

[1] Kahneman and Tversky 1979: 263-264.
[2] Jolls, Sunstein and Thaler 1998: 1473.
[3] Jolls, Sunstein and Thaler 1998: 1473.
[4] Jolls, Sunstein and Thaler 1998: 1473-1474.
[5] Jolls, Sunstein and Thaler 1998: 1475.

minimalist approach in interdisciplinary research cannot be presumed to satisfy a participation constraint for the disciplines involved. But if that is not the case, then the lack of exchange between the disciplines is to be expected. When at least one of the disciplines does not expect to gain from the collaboration, it is anticipated that the exchange will not take place.

Bearing these considerations in mind, the next section points out the mutually beneficial character of Minimalist Law-and-Economics. If the interdisciplinary exchange is mutually beneficial, then the participation constraint is satisfied for (at least some!) members of both disciplines. Hence, collaboration is possible.

3. Minimalist Law-and-Economics and the Gains from Collaboration

The central idea behind Minimalist Law-and-Economics is to respect the core commitments of the disciplines involved while, at the same time, taking full advantage of their comparative advantages. This idea calls for collaboration between lawyers and economists. The approach articulated in this dissertation is called Minimalist Law-and-Economics because it owes much to the minimalist strategy that characterizes Sunstein's approach to judicial reasoning, deliberative democracy, libertarian paternalism and also—although Sunstein himself might not have realized it—the behavioural turn in economics and in the economics of law.

Part I of the dissertation identifies a set of *desiderata* that are expected from legal and economic research. Lawyers want the respect of the fairness, wrongfulness and doctrinal theses. Economists want analyses taking the *ex-ante* perspective and respecting the epistemological and normative minimalism.

Yet, compatibility is not enough to have collaboration. This section describes succinctly the expectable gains from the collaboration between legal and economic research proposed by Minimalist Law-and-Economics.

What do lawyers gain from the collaboration with economists proposed by Minimalist Law-and-Economics? At least two potential payoffs can be identified. First, lawyers are often irritated by economic research and for good reasons, in my view. Minimalist Law-and-Economics acts as a powerful anti-inflammatory against the sources of this irritation. Second, once the irritation disappears, the stage is set for the contribution of economic research towards a better understanding of the incentives given by the law, of the social—in particular, market—practices scrutinized and can thus contribute to a better response to the societal problems under consideration.

What do economists gain from the collaboration with lawyers proposed by Minimalist Law-and-Economics? First of all, economists could be more successful in penetrating the market for

legal ideas. But more fundamentally, joining forces with legal scholars would help economists better keep their commitment to economic analysis as positive research. This is particularly important when it comes to axiological choices—that is, choices about values. Economists can delegate to the legal system the selection of societal goals instead of pursuing the maximization of total welfare—a value they are committed to for epistemological reasons. This dissertation proves that economists disagree about the choice of the maximand in the efficiency analysis of market relations. Hence, the problem of justifying one's preferred maximand arises. One solution is to engage in moral argumentation. Yet, many economists do not want to do that. They think it is beyond the scope of economic analysis, because they accept a sharp distinction between positive and normative analysis. Delegating the axiological choice to the legal system allows justification of the selection of a given maximand on the ground that it fits with legal practice. In so doing, the economist can focus on prescriptive analysis—that is, on the coherence between means and ends. In other words, I am proposing the economist move from "as economists want the legal system to do E, then M is the best way to do it" to "as the legal system wants to do E, then M is the best way to do it". It is then obvious that from a legal point of view this second approach is collaborative and not patronizing.

Finally, the constant need to meet the expectations of the other discipline can contribute to improving the quality of legal and economic analyses. For example, lawyers could become more cautious about the empirical foundations of their arguments, and economists increase their awareness of the normative underpinnings of theirs.

4. Law and Economics United in Diversity: An Overview

Minimalist Law-and-Economics proves that is it possible to have a bilateral, mutually beneficial dialogue between legal and economic research. In other words, law and economics can collaborate. This primary claim is warranted[1] by three intermediate claims: one economic, one translational, and

[1] "Warrant" and its cognates are used according to Susan Haack's "foundherentist" account of the structure and quality of evidence. According to Haack, how well the evidence warrants a claim is determined by three dimensions: supportiveness—"how *supportive* the evidence is of the belief in question"; independent *security*—"how *secure* the reasons are, independently of the belief in question" and *comprehensiveness*—"how comprehensive the evidence is" (Haack 2014: 14).
For example, imagine the claim C is supported by a single piece of evidence, E_1. E_1 is the testimony of a poor-sighted eye-witness who recognizes the defendant as the killer by saying: "I am sure it is him that I saw stabbing the victim to death". The warranty of C has the following features: E_1 is very supportive in its own terms if the victim was stabbed to death and much less if the victim was shot. The independent security of E_1 is low if the poor-sighted eye-witness was not wearing glass or the glasses had an insufficient correction; otherwise E_1 is quite secure—*ceteris paribus*, of course. However, E_1 lacks comprehensiveness. If E_1 is the only evidence, there is no motive, no murder weapon, no biological evidence, not even the victim's body. Hence, the case against the defendant is extremely weak. See, generally, Haack 2014: 1-26 and 47-77.

one doctrinal. The economic claim holds that consumer welfare is a maximand used in market efficiency analysis in alternative to total welfare. The translation claim holds that with consumer welfare as the maximand but not with total welfare, it is possible to offer a plausible economic account of fair market relations. Finally, the doctrinal claim holds that the consumer-welfare hypothesis explains better than the traditional total-welfare one the reasons given in the practice of a significant portion of EU antitrust and consumer law. Put differently, the doctrinal claim holds that the consumer-welfare hypothesis offers a better explanation of the legal reasoning concerning EU antitrust and consumer law than the traditional total-welfare hypothesis.

Part I, "A Minimalist Strategy for Collaboration between Law and Economics", identifies the problems in the current relation between legal and economic scholarship and articulates the conditions for a successful improvement thereof. Chapter 1, "Economics as a Legal Irritant and the Need for a Rosetta Stone", identifies the conditions of a Minimalist Law-and-Economics approach from a legal point of view. Legal scholars typically expect analyses of the laws applicable to market relations to comply with the fairness, wrongfulness and doctrinal theses. The fairness thesis holds that contract relations ought to be fair. According to the wrongfulness thesis, the breach of a duty is a wrong done to the holder of the correlative right. Finally, the doctrinal thesis holds that an explanation of the law ought to be based on the reasons given in its practice, at least in part. The economics of law typically respects none of them. This irritates legal scholars. Thus, to be of appeal to lawyers, the collaboration proposed by Minimalist Law-and-Economics must satisfy the fairness, wrongfulness and doctrinal theses.

Chapter 2, "Economic Analysis and Reverse Engineering the Law", argues that from the point of view of economists, Minimalist Law-and-Economics ought to be compatible with a reasonable version of epistemological and normative minimalism. In essence, economists seek claims that are operationalized in the interest of rigorous testing and also demand the minimization of normative commitments within the analytical framework. The behavioural turn is of great significance here. The normativity of preferences has been downgraded, and the urge to measure preferences as revealed by market behaviour is not as compelling as it once was. This sees not only epistemological minimalism relaxed, but also its normative counterpart. Additionally, the normative scope of the Pareto efficiency criterion is ultimately controversial, which shows the limited success of normative minimalism even on its own terms. Finally, it is argued that assuming total welfare as maximand is an inferior normative minimalism approach to reverse engineering the law—that is, to infer from legal practice the axiological choices embedded in it.

At this point, the conditions Minimalist Law-and-Economics must satisfy to succeed are clarified and the analysis can move on in Parts II and III to show how to they can be satisfied. To

this end, the inquiry warrants the economic, translation and doctrinal claims described above. Part II, "Deep into Theory—Consumer Welfare, Allocative Efficiency and Fair Market Relations", warrants the economic and translation claims of the dissertation. In so doing, it shows how to offer an economic account of market relations compatible with the fairness and wrongfulness theses and with the *ex-ante* perspective favoured by economists. Chapter 3, "Allocative Efficiency Can Be about Consumer Welfare", defends the economic claim of the dissertation. Consumer welfare is a possible maximand in the efficiency analysis of market relations according to the economic literature. The analysis is thorough and proceeds in three main steps. The first shows that the justification of the total-welfare assumption ultimately rests on normative minimalism. The second step demonstrates that part of the literature on both consumer sovereignty and contract theory is incompatible with total welfare while being compatible with consumer welfare. The third step shows that more or less marked traces of the consumer welfare approach can be found in the scholarship of economists that are central to the development of the economics of law, such as Marshall, Pigou, Kaldor, Hicks, Knight and—above all—Adam Smith and Coase. The conclusion is that consumer welfare is a possible maximand for allocative efficiency from an economic point of view. The analysis also shows that, if traditional normative minimalism necessarily implies the total-welfare assumption, and some economists reject the latter, traditional normative minimalism is not as foundational for mainstream economics as one would otherwise think. This finding reinforces the methodological appeal of reverse engineering the law.

Chapter 4, "Fairness and Allocative Efficiency: Towards a Rosetta Stone", discusses the relation between consumer-welfare maximization and the concept of fairness in Gordley's theory of private law. I chose Gordley's research as stepping stone because his scholarship builds on a long-standing tradition, engages with competing works at the conceptual level, and also shows concern for the explanatory power of legal practice. Moreover, while Gordley lucidly rejects economic analysis based on total welfare, he incorporates many economic insights in his own theory. His scholarship can thus appeal to economists, especially as the key explanatory concepts are cost, scarcity, need, and prudence—concepts economists can easily relate to, as Chapter 4 will show in detail. Against this background, I assess whether the reasons for rejecting the economic analysis based on total welfare apply also to that based on consumer welfare and find they do not. At the core of both the neo-Aristotelian theory and the economic analysis of the market mechanism stands a logic of price minimization. This mechanism allows consumers to satisfy their needs in exchange for a fair share of purchasing power and, therefore, maximize their surplus (economic theory). If the consumption choice is prudent and clever (i.e., rational and informed), it is then optimally instrumental to eudemonia (i.e., it maximizes consumer welfare).

The major weakness of the economic and fairness claims is that, while potentially of great interest to legal and economic theorists and perhaps to philosophers, they do not have much purchase with applied economists, other legal scholars and legal practitioners. The challenge addressed in Part III, "Narrow into Law—Reverse Engineering EU Antitrust and Consumer Law", is how to analyse legal materials in a way that is rigorous enough to appeal to economists while being based on legal reasons, thereby complying with the doctrinal thesis. Chapter 5, "How the Efficiency Hypotheses Are Tested", develops an original, inferentialist method for such an analysis, which I call the "explanatory scorekeeping model". This method compares the explanatory power of consumer-welfare and total-welfare hypotheses or *explanantia* on the grounds of seven substantive disagreements between them. The inferentialist analysis is then divided into three phases: 1) review of the reasons given in the *explanandum*; 2) articulation of the competing explanations; and 3) assessment. The scope of the *explanandum* is chosen bearing in mind that in the legal system of the European Union, antitrust law has the broadest notion of consumer, and consumer law the narrowest. Thus, if the results hold at these extremes, it can be expected that it works also in the intermediate cases, a claim that can be tested subsequently. Chapter 6, "EU Antitrust Law Reverse Engineered", and Chapter 7, "EU Consumer Law Reverse Engineered", apply this framework. In summary, quite often the reasoning justifying the relevant norms is, as predicted by judicial minimalism, so shallow that both *explanantia* can offer only low-quality explanations. Only in two decisions did the total-welfare *explanans* work better. However, in general, the consumer-welfare *explanantia* offer high-quality explanations of the *explanandum*. In particular, quite often a total-welfare *explanans* offers no plausible explanation while the opposing consumer-welfare one fits well with the *explanandum*. Conversely, there is no circumstance in which the latter offers no plausible explanation. Chapter 8, "A Superior Hypothesis", discusses some additional methodological points about the *explanandum* and its analysis, takes stock of the results and finds that the doctrinal claim is warranted.

The Conclusions recap the proposal of collaboration advanced by Minimalist Law-and-Economics in this dissertation and consider possible ways to carry it further.

4.1 Overview of Part I

Part I, "A Minimalist Strategy for Collaboration between Law and Economics", is composed of two chapters. Together, they identify the conditions that Minimalist Law-and-Economics will satisfy, thereby contributing to better collaboration between economic and legal research. Chapter 1, "Economics as a Legal Irritant and the Need for a Rosetta Stone", focuses on the legal perspective. In other words, it identifies a set of conditions that Minimalist Law-and-Economics has to respect to

be perceived as relevant from a legal point of view. Chapter 2 does the same for the economic perspective.

The starting point of Chapter 1 is the idea that economics often irritates legal scholars. Two types of irritation are distinguished. The radical irritation denies the relevance of economic insights to legal practice. This form of irritation is unreasonable. The law cannot ignore the contribution of economists, just like it cannot ignore the contribution of other types of experts. Indeed, there are conceptual contiguities between the two disciplines. The problems of conflict, cooperation and of the effectiveness of the law are seen as crucial by both disciplines. In fact, history illustrates successful examples of collaboration, such as the progressive assault on laissez-faire in the US and the development of ordoliberalism in Germany.

The second type of irritation is caused by the market-centred rhetoric of economists. Here, the problem is that the focus on market failure threatens two important ideas about market relations in legal thinking, here called fairness and wrongfulness theses. The fairness thesis holds that market relations ought to be fair. The wrongfulness thesis holds that the breach of a duty is a wrong done to the holder of the correlative right. Thus, it is imperative to explain how a market-centred rhetoric is compatible with these two substantive theses about market relations.

The analysis of Posner's efficiency hypothesis provides important insight regarding the idea that economic theory has to fit with the law. The first insight is that an efficiency hypothesis that fits with the law does not need to offer a substantive justification to the hypothesis. The normativity of the *explanandum* is presupposed, so that the hypothesis can piggyback on it. The second insight is that to fit with the law, the efficiency hypothesis has to be tested against legal reasoning. Failing to do so is the major drawback of Posner's efficiency hypothesis from a legal point of view. Posner was interested in testing his hypothesis against the economic effects of legal norms and not against the reasoning justifying them. Put differently, Posner failed to satisfy the doctrinal thesis, which holds that an economic explanation must be tested by looking at its fitness with legal reasoning. At this point, it is possible to identify a significant gap in the literature that is particularly relevant for any attempt to satisfy the fairness, wrongfulness and doctrinal theses.

In one way or another, the various attempts to reconcile efficiency and fairness rest on the conceptual separation assumption, which holds that efficiency and fairness are separate concepts. Minimalist Law-and-Economics rejects the conceptual separation assumption and pursues a translation strategy. The task is that of finding classes of inferences where economic and legal concepts can be used interchangeably. In Chapter 4, this strategy will prove successful in showing that the consumer-welfare hypothesis satisfies the fairness and wrongfulness theses.

In conclusion, Chapter 1 finds that Minimalist Law-and-Economics must satisfy the fairness, wrongfulness and doctrinal theses and suggests the importance of the translation strategy as a means to satisfy the first and the second theses.

Chapter 2, "Economic Analysis and Reverse Engineering the Law", focuses on the economic point of view. We have seen the importance of efficient market relations to economists. Later in this Introduction, we will see also the importance of incentive-based reasoning—the *ex-ante* perspective—to them. Chapter 2 describes the importance to economists of two forms of minimalism, epistemological and normative minimalism. Epistemological minimalism is about radical observability, mathematical precision and explanatory parsimony. Normative minimalism calls for as little normative commitments as possible. In their traditional understanding, the two interlock to justify the long-standing focus of economists on revealed preferences and total welfare.

An important trend that the behavioural turn has significantly contributed to is the relaxation of both forms of minimalism. In his own way, Calabresi also calls for their relaxation. As a matter of fact, economists are now open to a wider set of evidence to test their theories and have also down-graded the normativity of individual preferences. Minimalist Law-and-Economics welcomes this trend because it makes economic research more open to the contribution of legal research.

Against this background, the chapter points out two contradictions that are caused by normative minimalism: the Pareto efficiency and social engineer contradictions. The first contradiction is that Pareto efficiency is both too narrow and too broad as a normative concept for welfare analysis. The second contradiction is that the economist identifies how different means contribute to given and chosen ends. While a solution to the Pareto efficiency contradiction is proposed in Chapter 3, this chapter suggests a solution to the social engineer contradiction that requires economists to collaborate with legal scholars: reverse engineering the law. Reverse engineering the law aims to show the ends chosen by the legal system are compatible with epistemological minimalism. By delegating to the legal system the choice of the ends, the economist identifies how different means contribute to the realization of ends given by the law.

Together, Chapters 1 and 2 establish a set of *desiderata* of legal and economic scholars that Minimalist Law-and-Economics ought to satisfy. Lawyers want theories of law that respect the fairness, wrongfulness and doctrinal theses. Economists want theories that take the *ex-ante* perspective into account and are compatible with epistemological and normative minimalism.

4.2 Overview of Part II

The chapters of Part II defend the economic and translation claims of this dissertation. The inquiry contributes to Minimalist Law-and-Economics because it shows that assuming total welfare as the

maximand is not necessary to adopt the *ex-ante* perspective and that when allocative efficiency is about consumer welfare, fair market relations require the *ex-ante* perspective. Thus, the *ex-ante* perspective is necessary to satisfy the fairness thesis and the account satisfies also the wrongfulness thesis.

Chapter 3, "Allocative Efficiency Can Be about Consumer Welfare", defends the economic claim of this dissertation, namely that consumer welfare is a maximand used in market efficiency analysis as an alternative to total welfare. To do so, it first notes that the claim that the market ought to be allocatively efficient is an incompletely theorized agreement. In fact, sharing this claim requires agreement neither on what this "allocative efficiency" exactly is, nor on why it is worth pursuing in the first place. For example, the Arrow-Debreu proof of the existence of a Pareto optimal general equilibrium holds with allocative efficiency being both about total and consumer welfare.

Moving from this premise, the chapter undertakes four related inquiries aimed at warrantying the economic claims of this dissertation. The first inquiry focuses on the arguments justifying that allocative efficiency is about total welfare. The second inquiry offers five arguments grounded in mainstream or orthodox economic theory that weaken the total-welfare assumption. The third inquiry explores the concept of consumer sovereignty and how its account of market relations is aligned with mainstream economics, although the interest of consumers prevails. The fourth inquiry reviews the publications of great economists of the past, whose scholarship is particular influential for the economics of law. Surprisingly, they all endorse a consumer-welfare approach, but for Pareto and Stigler.

In the first inquiry, none of the four arguments in favour of total welfare is greatly persuasive: one is a naturalistic fallacy; one is just as deep as required to decide that perfect competition is better than monopoly; another presupposes that total welfare is the maximand; and the last one justifies total welfare as a way to respect the equality of different individuals. This finding is completely in line with the considerations about epistemological and normative minimalism of Chapter 2. Consequently, the case in favour of total welfare is not a strong one because it is not deeply theorized.

The five arguments presented in the second inquiry in part weaken the case for total welfare further, and in part support the one for consumer welfare. First, the standard comparative statics of monopoly and perfect competition overstates the size of the deadweight loss. This weakens the total-welfare approach because it sees in the deadweight loss the foundational source of monopolistic harm. Second, the total-welfare maximand is the cause of the Pareto efficiency contradiction. In fact, applied to bargaining theory, total welfare implies that any Pareto optimal

agreement is the best contractual outcome. However, applied to market analysis, the total-welfare approach censors the Pareto optimal agreements causing deadweight losses. Third, there is an interesting incoherence between the view that the markets maximize total welfare and the prevailing paradigm about company law, where corporations are understood to be maximizing the welfare of investors. One way to solve this incoherence is the claim that the latter goal is instrumental to the former. Another solution is that, because investors are also consumers, the goal in both markets and companies is the maximization of consumer welfare. The fourth argument makes a similar point about principal-agent theory. This literature sometimes assumes that the goal is the maximization of the welfare of the principal. Accordingly, just like a principal-agent relation maximizes the principal's welfare, market relations maximize consumer welfare. The last argument points out that occasionally mainstream economic textbooks and mathematical models describe market relations as maximizing consumer welfare. It is particularly interesting to note that some mathematical models maximizing consumer welfare are described in natural language as maximizing total welfare by their authors.

The third inquiry focuses on the concept of consumer sovereignty. The concept of consumer sovereignty was introduced by William Hutt in the 1930s to make explicit something widely shared by economists. In his view, "the only test of the desirability of a given flow of production is the utility to consumers … [while] the sacrifices and discomforts of the producers … are of no relevance whatever".[1] The analysis shows how market failures end up overthrowing the sovereign consumer, in one way or another. The analysis then assesses various critiques moved to this account. First, the concept of consumer sovereignty is sometimes reduced to the view that what is produced should reflect consumer preferences. While this narrow version is coherent, it is incompatible with the version of the concept proposed by Hutt. Second, consumer sovereignty is rejected by those who want the citizen to be the only sovereign. Again, the two opposing views are simply incompatible, with neither being conclusively superior. According to the third, the consumer is sovereign also when choices are made by others, the legal system included, in the interest of the consumer. While this view is incompatible with Hutt's original version, both accounts support the economic claim of this dissertation and therefore there is no need to adjudicate between them. As Hutt was a student of Hayek in London, the chapter describes the relations between consumer sovereignty and the Austrian school. While the concept is pivotal to both von Mises and Hayek, the contemporary "Austrians" led by Rothbard reject the concept as normatively unattractive. Like previous critics, the contemporary "Austrians" fail to formulate knock-out arguments against consumer sovereignty.

[1] Hutt 1940a: 70.

The fourth inquiry looks at whether a set of economists whose work is particularly significant for the economics of law assumed total or consumer welfare in their analysis of market relations. These economists are: Adam Smith, Marshall, Pareto, Pigou, Knight, Kaldor, Hicks, Coase and Stigler. Surprisingly, beside Pareto and Stigler, who assume total welfare, the others show a particular concern for the interest of consumers that fits with the adoption of a consumer-welfare maximand. For example—and strikingly—to Smith, that "the interest of the producer ought to be attended to, only so far as it may be necessary for promoting that of the consumer … is so perfectly self-evident, that it would be absurd to attempt to prove it".[1]

Together, these four inquiries show that it is indeed possible to conceive the allocative efficiency of market relations in terms of consumer-welfare maximization. The point is not that it is incoherent or incorrect to assume total welfare as the maximand. The economic claim simply holds that consumer welfare is an alternative maximand to total welfare from an economic point of view. This finding is sufficient to reassure economists that Minimalist Law-and-Economics proposes a collaboration that is fully compatible with incentive-based reasoning and economic-minimalist *desiderata*.

Chapter 4, "Fairness and Allocative Efficiency: Towards a Rosetta Stone", defends the translation claim of this dissertation according to which, with consumer welfare as the maximand, it is possible to offer a plausible economic account of fair market relations. In fact, the concept of fairness of the neo-Aristotelian requires to take the *ex-ante* perspective while respecting the fairness and wrongfulness theses. However, for this result to obtain, allocative efficiency has to be about consumer and not total welfare.

In the neo-Aristotelian tradition nowadays championed by Gordley, fairness or commutative justice is a virtue. Human beings ought to live virtuous lives. In general, virtue requires one to find the mean between two opposite vices. In the case of fairness, the vices are giving or receiving too much in an exchange. In other words, fairness requires equality in exchange. There is a controversy about whether this equality is between the performances or the gains of the parties. Gordley sides with the first reading.

Importantly, Gordley incorporates a series of economic insights regarding market relations in his theory of fairness. The starting point, clarified in the chapter, is the idea that prices are fair when they are determined by need, cost and scarcity. The expression "need, scarcity and cost" is co-referential to what economists call "supply and demand".[2] Thus, prices determined by supply and demand are fair.

[1] A Smith 2007 [1776]: 426.
[2] Gordley 2007: 1744. See also Gordley 1991: 98, 2006: 362.

Yet, some clarifications are in order. What do "need", "scarcity" and "cost" mean? What is the relation between these concepts? How do these concepts apply to information and risk? "Need" is understood in subjective terms as the actual preferences of consumers. "Cost" refers to the amount that should be paid to produce the good. The key idea of Gordley's account is that fair prices follow a logic of cost minimization plus compensation, which ensures the equality in the exchange of the parties. A price higher than the costs—unless there is scarcity—is unjustified. Implicit in this idea is the view that an unnecessarily high cost implies a price that is unfair. Against this background, clarifying the concept of scarcity is imperative.

The chapter introduces into neo-Aristotelian theory the distinction between physiological and pathological scarcity. The scarcity that makes prices fair is only physiological scarcity—a scarcity that sends meaningful signals for the reallocation of productive factors or consumers. When scarcity is pathological, the market is not an appropriate allocative mechanism. It does not perform a coordinating function and therefore there is no reason for prices to rise above costs driven by pathological scarcity. The economic analysis of rationing and of the war economy confirms the soundness of the distinction and its normative implications.

The resulting conceptual framework is extended easily to information and risk. They are both considered costs. Information cost and risk allocation follow the same logic of cost minimization plus compensation mentioned above about prices. Put differently, there is a "cheapest cost avoider" rationale at play here. In Gordley's account, this is particularly clear with regards to risk allocation. In the case of information, Gordley struggles to reconcile two conflicting rationales in his theory. Beside the cheapest cost avoider, there is the further idea that the performance must be suitable for its essential purpose. An implication is that a contract can be voided for mutual mistake when the performance is unsuitable. In his discussion of the point, Gordley takes the *ex-post* perspective economists criticize.[1] The chapter proposes to consider suitability as part of the concepts involved in determining that the consumer must have an information. So that the key question is only who the "cheapest cost avoider" is.

At this point, the chapter compares the offered account of the relation between fair prices and efficiency to those posed by Schumpeter, David Friedman and Golecki. The inquiry shows that the proposed account is superior to theirs in one way or another. Schumpeter's account fits well with the proposed one and also with the inquiry in Chapter 2. However, he makes a false claim about the unfairness of monopoly prices in Aristotle's thought. To Aristotle, they are not unfair. This finding can be reconciled with the translation claim in two ways. First, monopoly prices are unfair to the neo-Aristotelians. This is sufficient to warrant the translation claim. Second, even if

[1] On the notion of "*ex-post* perspective", see pp. 33-34.

monopoly prices are not necessarily unfair, to Aristotle they can be the expression of vice and, as such, reprehensible. Friedman's account ignores the economic claim of this dissertation and ends up considering the fair price doctrine as a method to reduce transaction costs when markets are not competitive. His account thus fails to respect both the fairness and wrongfulness theses. Fairness is simply a means to attain efficiency and the wrong is ultimately done to the economy as a whole. Golecki instead defends the view that equality in exchange is reached when there is equality in the division of the benefits created by the transaction. While Golecki's account is an interesting reformulation of the view that equality in exchange is about the parties and not the performances, it incurs various difficulties. Additionally, the equality of gains is not compatible with total-welfare maximization either, so that it counts as an original theoretical formulation but without much relevance in this dissertation.

To reinforce the proposed account of fair market relations, the chapter analyses the relation between prudence and bounded rationality. It is pointed out that the two concepts perform similar functions in the respective accounts of market relations. Limits in prudence imply that consumers acting upon their need might not make virtuous decisions. This opens the way to paternalistic intervention by the law. Similarly, when consumers rationality is bounded, their preferences are not a conclusive welfare indicator and consequently the law may intervene paternalistically to increase consumer welfare.

As a final point, the dissertation discussed the relation between commutative and distributive justice and its contribution to articulate the relation between the maximization of consumer and total welfare. In the neo-Aristotelian tradition, the point of having fair market relations is that the equality of performances neutralizes market relations from a distributive justice perspective. As the parties have an equal share of the resources available to the community before and after the exchange, the exchange is neutral in distributive justice terms. The most pressing issue is then what happens to total welfare. To some extent, this concept must have some normative significance. For Aristotle, one must have access to those resources that are necessary to living a virtuous life. Accordingly, total-welfare maximization captures the insight that among the parameters of a distributive justice society, beside the criterion of distribution, there is also the intuition that the amount of available resources is also of significance.

The resulting framework is an important contribution to Minimalist Law-and-Economics. When allocative efficiency is about consumer welfare and fairness is the neo-Aristotelian one, it is possible to translate claims about allocative efficiency in ones about fairness, and vice versa. Therefore, fairness requires the incorporation of the *ex-ante* perspective. Note that, to this end, allocative efficiency can also be about total welfare. However, under the latter assumption, the

translation claim fails, and the fairness and wrongfulness theses are not respected. In particular, the compensation for the costs becomes a mere means to an efficient allocation. The implication is that the fairness thesis is not respected because the fairness of market relations has instrumental value only. Similarly, an inefficient allocation is a wrong because it reduces total welfare, it is not a wrong done to the holder of the right correlative to the breached duty.

In conclusion, the economic claim is a necessary premise to the translation claim and both contribute to the collaboration between law and economics proposed by Minimalist Law-and-Economics. The opposition between fairness and the *ex-ante* perspective is avoided, and the fairness and wrongfulness theses are respected. What is still missing is the demonstration that reverse engineering the law allows economists to be normative minimalist without giving up on their commitment to epistemological minimalism.

4.3 Overview of Part III

Part III defends the doctrinal claim of this dissertation, which holds that the consumer-welfare hypothesis explains better than the traditional total-welfare one the reasons given in the practice of a significant portion of EU antitrust and consumer law. The chapters contribute to Minimalist Law-and-Economics by showing how legal materials can be used as evidence to decide which economic concept fits better with legal practice—in this case, between total and consumer welfare as the maximand in the efficiency analysis of market relations. In other words, these chapters show how to reverse engineer the law in a way that is rigorous enough to satisfy a plausible version of epistemological minimalism. Accordingly, when the focus is on the choice of ends—as in the opposition between the total- and consumer-welfare hypotheses—reverse engineering the law and choosing a maximand because it fits with the law is a way to be normatively minimalist without falling in the social engineer contradiction.

Chapter 5, "How the Efficiency Hypotheses Are Tested", sets the stage for the application of the explanatory scorekeeping model to EU antitrust and consumer law in the next two chapters. The explanatory scorekeeping model is an extension of legal inferentialism, an analytical approach introduced by Canale and Tuzet, who in turn build upon the inferentialist account of linguistic practices proposed by Brandom. The central idea is that an efficiency hypothesis implies certain commitments about legal reasoning. When the actual legal reasoning fits with one of these commitments, the hypothesis is entitled to the claim that it explains that reasoning. When it receives an entitlement, the hypothesis scores a point. By keeping the scores of the competing hypotheses, one can assess their explanatory power. Hence, the name "explanatory scorekeeping model".

The framework for testing the competing efficiency hypotheses or *explanantia* is divided into three parts: 1) delimitation of the scope; 2) identification of the legal materials to analyse (*explanandum*); and 3) the method of analysis. The *explanandum* is limited to general provisions of EU antitrust and consumer law. While the ultimate scope of the inquiry would be EU internal market law, various considerations lead to this narrower scope of inquiry. The whole of EU internal market law is an unrealistically broad focus for this dissertation. Against this background, the scope is limited to those areas where testing the hypotheses is likely to be easier. This consideration leads quite obviously to EU antitrust and consumer law. These two branches of EU law have the broadest and narrowest notions of consumer in EU law.[1] Accordingly, if one hypothesis fits better than the other in both fields it is plausible to make the testable conjecture that it works also in intermediate cases. In addition, the focus on general substantive provisions is meant to concentrate the attention on provisions of particular significance. By being cross-sectorial, general substantive provisions are robust to the specificities of different economic contexts.

The second step of the framework building activity is the identification of the legal materials comprised in the *explanandum*. This activity can be divided further in two parts: selection of the sources of EU law, followed by identification of the analysed case law. At the outset, note that the Opinions of Advocate Generals are considered only when referred to in a decision and to the extent the decision is particularly challenging to analyse.

The general substantive provisions of EU antitrust law include Articles 101 and 102 TFEU, Regulation (EC) 1/2003, Commission Regulation (EU) 330/2010, and Directive (EU) 104/2014. Exceptionally, the *explanandum* includes also the 2006 Guidelines on fines. The general provisions of EU consumer law include the case law on the free circulation of goods and services where consumer protection is invoked to limit the said freedoms and the case law on the following directives: Product Liability Directive,[2] Unfair Terms Directive,[3] Unfair Commercial Practices Directive[4] and Consumer Rights Directive.[5]

The criteria for the selection of the case law are particularly important to avoid the risk of cherry picking the cases included in the *explanandum*. This risk is particularly severe with regards to EU antitrust law, where there is extensive case law. Here, the selection criterion consider cases that are listed in *European Competition Law: A Case Commentary* as landmark cases about the substantive issues for the application of the selected sources of EU antitrust law. A similar problem

[1] See pp. 34-35.
[2] Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products.
[3] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.
[4] Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market.
[5] Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights.

applies also to the fundamental freedoms. Here, the authority to select the cases was delegated to Barnard's *The Substantive Law of the EU: The Fundamental Freedoms*[1] for the free movement of goods and to the *Guide to the Case Law of the European Court of Justice on Articles 56 et seq. TFEU* written by the European Commission for the freedom to provide services.[2] As the case law in the application of the directives of EU consumer law is less extensive, the *explanandum* includes all the cases listed on the website of the Court (curia.europa.eu) under the relevant entries of the systematic classification scheme decided before 17 November 2017.

The first two steps have determined the *explanandum*—what will be explained. The third step focuses on the method of analysis—how to compare the explanatory power of the competing efficiency hypotheses or *explanantia*. The third step is divided further in two parts. First, the seven disagreements that operationalize the competing efficiency hypotheses are specified. Second, the analytical method based on legal inferentialism is articulated.

The competing efficiency hypotheses or *explanantia* are operationalized in this dissertation by seven disagreements. Disagreement *i.* is about distributive concerns and disagreement *ii.* is about the reason why a market participant is protected. Distributive concerns and protection are merely instrumental to total welfare if this is the maximand. If, instead, consumer welfare is the maximand the distributive concern for and the protection of consumers are intrinsically valuable, while the concern for other market participants is instrumental. Disagreement *iii.* focuses on the relation between consumer and total welfare. The total-welfare *explanans* views concerns for consumer as instrumental. The competing consumer-welfare *explanans* does not deny a relevance to total welfare and therefore has to account for its relation with consumer welfare. Here, Minimalist Law-and-Economics builds upon the neo-Aristotelian tradition discussed in Chapter 4. When market relations aim at consumer-welfare maximization, they are neutral towards redistributive goals or distributive justice. Hence, distributive justice concerns are typically excluded from the relevant legal reasons. When these reasons matter, considerations about the redistribution of income are used in the *explanandum*. However, the same happens also when there are considerations about total welfare. They are not matters of market fairness, but of distributive justice.

Of the four more concrete disagreements, two focus on economic concepts, and two focus on legal concepts. Disagreement *iv.* is about the deadweight loss and productive inefficiency. The total-welfare hypothesis identifies in the deadweight loss the main source of allocative inefficiency. From a consumer-welfare perspective, the deadweight loss is important, but the transfer of welfare from consumers to producers is as (if not more) important. Not calculating the deadweight loss is a significant anomaly for the total-welfare hypothesis. Its consumer-welfare challenger can explain

[1] Barnard 2016: 174-176.
[2] European Commission 2016: 133-136.

this disregard by reference to considerations about the difficulty of identifying who these excluded consumers are and how much they have been harmed. Similar considerations apply to productive inefficiency. Productive inefficiency amounts to a waste of resources, which reduces total welfare. Accordingly, it is as harmful to allocative efficiency as the deadweight loss. The discourse is very different for the consumer-welfare *explanans*. Productive inefficiency matters only instrumentally and in so far as it reduces consumer welfare.

Disagreement *v.* is about elasticity of demand. Elasticity of demand could be used to connect price and quantity variations to the deadweight loss and give an important estimation of the reduction of total welfare. The point is when and why elasticity matters in legal reasoning. Failing to consider it to calculate the deadweight loss is hard to explain for the total-welfare hypothesis that sees in the deadweight loss the main source of allocative inefficiency. The consumer-welfare *explanans* is the same discussed about the calculation of the deadweight loss.

With disagreement *vi*., we move to the defences and exceptions against the application of a norm. Defences and exceptions can be divided into three categories: procedural, *de minimis* and other substantive defences and exceptions. The procedural ones are not relevant for current purposes. With regards to substantive defences, the situation is similar to that seen regarding disagreement *iii*. The total-welfare *explanans* justifies defences and exceptions—*de minimis* or otherwise—to the extent they are instrumental to the maximization of total welfare. The consumer-welfare *explanans*, instead, can justify them as instrumental to consumer welfare or in terms of distributive justice on the grounds of the relation between these two concepts outlined above.

Disagreement *vii*. is concerned with the purpose of remedies. The total-welfare *explanans* holds that remedies in general must deter inefficient behaviour. There is no significant difference between fines, compensation and nullity. Injunctions are advisable when the costs of setting the deterrent sanction are higher than the negotiation costs between the involved parties. In the shadow of the injunction, parties are facilitated to reach an efficient agreement. The consumer-welfare *explanans* acknowledges a deterrent and a reparatory function to remedies. Thus, fines focus on deterrence and damages are primarily reparatory. Similarly, injunctions are primarily deterrents, while nullity has both deterrent and reparatory (via restitution) functions.

These seven explanatory disagreements between the competing efficiency hypotheses are tested by performing an explanatory scorekeeping analysis of the *explanandum*. An efficiency hypothesis or, more precisely, its *explanans* scores a point about one of the disagreements when the relevant portion of the reasons given in the *explanandum* fits with the reasons the *explanans* gives. Fitness is a matter of degree and, to account for this, the explanatory scorekeeping model introduces points of different quality, organized in a triadic scale (*P*, *p*, *N*). High-quality points (*P*) are scored

when there is a very high match between the reasons of the *explanans* and of the *explanandum*. Put differently, the *explanandum* justifies an outcome just like the *explanans* would do. For example, a court holds that a contract is null because—in being anticompetitive—it leads to poor allocations of resources and harm, especially for consumers. The consumer-welfare hypothesis notes the existence of the distributive concern in favour of consumers, that more importance is given to their protection than to that of other market participants and concludes that this reasoning fits well with the *explanantia* regarding disagreements *i.* and *ii.*

Low-quality points (*p*) are scored when the reasoning in the *explanandum* fits with the *explanans*, but the former is so shallow that the *explanans* has to integrate the *explanandum* to provide a justification. For example, if a decision holds that a contract is null because it is anticompetitive, both *explanantia* score a *p* point. In fact, they can both add to the *explanandum* "and an anticompetitive contract is inefficient" (while meaning different things with "inefficient") and claim that the decision fits. An *N* point is scored when the explanation is patently implausible and is therefore rejected. This is particularly the case when the *explanandum* goes deeper in the reasoning than usual, but the *explanans* has basically to scratch out or overwrite this deeper theorization to provide an explanation. Reconsider the example about a contract leading to a poor allocation of resources harming consumers in particular. Assume this connection between the poor allocation and the harm to consumers was never made before in the relevant case law but is made by other courts afterwards. The total-welfare hypothesis has difficulties to explain why there is this particular concern for consumer harm. It can try to explain the concern in instrumental terms, but the difficulty is that in the example the poor allocation implies harm to consumers so that if you want to find an instrumental connection it would be the other way around. So, the *explanandum* would have to be rewritten to be explained by the total-welfare *explanans* that, therefore, scores no point.

The final aspect to discuss is how the *explanandum* is divided into parts and points are aggregated. In general terms, both EU antitrust and competition law are divided in two by reference to the higher or lower level of trust in the market mechanism. In EU antitrust law, Article 101 shows a higher degree of trust in the market mechanism than Article 102. In EU consumer law, the same can be said by reference to the distinction between empowering and protecting consumers. When the legal system empowers consumers, it puts them in the condition to exercise legal powers to conclude or terminate contracts effectively—for example, by imposing information duties. When consumers are protected, they are granted substantive rights about the performances. For example, they are protected against the unfairness of contractual terms. Within these four groups of cases, the efficiency hypotheses can score one point about the various disagreements. The occasional

exceptions to this division are justified by considerations of convenience because the *explanandum* is so homogeneous that keeping the division would make the text heavier without adding anything from an analytical point of view.

The points the *explanantia* can score have to be aggregated somehow. This is particularly complex since the point are of different quality. I have chosen a "polar attraction" scorekeeping rule. Polar explanations are those that receive either a high-quality explanation or no explanation. They attract low-quality explanations, so that if there are both *P* and *p* points, the result is a *P* point; conversely, if there are *p* and *N* points, the result is an *N* point. If there are both *P* and *N* points, there is an incoherence in the *explanandum* and the *explanans* scores a *p* point.

Chapter 6, "EU Antitrust Law Reverse Engineered", focuses on EU antitrust law. The consumer-welfare hypothesis scores ten *P* points and one *p* point while its total-welfare counterpart scores one *p* point and ten *N* points. The *explanandum* about Article 101 and 102 are analysed separately but for disagreements *v.* and *vii.*, where the similarity of the evidence suggested a unified treatment. Curiously, no materials about Article 101 relevant for disagreement *iii*. were found.

The prohibition set by Article 101(1) does not have a deeply theorized text. Often, the courts do not offer deeply theorized reasons, for example when it holds that for an agreement to be found anticompetitive, one has to "examine what would be the state of competition if those clauses did not exist".[1] However, there is a significant line of cases where there is a concern for the effects on consumers. In particular, with regards to restrictions by object, the courts consider that "[e]xperience shows that such behaviour leads to falls in production and price increases, resulting in poor allocation of resources to the detriment, in particular, of consumers".[2] Additionally, the case law on ancillary restrictions implies that restricting price competition or the freedom of economic organization can be procompetitive when it benefits consumers, for example, on the quality of the product. For disagreements *i.* and *ii.*, the analysis ultimately leads the consumer-welfare hypothesis to score two *P* points while its total-welfare counterpart scores two *N* points.

The *explanandum* concerning Article 101 is not rich of materials relevant to disagreement *iv*. However, the few that there are show a concern for anticompetitive behaviour also in the absence of the deadweight loss and for productive inefficiency only in relation to the effect on consumers. Thus, another *P* point for consumer welfare and another *N* point for total welfare.

Concerning disagreement *vi.*, the references to the interest of workers, intellectual property rights and the *de minimis* doctrine are all relevant. However, the provision of Article 101(3) is of particular significance because it refers to consumers receiving a fair share of the benefits.

[1] C-42/84 [18]. Similarly, C-126/97 [36] and C-453/99, establishing an instrumental relation between competition law and "the functioning of the internal market". See also T-29/05 [49].
[2] C-67/13 [51]. See also C-286/13 P [114-115], T-472/13 [341], T-208/13 [88], C-345/14 [19].

Ultimately, the analysis leads to conclude that Article 101(3) enshrines the idea that coordination between undertakings is a means to outperform competition in the maximization fo consumer welfare. This is the main reason why, again, the consumer-welfare hypothesis scores one *P* point and its total-welfare counterpart only one *N* point.

Moving to Article 102, the results of the inquiry are similar to those just sketched for Article 101. Concerning disagreements *i.*, *ii.*, *iv.* and *vi.*, the consumer-welfare hypothesis scores four *P* points and its total-welfare counterpart receives four *N* points. The results for disagreement *iii*. are interesting. The main reason is that, in *TeliaSonera Sverige*,[1] the Court holds that EU antitrust law "prevent[s] competition from being distorted to the detriment of the public interest, individual undertakings and consumers, thereby ensuring the well-being of the European Union". The total-welfare hypothesis can explain this statement straightforwardly, but it then fails to explain other statements that are of relevance. The consumer-welfare hypothesis gives only a low-quality explanation of this statement, but then offers high-quality explanations of other materials relevant to disagreement *iii*. Following the polar attraction scorekeeping rule, the consumer-welfare hypothesis scores a *P* point and its total-welfare counterpart scores its first *p* point.

As anticipated, the whole *explanandum* relevant to EU antitrust law and disagreements *v.* and *vii*. is analysed together. The results are one *p* point and one *P* point for the consumer-welfare hypothesis and two *N* points for the total-welfare one. While elasticity of demand does play a role in the reasoning of the courts, it does so to determine the relevant market and not to calculate the deadweight loss. But elasticity of supply is also calculated to determine the relevant market. The consumer-welfare hypothesis explains this, but the explanation receives only one *p* point. Its total-welfare opponent, instead, cannot explain this finding and, therefore, scores one *N* point. The *explanandum* is divided in pecuniary (fine, damages) and non-pecuniary sanctions (nullity and injunctions) for the purposes of disagreement *vii*. The point requiring more elaboration is understanding the function of damages, but the Damages Directive leaves no doubt that the function is primarily reparatory. The result of the inquiry is that the consumer-welfare hypothesis scores one *P* point and its total-welfare counterpart one *N* point.

In Chapter 7, "EU Consumer Law Reverse Engineered", a very similar plot unfolds. The consumer-welfare hypothesis scores seven *P* points and two *p* points, while the total-welfare one scores only two *p* points and seven *N* points. The *explanandum* is divided into two categories, empowerment and protection. For convenience's sake, disagreements *i*. and *ii*. are analysed together, as are disagreements *iii*. and *vi*. Disagreements *iv*. and *v*. have no bearing on EU consumer law.

[1] C-52/09 [21-22].

The first step is the analysis of disagreements *i*. and *ii*. regarding EU consumer empowerment law. A pivotal instrument of consumer empowerment is information duties. The justification of these duties is thus of particular importance for explanatory purposes. The Court holds that information "improve[s] the consumer's situation by protecting his health, his safety and his economic interest".[1] This insight is central to the case law on the freedoms. The concern for the interest of consumers is explicitly at the core of the prohibition of unfair commercial practices, and the right to withdraw is meant to "compensate for the imbalance between the consumer and the trader".[2] Overall, the *explanandum* shows a distributive concern in favour of consumers and their protection is presented as a goal in itself. Against this background, the consumer-welfare hypothesis scores two *P* points while its total-welfare counterpart scores two *N* points.

Concerning disagreement *iii*., the reasoning in the *explanandum* is shallow enough to allow both *explanantia* to score one *p* point. Moving to disagreement *vi*., the *explanandum* is informed by a concern to strike a balance between competition and the protection of consumers. The central concept is again the interest of consumers. Consequently, the consumer-welfare hypothesis scores another *P* point and the total-welfare one receives another *N* point.

The analysis of the materials regarding EU consumer protection law yields similar results. With regards to disagreements *i*. and *ii*., for example, the Product Liability Directive is meant "to protect the physical well-being and property of the consumer".[3] Once again, we find a distributive concern in favour of consumers and the presentation of their protection as intrinsically valuable. Accordingly, the consumer-welfare hypothesis scores two *P* points and the total-welfare one fails twice to provide a plausible explanation, thereby scoring two *N* points.

Regarding disagreement *iii*., the reasoning of the Court is usually shallow and both efficiency hypotheses score a *p* point. Of particular interest is the idea that consumer protection contributes "to raising the standard of living and the quality of life in its territory".[4] The *explanandum* is much richer with regard to disagreement *vi*. The upshot of the inquiry is that when there are reasons to believe that the market mechanism is not providing its intended benefits to consumers, more intrusive interventions steps in. Accordingly, the relevant consumer-welfare *explanans* scores a *P* point and its total-welfare opponent scores one *N* point.

The last inquiry focuses on disagreement *vii*. The analysis shows that the various remedies are all justified by a pivotal concern for consumers. For example, the inapplicability of unfair terms is meant to deter producers from introducing unfair terms and "re-establishes equality between".[5]

[1] C-362/88 [14 and15].
[2] C-227/08 [23 and 28].
[3] Recital 6, Product Liability Directive.
[4] C-168/05 [37]. See also C-243/08 [26], C-76/10 [49] and C-618/10 [67] that repeat the same idea.
[5] See, for example, C-137/08 [47].

When, however, the contract would be declared void as a whole following the declaration of unfairness of a term, National courts are allowed to revise the content of the term because doing otherwise would "expos[e] the consumer to disadvantageous consequences".[1] Also in this occasion, the consumer-welfare hypothesis scores a *P* point and its counterpart an *N* point.

Chapter 8, "A Superior Hypothesis", takes stock of the results of the scorekeeping analysis performed in Part III. Not only the explanatory power of the consumer-welfare hypothesis is overall superior; rather, for every disagreement the consumer-welfare hypothesis provides explanations that fit better or at most as well as the alternative ones with the *explanandum*. Thus, not only the doctrinal claim is warranted, but the consumer-welfare hypothesis is Pareto superior from an explanatory point of view.

The chapter also discusses certain aspects of the inquiry. Doubts about the subdivision of the *explanandum* are discussed and it is shown that the doctrinal claim would be warranted also under these different arrangements. In particular, the polar attraction scorekeeping rule is defended as the most appropriate aggregation rule for explanatory purposes against two possible alternatives: the *vincit superior* rule and the mediocrity rule. It is then shown that the triadic scale of points *P*, *p*, *N* could—if one wanted to—be turned into an arithmetical one.

5. Six Key Concepts: *Ex Ante* versus *Ex Post,* Consumer, Producer, Welfare, Scarcity, and Distribution

This final introductory section clarifies the meaning of terms that are central to the discussion of this dissertation, but that could confuse the reader in light of the plurality of their uses in the literature. These terms are "*ex ante* versus *ex post*", "consumer", "producer", "welfare", "scarcity", and "distribution". As we shall see, there are three different uses of the distinction "*ex ante* versus *ex post*" and recognizing the difference will be of great help during the inquiry. The importance of "consumer" and "welfare" here is obvious, as they are central to the proposal advanced by Minimalist Law-and-Economics. "Producer" is similarly important because simply defining it as "the counterparty of the consumer" is insufficient in light of the subcategories of consumers. The concepts of scarcity and distribution are at the centre of several considerations important to the proposal advanced in this dissertation.

[1] C-26/13 [82-84], Joined Cases C-482/13, C-484/13, C-485/13 and C-487/13 [33].

5.1 Ex ante *versus* ex post*: three views of the cathedral*

In the economics of law, the distinction between *ex ante* versus *ex post* is used to indicate three different, but correlated things: norm setting, governance structures, and forms of legal reasoning. To some extent, these uses overlap, but it is nevertheless advisable to distinguish them. The three used are discussed in order of importance and more space is dedicated to the third one, which is the most important.

When used to discuss the procedure for establishing the content of a norm, the distinction *ex ante* versus *ex post* is used synonymously with the distinction between rules and standards.[1] Rules are more precise than standards. In case of rules, the legislative process is costlier than with standards, but then in case of standards the determination of the content of the norm is costlier as a matter of compliance and of adjudication. Obviously, the distinction could be problematized by considerations of the possibility of arguing for implicit exceptions to the content of rules. However, for current purposes this point really is irrelevant.

According to the second distinction, *ex ante* versus *ex post* relates to two different forms of "governance" of interactions.[2] In this case, the distinction rests on the type of conduct to which a legal sanction is attached. An *ex-ante* approach attaches the legal consequence to an observable conduct or event that is anterior (hence, *ex ante*) to the conduct or event one wants to avoid or to bring about. Thus, a speeding ticket is a way to avoid accidents. It connects a legal sanction (a fine) to the act of speeding, which increases the probability of accidents. Compensating the victim once the accident has occurred is an *ex-post* approach. Similarly, giving a bonus to an employee when certain objectives are met, is an *ex-ante* approach. Firing the employee for breach of contract if he or she does not perform well is an *ex-post* approach.

Note that in the narrative about the second distinction, the focus can be put very aggressively on the behaviour of the addressee of the duty only. David Friedman, for example, writes:[3]

> The point of giving speeding tickets is that the knowledge that you might get one gives you an incentive not to drive fast. The point of punishing people for being in accidents is that the knowledge that if you are in accident you will get punished gives you an incentive not to have accidents.

This citation introduces a problem which will recur throughout the inquiry, namely that the economics of law tends to focus very much on the compliance with the norm. It also overlooks what, from a legal point of view, is the elephant in the room, namely that in case of accident there is

[1] See, for example, Kaplow 1992, Sunstein 1996, Weber 2013.
[2] See, for example, DD Friedman 2000: 74-83 and Hoeppner and Kirchner 2016.
[3] DD Friedman 2000: 77.

a victim, and compensating the victim is part of the tasks the legal system is entrusted with. Generalizing, legal thinking is based on the idea that there is a correlation between one's duty and someone else's right, so that the former is justified by the latter.[1] This is a correlation that, as shown by the above citation, the economics of law would fail to grasp[2] and which crucially implies that the breach of one's duty consists in a wrong done to the right-holder. Let us call "wrongfulness thesis" the thesis that the breach of one's duty is a wrong done to the holder of the correlative right.

Let us now move to the last conception of the *ex ante* versus *ex post* distinction. Here, the *ex-ante* perspective is about incentives, and the *ex-post* one about fairness. To explain the opposition, the economists of law often move from the example of a lottery or a bet.[3] Imagine Bruno and Silvia bet 1 EUR each on the result of a coin flip. Bruno bets heads, Silvia tails. If the coin is not loaded, then both parties have a 0.5 probability of winning. Silvia wins. *Ex post*, Bruno is worse off in comparison to Silvia, but *ex ante* they have the same chances of winning.

In this distinction, fairness is about the distribution of the losses between the parties after the event occurred. Kaplow and Shavell explain that there are two problems with fairness approaches. On the one hand, they are not very clear in explaining what they require. On the other hand, even when they are clear, "many notions of fairness focus on particular consequences and thereby ignore or undervalue other plausibly relevant aspects",[4] which have in particular to do with the consequences in terms of incentives and ultimately the reduction of total welfare.

Contrary to the first two distinctions, which is neutral, in the sense that both *ex-ante* and *ex-post* approaches can be attractive to the economist of law depending upon the circumstance, the situation is different with the third distinction. Here, the *ex-ante* approach is just better. The question then becomes whether the *ex-post* approach can have any room in normative analyses. Easterbrook's scholarship is illustrative of the tension. In 1983, Easterbrook wrote:[5]

> A broad, representative spectrum of legal and economic commentators, discussing a large number of questions, have proven beyond question that ex ante analysis is the appropriate way to look at legal matters.

In a footnote, he proclaims this a "Famous Quotation". Now you know. Yet, a couple of years later, in an article recognized as seminal not by himself but by others,[6] Easterbrook reconsiders, stating that[1]

[1] Seminal, in this regard, are Hohfeld 1913, 1917.
[2] See, for example, Coleman 2001 and Weinrib 2012. For a defence of a utilitarian theory of rights, see Ferraro 2014. Indeed, in the literature on the concept of right, one of the two main approaches—the interest theory—holds, roughly put, that the attribution of a right is based on the recognition of an interest that is strong enough to justify the imposition of the duty on the duty-holder. See Kramer 2010.
[3] See, for example, Easterbrook, Posner, WM Landes 1980: 342 and DD Friedman 2000: 74.
[4] Kaplow and Shavell 2002: 49. See also Scott 1993, who speaks of a "justice paradox".
[5] Easterbrook 1983: 486.
[6] Law and Contemporary Problems 1987.

> [t]he principles laid down today will influence whether similar parties will be in similar situations tomorrow. Indeed, judges who look at cases merely as occasions for the fair apportionment of gains and losses almost invariably ensure that there will be fewer gains and more losses tomorrow. … My point is not that creating incentives for future conduct should be the Court's sole objective in adjudicating legal disputes, but that the Court is bound to send the wrong signals to the economic system unless the Justices appreciate the consequences of legal rules for future behavior.

It seems that this second view is more descriptive of the *communis opinio* among the economists of law, especially those with a higher sensibility to legal questions.[2] And arguably, any legal scholar who agrees that laws are human artefacts with purposes and can be better or worse at that, will be inclined not to ignore "the consequences of legal rules for future behaviour".

Yet, in *Fairness versus Welfare*, Kaplow and Shavell again push fairness into a corner by arguing that a fairness approach often leaves both parties worse-off. And this is a problem from a legal point of view. While inclined to consider the consequences, as we shall see better in the next chapter, legal scholars want market relations to be fair. This inquiry, and especially Chapter 4, is meant to disarticulate the distinction *ex-ante* versus *ex-post* perspective and that between fairness and efficiency.

5.2 Consumer (customer, buyer, client, end user, etc.)

The use of the term "consumer" makes it particularly elusive to a satisfactory extensional definition. Its use is complicated both in economic and legal discourses.[3] Economists, often use it interchangeably with other terms, such as client, customer, buyer. Arguably, economists do not need to be particularly cautious with the use of this term because it is typically clear that what they are referring to is the demand-side of the market, represented in aggregate form by a demand function or demand curve.

The issue is more complex and delicate in legal discourse. In fact, the term "consumer" often has a restricted meaning, like in the expression "business-to-consumer" or in EU consumer law *strictu sensu*, in which the consumer is the 1) natural person 2) operating "outside his trade, business or profession".[4] EU competition law, instead, adopts a very broad notion of "consumer" which includes, "industrial consumers",[5] "institutional consumers",[6] "ultimate consumer".[1] In other

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[1] Easterbrook 1985: 10-11.
[2] See, for example, Calabresi 1982, Craswell 1993, Farber 2000, Kraus 2001, Farnsworth 2007, Mathis 2009, Ogus 2010 and Cserne 2012.
[3] I am indebted to Lucila De Almeida for helping me to realize the importance of this point.
[4] See Art. 2, lett. b, Council Directive 93/13/EEC of 5 April 1993, Art. 2, let. b, Directive 2005/29/EC of 11 May 2005, Art. 3, let. a, Directive 2008/48/EC and Art. 2(1), Directive 2011/83/EU of 25 October 2011.
[5] Joined Cases C-40-48/73, C-50/73, C-54-56/73, C-111/73, C-113/73 and C-114/73 [48].
[6] C-26/76 [8].

occasions, the case law refers to "customers".[2] A clear articulation of the competition law consumer is given by the Commission in the 2004 *Notice on the Application of Article 81(3)*, were "consumers" are

> all direct or indirect users of the products covered by the agreement, including producers that use the products as an input, wholesalers, retailers and final consumers, i.e. natural persons who are acting for purposes which can be regarded as outside their trade or profession.

From the perspective of competition law, then, the consumer *strictu sensu* is the final consumer. Sector-specific regulations complicate things further because they use their own terms which are onlypartially co-referential with the ones of consumer law and competition law. In financial services, MiFID I and II cover relations with clients, who are 1) natural or legal persons being provided 2) by investment firms 3) investment or ancillary services.[3] The category of clients is then further divided in retail and professional clients, receiving different degrees of protection. In telecommunications, the Framework Directive applies to the more general category of users and to the more specific category of consumers (defined as in consumer law *strictu sensu*).[4] Arguably, the most ramified sector is EU energy law. In fact, the 2009 directives refer to "customer" (not defined), further divided in wholesale and final customers, the latter further divided in household and non-household customers, with the further category of eligible customers.[5] Note, in particular, that in the energy sector the concept of final consumer is broader than in the 2004 Notice by the Commission quoted above, because in the energy sector the "final customer" is simply any customer purchasing energy "for his own use".

Among the available definitions, this dissertation, unless further specification is given, uses the term "consumer" in conformity to the 2004 Notice by the Commission quoted above. The reason for this choice is that this definition is the broadest, and it covers all the other definitions. This has several attractive features. It allows to describe a supply-chain as a sequence of producer-consumer transactions ultimately leading to a consumer *strictu sensu*. It embodies the insight that the conceptual framework used to represent a producer-consumer relation over the supply-chain remains the same even if the features of the market change. It makes clear that having an improvement in consumer welfare does require an analysis of the entire supply-chain, but of a single consumer-producer relation.

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[1] Joined Cases C-209-215/78 and C-218/78 [132].
[2] For example, C-311/84 [25].
[3] Art. 3, n. 10), Directive 2004/39/EC of 21 April 2004 and Art. 3, n. 9), Directive 2014/65/EU of 15 May 2014.
[4] Art. 2, lett. h and j, Directive 2002/21/EC of 7 March 2002.
[5] Art. 2, nn. 7-12), Directive 2009/72/EC of 13 July 2009, Art. 2(24)-(29), Directive 2009/73/EC of 13 July 2009.

5.3 Producer (undertaking, seller, manufacturer professional, service provider, etc.)

The term "producer" is used here to cover a variety of concepts, such as supply-side operator, seller, provider, manufacturer, etc. In a first approximation, it can be taken to refer to the sum of the inputs, or factors of production, leading to the offer of a good or service on the market.

The main difficulty with this term does not arise from its use, but rather from the relation between the different categories of inputs. In particular, as we shall see in Chapter 2, one can make an analogy between the role of the consumer in a market and of the investor in a company.[1] That claim should not be misunderstood, and to avoid that, it is useful to discuss from the outset the concept of producer. The danger of the analogy between consumers and investors is that the economic claim of this dissertation would be taken to mean that the welfare of investors takes precedence over the welfare of labour, just like the welfare of consumers takes precedence over the welfare of producers. This is not what the claim is meant for. The analogy is simply designed to show that in the whole body of economic literature the maximand is not always total welfare.

The crucial insight for current purposes is that a production can be organized by using different levels of contribution from the different inputs, or factors of production. For example, given constant output, a higher degree of automatization reduces the labour force needed, but increases the amount of capital invested.

The main claim of this dissertation is neutral with regard to conflicts between the different factors of production leading to a consumer-producer interaction as long as the possible solutions of the conflict have no consequence on consumer welfare. Thus, if paying the labour more or less does not affect consumer welfare, but merely implies a distributive effect between labour and capital, in this dissertation it is taken to be irrelevant from an allocative perspective. In contrast, if paying the labour force more increases the quality of the product—because, for example, it solves an incentive problem—but decreases profitability, the rise is desirable according to the economic claim of this dissertation. Arguably, this way of conceptualizing the relation between the different factors of production becomes much more reasonable once one's attention is drawn to the difference between the economic and the accounting notions of profit. The main difference is that interests over equity capital are considered as a cost in economic terms, but not in accounting. The economic notion of profit thus makes the fact that capital is just another factor of production clearer in comparison to that of accounting, which is admittedly more in line with ordinary language.

At this point, another clarification is in order. The fact that some industrial organizations are more desirable than others or are equally desirable according to the economic claim of this dissertation does not imply neither that there is a conclusive reason in their favour if they are more

[1] See pp. 88-90.

allocatively efficient nor that any organization is equally desirable, all things considered, if they are equally allocatively efficient. In fact, allocative efficiency is just one of the many values at stake. Thus, in some situations a less allocatively efficient organization might be justified by considerations about the condition of the labour force, or of the environment—which is obviously another of the inputs in the production of goods and services.[1]

5.4 Welfare (well-being, wealth, surplus, etc.)

The term "welfare" is particularly challenging, mainly because economists typically use it interchangeably with others, like "preferences", "willingness-to-pay" and "surplus". Sometimes, also other terms like "interest" and "value" are used. In the past, it was common to find the expression "economic welfare", to refer to that part of human welfare that can be adequately measured in monetary terms. European competition lawyers, in particular, have—as a consequence of the more economic approach of the Commission—been reflecting on the meaning of the expression "consumer welfare", but no conclusive consensus has yet been reached.[2] Similarly, it seems of little use to pursue some conceptual inquiry moving from intuitions like "welfare is a property of something that makes life better" or "something contributes to one's welfare if it makes the person better off". I find great insight in the claim that, in reflecting about welfare, it is advisable to take a context-dependent approach, according to which the term "welfare" can have different meanings in different contexts.[3] First, economic research is going into this direction after the downgrading of revealed preferences.[4] Second, this approach is consistent with the division made by Article 169 TFEU of the interest of consumers in economic interest, health, and safety, with the different branches of EU consumer law focusing primarily on some of these aspects.[5] Third and more importantly for current purposes, this claim allows to make some important observation about welfare for the purposes of this dissertation, which has as its privileged context of inquiry the market context.

The observation that the market mechanism does measure welfare in terms of preferences as reflected by consumers' willingness-to-pay is an important starting point. It yields at least two insights. The first is that the use of the market mechanism has to be based on some degree of commitment to the idea that consumers' preferences as reflected by their willingness-to-pay contribute to their welfare; a commitment increasing with the extent to which the market mechanism is relied upon by the legal system. Otherwise, it would be instrumentally incoherent to

[1] See pp. 153-155.
[2] See, for example, Cseres 2005, Akman 2012, Alboek 2013 and Daskalova 2015.
[3] Alexandrova 2017, especially 3-53.
[4] See, for example, Beshears et al. 2008, Weimer 2017 and Fabbri and Faure 2018.
[5] See pp. 166-167.

rely on the market mechanism because it would be a mechanism working on the grounds of an ineffective welfare indicator. Secondly, distrust in the use of consumers' preferences (as reflected by their willingness-to-pay) can be based on two different, non-mutually-exclusive, reasons. On the one hand, we may have reasons to believe that individual preferences are not a reliable welfare indicator. This is one of the important contributions of behavioural insights to the foundations of welfare economics.[1] On the other hand, we may have reasons to believe that because of the current distribution of resources, or because there are reasons to believe that for a certain good or service it is better to rely to a very limited extent on the market mechanism. This point requires a careful elaboration and is discussed in Chapter 3. Here, I would like to briefly point out a different case, healthcare. That health is an important component of individual welfare is hardly deniable.[2] Consider a comparison of the OECD data about the Italian almost universal healthcare system and the almost commodified US system. In 2015, Italy spent 9.1% of its GDP on healthcare, whereas the US spent 16.9%—almost the double![3] At the same time, Italy performs better than the US in all health status indicators used by the OECD. If we accept that the health indicators used by the OECD are a reliable proxy of the health component of individual welfare, there is at the very least a *prima facie* case for the claim that the Italian healthcare system is superior to the US one in terms of allocative efficiency (it costs consumers less and it provides them with more).

While these two problems are crucial and cannot be assumed away by some convenient claim about preferences, the distribution of resources, or the performance of the market, the opposite risk—namely, of problematizing too much the concept of welfare—also has to be avoided. In fact, to some extent the concept of welfare is open to debate and it is perhaps better to look at the ways in which it is measured in practice, rather than moving from the dizzy heights of the satisfaction of preferences of rational agents. (This is also a savvy way to narrow the scope of this dissertation.) For example, how do you calculate the welfare loss of a limb amputation? Over the years, Italian civil law has come up with a sophisticated system which translates injuries into points of invalidity, medically established and adjusted for age, to determine a basic index for the quantification of non-economic losses, which is then adjusted to account for individual specificities.[4] From a broader perspective, the practical and comparative nature of the problem in some, perhaps many, cases implies that money represents a valuable welfare proxy. Moreover, being aware of the difficulties of quantifying a damage, often legal systems introduce mechanism to

[1] See pp. 67-68.
[2] Denying this would mean denying that, other things being equal, a healthier life is not a better one—and this denial sounds absurd.
[3] The dataset is available at http://www.oecd.org/els/health-systems/health-statistics.htm.
[4] The system was originally introduced autonomously by different courts. A reform of the Italian Civil Code in this direction was approved by the *Camera*, but then the *Senato* failed to approve it before the Parliament was dismissed by the *Presidente della Repubblica*.

simplify the procedure, like conventional or legislative damage liquidation clauses, or grant broad discretionary powers to adjudicating bodies.

To sum up, in this dissertation welfare is presumed to be reliably expressed in monetary terms, unless considerations about preferences, distribution of resources or the functioning of the market mechanism suggest otherwise. When this is the case, operationalizing the concept of welfare cannot be done in terms of willingness-to-pay, but requires recurring to different types of welfare indicators—the discussion of which is beyond the scope of this dissertation.[1]

5.5 Scarcity: Natural and contrived

The concern in this subsection is with the concept of scarcity and, more specifically, with the distinction between natural and contrived scarcity. This distinction is important because it is often used by economists and economically informed legal scholars to distinguish between physiological (natural) and pathological (contrived) scarcity. A resource is scarce if there is not enough to satisfy the demand of everybody. As seen above, scarcity is often taken to be the starting point for both economic analysis and legal intervention. In fact, if a resource is not scarce there is no conflict among alternative uses (economics) and there is no need to introduce norms establishing duties and rights (law) over that resource.

Not all economists accept the relevance of the distinction between natural and contrived scarcity. For example, the "Austrian" economists of the von Mises Institute in Auburn, Alabama, follow the libertarian economist Murray Rothbard in his complete rejection of the relevance of the distinction—even at the cost of contradicting Mises himself on the point.[2]

Posner, instead, uses the distinction to protect natural monopolies from legal intervention in light of the argument that[3]

> monopoly rents are the result of an artificial, contrived scarcity rather than a natural scarcity, and that prices inflated by a rent factor serve a valuable purpose in rationing naturally scarce resources such as land or petroleum while the monopolist's rents serve no comparable social purpose. … Our concern is with the unregulated natural monopolist. His market power flows from the cost and demand characteristics of the market in which he is selling, rather than from unfair or restrictive tactics or from legal privileges. Moreover, … the natural monopolist is well situated to adopt a method of pricing—discrimination—that maximizes profit without necessarily restricting output.

Interestingly, Posner here is connecting total welfare and fairness to the idea of contrived scarcity, but he is doing so in exactly the way that is irritating from a legal point of view. In fact, Posner is

[1] For excellent discussions, see the essays collected in Diener, Helliwell, Kahneman 2010.
[2] See pp. 104-106.
[3] RA Posner 1999 [1969]: 19.

telling us that under natural scarcity it is possible to maximize profits without restricting out; this means that natural scarcity only causes transfers, does not cause a deadweight loss and it is thus irrelevant from a total-welfare point of view.[1] This account violates both the fairness and wrongfulness theses.

William Hutt, an author whose scholarship is central to the economic claim of this dissertation,[2] offers a different account of the distinction. In his view, also the natural monopoly falls within the category of contrived scarcities.[3] Scarcity is natural only "in a society in which there are no restrictions to the free movement, adjustment and full utilization of resources in response of the dictates of consumers' will".[4] Thus, private collusion, public as well as natural monopolies and price as well as output controls are all forms of contrived scarcity. The natural monopolist, in particular, operates in a way that maximizes profits by restricting output of an amount Hutt calls "internal contrived scarcity", equal to the difference between the profit-maximizing and optimal outputs.[5] In his view, then, there is no difference between a natural monopoly and other forms of monopoly because "[n]atural monopoly, like all monopoly, imposes contrived scarcities on natural scarcities".[6]

At this point, one can see a difference between Posner's and Hutt's lines of reasoning. Both authors accept an instrumental distinction between natural and contrived scarcities which builds on the argument that contrived scarcity reduces output below what is natural. However, Posner observes that the natural monopolist can maximize profits without restricting output, to the effect that total welfare is maximized and therefore the natural monopoly does not contrive quantity. Hutt does not consider this scenario. Thus, Posner's argument works only to the extent that natural monopolists engage in perfect price discrimination. It is therefore a special case, erroneously presented by the author as a general one.

5.6 Distribution: Transfers and redistribution

It is advisable to have here, at the beginning of this dissertation, also a discussion about the concept of distribution. "Distribution" is in fact a term with a surprisingly complex set of uses in economics for a discipline allegedly uninterested in distributive effects. Two classes of distributive concerns can be distinguished. The first is about the distribution of income or other resources within the members of a community. The second is about the distribution of welfare between contracting

[1] See pp. 171-172.
[2] See, in particular, pp. 96-100.
[3] Hutt 1934, 1935: 345.
[4] Hutt 1934: 15. "Natural scarcities are a reflection of the 'sovereignty of the consumer'" (p. 16).
[5] Hutt 1934: 18-19.
[6] Hutt 1935: 350.

parties. To avoid misunderstanding, let us call the first redistribution and the second transfer. Notably then, the fairness and wrongfulness theses focus on transfers rather than redistribution.

Mainstream economics commonly accepts, also in Europe, that "the function of contract law should not include (re)distribution of welfare".[1] This claim ultimately rests on a seminal paper by Kaplow and Shavell, with the self-explanatory title *Why the Legal System is Less Efficient than the Income Tax in Redistributing Income*.[2] This article distinguishes tax law from the rest of the legal system and intends to show that "the income tax system—understood here to include possible transfer payments to the poor" is superior to the rest of the legal system for "promot[ing the] distributional objective" because the latter distorts not only the incentives to work, but also because it "creates inefficiencies in the activities regulated by legal rules".[3] With this argument, they intend to challenge the critique that the disinterest for the "distribution of income" is a reason often used to criticize "the economic approach".[4] The claim advanced by Kaplow and Shavell—also called the double-distortion claim—has received a number of criticisms. The assumptions of the model are too strict, so that its descriptive power is limited even in a rational choice theory perspective.[5] Normative judgments about what people ought to prefer are implicit in the model.[6] The model is even less plausible once behavioural insights are considered.[7] Be this as it may, Kaplow and Shavell have clarified their position in *Fairness versus Welfare*. They do not argue that redistribution is normatively insignificant, just that under certain assumptions, it is better to exclude redistributive concerns from the analysis. However, "[i]f these reasons are inapplicable in a particular setting, a proper welfare economic analysis will take distributional concerns into account".[8]

Against this background, the reference to the regressive redistributive effects of some regulation, especially in the field of consumer law, could be considered a plot-twist befitting a detective story. Regressive redistributive effects are used as a reason against certain consumer rights because their costs are spread proportionately among consumers, but only the well-off ones are capable of reaping the benefits.[9]

How are these two positions relevant for current purposes? The double-distortion argument is irrelevant because the economic claim of this dissertation is not about redistribution between the members of the community—that is a matter of distributive justice. The economic claim of this

[1] Chirico 2010: 21, Cseres 2012: 188. For a clear discussion, see Gómez-Pomar 2008: 228-236.
[2] Kaplow and Shavell 1994: 667. See also Kaplow and Shavell 2000, 2002: 32-36, Kaplow 2013: 217-230.
[3] Kaplow and Shavell 1994: 667-668.
[4] Kaplow and Shavell 1994: 667.
[5] Sanchirico 2001, Nussim 2007, Adler 2012 and Fennell and McAdams 2016.
[6] Calabesi 2016: 131-156.
[7] Jolls 1998.
[8] Kaplow and Shavell 2002: 35.
[9] See, for example, Priest 1987, Bernstein 1991: 234-235, Bar-Gill and Ben-Shahar 2013: 115, Ben-Shahar and Schneider 2014: 178-180, Ben-Shahar and E Posner 2011: 144-145 and Luzak 2014: 106.

dissertation is about transfers between contracting parties. The situation is a little bit more complex about the regressive redistribution argument. The starting point is the plausible assumption that regressive redistribution is welfare reducing because the marginal value of money is decreasing—because, as Robin Hood understood, robbing the rich to feed the poor is, *prima facie* at least, a welfare increasing redistribution. If this is the case, a consumer law that benefits the richer consumers to the detriment of the poorer ones gives reasons to suspect that consumer welfare is not maximized in this legal and economic context.

A final note on redistribution is advisable. This dissertation is concerned with an account of fair market relation between consumers and producers that incorporates economic insights and respects the fairness, wrongfulness and doctrinal theses. Considerations of distributive justice and, therefore, redistribution of income are relevant only to the extent necessary to account for the articulation of the relation between fair market relations and distributive justice. A first important instance of this relation was seen in the discussion about the meaning of "producer". The other important instance will be found in Chapter 4, in the discussion of the relation between fairness or commutative justice and distributive justice. These considerations will then be incorporated in the inferential analysis of Part III.

Let us move to the account of transfers. Kaplow and Shavell's position is also instructive here. Kaplow and Shavell do not have very elaborated arguments about transfers in their 1994 article. They simply state that "it is well understood that redistribution usually is not accomplished because prices generally adjust to reflect the expected cost of legal rules".[1] However, this observation is far from sufficient to solve the matter. Craswell has offered a compelling argument against the idea that it is futile to regulate contractual terms because prices are adjusted by passing on the cost of the rules. Craswell actually observed that the "sellers' inability to pass on very much of a rule's costs should be taken as evidence that the rule is bad for buyers, not good".[2] The claim rests on the intuition that the more consumers appreciate the mandated terms, the easier it is for sellers to pass on their cost to consumers; and that, conversely, consumers not appreciating the mandated term will rather buy something else than paying the higher price. Craswell—almost a decade ahead of the behavioural turn in economically informed legal scholarship—relaxes the connection between welfare and willingness to pay and shows that the results hold even when demand is reduced as a consequence of the failure of consumers to appreciate the welfare gains in conformity to the theory of welfare justifying the mandatory rule.[3]

[1] Kaplow and Shavell 1994: 674.
[2] Craswell 1991: 362.
[3] The key trade-off in terms of consumer welfare is then between the (net) deadweight loss generated by the decreased demand due to the price increase and the infra-marginal consumer welfare increment (Craswell 1991: 391-398). I suspect that when Craswell rejects willigness to pay as welfare standard, he underestimates the welfare benefits. In fact,

In their more recent and ambitious *Fairness versus Welfare*, Kaplow and Shavell build a new line of defence against the relevance of transfers. Redistribution matters from a welfare perspective because the preferences for redistribution have to be aggregated together with any other preferences (say, for hot-dogs, Tupac, and President Trump) to build a social welfare function to drive policy decisions. Transfers, however, have to do with "who should prevail in a particular legal dispute".[1] This is what the wrongfulness and fairness theses are about. In this context, Kaplow and Shavell defend the position that while "the appropriate allocation is understood [by others] to be determined by notions of fairness … [w]elfare economics is not concerned with distribution in this situational sense".[2] The problem is ultimately not as severe as these statements suggest. In fact, in their analysis of contracts, they are agnostic about the matter of transfers. Indeed, they assume that the welfare created in the exchange is equally split between the parties, but they also note that for the sake of their argument, any other distribution would have worked as well.[3]

At this early stage of the dissertation, it is sufficient to note the following. Kaplow and Shavell's position about transfers rests on the mainstream claim that allocative efficiency is about total welfare and on the conceptual separation between efficiency and fairness. As anticipated, Part II of this dissertation challenges both premises. More precisely, in Chapter 3, the economic claim of this dissertation proves that allocative efficiency can be about consumer welfare and, in Chapter 4, the translation claim proves the separation assumption to be wrong. However, from a minimalist perspective, it is sufficient that their argument about an *ex-ante* perspective about contracts is compatible with a consumer-welfare approach. Also this approach wants contracts to maximize the welfare produced under the contract (so that consumers can take it all).

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his analytical strategy consists in building two demand functions for market after the introduction of the mandatory term, with the "real" one higher than the one based on the willingness to pay. To analyse the market equilibrium before the introduction of the mandatory term, he does not draw a symmetrical "real" demand curve, which would be lower than the one based on willingness to pay. Had he done so, the "real" welfare of consumers before the introduction of the mandatory term would have been lower. While this insight seems to be worthy of investigation on its own terms, its relevance for the purposes of this subsection is quite low and thus the issue is not analysed further.

[1] Kaplow and Shavell 2002: 36.

[2] Kaplow and Shavell 2002: 38.

[3] Kaplow and Shavell 2002: 173.

PART I

A MINIMALIST STRATEGY FOR COLLABORATION BETWEEN LAW AND ECONOMICS

— 1 —

Economics as a Legal Irritant and the Need for a Rosetta Stone

1. Economics as a Legal Irritant

Some twenty years ago, Teubner characterized the introduction via European integration of the concept of good faith in English law as a legal irritant. Teubner proposed the expression "legal irritant" as more accurate than "legal transplant". In his view, moving a "legal institution" from one system to another[1]

> works as a fundamental irritation which triggers a whole series of new and unexpected events. It irritates, of course, the minds and emotions of tradition-bound lawyers; but in a deeper sense,—and this is the core my thesis—it irritates law's 'binding arrangements'. … 'Legal irritants' … will unleash an evolutionary dynamic in which the external rule's meaning will be reconstructed and the internal context will undergo fundamental change.

In hindsight, perhaps the irritation of the British was much deeper and articulated than what Teubner's analysis of good faith in English law would suggest.[2] Be this as it may, the expression "legal irritant" was a success and identifies a problem that goes clearly well beyond the relation between National and EU law.

The idea of legal irritants can also be understood more broadly, to include, for example, the use of foreign precedents in legal reasoning.[3] On an even broader level of generalization, legal irritants can come from the interaction between legal discourse and any non-legal discourse.[4] It is

[1] Teubner 1998: 12.
[2] I am obviously referring to the Brexit.
[3] On this topic, see Ginsburg 2005 and Canale 2016.
[4] Bartesaghi and Noy 2015 define "Interdiscursivity" as "the dialectical relation between texts, discourses, and the realm of the social" (p. 2) and claim that the phenomenon can be analysed in light of three concepts: orders of discourse; genres; hybridity. The idea of orders of discourse highlights the fact that the demarcation between different types of discourses is conventional; genres in particular are "orders of discourse with a stable set of conventions" (p. 3); finally, hybridity is arguably the central notion in the authors' analysis, and it means that an interdiscursive genre is "made up of several other discourses" (p. 3).

then perhaps not by chance that Teubner's idea of law as an autopoietic system has given important contributions to the study of the relations between law and other discourses.[1] Ultimately this line of reasoning suggests that any form of "law and …" can be a legal irritant.

Economics, however, is particularly irritating. Expert-knowledge is undeniably beneficial for legal practice. Informed policy is better than uninformed policy. Yet, the economics of law has gone well beyond that. Economists have progressively advanced claims about what the law ought to do based on the goal of total-welfare maximization. In so doing, economics was promoted by its practitioners from the role of support to that of external parameter of correctness. Perhaps without fully recognising it, economists have settled down in the realm of the normative philosophy of law.

The frustration of lawyers is lucidly encapsulated in the distinction articulated by Calabresi between "Economic Analysis of Law" and "Law and Economics" seen in the Introduction. Now we see an immediate difference between the approach of this dissertation, which goes in the direction of Calabresi's Law and Economics, and Garoupa's explanation of why lawyers are not 'buying' the economics of law. Garoupa gives an external explanation of the phenomenon, and does not try to warrant it by reference to what lawyers think. His model explains the puzzle he is interested in, so it is irrelevant that this does not inquire the reasons given in legal practice for refusing to buy the economics of law. In this dissertation, instead, it does matters what the participants of the practice think.

Against this background, this chapter is structured as follows. Sections 2.1 and 2.2 distinguish two forms of irritation. The first is radical and ultimately grounded in an implausible intuition about the separation between legal and economic discourse. The second form of irritation stems from the market-based rhetoric of the economists of law and the connection between the market and total-welfare maximization. This connection worries legal scholars that the market is incompatible with the concern for the fairness and the wrongfulness of market relations. This form of irritation can—and in Chapter 4, will—be cured by showing how an economic account of market relations can give due consideration to their fairness and wrongfulness. Section 3 looks at Posner's efficiency hypothesis as an instructive starting point for Minimalist Law-and-Economics. Section 3.1 stresses the appeal of the fitness-as-justification strategy as a way to make economic research legally relevant. Section 3.2 points out that the main flaw of the said hypothesis is that of looking at economic consequences instead of legal reasons. From a legal point of view, economic discourse has to fit with legal discourse, not with its consequences. Building upon this insight, Section 4.1 notes that all the attempts to reconcile efficiency and fairness rest on the assumption that the two concepts are separate. Section 4.2 rejects this assumption and proposes to inquire whether economic

[1] Teubner 1993.

arguments about efficiency can be translated into legal arguments about fairness and vice versa. This translation strategy is then pursued in Chapter 4.

2. Types of Legal Irritation

There are at least two versions of the irritation that economics can cause to lawyers. In its most radical form, the irritation implies that the relevance of economics to the study of law is denied. In its weaker form, the irritation is localized on the market-centred rhetoric and its focus on market failures and their correction, something which appears hardly compatible with the way lawyers traditionally reason about contractual exchanges and other private interactions—that is, in terms of rights, wrongs, duties, obligations, fairness, equality. We shall consider them in turn.

2.1 Radical Irritation

The most radical form of irritation is unreasonable. It boils down to a defence of legal discourse as self-contained, pure and impermeable to other discourses. This naïve form of legal formalism—typically associated to Langdell in the United States, the first generation of commentators of the Code Napoleon in France and Puchta's conceptual pyramid in Germany—is on faulty grounds on its own. More often than it should, this approach is considered co-referential to (that is, having the same meaning of) legal positivism, to the effect that the proverbial baby is thrown away with the bath water.[1]

The cure of this radical form of irritation requires deeper treatments than the ones this dissertation can offer. Here, it is possible to offer only some brief remarks. Economically informed legal scholars often make a sort of *ad absurdum* argument against this attitude.[2] I offer a more modest thought experiment. Imagine how difficult it would be to build a bridge without engineering and architecture or organizing a health care system without medical knowledge. If indeed it appears difficult to the reader, I then ask to accept as provisionally plausible the view that perhaps when it comes to law and markets, economists have something important to say. This therapy is likely to be particularly effective for those engaging with EU law, given the importance of the internal market project for EU integration.

A more concrete therapy is based on the identification of foundational points of contact between legal and economic discourse and great historical examples of successful interaction. (The

[1] At this point, I think it is appropriate to disclose that my understanding of the law is mostly based in the legal positivist tradition, but I hope that the content of this dissertation might be of interest also to people more inclined to different approaches. After all, this is a minimalist project.
[2] Recently, see Calabresi 2016: 8-10 and Rubin 2017.

reader already convinced by the claim that this radical irritation is unreasonable may already want to skip to Section 2.2.) An important reason for believing that law and economics can fruitfully discuss with each other stems from the observation that the two fields take a common starting point, namely the existence of social conflict. A famous definition of "economics" defines it as "the science which studies human behaviour as a relation between ends and scarce means which have alternative uses".[1] At the same time, conflict is often considered as the starting point for the need of legal institutions in legal theory. In both disciplines, the same insight is also declined as the study of conditions making cooperation possible.[2] Similarly, both economists and lawyers are interested in building theories of human motivating factors—that is, the stimuli making more or less likely that someone will behaving in a certain way. The main difference is that economists call these motivating factors "incentives" while lawyers and in particular legal theorists call them "reasons for action".[3] But this difference is immaterial for current purposes.

A further conceptual reason consists in the fact that many researchers in both economics and law, accept some sort of great institutional division. For economists, this division is typically between cooperation on the market and command by the state, whereas for lawyers the difference is between private and public law or orders. A problem both discourses have is that the boundaries between the two institutions are very porous, to the effect that the discourse over these distinctions become very quickly confused.[4]

In the light of this conceptual contiguity between the realm of economics and of the law, it is not surprising that history provides inspiring examples of fruitful cooperation between lawyers and economists. Let us consider two of them. The first is the "progressive assault to laissez-faire" moved by a group of American scholars comprising, among others, legal theorist Wesley Hohfeld, legal realists Leon Green and Karl Llewellyn, economists Richard Ely and John Commons, and above all, legal and economic scholar Robert Hale. In particular this assault was moved to the "fair value" doctrine used by the US Supreme Court in the first decades of the 20th century to review rate of regulation statutes.[5] The second, slightly more recent, consists in the case of the Freiburg or ordoliberal school in Germany. Particularly important for the foundations of EU competition law,[6]

[1] Robbins 1932: 15.
[2] See, for example, Bacharach 1999, Markovits 2004, Bowles and Gintis 2011 and Shapiro 2012.
[3] Enoch 2011 for example considers prices as reasons for action, whereas economists would clearly consider them as incentives or constraints. In her criticisms of Enoch's analysis, Rodriguez-Blanco 2013 is comfortable with discussing prices as reasons for action. The conceptual connection is shown also by the idea shared in the economics of law (but not uncontested: Cooter 1984) that norms motivate behaviour just like prices do. While this idea distorts the concepts of norm, of price or of both, it clearly shows the connection between norms and prices.
[4] See, for example, Ogus 2009 and Micklitz 2014.
[5] Fried 1998 offers a beautiful reconstruction of this movement.
[6] A beautiful analysis of ordoliberalism, focused on competition issues is offered by Maier-Rigaud 2012.

this school of thought resulted from the joint effort of economists, such as Walter Eucker, and lawyers, such as Franz Böhm.

2.2 Irritating market-based rhetoric, fairness and wrongs

With the radical irritation off the table, it is now possible to focus on the more serious form of legal irritation caused by economics, which relates to the market-based rhetoric. This irritation is found in the claim that EU law instrumentalizes the interest of consumers on the altar of market integration.[1] A particularly good example of this irritation is provided by the Manifesto for *Social Justice in European Contract Law*, where its signatories claim:[2]

> European regulation of the market can be justified, but primarily on the ground of removing obstacles to commerce (negative integration) and of tackling market failures such as lack of competition (positive integration). It is expected that this régime for a free market will help to generate wealth, which will benefit most citizens of the European Union. What is missing from this European régime for governing markets is, of course, a vision of distributive justice or fairness in contracts.

Similarly, granting access to the internal market is not a convincing "theory of justice in European private law … because it totally disregards the interpersonal justice dimension of private law":[3]

> The main reason why contract terms should not be binding upon consumers when they 'cause a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer', is that the enforcement of such terms, except if they have been individually negotiated or are core terms according to the directive, would be unjustifiable between the parties.

Ultimately, what is demanded by these legal scholars is a clear explanation of how expressions like "market failure", "barriers to entry", "asymmetric information" fit in a theory of market relations that does not fundamentally distort the purposes traditionally at the centre of private relations in legal thinking. In other terms, the concern is that what really matters in market relations will eventually stop to matter because of the focus on market-oriented concepts.

The triggering factors of the irritation are typically the following. At the more superficial level, the irritation is caused by ideas like the importance of fairness and equality in market relations, the duty of the state to intervene to ensure these fairness and equality by protecting weaker parties and, more generally, that distribution between parties is a matter of contractual justice and cannot be relegated to some corner of the legal system. Let us call this the "fairness

[1] The claim is often cursorily made, but its thorough articulation can be found, for example, in Wilhelmsson 2004 and Schmid 2005.
[2] Collins et al. 2004: 660.
[3] Hesselink 2016: 691 (footnotes omitted). See also Alemanno and Sibony 2015: 25, Dagan 2016.

thesis". Deep down, the irritation is caused by the belief that there is a conceptual correlation between one's duty and someone else's right, so that the former is justified by the latter.[1] A correlation that the economic theory of law would fail to grasp[2] and which crucially implies that the breach of one's duty is a wrong done to the right-holder. In the Introduction, this claim was called, "wrongfulness thesis", which holds that the breach of one's duty consists in a wrong done to the holder of the correlative right.

In the context of market relations, both the fairness and wrongfulness theses fit uncomfortably with the assumption, typical of mainstream economics of law that the purpose of the market is to maximize total welfare. In fact, the focus on total welfare puts the fairness of market relations in the backstage, where at best it can be an additional concern that is subordinate to the one about total welfare. Yet, in the Introduction, we saw that the distinction between incentives-based reasoning and fairness is not as sharp as one may think. A similar discourse is set for the wrongfulness thesis. If the market is a means to maximize total welfare, then the individual rights of market participants are only instrumental to this goal, so that in an important sense violating those rights is not a wrong done to the right-holders but to the maximization of total welfare.

As a final note, let me emphasize the significance of the irritation caused by the market-rhetoric for the EU integration project. It is imperative for lawyers, legal scholars, legal practitioners, judges and other officials to have a harmonic understanding of the relation between the market and the law. Otherwise, they will ultimately fail to see EU law, the internal market project and the harmonization of National law, as grounded in it in their best light and, more fundamentally, will fail to contribute to its optimal development.

3. Fitness with Legal Reasons as a Minimalist Justification: Learning from Posner's Efficiency Hypothesis

Posner's case in favour of wealth maximization as a doctrine of adjudication has a clear minimalist character. For Minimalist Law-and-Economics, Posner's efficiency hypothesis of the common law teaches two important lessons. Section 3.1 argues that Posner's efficiency hypothesis is too shallow to ground a Minimalist Law-and-Economics approach. The main reason is that Posner's method for testing his total-welfare hypothesis fails to give due consideration to legal reasons. Section 3.2 points out that the efficiency hypothesis offered an interestingly minimalist justification to wealth

[1] Seminal, in this regard, Hohfeld 1913, 1917.

[2] See for example, Coleman 2001, Weinrib 2012. For a defence of a utilitarian theory of rights, see Ferraro 2014. Indeed, in the literature on the concept of right, one of the two main approaches—the interest theory—holds, roughly put, that the attribution of a right is based on the recognition of an interest that is strong enough to justify the imposition of the duty on the duty-holder. See, for example, Kramer 2010.

maximization, namely that it fits with the common law. As we shall see, Posner was indeed on the right track with his efficiency hypothesis, and to a large extent this dissertation is meant to carry his intuition further.

Like Posner, I see fitness as an important source of justification for a theory of law. As the subject of inquiry is an effective legal practice, the fitness with the practice suffices to ensure the relevance from a legal point of view of the findings of the inquiry. However, contrary to Posner, the fitness I am interested in is the one between the economic theory and the reasons given and accepted in the analysed practice.

As it happens, taken together, these insights have an eminently minimalist character. They are, in particular, quite shallow. Whether legal practitioners are morally right or wrong in accepting the reasons they accept does not move the scale.[1] Also, understanding the psychological or evolutionary causes that explain why they accept these reasons and not others is irrelevant. What Minimalist Law-and-Economics is content with is that legal practice is articulated around certain reasons and their articulation fits with the proposed efficiency hypothesis.

3.1 An efficiency hypothesis with shallow foundations swinging between fitness and justification

Originally, Posner's research was clearly minimalist.[2] His flagship was the efficiency hypothesis of the common law. This efficiency hypothesis held that "the common or judge made law—in sharp contrast to much legislative and constitutional rulemaking—promotes efficiency".[3] Note that "common law" here means judge-made law. Posner was never fully consistent on this point, as already some of his early research focused on economic law rather than common law.[4] Even considering these two not fully consistent interests, Posner's research agenda was narrow, or at least narrower than the scope of the economics of law nowadays. Notably, for current purposes, in 1974 Posner criticized public choice theories of regulation observing that "the 'consumerist' measures of the last few years … are not an obvious product of interest group pressures, and the proponents of the economic theory of regulation have thus far ignored such measures".[5]

At the same time, Posner's proposal was shallow in a very appealing sense. That is, it presupposed that the explained legal practice is justified. Thus, the hypothesis was not meant to test

[1] Unless, of course, being morally right or wrong are reasons accepted in the said practice.
[2] Using additional distinctions introduced by Sunstein 2006a about minimalism would allow to give an even better account of Posner's original minimalism and to compare it even better with Calabresi's Law and Economics. This inquiry is not strictly relevant for current purposes and it will be left for another occasion.
[3] RA Posner 1979a: 288.
[4] See, for example, RA Posner 1969, 1970, 1974.
[5] RA Posner 1974: 353.

the efficiency hypothesis against some extra-legal normative theory. Calabresi, who considered the hypothesis a "sophistry", encapsulates the source of its normative appeal clearly:[1]

> After all, if the common law is a legitimate source of law, and if over the centuries it has predominantly served a given goal, it is not silly to assert that any judicial failure to serve that goal, unless clearly required by the legislature, is criticisable.

As Calabresi notes, fitness with the common law is what would justify the use of wealth maximization as a justification for common law decisions. As common law precedents are normative, also the theory explaining them has to be. In other terms, the efficiency hypothesis of the common law piggybacked on the idea that common law decisions are normative. This approach is very shallow, in that it does not commit to the normativity of the *explanans*; the normativity of the *explanandum* is presupposed, not argued for, and then extended to the *explanans*. This analytical strategy is of great significance for Minimalist Law-and-Economics. In fact, also the consumer-welfare hypothesis articulated in this dissertation can—like Posner's—piggyback on the normativity of the *explanandum* in order to be used as a justification in legal discourse.

It is also well known that Posner tried to theorize a variety of substantive, extra-legal justifications for the core of his *explanans*, i.e. wealth maximization. However this research came at a later time and was prompted by normative criticisms, but it still had a distinctive shallow flavour. The first argument by Posner—in a reply to no less than HLA Hart[2]—basically was that wealth maximization was different from and more attractive than utilitarianism.[3] The following year, during a symposium organized by the *Hostra Law Review*, Posner advanced a consent-based justification for wealth maximization.[4] He received devastating critiques by Coleman and Dworkin,[5] followed by other critiques by Kronman and Weinrib, among others.[6] Posner revisited his position in 1985: "the principle of wealth maximization … expresses fundamental values of [the US] political culture" and by "a happy coincidence", those areas where it leads to "results contrary to widespread moral intuitions … have been taken out of the area of judicial discretion by constitutional provisions".[7] Note in particular this characteristically minimalist argument: [8]

> Wealth maximization combines … elements of utilitarianism and individualism, and in so doing comes closer to being a consensus political philosophy (I do not suggest it is

[1] Calabresi 1982: 87-88. Similarly, Kraus 2007: 357-358, Geistfeld 2013: 149-150 and Wagner 2016: 17.
[2] Hart 1977: 987-988.
[3] RA Posner 1979b.
[4] RA Posner 1980
[5] Coleman 1980 and Dworkin 1980.
[6] Kronman 1980, Weinrib 1980.
[7] RA Posner 1985: 105.
[8] RA Posner 1985: 104. Here Posner is clearly influenced by Rawls. Posner, like Rawls, wants to find a theory that can be agreed upon by many, while minimalism wants us to converge without agreeing on a theory. For a discussion of the point, see Sunstein 1995: 1735-1736, fn 8.

> one) in our contentiously pluralistic society than any other overarching political principle.

Ultimately, Posner was dragged in deep waters by legal theorists and philosophers of law. However, his commitment to wealth maximization as a normative theory remains shallow. In 2015, he summarized his view as follows: "The argument that legal decision making should be guided by [wealth maximization] does not require taking a position on its ultimate merits".[1] What, however, has fundamentally changed over time is the justificatory criteria. Originally, the justification of the theory stemmed from its fitness with the *explanandum*. Later on, Posner focused more and more on the normative merits of wealth maximization, thereby privileging more the substantive justification of his hypothesis over its fitness with the data.

I find that from a minimalist point of view the fitness-as-justification approach is far more attractive. It builds on the assumption that the practice is justified from a normative point of view. As a consequence, the fitness-as-justification approach can help in clarifying what the justification is, but does not defend it against moral critiques.

3.2 An hypothesis fitting with economic effects, not legal reasons

Section 3.1 has shown that Posner's efficiency hypothesis originally had an attractive feature from a minimalist point of view, namely that its legal relevance rested on the fitness-as-justification approach. Finding that the hypothesis fits with the law, matters from a justificatory perspective because the law is assumed to be justified, so the hypothesis that fits with it is also assumed to be justified.

This section problematizes Posner's understanding of the fitness-as-justification approach. It is shown that Posner adopts a version of this approach where the efficiency hypothesis has to fit with the economic effects of the law. This analytical method is not compatible with the way legal practice works. Let us call "doctrinal thesis" the view that an explanation of the law has to give an account of the reasons given and accepted in legal discourse to justify an interpretation of legal materials. To be compatible with the doctrinal thesis, an efficiency hypothesis has to fit with the content of legal reasoning, not with the economic effects of legal norms. Thus, this section adds another requirement from a legal point of view to a Minimalist Law-and-Economics approach, namely, that efficiency hypotheses are tested by looking at their fitness with legal discourse.

[1] RA Posner 2015: 12. See also RA Posner 1990a.

Why does Posner's efficiency hypothesis not respect the doctrinal thesis? We can see this by looking at Posner's description of it:[1]

> The positive branch of the [efficiency theory of the common law] hypothesizes that common law rules and decisions are best explained on the *"as if" assumption, not intended to be realistic*, that judges are consciously trying to promote efficient resource allocation, where efficiency is defined as wealth maximization.

In other terms, the message of the efficiency hypothesis of the common law is the following: the tools of economic analysis show that this gargantuan and chaotic set of legal materials that is the common law is structured around the simple conceptual framework of economic price theory. Lawyers, please listen! With some basic training in economic theory and our guidance, you will have a better understanding of the common law than what you would receive after years of traditional legal training. The project was ultimately unsuccessful. Yet, its powerful promise is still attractive, fascinating and seducing.

From a legal point of view, the major flaw of the Posner's efficiency hypothesis is that it is crucially dismissive of the content of legal discourse, a feature he was obviously well aware of.[2] The rationales for this choice are best discussed in Chapter 2.[3] Here we focus on the obstacle Posner's methodology raises against a Minimalist Law-and-Economics approach.

Posner's efficiency hypothesis makes no claim about the reasons given and accepted by parties and judges in legal practice. They are substituted, as just seen, by "as if" assumptions "not intended to be realistic". Posner gave a mere functional explanation of the common law, which basically ignores the importance of legal reasoning for an explanatory project of the law.[4] Unsurprisingly, Dworkin has made the same critique in his seminal article *Is Wealth a Value?*[5], which constitutes the end of the first round of a long-lasting debates between the two authors. For Dworkin, one can accept a theory of the law to the extent that, from the point of view of a participant to the legal discourse, the legal materials at hand fit in and are justified by the theory.[6]

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[1] RA Posner 1981: 775 (emphasis added); see also Posner and WM Landes 1987: 1. Similarly, according to Parisi 2004: 195, "[a]n important premise of law and economics is that the common law (i.e., judge-made law) is the result of an effort, conscious or not, to induce efficient outcomes. This is known as the efficiency of the common law hypothesis". For a review, see Stringham and Zywicki 2010 and for a critical discussion, see Garoupa and Gomez Liguerre 2012.

[2] RA Posner 2001: 36-37.

[3] See pp. 64-67.

[4] See, generally, RA Posner and WM Landes 1987; RA Posner and EM Landes 1978; RA Posner 1971. See also the discussion in Chapter 4.

[5] Dworkin 1980: 219-223. See also Cane 2005, Coleman 2001, Calabresi 2016: 1-27, Gordley 1981, 1991, 2001, 2006, Kraus 2001 and 2007, Weinrib 2001 and 2012: 297-333, SA Smith 2004, Wintgens 2007 and Papayannis 2013. At times, Posner denies this problem and accordingly uses functional and internal statements interchangeably. On his unawareness, see for example RA Posner 1990b: 359-362 and the transcript of the debate held in 2005 at St. Gallen's University (Ulen 2005: 115). To see the interchangeability, compare RA Posner 1975: 763-764 with the block quote at the beginning of this section.

[6] Dworkin 1986: 13-15 (on the internal point of view) and Dworkin 1978: 106-107 (on the use of the fitness and justification criteria). For a discussion, see Raban 2003.

To put it differently, the theory must identify reasons given in the legal materials and those reasons must fit the theory and count as justification.[1] To summarise: Posner's efficiency hypothesis is, by design, unfit for respecting the doctrinal thesis because it is uninterested in legal reasoning. This finding illustrates a general point. Failing to respect the doctrinal thesis is an obstacle to a Minimalist Law-and-Economics approach.

Yet, we have seen in Section 3.1 that the fitness-as-justification rationale behind Posner's efficiency hypothesis has attractive features from a minimalist point of view. That intuition is comfortably accepted by Minimalist Law-and-Economics. What is unacceptable is the idea that an efficiency hypothesis is tested against economic effects. To respect the doctrinal thesis, any efficiency hypothesis must be tested by looking at its fitness with legal reasons.

4. Legal Reasons and Economic Effects: Towards a Rosetta Stone

Posner's efficiency hypothesis is a particularly poor candidate for respecting the doctrinal thesis. His efficiency hypothesis is not tested against legal reasoning and, as such, is merely a hypothesis about legal outcomes and not one about legal reasoning. Notably, the problem discussed here is not a problem of justification;[2] it is rather a problem of fitness, as in fitness with legal discourse. This problem is not limited to Posner's efficiency hypothesis. The economics of law even goes as far as to reject the terminology of legal discourse. For example, in introducing the Coase Theorem, Cooter and Ulen present two possible rules for solving a case and then comment[3]

> [w]hich law is better? Perhaps you think that fairness requires injurers to pay the damage they cause. If so, you will approach the question as traditional lawyers do, by thinking about causes and fairness. … Professor Coase, however, answered in terms of *efficiency*.

Similarly, Posner points out that an advantage of economic analysis compared to conventional legal scholarship, is that the latter "tend(s) to be either pro-debtor or pro-creditor … . The economist

[1] Indeed, the interplay of two criteria (fitness and justification) implies that at a certain point one has to solve conflicts between the two. See, for example, Finnis 1987: 370-376. Note, however, that Dworkin, at least in *Taking Rights Seriously*, conceives the fitness criterion as having lexical priority over the justification criterion (Dworkin 1978: 107). For a general discussion of the recurrence of this problem in legal theory, see Bix 2013. The conflict of the two criteria is clearly a problem, but it is not a relevant one here. It simply implies that two scholars, with two alternative theories explaining the same materials—materials that to some extent fit in the theories and to some other extent are justified by them—might disagree on which theory better fits and justifies the legal materials.

[2] Indeed, Dworkin 1980 is a fierce critique of Posner's approach also from this point of view. Moreover, Posner has changed more than once the normative justification of his wealth maximization; for reviews, see Kraus 2001: 428-431 and Mathis 2009: 145-184, but bear in mind that RA Posner 2015 takes a substantial step back defending wealth maximization primarily for formal reasons.

[3] Cooter and Ulen 2012: 82.

favors neither side, favours only efficiency".[1] Both citations presuppose that searching for the fairness of market relations is a different task than searching for their efficiency.

These citations manifest the conceptual separation assumption between efficiency and fairness. The conceptual separation assumption holds that efficiency and fairness are different and separate concepts. Accordingly, the task is to articulate the relation between these concepts. Section 4.1 reviews the different strategies proposed in the literature to account for this relation and shows that they all rest on the conceptual separation assumption. Section 4.2 proposes the rejection of this assumption as a starting point for Minimalist Law-and-Economic. Accordingly, the task becomes searching for the conditions making the translation of concepts from legal to economic discourse and vice versa successful ("translation strategy").

4.1 The problem with the conceptual separation assumption

Much of the debate over the relationship between legal discourse and economics rests on the conceptual separation assumption. To see this more clearly, Kraus's research on the matter is an excellent case study. Kraus distinguishes three types of relations between explanatory projects based on moral and on economic concepts: convergence, horizontal independence, and vertical integration strategies. In case of convergence, two different theories explain the same outcomes, but do so in light of "logically incompatible grounds".[2] For example, Weinrib has concluded that economic (deterrence) and corrective justice theories typically converge in explaining tort law.[3] Similar claims have been advanced about unfair terms, which are generally considered to be also inefficient.[4] This approach does not work for Minimalist Law-and-Economics because it does not respect the doctrinal thesis. With a horizontal independence strategy, two theories are distinguished in the types of claims they make. There is, for example, horizontal independence between a causal and an internal explanation. The former focuses on the effects and the latter on the content of the law. From a minimalist perspective, here the problem is even more troublesome because the horizontal independence strategy makes the two discourses independent from one another—so that no exchange occurs. Because having exchanges between legal and economic research is the point of the matter for Minimalist Law-and-Economics, this strategy cannot work either.

Finally, vertical integration strategies create hierarchies between economic and moral theories that are integrated in a single theory while resting on a "division of labor" between the

[1] RA Posner 2001: 36-37.
[2] Kraus 2001: 421.
[3] Weinrib 2002.
[4] Beale 1989: 206, Theeuwes and van Wijck 2000: 85, Gómez-Pomar 2003: 16 and Gordley 2006: 369.

two.[1] Kraus's proposal has a clearly minimalist *ethos* because it would "combine the normative superiority of deontic theory with the superior determinacy of economic analysis".[2] Notably, this approach is very close to Posner's happy coincidence discussed in Section 3.1. Kraus seems to distinguish two types of vertical integrations.[3] According to the first, between the two theories there is a lexical normative hierarchy. Thus, if a moral value (say, autonomy) is lexically prior to total-welfare maximization, then increases in total welfare can never justify reductions in autonomy. Obviously, the lexical priority could also be the opposite, with total welfare taking priority over autonomy; but as seen above Kraus prefers to give priority to deontic theories for their allegedly superior moral credentials. The second type of vertical integration establishes an instrumental hierarchy between economic and moral theories. Thus, total-welfare maximization would be instrumental to fostering autonomy, or vice versa.[4] Vertical integration strategies significantly relax the implications of the separation between economic and moral concepts because they are mixed into a single inferential structure.

However, the concepts remain separate. From a legal point of view, this approach proposes to satisfy the fairness and wrongfulness theses by giving priority to accounts of the law that respect them and injecting economic insights only when those accounts are indeterminate. Accordingly, economics is either a temporary solution or a gap-filler. Either way, I fear that if we were to follow this approach, the *desideratum* of a consistent legal discourse would be harmed. More fundamentally, it is entirely unclear why economic analysis could not incorporate in its own assumptions deontic theories and contribute to their specification. In other terms, Kraus's project presupposes a theoretical separation between economic and deontic theories that is in flat contradiction with the project of Minimalist Law-and-Economics. As we shall see in the next chapter, there is reason to believe that the former project is also unpalatable to economists.

At this point, an alternative proposal is needed. Section 4.2 argues that the solution is the pursuit of the translation strategy.

4.2 From separation to translation: Towards a Rosetta Stone

The translation strategy explores the possibility that the concepts used in economic and legal discourses can be used interchangeably, at least in some contexts. This is a possibility that cannot be

[1] Kraus 2001: 422. For an analysis of the different types of normative hierarchies, see Guastini 2011: 229-244.
[2] Kraus 2007: 320, 2001: 436.
[3] I write "seems to" because the article then discusses only the lexical ordering.
[4] See, for example, Scott and Schwartz 2003 and Dagan and Heller 2017. This is a particularly interesting couple of sources to look at because Dagan and Heller consciously invert Scott and Schwartz's instrumental relation: while for the former autonomy is instrumental to total welfare, for the latter the opposite is true, at least for sophisticated contracting parties.

excluded *a priori* and actually finds some grounding in literature. For example, Bruce Ackerman has observed that if we had a sort of dictionary with one-to-one connections between each and every term used in legal discourse with each and every term used in economic discourse, there would be no problem of interdiscursivity between law and economics—we would simply have a "coded displacement" solved by consulting a "simple codebook".[1] Importantly, German ordoliberals understand their research agenda in similar terms. Mestmäcker cites assertively Böhm when the latter says that the goal of the ordoliberal school "is the attempt to translate the teachings of classical economic philosophy from the language of economics into the language of the science of law".[2] Dagan and Kreitner, instead, criticize the idea of a translation because—in their view—"when we pursue interdisciplinarity … we are looking for a way to combine two sets of tools … more like a joint engineering project than a translation".[3] For current purposes, it is important to note is that also these authors build upon the conceptual separation assumption. In fact, the idea of combining sets of tools presupposes that these conceptual tools are different—hence, the separation is assumed.

The translation strategy looks for the classes of inferences in which economic and legal terms can be used interchangeably.[4] The idea is quite simple, actually. Consider the action of greeting somebody in the afternoon. In English, you say "good afternoon"; in Italian "buon pomeriggio"; in German "Guten Abend"; in Portuguese "boa tarde"; and so on with other languages. These expressions can all be used correctly to perform the action of greeting somebody in the afternoon. Thus, "good afternoon", "buon pomeriggio", etc. can be used interchangeably to perform the said action (under the provison that the addressee understands) and can thus be translated from one to another language on the grounds of this knowledge.

The translation strategy basically boils down to a more demanding version of the convergence strategy. More precisely, while for the convergence strategy it is sufficient that theories converge on outcomes while they can disagree on the reasons, the translation strategy moves the inquiry to the level of the reasons given to justify the outcomes. Moreover, there are conceptual reasons suggesting that the translation strategy might work. In particular, an economic explanation can play a role in a legal justification.[5] When this happens, the doctrinal thesis is respected. As seen in Section 3.2, the main limit of Posner's efficiency hypothesis is exactly its irrelevance from a doctrinal point of view.

[1] Ackerman 1986: 931. See also Esposito 2017b, 2018b.
[2] Mestmäcker 2007: 25, citing assertively Böhm 1933.
[3] Dagan and Kreitner 2018: 545.
[4] See Chapter 4, in particular pp. 151-152.
[5] See Part III, below.

Take an obvious example of the interplay between law and economic theory. A court states with no further elaboration that a commercial practice is banned because it is anticompetitive. An economic explanation of what makes competition a desirable social process is a starting point for building a hypothetical legal justification of that decision. However, this hypothesis is still in need of legal warranty. Warranty may be given by grounding the hypothesis in other legal materials (for example, in the legislation or a previous decision by a court) or by excluding alternative economic explanations (because they are incompatible with legal materials or implausible). The point is simply that an economic explanation eventually needs to be warranted by legal reasons to be translated into legal discourse. When this happens, the economic explanation fits with legal discourse. Unless the hypothesis is warranted from a legal point of view, it does not fit with legal discourse and is thus of little (if any) use for legal practitioners.

In the pursuit of the translation strategy, this dissertation defends a translation claim about efficiency and fairness in market relations. The claim holds that if the maximand of the efficiency analysis of market relations is consumer welfare, then the economic account of market efficiency is the same as that of the neo-Aristotelian tradition based on the concepts of fairness and prudence.

To sum up the claim of Section 4, an explanatory theory of law that respects the doctrinal thesis has to fit with the reasons given in legal practice. The economics of law offers explanations about the economic effects of the law, with no grounds in legal reasoning. The focus on the explanation of economic effects leads to interdiscursive strategies that presuppose the separation between the concepts used in economic and legal discourses. The translation strategy rejects the separation assumption. It does not treat economic concepts as alternative to the concepts normally used in legal practice and instead tries to identify classes of inferences where economic and legal concepts are used interchangeably.

Minimalist Law-and-Economics aims at using economic concepts to give explanations that fit with legal reasoning. This is made possible by the pursuit of the translation strategy because such a strategy respects the doctrinal thesis. In so doing, Minimalist Law-and-Economics embarks in an intellectual journey aimed at the discovery of an interdisciplinary Rosetta Stone[1] for the dialogue between legal and economic research. In this regard, this chapter has pointed out the basic syntactical and semantic rules of inference from the legal side of the discourse. They are the doctrinal, fairness and wrongfulness thesis.

The next chapter focuses on the core commitments of economists: epistemological and normative minimalism, the debate on their proper content in economic literature, the difficulties

[1] See p. 121.

they imply, and how, by reverse engineering the law, Minimalist Law-and-Economics can respect the former and offer an innovative and attractive solution to the latter.

— 2 —

Economic Analysis and Reverse Engineering the Law

1. Introduction to the Idea of Reverse Engineering the Law

Chapter 1 has identified a set of obstacles towards a bilateral dialogue or collaboration between legal and economic research. It was seen that some of these obstacles are substantive in that they relate to concepts and conceptual relations. Others, however, have to do with the method of research. It was seen that from a legal point of view, the content of legal discourse has to be taken into consideration. Two obstacles from the economic point of view have been identified already. First, market relations ought to be efficient. Second, these relations should be looked at from an *ex-ante* perspective. This chapter introduces two methodological constraints coming from the economic side, i.e. epistemological and normative minimalism. Additionally, it points out that because of the interplay of total-welfare maximization and normative minimalism, economic analysis incurs into two contradictions, one about Pareto efficiency, and the other about the conception of the economist as a social engineer.

This chapter proposes the idea of reverse engineering the law and relates it to epistemological and normative minimalism. Reverse engineering the law means justifing an assumption in an economic model, theory, theorem, etc., simply because the assumed concept fits with the legal practice. The chapter ultimately defends the claim that a significant step towards a Minimalist Law-and-Economics approach is reverse engineering the law as a way of being normatively minimalist. To warrant this claim, the analysis is divided in five steps, presented in as many sections. Building upon on these results, Part III of this dissertation will introduce a new method for the analysis of legal materials: the explanatory scorekeeping analysis. The explanantory scorekeeping analysis presupposes the operationalization of conflicts between economic theories and then offers a rigorous inferentialist analysis of the reasons given in legal materials to assess which one of the competing efficiency hypotheses or *explanantia* has superior explanatory power.

Section 2 explains why epistemological and normative minimalism have represented such a formidable obstacle to a bilateral relationship between economic and legal research—in other terms,

to their collaboration. Section 3 points out that behavioural research has contributed to a significant relaxation of both epistemological and normative minimalism and also that Calabresi's view of the future of the relationship between legal and economic research is grounded in a parallel and equally powerful critique of epistemological and normative minimalism. Section 4 reveals that, on its own terms, normative minimalism leads to at least two normative contradictions, one about Pareto efficiency and the other about the economist as a social engineer. Against this background, Section 5 proposes legal materials as a valid source of economic evidence. If properly analysed, legal materials offer valuable information about the functioning of legal institutions and also of the regulated social practices. This inquiry is called "reverse engineering the law". In particular, reverse engineering the law delegates to legal research the task of identifying the axiological assumptions to be taken as premises for economic research and, in so doing, lets economists focus on the relation between given ends (provided by the law) and means. This delegation solves the social engineer contradiction.

2. Epistemological and Normative Minimalism: A Perfect Storm against Legal Research

The concepts of minimalism discussed in the Introduction are due primarily to Cass Sunstein. They have been used by him to account for a series of important features of judicial strategies and also in recollection of his own scholarship. The concepts of epistemological and normative minimalism discussed in this section have a similar genealogy. Not in the sense that we owe them to Sunstein, but in the sense that we owe them to scholars who try to capture salient features of the practice they study. More precisely, the concepts of epistemological and normative minimalisms are introduced by Alexandrova and Haybron.

According to Alexandrova and Haybron, much of "standard economics" rests on epistemological and normative minimalism. Note that standard economics can be understood as the mainstream economics of the second half of the 20th century.[1] For current purposes, the synthesis by Alexandrova and Haybron is very important because standard economics is by all means the economic backbone of mainstream economics of law, at least before the behavioural turn. As we shall see in the next section, behavioural insights have reshuffled the cards quite a lot, making a Minimalist Law-and-Economics approach easier to advocate for.

Epistemological minimalism identifies the core methodological commitments of economists in radical observability, mathematical precision and explanatory parsimony. Observability means "favouring choices over inner psychological states"; it is radical because it "postulat[es] that only a

[1] See also the notion of "orthodox economics" in Lavoie 2015.

certain kind of evidence is available to economists (choice behaviour, but not survey, experimental or neural data)".[1] The commitment to mathematical precision consists in the "assimilation of intellectual rigor to mathematical precision, to the extent that ideas not expressed in mathematical terms tend not to be taken seriously".[2] Finally, explanatory parsimony praises the capacity of a hypothesis to explain "much by little".[3]

Normative minimalism requires keeping "value commitments to a minimum, if not avoiding them all together, notably by orienting normative economics solely towards the satisfaction of preferences, and thus (ostensibly) deferring to individuals' own value judgments".[4] Alexandrova and Haybron point out that these commitments ground mainstream normative economics in cost-benefits analysis based on willingness to pay or to be paid—that is, the standard concepts of Kaldor-Hicks efficiency and its close cousin wealth maximization. The first step is the adoption of "an actual preference satisfaction theory of well-being".[5] If individual preferences are a reliable welfare indicator, then normative analysis can focus on the selection of the criteria for preference aggregation to formulate welfare-based normative arguments.

Pareto efficiency—named after the Italian economist and sociologist Vilfredo Pareto—aggregates preferences under strict conditions: no one is made worse off, and at least one is made better off, according to their own (rational) preferences. A state of affairs is then Pareto optimal if there is no further Pareto efficient change. For example, Tim is thirsty. He drinks some tap water and feels refreshed. Arguably, he is better off and no one is worse off. Hence, Tim drinking tap water was Pareto efficient. Note that, as in Pareto efficiency there are benefits but no costs, the measurement of preferences can be simply ordinal. The intensity of preferences is irrelevant because how much Tim prefers the new state of affairs is immaterial to conclude that the change is efficient.

When benefits and costs exist, evaluating if a change is desirable requires their quantification. An ordinal measurement of preferences is not sufficient and a cardinal measurement is needed. From a welfarist perspective, one needs to compare the value or utility of individual preferences. At the beginning of the 1930s, Lionel Robbins argued in *An Essay on the Nature and Significance of Economic Science* that interpersonal utility comparisons have "no place in pure science".[6] This extremely influential essay on economic inquiry is generally taken as the cause of the discredit of interpersonal utility comparisons.[7] At this point, welfare economists found

[1] Alexandrova and Haybron 2011: 96.
[2] Ibidem.
[3] Ibidem.
[4] Alexandrova and Haybron 2013: 169.
[5] Ibidem.
[6] Robbins 1984 [1932]: 123.
[7] Robbins 1938 stressed that such comparisons can and have to be made, but that they do not have a scientific status.

themselves in an uncomfortable position: either they placed welfare judgments in tension with normative minimalism or they could only make Pareto efficiency analyses. However, welfare economists were well aware of the fact that a wide variety of non-Pareto efficient social changes is plausibly desirable, although they lacked a scientific procedure for proving this.

The British economists Nicholas Kaldor and John Hicks came up with a solution in 1939. The solution is the criterion now known as Kaldor-Hicks efficiency. Kaldor and Hicks suggested to measure benefits and costs in terms of willingness to pay and willingness to be paid or, more succinctly, economic surplus.[1] A change is Kaldor-Hicks efficient when those negatively affected by the change could be perfectly compensated with there still being some surplus. Although this procedure is more demanding than a Paretian analysis, it is grounded in the same deference to individual preference. What is added is a method for assigning cardinal values to preferences. Indeed, this solved the impasse: welfare analysis remains scientific but, at the same time, it is set free from the straight-jacked represented by Pareto efficiency.

Critically, it is clear that normative minimalism has a lot to do also with the idea that transfers are irrelevant—an idea that, as seen in Chapter 1, lawyers find particularly irritating. The irrelevance of distributive concerns is already embodied in the concept of Pareto efficiency: who is better off does not matter nor does it matter how much they better off; what matters is that at least someone is better off and no one is worse off in comparison to the situation existing before the change under consideration. The insensibility to distribution already shown by Pareto efficiency is even more acute under Kaldor-Hicks efficiency: it is now even possible to harm someone to create value, without the need of compensation. Compensation is hypothetical: it is only required that, if losers were compensated, some benefit would remain.[2]

Taken together, epistemological and normative minimalism, create terrible conditions for a bilateral dialogue between legal and economic research—a perfect storm, in my opinion. Legal data do not count as economic evidence, so that the wisdom of the law Mills and Calabresi refer to cannot inform the economist's understanding of legal practices and of the social practices that are regulated by the law. Moreover, normative judgments are made on the grounds of a conceptual framework that is independent from legal reasons and impermeable to them. Under these conditions, it is clear that the law can only be conceived of as a subject of economic analysis and that legal research is not a partner to engage with, but one of the addressees of the findings of economic research.

[1] The concept of economic surplus is generally associated to Alfred Marshall; see pp. 109-110.
[2] Potential compensation is the reason why Kaldor-Hicks efficiency is also called Pareto-potential efficiency: if all losers are compensated and someone in society is better off, the resulting change is Pareto efficient.

Luckily, the situation is changing in mainstream economics, with both forms of economic minimalism being the object of a fascinating reconsideration.

3. Relaxing Epistemological and Normative Minimalism

Epistemological and normative minimalism are challenging obstacles for Minimalist Law-and-Economics. They create a multi-layered cocoon around economic research that is extremely difficult to pierce. Piercing it however, is essential for the success of the proposal of collaboration advanced in this dissertation. Luckily, both forms of minimalism have been greatly relaxed in recent years, thanks in particular to the behavioural turn. Behavioural research finds that revealed preferences are not a conclusive welfare indicator and, as a consequence, there is a rich debate on the methodology of welfare economics, with both epistemological and normative minimalism being relaxed. In particular, observability is no longer radical, which is an important step towards the use of legal materials as economic evidence. At the same time, there is room for non-subjective accounts of welfare with economists reflecting on when individual preferences are and are not a reliable welfare indicator. Against this background, Calabresi has shown already that relaxing economic minimalism and taking the law into consideration can lead to a better understanding of economic concepts.

3.1 The behavioural turn and the downgrading of revealed preferences

In the Introduction, behavioural research was discussed in its rhetorical dimension, which has a minimalist character. In this section, we focus on the merits of behavioural research to show how it is contributing to a relaxation of both epistemological and normative minimalism. Note that this section is not meant to argue that behavioural research has been the sole cause of these changes. More modestly, the claim is that the concepts of epistemological and normative minimalism described above do not quite capture significant features of research in behavioural economics.

In an influential article, Behsears and his co-authors distinguish between revealed preferences and normative preferences and, among other things, discuss six methods for the identification of normative preferences. Already in the abstract, the authors emphasize that these methods are all based on "consumer behavior" but "without equating revealed and normative preferences".[1] These methods, in one way or another, infer normative choices from experimental or field data and surveys. In a similar vein, in the introduction to his recently published book

[1] Beshears et al. 2008: 1787.

Behavioral Economics for Cost-Benefit Analysis, Weimer notes that "[u]ntil the 1970s, only observed consumer behaviors were the basis for inferring monetary values", but that over time "stated preference methods" have become increasingly accepted by economists.[1] However, behavioural research has added to this picture the use of laboratory evidence and field experiments that while still controversial, have mutually reinforced each other and find in behavioural economics a theoretical underpinning.[2]

This anecdotal evidence shows clearly that there is a trend to move beyond revealed preferences in economic research at the moment, and that this trend is neither peripheral nor heterodox. In this regard, I find Alexandrova and Haydron's conclusion convincing, that the trend is motivated by a commitment to "an economics that is at once messier and yet more faithful to the realities of human life".[3]

The relaxation of epistemological minimalism is in fact not an end in itself, or at least it is not only the consequence of the availability of new techniques. It is instead a consequence of the robustness of the behavioural findings questioning the normativity of revealed preferences. The research is ongoing and many interesting proposals are being formulated.[4] For current purposes, what matters is that the downgrading of revealed preferences has led economists to be more self-conscious about the normative foundations of their discipline. The point is shown very clearly by Lunn, who observes:[5]

> [T]he range of available empirics may offer only an indication of what is likely to constitute a welfare improving policy, perhaps on the balance of probabilities or with additional assumptions regarding the relative weight to be given to distributional concerns. For those seeking objective empirical criteria to determine policy, this level of subjectivity is doubtless unwelcome. However, the main implication of behavioural economics for consumer and competition policy may be that, at least in markets where significant behavioural phenomena have been identified, a subjective judgment informed by a range of objective but not decisive empirical findings will be the best we can do in pursuit of welfare improving policies. Such subjective judgements will surely produce better policy, the more they are informed by evidence.

This 'messier' but more open methodological context gives obviously better prospects to legal research for being acknowledged by economists as capable of contributing to their own inquiries. In the next subsection, I argue that it is from this perspective that Calabresi's *The Future of Law and Economics* offers its most powerful set of arguments in favour of a bilateral relationship or collaboration between economic and legal research.

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[1] Weimer 2017: 1.
[2] Weimer 2017: 135.
[3] Alexandrova and Haybron 2011: 94.
[4] See Beshears et al. 2008, Weiner 2017 and Fabbri and Faure 2018.
[5] Lunn 2015: 327.

3.2 Calabresi on minimalism in economics

A seen above, in *The Future of Law and Economics* Calabresi distinguishes two approaches to the use of economic concepts in legal research, Economic Analysis of Law and Law and Economics, and then calls for a move from the former to the latter. Importantly, the main addressees of this call are economists themselves. The core of the message to economists is twofold. First, legal discourse has something to contribute to economic theorizing. Second, economists must relax their commitment to normative minimalism. In pure interdisciplinary minimalist spirit, Calabresi is careful in pointing out that doing such things is not a threat to economic discipline, but is actually an opportunity for improvement.

The law contributes to economic theorizing because it might disclose important insight. Legal discourse can in particular help in developing a "more nuanced recognition of the relationship between command and market structures".[1] And in this regard, listening to lawyers is of value to economists because lawyers can grasp the function of the legal system even better than institutional economists.[2] Hence, it is important not to be too quick in dismissing the wisdom of the law (and of lawyers). At the same time, it is important to ask narrow questions, thereby being able to consider the granularity of legal practice.

To show how to take the law more seriously, Calabresi connects the concept of merit goods to two types of preferences about the use of the market as allocation mechanism. Merit goods are a special category of economic goods that inflict "mental sufferings" because they are available on the market.[3] These are divided by Calabresi in two groups: intrinsic and contingent merit goods. Intrinsic merit goods are "pearls beyond price", they are goods for which "commodification is in itself costly".[4] In other terms, it is the simple fact that an intrinsic merit good can be bought and sold that inflicts moral costs within the community. The prime example of this category of goods is life. For contingent merit goods, the problem is that the contingent distribution of wealth influences the allocation of these goods. Calabresi suggests as examples of contingent merit goods "military service … the right to have children … to obtain various body parts … to influence elections".[5] Thus, the market is not an appropriate allocation mechanism for contingent merit goods when the distribution of resources within the community excludes some members of it from accessing particularly important material goods. For current purposes, what matters is that Calabresi shows clearly that legal materials can be used as economic evidence to formulate an explanation of the role

[1] Calabresi 2016: 22.
[2] Calabresi 2016: 19-20.
[3] Calabresi 2016: 27.
[4] Calabresi 2016: 26.
[5] Calabresi 2016: 43.

of the market within a society. If Calabresi is right, then epistemological minimalism and in particular observability cannot be a reason to ignore the potentials of legal materials as economic evidence.

With regards to normative minimalism, Calabresi's argument takes-off by pointing out that judgments about Pareto optimality hide normative commitments. "To ask whether … attitudes are 'right'; 'make sense"—or as is sometimes done, 'are consistent with Pareto optimality'—is to engage in precisely the kind of taste/values assertions that economics says it eschews'".[1] Calabresi dedicates two chapters to tastes and values, tellingly entitled *Of Tastes and Values Ignored* and *Of Tastes and Values: What Economics Can Tell Us about Them*. Here the critique of epistemological and especially normative minimalism takes the central stage. The starting point is again that it is "paradoxical … to ignore or treat as irrational" some "tastes, values, and costs" while "taking the position that, as to the validity and merit of tastes and values, economics has nothing to say".[2] However, Calabresi recognises that there are "potentially sound reasons" in favour of this approach. These reasons rest on epistemologically minimalist grounds. Doing otherwise would cause "problems of economic modeling"[3] and "great technical advantages" would be lost.[4] Nevertheless, Calabresi rightfully observes that, consistently with epistemological minimalism, the filtering of tastes, values and costs ought to be done openly and clearly. In the following and final chapter of the book, Calabresi raises the stakes and claims that[5]

> economists, while remaining true to all the restrictions they have appropriately wanted to put on their field, can tell lawmakers a great deal about what value changes can properly be viewed as desirable. And … that they can do this on simple assumptions by employing those very skills they and their field have more than anyone else.

Ultimately, Calabresi clearly asks economists to reconsider their minimalist commitments. On the one hand, these commitments require a more sophisticated attitude towards tastes, values and costs as well as more transparency. On the other hand, these commitments do not really prevent economists from saying anything about tastes, values and costs while being loyal to their methodological commitment to epistemological and normative minimalism.

This section has shown that epistemological and normative minimalism, far from being the solid foundations of current research in economics, are being reconsidered. To this line of inquiry, Calabresi adds a powerful plead in favour of including legal materials among the sources of economic evidence. The next section advances a more radical critique of normative minimalism, based on two contradictions it causes in the economic literature.

[1] Calabresi 2016: 74.
[2] Calabresi 2016: 131.
[3] Calabresi 2016: 146.
[4] Calabresi 2016: 150.
[5] Calabresi 2016: 160.

4. Two Contradictions Caused by Normative Minimalism

For a long time, mainstream economics of law has enthusiastically accepted the normative framework of welfare economics developed before World War II. The framework establishes a normative hierarchy between Pareto and Kaldor-Hicks efficiencies, with the latter efficiency being normatively superior to the former. In fact, relying on Pareto efficiency foregoes the possibility of making welfare improvements that, however, harm somebody. The urge to make judgements about welfare improvements in conformity with epistemological and normative minimalism led to the diffusion of Kaldor-Hick efficiency, to a strict notion of welfare based on preferences—the value of which is measured in terms of willingness to pay and to be paid—and to the expulsion of distributive concerns.

This section argues that, unfortunately, the interplay of total welfare with Pareto efficiency and normative minimalism generates two contradictions. To see this, the starting point is that, in light of the analysis in Section 2, the normative framework used in the economics of law includes the following proposition: (1) "Pareto efficiency is too narrow as the conclusive normative concept for welfare analysis".

To expose the contradiction related to Pareto efficiency, we need to warrant within economics of law the negation of proposition (1): (¬1) "Pareto efficiency is too broad as the conclusive normative concept for welfare analysis". This is the task of the next subsection.

4.1 The Pareto efficiency contradiction: Pareto efficiency is both too narrow and too broad as the conclusive normative concept for welfare analysis

Pareto efficiency is the standard economic justification of a voluntary transaction.[1] For example, Posner and Kronman open the first paragraph of the introductory chapter of *The Economics of Contract Law* as follows:[2]

> The fundamental economic principle with which we begin is that if voluntary exchanges are permitted—if, in other words, a market is allowed to operate—resources will gravitate to their most valuable use. If A owns a good that is worth only $100 to him but $150 to B, both will be made better off by an exchange of A's good for B's money at any price between $100 and $150; and if they realize this, they will make the exchange. By making both parties better off, the exchange will also increase the wealth of the society … .

[1] See, for example, Shavell 2004: 293-294; Cooter and Ulen 2012: 277-279.
[2] Kronman and RA Posner 1979: 1-2. Please bear in mind that in light of the analysis of the concept of welfare in the Introduction (pp. 37-39), the terms "welfare", "wealth", "well-being", etc., are used interchangeably in this dissertation.

Not all voluntary transactions are consistent with the total-welfare maximization rationale.[1] Setting aside more complex cases such as information asymmetries and bounded rationality, bargaining power justifies proposition (¬1). The presence of bargaining power does not alter the Pareto efficiency of the exchange. If the consumer Charles is willing to pay 6 EUR for a beer, he is better off if the seller Silvia sells him a beer for 6 EUR. Whether 6 EUR is a competitive price or not is irrelevant for the claim that the exchange is Pareto efficient.[2] However, as it will be seen in Chapter 3, when the market price is above competitive level, the market equilibrium is inefficient. And, in this regard, whether allocative efficiency is about total or consumer welfare is irrelevant.[3] To put it differently, there is a conflict between a normative understanding of bargaining theory and perfect competition.[4]

Proposition (¬1) holds that "Pareto efficiency is too broad as the conclusive normative concept for welfare analysis".[5] This is what this section has shown. By expressing a positive judgement towards exchanges that are allocatively inefficient, Pareto efficiency is too broad to be the conclusive normative concept for the welfare analysis of market relations. Therefore, proposition (¬1) is justified, at least in the concept of market relations. For current purposes, this is sufficient to conclude that the Pareto efficiency contradiction takes place: (1) ∪ (¬1) "Pareto efficiency is both too narrow and too broad as the conclusive normative concept for welfare analysis".

4.2 The social engineer contradiction: a value-free quest advocating for total welfare

Economists are sometimes referred to as social engineers.[6] The idea of economics as social engineering is also embedded in economic language. Terms like efficiency and equilibrium come from engineering. Vilfredo Pareto, for example, was an engineer by training. Economic language

[1] I have discussed these topics at greater length in Esposito 2016. However, in that occasion, I discussed the conflict between proposition (1) and (a simplified version of) the economic claim of this dissertation.
[2] Indeed, if the competitive price for the beer is 3 EUR, Bruno could have been better off if Silvia had sold him the beer at the competitive price, but she would have been worse off.
[3] Note that the only exception is the case in which Silvia is capable to perfectly discriminate her consumers on the grounds of their reserve price.
[4] See pp. 87-88.
[5] I am indebted to Stavros Makris because our long discussions on this point made my ideas much sharper.
[6] It is quite common to consider the economist as a social engineer. In this regard, two attitudes can be distinguished. The first is derogatory and contends that economists are too confident in their capacity to obtain the intended result (Myrdal 1972 and Santos and Rodrgues 2009). This conception fits uncomfortably with the considerations of this subsection. Indeed, it is problematic when economists and economically informed scholars are too confident in their conclusions. Nevertheless, as the second attitude towards the expression "social engineer" shows, social engineering can be more broadly understood as a means aiming to identify effective policy solutions (Davidson 2010, Boettke and O'Donnell 2016; this is also the way in which legal realists used the expression: see Simpson and Field 1945, Schutt 1998). In other terms, social engineering in this more neutral sense aims at informing policy choices in light of instrumental or causal consideration. For a discussion, see Godłów-Legiędź 2011.

also uses a variety of mechanical metaphors, among which arguably the most famous among lawyers are the ideas of market forces and that transaction costs are the frictions of the economic system.[1]

What I want to make explicit here is that between the commitment to be a social engineer and the use of total welfare (or any other axiological assumption, for that matter) as a base for policy recommendations there is a clear contradiction. In theory, social engineering would be about identifying the best means for a given end or, perhaps even more objectively, identifying how different means would contribute to the realization of a given end. This is shown by the definition of "economics" given by Lionel Robbins: "the science which studies human behaviour as a relationship between ends and scarce means which have alternative uses".[2] Accordingly,[3]

> [e]fficiency does not tell us whether we should wish to pursue material gain, private profit, protection of the environment, social justice, or any other substantive goal. It merely tells us how best to pursue the goals we have, or more precisely, how to pursue them in such a way that performs best on a cost–benefit test.

Following this line of reasoning, the economist as social engineer is committed to the following proposition: (2) "the economist identifies how different means contribute to given ends".

The economist assuming total-welfare maximization does not respect proposition (2) for the simple fact that the assumption of total welfare is not a given, but is chosen by the economist in the first place. Note that this is not a problem of total-welfare maximization, but more generally a problem of the choice of any axiological assumption. When the end is not given but, to the contrary, is chosen by the economist, there is a commitment to the contrary of proposition (2): (¬2) "the economist identifies how different means contribute to chosen ends".

The economics of law inherits the contradiction between these two propositions. To substantiate this claim, let us consider some discussions in the economics of law that show this contradiction. For Sanchez-Graells,[4]

> [t]he economic analysis of law is a fundamental tool with which to try to ensure that the legal system is both effective in achieving its goals (which are by no means predetermined by the law and economics approach), and efficient in doing so (that is, it achieves those goals in the way that makes most members of society better off, which is what the concept of efficiency as a proxy for social welfare ultimately encapsulates).

It is indeed reasonable to require the legal system to minimize its operating costs in the pursuit of its goals. However, at the same time the author observes that "the normative dimension of the economic analysis of law … ultimately rests on the pursuit of economic efficiency as a proxy for

[1] On this point, see Mirowski 1989 and the essays collected in Mirowski 1994 and, in particular, Cohen 1994.
[2] Robbins 1932: 15.
[3] Katz 2015: 174. See also Krugman and Wells 2009: 109.
[4] Sanchez-Graells 2017: 170.

the maximization of social welfare". Obviously, the economist of law cannot have it both ways. Either the economist helps the legal system in the pursuit of its own goals, or advocates for the norms that maximize total welfare. Let us look at another example.

In reflecting on the impact of behavioural research on the economics of law, Cooter finds that the main concern of the economics of law is about the effects of the law. Data about the effects of the law are useful to practicing lawyers to formulate legal arguments when the law is unclear. This is obviously true. However, this way of looking at the contribution of economics to legal practice begs the central question of why consequences ought to be assessed in the way economists assess them. More specifically, the problem is that understanding "How does a law affect economic efficiency",[1] is not only a causal question as Cooter assumes. This question presupposes instead an understanding of what efficiency is about. And, as for Cooter it is about total-welfare maximization, the question assumes the relevance of this goal for legal practice. Thus, whether a norm is efficient is not just a causal question. It is a normative question followed by a prescriptive one.

Geistfeld lucidly articulates this point about the economic analysis of tort law—but it is of general application. While "Friedman[2] observed that positive analysis is 'in principle independent of any particular … normative judgments' … the positive economic analysis of tort law is tied to a particular form of normative judgement"[3]—the maximization of total welfare. Under these conditions, the legal relevance of economic analysis "would seem to have only a limited or contingent normative message".[4]

Admittedly, also following Geistfeld's account, the social engineer contradiction is avoided. But at what price? At the price of normative irrelevance of economic analysis, and no less. The question on whether the purpose of a legal practice is the maximization of total welfare has to be answered in the affirmative, or at least the claim has to be made that the maximization of total welfare ought to be the purpose of that legal practice. Otherwise the analysis of the effects on total welfare of the law remains at the stage of an interesting intellectual exercise, and no more than that. Assuming that the social purpose of economic research is not the same of crosswords, this line of reasoning does not seem to provide a viable answer to the social engineer contradiction.

These examples are illustrative of how little it gets to fall into the social engineer contradiction. The next section shows that taking the law seriously is a solution to the social engineer contradiction that respects both normative and epistemological minimalism.

[1] Cooter 2011: 1481.
[2] M Friedman 1966: 3-4.
[3] Geistfeld 2013: 150.
[4] *Ibidem*, citing Coleman 1980: 548-549. On this point, see pp. 75-77.

5. Economic Analysis, Reverse Engineering the Law and Minimalist Law-and-Economics

The social engineer contradiction leaves us with a puzzle. How is it possible to be a social engineer and, at the same time, select an axiological assumption for one's analyses? To put it differently, how is it possible to assume the maximization of total welfare as policy goal without defending it openly as a matter of moral philosophy? Minimalist Law-and-Economics proposes a simple answer. Economists delegate the choice of the policy goal to someone else, specifically to the legal system. Accordingly, economists can focus on how different means contribute to the realization of ends given by the law. Only if the maximization of total welfare were the goal of the legal system, assuming it as the goal in the analysis of the law would let the economist be a social engineer.

The proposed solution to the social engineer contradiction passes through the doctrinal thesis. The doctrinal thesis holds that the content of the law must be taken seriously by a Minimalist Law-and-Economics approach. The social engineer contradiction shows why economists have a reason for taking the doctrinal thesis seriously. In the Introduction, it was anticipated that doctrinal claim of this dissertation proves that, in EU antitrust and consumer law, allocative efficiency is about consumer welfare and not total welfare. This finding justifies the assumption of consumer welfare as maximand in the analysis of market practices in the European Union without incurring in the social engineer contradiction. Why? Because the doctrinal claim rejects proposition (¬2) "the economist identifies how different means contribute to the realization of chosen ends". The doctrinal claim allows the economist to assume consumer welfare as the maximand in the analysis of market efficiency in the European Union because, as a matter of fact, EU lawfits better—for whatever reason—with this value choice. Had Part III of this dissertation found that the total-welfare hypothesis has superior explanatory power, total-welfare maximization could have been assumed for the same and simple fact that EU law fits better with this value choice.

This solution can plausibly be called reverse engineering the law. In a first approximation, reverse engineering the law is about justifying an assumption in economic modelling because it fits with legal practice. The expression "reverse engineering" indicates a process by which the study of an artefact, for example a smartphone, is used to understand how it is made to then replicate or improve it.[1] Similarly, reverse engineering the law studies the content of the law to identify the axiological and instrumental choices currently accepted in a legal system.

[1] To "reverse engineer" means "to disassemble and examine or analyze in detail (a product or device) to discover the concepts involved in manufacture usually in order to produce something similar" or to "cop(y) the product of another company by looking carefully at how it is made" (respectively, Merriam-Webster online and Cambridge Dictionary online, available at https://www.merriam-webster.com/dictionary/reverse%20engineer and http://dictionary.cambridge.org/dictionary/english/reverse-engineering).

Crucially, economists have a lot to contribute to any attempt made to reverse engineer the law. Their expert knowledge is critical for connecting ends and means. These considerations are often used to claim that the economists of law typically formulate hypothetical prescription like "if you want to achieve ends E, then norm N is better than norm M".[1] However, it seems more appropriate to state that the typical form of prescription by the economists of law take the form "norm N is better than norm M in achieving E, therefore N ought to be adopted".

As seen, the problem of this approach is that if end E is not a given, but is chosen by the economist, then the commitment to normative minimalism does not avoid value choices. Sooner or later, axiological conflicts will spring out. The Pareto efficiency contradiction. But ultimately, these contradictions undercover the limits of the total-welfare assumption, which ultimately leads to the social engineer contradiction.

There are two ways for avoiding this contradiction. The first is to give axiological reasons in support of a certain axiological assumption. We then enter the realm of moral philosophy and ethics. Some economists are willing to bite the bullet. Amartya Sen is arguably the most notable example of this choice nowadays.[2] However, the consequence is that the commitment to normative minimalism is abandoned completely. It is indeed possible and desirable for economists to critically engage in the normative foundations of their discipline. And we have also seen that behavioural insights are contributing to a fascinating debate in this regard.

Reverse engineering the law is addressed to those economists who care about logical consistency, do not want to cross the line between economic analysis and morality but want nevertheless to formulate policy recommendations based on some justified axiological assumption. Understanding the axiological choices embedded in the law and accepting them as starting point for economic analysis is my proposal for these economists. This is what reverse engineering the law is about. Importantly, Posner's efficiency hypothesis did something similar, but crucially different. Also Posner's efficiency hypothesis justified the adoption of wealth maximization because it (allegedly) fits with judicial practice. However, contrary to Posner's efficiency hypothesis, the idea of reverse engineering the law is not committed to any particular axiological concept and, crucially, is intended to respect the doctrinal thesis by giving due consideration to the reasons given in legal practice.

To sum up, reverse engineering the law promises to be beneficial for both the economist and the lawyer. To the economist, reverse engineering the law offers a solution to the social engineer contradiction respectful of normative minimalism. For a lawyer, reverse engineering the law is a

[1] Coleman 1980: 548-549, Craswell 1993, Cserne 2012, Geistfleld 2013: 150 and Bix 2017: 400.
[2] See, for all, Sen 2009.

promising approach because it ensures that the economist takes the content of the law (more) seriously.

PART II

DEEP INTO THEORY—CONSUMER WELFARE, ALLOCATIVE EFFICIENCY AND FAIR MARKET RELATIONS

— 3 —

Allocative Efficiency Can Be about Consumer Welfare

1. Introduction to the Economic Claim

This chapter defends the economic claim of this dissertation. The economic claim holds that consumer welfare is a maximand used by economists in the efficiency analysis of market allocations in alternative to total welfare. Thus, to respect the view that market relations ought to be efficient it is not necessary to use total welfare as maximand.

An attractive feature of the consumer-welfare maximand is its ability to solve the Pareto efficiency contradiction. When looked at from a consumer-welfare perspective, contractual exchanges that are Pareto efficient are not necessarily also allocatively efficient. Reconsider the real-life example of a consumer (Charles) buying a beer from a seller (Silvia). Charles is willing to pay up to 6 EUR for a beer. The competitive price—3 EUR—makes also Silvia better off. From a total-welfare perspective, any price between 3 and 6 EUR is both Pareto and allocatively efficient.[1] On the contrary, from a consumer-welfare perspective, every price higher than 3 EUR is Pareto efficient but is also allocatively inefficient. The proposed solution to the Pareto efficiency contradiction is to downgrade Pareto efficiency to the role of participation constrain and keeping only allocative efficiency as normative parameter for market relations. Accordingly, the *desideratum* that market relations ought to be efficient is respected.

Allow me to avoid a possible misunderstanding. The consumer-welfare maximand does not imply that Silvia has the duty to sell the beer to Charles at the marginal cost to her, say 2.5 EUR. Indeed, a price of 2.5 EUR would make Charles even more better off than the competitive price of 3 EUR. However, for Silvia selling at 2.5 EUR is not feasible in the sense that the market mechanism does not provide reasons that are strong enough to lower the price below 3 EUR. Perhaps in time Silvia's profits will attract a new seller close to Silvia's business premises and this event will lower the price of beer. The point is that there is a presumption in market analysis that the market is

[1] Cooter and Ulen even state that the two expressions are synonyms (Cooter and Ulen 2012: 14).

typically more efficient in the allocation of resources than more intrusive forms of legal intervention. The assumption is, in other terms, that the introduction of legal norms forcing Silvia to sell the same beer at 2.5 instead of 3 EUR is very likely to be more costly than having Silvia operating under the threat of actual and potential competition as a means to improve the quality of her offer to Charles (and to the other consumers).

Also note that a stronger version of the economic claim is possible. The version of the claim defended in this dissertation simply points out a disagreement within economic theory: the maximand of allocative efficiency can either be total welfare or consumer welfare. The stronger version argues that conceptual reasons show that consumer-welfare maximization is the most plausible maximand for allocative efficiency. For the purposes of this dissertation, the stronger version of the economic claim would be—assuming, for the sake of the argument, that it could be warranted—too deeply theorized. What the economic claim needs to show is simply that assuming consumer welfare in the analysis of market efficiency is a small step for economists. Then, together with the translation and doctrinal claims of this dissertation, this small step for economists will become—if not a giant leap—a mutually beneficial improvement for legal and economic research, and a core element of the collaboration proposed by Minimalist Law-and-Economics.

To warrant the economic claim, the chapter undertakes four inquiries. The starting point is that perfect competition claims allocative efficiency (Sec. 2). Against this background, the first inquiry reviews the arguments in support of the choice of total welfare as the maximand for explaining that perfect competition is more desirable than monopoly (Sec. 3). The second inquiry broadens the perspective and offers five arguments from mainstream economics in favour of the economic claim of this dissertation (Sec. 4). The third inquiry focuses on the concept of consumer sovereignty and shows that consumer sovereignty supports the economic claim, is compatible with market-failure analysis, has not received invincible critiques and, moreover, is a concept with a respectable economic pedigree (Secs. 5-9). The fourth and last inquiry focuses on the thought of great economists of the past whose scholarship, one way or another, is important for economic theory and for the economics of law (Sec. 10). Section 11 takes stock and discusses the overall warranty of the economic claim of this dissertation.

2. Perfect Competition Claims Allocative Efficiency

It is relatively simple to establish how for mainstream economists, perfect competition claims allocative efficiency. In its most general and neutral sense, efficiency is an incremental criterion for

judging if a certain course of action is more effective than another in the pursuit of a given goal.[1] Let us move from a characterization that is shallow, and then let us proceed by going deeper. From this perspective, to understand what market efficiency is about in general terms, we need to first specify what markets do.

Markets allocate resources. Hence, allocative efficiency is the criterion for evaluating the performance of a market. Although the next sections highlight disagreement on the reason why perfect completion is allocatively efficient and monopoly is not, the idea that allocatively efficiency is the evaluative criterion is never questioned. Hence, perfect competition claims allocative efficiency.[2]

2.1 Arrow, Debreu, perfect competition and Pareto optimality: Avoiding a misunderstanding

There is an objection to the idea that perfect competition claims allocative efficiency based on the Arrow-Debreu model of general competitive equilibrium that was put to me in several occasions—once even by an anonymous reviewer[3]—that it is best to address here, at the very outset of this chapter.

The objection is the following: is it really the case that perfect competition is better than monopoly because it is allocatively efficient? Arrow and Debreu have demonstrated that perfect competition is Pareto optimal, have they not? This objection does not withstand critical scrutiny. Indeed, it is true that Arrow and Debreu have demonstrated that, under certain assumptions, perfect competition is Pareto optimal. Thus, the problem of the objection rests in misunderstanding the aim of their seminal paper, *Existence of an Equilibrium of a Competitive Economy*. In fact, Arrow and Debreu are not interested in the normative properties of perfect competition and, in fact, they do not compare it with monopoly or other market structures. As the title of the paper suggests, their interest is that of offering the mathematical proof that "the equations … have a solution".[4]

Hence, the Arrow-Debreu model of general competitive equilibrium does not count as counter-evidence for the economic claim of this dissertation.

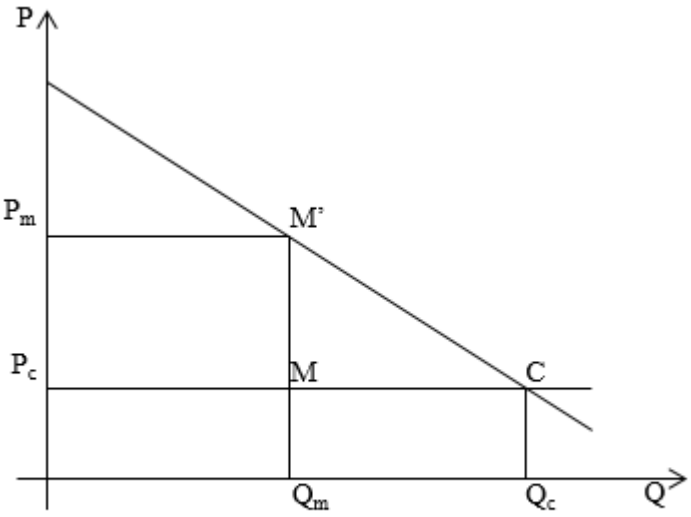
[1] See p. 73.
[2] Note that I do not hold that this is a conceptual necessity. I simply point out the broad consensus between economists on the matter.
[3] The article in question is Esposito 2016.
[4] Arrow and Debreu 1954: 265.

3. Why Allocative Efficiency Would Be about Total Welfare—The First Inquiry

The standard economic explanation—accepted by mainstream economists of law[1]—of what is allocative efficiency, is expressed in canonical form as follows:[2]

> In comparison with the competitive outcome, monopoly involves a transfer from consumers to suppliers. But the efficiency loss consists solely of the reduction in Consumer and Producer [welfare] that are due to the lessened volume of trade.

This explanation accepts first the usual distinction between allocative efficiency and transfers and second that allocative efficiency is the conclusive reason for considering perfect competition better than monopoly.[3] It also confirms that, according to the standard economic account, efficiency is attained when total welfare is maximized. The reduction in total (consumer plus producer) welfare is also called "deadweight loss". This is summarized by Figure 1, which represents a comparative statics[4] between the long-run equilibrium[5] in the case of monopoly and in the case of perfect competition. The comparison highlights two effects of the monopoly: a transfer of welfare from consumers to producers (the rectangle P_mP_cMM') and a reduction in exchanges causing a deadweight loss of welfare (the triangle MCM'). It follows that the preference for perfect competition needs to be found in one or both of these consequences.



– Figure 1: Perfect competition v Simple monopoly –

What is less clear is why economists choose to focus on the deadweight loss and ignore the transfer of welfare. I have identified four main arguments used for this purpose in economic textbooks.[6] As

[1] See, for example, Weigel 2008: 3-5 and RA Posner 1985.
[2] Hirshleifer 1976: 287.
[3] Unless specified otherwise, monopoly in this dissertation refers to a monopoly without price discrimination.
[4] Comparative statics consists in the comparison of two equilibria in order to highlight similarities and differences between them; see Nachbar 2008.
[5] Some economists use a short run equilibrium graph (see, for example, Hirshleifer 1976).
[6] On the peculiar importance of economic textbooks for economists, see Lepenies 2014: 1-3 and Johansson 2004.

in the quotation, they all move from a comparative statics between perfect competition and a simple monopoly (without price discrimination). There are at least four positions regarding the transfers.

The four arguments are presented on a continuum from the least to the most convincing. The first argument admits the normative relevance of the transfer but then ignores it. In the version presented by Mankiw, total surplus is "[o]ne possible measure" of the "economic well-being of a society";[1] however—reader rest assured—it is "natural to use total surplus as a measure of society's economic well-being".[2] The second is simply an incompletely theorized argument.[3] It holds that while the transfer raises difficult normative issues, under monopoly, "total benefit is an amount unambiguously smaller than that generated in the competitive case".[4] The sub-optimal level of aggregate welfare is a sufficient reason to conclude that perfect competition is better than monopoly. Thus, perfect competition is better than monopoly whatever one thinks of the consumer-to-producer transfer. According to the third argument, there is no welfare implication in transfers. A transfer is irrelevant because "the monopolist derives an exactly equal benefit", so that "[t]he transfer cancels out".[5] The fourth argument rejects the value judgment that consumer welfare is more important than producer welfare. As Cowen and Tabarroc put it, "what's so special about consumers? Monopolists are people too. So if we want to discover whether monopoly is good or bad …" as the reader expects by now, we have to focus on the deadweight loss.[6]

How strong, plausible and convincing are these arguments in expelling transfers from the maximand of allocative efficiency? The first is based on a naturalistic fallacy. It asks the reader to accept the author's standpoint simply because it is 'natural'. The second argument recognizes that the provided analysis of the concept of allocative efficiency is incomplete. The position is thus minimalist in character. It is just as deep as needed to decide that perfect competition is better than monopoly. The third argument, instead, rests heavily on a commitment to epistemological minimalism. It builds on the idea that the analysis makes individual welfare perfectly comparable. Yet, it offers no explicit normative argument on why only the total welfare counts. This normative argument, which is implicit in the third argument is made explicit in the fourth one.

The fourth argument expresses—with a characteristically normatively minimalist attitude—an agnostic stance on the conflict over welfare between producers and consumers. It is with this

[1] Mankiw 2015: 145.
[2] *Ibidem*.
[3] Obviously, this argument is shallow. However, it turns out to be also narrow, because it cannot explain why perfect competition is better than perfect monopolistic discrimination. Yet, once the choice of the maximand is made for the central case of perfect competition versus simple monopoly, the axiological choice made implies that the perfectly discriminating monopoly is as good as perfect competition.
[4] Estrin, Laidler, Dietrich 2012: 295 and Varian 2010: 446. In his famous article on the measure of monopoly harm, Harberger declares that "[w]hat [monopoly] does through its effect on income distribution I leave to my more methaphisically inclined colleagues to decide" (Harberger 1954: 87).
[5] Hirshleifer 1976: 286.
[6] Cowen and Tabarrok 2010: 225.

axiological stance that the consumer-welfare approach disagrees with. Welfare should be grabbed entirely by consumers, leaving to producers only the recovery of costs—an amount that, notably, includes also the competitive level of profit—to whatever extent possible.

4. Five "Mainstream" Arguments against Total-Welfare Maximization—The Second Inquiry

To support the economic claim of this dissertation, this section discusses five arguments against the total-welfare maximand taken from contemporary, mainstream economic thought. They are powerful arguments because they come from sources very close to those endorsing the total-welfare maximand. They are presented from the least to the most problematic for this maximand. The first critique holds that, under a most plausible assumption, the deadweight loss is usually overstated. The second critique identifies in the total-welfare maximand the origin of the Pareto efficiency contradiction. The third critique problematizes the relation between total-welfare maximand and allocative efficiency in light of the similarities between the position of the investor in the firm and of the consumer on the market. The fourth makes similar considerations about the principal-agent literature. Finally, the fifth simply points out that some mainstream economic textbooks and models accept the economic claim of this dissertation.

4.1 The deadweight loss is overstated

The first argument is that the triangle MCM' of Figure 1 is an overstatement of the deadweight loss because the excluded consumers—that is, the consumers that in the competitive equilibrium would have bought the good—in the case of a monopoly find themselves with an ordering of preferences to satisfy and some money to spend.[1] Hence, they will simply satisfy some other preference![2]

It follows that the account given in Section 3 overstates the deadweight loss. The deadweight loss is actually given by the difference between the first-best allocation and the second-best allocation caused by monopoly. For the sake of clarity, in what follows, the triangle MCM' represents the "gross deadweight loss" and the more accurate concept of deadweight loss just identified is called "net deadweight loss". This distinction systematizes an account that is common also among competition lawyers, namely that excluded consumers "are forced to shift to other

[1] The plausible assumption behind the distinction between gross and net deadweight losses is that other markets beside the monopolized one described in Fig. 1 exist. If no other markets exist, then it would be true that the consumers do not have any welfare increment and they are simply excluded from the market. However, a world with one market is purely fictional. Moreover, even under this assumption, excluded consumers can still invest the unspent money thereby consuming more in the future. On the relation between investors and consumers, see pp. 88-90.
[2] Baumol and Blinder 1979: 443.

products, which they value less".[1] The gross deadweight loss fails to account for this shift in demand. For this reason, not only it is important to distinguish the gross from the net deadweight loss, but it is also more appropriate to talk of distorted rather than excluded consumers.

Why does the overstatement of the deadweight loss count as an argument in favour of the economic claim? Admittedly, the support is weak and only indirect. However, it is supportive nevertheless because if the deadweight loss is systematically overstated, then it becomes less plausible to condemn monopoly only in light of it.

4.2 Total-welfare maximization is the origin of the Pareto efficiency contradiction

Once one assumes that consumer welfare is a possible maximand for market analysis, the origin of the Pareto efficiency contradiction appears to be the interplay between the total-welfare maximand and the bargaining theory.[2] Mainstream economics of law accepts a theory of harm holding that a monopoly is undesirable only in as far as it reduces the total welfare available to society; hence, the transfer in favour of the monopolist is irrelevant. Hinging upon this theory of harm, it accepts a normative theory of bargains according to which the distribution of welfare between the parties of the exchange is irrelevant.[3] This statement usually goes hand in hand with the simplifying assumption that the agreement generates no externality.[4]

The bargaining theory does not necessarily require a normative stance insensitive to transfers. In its truly positive version, it is the theory of the sources of bargaining power and studies the effects of a bargaining strategy on total welfare and its distribution.[5] In claiming that any price goes as long as the exchange is made, mainstream economists of law ignore the embeddedness of

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[1] Geradin et al. 2012: 8. Similarly, but more in detail, Monti 2007: 84 observes:

> Economists say that the monopoly is undesirable because of the harm it causes to [excluded] consumers … . These consumers are forced to leave their preferred market, misallocating resources: fewer earphones are produced and more goods that consumers want less keenly are made.

[2] Posner handles this tension implicitly thanks to an ambiguity in his use of "maximization". On the one hand, "maximization" means, actually, maximization: perfect markets reach a maximum (RA Posner 1985: 88). On the other hand, "maximization" means a mere increment: this is the case when it is said that an agreement is wealth maximizing. To see this, compare the quote from Kronman and RA Posner 1979: 2 in Chapter 2, Section 4.1, with the similar discussion in RA Posner 1985: 85-88. Obviously, not all welfare increasing actions are welfare maximizing.

[3] Cooter and Ulen are explicit on this: "[w]hen the parties bargain successfully, the legal allocation of rights does not matter to efficiency" (Cooter and Ulen 2012: 84; see also 74-76).

[4] Reconsider Kronman and RA Posner 1979: 2. At the end of the long quote in Chapter 2, Section 4.1, they add the following footnote: "[m]any contracts have third-party effects but they are normally [not] studied in courses on contract law. We shall therefore ignore them".

[5] See Muthoo 1999 for a formal discussion and Muthoo 2000 for an informal one. Note that in the former the author speaks of Pareto efficiency and distribution (Muthoo 1999: 3). However, the same paragraph show that the reference to Pareto efficiency is inappropriate: the author argues that for an exchange to be Pareto efficient, transaction costs have to be minimized. According to the definition of Pareto efficiency, as long as at least one party is better off and there are no externalities, even if transaction costs are positive, the exchange is Pareto efficient. True, the exchange is neither Pareto optimal, nor welfare maximizing, because transaction costs reduce the size of the contractual pie, but it is still Pareto efficient.

the negotiation in the market process.[1] In fact, the parties are constrained by the market. In particular, the seller is threatened by the possibility of the consumer shopping somewhere else. In perfect competition the seller cannot raise prices at all because he has no bargaining power. The consequence is straightforward: any case where the price is higher than the perfect competition one is an instance of a market failure[2] allowing the seller to exercise a bargaining power that, according to perfect competition, he ought not to have. Accordingly, the Pareto efficiency contradiction is primarily the result of the unwarranted extension to the bargaining theory of the total-welfare maximand.

Disentangling the bargaining theory from the total-welfare maximand solves the said contradiction. In fact, it becomes clear that from a consumer-welfare perspective, Pareto efficiency is too narrow as normative criterion. Thus, the consumer-welfare approach rejects proposition (1) and solves the Pareto efficiency contradiction.

4.3 Investors in firms as consumers in markets

A further two-fold argument—taken in part from the economic theory of corporate law, and in part from the economic functional explanation of the firm—increases the warranty of the consumer-welfare maximand.[3] The argument stresses the similarity between two factors: the first being the relation between investors and the firm—which results from the interplay of the economic theory of corporate law and of the firm— and the second being the relation between consumers and the market. If the argument is correct it follows that the principal conception of investors enhances the security of the concept of consumer sovereignty, thereby enhancing the warranty of the economic claim of this dissertation.

The argument starts with the premise that assuming the consumer-welfare maximand establishes a principal-agent relation between consumers and producers. This is particularly evident in the literature on the concept of consumer sovereignty, but it actually goes beyond that strand of economic literature.[4] It adds that economists generally conceive of investors as the principal of the firm and thus the directors are their agents: directors (should) manage the firm in order to maximize the investors' interest. The latter is a well-accepted economic claim, also by corporate lawyers.[5]

[1] Marshall 2013 [1920]: 270-271. Pigou 1920: 240 is the first to identify in the independence of the price of commodity units from each other the condition "most favourable to [price] discrimination" and thus to consumer exploitation.
[2] Note that not all market failures raise prices: negative externalities and the exploitation of the salience effect, for example, have the effect of lowering prices.
[3] I thank Stefan Grundmann for drawing my attention to the relevance of this argument for this dissertation. The ideas discussed in this subsection have been developed in more detail in Esposito and Grundmann 2017.
[4] See pp. 96-107.
[5] Bearle and Means 1991 [1933]: 112-116, Alchian and Demsetz 1972: 782-783, Grundmann 2010: 1071 and JBuchanan, Chai and Deakin 2012: 40-61.

If one can thus show that the principal conception of investors is a particular instantiation of the concept of consumer sovereignty, the security of consumer sovereignty as an economic concept increases. At the outset, note that the concept of investor can be further specified in several ways, the most important being that between shareholders and other investors (bond-holders, banks via credit limits, etc.). As these distinctions do not matter for current purposes, they can be ignored. To complete the argument, it is now necessary only to qualify the investor as a consumer. This can be done straightforwardly. From an economic perspective, the consumer is often described as someone who gets[1] a good or service to satisfy a preference.[2] Each agent endowed with some wealth faces a choice: consume today or invest today to consume (hopefully more) tomorrow. Accordingly, the investor of today is the consumer of tomorrow.

Notably, the economic literature on the function of the firm is compatible with the argument just elaborated. In *The Nature of the Firm*, Coase explains the existence of the firm primarily[3] in terms of minimization of transaction costs. Using the simple motto introduced by Williamson, the firm decides whether to "make or buy" with the aim of minimizing costs. Now, the lower the costs, the higher the net returns—given the same value-output. Adding the premise that the directors are agents of the investors, we can conclude the higher the net returns, the higher the welfare of investors. Therefore, the directors, acting as agents of the investors, (should) identify the mix of making and buying that maximizes the returns of investors.

In light of the above, the principal conception of investors is an implication of the principal-agent relation between consumers and producers entailed by the consumer-welfare maximand. At the same time, the cost-minimization function of the firm is the counterpart of the cost-minimization function of the market. In both cases, minimizing costs is instrumental to maximizing the value of the economic activity in the interest of one party—respectively, the investor and the consumer. Thus, in both cases, there is a distributive concern in favour of one party that is not instrumental to the minimization of costs.[4]

At this point, one may argue, that there is an axiological conflict between these two principal-agent relations, one between the consumer (principal) and the producer (agent) and the other between the investor (principal) and the directors (agents). In this regard, the argument given in the Introduction, according to which the internal organization of producers is relevant from the

[1] I use deliberately the a-technical term "get" to take advantage of its vagueness. Other possible terms, like "buy", "purchase" or "use", remind one or another legal institution.
[2] Johnson 1958 and Milgate 2008.
[3] I say primarily because, in Coase's analysis, the firm and the market do not only have an instrumental value, but also an intrinsic value. That is to say, production is organized in part on the basis of the preference for a higher or lower taste for hierarchy.
[4] Note that the principal conception of investors is arguably a more stable proposition in the economics of law literature. Explaining this difference, albeit arguably interesting, falls outside the scope of this dissertation.

perspective of this dissertation only instrumentally, must be recalled. From this perspective, the investor of today—that is, the consumer of tomorrow—is more similar to the worker who is also a consumer on some other market. Imagine that Silvia—who has sold a beer to Charles in the Introduction—is an employee of Ernest's company. The economic claim holds that conflicts between Silvia and Ernest matter in terms of allocative efficiency only to extent their different solutions have a consequence for Charles's welfare.

The point remains that regardless of the type of internal organization of the firm, consumers are the residual claimants of the market process. A residual claimant is simply someone who is entitled to all the resources that remain once the factors of production are paid.[1] This is what happens in a competitive market: consumers pay the market price and then reap all the remaining welfare. Yet, there is a significant difference between being a residual claim in the market and being a residual claimant in the firm. The presence of residual claimants in a firm is important for having someone with the incentives and powers to monitor.[2] It is thus an instrumental reason for the minimization of production costs. Indeed, if one assumes the total-welfare maximand, then also having the consumers as residual claimants could be justified by instrumental reasons. However, if one assumes the consumer-welfare maximand, having the consumers as residual claimants is intrinsically valuable. Notably, the next subsection shows there are various conceptions of the principal-agent relation. And some of them are compatible only with the consumer-welfare maximand.

4.4 The informational rent trade-off and the ambiguities of principal-agent theory

This subsection discusses the relation between the economic claim of this dissertation and principal-agent theory.[3] This theory is topical in light of the awarding of the 2016 Nobel Prize for economics to Oliver Hart and Bengt Holmström and also particularly insightful for current purposes. In this

[1] Alchian and Demsetz 1972: 782 and Fama 1980: 281.

[2] Seminal, in this regard, is Alchian and Demsetz 1972. It is particularly noteworthy that they

> use the term monitoring to connote several activities in addition to its disciplinary connotation. It connotes measuring output performance, apportioning rewards, observing the input behaviour of inputs as means of detecting or estimating their marginal productivity and giving assignments or instructions in what to do and how to do it. (It also includes, as we shall show later, authority to terminate or revise contracts.) (p. 782)

The literature often fails to appreciate this point. In particular, it is attributed to Hölmstrom 1982 the idea that it is important to introduce in a firm incentive mechanisms that allow to break the budget of the people working in it (team) as a means to fight the imperfect knowledge of every team member with regards to the performance of the firm. However, while Hölmstrom has popularized the problem, it was already included in Alchian and Demsetz's notion of monitoring.

[3] Esposito and Grundmann 2017: 12-16 offers a more detailed, but less sophisticated version of the content of this subsection.

literature, the idea of a principal-agent relation is co-referential to the idea of a contract.[1] However, there is a certain degree of conceptual confusion on the criteria for identifying principals and agents. As we shall see, one of the versions of this theory fits particularly well with the economic claim of this dissertation.

In a principal-agent relation, the principal delegates to the agent the performance of an action. Information asymmetries represent the crux of the concerns. Information asymmetries are distinguished in two types. On the one hand, the asymmetry may relate to private information—that is, an information that is unknown to the counterparty. This situation is also called adverse selection or hidden knowledge. For example, the cost of production or the quality of an experience or reliance attribute,[2] are expectably unknown to the consumer. Conversely, the reserve price and the preferences of the consumers are expectably unknown to the producer. On the other hand, the asymmetry may relate to an action that the counterparty cannot observe, verify or evaluate. This situation is also called moral hazard or hidden action. The problem is generally related to a level of effort that is sub-optimal. An additional informational problem is sometimes considered to be that of a third party intending to verify the claims made by the principal and the agent.

A principal-agent relation is typically represented by a plan of action broken down in three parts: 1) a value function to be maximized, 2) an incentive-compatibility constraint and 3) a participation constraint. Incentive compatibility assures that the more informed party has a sufficient incentive to reveal the information, while the participation constraint is intended to ensure that the agent prefers to participate in the principal's plan rather than to accept someone else's offer. Together, the two constraints determine the set of incentive-compatible allocations. Among them, the optimal course of action is the one that maximizes the value function.

The central problem is that the party with the informational advantage can obtain an informational rent. This situation leads to a trade-off between informational rents and "efficiency".[3] Importantly, "efficiency" here is used in significantly different ways. One strand of the literature accepts total welfare as maximand. However, in the other, the maximand is the interest of the principal. Notably, if we qualify the consumer as the principal, these two strands of literature mirror the two axiological criteria at the centre of the economic claim of this dissertation, namely the maximization of total and consumer welfare.

[1] This is a marked difference with the (especially Anglo-American) debate over the relation between fiduciary duties and contracts. For example, see Markovits 2014 and PB Miller 2018.

[2] Reliance and experience attributes are unknown at the time of the contract. In case of reliance attributes, they remain unknown, so that the party must rely on the other. In case of experience attributes, the party learns about the attribute over time, for example due to repeated use or transactions.

[3] Malin and Martimort 2002: 159 and Laffont and Martimort 2001: 38. For further references, see Esposito and Grundmann 2017: 12-21.

There is also a second ambiguity in the principal-agent literature. While the previous ambiguity is axiological, the second is ontological and concerns the criterion for distinguishing principals and agents. The difference can be grasped by answering to the following question: in an insurance contract, who is the principal and who is the agent? Is it the case that the insurer company is the principal and the insured is the agent or is it the contrary? If you answer that the insurer company is the principal, most probably you will give as reason that it typically suffers from information asymmetries. If you answer that the insured is the principal, instead, the reason is that the insured delegates to the insurer the cover of the insured risk.

As the axiological and ontological criteria are not mutually exclusive, it follows that there are four different versions of principal-agent theory: 1) welfare maximization of the delegating principal; 2) welfare maximization of the uninformed principal; 3) total-welfare maximization with delegating principal; and 4) total-welfare maximization with uninformed principal. While conceptually all these uses are possible, it is nevertheless relevant to point out that there is a reason to find conception 1) more convincing than the others. According to conception 1), the principal delegates an action to the agent to maximize his own interest. For example, the insured delegates the risk to the insurance company to maximize his own interest. Consistently with the main claim of this dissertation, this account generates the hypothesis that in insurance law there is a distinctive concern for the interest of insured; for example, for making sure that insurance prices are low, or that equality between the contracting parties is restored. This account is perfectly cognizable and compatible with the economic claim of this dissertation—the insured is the consumer, the insurer the producer—and in particular with the concept of consumer sovereignty, which is also based on the idea of delegation of powers.[1]

For conception 2), the insurer is the principal. The maximand is then the welfare of insurance companies—that is, the producers. Obviously, this account does not fit with a consumer-welfare approach. But by caring for the transfer, neither does it fit with a total-welfare approach. The circumstance that the transfers are in favour of insurance companies instead of the insured does not make the point less incompatible with a total-welfare approach.

With conception 3), the insured is once again the principal, but this time the maximand is total welfare. The problem of this conception is that it becomes difficult to understand in what sense the insured is indeed a principal. In ordinary language, the concepts of principal and agent enshrine a hierarchy between the two actors, a hierarchy that is lost when total welfare is the maximizand. This problem is further exacerbated in conception 4), where the insurance company is a uninformed principal whose welfare is not the maximand. In this conception, the insurance company plays a

[1] See pp. 96-97.

secondary role both axiologically and informationally, so that it becomes bizarre to consider him as a principal. Indeed, it happens to be the case that linguistic uses falling under conception 4) are hard to find for the simple fact that they fall under a completely different and more neutral heading: information economics. In fact, mainstream information economics studies problems of information asymmetry and typically assumes a total-welfare standard.[1] This framework avoids completely to talk about principals and agents.[2]

The findings of this subsection are coherent with the findings of the previous one. Together, they show, at the very least, that it is possible to include in the axiological assumptions of economic analysis the idea that the transfer of welfare between the transacting parties matters. Moreover, this inclusion does not introduce an external equity constraint to a total-welfare approach, but rather includes considerations about transfers in the economic maximand.

4.5 The economic claim is warranted by textbooks and by the math

Economic textbooks seldom assume the consumer-welfare maximand. They explain the allocative inefficiency of the monopoly in terms of consumer harm.[3] Seldom, however, is not never. This finding is sufficient for warrantying the economic claim of this dissertation: since mainstream economists give different normative foundations to perfect competition, assuming any of them makes the explanation of market relations an economic one.

For example, Baumol and Blinder state that the "main reason for the strength of public reaction against monopoly" is that "a monopolist's higher price enables him to grow rich at the consumer's expense".[4] In addition, monopolistic output is "too small from the viewpoint of consumers' best interest" and it also "distort[s] consumer demand".[5] More thoroughly, Ison and Wall list three reasons why a monopoly is against "public interest". First, the reduction of output and the increase in prices. Second, the abnormal monopoly profits, instantiating "a redistribution of wealth from consumer to the producer which can be criticized on equity grounds". Third, barriers to entry imply a reduction in the incentives to minimize costs, thereby causing productive

[1] Seminal for this literature, Stigler 1961. For an overview from an EU law perspective, see Grundmann 2002.
[2] In light of these considerations, it seems that the following stipulation could be helpful to regiment the use of the terms "principal" and "agent" and bring some conceptual clarity. A principal is an actor that delegates an action to an agent to be performed in the interest of the former. Thus, allocative efficiency is about principal welfare. The problem is that of designing feasible allocations between the principal and the agent, that is allocations respecting the incentive compatibility and participation constraints of the agent. A central problem is that due to information asymmetries the interests of the principal and of the agent diverge. Importantly, information asymmetries are a problem from a total welfare perspective too. However, in this framework, as the goal is the maximization of total welfare, all the economic actors are simply principals.
[3] For further references, see Esposito 2013: 161, fn 51.
[4] Baumol and Blinder 1979: 442-443.
[5] Baumol and Blinder 1979: 443.

inefficiencies.[1] Notably, the first two reasons boil down to consumer harm straightforwardly. The reduction of output creates a contrived scarcity and thereby drives prices up. It is thus the cause of the transfers and distortionary effects caused by monopoly. However, the increase of costs caused by the monopolist's "quiet life", as Hicks called it,[2] is relevant from the perspective of the economic claim of this dissertation only to the extent that it makes consumers worse off. In the absence of this effect, the monopolist can organise his firm as he pleases to operate on the market. The concern for the productive inefficiency of monopoly is thus only instrumental from a consumer-welfare perspective.[3]

Interestingly, there is sometimes a tension between the maximand described in natural language and the one expressed by the mathematical formula. In particular I found this to happen in the analysis of product liability and of regulated industries. For example, Shavell, in the analysis of product liability, writes:[4]

> Let c be the direct production cost per unit of a firm's product, x the cost of care per unit of the product, s the quantity of the product produced and consumer, and u(s) the utility consumers obtain from the product. Then social welfare is $u(s) - s[c+x+p(x)h]$, where the term in brackets is the production cost, cost of care, and expected harm suffered by strangers per unit.

The equation introduced by Shavell assumes consumer welfare as the maximand! The impact of product liability on the market mechanism is assessed on the grounds of the difference between "the utility consumers obtain from the product" and the costs of producing it. Shavell, who is a leading authority on this topic, is in good company.[5] Geistfeld notes that this consumer-welfare maximand in disguise is the consequence of the fact that consumers both pay and get the benefits from the liability regime.[6] Perhaps, if asked, Geistfeld would give the same explanation also for regulated industries. Sometimes also here the maximand in ordinary language is total welfare, but then in the math it is consumer welfare. For example, Hagerman declares he is building a "total surplus maximization problem", but then imposes a profit cap, so that the formula actually maximizes consumer welfare.[7] The question then becomes: Why do we need to say that we are maximizing total welfare when we are actually maximizing consumer welfare? This framing seems to be the consequence of assuming that allocative efficiency has to be be about total welfare.

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[1] Ison and Wall 2007: 137-138.
[2] Hicks 1935: 8.
[3] See pp. 173-174.
[4] Shavell 2007: 156.
[5] Polinsky and Rogerson 1983: 582.
[6] Geistfeld 2009: 288.
[7] Hagerman 1990: 76. See also Cowan 2002: abstract and 174. For a more thorough discussion, see Esposito and De Almeida 2018.

For current purposes, what matters is not why there is a mismatch between ordinary language and the formulas. The point is that sometimes both in textbooks and in mathematical formulas the maximand is consumer welfare. This circumstance proves that it is just a small step for the economist to assume consumer welfare as the maximand. Sometimes they take this step without even noticing it—or, at least, without admitting it.

4.6 Assessing the impact of these five critiques

Before abandoning the placid waters of the mainstream to move to the third inquiry, it is important to stress how these five critiques support the economic claim of this dissertation.[1]

The distinction between gross and net deadweight loss makes the monopoly problem less alarming from a welfare perspective—regardless of whether the maximand is total or consumer welfare. However, its impact on total welfare is much harder. For the latter, the deadweight loss is all that matters. Thus, the smaller it is, the less likely it becomes that all the legal structures created to protect competition are justified by it.[2] On the contrary, from a consumer-welfare perspective, the harm done to both the distorted consumers (deadweight loss) and the exploited consumers counts.[3] Ultimately, this distinction makes total welfare a much less plausible rationale for market intervention.

Finding in total-welfare maximization the origin of the Pareto efficiency contradiction, strikes a powerful blow to the total-welfare maximand. Additionally, the consideration that one can solve the contradiction by rejecting the total-welfare maximand moves the burden of persuasion to the field of the total-welfare approach by asking how the contradiction can be solved from a total-welfare perspective. The considerations about the investor-consumer symmetry, the ambiguities in the principal-agent literature and the use of the consumer-welfare maximand in mainstream economic literature, support the economic claim of this dissertation directly.

The other sections of this chapter add further evidence in favour of the economic claim. Thus, the reader convinced by the economic claim of this dissertation might want to move directly to the next chapter, or perhaps to the conclusions of this one. This suggestion applies especially to

[1] According to Haack's foundherentist account of warranty, the first argument reduces the independent security of the total welfare maximand, the second the supportiveness it receives from mainstream economics, while the third and the fourth reduce the comprehensiveness of the evidence in its support.

[2] Imagine, for example, that the gross deadweight loss is 1 million EUR and the net deadweight loss only its half. A competition law enforcement capable of eliminating the deadweight loss that costs between 1 million and half a million EUR actually ends up reducing total welfare and it is therefore unjustified once our concern is for the deadweight loss only.

[3] Continuing the example of the previous footnote, if there is a redistribution of 2 million EUR, accepting this argument reduces the monopolistic harm from 3 million to 2.5 million EUR. Indeed, a much smaller reduction than for the wealth maximization rationale.

the legal scholars interested in finding out what Minimalist Law-and-Economics offers them. The next five sections are dedicated to the concept of consumer sovereignty.

5. Consumer Sovereignty: The Consumer is Sovereign, the Producer is Servant—The Third Inquiry Begins

This first section on consumer sovereignty shows that the concept supports the economic claim of this dissertation. Section 6 shows that consumers are not sovereign when markets fail. Section 7 discusses the main critiques moved to consumer sovereignty, Section 8 discusses the fortune of consumer sovereignty in the Austrian School of Economics, and Section 9 takes stock.

The first and most articulate account of consumer sovereignty I found is the legacy of the British economist William Hutt. Hutt was a student of Hayek at the London School of Economics and later became professor in South Africa. Hutt introduced the expression "consumer sovereignty" as early as 1934 and discussed it at length in his 1936 book *Economists and the Public Interest*.[1] In this discussion of consumer sovereignty, Hutt's scholarship is presented as the most important source not only because he was the first to discuss the concept explicitly, but because—as Section 7 shows—he has offered the most developed analysis of what "consumer sovereignty" means. Hutt defined "consumer sovereignty" as follows:[2]

> The consumer is sovereign when, in his role of citizen, he has not delegated to political institutions for authoritarian use the power which he can exercise socially through his power to demand (or refrain from demanding).

Mainstream economists of law—to the best of my knowledge—do not generally speak of consumer sovereignty.[3] This is hardly surprising. From their perspective, consumer sovereignty is an uncomfortable anomaly. First, there is an obvious distributive concern built in the concept of consumer sovereignty:[4]

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[1] The subject of the book is "th[e] problem of the limits of freedom" as related to "the province of the State in industry and commerce" (Hutt 1936: 249). Note that Hutt quotes the great legal positivist John Austin as reference for the concept of sovereignty. This is not the place to discuss this point thoroughly, but it is nonetheless important to stress that Herbert Hart's famous attack against "Austin's concept of sovereignty" does not harm the soundness of Hutt's analysis for the simple reason that Hart does not criticize Austin's actual thought but some sort of straw-Austin—as Hart recognises; see in particular, Hart 1994 [1961]: 74 and compare it with Austin 1995 [1832]: 185.

[2] Hutt 1936: 257. Quoted *verbatim* in Buchanan 1988: 6, Persky 1993: 185 and Munier and Wang 2005: 66.

[3] Exceptions are Cseres 2005 and Parisi 2013. For a critical account of their use of the concept, see Esposito and Grundmann 2017: 6-8.

[4] Hutt 1940a: 70, 1936: 311: "in replacing the idea of economic welfare by that of consumers' sovereignty, we have not destroyed the significance of most utility studies. … We have, however, introduced a concept which greatly enhances the realism of economic theory. … Incidentally, it brings economic science much more vividly into relation with political science". Buchanan, in his homage essay to Hutt, defines consumer sovereignty as the criterion according to which "[v]alue to consumer of final products and services … may be used to make the distinction between voluntary agreements that pass the ultimate value test and those that do not" (JM Buchanan 1988: 6).

> [T]he only test of the desirability of a given flow of production is the utility to consumers … [while] the sacrifices and discomforts of the producers (or, for that matter, the happiness and satisfactions they derive from their work) are of no relevance whatever from the point of view of total welfare.

In other terms, Hutt considers consumer choices as the choices regarding which ends should be pursued on the market and producer choices as the ones regarding the best means for pursuing them.[1] Moreover, the citation shows a trend we have seen also in Section 4.5, namely that when economists refer to total or social welfare, what they mean is actually consumer welfare.

From a consumer sovereignty perspective, Hutt summarized the relation between consumers and producers brilliantly: "[a]s consumer the individual is sovereign; as producer he is subject".[2] Consumers' "orders are based upon a distribution of economic power (i.e. income)":[3] "[c]onsumer sovereignty is the stimulus to which productive effort is a response".[4] This stimulus is backed-up by "the most important form of social coercion",[5] namely, "obtain[ing] nothing in the form of claims on others in return"[6] and being ultimately excluded from the market. Why consumer sovereignty, one may wonder. Hutt answered that "the supremacy of the consumer over the producer may be justified on the grounds that every individual is, after all, not only a producer but a consumer—that every individual is not only a subject but sovereign".[7] It is, in other terms, a consequence of the division of labour and the specialization it implies.

Hutt thus rejects the irrelevance of transfers and the only argument offered in support of the total-welfare maximand that is well-formed, namely, that of the normative neutrality between consumers and producers. He does so by offering a broader view of the market mechanism, in which each and everyone of us is sovereign as consumer, and servant as producer. Without a doubt, these observations lead to the conclusion that, at least in Hutt's original articulation, consumer sovereignty requires to use consumer welfare as maximand in the efficiency analysis of a market allocation.

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[1] Hutt 1940a: 68. See also Faser 1939: 5, Hildebrand 1951: 21 and 32, Kaldor 1951: 4, Reekie 1988: 6, Rothenberg 1962: 270 and Persky 1993: 188.
[2] Hutt 1936: 257. Similarly, Hildebrand 1951: 21 and Persky 1993: 187. In reviewing *The Economist and Public Interest*, Viner observes that Hutt conceives of the "entrepreneur … as merely a medium through which the edicts of the sovereign consumers are transmitted to the productive agents" (Viner 1938: 572). See also Redmond 2000: 179.
[3] Hutt 1936: 99.
[4] Hutt 1936: 260.
[5] Hutt 1936: 259.
[6] Hutt 1936: 257.
[7] Hutt 1936: 262.

6. Market Failures Overthrow the Sovereign Consumer

What is the relation between consumer sovereignty and market failures? Lowery observes that consumer choices can be inconsistent with consumer sovereignty "if there are too few competitors, if preferences are ill-informed or are biased by manipulation or by externalities".[1] In other terms, consumer sovereignty is limited when markets fail. The connection between consumer sovereignty and market failure is important because to identify a market failure one needs to identify first what a market should do.[2] If market failures overthrow the sovereign consumers, consumer sovereignty justifies the correction of market failures. In other words, if markets are well-functioning, consumers rule.

Hutt considers "competitive institutions" as "enabl[ing] the fullest realization of consumer's sovereignty".[3] Monopoly power instead implies a "frustration of consumer's sovereignty".[4] To this regard, Hutt quotes twice J.B. Clark[5] in stating that "'monopoly, not competition' … 'infuses into distribution an element of robbery'".[6] Indeed, producers' bargaining power reduces the domain of choice of the consumers.[7]

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[1] Lowery 1998: 165. For Gintis 1986: 99 the issues discussed in this subsection represent the "deeper problems in the contemporary theory of consumer sovereignty".

[2] Bork 1978: 50. See also pp. 82-83, above.

[3] Hutt 1940a: 73; "it is under competitive institutions that we find [the] full and untrammelled realization" of consumer sovereignty (Hutt 1936: 261, see also 314). Consumer sovereignty "requires the market mechanism and a perfectly competitive price system" (Hildebrand 1951: 20); consumer sovereignty "rests on a value judgment—that it is desirable that consumers should control the economic system—and also on a factual assertion, that in the absence of governmental or other interventions, they do in fact so control it through the price system" (Knox 1960: 138); "consumer sovereignty without competition is sterile" (Adams 1962: 278); consumer sovereignty means that "in a given economic context production is conditioned by the satisfaction of an autonomous set of consumer needs, which are the *final ends* of economic activity" (De Strobel 1970: 39, translation by the author); "consumer sovereignty is the state of affairs that prevails or should prevail in a modern free-market economy" and it consists in consumers "having the power to define their own wants and the opportunity to satisfy those wants at prices not greatly in excess of the costs borne by the providers of the relevant goods and services" (Averitt and Lande 1997: 717); "[b]uyers are portrayed as having unprecedented power to avoid goods and services they do not want, shape those they do want to individual taste, and shop around for the best price-quality combination" (Shipman 2001: 331); consumer sovereignty is "the *deus ex machina* solving all resource allocation problems: which factors of production are employed, and how; for producing which goods and services, for determining the price" (Vaciago 2006: 823, translation by the author).

[4] Hutt 1940a: 76. "Monopolies strike at the heart of consumer sovereignty by eliminating competition" (Lowery 1998: 7); "[i]f monopolistic conditions are pervasive, consumer sovereignty is *pro tanto* diminished" (Adams 1962: 265); "[a] purely competitive market system in its ideal form would be the most efficient in solving the allocation problems in a system of consumer sovereignty" (Knopf 1991: 53); "[i]t is axiomatic that perfect competition, the perfect functioning of a competitive market, will maximize the welfare of consumers" (Averitt and Lande 1997: 724); "[u]nder ideal conditions, then, markets both provide consumer sovereignty and are justified by it" (Lowery 1998: 5).

[5] J.B. Clark (1884 – 1963) was an American neoclassical economist.

[6] Hutt 1936: 99-100; at page 261 he adds: "[t]he individual who possesses a large share of the physical agents of production will reap a large personal return therefrom, and that return may be indefensible on the grounds of distributive justice".

[7] Fig. 1 shows this. In perfect competition, supply and demand would meet at point C. Thus, the price and quantity (Q_c, P_c) would be determined by the costs of production and by consumer demand. Consumers would therefore determine the quantity produced, and the price would be the same with higher or lower demand (the supply curve is flat). In a monopoly, the quantity and the price (Q_m and P_m) are determined by choices made by the monopolist in the pursuit of its profit-maximizing agenda. According to this agenda, consumer preferences play the role of mere factual constraints instead of being the pursued ends. At point M, the marginal revenue of the monopolist equals its marginal costs. In

Information asymmetries limit consumer sovereignty straightforwardly.[1] A non-informed consumer ignores some attributes of the available goods or services. Therefore, it is unlikely that he is going to identify the optimal product or service according to his preferences. Moreover, through manipulation, producers influence the preferences of the sovereign consumer. Therefore, to some extent, the producer chooses the ends and not only the means of the economic process thereby overthrowing once again the consumer from the market throne. According to Hutt, the "de facto influence of producer's propaganda upon consumer's preferences" is an undue hindrance to consumer sovereignty.[2] Before the diffusion of behavioural insights, the modern discussion of this point built on the scholarship of the Nobel Prize laureate John Kenneth Galbraith. Rational choice theory does not allow for manipulation. Preferences are exogenous to the economic system and consumers "know it all".[3] Galbraith's view, instead, moves from the claim that markets show a dependence effect, in the sense that "wants depend on the process by which they are satisfied".[4] It follows that "[o]ne cannot defend production as satisfying wants if that production creates the wants".[5]

A similar argument applies to bounded rationality. These bounds imply mistakes and detrimental choices. Hutt dedicated two chapters of his book to this problem. In his view, it is normal that preferences are influenced and determined by the environment and this does not entail that the consumer is not a sovereign.[6] Still, for Hutt "the desire to improve taste and morals [is] a higher task than the desire to minister it".[7] Notably, not only children but also adults sometimes have to be protected from their own choices.[8] In such circumstances, Hutt accepted to have a non-sovereign consumer. As we shall see below, a more substantive notion of consumer sovereignty, also available in the literature, implies that in cases of bounded rationality the consumer is still sovereign when the legal system intervenes in his or her interest.

Finally, also externalities are considered a limitation for consumer sovereignty.[9] Even assuming rational choice theory and all the other elements of the perfect competition model,

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monopoly, the producer's choice determines prices and quantities according to the producer's interest. Had the sovereign consumers determined the market outcome, prices and quantities would have been the competitive ones. It follows that in case of monopoly, the consumer is not a sovereign about prices and quantities.

[1] Solverson 1969: 1247, Rothchild 1998: 288-290 and Shipman 2001: 332. Hutt, however, does not discuss the concept explicitly.

[2] Hutt 1940a: 71.

[3] Luth 2010: 41.

[4] Galbraith 1976: 131.

[5] Galbraith 1976: 126-127. The dependence effect implies that "in a market economy and because of the development of marketing tools and advertising, the … consumer has lost his sovereignty" (Munier and Wang 2005: 65).

[6] Hutt 1936: 282-286.

[7] Hutt 1936: 288.

[8] Hutt 1936: 273-276.

[9] Hutt 1936: 276-278. See also Knox 1960: 143, Rothenberg 1962: 271, Lerner 1972: 2 and 7, Hamlin 1986: 2-3, Lowery 1998: 19 and 25 and Korthals 2001: 202.

externalities require regulation. Negative externalities impose costs outside the market process. Positive externalities imply that the market mechanism is bypassed by opportunistic free-riders and therefore quantity and price are not optimal for willing to pay consumers. In both cases, the market process responds imperfectly to the "orders" issued by sovereign consumers.

7. Consumer Sovereignty and Its Critiques: Freedom and Citizenship

The concept of consumer sovereignty has received several critiques. These critiques can be divided in two groups. The first group reduces the concept of consumer sovereignty to an unconstrained exercise of will.[1] The second group problematizes the relation between the normative roles of consumer, producer and citizen. The critics here claim that consumer sovereignty is not the conclusive normative criterion.

The accommodation of these critiques reinforces the security of consumer sovereignty and, therefore, the warranty of the economic claim of this dissertation.

7.1 Freedom. Does anything else matter?

From a consumer-welfare perspective, consumer choice plays an important role, but an instrumental one. Consumer choices are good if they increase consumer welfare. The instrumental dimension of choice is however questioned in the consumer sovereignty literature. One line of critique narrows the scope of consumer sovereignty and holds that consumers are sovereign even when there are transfers to producers. The other goes in the opposite direction and holds that consumers are sovereign also when others decide in their interest.

Some uses of the expression "consumer sovereignty" suggest that for a market exchange to be consistent with consumer sovereignty it is necessary and sufficient that consumers indirectly determine the characteristics of what is produced.[2] The implication is that transfers from the consumers do not matter and the total-welfare maximand is back into business. However, the previous section shows that Hutt and part of the literature consider transfers an important obstacle to consumer sovereignty; prices matter too: if the market is to exalt the consumer as sovereign,

[1] This group of critiques is very close to positions already seen in support of the Pareto rationale of contracts and in the related normative reading of the bargaining theory that leads to the Pareto efficiency contradiction. SeeChapter 2, Section 4.1 and Chapter 3, Section 4.2, above.

[2] See Weisbrod 1959: 157, Moffat 1976: 60, Hicks 1981: 140, Knopf 1991: 53, Pearce 1992: 78, Munier and Wang 2005: 66-67, Waldfogel 2005: 691 and Weimer 2017: 1.

prices need to be the lowest—that is, in line with costs. If not, consumer preferences are not the end pursued by the producers, but a mere constraint to their agenda.[1]

Moving to the issue of the value of choice, one finds a diversity of opinions, presented here from the less to the most critical of consumer sovereignty. Persky, for example, limits (but does not deny) the role played by welfare considerations in Hutt's view. Instead, the author emphasizes the feeling of free, impartial and impersonal treatment that accompanies the market mechanism.[2] True, Hutt stressed that the price system is consistent with free, impartial and impersonal treatment and that these elements have moral value.[3] Indeed, Hutt applauds the impartiality and impersonality of liberty in general and particularly in the market.[4] However, it seems more accurate to consider these values as reasons useful for explaining why firms (and individuals more generally) are likely to accept their subordinate role in the economic process when they are producers.[5] Accordingly, freedom plays primarily an instrumental role. Moreover, freedom is central but is not all that matters; Hutt considered also equality of opportunity a necessary condition—under feasibility constraints, given by "the necessity for gradualness in social change, and the present folly of mankind"[6]—for market forces to be impartial.

More radically, Sugden proposes to reformulate consumer sovereignty to reconcile it with the descriptive crisis of rational choice theory. In his view, "value is attached to the size and richness of an individual's opportunity set"[7] and not to utility.[8] Sugden's approach shows that once rational choice theory is questioned, one is forced to search for new ways.[9]

7.2 Consumers and citizens

Hutt and the concept of consumer sovereignty have been charged of reducing individual welfare to consumer welfare, thereby ignoring the importance of other social values.

Fraser offers an early example of this critique. In his review of *Economists and the Public Interest*, Fraser rejects the idea that consumer preferences are "in principle more important" than producer preferences. He further adds that sovereignty "rests … with men and women who are potentially consumers *and* producers". Consumption, moreover, is just a "means to a further end …

[1] See pp. 98-100.
[2] Persky 1993: 188-189.
[3] Hutt 1940a: 71, 1936: 268.
[4] Hutt 1936: 249-255.
[5] Curiously, even Persky 1993b: 17-18 argues in this way and observes that Hutt argued this way too.
[6] Hutt 1936: 256. The problem of equality is further discussed by Hutt in a dedicated chapter (Hutt 1936: 313-347).
[7] Sugden 2004: 1016. This proposal comes very close to Sen's capabilities approach, although Sugden does not discuss the point.
[8] Sugden 2004: 1021. This is a view shared also by some critiques of consumer sovereignty that ignore the instrumental value of preferences. See, for example, Gamble 1997: 323 and Schubert and Chai 2012: 2.
[9] See pp. 67-68.

the good life" which covers also working conditions.[1] This latter point was also the main thrust in Viner's review. Viner, however, expresses his critique in terms of limitation of the scope of the analysis while he "subscrib[ed] heartily to all the major items of [Hutt's] specific program".[2] Similarly, in our days, Sunstein believes that consumer sovereignty is at the core of the claim that "market arrangements are sufficient for purposes of promoting citizen welfare".[3] In his view, however,[4]

> [t]he idea of "consumer sovereignty" is too contestable and too vulnerable to be challenged by those who stress limited information, bounded rationality, and the difference between the decision people make as citizens and those they make as consumers. … [I]t should ultimately be possible, first, to obtain an incompletely theorized agreement on the need for cost-benefit analysis and, second, to obtain incompletely theorized agreements on certain understandings of what cost-benefit analysis entails.

A related critique contends that consumer sovereignty is not tantamount to a social welfare function and, therefore, it is not a conclusive normative criterion. The critics conclude that consumer sovereignty cannot be endorsed.[5]

These critiques are not charitable—at least, when moved to Hutt's seminal scholarship. On the citizen-to-consumer reduction, suffices to recall that, already in his definition of consumer sovereignty, Hutt made clear that the citizen is a distinct social role and the individual exercises power in both market and political spheres;[6] he could not have been more explicit on the point:[7]

> Electors' sovereignty and consumers' sovereignty under democratic institutions are complementary. The individual's autonomy is expressed within the limits imposed by both. They cannot be considered apart.

Also the critique that consumer sovereignty is not a conclusive normative standard does not bite. First of all, as seen, bounds of rationality imply that overthrowing the sovereign consumer can be in his own interest. Second, Hutt clearly stated that he did "not claim … that because an event is a response to consumers' sovereignty it represents a solution of the social problem which maximizes some good derived from ethical, aesthetic or other metaphysical considerations".[8]

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[1] Fraser 1939: 546-548.
[2] Viner 1938: 575.
[3] Sunstein 1999: 203.
[4] Sunstein 1999: 209-210.
[5] Rothenberg 1962: 271 and Gintis 1972: 273. However, it is interesting that in Gintis 1988: 98 it is (apodictically) stated that "[t]he principle of consumer sovereignty holds first that social welfare is improved if at least one individual is made better off and no one is made worse off (the Pareto criterion), and secondo that individuals are the best judge of when they are better off".
[6] Hutt 1936: 257.
[7] Hutt 1936: 311.
[8] Hutt 1936: 267.

These problems can be better discussed in the context of Chapter 4. In fact, the translation claim will place consumer welfare in relation with the neo-Aristotelian distinction between commutative and distributive justice. From this perspective, finding that a certain argument does not fit in a consumer-welfare approach is not a significant objection to it unless it is also proven that it is not accountable in terms of distributive justice. Accordingly, it was seen in the Introduction that the conflict capital-labour can be relevant from a consumer-welfare perspective if it improves the quality of the offers to consumers. Otherwise, it can still be articulated as a matter of distributive justice.

This approach allows to give a better reply than Hutt's original one to the issue, stressed by his reviewers, of the importance of considering the working conditions. Hutt replied that in demanding better working conditions, the individual acts as a consumer (of working conditions).[1] I find more plausible to say that the individual asking better working conditions is making a claim in terms of distributive justice.

7.3 Consumer sovereignty between independence and welfare

Some critiques put into the spotlight the tension between the consumers' freedom of choice and their welfare in the literature on consumer sovereignty.[2] One can wonder whether a choice made in the interest of a consumer by someone else is consistent with consumer sovereignty in two different ways. In terms of labelling, the question is if in such cases the consumer is still sovereign or not. In normative terms, instead, the question is whether this intrusion is justified or not. One could argue that the consumer remains sovereign in both cases because his welfare, even if sometimes defined by others, is still the reason that justifies the outcome.[3] I call this solution the welfare conception of consumer sovereignty.

Hutt, however, gave different answers to the two issues. For Hutt, consumers are sovereign when their actual choices determine market outcomes.[4] However, for him consumers can make poor choices, harming themselves and a paternalistic regulation is therefore justified. That is to say, in

[1] Hutt 1940a: 69-70.

[2] For example, note the uneasiness expressed by the comments in Berson, Wellinsz and Baumol 1962 to Scitovsky 1962 and Rothenberg 1962 on the implication of the non-universal validity of the claim that "the overt preferences of any household such as might be expressed in the market are more or less indicative of the utility the household realizes from personal consumption".

[3] This is the direction taken by the critical analysis in Hamlin 1986 and Penz 1986. Hamlin 1986: 28: "[o]nce the notion of consumer sovereignty is extended to include indirect actions which may take the form of setting up social institutions which appear to restrict individual choice, then consumer sovereignty reemerges as an attractive principle"; Penz 1986: 2: "[t]he interest conception of consumer sovereignty makes it apparent that the basic question in assessing the principle of consumer sovereignty is whether consumer preferences are an adequate representation of interests and, if not, how they have to be extended, qualified, or replaced to provide such an adequate representation".

[4] Hutt 1936: 260-265, 278, 286; in particular, at 265: the consumer tries "to achieve the fullest realization of his preferences, whatever they may be".

these cases, there is an economic *prima facie* reason for market behaviour regulation. However, the consumer is not a sovereign anymore.[1] Hutt's version of consumer sovereignty can be named independence conception of consumer sovereignty.

Admittedly, we face two concepts of consumer sovereignty. However, for current purposes, the disagreement is merely a matter of semantics. Both the welfare and independence conceptions of consumer sovereignty are included in a conceptual framework putting the welfare of the individual acting as consumer at the core of their normative account of market relations. Thus, they are both consistent with the consumer-welfare approach and thus support the economic claim of this dissertation. Consequently, there is no need to deepen the analysis of the concept here.

8. Consumer Sovereignty in Austrian Economics

Given that Hutt was Hayek's student at the London School of Economics, it is interesting to look at the relation between consumer sovereignty and Austrian Economics. The relation between mainstream and Austrian economics cannot be discussed here. What is clear, however, is that Austrian economists, in comparison to mainstream economists, are more comfortable in considering economics a normative discipline and a branch of ethics.[2] We start from Hayek because he was Hutt's mentor and then consider also the thought of Ludwig von Mises, as they are the two most prominent Austrian economists.[3]

Hayek has never offered a definition of consumer sovereignty, but he entitled *Abrogation of the Sovereignty of the Consumer* a section of his concluding essay in the famous 1933 edited volume *Collectivist Economic Planning*. To analyse that discussion, it is useful to start from Hayek's clear articulation of the market rationale in the 1948 essay *The Meaning of Competition*:[4]

> The function of competition is here precisely to teach us who will serve us well: which grocer or travel agency, which department store or hotel, which doctor or solicitor, we can expect to provide the most satisfactory solution for whatever particular personal problem we may have to face.

[1] Regarding both Hamlin and Penz, the disagreement is arguably just a matter of labelling. In fact, Hamlin—who does not refers to Hutt's work—does not take into account the duality of sovereignty between citizen and consumer. Still, he adopts the distinction between consumer sovereignty at the practical level and critical level. More precisely, restrictions of consumer sovereignty at the practical level "can be seen at the critical level to be capable of being derived from consumer sovereignty" (Hamlin 1986: 7); "[i]n this way consumer sovereignty may restrict its own domain" (Hamlin 1986: 11). Penz, instead, refers to the work of Hutt, but only to the chapter of Hutt 1936 on consumer sovereignty; this surprising choice helps to explain why the author is blind to the complex relation between consumer and citizen sovereignty. In fact, that relation is discussed in other parts of the book. Interestingly, the reviews of Penz's book—Gintis 1988 and McCain 1988—are silent on this omission.

[2] For an overview, see Cubeddu 1993.

[3] Perhaps one might want to add Carl Menger.

[4] Hayek 2013 [1948]: 109.

This is a restatement of the concept of consumer sovereignty as discussed by Hutt. And indeed, in 1933, Hayek points out that abandoning the competitive system would imply a substitution of the stimulus to economic activity given by demand with central economic planning.[1]

The concept of consumer sovereignty is central to Mises's work. In his monumental *Human Action: A Treatise in Economics*, there is a section entitled *The Sovereignty of the Consumers*.[2] In the first paragraph we read that producers "are bound to obey unconditionally the captain's orders. The captain is the consumer".[3] Thus, producers act as agents of consumers, under the threat of the refusal to buy; where the sanction is loss and, ultimately, bankruptcy.[4] This mechanism fails under monopoly.[5] Thus, both Hayek and Mises have an understanding of the market mechanism based on a notion of consumer sovereignty very much in line with Hutt's.

It must be noted that more recent "Austrian"[6] economists follow Rothbard's critique of the normativity of consumer sovereignty.[7] Rothbard begins by denying any coercion imposed by consumers over producers.[8] In his view,

> [r]ather than "consumers' sovereignty," it would be more accurate to state that in the free market there is sovereignty of the individual: the individual is sovereign over his own person and actions and over his own property. This may be termed individual self-sovereignty.[9]

Every price agreed upon is voluntary, continues Rothbard, whereas every price imposed by the state is coercive and, therefore, to be condemned. Unhappy with this libertarian critique, Rothbard moves to the ontological level to claim that the analytical distinction between consumer and producer does not hold.[10] Additionally, the monopolist behaves as any other producer—he seeks profits—and the fact that consumers are willing to pay more demonstrates that the monopoly is "value-productive, to consumers".[11] As a consequence, also under monopoly, the agreement is freely made, mutually beneficial and thus there is no exploitation.[12] In this regard, even if a monopolist were to decide to

[1] Hayek 1933: 214-217.
[2] According to Gunning 2009a, the concept of consumer sovereignty is at the core of Mises's economic theory. Both Gunning 2009a and Sanchez 2012 indicate further references endorsing consumer sovereignty in the Austrian School.
[3] Mises 1996 [1963]: 269.
[4] Mises 1996 [1963]: 270-271.
[5] Mises 1996 [1963]: 272.
[6] Inverted commas are necessary because, first, the critics are not Austrian nationals and second because it has been argued by Gunning that the critique against consumer sovereignty implies a rejection of Austrian economics (Gunning 2009b).
[7] Shenfield 1986: 97-98; RP Murphy 2003. Paradoxically, the first reference is a chapter in the—sadly short—*Liber Amicorum* for William Hutt, and the publisher of the second reference and of Rothbard's book is *The Ludwig von Mises Institute*.
[8] Rothbard 2004 [1973]: 629.
[9] Rothbard 2004 [1973]: 630 (italics and citations omitted).
[10] Rothbard 2004 [1973]: 634-636.
[11] Rothbard 2004 [1973]: 638-639.
[12] Rothbard 2004 [1973]: 636.

destroy part of his stocked goods to increase prices, there would be no problem.[1] To his credit, Rothbard's analysis has the advantage of avoiding the Pareto efficiency contradiction because it rejects proposition (¬1).

There are at least two ways of replying to Rothbard's critique. The first is that his libertarian account is simply not fitting with legal practice, nor it is fitting with the normal understanding of basic notions of human decency, so that it simply results in a poor account of fair market relations. His denial of the possibility of unfair agreements is just as irritating as the denial by the total-welfare narrative. The second, more sophisticated critique emphasizes that Rothbard builds an argument that is incompatible both with a consumer and a total-welfare approach. In fact, both approaches do distinguish between perfect competition and monopoly, albeit for different reasons. Additionally, the example of a monopolist destroying stocks clearly shows that he also rejects the distinction between natural and contrived scarcity. As seen in the Introduction, the distinction between natural and contrived scarcity raises some conceptual problems, but it definitely captures the idea—that Rothbard rejects—that there are different types of scarcity, and while some are unavoidable, others are and ought to be avoided. This discussion nevertheless is useful to the extent it brings into centre stage the fact that individual freedom cannot be unlimited from neither a total- nor a consumer-welfare perspective.

9. The Economic Pedigree of Consumer Sovereignty—The Third Inquiry Ends

Is consumer sovereignty an idiosyncratic proposal William Hutt was the first to formulate? He denied. In his view, consumer sovereignty is a "fundamental notion … implicit, but seldom clearly stated, in applied economic writings in the orthodox tradition".[2] As we shall discuss in Section 10 .1, the concept can be traced back at least to Adam Smith himself.[3] Moreover, the economic literature on the concept is extensive and it encompasses contributions by highly renowned economists;[4] even economic textbooks discuss the concept;[1] and the concept plays a pivotal role

[1] *Ibidem*.

[2] Hutt 1940a: 67. Hutt 1936: 34 had already explained that "[h]is book is as much a criticism as a vindication of those who have been led to build on the traditions of orthodoxy"; in fact he considered as the "main task of the economist or any other genuine social philosopher in th[o]se days … to determine the origin and then attack the false beliefs which actuate the society in which he finds himself" (Hutt 1936: 38).

[3] Hutt 1936: 261, see also 123; compare the critique to the importance of producer's interests in A Smith 2007 [1776]: 426 with Hutt 1940b: 428. See also Bymers 1982: 195, Reekie 1988: 6, JM Buchanan 1988: 6, Persky 1993: 184, Rutherford 2013: 113. Reekie 1988: 3 states that "[b]y the mid-nineteenth century Smith's views had prevailed"; De Strobel 1970: 7 remarks that "[e]conomists have always stated that consumption is the ultimate end of production" (translation by the author; see also 21-28). It is particularly important that this view is expressed also in Iain Ramsay's entry "consumer protection" of *The New Palgrave Dictionary of Economics and the Law*: "consumer protection reflected Smith's statement that 'consumption is the sole end and purpose of all production'" (Ramsay 2002: 410).

[4] The literature on the concept includes contributions by two Nobel Prize laureates (Buchanan and Galbraith) and other pivotal figures such as Berson, Scitovsky, Lerner, Hicks, Sugden and Sunstein; some of the consulted sources are

also in the thought of the most prominent Austrian economists. For current purposes, it is particularly important to stress that both John Hicks and Nicholas Kaldor refer to consumer sovereignty in a way which is straightforwardly compatible with Hutt's original conceptualization.[2] All this is important for the economic claim of this dissertation. The stronger the economic pedigree of the concept of consumer sovereignty, the more secure is the warranty to the economic claim of this dissertation.[3]

Before drawing the conclusions on this point, a final piece must be added to the puzzle: a tailored review of the history of economic thought. This review generally increases the warranty of the economic claim, because it shows that consumer welfare plays an important role in the history of economic thought, although it was made apocryphal by the mainstream account of this history.[4]

10. Consumer Welfare in Mainstream Economic Thought—The Fourth Inquiry

The fourth and final inquiry of this chapter is a tailored review of the thought of economists particularly important for mainstream economics of law.[5] This list includes, chronologically: Adam Smith, Alfred Marshall, Vilfredo Pareto, Arthur Pigou, John Hicks, Nicholas Kaldor, Frank Knight, George Stigler, and Ronald Coase. Indeed, many other economists could be added to this list—for example, Ricardo, Wàlras, Friedman, Arrow, Williamson, Hart, Thaler. However, this list is rich enough for giving a sense of the relation between the economic claim of this dissertation and the history of mainstream economic thought.

The discussion will address two points: why the scholarship of the author matters for mainstream economics of law, and what is the role of consumer welfare in his understanding of the market rationale.

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published in top economics journals such as *The American Economic Review*, *Economica*, *The Economic Journal*, *Journal of Political Economy*, *The Journal of Economic Perspectives*, *Review of Social Economy*, *Journal of Consumer Policy*. *The Palgrave Dictionary of Economics* does not have a "Consumer Sovereignty" entry, but the expression is used seven times and it appears in some key entries concerned with normative economics, like "Ethics and economics", "Pareto efficiency", "The socialist calculus debate". William Hutt is quoted twice, only once in relation to consumer sovereignty. Also other economic dictionaries mention the concept.

[1] See, for example, Wetzstein 2013: 23-25 and Boyes and Melvin 2008: 75-76.

[2] Kaldor 1950: 4 and Hicks 1981: 140.

[3] "Secure" and "warranty" are used in the technical sense given them by Susan Haack. See p. 12, fn 1.

[4] Stefan Grundmann suggested the expression "hidden in the mainstream". I have ultimately preferred the term "apocryphical".

[5] Indeed, as "importance" is a vague term, importance ultimately rests in the mind of the beholder.

10.1 Adam Smith

Adam Smith's (1723 – 1790) relevance is all too obvious. Many associate him with the invisible hand and the idea that markets are inherently good. For example, the entry "Welfare economics" in *The New Palgrave Dictionary of Economics* opens as follows:[1]

> In 1776, the same year as the American Declaration of Independence, Adam Smith published The Wealth of Nations. Smith laid out an argument that is now familiar to all economics students: (a) the principal human motive is self-interest; (b) the invisible hand of competition automatically transforms the self-interest of many into the common good; (c) therefore, the best government policy for the growth of a nation's wealth is that policy which governs least.

The author of this entry goes all the way to calling "pro-Smithians" the supporters of what he labels as laissez-faire policies.[2] However, what is not so often recalled is Smith's pro-consumer understanding of the "common good" fostered by competition.[3] In *The Wealth of the Nation*, he wrote:[4]

> Consumption is the sole end and purpose of all production; and the interest of the producer ought to be attended to, only so far as it may be necessary for promoting that of the consumer. The maxim is so perfectly self-evident, that it would be absurd to attempt to prove it.

Smith could not have been clearer in placing consumer welfare at the centre of his normative analysis of the market. Moreover, Smith distinguished the exchange-value of goods in the one identified by "market price"—the actual price of a commodity—and the one identified by "natural price":[5]

> [W]hen the price of any commodity is neither more nor less than what is sufficient to pay the rent of the land, the wages of labour, and the profits of the stock employed in the raising, preparing and bringing it to market, according to their natural rates, the commodity is then sold for what may be called its natural price.[6]

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[1] Feldman 2008.

[2] That is "economic policies involving deregulation, tax reduction, denationalizing industries, and reduction in government growth in Western countries; and in the deliberate restoration of private markets in China, the former Soviet Union and other eastern European countries".

[3] From this perspective, it is unsurprising that the passages referred to in the next footnote have not been included in George Stigler's 1987 *Selections for the Wealth of Nations*. For a brief overview of the "Uses and Abuses of Adam Smith", see Sen 2011 and for a book-long analysis, see Farina 2015.

[4] A Smith 2007 [1776]: 426; see also 85, 162-163, 318.

[5] A Smith 2007 [1776]: 19.

[6] A Smith 2007 [1776]: 36. On the concept of natural price, see Vaggi 2008. Similarly, Hutt distinguished price in those based on natural scarcity as opposed to those based on contrived scarcity (Hutt 1934, 1935). The former is the competitive price (Hutt 1936: 266). In my understanding, Harcourt 2011 has missed the opportunity to consider the importance of this concept in his critique of Chicago economics and Economic Analysis of Law. The author mentions the expression only once, and in a footnote.

In Smith's system, the concept of natural[1] price is the bridge between competition and the consumer interest. When the exchange-value is set at the natural price, the condition that "the interest of the producer ought to be attended to, only so far as it may be necessary for promoting that of the consumer" is satisfied. Thus, the consumer interest has maximum satisfaction, with the only constraint of voluntary cooperation—embodied by Pareto efficiency.[2] Indeed, just as the consumer-welfare maximand requires. Had Smith been alive today, it is expectable that he would have been critical of the total-welfare approach and—as odd as it may sound—he might have been classified as a heterodox economist.

10.2 Alfred Marshall

Alfred Marshall (1842 – 1924) held the Chair of Political Economy at Cambridge.[3] Marshall introduced, or at least contributed to introduce, the concept of surplus, that is central to the normative irrelevance of transfers and upon which Posner's notion of wealth maximization is built.[4] David Friedman (Milton's son), offers a spirited defence of wealth maximization associating it with Marshall.[5] Unfortunately, Marshall would not have endorsed such a defence.[6]

About the market rationale, Marshall's discussion of consumers' demand opens with a statement very close to Hutt's consumer sovereignty: "[t]he ultimate regulator of all demand [that is, of production and consumption choices] is therefore consumers' demand".[7] Besides, an essential element of a market is, according to Marshall, equal exchange price: "the more nearly perfect a market is, the stronger is the tendency for the same price to be paid for the same thing at the same time";[8] as a consequence, when two economic agents are involved in a "causal bargaining"—such as the exchange of "pictures by old masters, rare coins"—"there is seldom anything that can

[1] Notably, Smith uses the powerful metaphor of the state of nature to identify the equilibrium of perfect competition. Does this mean that—as suggested by the introductory block quotation of this section—he believed in the self-sufficiency of the market? Not at all. Smith dedicates a substantial part of his discussion on public finance to the "public works and public institutions for facilitating commerce" (A Smith 2007 [1776]: 471-492). Thus, in speaking of natural markets and natural price, Smith is not a scientist, but a normative philosopher. And, in performing this task, he employs the language of nature, as many other normative philosophers of the period between the 17th and early 19th century—such as Pufendorf, Grotius, Hobbes, Locke, and Rousseau. It is well known that the metaphor of the state of nature is a tool for both social conservatives and social reformists. And, indeed, Smith belonged to the class of the social reformists. To a great extent, in fact, *The Wealth of Nations* is a full-blown critique of mercantilism. What is the ultimate problem of mercantilism? The problem is that "in the mercantile system, the interest of the consumer is almost constantly sacrificed to that of the producer" (A Smith 2007 [1776]: 426).

[2] See pp. 71-72.

[3] For an overview of Marshall's role in the development of mainstream economics, see Groenewegen 2013: 1-15.

[4] "The excess of the price which [the consumer] would be willing to pay rather than go without the thing, over that which he actually does pay, is the economic measure of this surplus satisfaction. It may be called *consumer's surplus*" (Marshall 2013 [1920]: 103).

[5] DD Friedman 2000: 18-23.

[6] See Marshall 2013 [1920]: 15-16, 45, 108, 389-390.

[7] Marshall 2013 [1920]: 78.

[8] Marshall 2013 [1920]: 270-271.

properly be called an equilibrium of supply and demand".[1] In Marshall's view, then, an exchange process where the producer charges differentiated prices to its consumers cannot even be considered a market.[2]

Marshall never states clearly that competition ought to maximize consumer welfare. However, he does analyse the effects of taxes and bounties on consumer welfare and not on total welfare.[3] Moreover, he accepts the view that the "plain rule" in the presence of steady demand and technology is that production costs "govern" market prices.[4] Against this background, Marshall's discussion of monopoly opens as follows: [5]

> It has never been supposed that the monopolist in seeking his own advantage is naturally guided in that course which is most conducive to the well-being of society regarded as a whole, he himself being reckoned as of no more importance than any other member of it.

Marshall then analyses briefly the standard monopoly case with linear production costs to later focus his attention on situations where the interest of the monopolist is less in contrast with the interest "of the rest of society". Marshall basically sees two ways in which monopolistic behaviour could be pro-social. First, in the case of economies of scale. In this case, it is possible (but by no means necessary) that the reduction of the production costs is great enough to lead to a benefit for consumers even if the firm is pursuing a profit maximizing strategy.[6] Second, the monopolist might—of its own motion—include the consumer interest in its maximization calculation. Marshall sees two main scenarios where this may happen.[7] In the first scenario, the monopolist lowers its current revenue to make consumers more familiar with its product or to increase the consumption of a complementary good and thus increase its overall revenues. Thus, consumers are temporarily better off as a consequence of the monopolist's profit maximizing strategy. In the second scenario, the monopolist may have a direct interest in increasing consumer surplus. Interestingly, it is only to discuss this second scenario that Marshall introduces "total benefit", the sum of consumer and producer surplus and shows that it is maximized when consumer surplus is maximized. Marshall observes that this benevolent monopolist is very unlikely to exists and, at most, one may expect the monopolist to maximize a "compromise benefit" where one unit of consumer surplus is counted as less valuable than one unit of producer surplus.

[1] Marshall 2013 [1920]: 277.
[2] This insight is developed by Marshall's successor at Cambridge, Arthur C. Pigou; see, Section 10.4, below.
[3] Marshall 2013 [1920]: 385-389.
[4] Marshall 2013 [1920]: 305.
[5] Marshall 2013 [1920]: 395.
[6] Marshall 2013 [1920]: 401, especially fn 1.
[7] Marshall 2013 [1920]: 402-405.

Despite the fact that Marshall introduced in market analysis the concept of total surplus, which has become the core of the mainstream efficiency analysis of the market allocation, he did so in order to develop an analysis of how harmful different kinds of monopolies may be. His position is thus compatible with the economic claim of this dissertation.

10.3 Vilfredo Pareto

Vilfredo Pareto (1848 – 1923) was Professor of Political Economy at Lausanne, chair previously held by Leon Wàlras. He developed his interest in mathematical economic theory in his forties, after a successful career as engineer and before making important contributions to sociology. Pareto was thus an eclectic scholar. The influence of Pareto for the economics of law is mainly indirect and limited to the notions of Pareto optimality and Pareto efficiency. However, given the importance of these notions, it seems useful to inquire the thought of this author.

According to Pareto, "[a]s the older economists have already noticed, the pursuit of the greatest advantage for society is mainly a problem of production" and, at the same time, he was rather impatient towards moral judgments of economic matters.[1] Pareto's view thus supports the irrelevance for the economic analyst of the matters of transfers. Notably, transfers are important, but outside the realm of economic analysis. The reason why monopoly then is worse than competition is that it reduces aggregate wealth.[2] At the same time, Pareto labels as "parasites" those who make a living out of practices that are productively inefficient,[3] and the monopolists as "privileged",[4] thereby showing reprobation against inefficient behaviour. Be this as it may, Pareto seems to have endorsed the total-welfare rationale of markets.

10.4 Arthur Cecile Pigou

Arthur C. Pigou (1877 – 1959) took over Marshall's chair at Cambridge and is generally considered the founding father of welfare economics.[5] Indeed, as the developments in welfare economics have not played a very important role—but this has changed in the last decade or so[6]—in the development of the economics of law, one may wonder why his thought matters. In my view, it matters first because Coase's *The Problem of Social Costs* is primarily a critique of Pigouvian taxes

[1] Pareto 2014 [1906-1909]: 182-183.
[2] Pareto 2008 [1894]: 387-395.
[3] Pareto 2014 [1906-1909]: 175.
[4] Pareto 2014 [1906-1909]: 196.
[5] Aslanbeigui 2008; Aslanbeigui and Oakes 2015.
[6] See Esposito 2017c: 390-393.

as a general means for internalizing social costs.[1] Second, similarly to what we have seen especially about Smith, mainstream economists enjoy wearing Pigouvian vestments. For example, George Mankiw has founded the Pigou Club—counting among its members important economists, Al Gore and even Richard Posner[2]—which advocates the use of Pigouvian taxes on gasoline to improve the performance of the U.S. social system from seven different perspectives.[3] It is thus reasonable to identify in Pigou a central figure—both directly and indirectly—for the economics of law.

At first glance, Pigou's though may appear incompatible with the economic claim of this dissertation. Pigou, is, after all, taken as a great advocate of welfare maximization. There are, however, several problems with this view. Of the utmost importance for current purposes is Pigou's analysis of monopolistic discrimination. To reduce the preliminaries to the essential, consider the case of perfect monopoly discrimination—the case where the monopolists makes each consumer pay his reserve price. In such a scenario, there is no deadweight loss: no consumer is distorted, but all consumers are maximally exploited. Thus, in comparison to perfect competition, there is a massive transfer from the consumers to the monopolist, but welfare is maximized. From a total welfar perspective, there is no reason to regulate.

Pigou's analysis offers two lines of argument against this practice that are incompatible with the total-welfare maximand. First, a justice claim and, second, a general equilibrium argument or, in Smithian terms, a natural price argument. Monopolistic discrimination leads to "obvious abuses" and the monopolist has to be careful in order to avoid "legislative intervention" prompted by "outrage to popular sense of justice".[4] Pigou does not dwell in the reason why monopolistic discrimination is abusive, unjust and outrageous. Pigou does not feel the need of elaborating the point, just like Smith did about the obviousness of his pro-consumer market rationale. Things are different when it comes to the general equilibrium argument. Pigou, contrary to the economic textbooks discussed in Section 4, does not offer a comparative statics of monopoly and competition to rank the effects of alternative market structures. Instead, Pigou first discusses the tendency of competition to equalize the return of producers in different markets[5] and then observes that under perfect discrimination there is no deadweight loss.[6] Finally, he shows that[7]

[1] Curiously enough, but ultimately not so important for the present project, Pigou did not present Pigouvian taxes as a general remedy to negative externalities, but as a means to be used in those cases where "technical considerations prevent payment being exacted from the benefited parties or compensation being enforced on behalf of the injured parties" (Pigou 1920: 159).
[2] See http://gregmankiw.blogspot.it/2006/09/rogoff-joins-pigou-club.html .
[3] These are: the environment, road congestion, regulatory relief, the budget, tax incidence, economic growth, and national security. For further details, visit http://gregmankiw.blogspot.it/2006/10/pigou-club-manifesto.html.
[4] Pigou 1920: 245, fn 2 and 246-27.
[5] Pigou 1920: 125-138.
[6] Pigou 1920: 247-248. See also Pigou 1904: 388.
[7] Pigou 1920: 253-254.

> even where discriminating monopoly makes aggregate output more nearly conformable to the ideal than simple monopoly or simple competition would do, it does not follow that it will involve greater equality between the values of marginal trade net products … . It can be shown, further, that the establishment in any industry of a given output associated with discriminating prices is likely to conduce less towards equalisation among the values of marginal trade net products as a whole than the establishment of the same output associated with uniform prices.

Two comments are particularly important about this remark by Pigou. First, the economic problem of monopoly, according to Pigou, is not the deadweight loss but the inequality of the rates of return (or profits) in different markets. Indeed, this is not a perspective explicitly compatible with the economic claim of this dissertation, but the point will be reconsidered in the next chapter. The second comment is, however, helpful. The idea of equal profit is basically the same idea behind Smith's discussion of natural prices. It was clear that in Smith's analysis the natural price was connected with the primacy of the consumer interest. The point, in other terms, is that equality of profit is the result of the relentless move of producers from one market to the other driven by their seek for profits. Equality of profit thus plays an important instrumental value in the maximization of consumer welfare via market exchanges.

To sum up the results of this inquiry, Pigou recognized that perfect monopolistic discrimination does not cause any deadweight loss. Still, he considered this practice obviously abusive, unjust and outrageous. He also pointed out that this conduct has the effect of moving the economy away from a state where firms obtain equal profit rates in the different markets. Pigou did not accept the welfare maximization rationale of markets. On the contrary, his analysis of monopolistic discrimination shows that he acknowledged that consumers' exploitation is abusive and unjust. A position fully consistent with the consumer-welfare perspective and thus supportive of the economic claim of this dissertation. Furthermore, a position that foreshadows the possibility of an economic analysis respectful of the fairness thesis.

10.5 Frank Hyneman Knight

Frank H. Knight (1885 – 1962) is generally considered a founding father of the Chicago School of Economics.[1] For example, in the conclusion of his article on *The Problem of Social Costs*, Coase refers to Knight as a mentor.[2] Similarly, Stigler states that Knight made the "most influential statement of the conditions for perfect competition".[3] Given the connection between the Chicago

[1] Stigler 2008a.
[2] Coase 1960: 43.
[3] Stigler 2008b.

School of Economics and mainstream economics of law, Knight is clearly an important economist for current purposes.

For Knight equating prices to costs is "the ultimate goal of the competitive tendencies".[1] The implication of this statement is that monopoly, even in the ideal situation where it does not cause a deadweight loss, would be a violation of the goal of competition. In discussing monopolies, Knight recognises a "close connection between the moral aspect of the economic order and the problem of monopoly". He also mentions the contributions of the Clark School—as previously noted, Clark saw an element of robbery in monopolies. Knight himself makes a similar consideration:[2]

> Monopoly may … be based on mere financial power, on the threat of local underselling, boycott, and other forms of "unfair competition"; this amounts in effect to a voice in the control of property owned by others or their persons as well; that is, to part [of their] ownership.

Monopoly—when it is not legal, like in the case of patents—is a violation of the rights of other market participants. At the same time, moving along the lines of Hutt's consumer sovereignty, Knight asserts that "[p]roduction is motivated and controlled by the consumers' expenditure of income".[3] Thus,[4]

> [t]he outstanding evil of monopoly is of course the burden under which it places the consumer of paying a higher price for the commodity than is necessary, and allowing the owner of the monopoly and unearned income—if it is unearned.

It is nonetheless important to recognise that Knight hedges this claim by continuing that "[a] less conspicuous evil, but one which may be more serious, is the reduction in the use of the good".[5] In any case, Knight's position is compatible with the economic claim of this dissertation because he does not reduce the monopoly problem to the deadweight loss.

10.6 John Richard Hicks

John R. Hicks (1904 – 1989) was the Drummond Professor of Political Economy at Oxford. As his 1939 paper on *The Foundations of Welfare Economics* is generally considered a foundational paper of the economics of law, his scholarship is obviously included in the current review.

Hicks follows two different routes in discussing the market rationale. On the one hand, Hicks follows the consumer sovereignty route:[6] "[e]conomic life is an organization of producers to

[1] Knight 1980: 202; see also 245. Knight had a typology of monopolies on the grounds of the source of the monopoly power.
[2] Knight 1921: 185.
[3] Knight 1967: 33.
[4] Knight 1967: 93.
[5] Knight 1967: 93.
[6] Hicks 1971: 17-18.

satisfy the wants of consumers"; "the whole of the economic activity … consists of nothing else but an immense co-operation of workers or producers to make things and do things which consumers want". The observations that these wants may be "deplorable" and the satisfaction of consumer wants is not "necessarily admirable" do not modify this "description". On the other hand, in his essay *The Rehabilitation of Consumers' Surplus*, Hicks's reasoning resonates with Marshall's and Hicks referred to the monopolist strategy as "exploitation", a term with a clear negative connotation for its effects on the contractual counterparties.[1] Hicks applies the Kaldor-Hicks test to conclude that, when the test is passed, there is a productive efficiency improvement.[2] The development of the argument, as anticipated, is reminiscent of Marshall's: using consumer welfare up to a certain point, and then switching to a total-welfare standard. However, for Hicks as for Marshall, the total-welfare standard is used to search for improvements in the welfare of the consumers. In fact, Hicks first observes that in perfect competition there is an optimum measurable in terms of consumer surplus and that the same concept "offers us a way of measuring the size of the deviation"[3]. Second, in comparing the performance of perfect competition and monopoly, Hicks switches to a total-welfare standard to show that even if monopoly gains are transferred to consumers, they are still worse off in comparison to the perfect competition case. Still, it is indeed true that during this discussion, Hicks starts to refer to the social loss, as the joint reduction of consumer and producer welfare. His standpoint swings again it the analysis of the case of a production with "diminishing (average) costs".[4] In this case, Hicks observes that allowing price discrimination may be necessary to ensure the profitability of the production; but given the cost function, with discrimination, consumers are made better off.

To sum up, the review of Hick's analyses supports the economic claim. On the one hand, he takes a position that is fully compatible with a consumer-welfare approach. On the other hand, he applies a total-welfare perspective. However, it is important to stress that the welfare maximization analysis is meant to assess whether the consumers are ultimately made worse off. Thus, also in this second line of reasoning, total-welfare maximization is not the market rationale, but a mere analytical tool.

10.7 Nicholas Kaldor

Nicholas Kaldor (1908 – 1986) was a Hungarian-born economist who became professor of economics at Cambridge and later Baron of Newham. Kaldor's contributions to economic theory

[1] Hicks 1935: 5.
[2] Hicks 1971: 101, 105.
[3] Hicks 1971: 106.
[4] Hicks 1981: 111.

cover a great variety of fields.[1] He was also greatly active in the public sphere, writing more than 160 *Letters to the Editor* of the *Times* and acting as member of the British Royal Commission and then as special adviser of the British Chancellor of the Exchequer. As already for Pareto and Hicks, the opportunity of including his thought in this review goes without saying.

With regards to the market rationale, Kaldor's most important publication is his 1951 article on *The Economic Aspects of Advertising*, where he analyses the welfare effects of the private advertising of goods. Kaldor begins by qualifying advertising as a "particular form of subsidised commodities (commodities sold below cost)" and then sets the framework for its economic assessment, distinguishing the "direct functions of advertising" from "its indirect contribution to welfare through the changes which it helps to bring about in the economic organisation of society". What matters here is his analysis of the direct functions of advertising. The starting point is that to have advertisement, the market must be monopolised, at least to some degree; otherwise, subsidised commodities would not be profitable. As per the effects of advertising, he states: [2]

> The optimum distribution of resources which maximises welfare relative to a given pattern of consumers' preferences (and also a given pattern of income distribution between persons) is necessarily the one which secures the equality of price and marginal costs, for all commodities.

On the grounds of this criterion and his analysis of advertising, Kaldor concludes that[3]

> [t]he expenditure on advertising cannot be justified—on the purely formal plane of economic theory—in the same way as the expenditure on other commodities and services, merely by reference to the principle of "consumer sovereignty"—i.e. by accepting consumers' preferences as the ultimate criterion of all economic activity.

In a footnote, he adds that generally consumer sovereignty rests on the assumption that consumers are rational and their preferences are exogenous to the economic system. In other terms, Kaldor subscribes the doctrine of consumer sovereignty as developed by Hutt[4] and his position thus supports the economic claim of this dissertation.

10.8 George Joseph Stigler

George J. Stigler (1911 – 1991) was a pivotal figure of the Chicago School of Economics, awarded with the "Nobel Prize in Economics" in 1982. Stigler is included in this review for two main reasons. First, he contributed dramatically to the diffusion of the "Coase Theorem", of which he

[1] Wood 2008.
[2] Kaldor 1950: 3-4.
[3] *Ibidem.*
[4] See pp. 96-106.

actually gave the first formulation.[1] Second, his work has been central in the development of the Chicago Price Theory, a pivotal methodology to the economics of law.[2]

About the market rationale, in his Simons Lecture, Stigler states the "first and most ancient goal [of the economic policy] is the largest output of goods and services"; and this is the goal that justifies "the combatting of monopolies".[3] This argument is confirmed in his textbook, *The Theory of Price*.[4] Stigler's position is not consistent with a consumer-welfare approach. However, in the light of the findings of this section one is left to wonder to what extent Stigler's argument is secure.

10.9 Ronald Harry Coase

Ronald H. Coase (1910 – 2013) is the last, but—by all means—not least, economist whose work is discussed in this section. Professor at Chicago, Coase received the Nobel Prize in Economics in 1991. Regarding the importance of his work, suffice it to bear in mind that economists of law consider him a founding father in their field and that at the same time Calabresi considers him a founding father of Law and Economics.

Most probably, every economically informed legal scholar has cited Coase's *The Problem of Social Costs* at least once, and few dare not to consider also his article on *The Nature of The Firm*. In his collection of essays, *The Firm, The Market, and the Law*, Coase presents these two articles as the core of his scholarship, together with a third one,[5] *The Marginal Cost Controversy*—that is fair to say literature has ignored, by and large.[6] The main subject of this article is the identification of the best pricing system for an industry where average costs are decreasing.

Coase begins by presenting the pricing system as the "most useful guide to what consumers' preferences really are".[7] Two normative problems are related to the use of a pricing system: first, the "optimal distribution of income and wealth"; second, the "optimum system of prices". While the first is basically an ethical matter, both problems "have to be solved if a pricing system is to produce satisfactory results".

Coase limits his analysis to the second problem and identifies two "principles" of an optimal pricing system. According to the first, for each consumer, the price of all productive factors should be the same in each possible use. If not, prices do not guide him to "choose rationally". According

[1] See Medema 2011.
[2] On the relation between Chicago Price Theory and the economics of law, see Hovenkamp 1990.
[3] Stigler 1986: 90.
[4] Stigler 1987: 198, 203.
[5] Coase 1988: 1.
[6] See, for example, Medema 1997 (a 1000 pages collection of essays celebrating *The Legacy of Ronald Coase in Economic Analysis*) where no one speaks of this particular article!
[7] Coase 1946: 172.

to the second principle, each productive factor should be sold to each consumer at the same price. If not, there is a worsening in the distribution of income and wealth between consumers. It is from these two principles that follows "the familiar but important conclusion that the amount paid for a product should be equal to its costs".[1] Thus, also Coase's thought supports the economic claim of this dissertation. Indeed, it is a very important support.

11. The Warranty of the Economic Claim

The case in favour of the economic claim of this dissertation has been presented. It is time to summarize the results of this four-fold inquiry and assess how well it warrants the economic claim of this dissertation.

The starting point is a disagreement on the choice of the maximand in the analysis of the allocative efficiency of the market or on what "allocative efficiency" means. The mainstream position identifies this maximand in total welfare and ignores transfers. The alternative position instead adopts consumer welfare as the maximand and thus considers transfers relevant.

The first inquiry reconstructs the arguments given to support the view—based in a total-welfare perspective—that one ought to focus on the deadweight loss to explain why perfect competition is better than monopoly. Four arguments were discussed: total-welfare maximization is the natural standard; it is unclear whether the exploitation of consumers is relevant, but the deadweight loss is clearly a problem; transfers have no significance in the analysis of the welfare effects of monopolies; producers are people too, their welfare counts just as much as consumer welfare. It is then showed that only the last one is a well-formed normative argument. Thus, the disagreement on the market rationale boils down to a disagreement on whether the role of the consumer is—in some normative sense—superior to the role of the producer.

The second inquiry includes various arguments from mainstream literature that support the economic claim in different ways. First, the standard understanding of the deadweight loss overstates the loss to consumers. Thus, the idea that the harm done by monopoly is reducible to the deadweight loss, becomes more implausible because the deadweight loss is smaller than normally understood. This observation reduces the supportiveness of the total-welfare maximand. The second argument identifies in the total-welfare maximand the origin of the Pareto efficiency contradiction pointed out in Chapter 2 and shows that the consumer-welfare maximand avoids the contradiction. This finding reduces the independent security of the total-welfare maximand because it reduces the quality of the argument supporting it and, conversely, increases the security of the consumer-

[1] Coase 1946: 173.

welfare maximand. The third argument showed the symmetry between the position of the investor in the firm and that of the consumer in the market and added two observations. First, it pointed out the incoherence of mainstream literature that accepts the investor value or investor sovereignty approach in corporate governance theory and the total-welfare approach in market analysis. Second, it showed that the concept of residual claimant that is used to describe the particular position of shareholders in a company can be used also to describe the consumer-welfare maximand. With the fourth argument, the considerations of the third argument are connected to principal-agent theory, where it is shown that also here there are a variety of conceptual foundations. In particular, it was argued that version 1), where the goals is maximizing the welfare of the delegating principal, is the one most in line with the economic claim of this dissertation, but also with the ordinary meaning of "delegation" and "principal". These two inquiries reduce the security of the total-welfare maximand and at the same time increase the supportiveness and comprehensiveness of the argument in favour of the consumer-welfare maximand. The fifth argument consists in pointing out that the consumer-welfare maximand is used by some mainstream economists in textbooks and models, which gives direct support to the economic claim.

The third inquiry, on the concept of consumer sovereignty, shows that central concepts related to market analysis can be included in an account of market relations based on consumer sovereignty. Consumer sovereignty is the counterargument to the only well-formed economic argument supporting the total-welfare maximand found during the first inquiry. The review of the literature on consumer sovereignty shows that William Hutt offered in 1936 the best account of this concept. His version of consumer sovereignty withstands the critiques moved to less elaborated notions of consumer sovereignty. It was also pointed out how both Hayek and Mises accepted Hutt's notion of consumer sovereignty as market rationale, even if more recent "Austrian" economists reject it. The concept of consumer sovereignty has thus a respectable economic pedigree and it counts as a reformulation of the consumer-welfare maximand.

The fourth and last inquiry undertaken in this chapter focused on the thought of influential economists, whose opinion is, in one way or another, important for mainstream economics of law. With the exception of Pareto and Stigler, all the other economists' view—Smith, Marshall, Pigou, Hicks, Kaldor, Knight, and Coase—supports the economic claim of this dissertation.

The upshot of this chapter is that it is indeed possible to conceive the market as a means to an end that is not the maximization of total welfare but of consumer welfare. Sometimes, maybe not often, economists actually choose it even nowadays. Thus, holding that allocative efficiency is about total welfare is not a necessary element of the view that market relations ought to be efficient. This is an important finding in that it allows to throw away the bathwater while saving the baby.

The baby is the wealth of insight that economic theory can offer to the study of market relations, and the bathwater is the axiological assumption of total welfare. This assumption irritates lawyers, who find it incompatible with the fairness and wrongfulness theses. This finding is sufficient to warrant the economic claim of this dissertation, namely that the analysis of the efficiency of a market allocation can be based on either the total or the consumer-welfare maximand.

A question remains unanswered. Why would economists move away from the total-welfare maximand? What do they gain from it? At the very least, they are offered a solution to the Pareto efficiency contradiction. After all, the consistency of a conceptual framework is still a theoretical value. In alternative, they might want to contribute to their literature by checking the robustness of certain conclusions about the efficiency of a market outcome once the maximand is changed from total to consumer welfare.

In any case, this chapter was concerned with the acceptability of the consumer-welfare maximand as a viable possibility, from an economic point of view, rather than a superior assumption. It is for the following chapters to prove that the consumer-welfare maximization allows for an account of fair market relations that may be acceptable to legal scholars (translation claim), which in turn allows for the solution of the social engineer contradiction by reverse engineering the law (doctrinal claim).

— 4 —

Fairness and Allocative Efficiency: Towards a Rosetta Stone

1. Introduction to the Translation Claim

In July 1799, while serving in Napoleon's Egypt Campaign, Captain Pierre-François Bouchard found near Rashid (on the delta of the Nile) an interesting stele, carved with scores of symbols he could not understand. Albeit insignificant for military purposes, Captain Bouchard decided to recover it. We now know this stele as the Rosetta Stone. Written in Ancient Egyptian, Demotic and Ancient Greek, the Rosetta Stone turned out to be crucial for the translation of Ancient Egyptian, which had resisted all previous attempts of translation.[1] It is fascinating and inspiring to see how a single piece of rock made possible a translation that had so far been considered unfeasible.

This chapter defends the translation claim of this dissertation. The purpose is translating the account of market relations from the economic 'dialect' of consumer-welfare maximization to the moral 'dialect' of the neo-Aristotelian tradition (and vice versa). More precisely, the translation claim holds that if the maximand for the efficiency analysis of market relations is consumer welfare, when the market is efficient fair market relations are fair according to the neo-Aristotelian tradition (with the caveat that consumers are prudent, as discussed in Section 6). This thought-provoking finding will be proven compatible with the fairness and wrongfulness theses and also with the *ex-ante* perspective. In so doing, the chapter overcomes the struggle between the *ex-ante* perspective and fairness.

In a first approximation, this is how the fairness and wrongfulness theses will be accounted for. The fairness thesis requires this chapter to explain how are market exchanges to be considered fair when consumer welfare is maximizaded by these exchanges and how do they make consumers and producers equal. This account will be given by connecting the insight that an economy in a state of perfectly competitive general equilibrium equalized the returns of producers in all the markets, to

[1] This story is told in Parkinson, Diffie and Simpson 1999 and in Parkinson 2005.

the explanatory theory of private law that James Gordley has built on the teachings of the neo-Aristotelian school. The value of the performances of the consumer and producer is equal when prices are aligned with production costs (including information and risk) and physiological scarcity. When this happens in all markets, producers in all markets are equally remunerated for their activities.

At this point, the question moves to the wrongfulness thesis. The consumer-welfare maximand makes the wrongfulness thesis an easily surmountable obstacle. The interest of consumers is intrinsically valuable and, from here, it is a small step to argue that allocatively inefficient exchanges are wrongs done to consumers. Here the consumer-welfare maximand has a clear edge against the total-welfare maximand, which refuses to give any intrinsic value to the rights established by the law.

Also with regards to the relation between fairness and the *ex-ante* perspective, the prospects are encouraging. The argument in the Introduction showed that the *ex-ante* perspective is associated with the idea of a bet. In discussing the separate liability for the violation of antitrust law by multiple companies, Easterbrook, Landes and Posner observe that while the distribution *ex post* seems unfair because one pays for all, *ex ante* it is like a fair lottery ticket.[1] In Chapter 2, it was seen that consumer welfare is the actual maximand, sometimes used to analyse product liability. Geistfeld has pushed the connection further by holding that product safety is an "intrapersonal conflict of the consumer's interests" when the "burdens incurred by the manufacturer—the cost of safety precautions and injury compensation—are passed onto the consumer in the form of higher prices".[2] This chapter elaborates on this point to explain how an argument about the efficiency of market relations can be translated into one about their fairness according to the neo-Aristotelian tradition, and vice versa.

Even more fundamentally, Kaplow and Shavell group under the label of "fairness theories" in the field of contracts, the literature considering contractual obligations as promises and the one considering the breach of contract as a tort. Thus, they do not engage with the neo-Aristotelian tradition. However, they recognise that other accounts of fairness might be compatible with their claims. Moreover, they state:[3]

> [I]f an analyst thought that a concept of well-being that was qualitatively different from the welfare economic one (say, an objective view of the good life) was normatively compelling, … there would be no change to the logic of our argument that giving any weight to a notion of fairness that is independent of well-being always raises the possibility that everyone would be made worse off.

[1] Easterbrook, WM Landes and RA Posner 1980: 342.
[2] Geistfeld 2006: 37-38.
[3] Kaplow and Shavell 2002: 23, fn 14.

This is exactly what the neo-Aristotelian tradition does. Writers in this tradition believe that there is a distinctively correct way of living, which is *eudemonia*[1]—a life lived according to virtue.[2] Aristotle's virtue theory is very complex, and I will make no attempt to offer a comprehensive account of it—primarily because for my argument it is not necessary to go beyond a rudimentary sketch of the theory. Virtues are praise-worthy states and can be distinguished in virtues of character and virtues of intellect.[3] Virtues are acquired with exercise, "we learn by doing".[4] Importantly, from a legal perspective, "legislators make the citizens good by habituating them" to act in accordance with virtue.[5] Virtuous actions are the 'mean' between deficiency and excess. For example, courage is the mean between fear and confidence; temperance is the mean in the bearing of pleasure and pain (excessive tendency to pleasure is intemperance, and excessive tendency to pain is insensitivity[6]). "Mean" is not to be understood as the "arithmetic mean".[7] In particular, depending on our natural tendencies, it may be closer to virtue to indulge in one excess than in the other.[8] For example, Aristotle believes it is better to excess in confidence than in fear.

The starting point of the inquiry of this chapter is Gordley's life-long project of vindicating the neo-Aristotelian tradition starting with Aquinas and later systematised by the school of Salamanca.[9] In this tradition, the concepts of equality in exchange, fair price and commutative justice are connected to the market price. All in all, Gordley's theory of fair price is based on three concepts that are quite familiar to economists: need, cost, and scarcity. It is the interplay of these concepts that determines, for Gordley, the just price. Notably, Gordley explicitly writes that "supply and demand" are co-referential to "need, scarcity, and cost".[10] These preliminary observations are more than sufficient to see that there is room for interesting conceptual work on the relation between allocative efficiency and the neo-Aristotelian theory of fair market relations. Ultimately, Gordley fails to articulate a translation claim mainly because he shares the conceptual separation assumption and ignores the economic claim of this dissertation.

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[1] Aristotle considers the end, goal and purpose of human life to be *eudemonia*— a term typically translated as "happiness", "good or best life", "human flourishing". As the translations have all advantages and disadvantages for current purposes, in the few instances where I refer to this concept in the chapter, I use the term "*eudemonia*".
[2] For a more detailed, but still quite concise, discussion, see Shields 2014: 387-400.
[3] EN I, 13, 1103a. "States" are "those things in respect of which we are well or badly disposed in relation to feelings" (EN, II, 5, 1105b).
[4] EN II, 1, 1103b.
[5] EN II, 1 1103b and X, 9.
[6] The virtue of temperance does not relate to all sort of pleasures (EN III, 10). Interestingly, it is basically concerned with those pleasures that imply the consumption of material resources; in fact, intemperate spending is one of the ways in which one can be wasteful (EN IV, 1).
[7] EN II, 6, 8 and 9.
[8] EN II, 8 and 9.
[9] For a discussion and collection of some important texts of this school, see Grice-Hutchinson 1952.
[10] Gordley 2007: 1744. See also Gordley 1991: 98, 2006: 362.

Gordley's research is impressive and extremely insightful, and I am comfortable in admitting that, had it not been for his work, the whole structure of this dissertation would have been different. Sticking to the Rosetta Stone analogy, I find Gordley's scholarship to be at least as important for the translation claim of this chapter as the research of Thomas Young was for cracking the original Rosetta Stone.[1] Nevertheless, this chapter is not a mere exposition of Gordley's findings. Rather, it is its extension to additional legal (information duties) and economic concepts (bounded rationality). This chapter also systematizes in the broader context of the theory at least four points Gordley does not discuss satisfactorily, namely: the relation between information and fairness; the role of scarcity; the relation between fairness and prudence.

The chapter is structured as follows. Section 2 points out that between the neo-Aristotelian tradition and the economics of law there is an incompletely theorized agreement about desirable market relation converging on the centrality of considerations of need, cost, and scarcity to determine market prices. Section 3 shows that "scarcity" has to mean "physiological scarcity", which is scarcity that sends meaningful signals for the reallocation of productive factors or consumptions. Economists acknowledge that in situations of pathological scarcity allocating goods and services with mechanisms different from the price system might well be more attractive. Section 4 discusses the role of information and risk allocation in the neo-Aristotelian account. It points out that information cost and risk allocation follow a logic of cost minimization plus compensation which ensure the equality in the exchange of the parties and also clarifies some ambiguities in Gordley's account. Section 5 defends the previous account against the ones by Schumpeter, David Friedman and Golecki. Section 6 extends the conceptual framework to considerations of limited prudence and relates them to bounded rationality and the concept of behavioural market failure. Section 7 points out that, once the maximand is consumer welfare, the findings allow for a translation between claims about market efficiency and market fairness. Moreover, the account is compatible with the fairness and wrongfulness theses and even requires taking the *ex-ante* perspective. Finally, Section 8 presents the relation between fairness and distributive justice according to the neo-Aristotelian tradition. Section 9 concludes.

[1] On Thomas Young, see Robinson 2006. Young was a man of many interests and contributed to many lines of inquiry. This is another parallel with Gordley, who is a celebrated private law theorist, historian of law and comparative lawyer.

2. Gordley and the Economics of Law: An Incompletely Theorized Agreement regarding Market Relations

Gordley shows that many economic insights are incorporated into the neo-Aristotelian account of fair market relations. Commutative justice, contractual fairness or equality in exchange are the result of well-functioning markets. Two points are particularly explicit in his account, as we shall see. First, supply and demand in a competitive market context determine fair prices. Second, risk allocation and information duties ought to be established by considering who the cheapest cost avoider is. Thus, Gordley's account of fair market relations is not only compatible with but even requires an *ex-ante* perspective. Yet, Gordley criticizes mainstream economics of law for its failure to satisfy the fairness and wrongfulness theses.[1]

Against this background, Gordley has supported both the convergence strategy and the vertical integration strategy. The economics of law and the neo-Aristotelian tradition merely converge, in the sense that they would typically condemn the same terms, but the economist would do this for their inefficiency and the neo-Aristotelian scholar for their unfairness.[2] Gordley then moves one step further when he holds that economics offers "valid" conclusions once the members of society are also virtuous.[3] Either way, Gordley's account is based on the conceptual separation assumption.

Gordley underestimates the depth of the agreement between his approach and the economics of law. He does not only agree on outcomes with the economics of law, he also agrees that the market mechanism plays an essential role in determining the desirable contents of a market transaction about price, but also information costs and risk allocation. In so doing, Gordley succeeds in integrating considerations of incentives in his account of fair market relations. The disagreement is focused on the reasons why supply and demand (or need, cost and scarcity) play such an important role in determining the content of market transactions. In this regard, the disagreement springs from the conflict between total welfare and the fairness and wrongfulness theses.

The consumer-welfare maximand allows, as anticipated, to find agreement also at this deeper level of theorization. To see this, let us consider how the relation between need, cost, and scarcity determine a fair price for Gordley. Need sets the limit of the desire of the consumer, in the sense that if the price is too high, the consumer is not motivated to exchange.[4] In principal-agent

[1] Gordley 2006: 366-367, 1991: 238-239.
[2] Gordley 2006: 369, quoting Beale 1989: 206, 1991: 243. For an analysis of the economic arguments regarding the relation between the market mechanism and contract terms before and after the behavioural turn, see Esposito 2017a and the references therein.
[3] Gordley 2006: 25. See also, for example, Gordley 2001, 2002 and Gordley and Cooter 1995.
[4] Gordley 1981: 1605.

terms, need is the participation constraint of the consumer.[1] Cost represents the amount that should be paid to produce the good. A fair price covers these costs. Scarcity means "the quantity available" and justifies prices raising above costs.[2] The next section will analyse the role of scarcity.

Before that, it is crucial to see in what sense, if the price is established according to normal or competitive market conditions, the two parties are equal. The starting point is that equality in exchange consists in keeping unchanged the shares of overall resources owned by the contracting parties.[3] Parties are equal because the value of what they give is equal to the value of what they receive. In other terms, there is equality between the exchange value of the performances. We can thus see why fairness or equality in exchange is also called commutative justice in the neo-Aristotelian tradition. As the value of what is given and received is equal, the share of resources the two parties have before and after the exchange is unchanged. Thus, if the value of Charles's resources is 100 EUR before buying the beer from Silvia at the competitive price of 3 EUR, it remains 100 EUR once Charles he has bought the beer. The same goes for Silvia.

As a matter of Aristotelian exegesis, the secondary literature is divided, and for good reasons,[4] on the claim that equality in exchange is equality of exchange values. Gordley is representative of the view that the equality is between the market values of the exchanged goods under normal market conditions. Others, for example Golecki, hold that equality is obtained when there is an equal split of the gains because equality comes from the equal satisfaction of needs. The difference between the two views is discussed in Section 5.3. It can be already pointed out that Gordley's position is in line with a variety of Aristotle's commitments, among which in particular the idea that[5]

> everything that is exchanged must be in some way commensurable. This is where the money comes in; it functions as a kind of mean since it is a measure of everything, including, therefore, excess and deficiency. It can tell us, for example, how many shoes are equal to a house or some food.

This passage clearly tells us that the equality must hold between the goods produced, and this equality is expressed in terms of money. Thus, for example, 5 EUR of butter equal 5 EUR of truffles. While as a matter of Aristotelian exegesis the point is open to debate, it is quite uncontroversial that the neo-Aristotelian tradition identifies in the exchange value the core determinant of fair market relations.

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[1] "Need" can be expressed as $P_c(E)>P_c(\neg E)$, with "P" meaning preference, "$_c$" meaning consumer, and "E" meaning exchange. Regarding the concept of preference, recall the considerations in the Introduction (pp. 37-39) on the relation between welfare and preferences.
[2] Gordley 2006: 362.
[3] Gordley 2006: 363.
[4] See the book-long study by Meikle 1995.
[5] EN, V, 5, 1133a.

Be this as it may, saying that the prices are the same does not tell us much about the costs and, one may rightfully object, if fair prices maximize consumer welfare then they ought to minimize costs. Indeed. An account of fair prices including a logic of cost minimization is possible and actually implicit in the concept of commutative justice of the neo-Aristotelian tradition. The neo-Aristotelian account of a fair price is recast more explicitly (or at least comfortably for an economist) in terms of price minimization rather than party equality, without any implication for its meaning. As anticipated, Gordley finds a logic of cost minimization into fair ancillary terms that allocate risks and impose information duties; a logic enshrined in the economic expression "cheapest cost avoider". Prices vary accordingly to the cost-minimizing allocation of these duties, thereby making the compensation of the burdened party possible. There is no reason for applying different logics to prices and other terms, especially because in this account they are connected *ex ante*. To see this, is it sufficient to recall the idea of pass-on, which is invoked by mainstream economics of law to point out that mandatory changes in contractual terms will be reflected in price variations.[1] Thus, commutative justice includes a claim to the minimization of production costs and to compensation by the adjustment of the price. In other terms, the fair price includes a concern for the minimization of that price, not only in terms of avoiding transfers from consumers to producers but also in terms of avoiding that those same producers unnecessarily inflate production costs.

In sum, at the core of the neo-Aristotelian theory, there is a price-minimization logic. The price-minimization logic implies that consumers satisfy their needs in exchange for the share of purchasing power that is just necessary to cover the costs (fairness theory) and, therefore, maximize their welfare (economic theory). The great caveat relates, as implied by the behavioural turn, to those cases where the preferences of consumers are not a conclusive indicator of their welfare. This problem is considered below, in Section 6.

The account given so far has focused on the relation between need and cost. What is still unaccounted for is the role of scarcity. It is a delicate point, because scarcity justifies prices above production costs, and it is therefore necessary to explain how, and when, it does so.

3. Scarcity Specified: The Signalling Function of Physiological Scarcity

In the neo-Aristotelian tradition the fair price—which makes contracting parties equal—is determined by the interplay of need, cost and scarcity. We have also seen that Gordley treats these three concepts as co-referential with those of supply and demand. In the previous section, need was

[1] For an insightful analysis, see Craswell 1991.

taken to determine the participation constraint of the consumer and explain that a price which is in line with costs is fair because the exchange value of the performances is the same.

The role of scarcity has not been explained yet. The claim of this section is that scarcity has a signalling function, in that it allows for economic profits in the short-run and therefore calls for the entrance of new producers in the market—thereby increasing supply, reducing scarcity and ultimately bringing prices more in line with costs.[1] Consequently, when scarcity does not exercise this coordinating function between different markets, letting prices increase because of scarcity has no justification.

As we shall see, Gordley recognises that the neo-Aristotelian tradition does not articulate accurately the role of scarcity in determining fair market prices, but has failed to offer a better account of his own. Gordley fails to do so because in his view economists do not have an account for situations where scarcity does not provide meaningful signals to market participants. Let us consider two other occasions in which Gordley refers to a famine. In both instances, Gordley thinks of famine as a situation in which distributive justice is at stake. In both occasions, he claims that economists would reply that the case is "aberrational", but in one occasion he adds that in this situation an economist could observe that the standard theory "does not apply".[2] Unfortunately, Gordley didn't inquire any further into this topic from an economic point of view. He simply takes as a relevant economic proposition that "[a]s modern economists have recognized, if prices were frozen, there would be no incentive to produce more of the goods that are short in supply".[3] Had he gone deeper, he would have seen that in some situations of scarcity, also economists think of price increases as undesirable.[4]

Against this background, the analysis is divided into three steps. First, "scarcity" must be understood as natural scarcity, because contrived scarcity leads to unfair prices. Second, natural scarcity justifies price increases only as a means to signal that it is desirable to have inter-market shifts of factors of production or demand. The implication is that when this is not the case, prices ought not to rise in response to scarcity, to the effect that the legal systems steps in much more intrusively in the allocation of resources. The third step reconnects these findings to Gordley's account and shows that the argument of this section does not depart dramatically from Gordley's own account, but simply orders more systematically his considerations on the matter.

[1] Plausibly, this signalling function is exercised better by prices than by other contractual terms. This fact leads to the observation that scarcity is, therefore, more important to prices than to other contractual terms, which in turn implies that—if Gordley is correct—one can expect a less intrusive system for the fairness control of prices than of other terms. Indeed, this is what one finds in Directive 93/13/EEC, as discussed in Chapter 7, Sections 3 and 4.
[2] Gordley 2002: 73-74, 2006: 23.
[3] Gordley 2015: 207; see also Gordley 2006: 363.
[4] Gordley 1981: 1612 comes close to admitting this possibility when he observes that "a society would prevent price fluctuations entirely by freezing prices if it could do so without fear of causing greater evils".

The first step can be walked quickly. It is quite obvious that the scarcity we are referring to cannot be the contrived scarcity. In fact, the monopolist who limits its output at the level where marginal revenues equal marginal costs is an example of contrived scarcity. If contrived scarcity were to justify the increase of prices, the whole idea of prices equal to costs would collapse. Thus, the scarcity we are referring to here is natural scarcity. The question then becomes what, in case of natural scarcity, makes a price increase valuable or normatively attractive. This section defends the view that scarcity has a signalling function. Economic profits in the short-run signals the opportunity of entering the market to new producers—thereby increasing supply, reducing scarcity and ultimately bringing prices more in line with costs. To this end, Section 3.1 shows the economic pedigree of this claim and Section 3.2 shows how it fits in Gordley's account of the neo-Aristotelian tradition.

The conceptual claim of this section can be immediately put to work. In the Introduction, we saw that the distinction between natural and contrived scarcity is open to debate, but that there is agreement on the idea that the former is physiological and the latter pathological. In this regard, however, we have seen that famine is a prime example of a pathological scarcity. This finding suggests the opportunity of abandoning the distinction natural/contrived because of its erroneous suggestion that scarcity caused by natural events[1] has still to be handled with the market mechanism. Thus, I prefer and will use from now on the functional distinction between physiological and pathological scarcity, so that scarcity is physiological if price signals are considered the appropriate means to manage it and is pathological otherwise.

To see why this distinction is helpful, consider an outrageous example by Posner. Posner considers a case of scarcity in which the unequal distribution of income makes the result particularly irritating if not obnoxious. A rich person wants a drug (a pituitary extract) to let his gerbil grow oversized and he overbids a poor man who wants to cure his child of a disease that will make him grow as a dwarf. The irritation comes from the fact that the great difference in wealth, coupled with the very different uses of the resource to be allocated, both point into the direction of a wrong outcome. Crucially, Posner does not defend the outcome on its own, but rather by asking us to think "that in the long run, there may be more and cheaper pituitary extract, and fewer dwarves, if the society does not try to allocate the product to those who will derive the greatest happiness from it."[2] Plausibly, this can be understood as a claim that the scarcity of the drug is physiological, in the sense that the market mechanism is capable of dealing with this scarcity better than with an allocation by the state.

[1] Another primary example of natural scarcity in this sense, which is functionally pathological, is found in medical shortages, for example in the emergency room, which are not dealt with via the price system. See, seminal on this topic, Hall 1997; see also Foster 1983.
[2] RA Posner 1985: 96.

3.1 The signalling function of scarcity and its failure in case of pathological scarcity

If the social function of scarcity is that of being a signal to producers and consumers, when the signal is not effective or meaningful in determining a reallocation of productive factors or consumption, then prices should not be allowed to increase as a consequence of scarcity. Physiological scarcity attracts producers from other markets. From their perspective, physiological scarcity is the opportunity cost[1] of operating in their own market rather than moving to the market where a product has become scarcer. Conversely, if supply is excessive, producers are motivated to move to a market with higher market prices. The same also applies to consumers, who can shop around motivated by lower costs. Thus, physiological variations in scarcity allow for the coordination, through the market mechanism, of producers and consumers in different markets. This is the beneficial effect of allowing the price to vary above and below cost in consideration of the variation in the natural scarcity of a product.

Economists know there are situations in which the market mechanism does not give sufficient incentives to producers to enter one market or consumers to exit it. As a consequence, price increments have no social function. Producers would receive an advantage, to the detriment of the consumers, without doing anything useful in return. This claim can be seen in a particularly clear way by looking at how scarcity is related to the functioning of the economy in times of war—a situation also referred to by Gordley as an aberrational case. The argument can be generalized to all cases of pathological scarcity—that is, a scarcity that does not provide effective or meaningful signals to producers in other markets.[2]

William Hutt, who—as seen—had a particularly sophisticated sensitivity for the role of consumers in the market, observes that "[t]emporary natural scarcity cannot be held to cause the right values; for it will have no tendency to bring about desirable developments in the long run. … Hence, in times of catastrophe or war, rationing, with or without free bidding, may be preferable to competition".[3] Writing at the doorstep of World War II, Richards explains the problem as follows:[4]

> The fundamental question is whether reliance shall continue to be placed on normal competitive forces and technique, operating through the pricing system, to regrade and

[1] This is true in the absence of transaction costs (for example, transportation and switching costs). When there are present they reduce the opportunity cost. For example, the farmer Ferdinando becomes aware that in the neighbouring market corn is sold at 2 EUR/Kg more than in his usual market. If the transportation cost is 0.5 EUR/Kg, then the opportunity cost for Ferdinando is 1.5 and not 2 EUR/Kg.

[2] An insightful general discussion can be found in Cox 2013. See also Edwards 1974 (discussing the rationing of gas during the oil crisis), Weitzman 1977 (comparing the price system with rationing) and Neary 2008 (giving an accessible explanation of the effects of rationing on the prices of non-rationed commodities).

[3] Hutt 1935: 352.

[4] Richards 1939: 311.

> re-assess consumers' preferences, to redirect supplies into the new channels of production and consumption and to call forth increasing supplies of products now required in greater total than formerly, or whether such technique is now inadequate and whether the new object of war and the many problems which arise from it necessitate (further) Government interference and control … .

Similarly, at the climax of the conflict, the Harvard economist Paul Sweezy observed that about "the problem of channelling the goods which can be produced to those who ought to get them … we must not count very much on the price system".[1] These citations leave no doubt about the signalling function of scarcity and profits and the justifiable reduction in the reliance on the market mechanism when this function cannot be pursued.

These authors also had a clear concern for the fairness of making profits in times of war. For Hutt, when scarcity fails as a coordination mechanism,[2]

> [t]here is no reason why private owners should have the right to benefit in such cases unless the situation is such that productive resources are thereby likely to be attracted in with sufficient rapidity to rectify the scarcity immediately.

Richards and Sweezy make similar considerations. To Richards, a pressing problem is to "prevent nationals or groups of nationals from utilizing the circumstances of war conditions to obtain undue gains at the expense of the community".[3] Similarly, Sweezy finds that "quite irrational and indefensible inequalities in income would develop, with war profiteering at one end of the scale finding its true counterpart in starvation at the other end".[4]

These quotations show that when scarcity does not provide any useful signalling function to coordinate the factors of production across different markets, there is no justification from an economic point of view for the raising in prices, to the effect that when this happens, the result is unfair. A confirmation of this line of reasoning is found in the fact that in the long-run, producers make zero economic profits in perfect competition and return over capital is equalized in all the markets. In this scenario, in fact, physiological scarcity across the markets is optimally dealt with, so that there is no signalling function to perform. Hence, scarcity is determined only by production costs while prices are based only on them.

This finding allows us to give a full account, in the neo-Aristotelian tradition, of the relation between need, cost, and scarcity, entirely as a matter of commutative justice. This is a central claim

[1] Sweezy 1943: 69.
[2] Hutt 1935: 351-352.
[3] Richards 1939: 312. At page 317, Richards criticizes the reliance on taxes to address these issues with an argument that could have been written by a moral philosopher:

> [Taxation] does nothing to rectify the unjust distribution of 'war' burdens. War profiteering, particularly in necessaries, affects adversely the lower income groups. No rectification of these initial 'injustices' can be obtained through subsequent payment to the State by producers of excess profits on such sales-the two groups are not identical.

[4] Sweezy 1943: 66.

of Gordley's account, which was in tension with the connection between scarcity and distributive justice. Arguably, here Gordley seems to have conflated the two meanings of distribution distinguished in the Introduction, namely transfers between consumers and producers and redistribution between the members of the community.

3.2 Scarcity as a signal and the neo-Aristotelian tradition

Gordley does not offer a clear account of the role of scarcity in the determination of fair prices. Overall, Gordley seems to justify the role of scarcity on pragmatic grounds when he observes that "[t]here are … certain changes in the distribution of purchasing power that we cannot prevent".[1] The core of his account of the relevant literature and of its features is that, contrary to modern economists, the neo-Aristotelians did not conceive of "supply and demand as separate schedules that clear at a unique equilibrium price" and of market prices as tending towards a long-run equilibrium.[2] Instead, they took market prices as representing the *communis aestimatio* of the value of a good. Around this central idea, Gordley offers a series of additional considerations, not articulated in a clear conceptual framework.[3] First, the neo-Aristotelians understood that if producers systematically do not cover costs, they will cease to produce. Second, when the market price is normatively dissatisfactory, public authorities are entitled to regulate them. Third, that queuing, as an alternative to price increases, is an unattractive way to solve problems of scarcity because "if buyers queue up because the market doesn't clear, goods will no longer go to those who are willing to pay the most but to those who happen to queue up first". The last, which is by far the most important for current purposes, is the claim that:[4]

> Whatever the earlier writers may have had in mind, the entire argument just sketched can be restated more precisely and more persuasively in terms of modern economics. Suppose … that the economy were actually in the long-run equilibrium state hypothesized by economists: prices would never change and producers would always recover their costs. In that event, contracts at the market price would not change the wealth of the parties in the sense of the purchasing power that each of them commands.

Let us move backwards from this last idea. In a long-run competitive general equilibrium, in all the markets, prices and quantity exchanged are constrained by production costs only. As long as consumers are willing to pay such a price in return for the good or service, the exchange will take place. At the same time, the equality in exchange is attained. If this is the case, then rather than a mere pragmatic constraint to the fairness of market relations, scarcity is beneficial as long as it is

[1] Gordley 2006: 363.
[2] Gordley 2006: 362-363, 1991: 96-101, 1981: 1604-1617.
[3] *Ibidem*.
[4] Gordley 1981: 1611-1612.

instrumental to shifts in production and consumption eventually leading to the said long-run equilibrium. Producers exiting the market because there is not sufficient demand for their product are part of this process. Queuing does not provide meaningful signals to producers. Additionally, the proposed line of reasoning gives a theoretical reason for price regulation, namely that scarcity is not exercising its signalling function, so that it is pointless to let prices increase.

From the neo-Aristotelian perspective that Gordley defends, it is interesting to follow the claim of this section regarding the signalling function of scarcity. This claim makes the framework more coherent internally and also more coherent with economic theory—a line of argument Gordley himself has considered—and avoids the justification of the role of scarcity on the grounds of the convenient observation that pragmatic reasons imply that there is only so much equality in exchange that we can ensure. On the contrary, scarcity has a socially meaningful function. To see these ideas in practice, let us conclude by looking at a case analysed by the Aquinas about a famine in a county.[1]

A merchant transports corn from a neighbouring area and he knows other merchants are arriving as well, to the effect that Aquinas wonders if it is fair for the merchant to hide the information about the other merchants and to apply higher prices as a consequence. Aquinas says it is fair, and Gordley accepts the claim, but without explaining why it is fair to withhold this information and charge higher prices. The merchant responds to a physiological scarcity and transports the corn from an area where corn is less scarce to an area where it is scarcer. The rationale for withholding the information then is that the merchant has embarked in a trip to the starving county motivated by profit and if prevented from making this profit, merchants would have fewer incentives to do the same in the future. Not only physiological scarcity explains why the merchant behaved fairly, but the perspective in this reasoning is clearly *ex-ante*.

In light of the above, it can be understood why physiological scarcity allows for prices to rise above costs while being fair. Prices above costs exercise a signalling function that is part of the coordination exercised by the market mechanism of producers and consumers in different markets. Consequently, when the scarcity is pathological, expectably, the legal system intervenes because price increases find no justification. The next section looks more in detail to two components of the cost of a product that are not production costs *strictu sensu*, i.e. information costs and risk.

4. Extended Production Costs: Risk and Information

[1] Gordley 1981: 1605, 1991: 96.

The discussion so far has established a connection between commutative justice and the market mechanism by pointing out that when prices are in line with cost and physiological scarcity, the price is fair. As next step, we will see how problems of information and risk allocation fit with the neo-Aristotelian account. How, in other terms, fair duties about information and risk are identified. The two topics can be treated together because Gordley sees in the law of mistake a "risk-allocation question".[1] However, as we shall see below, his analysis of risk allocation with regards to the law of mistake is quite problematic, so that it is best to start from the allocation of risk in ancillary terms, where Gordley declares "we can learn from the economists".[2]

Gordley accepts the economic argument that "the parties would want to place risks and burdens on whichever party can bear them most easily". The market mechanism then incorporates in the price the risk allocation, which operates like any other cost of production[3] The argument about the fairness of allocating risks to the cheapest cost avoider can be summarized as follows:[4]

> An economist would say that this allocation of risks and burdens is 'efficient' because there is no way to change it in return for compensation so as to make both parties better off. The Aristotelian approach explains why it is not only efficient but fair. … [T]he contract is fair when [a] party assumes the risk and is compensated for doing so.

This argument is crucial for current purposes. Gordley connects the criterion of the cheapest cost avoider and the price mechanism to equality in exchange. Allocating the risks to the cheapest cost avoider is not only Pareto efficient, but it is also fair since price variations adjust the value of the performances so as to compensate the party who takes on the risk for such an assumption. This process ensures the equality of the exchange value of the performances. Notably, it also maximizes consumer welfare. As seen above, when costs are minimized and the consumer just pays a sum of just compensating the producer, consumer welfare is maximized.

Another reference to risk in Gordley's scholarship requires consideration. This is related to the justification of price variations and it is alternative to the one based on physiological scarcity. The claim is that price fluctuations preserve the equality of the parties like a "fair bet" does because "the party who failed to recoup his costs might as easily have made a gain".[5] The claim is important for this inquiry because the idea of a bet is central to explain the difference between *ex-ante* and *ex-post* perspectives in the economics of law. Yet, here it is meant to explain fairness. I find this explanation problematic for two reasons. First, it disconnects the fair allocation of risk from the

[1] Gordley 2006: 314, citing Atiyah 1995: 227.
[2] Gordley 2006: 369, 1991: 243.
[3] Gordley even accepts the controversial argument that also a monopolist would operate in this way and exploit its bargaining power only in the calculation of monopoly price. The argument is controversial because it rests on a set of non-trivial assumptions even when behavioural insights are not considered. For an overview, see Esposito 2017a: 206-211.
[4] Gordley 2006: 369, 377.
[5] Gordley 1991: 100-101.

logic of risk minimization plus compensation just discussed. This disconnection reduces the internal coherence of the account. Second, this claim is based on a puzzling conception of risk, where risk is not a degree concept, and cannot be handled better or worse by the different contracting parties. This is particularly clear in the remark that "Molina defended the rule that the risk of physical destruction fell on the buyer before delivery by observing that, as he could lose if the goods perished, so he could gain if their condition improved".[1] Molina suggests that the risk of destruction and the possibility of an improvement in the market value cancel out each other. But this is a contingent matter, not a conceptual one. And, additionally, one may wonder if these rules give the right incentives to the seller who has custody of the good to minimize the risk of destruction. Gordley articulates this problematic "fair bet" justification of price fluctuations as speculative and alternative to the one based on physiological scarcity. Since the latter is very fitting with economic theory and with the general scheme of the neo-Aristotelian account, the "fair bet" justification is rejected.

We can now move to information. As anticipated, Gordley accepts that the same logic also applies to information. Indeed, the economic function of mandatory information disclosure is minimizing the cost of information.[2] These norms regulate the information flow from the more to the less informed. Typically, but not always, information duties fall on the professional. For example, in financial regulation also clients have duties to provide information. Similarly, but not always, it is most likely that the consumer makes a mistake.

Gordley articulates two rationales, one for the case of mutual mistake and the other for the case of a unilateral mistake. The first rationale rests on the metaphysical thesis that every kind of object has a proper purpose. For example, objects belonging to the kind "houses" ought to be habitable. Hence, relief for mistake shall be granted when "a performance is unsuitable, not only to the purposes of the party who is to receive it, but to the purposes of parties in general who would otherwise have contracted for such a performance".[3] According to this line of reasoning, Gordley explains, relief should be granted for the purchase of a cow mistakenly believed to be sterile because no one would slaughter it.

The rationale in case of a unilateral mistake is different. Here, Gordley follows again a logic of information cost-minimization:[4]

[1] Gordley 1991: 100.
[2] A useful distinction here is between inspection, experience and credence information. See, for a clear illustration, de Jager 2017: 44. Note, however, that the distinction is not satisfactorily made in terms of goods because goods (and performances more generally) are multidimensional, so that information over one attribute could be obtained by inspection and over another by experience, while over another it could not be achievable.
[3] Gordley 2006: 317.
[4] Gordley 2006: 320.

> The seller knows that because of the character of the performance, it will answer to the needs of parties with certain characteristics but not those with others. That risk arises because the performance is not one suitable to the needs of all those who have a certain need. If the purchaser is wrong about his own characteristics which make the performance suitable to him, he should bear the risk. He is in the best position to know, and the seller should not have to run the risk that prices will fall because of the buyer's error. But if the buyer knows his own characteristics correctly, for example, his shoe size, then the risk ought to fall on the seller who inadvertently sells him the wrong size shoe. He is in the best position to identify such a mistake, and if it occurs recurrently, to spread the risk across all the buyers who might be harmed.

The presence of two tests requires explaining their relation. Are the tests of unsuitability and information cost-minimization alternative or are they in a hierarchical relation of some sort? Are they even compatible? In my view, the main problem lies in the vagueness of the concept of unsuitability. Reconsider the example of the cow mistakenly believed to be sterile. It is extremely doubtful that no one would slaughter it. If the transaction costs of reselling the cow as a fertile one are high enough and if the new owner is not in need of a fertile cow, he can actually be expected to slaughter it. Moreover, it is not self-evident that the information cost-minimization criterion would lead to the conclusion that relief should be granted, but Gordley does not discuss the point because he takes an *ex-post* perspective and asks who is in the "better economic position … to face the consequences of the mistake" once it has been made.[1] Thus, Gordley makes the move economists often charge legal scholars of, namely focusing on an *ex-post* perspective about legal intervention.[2] From an *ex-ante* perspective, it depends on who the cheapest information collector was. If sellers are typically the ones in the best position to collect information about the fertility of cows, then relief should not be given to the seller who mistakenly believes he is selling a sterile cow.

Finally, the unsuitability criterion does not explain an important element for mistake defences, namely the role of the recognisability or recognition of the mistake by the defendant.[3] This criterion is explainable from an information cost-minimization perspective because it provides incentives to correct recognisable and recognised mistakes and also allocates the consequences of non-corrected recognisable mistakes, thereby giving incentives to be informed and to inform.[4] As this duty operates during negotiations, the price mechanism can still be used (as in the case of

[1] Gordley 2006: 315. I am thankful to Hanoch Dagan for pointing out to me that this is a problem of *ex-ante* versus *ex-post* perspective. To Gordley's credit, he is very aware of the distinction between *ex-ante* and *ex-post* perspectives. See, for example, his discussion of the limits of the *ex-ante* perspective when both parties consider a risk *ex ante* to be too remote to be worth of explicit allocation (Gordley 2006: 376-377).
[2] See pp. 33-34.
[3] See DCFR Model Rule II. – 7:201 and the commentary by the Study Group for a discussion of the diffusion of this criterion in Europe.
[4] See De Geest and Kovač 2010 and Zhou 2011.

ancillary terms) to ensure the fair compensation for cost-minimizing collection and allocation of information.

In light of these considerations, the information cost-minimization test cannot be readily understood as an extension of the unsuitability test. On the contrary, the unsuitability test can be understood as a criterion for establishing the duty to inform. If the seller can be reasonably expectable to be aware of knowing that a good is unsuitable for normal uses, then it makes sense to impose upon him the duty to disclose the information that the object of the contract is unsuitable for the said use. If the seller fails to collect and later share information about risks he is in a better position to collect, giving a remedy to his counterparty makes sense.

The cost-minimization test should then be preferred to the unsuitability test as the main criterion for information policy, not only from an economic but also from a neo-Aristotelian perspective. To Gordley's credit, his discussion focuses primarily on cases of mutual mistake and treats cases of unilateral mistakes as exceptions, "not[ing] in passing" that commutative justice requires a duty to disclose information in these cases.[1] Thus, it might well be that had he focused more on unilateral mistakes, his account would have been more linear. In light of the above, the prevalence of the information cost-minimization over the unsuitability test is preferable.

Does the information cost-minimization criterion maximize consumer welfare? Typically, information duties are associated with information that the professional is expected to have. At the same time, this information is for the consumer typically more difficult, burdensome and costly to find. Thus, the law imposes on the professional a duty to (collect and) disclose this information to the consumer. Notably, while it is expectable that the professional passes the cost of this disclosure onto the consumer, this mechanism (if the market is well-functioning) is still less costly for the consumer than bearing the costs of searching the information independently. It is thus allocatively efficient from a consumer-welfare perspective.

There is, however, another major concern about the duty of sharing information, namely that the informed party might have incurred in costs justifying the withholding of information.[2] In other words, the concern is not deterring from the acquisition of valuable information. In fact, forcing to share information might reduce the incentives to collect the information in the first place. We can rephrase the point in terms of scarcity. The scarcity of knowledge is considered as a reason for having prices that depart from costs. The clearest example of this approach is the institution of patents. Patents are a means to reward innovation by granting temporary monopoly power. Notably, the quantification of the reward is delegated to the market system, so that some patents are

[1] Gordley 2006: 322.
[2] See De Geest and Kovač 2010 and Zhou 2011.

worthless and others can change the life of the inventor.[1] Although Gordley does not discuss problems related to information acquisition, we know that physiological scarcity justifies the raising of prices as a signal to producers—in this case of knowledge. Accordingly, when scarcity is physiological, prices rising above costs are justified.[2] Admittedly, it is difficult to estimate when the information scarcity is physiological or pathological. However, it is also the case that the point is even debated in the literature on the optimal information acquisition.[3]

The conclusion reached so far is that at the core of both the neo-Aristotelian theory and the market mechanism there is a logic of price minimization. To see this clearly, imagine a market in which supply meets demand and prices equal costs. This is the core of the perfect competition model. Under these conditions, price minimization implies that consumers satisfy their needs in exchange for the share of purchasing power that is just necessary to cover the costs (fairness theory) and, therefore, maximize their surplus (economic theory). As we will see in more detail in Section 6, if the choice is prudent and clever, it is then optimally instrumental to *eudemonia* (fairness theory); if the choice is rational, it maximizes consumer welfare and is therefore allocatively efficient (economic theory). However, before moving to that discussion, it is advisable to reinforce the findings of these three sections on the relation between fairness, cost, information, risk and scarcity by looking at three incompatible accounts of the relation between fairness and efficiency advanced in the literature.

5. Inferior Economic Accounts on Fairness and Efficiency

To confirm these conclusions, it is useful to look at three ways in which mainstream economic theory and Aristotle's concept of commutative justice have been related to each other. These analyses are dissatisfactory but once they are corrected lead to the same claim reached above. I first comment Schumpeter's discussion of commutative justice in his monumental *The History of Economic Thought.* Second, a short article by David Friedman entitled *In Defense of Thomas Aquinas and the Just Price*. Third, I discuss the more recent contribution by Golecki to *Aristotle and the Philosophy of Law*, discussing the relation between commutative justice, economics and mainstream economically informed legal research.

[1] Obviously, the situation is much more complex than this. The evidence in support of the idea that patents are necessary is weak, there is the need to allocate patent rights between employers and employees, the problem of patent-settlements, the interplay between patents and the access to essential facilities, etc.
[2] An additional problem occurs when the consumer is more informed. In situations like this, the consumer welfare approach clearly points in the direction of the desirability of the exchange. From a neo-Aristotelian perspective, the point requires a more thorough exploration.
[3] See, in particular, the review in Zhou 2011.

5.1 Schumpeter on fairness and efficiency

Schumpeter observes that "Aristotle's embryonic 'pure' economics" has greatly influenced the methodology adopted by Smith in *The Wealth of the Nations* and was importantly integrated by "later scholastics".[1] In Schumpeter's view, "if A barters shoes for B's loaves of bread, Aristotelian justice requires that the shoes equal the loaves when both are multiplied by their normal competitive prices; if A sells the shoes to B for money, the same rule will determine the amount of money he ought to get".[2] This conclusion follows, Schumpeter suggests, from the claim that for Aristotle the monopoly price is unjust and, therefore, "actual commodity prices" cannot be the criterion for determining whether an exchange price is commutatively just or not.[3]

It is indeed the case that Schumpeter's claim fits perfectly in the argumentative strategy of this dissertation and with its claims. Like in Chapter 3, the analysis hinges on the intuition that there is something bad about monopolies. An argument for this claim is then given in light of Aristotle's discussion of commutative justice. Unfortunately, there is a serious weakness in Schumpeter's argument, namely that Aristotle never condemns monopoly as unjust. Contrary to Schumpeter's claim, in the passages of *Politics* and *Nichomachean Ethics* where Aristotle refers to monopoly prices, there is no explicit condemnation of monopolistic behaviour.[4] And one cannot find any criticism even in the *Economics*, the treaty on economic activities controversially attributed to Aristotle.

I see two possible strategies for repairing Schumpeter's argument. First, the condemnation of monopolistic behaviour is implicit in Aristotle's thinking—all it needs is to make it explicit. Second, even if Aristotle did not condemn monopolies, suffices that the neo-Aristotelian tradition did. The main purpose of the translation claim of this dissertation is proving that it is possible to use economic theory explain the law consistently with the fairness, wrongfulness and doctrinal theses.[5] Whether Aristotle himself and/or the neo-Aristotelian tradition allow for connecting commutative justice to the condemnation of monopolistic behaviour is not of pivotal importance.[6] What is important is that the connection can be established, which in turn supports the translation claim of this dissertation and, therefore to the collaboration proposed by Minimalist Law-and-Economics. This dissertation focuses on the first repairing strategy, as the second is amply documented in

[1] Schumpeter 1994 [1954]: 96.
[2] Schumpeter 1994 [1954]: 98.
[3] Schumpeter 1994 [1954]: 97.
[4] Schumpeter 1994 [1954]: 96. This is problematic especially for Schumpeter's claim since Aristotle had clear in mind the fact that monopoly pricing is often based on contrived scarcity (Pol. I, 11).
[5] See p. 13 for a statement of these theses.
[6] Thus, all three strategies are viable solutions to warrant the claim defended in this section. However, under the assumption that being more or less consistent with Aristotle's theory is relevant to establish the strength of the argument, the strength of the strategy is decreasing from the first to the third.

Gordley's writings. While Aristotle did not say that monopoly prices are bad *per se*, his theory of virtue and the concept of *eudemonia* imply that the virtuous man in normal circumstances ought not to charge monopoly prices. Thus, Schumpeter's argument is repaired by moving the claim from the level of commutative justice to that of virtuous life while, at the same time, accepting that monopoly prices can be justified in Aristotle's theory.

The monopoly price is the price a vicious person would ask for. At least two vices are relevant here: greed and stinginess.[1] A greedy person chooses more than the mean of what is good and too little of what is bad—this not being necessarily money.[2] Stinginess, instead, is more specifically concerned with money, as it is one of the opposites of the virtue of generosity, which is necessarily concerned with money.[3] One of the types of stingy action is taking too much money from others. For example, this is the case of "people who lend small sums of money at high rates on interest". Indeed, lending money falls within the scope of application of commutative justice, to the effect that the stingy moneylender violates the mean by taking too much from the borrower. The action of the stingy moneylender is thus unfair. More generally, a stingy person is driven by a "disgraceful love of gain".[4] Similar considerations are made by Aristotle when he discusses a way of "property acquisition" that he calls "wealth acquisition" and consists in being driven by an unlimited desire for wealth. The problem of wealth acquisition is that the actions are not directed towards *eudemonia*.[5] The conclusion that monopoly prices are unfair follows from the observation that they escape from the logic of price minimization described above. Monopoly prices are justified neither by cost nor by physiological scarcity. Instead, they are based on the profit-maximization calculus of the monopolist,[6] whose actions are affected by the vices of greed and stinginess. Stinginess, in particular, implies being unfair to others by giving them too little or asking them too much in exchange. Thus, if monopoly prices are motivated by the desire for money *per se*, as it typically happens, then they are arguably unfair.

There is, however, an important caveat. The end, purpose, goal of the agent is essential for Aristotle to determine whether a person is vicious and, if so, what his vice is. For example, a person committing adultery for money is greedy but not intemperate, because the action was not motivated by appetite.[7] Regarding the purpose of monopolists, both examples Aristotle gives in *Politics* are ambiguous. In the first, after predicting a great harvest thanks to his knowledge of the stars, Thales

[1] Commentators feel at ease in concluding that the unfair person is always greedy. See Crisp 2004: xxii and FD Miller 1995: 87-88.
[2] EN V, 1-2.
[3] EN IV 1, 1119b and 1121b-1122a. Note that generosity is not the only virtue concerned with money, as there is also magnificence, which "surpasses generosity in its large scale" (EN IV, 2).
[4] EN IV 1, 1122a.
[5] Pol. I, 9, 1257a.
[6] See pp. 84-86.
[7] EN V, 2, 1130a.

the Milesian temporarily monopolized the olive-presses industry of Chios and Miletus to prove that "philosophers can easily be rich if they like, but that their ambition is of another sort".[1] In the second, a man monopolizes the available iron and makes a great profit out of it. He is consequently exiled as his actions were considered contrary to the interest of the tyrant of the city. Aristotle does not criticize these behaviours, and this is especially problematic for the second example, where the man seems to act out of greed and stinginess. Instead, Thales seems to have Aristotle's approval (as he is acting to defend the reputation of philosophers). The explanation of this gap rests partially in the observation that in *Politics* Aristotle is giving a piece of advice to all, but especially statesmen, who can be in need of money.[2] At the same time, the conclusion that monopoly prices are normally unfair can be reinforced by considering that Aristotle's philosophical method emphasises the importance of central cases.[3] In *Politics*, Aristotle makes it abundantly clear that in his view "wealth acquisition" is the normal attitude in the marketplace.[4] However, this does not imply that Aristotle justifies this attitude. Wealth is important—Aristotle admits—because *eudemonia* requires material goods.[5] However, a life dedicated to wealth is "justly censured" because wealth should be pursued only to the extent it is needed to achieve *eudemonia*.[6] On these grounds, it seems plausible to conclude that charging a monopoly price is normally an unjust action. Thus, Schumpeter could be agreed with for the claim that the price set by the profit-maximizing monopolist is unfair.

5.2 David Friedman on fairness and efficiency

Surprisingly, David Friedman's views about fairness and efficiency are almost compatible to the ones proposed in this dissertation. This is surprising because his book *Law's Order* is a clear example of mainstream economics of law.[7] In *In Defense of Thomas Aquinas and the Just Price*, Friedman distinguishes two theses about contracts and prices. The first requires only that the "price was acceptable to both parties" and would correspond to "current legal practice and conventional economic views", while the second required exchanges to be made at the just price, which "was either the intrinsic value of the commodity or its value to the seller, whichever was higher".[8] In other terms, Friedman opposes the view by which Pareto efficiency is sufficient to conclude that the contract is desirable, with the concept of just price as determined by cost and scarcity.

[1] Pol. I, 11.
[2] Aristotle does the same in *Economics*.
[3] See Finnis 2011: 9-11 and Shields 2014: 386. An important application of this method can be found in Aristotle's influential distinction between law and equity articulated in EN V, 14.
[4] Pol. I, 9, 12571-1257b.
[5] EN I, 8 and VII, 13.
[6] P I, 9-10 and VII, 1. See also FD Miller 1995: 338-339, Crespo 2008: 10 and Höffe 2003: 166.
[7] DD Friedman 2000.
[8] DD Friedman 1980: 234-235.

If Pareto efficiency is the rule, why would the doctrine of just price be a justified exception? In Friedman's view, the purpose of the doctrine of just price was to "determine the price in … non-competitive situations" and if this is the case, "it may have served a useful economic purpose".[1] Just price would be, for Friedman, a tool to identify a proxy of the "price at which the merchants in the competitive market could afford to sell it".[2] The merit of this procedure would be its considerable determinacy and the capacity of market prices to approximate the estimation of "subjective values", with the possibility of considering higher than normal costs incurred by the seller. So far, Friedman's approach is fully compatible with the assumption of the consumer-welfare maximand. Indeed, Friedman even notes that when "the buyer was willing to pay more than the market price … the doctrine [of just price] would allocate virtually all of the surplus to the buyer".[3]

The problem comes from the additional, axiological claim that the economic justification of the just price doctrine is simply that of being "a useful device to minimize the (bargaining) costs resulting from imperfect competition".[4] This justification is indeed compatible with a total-welfare approach and with "conventional economic views". But, at the same time, it falls short of being compatible with the fairness and wrongfulness theses. The problem of the unjust contract is not that it is unfair to the aggrieved party, but that it does not minimize bargaining costs and, therefore, fails to maximize total welfare. Moreover, the unfair price is not a wrong done to the aggrieved party, but it is a wrong because it does not minimize transaction costs.

5.3 Golecki on fairness and efficiency

Golecki has reconsidered recently the relation between the Aristotelian tradition and economically informed legal research. His analysis has a great deal in common with the approach followed in this dissertation. In particular, in Golecki's view, "[t]he theory of Aristotle may be regarded as the ethical foundation for the economic theory, whereas economic theory of contract determines necessary conditions for a proper moral choice".[5] However, there are several points of disagreement between Golecki's account of Aristotle's theory and the one given in this chapter. Their discussion will strengthen the translation claim.

Golecki takes the view that Aristotle had a subjective theory of commutative justice, which was later objectified by the Aquinas.[6] This reading of Aristotle's theory fits uncomfortably with the

[1] DD Friedman 1980: 236.
[2] DD Friedman 1980: 237.
[3] DD Friedman 1980: 237.
[4] DD Friedman 1980: 240.
[5] Golecki 2013: 254.
[6] Golecki 2013: 257.

reconstruction given above,[1] in which need is just a participation constraint for the consumer whereas the interplay of cost and physiological scarcity determines the fairness of the exchange. Moreover, this subjective reading can hardly be reconciled with Golecki's own observation that individual subjective utility is an "introductory condition of exchange" but is not "directly related … to the fairness of exchange".[2] This observation is, in fact, a reformulation of the idea that need is just a participation constraint. In consideration of these elements and also of the lack of arguments given by the author to support this subjective reading of Aristotle's commutative justice, this dissertation rejects the claim.[3]

At this point, Golecki considers three reparatory strategies used in the literature. The first strategy, attributed to Gordley and Murphy, is based on an objective notion of value, but it would fail because "the majority of legal systems define reciprocity in contracts in purely subjective terms, referring to the exchanges of promises and the underlying consent of parties".[4] In this regard, we can anticipate that indeed EU law welcomes an objective notion of value.[5] Given the weak evidentiary support to Golecki's claim,[6] Gordley's scholarship remains convincingly accurate both in its account of Aristotle's theory and in its explanatory claim.[7] The second and the third strategies modify "some basic principles of Aristotelian theory". The second basically tries to build a will theory and is found wanting by Golecki in several versions. As will theories are not relevant for the purposes of this dissertation, they are not discussed here. The third strategy, the most important and interesting one for current purposes, is based on the use of mathematics and, in particular, game theory. Golecki calls this strategy "functional approach" and connects it clearly with mainstream economics of law by giving Posner as the pivotal example of its use. In Golecki's view, Posner has tried to give "a new meaning to the idea of commutative justice" based on the concept of "optimal allocation of resources".[8]

[1] See, in particular EN V, 4, 1132a, where Aristotle states that justice in exchange "consists in having an equal amount both before and after the transaction" and that "what is just in rectification will be the mean between loss and gain" and EN V, 5, where Aristotle rejects the claim that "reciprocity is just without qualification"—as in a principal-agent model, reciprocity is merely a participation constraint that is necessary in order for voluntary transactions to take place. Also FD Miller 1995: 93 makes the same mistake.

[2] Golecki 2013: 262. A similar tension can be found in Crespo 2008 (compare pp. 18 and 22). In the language used in this dissertation, need is a participation constraint.

[3] Note that for the purposes of this dissertation, it would also be sufficient to subscribe to the view that a subjective theory of value was later rejected in the Aristotelian tradition.

[4] Golecki 2013: 258.

[5] To give just two examples: neither the "unfair test" under Article 4, Directive 93/13/EEC nor the "average consumer" in the CJEU case law can be understood in a subjective sense (see more generally pp. 223-253).

[6] Golecki 2013: 249.

[7] See, in particular, Gordley 1981, 1991 and 2006.

[8] Golecki 2013: 260.

Notably, Golecki's argument rests on the claim that a "just contract is in fact a contract according to which the gains of two parties are equal".[1] This account falls in the Pareto efficiency contradiction identified in Chapter 2 because it expels from the analysis the connection between the contracting parties and the market mechanism.[2] As seen in Chapter 3, assuming the consumer-welfare maximand avoids this result. Moreover, it is actually unlikely that Posner would support it. If all the market participants split gains equally, then we are in a new type of perfectly discriminating monopoly in which the prices are not equal to consumer demand but are the mean between production costs and consumer demand. Golecki suggests that the relevant equality is about the distribution of gains. However, the distribution of gains is typically considered irrelevant from a total-welfare perspective. Although original, Golecki's account fits uncomfortably with both the neo-Aristotelian tradition and mainstream economics of law.

To sum up, we have seen that a fair price is based on the interaction of need, cost and scarcity. When these concepts determine the price, this tends to be minimized and is fair. Parties are then equal in the sense that they are both price-takers, but also and more importantly in the sense that the value of the exchanged resources is equal. And this is true both in case of a market exchange and of a barter.

Looking at the role played by rationality in the mainstream economics of market relations confirms these results, as the next section shows.

6. Bounded Rationality and Prudence

Both fairness and allocative efficiency with the consumer-welfare maximand identify a price-minimization logic as the framework for the analysis of market relation about prices, ancillary terms, information and scarcity. Accordingly, any argument for the fairness of market relations can be translated into an argument about the allocative efficiency of the market, and vice versa.

This section looks at the relation between the neo-Aristotelian framework and the observation that, in some cases, individual preferences are not a reliable welfare indicator. In fact, while this claim is accountable from a consumer-welfare perspective,[3] it is still unclear to what extent it fits with the neo-Aristotelian framework. The problem is particularly significant once we

[1] Golecki 2013: 250. This is the view implicitly taken in those economic models where parties have equal bargaining power and perfect mutual information and therefore end up splitting the gains. However, this understanding of equality is different from the one defended in this dissertation, according to which parties are equal when they have no bargaining power and, therefore, are equally price-takers.

[2] See in particular Golecki 2013: 253, claiming that for "political economy" it is sufficient that the exchange is a "Pareto-optimum". Indeed, here the contradiction with the citation from page 254 is evident because now Pareto optimality is a sufficient condition, whereas before economics would only set necessary conditions.

[3] See pp. 37-39 and 103-104.

recall that, as a matter of Aristotelian exegesis, there are conflicting accounts about the relation between need and exchange value.

To shed light on this issue, this section first critically reviews Gordley's account of the relation between the neo-Aristotelian framework and paternalism. The article offers important insights, but has three conceptual problems. These problems are solved by giving a more nuanced account of Aristotle's discussion of prudence, which is then connected to the concepts of bounded rationality and behavioural market failure. The outcome is a plausible account of the semantic relations between allocative efficiency on the one hand, and the concepts of fairness and prudence in the neo-Aristotelian tradition on the other.

In *Morality and Contract: The Question of Paternalism*, Gordley answers the question "Is it right or proper for a state to interfere on moral grounds with contracts voluntarily entered into?".[1] While in other writings Gordley focuses mainly on the explanatory role of the concepts of fairness and distributive justice, in this essay the attention is placed on prudence and the other virtues: "[t]hough prudence enables [people] to recognize the right choice, to act rightly they will need other virtues as well".[2] Paternalism refers to "what the state does when it circumscribes or influences the choice a citizen would otherwise make because it believes the citizen's choice is wrong, whether through a want of prudence or of some other virtue".[3] As Gordley notes, according to this definition, as long as the state intervenes on the grounds of commutative or distributive justice, the intervention is not paternalistic. Contrary to a common understanding of the concept of paternalism, this notion of paternalism implies that when "the government is interfering with the terms of contracts voluntarily entered into" it is not necessarily acting paternalistically.[4]

This distinction is appealing. Imagine a parent telling his child, Aurora, that she must stop watching TV because she ought to do her homework. This is intuitively a case of paternalism: finishing the homework instead of watching TV is in Aurora's interest even if she disagrees. Consider now the case in which a six-years-old complains to his mother that, while playing with the videogame console, his five-years-older brother tricked him in accepting a videogame challenge where the winner would get to play videogames afterwards. Expectably, the younger one loses, but does not want to stop playing and calls for his mother's help. We may say that the bet was unfair[5] in that the terms were too disadvantageous to the younger brother, or more radically that there was no consideration in the bet, because in the unlikely case of victory, the younger brother would not be gaining enough. While we may say that the younger brother was imprudent, the elephant in the

[1] Gordley 2007: 1733.
[2] Gordley 2007: 1735.
[3] Gordley 2007: 1743.
[4] Gordley 2007: 1744. For a review of the literature on paternalism, see Cserne 2018.
[5] I can only add I did not find it unfair when I was eleven.

room here is the unfairness of the challenge made by the older brother. The standard view that all interferences with private agreements are paternalistic, ultimately, as Gordley notes,[1] rests on the idea that freedom of contract is the foundational value of contract law. However, this intuition implies that the parent defending the younger brother is acting paternalistically. It seems to me more accurate that this parent is reacting to an unfairness of the older brother. The great advantage of the neo-Aristotelian framework is that of offering a demarcation criterion between this case and Aurora's refusal to do her homework, and more generally between the cases in which one party is taking advantage of the other (unfairness) and the cases in which the problem is just that a party is making a wrong choice for himself (paternalism).

The legitimation to intervene paternalistically stems from the claim that the state is entitled to help its subjects to achieve their *eudemonia*.[2] This, however, does not imply that the state is always entitled to decide for imprudent citizens. First, the state might not be in the position to take the best decision; second, there is an intrinsic value in choosing; third, exercising and executing choices is part of a learning process that cannot be ignored.[3] Thus, "pragmatic reasons" require choosing the lesser of evils. Crucially, for the purposes of this dissertation, Gordley presents these pragmatic reasons as belonging to the realm of economics and as separate from moral reasons.[4] We stumble again upon the conceptual separation assumption. And again, this dissertation rejects the assumptions and explores whether a translation is indeed possible.

Gordley's account reveals two additional problems. First, the examples of justified intrusive interventions are already accounted for by him in terms of distributive and commutative justice. This observation makes one wonder if there is really an independent scope of paternalistic interventions according to the neo-Aristotelian tradition. Second, the account ignores the role of cleverness and doesn't sufficiently discuss the relation between prudence and the state of wastefulness. These problems are accounted for in three steps. The first step shows that the idea that limited prudence and cleverness lead to wastefulness, to the effect that there is a category of interventions that are justified independently of any appeal to fairness or commutative justice. The second step shows the compatibility of this framework with behavioural insights. The third step explains that also in behavioural literature there is an overlap similar to that between commutative justice and prudence regarding the concept of behavioural market failure.

[1] Gordley 2007: 1735.
[2] Gordley 2007: 1764-1765. See also Section 2 and Section 8. Additionally, note that Gordley dedicates a significant part of the article (pp. 1748-1753) to rejecting the claim that according to the Aquinas the state is not entitled to act paternalistically made by Finnis 1998.
[3] Gordley 2007: 1756-1758.
[4] Gordley 2007: 1744.

6.1 Limited prudence and cleverness lead to wastefulness

For Aristotle, prudence—also called practical wisdom—is a virtue of intellect. Aristotle is extraordinarily brief in discussing it, but we know for sure that *eudemonia* requires it too.[1] In his analysis of virtues, Aristotle often uses the metaphor of hitting or missing a target and the metaphor is particularly useful to explain the peculiar role of prudence: "virtue makes the aim right, and practical wisdom the things towards it"[2] or, in other terms, practical wisdom "gets the goal right".[3]

As also Gordley observes, prudence is the virtue that allows choosing between ends, goals and values in conflict. Thus, practical wisdom is not instrumental rationality—that is, the ability to identify and deploy the best means to achieve an end. Indeed, Aristotle calls this ability "cleverness".[4] Prudence cannot be reduced to cleverness, but it "does involve it".[5] While Aristotle does not elaborate the point, clearly there are complex interactions between ends and means, so that the selection of the ends involves considerations about the means. For this reason, in the following pages, considerations about cleverness will be included in considerations about prudence, so that "prudence" will be better understood as "prudence and/or cleverness".

Importantly for current purposes, prudence relates to two states leading to the vice of wastefulness, the states of incontinence and intemperance.[6] Incontinence is not a vice, but intemperance is. The intemperate person chooses to consume too much, contrary to the virtue of temperance.[7] The incontinent person simply acts "contrary to correct reason, but not out of conviction", and rather out of a lack of "self-control". The main difference is that the intemperate person does not experience regret, while the incontinent one does. Since being intemperate is a vice, from a neo-Aristotelian perspective, the law is justified in fighting against it. However, the same applies to incontinence, because it leads to "do[ing] unjust things".[8]

6.2 A behavioural perspective on intemperance and incontinence

The second step of this analysis connects intemperance and incontinence to behavioural findings. The inquiry is mainly suggestive, in the sense that it simply shows that central examples of

[1] EN X, 8, 1178a.
[2] EN VI, 12, 1144a.
[3] Crisp 2004: xxvi.
[4] "There is a thing people call cleverness. This is such as to be able to do the actions that tend towards the aim we have set before ourselves and to achieve it" (EN VI, 12, 1144a).
[5] EN VI, 12, 1144a.
[6] "Wasteful" are "those who are incontinent and spend their money on intemperate pursuits" (EN IV, 1, 1119b). Gordley does not discuss the conceptual relation between prudence, temperance, continence and wastefulness (see in particular Gordley 2002 and 2007).
[7] EN III, 10 and VII, 8, 1150b.
[8] EN VII, 8-10.

behavioural findings can be accounted for by reference to the concepts of intemperance and incontinence. Behavioural sciences show that people behave in ways that are not predicted by rational choice theory, and do so systematically. Their actions are often based on a series of heuristics and cognitive biases that can lead to welfare-decreasing choices in comparison to the predictions of rational choice theory.[1]

Two lines of inquiry in this literature are particularly interesting here. The first focuses on the downgrading of revealed preferences as a welfare indicator due to heuristics and biases. The second identifies two types of behavioural market failure.[2]

The downgrading of preferences as a welfare indicator is a serious blow to standard welfare economics.[3] What seems good for someone on the grounds of this person's informed consumption choices might not be that good once behavioural insights come into the picture. In some cases, a more sophisticated axiological argument is needed. Imagine two people, Tim who is not saving for his retirement and Tom who has the habit of smoking. In a rational choice theory framework, if Tim and Tom are informed about the consequences of grasshopperish behaviour and of inhaling nicotine, tar, etc., it follows that their behaviours are welfare-increasing because they prefer them.[4] In a behavioural framework, there are reasons to doubt this conclusion. For example, evidence shows that consumers tend to excessively discount gains which are in the distant future (hyperbolic discount) and to underestimate the likelihood that a certain negative event will happen to them (optimistic bias).

For current purposes, it is unnecessary to establish whether hyperbolic discount is a matter of intemperance and optimistic bias one of incontinence or any other combination between the two dichotomies. Here, it is sufficient to emphasise that many behavioural findings connected in particular with procedural bounded rationality[5] can be accounted for as limitations of prudence.[6] Think for example of concepts like inertia, information overload, framing and anchoring effects and confirmation and availability biases. In one way or another, they all show how in certain situations

[1] However, note that the claim is not that this is always the case. The concept of "ecological rationality" is exactly advocated by Gigerenzer and others (see for example the essays in Gigerenzer and Engel 2006) to stress this point.
[2] For more detailed analyses of the implications of behavioural sciences for consumer policy, see Esposito 2017a, 2018b and the references therein.
[3] The implications are so serious that Lunn 2015 suggests that it is inappropriate to use the expression behavioural market failures because the phenomena connected to this expression depart so much from the analytical framework of standard welfare economics that they "question the legitimacy for policy analysis of the framework itself" (p. 316). As I have articulated elsewhere, I believe Lunn's conceptual point is ultimately not convincing, although I fully concur with him in holding that the axiological downgrading of revealed preferences is a key challenge for mainstream economic theory (Esposito 2017a, especially 202-203 and 2018b: 15-16).
[4] Gordley's critique to this approach is articulated at length in Gordley 2002: 68-72.
[5] Within the concept of bounded rationality, the main distinction is between the relaxation of the assumption of egoism (substantive bounded rationality) and the relaxation of the description of choice as the selection of the highest value preference in a complete and transitive ordering (procedural bounded rationality).
[6] The further distinction between intemperance and incontinence is immaterial here.

consumers can end up choosing to consume too much, save too little or take on too much risk. These are exactly the behaviours one would associate with the ideas of intemperance and incontinence.

It can thus be concluded that there are indeed paternalist grounds unrelated to concerns about commutative and distributive justice and related instead to limitations in temperance and continence. Furthermore, the conceptual framework of behavioural sciences can be fruitfully used to specify and analyse the Aristotelian concepts of temperance and continence.

6.3 Symmetrical overlaps in the neo-Aristotelian tradition and in behavioural theory

We can now move to the third step, which shows that the same overlap between paternalistic and justice considerations is also found in the field of behavioural sciences. To see this, it is useful to focus on the distinction between two meanings of "behavioural market failure".[1] In the first sense, a behavioural market failure occurs when the market gives incentives to producers to take advantage of consumers' heuristics and biases. In the second sense, a behavioural market failure occurs when the market does not give incentives to correct detrimental choices without this being to the advantage of producers. Both types of behavioural market failure imply sub-optimal allocations and, as any other market failure, open the way to considering whether the legal system can improve the allocative efficiency of the market. It is thus interesting to reflect on their conceptual relation with fairness and prudence in a neo-Aristotelian framework.

The first point of contact is that just like considerations about prudence and fairness cannot always be disentangled, so are the two types of behavioural market failure. In fact, producers could compete by making consumers aware of the threat imposed by the incentives to take advantage of bounded rationality, or operators on a secondary or ancillary market could offer assistance against these practices. Thus, the existence of the first type of behavioural market failure presupposes the second one. In other terms, for producers to take advantage of bounded rationality, market incentives have to be too weak for producers to find profit in contrasting these exploitative practices. But the opposite is not the case because the second type of behavioural market failure can happen without any advantage being taken by producers.

Let us now give a closer look at these two types of behavioural market failure. In cases of the first type of behavioural market failure it is possible to distinguish two types of harmful consequences, which mirror the distinction between exploited and distorted consumers.[2] Let us call

[1] See Esposito 2017a: 199-200 and 2018b: 12-16 and the references therein.
[2] See pp. 86-87.

the first "exploitative producer nudging"[1] and the second "distortive producer nudging". An example of exploitative producer nudging is given by the finding that very low-interest rates for an entry period followed by high overdraft charges are a very lucrative business model for the credit card industry. The fact that professionals who are not engaging in this pricing strategy will be at competitive disadvantage warrants the importance of this finding.[2] The concept of distortive producer nudging is well illustrated by reference to the facts of the *Mars* case.[3] Mars GmbH sold ice-creams with a 10% free increase of quantity per bar, but the information on the package occupied much more space of the surface and used bright colours.[4] Regardless of the compatibility of this advertising technique with EU law, the point is that the claim against this practice is not that the contractual conditions were exploitative, but that the advertisement distorted the consumption choice of the consumer, which is why these strategies are more precisely called "distortive private nudges".[5] It is indeed true that consumers received more ice-cream than usual. However, at least some of these consumers would have consumed something else had it not been for this producer nudge. If we come to the conclusion that the alternative choice would have increased consumer welfare, distortive private nudges are allocatively inefficient.[6] In case of both exploitative and distortive producer nudges, producers take advantage of consumers' bounded rationality (imprudence) to reach an allocatively inefficient (unfair) outcome. Hence, arguments about this first type of behavioural market failure can be translated into one about the unfairness of the practice.

Let us consider the second type of behavioural market failure. In this scenario, producers do not act unfairly and to the disadvantage of the consumer because they do not benefit from consumers' bounded rationality (imprudence). An example is the use of one-side printing default settings in a printing software. Users end up printing many documents as one-sided but they do not actually need to. Unless the producer of printing software produces also the paper, he derives no benefit from this setting. While these users are either intemperate or incontinent, if software producers do not intervene, we have the second type of behavioural market failure.

[1] Alemanno and Sibony 2015: 18 call this strategy "exploitative private nudging", which I find an accurate expression, but in the context of this dissertation it is more appropriate to substitute the term "producer" to "private".
[2] This observation has important consequences: economists of law have strenuously defended, even in the face of heroic caveats, the argument that professionals have reliable incentives to minimize risks and to take advantage of market power only by increasing prices. For a more detailed discussion, see Esposito 2017a: 197-202.
[3] C-470/93.
[4] While the CJEU stated—without any argument—that the "reasonably circumspect" consumer would not fall for this trick, empirical evidence collected by Purnhagen and van Herpen 2017 suggests that there is reason to believe the practice did influence the perception of reasonable consumers. However, the evidence did not show a distortion in the behaviour, so that it cannot count as strong evidence in favour of the conclusion that what Mars GmbH did was a distortive producer nudge.
[5] Alemanno and Sibony 2015: 18 refer to private nudges that "alter [consumer] preferences" without distinguishing clearly from them in distortive and exploitative private nudges.
[6] See pp. 226-228, 232-233 and 248 for the inferentialist analysis of the Unfair Commercial Practices Directive.

This section has shown the substantial overlap between limitations of prudence and bounded rationality. In some cases, the imprudence (bounded rationality) is taken advantage of by producers. When this happens, the problem falls within the scope of unfairness. However, when producers do not take advantage of consumers' imprudence, the problem is strictly a matter of paternalism.

Against this background, let us reconsider the pragmatic limitations Gordley refers to, which would have an economic rather than moral rationale. I fail to see why considerations about the comparative advantage of the legal system or the intrinsic and instrumental importance of choosing are external to considerations of prudent choice. As seen above, the legal system has a power-duty to contribute to the *eudemonia* of its constituents. It is then quite obvious, in my view, that such a power-duty has to be exercised when, all things considered, the paternalistic intervention contributes to *eudemonia*. Indeed, we saw the same problem about scarcity. There, the problem was accounted for with the distinction between physiological and pathological scarcity. In the same way, we can distinguish between physiological and pathological imprudence (bounded rationality). If we find that a paternalistic intervention by the legal system contributes to the *eudemonia* of consumers, then the imprudence is pathological; otherwise, the imprudence is physiological.

7. The Translation Claim, the Fairness and Wrongfulness Theses and the *Ex-Ante* Perspective

This section plays a central role in the structure of this dissertation. It has three goals: 1) to recapitulate the argument warrantying the translation claim, 2) to make explicit how the resulting account satisfies the fairness and wrongfulness theses and, finally, 3) to point out the compatibility of the account with an *ex-ante* perspective.

The translation claim is meant to show that analyses of market relations in terms of efficiency and in terms of fairness and prudence can be related more deeply and fruitfully than what it is typically supposed. This is possible once the maximand is consumer welfare and the theory of fairness is the neo-Aristotelian one. The main strategies to connect these accounts are the convergence strategy, the horizontal independence strategy and the vertical integration strategy. All these strategies rest on the conceptual separation assumption between fairness and efficiency because they all presuppose that searching for the fairness of a market relation is a different task than searching for its efficiency.

The translation strategy rejects the conceptual separation assumption and searches for classes of inferences in which economic and legal terms can be used interchangeably. Basically, the translation strategy boils down to a more demanding version of the convergence strategy. More precisely, while for the convergence strategy that theories agree on outcomes but disagree on the

reasons is sufficient, the translation strategy moves the inquiry to the level of the reasons given to justify the outcomes. The translation is successful when the reasons are the same, so that the fact that the outcomes receive different labels—efficient versus fair—is immaterial.

Assume that consumers are prudent and consumer welfare is appropriately represented by preferences as measured by consumers' willingness to pay. Under these circumstances, it was shown that both approaches identify the function of the market mechanism in price minimization for the consumer, with the price also including risk and information costs. This is not simply an outcome. This is a norm or a guiding principle that applies to the different dimensions of the contractual relation (price, information, risk). Moreover, the two frameworks also agree in finding that when scarcity is pathological, the legal system becomes a valid alternative to the market as an allocative device.

In other terms, imagine a contract where the price equal production costs and information costs and risks are allocative so as to minimize their value. Once all of this is given the consumer, in return for the performance, transfers to the producer a sum of money of equal value. This contract is efficient from a consumer-welfare perspective. And it is also fair from a neo-Aristotelian perspective. Now, imagine that prices are above cost because there is scarcity. If the scarcity provides meaning signals to producers and consumers, the price is still efficient and fair. Conversely, imagine the producer withholds a relevant piece of information that is very difficult to retrieve for the consumer. In this case, the contract is inefficient and unfair. It is inefficient because to retrieve the information, the consumer must pay more than the cost of disclosure. It is also unfair because to retrieve the information, the consumer must pay more than the cost of disclosure. And the same considerations apply to risk allocation. By now, it should be clear why an argument about the inefficiency of the contract can be translated into an argument about its unfairness. Under the considered conceptual frameworks, the arguments leading to the conclusion that a contract is inefficient and unfair are the same.

Would it not be the same if efficiency were about total welfare? No. If efficiency is about total welfare, minimizing the price is instrumental to maximizing quantities and to minimizing costs. One way to see this is recalling the cases of simple monopoly and of monopoly with perfect price discrimination. The problem of prices going up in case of simple monopoly is not that it is unfair to consumers, but that by reducing the quantities sold, total welfare is reduced. What happens to the exploited consumers is irrelevant. And in fact, if the monopolist perfectly discriminates and applies to each and every consumer his reserve price, then this market outcome is efficient from a total-welfare perspective. However, the price is clearly unfair. Hence, claims about fairness cannot be translated into claims about total welfare.

We can also see why the efficiency analysis of market relations in terms of consumer welfare respects the fairness and wrongfulness theses. Respect of the fairness thesis is self-evident: if arguments about market efficiency can be translated into arguments about market fairness, it follows that the proposed framework of efficiency analysis respects the fairness thesis. The wrongfulness thesis is respected because when a producer behaves inefficiently its behaviour is a wrong done to the exploited and distorted consumers: they are denied fair market relations and precluded to maximize their welfare. If this is correct, this chapter contributes significantly to the Minimalist Law-and-Economics project of this dissertation by removing the obstacles to the interdisciplinary exchange represented by the fairness and wrongfulness theses.

Is the proposed account of fair market relations also capable of addressing the economists' concern for the importance of the *ex-ante* perspective? I do not see why not. In the Introduction, we saw that from an *ex-ante* perspective the distribution of welfare is irrelevant as long as total welfare is maximized. In Chapter 3, we saw that in the analysis of product liability, Shavell, among others, adopts a consumer-welfare maximand even if he calls it "social welfare". Unless Shavell was reasoning from an *ex-post* perspective, then neither would the analysis in this chapter. The analysis of market relations proposed here considers the relations between the parties and the market mechanism as means of coordination between consumers and producers on the market and between markets. Also, the analysis examines the consequences of different courses of action in terms of allocative efficiency, which is what advocates of the *ex-ante* perspective require. Ultimately, it was shown that fairness is not only compatible with, but even requires taking an *ex-ante* perspective.

8. Fairness and Distributive Justice in the Neo-Aristotelian Tradition

This chapter has defended an account of fair market relations with prudent consumers and shown that such an account can be translated in one about the efficiency of the market, once the maximand is consumer welfare. It is time to discuss the relation between fairness or commutative justice and distributive justice in the neo-Aristotelian tradition. The relation is, in fact, useful in addressing a possible objection by the total-welfare approach and will prove useful for the inferential analysis in Part III.

Distributive justice is concerned with the division of the resources between the members of the community.[1] Aristotle believes that the form of government of a community determines the notion of distributive justice it will follow. Thus, there is an instrumental coherence between the government of a community and the notion of distributive justice it will follow. The division of

[1] Pol. V, 1 (1301b29-39); EN V, 3 (1131a14-2). See also FD Miller 1995: 89, Bartlett and Collins 2011: 290.

resources between the constituents is thus a political choice and distinct from the fairness of market relations. The redistribution has to be done according to merit, but what "merit" means depends on the political organization of the community.[1] As Bartlett and Collins summarize, "in the dispute about what constitutes merit, democrats say that it is freedom; oligarchs, wealth; others, noble birth; and aristocrats, virtue".[2] Thus, for Aristotle, distributive justice rests on an incompletely theorized agreement, according to which merit is the criterion of distributive justice, but "merit" can mean very different things.[3] Ultimately, the criterion of distributive justice is "established by the public authority".[4]

Gordley explains that in the neo-Aristotelian tradition fairness and distributive justice are related because "we have to view society as an ongoing enterprise, concerned at the social level with ensuring, so far as possible, that each person has a fair share, and in individual transactions, that no one increases his share by depriving another of his resources".[5] The claim has support in Aristotle's own writings and contemporary secondary literature.[6] Thus, the general idea is that we maximize our welfare when acting as consumers but at the same time our actions remain neutral from a distributive justice perspective.

The idea that equality in exchange makes the exchange neutral in terms of distributive justice is compatible with the normative accounts of market relations given by Pigou and Coase.[7] Pigou wants the economy to reach a state where the profit rates in the different markets is equalized.[8] Similarly, for Coase in an optimal price system, for each consumer, the price of all productive factors should be the same in each possible use and each productive factor should be sold to each consumer at the same price. Following these two lines of reasoning, the idea of equality in exchange can be recast as a matter of equality between the members of the community in their role of producer and also in their role of consumer. If, as producers individuals make the same profits in every market, their relative share of the available resources is unchanged because there is no market where they will make more or less money in return for their efforts. And conversely, if, as consumers individuals pay the same price for each productive factor in every market, their relative share of the available resources is unchanged because there is no market where they will transfer more or less money in return for the performance of producers. It follows that the equality

[1] For example, Baracchi 2008: 166 concurs with Aristotle's own words: "all agree that what is just in distribution should be according to merit … of some sort, but not everyone means the same merit" (EN V, 3, 1131a).
[2] Bartlett and Collins 2011: 290.
[3] Building on this idea might be insightful for those interested in merging considerations of desert in the normative framework of welfare economics. See Medina and Zamir 2010, Adler 2012.
[4] Golecki 2013: 249.
[5] Gordley 2006: 13, 362-363.
[6] See, in particular, EN V, 3-5, and, for example, Bartlett and Collins 2011: 298.
[7] See pp. 111-113 and 117-118.
[8] Pigou 1920: 253-254.

in exchange as equality of the performances makes market transactions neutral in terms of distributive justice is compatible with economic thought.

The implications of this view are far-reaching. The fairness of market relations is meant to isolate market relations from and to make them neutral to the quest for distributive justice within the political community. Accordingly, distributive justice can trump fairness. For example, increasing the salaries of workers in an industry to the detriment of consumers might well be justified in terms of distributive justice even if it is allocatively inefficient.

Against this background, the proponent of the total-welfare approach may advance the following request of clarification: if allocative efficiency is not about total welfare as Minimalist Law-and-Economics claims, what is the place for the intuition that a more affluent society is a better one *ceteris paribus*? This is a good question indeed. Ultimately, I think that the concept of total welfare is reduced to the sum of the welfare of the members of the community and it no longer plays an explicit role. More precisely, total welfare is in part substituted by fairness and in part by distributive justice. Of fairness we have discussed at length. Of distributive justice, we have seen that it is based on a normative assessment of the merit of the members of the community. This means that depending on the notion of merit, one could come up with different criteria for the aggregation of individual welfare. From this perspective, it then makes sense to associate considerations about total welfare to distributive justice and, interestingly, to the same framework focusing on the redistribution of income.

This thought-provoking consideration about total welfare, the redistribution of income and distributive justice concludes the argument in favour of the translation claim of this dissertation. The next section reviews the findings of this chapter.

9. Conclusion: Towards a Rosetta Stone

This chapter has defended the translation claim of this dissertation, which holds that with consumer welfare as the maximand, it is possible to offer a plausible economic account of fair market relations. *Ex post*, the analysis can be divided into three main steps.

First, it was shown that the neo-Aristotelian framework distinguishes relations between consumers and producers, which are primarily governed by considerations of fairness and prudence. More precisely, it was seen in what sense parties of a fair exchange are equal and what is the role of information, scarcity and limited prudence in this regard. The fair market relation is based on a logic of cost-minimization plus compensation, derogated only when scarcity is physiological (because it sends meaningful signals for the coordination of producers and consumers on the

market). The analysis has been the occasion for clarifying several points of Gordley's explanatory project and, in particular, to depurate his account from the problems following from the acceptance of the conceptual separation assumption, according to which fairness and efficiency are separate concepts.

Second, Section 7 has made the argument that warrants the translation claim explicit and has shown that the analysis is compatible with the fairness and wrongfulness theses and require an *ex-ante* perspective. The central idea is that the function of the market mechanism is price minimization for the consumer, with the price including also risk and information costs.

The third and final step, in Section 8, has explained the relation between fairness and distributive justice, but also between distributive justice, the redistribution of income and total-welfare maximization. The result is thus a conceptual framework that can plausibly translate economic insights into a normative discourse which is compatible with the fairness and wrongfulness theses without being oblivious to the important insights of the *ex-ante* perspective.

A final note. The translation claim works at the theoretical level and shows that it is possible for arguments about fairness to warrant claims about efficiency and vice versa. This is where the doctrinal claim becomes particularly important. Part III of this dissertation shows with an inferentialist analysis of legal discourse, that the explanatory power of the consumer-welfare hypothesis is superior to that of the traditional total-welfare one. To economists, Part III shows that reverse engineering the law is a viable solution to the social engineer contradiction. To lawyers, it shows that economic insights do not come at the cost of violating the doctrinal thesis. The collaboration proposed by Minimalist Law-and-Economics is thus beneficial to both economists and lawyers.

PART III

NARROW INTO LAW—REVERSE ENGINEERING EU ANTITRUST AND CONSUMER LAW

— 5 —

How the Efficiency Hypotheses Are Tested

1. Introduction to the Doctrinal Claim

Minimalist Law-and-Economics proposes that legal and economic research exploit their respective comparative advantages. An important component of the proposal is the idea of reverse engineering the law. This approach offers doctrinal or internal analyses of the law—seen as a linguistic practice of giving reasons rather than as a causal system—that are rigorous and epistemologically minimalist. Reverse engineering the law respects normative minimalism by delegating to the legal system the value choices to be assumed in economic analysis.

Part II has shown that consumer welfare is a maximand with economic pedigree, perfectly capable of being operationalized in ways that respect epistemological minimalism. This finding proves that it is indeed possible to formulate a consumer-welfare hypothesis of the law. An efficiency hypothesis that, in contrast to Posner's, takes consumer welfare rather than total welfare as its maximand. At the same time, the account of market relations within the neo-Aristotelian theory of private law based on fairness and prudence can basically be translated into one expressed in terms of consumer-welfare maximization, and vice versa. This finding removes two important conceptual obstacles faced by total-welfare approaches, namely that they fail to respect the wrongfulness and fairness theses. The upshot of Part II is that consumer-welfare maximization is a strong candidate for the proposal of collaboration formulated by Minimalist Law-and-Economics. For scholars who are more abstract-theory oriented, the case in favour of this proposal of collaboration can probably be rested already.

Others call for further details. Many believe that the proof of the pudding is in the eating; in other words, while abstractions may be interesting, discussion of application is also needed. Ultimately, not looking closely at legal reasoning would be in tension with the minimalist commitment of this dissertation.

Part III of this dissertation warrants the doctrinal claim, which holds that the consumer-welfare hypothesis explains better than the traditional total-welfare one the reasons given in the

practice of a significant portion of EU antitrust and consumer law. In other words, the consumer-welfare hypothesis of EU antitrust and consumer law has superior explanatory power to the traditional total-welfare hypothesis. This is why Part III is entitled "Narrow into Theory—Reverse Engineering EU Antitrust and Consumer Law". The choice of the welfare standard for the efficiency analysis of the market is ultimately an axiological one. As Chapter 3 shows, economists disagree on this value choice. Delegating the choice to the legal-political process solves this disagreement in conformity with a procedural understanding of normative minimalism. This observation makes the doctrinal claim of this dissertation particularly appealing to those economists who want to be normative minimalists without falling into the social engineer contradiction.

Part III goes narrow because the doctrinal claim is context specific. That is to say, depending on the body of law you look at, it may or may not hold. In an important sense, the doctrinal claim is therefore different from the claims advanced in Parts I and II. Both the conditions for a Minimalist Law-and-Economics and the economic and translation claims address a broad audience. In other words, Parts I and II are—if you like—universal,[1] while Part III is particular because it focuses on one portion of EU law. However, this does not mean that those uninterested in EU law have no interest in Part III. To warrant the doctrinal claim, this chapter builds a theoretical framework that is universal and can thus be applied to other portions of EU law, to the functional equivalent of the analysed portion of EU law in other jurisdictions, or to completely unrelated portions of the law of other jurisdictions.[2] Additionally, the analysis in the following two chapters is also meant to show to economists that the analysis of legal materials can be done in a way that is rigorous enough to satisfy the constraints imposed by epistemological minimalism. Reverse engineering the law is a way to be normatively minimalist without falling into the social engineer contradiction.

The theoretical framework elaborated in this chapter is divided into three parts. The first part identifies the body of law under consideration. This chapter analyses the general and extreme poles of that part of EU economic law that disciplines market interactions between producers and consumers.[3] The second part selects the legal materials to be analysed. This chapter looks only at the text of EU primary and secondary provisions and at the judgments by the Court of Justice of the European Union (CJEU), the General Court and the European Commission in its capacity as an adjudication body. Put differently, it focuses on sources of law in the traditional sense. Together, the first and second part determine the *explanandum*. The third and final part of the theoretical framework describes the methodology used to compare the explanatory power of the competing *explanantia*. This last part has a substantive and an inferential component. The substantive

[1] For a critique of universal theories of a branch of the law, see Bix 2017.
[2] See p. 267.
[3] On the concepts of producer and consumer, see pp. 34-37.

component identifies seven disagreements between total- and consumer-welfare *explanantia*. The inferential component describes how the substantive component will be used in the analysis of the *explanandum*. In particular, the analysis will attribute points on a triadic scale to the competing *explanantia*: high-quality points (*P*), low-quality points (*p*) and no point (*N*). If the consumer-welfare hypothesis has overall superior explanatory power, then the doctrinal claim of this dissertation is warranted.

The concept of warranty used in this dissertation is composed of three elements: supportiveness, comprehensiveness, and independent security.[1] Supportiveness is about how well the evidence supports the claim. Comprehensiveness relates to the extension of the evidence and whether it excludes significant pieces of evidence. Finally, independent security focuses on the intrinsic quality of the evidence.

Against this theoretical background, it is useful to consider the relation between the constituent parts of the concept of warranty and the different components of the analytical framework developed and applied in Part III. This reflection will make it easier to identify the strengths, but also the (potential) weaknesses, of the framework. The first and second components of the framework define the *explanandum*. The characteristics of the *explanandum* are critical for the comprehensiveness and the independent security of the warranty offered to the doctrinal claim. In fact, failing to include relevant pieces of evidence in the *explanandum* reduces the comprehensiveness of the warranty. Moreover, if the *explanandum* is of little relevance for the explanatory purposes to which it is directed, the independent security of the doctrinal claim is also weakened. The methodology of analysis is then important for the supportiveness of the evidence for the doctrinal claim. In fact, if the substantive component does not account accurately for the disagreements between the competing *explanantia*, the analysis does not accurately support the doctrinal claim. Similarly, if the inferential component of the analytical framework fails to make explicit the differences in the explanatory power of the competing *explanantia*, the analysis fails to support the doctrinal claim.

The three-fold conceptual framework developed in this chapter will set the stage for a comparison of the explanatory power of consumer-welfare and total-welfare hypotheses in the next two chapters. Chapter 8 wraps up the results of the inferential analysis and show that the doctrinal claim is warranted.

[1] See p. 12, fn 1.

2. The Framework, Part 1: The Scope

The ultimate scope of the doctrinal claim would be EU internal market law.[1] However, for reasons soon to be given, the focus of this dissertation is much narrower. The doctrinal claim focuses on the general, substantive provisions of EU antitrust[2] and consumer law. As explained in the previous section, the doctrinal claim is thus narrower than the economic and translation claims.

The EU internal market includes, at a minimum, the fundamental freedoms, competition law, sector-specific "regulation" (energy, telecom, financial services, transportation), consumer law, labour law, company law, intellectual property law, the constraints on the economic policy of Member States, procurement law, monetary law, and international private law. As the scope of the doctrinal claim is much narrower than this, a justification is required because the delimitation of an inappropriate scope could compromise the comprehensiveness of the evidence. This justification has two steps. The first step of the justification is the observation that the EU internal market is now a broad and sophisticated body of law, to the effect that an analysis of the entirety of it cannot be accomplished here. On this ground, the scope of the doctrinal claim is limited to those parts of it more relevant for the warrant of the doctrinal claim. In other words, I look at areas of EU law where the analysis I propose is more likely to be fruitful. If it does not work here, it is unlikely to work anywhere else.

The second step is to characterize that portion of the EU internal market more relevant to the doctrinal claim. Let us start with the fundamental freedoms. On the one hand, it was seen in the Introduction that capital and labour are two factors of production and that, in the conceptual framework of this dissertation, conflicts between them are relevant in so far as they are consequential for consumer welfare. Therefore, the fundamental freedoms of capital and labour, as well as the related secondary legislation, are peripheral to the purposes of this dissertation. A comprehensive theory of the EU internal market ought to account also for the discipline of labour and capital and the conflicts between them, thereby identifying the legal principles animating these branches of EU law. However, this dissertation does not aim to propose a comprehensive theory of the EU internal market. Its more modest goal is to assess whether total or consumer welfare is more helpful in explaining the content of EU law. To do so, this dissertation focuses on those areas where the conflict between the interest of producers and consumers is considered explicitly. On the other hand, competition law, sector-specific regulation, and consumer law partially overlap in their scope. It was seen in Chapter 1 that competition law has the broadest concept of consumer and consumer

[1] On the EU internal market, see Weatherhill 2017, 2018.
[2] Note that antitrust law is a subfield of competition law, as explained in detail in Section 3.1.

law the narrowest one, with sector-specific regulation falling in between, and often articulating a framework based on multiple categories (e.g., the professional and non-professional investor).

In this scenario, Part III of this dissertation focuses on EU antitrust law and consumer law. The reason is that these are the two extreme poles of the axis representing broader and narrower notions of consumer. Thus, if the consumer-welfare hypothesis explains better than the traditional total-welfare one both antitrust law and consumer law, it can be taken as a starting poiny for further research that consumer welfare also better explains sector-specific "regulation". This is the case because of the commitment to the consistency of EU law expressed by Article 13 TEU. It would be inconsistent to have antitrust and consumer laws pursuing consumer welfare and sector-specific regulations pursuing total welfare. Additionally, previous research in EU electricity and financial services law, while rather preliminary and partial,[1] supports the claim regarding the explanatory power of consumer welfare, thereby reinforcing the conclusion that the chosen limitation of the scope of the inquiry is appropriate.

I add a further limitation, namely that I look only at general antitrust and consumer law. By general, I mean law applicable to any sector of economic activity.[2] For example, Commission Regulation (EU) 461/2010[3] applies only to vertical agreements in the motor vehicle industry and is, therefore, excluded from the analysis. Used in this sense, the term "general" is interchangeable with the term "horizontal" when it is used to say that, for example, the Unfair Terms Directive[4] is horizontal consumer law. Note also that the distinction between general and particular law is ultimately a matter of degree. For example, the Consumer Rights Directive[5] does not apply to a series of contracts listed in Article 3(3) including, among others, financial services. That being the case, a strict notion of generality would imply that this directive should be expelled from the scope of this research. This approach would ultimately lead to the conclusion that there is no general EU consumer law. However, it makes sense to say that the Unfair Terms Directive is general EU consumer law while the Consumer Credit Directive[6] is not.

Finally, this dissertation focuses primarily on substantive provisions establishing legal positions (duties, rights, powers, subjections, etc.)[7] of consumers, undertakings and professionals and the related legal consequences (fines, remedies, etc.). This means that procedural sources—such

[1] Esposito and Grundmann 2017, Esposito and De Almeida 2018.
[2] For a deep analysis of the concept of "economic activity" under EU law, see Welhander 2016.
[3] Commission Regulation (EU) No 461/2010 of 27 May 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices in the motor vehicle sector.
[4] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L29/95.
[5] Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights [2011] OJ L304/64.
[6] Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC.
[7] See Hohfeld 1913, 1917.

as Regulation (EC) 1/2003[1]—are in principle excluded from the analysis, except when they establish legal consequences, such as Articles 7 to 10 of the just-mentioned regulation. This choice is based on the observation that while considerations regarding institutional competence might well be relevant for the doctrinal claim, they are often based on grounds that in part have to do with the substantive reasons animating a legal practice. This point is discussed further in Section 4 of this chapter.

The considerations in the previous paragraph are part of the rationale for what—in my opinion—is the most controversial exclusion from the *explanandum*: Chapter 1, Title VIII of the TFEU, on the economic policy of the EU. In fact, on the one hand Article 120 TFEU refers expressly to the idea that the economic policy of Member States ought to "favour an efficient allocation of resources" and Article 122 TFEU is extremely interesting for problems related to those situations of severe scarcity discussed in Chapter 4. The reasons given in the applications of these provisions would thus provide important evidence for the warranty of the doctrinal claim. However, these sources are not sufficiently theorized, the case law on them is not particularly broad, and the economic policy involves a variety of secondary sources, to the effect that the analysis would require an amount of time and space that is incompatible with the current project.

This section has characterized the scope of the analysis, but it has not specified its content, a task taken up in the next section.

3. The Framework, Part 2: The Selected Sources of Law

As anticipated in Section 1, this chapter focuses only on sources of law in the traditional sense: the treaties (EU primary law), directives and regulations (EU secondary law), Commission regulations (delegated acts), and their judicial interpretation by the Court of Justice of the European Union (CJEU), the General Court, and the Commission (in its capacity as the authority enforcing competition law). It follows that doctrinal opinions, policy documents (such as White and Green Papers), but also the Commission's guidelines and the opinions of the Advocate Generals are not considered directly because they are not sources of law in the traditional sense. These materials can be considered indirectly if—and to the extent that—they are referred to in the text of the considered legal materials. For example, if the recitals of a directive mention the considerations in a policy document by the Commission, then these considerations become relevant. Similarly, the analysis of an Advocate General referred to by the Court is relevant. In fact, when this happens, courts incorporate the reasons given in these other materials in their own reasoning. However, such an

[1] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

extension of the *explanandum* is made only when the analysis of the legal material referring to these secondary materials remains unclear. Put differently, in some cases, I endanger the independent security of the warranty to increase its comprehensiveness because doing so is particularly important for the supportiveness of the evidence to the doctrinal claim.[1] A drawback of this method is that many interesting considerations are excluded from the analysis. For example, the Commission staff working document evaluating the Consumer Rights Directive[2] or the Commission communication on the quantification of damages awarded on the grounds of the Damages Directives or on the enforcement priorities of the now Article 102 TFEU.[3] However, the legal nature of these documents is shaky, at best.

Especially when it comes to the Commission's guidelines, this method might appear too restrictive. In fact, one may observe that the purpose of these documents is precisely to give guidance on how the Commission will enforce competition law. This observation is indeed agreeable, but it does not justify including these documents among the direct sources. After all, if the Commission follows its guidelines, its judicial activity will show it. Thus, I decided that—all things considered—using a strict notion of source of law is the best course of action to ensure the independent security of the *explanandum* as a means to warrant the doctrinal claim. However, as better explained in the following subsection, I have introduced a derogation to this rule with regard to the 2006 Guidelines on the calculation of the amount of fines.

3.1 Antitrust law

In the EU, antitrust law can be found already in primary law, namely in Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU). As per secondary legislation, the focus is on Regulation (EC) 1/2003, Commission Regulation (EU) 330/2010, and Directive (EU) 104/2014. As anticipated, and exceptionally, the *explanandum* also includes the 2006 Guidelines on fines.

The choice of this *explanandum* requires some discussion. First of all, it is important to highlight that EU antitrust law is a subfield of EU competition law.[4] The former finds its central provisions in Articles 101 and 102 TFEU, with the secondary legislation supporting and supplementing these in their applicative practices. Competition law is broader in scope, as it

[1] Note, in this regard, that the extension is not based on whether it increases the supportiveness of the evidence to the consumer welfare *explanans* only, but more generally when it allows movement to an explanation of higher quality.
[2] Commission Staff Working Document Evaluation of the Consumer Rights Directive [2017] (SWD/2017/0169 final).
[3] Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union [2013], C(2013) 3440, 11.6.2013; Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009], OJ C/45/7, 24.2.2009.
[4] The distinction is often found in the literature and it is also used by the European Commission. See, http://ec.europa.eu/competition/antitrust/overview_en.html, last access: 3 February 2017.

includes also control of mergers and acquisitions (Regulation (EC) 139/2004) and the various forms of more or less direct intervention by Member States in the economy (Articles 106 and 107 TFEU, Protocol 26). While in principle all these sources of EU law could be included in the *explanandum*, various considerations led me to exclude them. The exclusion of control of mergers and acquisitions is based fundamentally on practical considerations. The review of the case law on this control is extremely time consuming, but a preliminary inquiry has shown that the analysis of the applicative practice of the Commission is consistent with the findings of Chapter 6.[1] Instead, the exclusion of materials related to the application of Articles 106 and 107 TFEU and Protocol 26 is essentially based instead on considerations similar to those regarding the exclusion of the economic policy.

Finally, a note on the inclusion of the Commission Regulation 330/2010 and of the 2006 Guidelines is also advisable. The Commission Regulation 330/2010 does not apply to all the agreements in an industry, but only to a particular category (vertical agreements). On these grounds, one might doubt it is a general source of law in the sense discussed in Section 2. I consider it general because, while it covers only some agreements, it is applicable virtually across all the sectors of economic activity. The choice of including the 2006 Guidelines is very disputable, as they are not a source of law. The analysis of the *explanandum* has revealed that their inclusion is nevertheless advisable due to the interplay of two doctrines of EU law. The first holds that the Guidelines are binding on the Commission, so that it cannot deviate from the criteria established therein unless the deviation is justified explicitly.[2] The second grants a margin of discretion to the Commission in setting the amount of the fines, subject to the unlimited jurisdiction of the courts.[3] The practice of the courts based on these doctrines reveals that the 2006 Guidelines are typically taken as the parameter for any review of the decision of the Commission about the amount of the fines. Under these circumstances, including the 2006 Guidelines in the *explanandum* increases its comprehensiveness without raising significant questions about its independent security.

3.2 Consumer law

Consumer law nowadays finds explicit grounds in the Treaty of the European Union (TEU) and in the TFEU. In the TEU, Article 4(2)(f) indicates consumer protection among the competences shared between the EU and the Member States; Article 12 says that consumer protection shall always be "taken into account" by the EU institutions and reasonable prices for consumers is one of the goals

[1] The preliminary inquiry showed that while on many occasions the reasons given are shallow and based on whether the operation "rise[s] significant impediment to effective competition" (COMP/M.6127 [43]), in others goes deeper and in the direction of the consumer welfare *explanans*. See, for example, COMP/M.1630 [84-86], COMP/M.2314 [160], COMP/M.4647 [144].
[2] See, for example, T-29/05 [230].
[3] See, for example, T-29/05 [227], C-286/13 P [146].

of the common agricultural policy (Article 39(e)). In the TFEU, besides the competition law provisions, Article 114(3) mentions a high level of consumer protection as the baseline for the approximation of laws within the EU and Article 169(1) explains what it means to give consumers a "high level of consumer protection".[1] For current purposes, Article 169(1) TFEU is particularly useful because it identifies three consumer interests protected under EU law: health, safety, and economic interests.

If we look at EU consumer law on the grounds of these interests, we see that there is no secondary source specific to health. This is related to the fact that health is the subject of Article 168 TFEU, which establishes—similar to Article 12 TEU for consumer protection—that health protection must be always "taken into account". Moreover, the intervention in health protection by the EU is less active in comparison to consumer protection. In fact, the EU aims to "complement, support and add value to the policies of the Member States to improve the health of Union citizens".[2] In other words, EU consumer law focuses mainly on the safety and economic interest of consumers.

About safety, two sources are particularly significant: the General Product Safety Directive[3] and the Product Liability Directive.[4] However, the General Product Safety Directive focuses primarily on matters of competence and is part of a complex system of secondary legislation and other sources, which means it is advisable to exclude it from the *explanandum* and to focus solely on the Product Liability Directive. The economic interests of consumers are a central concern of three general directives of EU consumer law: the Unfair Terms Directive,[5] the Unfair Commercial Practices Directive[6] and the Consumer Rights Directive.[7]

In the context of this analysis, the fundamental freedoms established by EU law also have a role to play. In fact, it is well-known that since *Cassis De Dijon*,[8] consumer protection is one of the mandatory requirements that—if proportionate—limit the freedom of circulation of goods and services under EU law.

[1] See also Article 349(2) TFEU on the application of the TFEU to the overseas departments of France, Portugal and Spain.
[2] Article 2, Regulation (EU) No 282/2014 of the European Parliament and of the Council of 11 March 2014 on the establishment of a third programme for the Union's action in the field of health (2014-2020).
[3] Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on general product safety.
[4] Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products
[5] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.
[6] Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market.
[7] Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights.
[8] C-120/78.

3.3 Case selection

It was seen that the decisions by the Court of Justice, the General Court and the Commission related to the sources identified in the previous subsections matter for the doctrinal claim of this dissertation. Ideally, one ought to consider all the cases. However, practical considerations of time and space require reducing the scope of the analysis. In this scenario, the risk of cherry picking is particularly severe. By cherry picking, I mean the allegation that I selected only the cases that fit my research question and ignored the others. Countering (or at least reducing) this risk requires independent criteria for case-law selection. This task is not particularly easy in the field of EU law because the predominant style of academic books is the doctrinal treaty or (more fashionable these days) research handbook, whereas it is virtually impossible to find commentaries. In this context, it could be possible to look at textbooks addressing students. This literary genre has better fortune in EU consumer law than commentaries. However, these sources raise some concern for two reasons regarding current purposes. First, they are addressed to undergraduate or, at most, masters students. Second, they tend to be new editions of books written some time ago. While the authors typically are keen on updating the texts, there is still a risk of path dependency. If no better options are available, these sources could be used. However, I believe there are better sources for current purposes.

In the field of competition law, I focus on the cases reported in *European Competition Law: A Case Commentary*.[1] This book, now in its second edition (the first was published in 2014), is based exactly on the premise that the selected cases are "the most important" ones.[2] In the field of consumer law, I am aware of no similar book. With regards to the relation between the freedom of goods and consumer protection, I look at the cases cited in *The Substantive Law of the EU: The Fundamental Freedoms*. Barnard's book is often considered a reference point for the study of the fundamental freedoms—and it will be considered that way here as well. To diversify the criteria of case-law selection, with regard to the freedom of services, I analyse the 10 cases indicated by the Commission in its *Guide to the Case Law of the European Court of Justice on Articles 56 et seq. TFEU* in the subsection on consumer protection.[3]

The case selection with regards to EU secondary legislation in the field of consumer law is more complex. *Prima facie*, the book *Landmark Cases of EU Consumer Law*, edited by Colaeert, Straetmans and Terryn, would seem a good resource, at least for the cases before 2013.[4]

[1] Van Themaat and Reuder 2014.
[2] Van Themaat and Reuder 2014: xxiii. I have selected the cases on the grounds of the first edition, and then update the list in the light of the additions in the second.
[3] European Commission 2016.
[4] Colaeert, Straetmans and Terryn 2013.

Unfortunately, while the essays collected here are of outstanding quality, the volume is organised as a doctrinal treaty, not as a commentary. It is therefore not particularly helpful for selecting cases, primarily because the "selection has … been determined by the particular interests" of the contributors.[1] Alternatively, the *European Review of Contract Law* (ERCL) has started to report the cases of the CJEU starting in the year 2008. The journal reports all the cases from 2008 to 2013,[2] and only significant decisions thereafter. The selection by the ERCL is thus only partial and not homogenous; additionally, I contributed to it in 2017. For this reason, this source does not offer good grounds for case selection. In the light of the fact that there are few cases decided by the CJEU in the subfield of consumer law relevant for this chapter, I look at the entire list of cases selected by the website of the Court (curia.europa.eu) under the relevant entries of the systematic classification scheme.[3] The research was limited temporally to the decisions made before 17 November 2017. The case selection breaks down as follows: 158 competition law cases, 26 cases on conflict between consumer protection and the freedoms and 112 consumer law cases.[4]

Some final remarks about the identification of the *explicandum* are in order. The selection criteria used were chosen to strike a balance between the conflicting *desiderata* of comprehensiveness, manageability and avoiding charges of cherry picking. In particular, the deference to four different sources for case selection makes it apparently implausible that I managed to select the sources so skilfully that I managed to cherry pick the cases. Be this as it may, ultimately, the best remark regarding the selection of the *explicandum* is: feel free to apply the method of analysis proposed in the next two sections to any *explicandum* of your choosing.[5] I would be honoured and thrilled to see my research replicated by others.

4. The Framework, Part 3: The Method of Analysis—The Substantive Disagreements

Once the *explanandum* has been identified, it is necessary to describe the method of analysis as clearly as possible. By articulating a clear and rigorous method of analysis, this dissertation tries to

[1] Colaeert, Straetmans ans Terryn 2013: ix.
[2] Micklitz and Kas 2014a and 2014b.
[3] For the period prior to the entry into force of the TEU and TFEU, I selected, in the area B-36 (Consumer protection): B-36.02 (Off-premises contracts), B-36.03 (Distance contracts), B-36.04 (Unfair terms), B-36.05 (Unfair commercial practices), B-36.10 (Unfair commercial practices), thereby excluding B-36.00 (General), B-36.01 (Concept of consumer), B-36.06 (Consumer credit), B-36.07 (Sale of consumer goods and associated guarantees), B-36.08 (Package travel, package holidays and package tours) and B-36.09 (Air passenger rights). For the following period, I selected in the area 4.18 (Consumer protection): 4.18.02 (Consumer rights - general framework), 4.18.03 (Indication of prices), 4.18.04 (Unfair terms), 4.18.05 (Unfair commercial practices), 4.18.10 (Liability for defective products), thereby excluding 4.18.00 (General), 4.18.01 (Concept of consumer), 4.18.06 (Consumer credit), 4.18.07 (Sale of consumer goods and associated guarantees), 4.18.08 (Package travel, package holidays and package tours) and 4.18.09 (Air passenger rights).
[4] See the List of Cases, below.
[5] I am thankful to Urška Šadl for the advice on this point.

show that doctrinal research can meet a high standard of methodological rigour. As rigour is so important to epistemological minimalism, devising a clear and rigorous method of analysis is central to the minimalist project of this dissertation, and its search for a compromise both lawyers and economists can live with.

The seven substantive disagreements described below operationalize the competing efficiency hypotheses—the traditional one having total welfare as maximand and the alternative one having consumer welfare as the maximand. For each disagreement, this section articulates two competing *explanantia*. As discussed in the next section, the better explanation will be the one more fitting with the reasons given in the *explanandum* and the better efficiency hypothesis will be the one with the best overall explanatory score. The scores of the competing *explanantia* are kept with the aid of a triadic scale (*P*, *p*, *N*).

Proving that legal reasons are a type of evidence valuable to economists requires the articulation of a rigorous method of analysis compatible with epistemological minimalism. Regarding the method of analysis, we already know the following: 1) the competing explanations are based on two competing efficiency hypotheses, i.e. two alternative accounts of what allocative efficiency is about—the maximization of total or consumer welfare—and 2) the analysis must explain the legal reasons given in the *explanandum*. These two points must be expanded to become a workable but rigorous analytical framework. Point 1) is the substantive or economic component of the framework and it makes explicit the substantive disagreements over legal reasoning between the competing efficiency hypotheses. To this end, this section formulates alternative *explanantia* for each disagreement. Point 2) is the inferential component of the framework and it aims to show whether, and to what extent, actual legal reasoning can be explained by one, both, or none of the competing substantive hypotheses. The next section elaborates the inferential component.

Minimalism stresses the importance of different levels of abstraction. The main reason is that people disagreeing at higher levels of abstraction often converge on choices at lower levels of abstraction, albeit for different reasons. For example, three friends might converge on the choice of watching a certain movie, say *Ghostbusters* (1984), albeit for different reasons—maybe one is a total fan of the movie, another thinks Bill Murray is hilarious, and the third is simply inert and just wants to be with his pals. These considerations also apply here. It is possible to distinguish at least[1] between high- and mid-level abstractions. High-level abstractions relate to the relation between concepts that play an important role at the axiological level of analysis while mid-level abstractions take also into consideration institutional elements, at least more markedly than the high-level ones.

[1] Obviously, the difference is a matter of degree, so that more granular distinctions are possible as well.

Section 4.1 distinguishes three high-level abstractions on which the competing efficiency hypotheses disagree: the importance of distributive concerns, the justification for the protection of an economic actor and the type of integration between consumer and total welfare. Section 4.2 identifies four mid-level abstractions that are the object of disagreement; the first two focus on the use of specific economic concepts (deadweight loss, productive inefficiency and elasticity) in legal reasoning while the other two relate to the content some legal institutes must have to be instrumentally coherent with either a total- or a consumer-welfare approach. These types of legal institutes are, on the one hand, defences against (and exceptions to) the application of norms. The key example is Article 101(3) TFEU, which establishes the general conditions for the legality of anticompetitive conduct under Article 101(1). On the other hand, these instates are the legal sanction connected to a conduct. For example, what the remedy is if a contractual term is found unfair.

These seven disagreements will provide ample room for testing the fitness of the competing efficiency hypotheses with the *explanandum*. At the same time, there are aspects of the *explanandum* that have been analysed in the literature and have an important bearing on the selection of the best course of action. They have to do with the comparative reliability of the different economic and legal actors involved to pursue a given end effectively. Assessing the comparative reliability of different actors is an important step of any real-world instrumentalist analysis. We can only choose between imperfect alternatives. While important, these issues are not relevant for the purposes of the present analysis, as Section 4.3 discusses.

4.1 High-level abstractions

This section describes three high-level abstractions on which the two efficiency hypotheses disagree and operationalizes them in competing *explanantia*. The first is about whether transfers matter. It is the most abstract disagreement. In an important sense, all the other disagreements stem from this disagreement. The second disagreement concerns the reasons that justify the protection of a category of economic actors, while the third focuses on whether consumer-welfare maximization is instrumental to total-welfare maximization.

i. What about transfers? Transfers, as seen in Chapter 2, are the difference between the cost of production and the agreed price. Unless the scarcity is physiological, for the consumer-welfare *explanans* market practices that increase the prices above costs are inefficient. These practices are intrinsically wrong because they harm consumers and, as seen in Chapter 4, they are also unfair.

The total-welfare *explanans*, as already seen in the Introduction, is uninterested in transfers. While redistribution matters in principle, transfers allegedly fall outside the scope of economic analysis. Some scholars relax this view in an instrumentalist fashion. They hold that transfer-seeking can indirectly reduce productive efficiency because to obtain the transfers, producers must engage in all sorts of wasteful activities. This observation is part of the total-welfare *explanans* regarding disagreement *iv*. Others hold that preferences about transfers ought to be accounted for in the calculus but have no independent standing.[1] For current purposes then, the total-welfare *explanans* rejects the relevance of concerns for transfers in market analyses. This component of the total-welfare *explanans* is the most direct source of the irritation of legal scholars related to the fairness thesis, which ultimately expresses the idea that legal discourse cannot be made impermeable to distributive considerations about transfers.

ii. Why is an economic agent protected? EU law protects both the consumers (including distributors and consumers *strictu sensu*) and the competitors of a producer. The competing efficiency hypotheses advance different explanations of this choice. For the consumer-welfare *explanans*, the protection of consumers is intrinsically important; allocative efficiency is, after all, about consumer welfare. Competitors are instead protected only instrumentally. Protecting them is a means to ensure the competitiveness of the market, which ultimately advances consumer welfare. When protecting competitors is not necessary to advance consumer welfare, competitors are not entitled to protection because they do not deserve it.

Instead, the total-welfare *explanans* has the same approach to harming consumers and competitors: harming both groups of economic actors is relevant only instrumentally and in so far as total welfare is reduced. This component of the total-welfare *explanans* is the source of the irritation of legal scholars expressed by the wrongfulness thesis—the idea that a conduct is a wrongdoing of the agent against someone.

iii. Is there an instrumental integration between consumer and total welfare? The consumer-welfare hypothesis moves from the assumption that allocative efficiency is about consumer welfare. Thus, consumer welfare is the key justificatory concept for the legal intervention in market relations between consumers and other market agents. This means that there is no instrumental integration between consumer and total welfare—that is, consumer-welfare maximization is not a means to the end of total-welfare maximization in market relations. However, this does not imply that consumer welfare is all that matters. This point has been emphasized at several points in this dissertation.[2] To

[1] See p. 43.

[2] In Chapter 1, it was seen that it is often believed that we can distinguish what we owe each other as individuals and as members of a community. In Chapter 3 a similar distinction was found in the First and Second Welfare Theorems, and in Chapter 4 in the distinction between commutative and distributive justice. It was also seen that total welfare claims have a role (perhaps not exclusive, but a role nevertheless) in distributive justice claims.

make sense of these considerations, it is necessary to move from the claim made in Chapter 4 that a plausible theory of distributive justice is also concerned with the amount of available resource to redistribute and, therefore, with total-welfare maximization. On these grounds, here it is sufficient to hold that, for the consumer-welfare *explanans*, between consumer and total welfare there is a horizontal integration, in the sense that total welfare (and distributive justice) can sometimes prevail over consumer welfare. Therefore, the consumer-welfare *explanans* denies an instrumental integration in market relations between consumer and total welfare but acknowledges that distributive justice may trump allocative efficiency.

In disagreement with the consumer-welfare approach, the total-welfare hypothesis assumes that allocative efficiency is about total welfare. Straightforwardly, then, consumer welfare is important only in so far as by increasing it, one increases total welfare. Therefore, for the total-welfare *explanans*, there is indeed an instrumental integration between consumer and total welfare. Protecting the consumers specifically in particular contexts can then be explained by considerations of incentives, disadvantages in access to information and other comparative disadvantages about transaction costs of consumers against other agents to the extent that improving the position of consumers would increase total welfare.

4.2 Mid-level abstractions

As anticipated, this analytical framework considers four mid-level abstractions, two about the role played by an economic concept in legal reasoning, and two about the content that some types of legal institutes must have to be instrumentally coherent with the total- and consumer-welfare hypotheses. The economic concepts are deadweight loss, productive inefficiency and elasticity of demand. The types of legal institutes are, on the one hand, defences against and exceptions to the application of norms and, on the other hand, the legal sanction connected to a conduct. By legal sanction, I mean any consequence the law attaches to a conduct, such as contractual invalidity, a fine, or the duty to compensate or of restitution.

iv. What role for the deadweight loss and for productive inefficiency? As seen, the deadweight loss is the reduction in total welfare resulting from pathological scarcity. The deadweight loss is a representation of the harm inflicted on those consumers whose behaviour is distorted, because they respond to the scarcity by moving to a different market.[1] Productive inefficiencies represent costs that are currently incurred to produce a good or provide a service but

[1] See pp. 127-132.

could conceivably be avoided because a less costly organization of the production or provision is possible under existing technological constraints.

For the total-welfare *explanans*, the normative relevance of the deadweight loss and of productive inefficiency is the same—both reduce total welfare. For its consumer-welfare challenger, instead, the deadweight loss is, as seen, intrinsically undesirable but also peripheral because the main concern is about the exploitation of consumers in the form of transfers.[1] The situation is different regarding productive inefficiencies. In fact, when these inefficiencies are of no consequence for consumers because they simply reduce the margin of profit of producers, they are irrelevant for the consumer-welfare *explanans.*

Concerning the deadweight loss, points can be assigned by looking at two aspects of the reasoning. First, the explicit considerations about who the victim of the prohibited conduct is. Thus, if the concern is only for the excluded consumers, the total-welfare *explanans* accounts for it well. If it includes the exploited consumers, the better explanation is given by the consumer-welfare *explanans*. Second, the reasoning about those rare market contexts in which the deadweight loss is likely to be particularly small is of great interest. This can happen, for example, because the available quantities are rationed, and they are going to be allocated in any case, or because demand is particularly inelastic. The total-welfare *explanans* implies that such market contexts are not an enforcement priority.[2] Its consumer-welfare challenger instead implies that the judgment about the market context will not be influenced significantly by this factor, or emphasis will be placed upon the exploitation of the consumers or the adverse effects for them.

A final aspect of legal reasoning relevant for attributing points regarding disagreement *iv*. is the relation between the variables of cost, quantity and price. In fact, from the previous discussion regarding disagreement *iv.*, it follows that the total-welfare *explanans* requires examination of the effects of a conduct on costs or quantities—unnecessarily high costs and unnecessarily low quantities imply a deadweight loss and unnecessarily high prices are relevant only to the extent they are evidence of the former two circumstances. In constrast, the consumer-welfare *explanans* is mainly interested in unnecessary increases in prices and reductions in quantities; unnecessarily high costs are relevant only to the extent they are evidence of the former two circumstances.

v. What role for the elasticity of demand? The elasticity of demand describes the relation between the variation of prices and the variation of quantities exchanged in a market. If a price variation of x% causes a reduction of quantities exchanged of x+y%, demand is elastic. Conversely,

[1] This account is based on the assumption, hopefully plausible also for the reader, that normally the magnitude of the distributive effect from consumers to undertakings is of higher magnitude than the deadweight loss. For a conceptual reason in favour of this consideration, see pp. 86-87.

[2] Vice versa in contexts in which the deadweight loss is particularly large.

if a price variation of x% causes a reduction of quantities exchanged of x–z%, demand is inelastic.[1] Elasticity does not directly provide information about the total- versus consumer-welfare controversy, but it can be used to connect different relevant concepts in a number of ways. In fact, elasticity connects variations of prices and variations of quantities. Accordingly, it allows us to estimate the transfers and the deadweight caused by variations of prices and quantities. Additionally, an estimation of elasticity allows the inference of the deadweight loss from transfers, and vice versa.

The importance of the elasticity of demand for consumer- and total-welfare *explanantia* follows from their accounts of the deadweight loss. For the consumer-welfare *explanans*, then, elasticity matters, but it is peripheral. On the contrary, for the total-welfare one, the elasticity of demand is a central economic concept for the analysis of market allocations. Given a price increase of x, the more demand is elastic, the higher the deadweight loss; conversely, the more demand is inelastic, the lower the deadweight loss.

vi. Which defences and exceptions? The *explanandum* includes at least two types of defences and exceptions relevant for our purposes: *de minimis* defences, and other substantive defences. Under *de minimis* defences, a norm is inapplicable because the conduct falls below a threshold of relevance. They are thus internal to the logic of the norm and can be understood as being based on considerations of enforcement costs. At the outset, let me point out that these defences are unlikely to be particularly revealing for current purposes because enforcement costs are not an easily observable variable in the *explanandum*.[2] Also, the other substantive defences identify conditions pertinent to the conduct (including its effects) that make the sanction inapplicable. For example, Article 36 TFEU justifies limitations on the free movement of goods and Article 101(3) TFEU makes anticompetitive agreements lawful.

An additional category of defences is procedural defences. Procedural defences are based on the violation of procedural norms. The category of procedural defences is broad, and it includes, for example, claims about the lack of standing, the allocation of the burden of proof, the proper standard of review and the admissibility of a claim. These defences belong essentially to the set of institutional reasons that, as explained below,[3] are excluded from the scope of the current analysis because they do not have to do with the disagreement about the meaning of "allocative efficiency".

[1] Under the assumption that the value of x, y and z is positive.

[2] It is indeed the case that there are important signals with regard to enforcement costs, such as the length of the procedure and the length of the relevant legal documents of the Commission, defendants, intervenors, the courts, etc. However, an estimation of the enforcement costs would be an extremely time-consuming activity that—in the light of the content of the *explanandum*—would also be a massive waste of time.

[3] See pp. 178-179.

It is time to articulate the relation between *de minimis* defences, the other substantive defences and the competing *explanantia*. The consumer-welfare *explanans* would justify *de minimis* defences when the enforcement costs are so high that, if consumers were to pay for them, they would be better off without the legal intervention. Put differently, the benefits for the consumers are higher than the costs, so that in a principal-multiple-agents perspective,[1] the optimal approach of the legal system is non-intervention.

A similar reasoning can also explain the other substantive defences. If the purpose of a norm is to maximize consumer welfare, applying that norm also when the consequence would be a reduction in consumer welfare is self-defeating. However, the other substantive defences can also be explained on the grounds of a different justificatory scheme. In fact, as acknowledged at various points in this dissertation, consumer welfare is not the only substantive normative reason available. Consumer welfare competes at least with distributive justice, which includes a concern for the total welfare available within a society. The explanatory power of the consumer-welfare *explanans* will thus in part depend on its capacity to justify—in terms of distributive justice—substantive reasons that do not relate to consumer welfare.

The total-welfare *explanans* offers an homogeneous account of all the three types of defences. They all must be applied if their application increases total welfare. Thus, *de minimis* defences are typically easier to apply for the total-welfare *explanans* than for its consumer-welfare challenger because the enforcement costs need not be higher than the benefit to consumers, but to society—benefit which consists in reducing the deadweight loss and increasing productive efficiency.[2] At the same time, the distinction between the other substantive defences is based on the distinction between the maximization of total welfare and its distribution, which is typically considered to fall within the remit of taxation and subsidy schemes. In fact, if the maximization of total welfare is the purpose of all the norms of the legal system but a few norms and especially tax law,[3] only when these norms enter the picture does it make sense for the other substantive defences to be based on a reason different from total-welfare maximization, namely redistribution.

vii. Which sanctions? EU antitrust and consumer law contain at least four types of sanctions: fines, damages, nullity and injunctions. From the consumer-welfare *explanans*, fines aim at deterring unlawful behaviour. Damages are essentially reparatory. Although they do have a deterrent effect (because one typically does not like to become poorer), their aim is primarily to eliminate (or at least reduce) the harmful consequences of the unlawful behaviour. Nullity has a mixed function. Its main effect is to make an agreement (or at least a term) invalid or inapplicable.

[1] See Esposito, Grundmann 2017: 12-19.
[2] Esposito and De Almeida 2018: 110-112.
[3] See pp. 41-43.

In so doing, the threat of nullity has a deterrent effect. On the other hand, by triggering restitution duties, nullity contributes to the elimination of the harmful consequences of the unlawful behaviour. Injunctions aim at terminating conducts that are contrary to the overall goal of consumer-welfare maximization.

For the total-welfare *explanans*, instead, the theory of sanctions is much simpler. First, there is no significant difference between fines and damages in terms of function. Fines and damages are both a means to the maximization of total welfare.[1] Ultimately, they function like prices or taxes imposed by the legal system on producers. They should be equal to the harm (wealth transfers, deadweight loss and enforcement costs) caused by the inefficient behaviour. Neither higher, nor lower, than that. The reason is that if producers are willing to pay this amount, it means that the conduct increases total welfare. If they are not willing to pay this sum, the conduct would have reduced total welfare and, therefore, the producers abstain from the conduct. Nullity is also justified solely on deterrence grounds by the total-welfare *explanans*.[2] The justification of injunctions is different.[3] According to the mainstream account of injunctions, they are a means to maximize total welfare, on the grounds of a comparative institutional analysis between the transaction costs of the parties and the adjudication costs. If the transaction costs are lower, then an injunction is the right remedy because it is an additional incentive for the parties to solve their controversy through negotiation; if the transaction costs are higher than the adjudication costs,[4] it is for the courts to select the price of the exchange in the form of a damages award.

The *explanantia* regarding the seven theoretical disagreements between the competing efficiency hypotheses show that while, at a very high level of abstraction, total- and consumer-welfare approaches can have an incompletely theorized agreement on the claim that perfect competition is better than monopoly,[5] as soon as they start descending to lower levels of abstraction, disagreement becomes pervasive and operationalizable. Table 1 summarizes the competing *explanantia* regarding these seven disagreements.

[1] WM Landes 1983, van der Berg et al. 2006. For a critical account, see Wils 2006.
[2] Koszinski 1988, Harvard Law Review 2006.
[3] This account rests on a gross simplification of the conceptual framework introduced by Coase and extended in the seminal 'Cathedral' article by Calabresi and Melamed; see Coase 1960, Calabresi and Melamed 1972. On the gross simplification of their analysis by total welfare approaches, see Calabresi 2014, 2016.
[4] Sometimes the point is made in absolute or categorical terms by stating that transaction costs are 'prohibitive'. This simplification is ultimately in violation of the consequentialist character of economic explanations. On this point, see Komesar 1992.
[5] See 82-83.

	i. Transf.	*ii. Protect.*	*iii. CW-TW*	*iv. DW/Pr.In.*	*v. Elasticity*	*vi. Defences*	*vii. Sanction*
CW	Intrinsic	Intrinsic for consumers	Horizontal	Peripheral/ Instrum.	Peripheral	CW or distr. Justice	Repair and/or deter
TW	Instrum.	Instrum.	Vertical	Central	Central	TW, but distr. just. if tax law	Deter or min. costs

– Table 1: Summary of the seven disagreements –

4.3 Why comparative institutional analysis and the ex-ante *perspective do not matter*

There is a vast literature on comparative institutional analysis. Consider some examples. Komesar has shown that the relation between the market, legislative bodies and the judiciary is a complex one, and it is ultimately a choice between imperfect alternatives.[1] Sunstein has incorporated these considerations in his analysis, although the market typically rests in the backstage.[2] Maduro has applied Komesar's conceptual framework to the institutional complexities of the EU internal market, where both EU and National legislative bodies and judiciaries are to be found.[3] Shapiro has offered important considerations about the relation between interpretive practices and the allocation of trust among different legal institutions within a legal system.[4]

Reflecting on the best institutional organization to pursue a given (set of) value(s) is obviously an important line of research. However, it is not the research undertaken in this dissertation. It is therefore advisable to clarify the relation between comparative institutional analysis and the current project. To some extent, institutional considerations play a role in the scorekeeping analysis. The images of the institutions involved offer inferential bridges between more and less abstract levels of analysis. In other words, institutional considerations are useful, at times even necessary, to connect the contents of the *explanandum* to the seven disagreements between the competing efficiency hypotheses. For this purpose, what matters is the understanding of the institutional pros and cons that are embedded in the *explanandum*. They might be false. For example, the *explanandum* could consider the consumer fully rational in circumstances where the best available behavioural evidence suggests he is not. From a normative perspective, this might call for a revision of the *explanandum*. We have seen this happening over the last few years for the information paradigm in EU consumer law.[5]

The perspective in this dissertation is different. What matters here is to understand what the *explanandum* is trying to achieve even if the assumption it moves from (say: consumers are fully

[1] Komesar 1992.
[2] See, in particular, Sunstein 2006a, 2006b and 2012a.
[3] Maduro 1998.
[4] Failing to consider the market mechanism is a significant drawback of Shapiro's economy of trust. See Shapiro 2012.
[5] See Esposito 2017a, 2018b.

rational, markets normally competitive, legislators unbiased or judges fully informed) is unconvincing. Put differently, what matters here is not whether one institutional arrangement is truly the best available, all things considered, or at least a plausible one. What matters are the axiological reasons justifying an institutional arrangement. The reasons in the *explanandum* might be morally wrong and/or empirically controversial, but they are the nevertheless the reasons found in the *explanandum*. Take for example the *Buet* decision,[1] which is part of the *explanandum*. It might well be that consumers would be better off if the canvassing at the home in relation to the sale of educational material were permitted; that is, if the free circulation of goods in the internal market were to take precedence over consumer protection. But what matters for the current inquiry is why the CJEU established that this prohibition is compatible with EU law.

Similar considerations apply to the distinction between *ex-ante* and *ex-post* perspectives seen in the Introduction. Assume EU law has only an *ex-post* perspective. Even if this were the case, the implication would simply be that there is a vast programme of reforms economists can advance in order to help the legal systems maximize the value it has chosen to maximize.

Having made these points clear, we can conclude this digression on comparative institutional analysis and move towards the articulation of the method of analysis that will be used in the following chapters.

5. The Framework, Part 3: The Method of Analysis—The Scorekeeping Model

The previous section identified seven disagreements between the consumer-welfare and total-welfare hypotheses, operationalized in seven competing *explanantia*. What is necessary to determine now is the method to apply, and the procedure to follow to analyse the *explanandum* and establish which efficiency hypothesis has superior explanatory power.

In this scenario, I build on and modify the framework proposed in a joint research with Giovanni Tuzet which merges economic analysis with legal inferentialism to introduce an interdisciplinary explanatory model of linguistic practices: the explanatory scorekeeping model.[2] The explanatory scorekeeping model builds on the model of interpretive or judicial scorekeeping developed by Canale and Tuzet. In turn, Canale and Tuzet draw inspiration from Brandom's account of linguistic exchanges in general.

In Brandom's account of linguistic exchanges, the participants in the communication "keep score" of the deontic statues undertaken and attributed by themselves and by others—which is why

[1] C-382/87.
[2] Esposito and Tuzet forthcoming.

this account can be called linguistic scorekeeping.[1] The deontic statuses undertaken and attributed by the participants are of at least two types: commitments and entitlements. The commitment is the initial deontic status of a speech act. The speaker claims, puts forward and commits to the idea that something is the case. For example, I am committed to the idea that allocative efficiency can be conceived of in terms of consumer welfare. The entitlement, instead, is a stronger deontic status because it makes the speaker justified, correct and entitled to hold that something is the case. Concerning my commitment to consumer welfare, the purpose of Chapter 3 of this dissertation is to turn that commitment into an entitlement. Brandom uses the scorekeeping model to account for the way in which the content of a concept[2] is determined. More precisely, he takes the view that the practice of keeping score of the deontic statutes (commitments and entitlements) attributed and undertaken by speakers establishes the content of a concept.

Canale and Tuzet have applied Brandom's conceptual framework to legal discourse, giving birth to an approach they call legal inferentialism.[3] Canale and Tuzet follow Brandom in holding that the ascription of meaning to a legal provision can be seen as the act of assessing the correctness conditions of the use of legal terms or expressions that figure in that provision.[4] Of the utmost importance for current purposes, the conditions of correctness of the use of legal expressions can be made explicit in the practice of giving and accepting legal arguments; that is, through legal argumentation. Canale and Tuzet apply this conceptual framework to a simplified judicial practice, which is fully adversarial. In other words, the judge does not formulate arguments, she simply attributes entitlements to the arguments formulated by the parties. In Sunstein's terms, the judge in this model offers fully particularized decisions—that is, unreasoned decisions. This choice is justified and justifiable because the central feature of legal interpretation Canale and Tuzet want to account for is that the judge is the interpretive scorekeeper, in the sense that her attribution of entitlements ultimately determines the meaning of the legal sources the parties are arguing about.[5]

An inferentialist perspective is also appropriate for the solution of the disagreement between consumer-welfare and total-welfare hypotheses. As seen, these two efficiency hypotheses have high- and mid-level disagreements with regards to the proper content of (or set of inferences about) antitrust and consumer law. From an inferentialist perspective, the competing *explanantia* regarding

[1] See Brandom 1994, 2000.
[2] In inferentialist terms, the content of a concept is the set of inferences one is justified, correct, entitled to draw by using the concept.
[3] Canale and Tuzet 2005, 2007, 2008, 2009, 2010.
[4] Canale and Tuzet 2005.
[5] Two points have to be noted here. The first is that this account is obviously a simplification of actual legal practice. The second is that Canale and Tuzet allow to each party the power to attribute entitlements to the other. While this is plausible to a great extent, it is somewhat in tension with the idea that the judge attributes the entitlements; in other terms, the authors seem to rule out the possibility that the judge disagrees with the entitlement attributed by one party to the other. However, this seems to be the case, for example, in case of the *ex officio* control of unfair terms in consumer contracts (see pp. 252-253).

these disagreements have the deontic status of commitments about the proper content of these branches of the law. These commitments can be used for explanatory purposes. The resulting analytical framework can thus be called explanatory scorekeeping model and used to carry out an explanatory analysis, which I will call explanatory scorekeeping analysis to mark its theoretical origins. The scorekeeping analysis is described in the next subsection.

5.1 Explanatory scorekeeping analysis

The explanatory scorekeeping analysis is divided into three phases: 1) report of the reasons found in the *explanandum* that are relevant for a disagreement; 2) account of how the competing *explanantia* explain them; and 3) attribution of the points to the competing *explanantia*. The first phase is thus declaratory of the content of the *explanandum*. Note, however, that it is not a traditional exposition of the content of the law. It does not aim at describing, summarizing, clarifying or systematizing the *explanandum*. Not at all. The exposition is fully instrumental to the identification of the reasons that are significant for assessing the explanatory power of the competing *explanantia*. In the second phase, these reasons are put in relation with the competing *explanantia* and their degree of fitness is made explicit. The third phase evaluates the quality of these explanations and justifies the attribution of a point on the triadic scale *P, p, N* to the efficiency hypotheses. Put differently, the third phase imposes a reality check on the narratives of the competing *explanantia*.

The idea of scorekeeping is meant, in an inferentialist fashion, to help me in keeping the score of the analysis of the *explanandum*. The triadic scale *P, p, N* allows to distinguish between explanations of different quality. The *explanantia* can thus score points of three types: high-quality points (*P*), low-quality points (*p*) and no points (*N*). In other words, the analysis attributes entitlements of different quality and when the *explanans* scores no point it is not entitled to its commitment that it fits with, account for and explains the relevant portion of the *explanandum*.

Simpler, direct and plain explanations receive high-quality points exactly because they fit better with the *explanandum*. Let me elaborate on this point a bit more by referring to an example outside of the *explanandum*. *The Anatomy of Corporate Law* is a leading theoretical book about corporate law, which mingles doctrinal analysis, the comparative method and economic insights brilliantly. The book accepts that, according to the law, shareholder value is the typical purpose of corporate law; at the same time, the book accepts that, as a matter of economics, allocative efficiency is about total welfare.[1] How are these two claims reconciled? The authors posit that the best way for corporate law to contribute to total-welfare maximization is to focus on shareholder

[1] See Armour, Enriques et al. 2017: 22-24. On this point, see also Esposito and Grundmann 2017: 15-16.

welfare. This explanation does not receive any support. It makes sense because it reconciles shareholder welfare and total welfare by putting them in an instrumental relation; shareholder welfare is instrumental to total welfare. What type of point does this explanation score, *P*, *p* or *N*? I think a *p* point because the explanation is based on an instrumental relation—from shareholder to total welfare—which does not receive an explicit warrant, but it is advanced to reconcile the two commitments. Notably, one could argue, equally well, that maximization of shareholder value is the best way to attaint productive efficiency and that, through competition, this leads to the maximization of consumer welfare.

Explanations receiving *p* points are of low quality because they get very close to committing the *petitio principii* fallacy. They identify and fill the silence of the *explanandum* on the grounds of the *explanans*. However, the point of explanatory activity is exactly to justify the *explanans*, not to rewrite the *explanandum*. Put differently, low-quality points can be understood as hypothetical points; they work under the hypothesis that the *explanans* is accepted. They thus need to interlock with some high-quality point to support the *explanans* directly. It follows that an explanation scoring only low-quality points fits with the *explanandum*, but the support the evidence gives it is weak.

The distinction between high- and low-quality points is at times a matter of details and degree, leaving room for some discretion. The distinction becomes even more delicate for rejection of the explanation—that is for *N* points. In this regard, I find it appropriate to indicate at the outset that in the attribution of points I will typically make an effort to attribute to both *explanantia* the highest possible point. That is to say, I will try to assess the *explanantia* fairly and charitably. However, it is also crystal clear that my own analysis is not impartial, in the sense that I have an interest in finding that the consumer-welfare hypothesis has superior explanatory power because this result is the most desirable outcome in the light of the content of Parts I and II of this dissertation. While I have attempted to be as impartial as possible, I look forward to the reaction of scholars committed to total welfare to the analysis offered in Part III of this dissertation.

With regards to the assessment of the explanations, it is appropriate to discuss two aspects of the application of the scorekeeping model at some length. The first is that there are topics for which the literature on the optimal solution to maximize total welfare is not settled. This problem of indeterminacy is particularly pressing for the liability standard in case of defective products.[1] Against this background, I will choose the most convenient account of the *explanandum* for the *explanans* under consideration and assess its explanatory power.

[1] See pp. 243-244.

The second, which is more important, is an articulation of the conditions for concluding that an *explanans* does not fit with the reasons given in the *explanandum*, to the effect that the related efficiency hypotheses is not entitled to the claim that it explains these reason and therefore scores no point (*N*). To conclude that an *explanans* does not advance a plausible explanation, the inquiry will be epistemologically minimalist. In particular, this means that the commitment to observability justifies taking legal discourse at face value. If the reasons given in the *explanandum* go deeper than necessary[1] to justify an outcome and go in the direction of the other *explanans*, then the *explanans* under consideration is barred from adding a further implicit reason establishing an unclear conceptual relation between the *explanans* and the *explanandum*. Let us consider a fictional example. A decision says "price-fixing cartels are prohibited because they harm consumers" and previous decisions used to be more shallow and say that ""price-fixing cartels are prohibited because they are anticompetitive". In this context, the total-welfare *explanans* is barred from explaining why price-fixing cartes are prohibited by loding that harming consumers reduces total welfare. Such an explanation, in fact, does not simply add part of the *explanans* to the content of the *explanandum* as in the case of a low-quality explanation. It basically rewrites the *explanandum* by neutralizing the explicit reference to the harm to consumer by positing that—somehow—harming consumers reduces total welfare. In the next two chapters, when no score is attributed, the analysis of the deficiencies of the explanation will be articulated as clearly as possible. However, this does not rule out the possibility that a more ingenious explanation can be advanced. Again, I look forward to proposals in this regard, that would be an obviously valuable contribution to a Minimalist Law-and-Economics approach.

A final aspect of the scorekeeping analysis to be discussed is that often the reasoning in the *explanandum* is shallow enough[2] to receive low-quality explanations by both *explanantia* but these shallow decisions coexist with more deeply theorized ones which score *P* and or *N* points. In other terms, the problem at hand is what point is scored when explanations of different quality coexist within the relevant portion of the *explanandum*. Three basic scenarios can be distinguished, in which the *explanandum* receives: 1) a *P* point and a *p* point; 2) a *p* point and an *N* point; and 3) a *P* point and an *N* point. To solve these conflicts, I will use a "polar attraction" scorekeeping rule. Polar explanations are those receiving either high-quality points or no point. According to the polar attraction scorekeeping rule, low-quality explanations are attracted by high-quality explanations and by the lack of plausible explanation. The intuition behind this choice is that an inferentialist approach implies that when, in a series of speech acts, some reasons are deeper than others they

[1] "Going deeper than necessary" is context dependent. It means that if the case law shows that a shallower reason is given in support of an interpretation, when a court gives a deeper reason it goes deeper than necessary.
[2] This is hardly surprising and actually expectable from the perspective of judicial minimalism.

contribute to fixing the semantic content of the shallower ones. However, this scorekeeping rule is by no means the only possible one, so the opportunity of using other rules is briefly discussed in Chapter 8. In the rare cases in which high-quality explanations coexist with a lack of plausible explanation, the polar attraction scorekeeping rule leads to indeterminate results (the poles attract each other simultaneously). In such cases, the *explanandum* incorporates conflicting reasons and is considered to provide a low-quality explanation, so that it scores a *p* point. If both poles have explanatory power, it seems appropriate to conclude that the result is the intermediate solution—that is, a low-quality point.

5.2 The subdivision of the explanandum

Before starting the analysis of the *explanandum*, it is useful to discuss openly the following problem: how is the *explanandum* to be divided to attribute the points? For current purposes, this is not only a matter of framing or of expositive convenience. The question is important because, first, the answer influences the number of points to be attributed and, second, the division of the *explanandum* in subsets may affect the results in light of the polar attraction scorekeeping rule. It was already seen that a first division is between antitrust and consumer law. From this perspective, it is advisable then to keep the further divisions of these two areas balanced—also because the amount of legal materials considered in this dissertation about EU antitrust and consumer law is comparable.

In light of these issues, the analysis in the next two chapters has to be primarily based on the division of the *explanandum* on the grounds of a robust and independent criterion or set of criteria. A criterion justified by reasons detached from the analytical purposes increases the independent security of the doctrinal claim. In fact, the criteria are justified by reasons that have no connection with the purposes of the analysis but are instead to be assessed on their own terms. The central criterion for the division of the *explanandum* is based the type of interaction between the market and the law. In both antitrust and consumer law, it is in fact possible to distinguish two broad areas of legal intervention in market relations based on the degree of intrusion of the law in the interactions between market participants. This institutional criterion is appealing because it has a bearing on a comprehensive analysis of the relation between the law and the market mechanism but that, as explained above, is not directly significant for current purposes.

Let us apply these considerations to the *explanandum*. More precisely, let us look first at the distinction between antitrust and consumer law in more detail and then elucidate the further division of these two components of the *explanandum* in the light of the degree of intrusion of the law in

market relations. The division of EU antitrust law from of EU consumer law makes sense, first of all, because these two areas of EU law are normally analysed separately from a legal point of view. Legal academics working in these two areas are generally considered as belonging to different professional fields of legal practice and academic research.

The degree of intervention of the law in market relations allows us to distinguish two broad areas within both EU antitrust law and EU consumer law. Let us consider antitrust law first. While, there are significant similarities between the texts of Articles 101 and 102,[1] the distinction between a lower and higher degree of intrusion is quite clear and mirrors the formal division between these two articles. In fact, Article 101 applies to a broad range of market behaviours that have in common the imputation of anticompetitive conducts to groups of undertakings. Instead, Article 102 applies to the unilateral conduct of undertakings in a dominant position. This dominant position imposes upon these undertakings a special responsibility, which implies a deeper degree of scrutiny of their behaviour.[2]

In the field of consumer law, a similar distinction can be made, although it is not as clear as in antitrust law. Here, the distinction is between consumer empowerment and consumer protection. In a first approximation, consumer empowerment is about "helping consumers to help themselves".[3] Consumer empowerment focuses on enabling consumers to assess for themselves the appropriateness of a choice. Instead, consumer protection is more intrusive because it enables the legal system to exercise substantive control over the content of the contract. According to this distinction, it is easy to qualify the Unfair Terms Directive and the Product Liability Directive as forms of consumer protection. They both allow for a substantive review of the content of the exchange and their central provisions are mandatory. The Unfair Commercial Practices Directive (UCPD) and the Consumer Rights Directive (CRD) fall instead in the category of consumer empowerment. The UCPD in fact targets commercial practices that "appreciably impair the consumer's ability to make an informed decision, thereby causing the consumer to take a transactional decision that he would not have taken otherwise".[4] The CRD is also an instrument of consumer empowerment because it establishes various information duties, and it also establishes a right to withdraw, which allows consumers a window to reconsider the downsides of some contracts. As both directives ultimately aim to monitor the quality of the context in which the consumer makes a transactional decision, they both fit in the category of consumer empowerment.

[1] I refer in particular to the requirement that the behaviour under scrutiny "may affect trade between Member States", to the identity between the conducts forbitten by Art. 101(1)(d) and (e) and by Art. 102(1)(c) and (d), and to the similarity between the conducts forbitten by Art. 101(1)(a) and (b) and by Art. 102(1)(a) and (b).
[2] See 203-214.
[3] Communication from the Commission of 1 December 1998, Consumer Policy Action Plan 1999-2001 (COM/1998/696 final), 8.
[4] Article 2(1)(e), UCPD. On the notion of transactional decision, see Article 2(1)(k) and C-281/12 [36].

The classification of the case law on the free circulation of goods and services is harder, but I consider it a form of consumer empowerment. In fact, the main purpose of these freedoms is to enable the flow of goods and services between Member States, thereby strengthening the competitive process by eliminating legal barriers. However, one might prefer to include this case law in consumer protection because, after all, "consumer protection" is invoked as a limitation to the said freedoms. In this regard, three observations justify the choice of categorizing these cases a s consumer empowerment. First, consumer protection is invoked as a defence, which implies that its main role is in the context of disagreement *vi*. Second, the expression "consumer protection" is used in a broad sense in the *explanandum*, which encompasses both consumer empowerment and protection. Third, and in relation to the second point, the scholarship on this case law has long emphasized that it expresses a favour for information duties instead of more intrusive forms of consumer protection. Thus, as both the purpose of the freedoms and the preferred form of defence fall within the category of consumer empowerment, it is appropriate to include this portion of the *explanandum* in the said category. Admittedly, this is the most controversial classification discussed in this section. As a counter measure, Chapter 8 will discuss whether including it in consumer protection instead would lead to markedly different results about the doctrinal claim. It can be anticipated that it would not.

In light of the above, the competing efficiency hypotheses can score up to four points for each of the disagreements identified in Section 4. The exception is disagreement *vii*., where only two points are attributed. The reason for this exception is based on the following considerations. The sanctions do not fit very well in the distinction between consumer empowerment and protection. This is particularly the case for antitrust law. In fact, there is no significant distinction between the remedies applied in case of violation of the prohibitions enshrined in Articles 101 and 102. Thus, their division based on whether they follow from the application of Article 101 or 102 strikes me as fictional. For expositive purposes, it is more appropriate to distinguish between pecuniary and non-pecuniary sanctions. However, since this distinction is based on a criterion chosen for expositive convenience, it seems appropriate to attribute only one point for the whole analysis of EU antitrust law regarding disagreement *vii*. On these grounds, the question then becomes what to do about consumer law and disagreement *vii*. In this context, the division between empowerment and protection is used, which suggests attributing two points. However, symmetry suggests attributing one point only. Ultimately, I find symmetry a more valuable *desideratum*. As the choice is admittedly controversial, Chapter 8 discusses whether a different choice would have an impact on the doctrinal claim. It can be anticipated that it would not.

5.3 The types of content of the explanandum *and their relevance for the doctrinal claim*

The *explanandum* is a heterogeneous body of legal materials. It includes primary and secondary EU law and judicial decisions. These legal materials can be divided into textual statements of at least three types: normative statements, interpretive statements and argumentative statements.[1] These three types of textual statements are connected and sometimes difficult to distinguish, but at this stage of the analysis it is important to account for their differences and connections. Normative statements express norms. As the *explanandum* is composed of legal normative statements, it expresses legal norms. Interpretive statements give meaning to normative statements and, in so doing, produce norms. Finally, argumentative statements justify an interpretive statement. NS being a normative statement, N a norm, IS an interpretive statement and AS an argumentative statement, consider the following statements:

(1) NS

(2) NS means N

(3) NS means N because of such-and-such reason

Statement (1) is a normative statement (NS); (2) is an interpretive statement (IS); and (3) is an argumentative statement (As). Reconsider the *Buet* case, which is part of the *explicandum*, and was mentioned in Section 4.3. The CJEU interprets Article 34 TFEU and holds that prohibiting the canvassing at the home in relation to the sale of educational material is compatible with EU law. The main argument is that the prohibition is not disproportionate to the aim of consumer protection. Article 34 TFEU is the interpreted normative statement; the holding that the prohibition is compatible with Article 34 TFEU is the interpretive statement and it expresses the norm that the prohibition is compatible with Article 34 TFEU; finally, the argumentative statement is that the prohibition is not disproportionate to the aim of consumer protection. This analysis is arguably unnecessarily for a lawyer, but I prefer to be over-inclusive rather than under-inclusive on these preliminary considerations—also because I want to make sure that also an economist can follow the discussion.

How is this taxonomy helpful for current purposes? It is helpful because it provides guidance on the type of statements that we can expect to find in the different elements of the *explicandum*. The articles of primary and secondary legislation are normative statements. The recitals are instead complex and fascinating legal materials. They provide various types of information about the context (legal and factual) and the goals of the secondary source of EU law. In so doing, they are of great importance for the justification of interpretive statements. Put

[1] See, generally, Ratti 2008: 15-27 and Twining 2013: 293-322.

differently, they play an important role in the formulation of argumentative statements. Judicial decisions typically include all the types of statements under consideration. In the case law of the CJEU, they can be distinguished rather clearly—especially in the most recent cases. In fact, the decisions of the Court typically open with the identification of the relevant normative statements of EU and National law. Then, the Court reconstructs the procedural steps of the judgment and, importantly, the interpretive arguments of the parties. At this point, the Court expresses its reasoning about the case—that it to say, it formulates the argumentative statements that justify its interpretive statements. The decision concludes with the interpretive statements by the Court, which are written in bold.

The preceding considerations suggest that the recitals of secondary legislation and the interpretive arguments of the CJEU and of the Commission will be particularly significant for assessing the doctrinal claim of this dissertation. In fact, these statements make explicit the reasons given to justify norms in EU legal discourse. However, also the normative statements will be useful, especially when their plain meaning is used by the courts as an interpretive statement and it includes concepts that can receive a high-quality explanation by one *explanans* but are difficult to explain by the other.

The next chapter applies the explanatory scorekeeping model of inferential analysis to EU antitrust law. The following one applies it to EU consumer law.

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EU Antitrust Law Reverse Engineered

1. Introduction to the Scorekeeping Analysis of EU Antitrust Law

This chapter applies the explanatory scorekeeping model of inferentialist analysis developed in Chapter 5 to the portion of the *explanandum* regarding EU antitrust law. The goal of the analysis is twofold. First, to assess which efficiency hypothesis has superior explanatory power between the total-welfare hypothesis and its consumer-welfare opponent. Second, to do it in a way that is rigorous enough to respect the economists' commitment to epistemological minimalism. More precisely, the chapter analyses the texts of Articles 101 and 102 TFEU, Regulation (EC) 1/2003,[1] Commission Regulation (EU) 330/2010,[2] and Directive 2014/104/EU[3] (Damages Directive) as well as the 2006 Guidelines.[4] As described in Chapter 5, the *explanandum* includes also a set of decisions by the Court of Justice of the European Union (CJEU), the General Court, and the Commission.

Warrantying the doctrinal claim consistently with epistemological minimalism then gives a normatively minimalist reason to prefer consumer welfare to total welfare as the maximand in the efficiency analysis of EU antitrust law. The reason is that consumer welfare fits better than total welfare with legal practice. As seen in Chapter 2, reverse engineering the law is a normatively minimalist way to infer the value choices embedded in it. In sum, by reverse engineering EU antitrust law, this chapter assesses the fitness with legal reasoning of the two competing efficiency hypotheses. In this regard, the consumer-welfare hypothesis is particularly promising. Consumer welfare, like total welfare, is a maximand with an economic pedigree (Chapter 3) but, contrary to total welfare, satisfies both the fairness and the wrongfulness theses (Chapter 4). Thus, if the

[1] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.
[2] Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices.
[3] Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under National law for infringements of the competition law provisions of the Member States and of the European Union.
[4] Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003.

doctrinal claim is warranted consistently with epistemological minimalism, it will follow that consumer-welfare maximization contributes significantly to the proposal of collaboration between economic and legal research advanced by Minimalist Law-and-Economics.

To anticipate the results of the scorekeeping analysis performed in this chapter, the consumer-welfare hypothesis scores ten high-quality points and a low-quality one; in constrast, the total-welfare hypothesis scores one low-quality point and its explanations are rejected the all other ten times. Thus, once reverse engineered, EU antitrust law supports the doctrinal claim of this dissertation.

2. Explaining Article 101 TFEU and the Related *Explanandum*

Article 101 TFEU is divided into three paragraphs. Paragraph 1 sets a prohibition, paragraph 2 establishes that agreements in breach of Article 101 "shall be automatically void" and paragraph 3 identifies four conditions that, if jointly satisfied,[1] make paragraph 1 (and therefore paragraph 2) inapplicable. In light of the reasons regarding the subdivision of the *explanandum* for analytical purposes given in Chapter 5, the legal materials related to paragraph 2 are considered at a later stage, as they pertain to disagreement *vii*. In this first set of point attribution, the start of the consumer-welfare hypothesis is powerful. Its *explanantia* score four high-quality points and, conversely, the *explanantia* of the total-welfare hypothesis are rejected four times.

2.1 The prohibition of Article 101(1) and disagreements i. *and* ii.*: 2* P *v 2* N

Article 101(1) TFEU establishes that three types of conduct follow within its scope: agreements between undertakings, decisions by associations of undertakings, and concerned practices. For current purposes, the analysis of these concepts is not relevant.[2] What is worthy of emphasis is that the provision of Article 101(1) TFEU is not deeply theorized. In essence, its plain meaning simply prohibits anticompetitive behaviours affecting trade between Member States. The various conducts identified by Article 101(1)(a)-(e) are also not particularly informative.[3] It is then imperative to look

[1] See, for example, C-238/05 [65].

[2] On the notion of undertaking, see Joined Cases C-180-184/98 [74-75], C-309/99 [46-47], C-440/11 P [36] and C-286/13 P [140]; on the notion of concerned practice, see Joined Cases C-40-48/73, C-50/73, C-54-56/73, C-111/73, C-113/73 and C-114/73 [26-27, 283]; on the notion of "decision by an association of undertakings", see Joined Cases C-209-215/78 and C-218/78 [88], C-136/12 [44], C-382/12 P [68-69] (particularly interesting because it draws the line between an association of undertakings and the customers of an undertaking). These distinctions are meant to "catch different forms of coordination between undertakings … and thus to prevent undertakings from being able to evade the rules on competition on account simply of the from in which they coordinate that conduct" (C-382/12 P [63]).

[3] Letter (d) is a bit more interesting than the others in that it prohibits undertakings from applying "dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage". This

at the application of the prohibition in the case law to test the explanatory power of the competing *explanantia*.

Unsurprisingly, in a conspicuous number of decisions the reasoning is shallow. Some illustrative examples will suffice.[1] In the *Remia* judgment, the Court holds that "[i]n order to determine whether [contractual] clauses come within the prohibition in Article [101](1), it is necessary to examine what would be the state of competition if those clauses did not exist".[2] Focusing, instead on the undertakings rather than on competition, in *Sukie Unie* the Court explained that there is a "concept inherent in the provisions of the Treaty relating to competition [namely] that each economic operator must determine independently the policy which he intends to adopt on the common market".[3] Still too shallow for current purposes is the observation in *Metro I* that the "requirement … that competition shall not be distorted implies … in particular the creation of a single market achieving conditions similar to those of a domestic market".[4]

The often-shallow reasoning found in the *explanandum* is readily explained by the observation that even without making the reasons for the protection of competition explicit, the case law has been able to describe in depth the functioning of the competitive mechanism.[5] While unhelpful for current practical purposes, these findings confirm the soundness of the minimalist framework of judicial decision-making accepted in this dissertation; courts often do not go deeper than necessary to decide the case at hand.

A similar situation exists for the requirement that the prohibited conduct may affect trade between Member States. In fact, the case law does not go beyond stating that the conducts are

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prohibition does indeed show a concern for the protection of trading parties, which is relevant to disagreement *ii.*, especially when these trading partners are customers. However, both efficiency hypotheses fail to offer a high-quality explanation of this prohibition because they are both based on the instrumental connection between competition and their own maximand. The consumer-welfare explanation is that trading parties do not have to be at competitive disadvantage because competitive pressure is beneficial to consumers; conversely, the total-welfare explanation is that trading parties do not have to be at competitive disadvantage because competitive pressure is beneficial to total welfare.

[1] See Joined Cases C-56/64 and C-58/64 p. 339, C-22/71 [7], Joined Cases C-40-48/73, C-50/73, C-54-56/73, C-111/73, C-113/73 and C-114/73 [196, 307], C-75/84, T-395/94 [69], C-7/95 [88], C-306/96 [22], T-53/03 [90], C-209/07 [16], C-226/11 [36], C-440/11 P [99], Joined Cases C-209-215/78 and C-218/78 [108] and C-384/13 [26].

[2] C-42/84 [18]. Similarly, C-126/97 [36] and C-453/99, establishing an instrumental relation between competition law and "the functioning of the internal market". See also T-29/05 [49].

[3] Joined Cases C-40-48/73, C-50/73, C-54-56/73, C-111/73, C-113/73 and C-114/73 [173]. See, also, among others, T-29/92 [119], T-504/93 [158], C-286/13 P [119] and C-382/12 P [62] using at [89] the expression "commercial autonomy"—used also in T-208/13 [97], T-472/13 [451]. In a similar vein, in C-453/99 [33] "the party who claims to have suffered loss through concluding a contract that is liable to restrict or distort competition found himself in a markedly weaker position than the other party, such as seriously to compromise or even eliminate his freedom to negotiate the terms" deserves to receive compensation for the damage suffered.

[4] C-26/76 [20]. Cited *verbatim* in C-107/82 [42].

[5] See, for example, C-8/72 [17], Joined Cases C-40-48/73, C-50/73, C-54-56/73, C-111/73, C-113/73 and C-114/73 [14-21, 285], C-107/82 [33], T-2/89 [132], C-7/95 [88], T-328/03 [109] and C-439/09 [40].

contrary to the goal of establishing the internal market[1] and adding that the test is meant to divide the competence between EU antitrust law and the antitrust law of Member States.[2]

From time to time, the reasoning found in the *explanandum* goes deeper. A first step is that Article 101 TFEU has direct effect,[3] and therefore gives rights to individuals that are correlative to the duties explicitly established upon undertakings. This is the essence of the wrongfulness thesis, as seen in Chapter 1. The problem then becomes whether these rights are instrumental to total-welfare or consumer-welfare maximization. To check this, we need to consider the occasions where the reasoning is even deeper. The existence of these decisions is particularly consequential because, as stated, the frequently shallow decisions suggest that the outcome could have been justified without deep theorization. Plausibly, then, these deeper reasons mark the deliberate choice to determine the rationale of the prohibition set by Article 101(1).

First of all, the case law reveals an interest for the protection of competitors.[4] As seen in Chapter 5, both efficiency hypotheses can account for this concern as instrumental to the protection of competition which, in turn, fosters consumer or total welfare. In the context of paragraph 1, these explanations remain of low quality. We shall see in Section 2.3 that the situation is different in the context of paragraph 3, which is particularly relevant for disagreement *vi*.

Second and momentous, decisions showing a specific interest for the effect of the anticompetitive conduct on consumers abound. In *Scandinavian Airlines*, the Court of First Instance stresses the "effective economic capacity of offenders to cause significant damage to other operators—in particular consumers".[5] This statement does not offer a particularly strong endorsement of the interest of consumers, but it stresses nevertheless the impact of the conduct on consumers. The cases in which the reasoning is much more explicit are, if not an army, at least a legion. Already in *Consten and Grunding*, one of the first competition law cases decided by the Court of Justice, it is explained that[6]

> the parties might seek, by preventing or limiting the competition of third parties in respect of the products, to create or guarantee for their benefit an unjustified advantage at the expense of the consumer or user, contrary to the general aims of Article [101].

The Court makes it crystal-clear that limiting "the competition of third parties" gives to the undertakings "an unjustified advantage at the expense of the consumer or user", a result that is

[1] Joined Cases C-56/64 and C-58/64 p. 340, C-42/84 [22], C-250/92 [54], T-213/95 [175], C-306/96 [16] and C-440/11 P [99].
[2] Joined Cases C-56/64 and C-58/64 p.340; T-29/92 [227], T-395/94 [80], T-29/05 [166] also for Article 102, C-238/05 [33].
[3] C-234/89 [45], T-24/90 [90-93] (connecting direct effect to "safeguard" under National law) and T-213/95 [96].
[4] C-172/14 [37].
[5] T-241/01 [69].
[6] Joined Cases C-56/64 and C-58/64 p. 339. See also Joined Cases C-40-48/73, C-50/73, C-54-56/73, C-111/73, C-113/73 and C-114/73 [70].

"contrary to the general aims of Article [101]". Thus, the exploitation of consumers is part of the problem with excluding competitors. In *Suiker Unie*, already cited, the cartel was "established to the detriment of effective freedom of movement of the products in the common market and of the freedom of consumers to choose their suppliers".[1] It is obvious that products do not have rights, so that a conduct detrimental to "their" freedom of movement must be understood as harming human interests that the free movement of the goods fosters. In assessing the amount of the fine, the Court reasons as follows:[2]

> [T]he damage which the users and consumers suffered as a result of the conduct to which exception is taken was limited, because the Commission itself has not blamed the parties concerned for any concerted or improper increase in the prices applied and because, even though the restrictions on the freedom to choose suppliers caused by the partitioning of the market deserve censure, they are not so oppressive in the case of a product like sugar, which is mainly homogenous.

The reasoning of the Court in this case shows that the theory of harm in *Suiker Unie* ultimately rests only on the reduction of the freedom to choose of users and consumers. Even more clearly, sometimes it is stated explicitly that the violations of Article 101(1) were detrimental to the interest of consumers (and customers); thus, in the *van Landewyck* judgment, the Court explains that[3]

> the agreement between the applicants regarding the size of the margins to be allowed to direct traders from them, thus preventing market forces from determining the size of those benefits, in particular on the basis of the services which such intermediaries may render individually, is a restriction on competition prohibited by Article [101(1)].

The Court also agrees with the Commission that the enforcement of Article 101(1) "where [anticompetitive] agreements relate to sales, will benefit buyers".[4] The Court of First Instance states that "a horizontal agreement between *sociétés de courses* … would … restrict such potential competition … to the detriment of bookmakers and ultimate consumers"[5] and the General Court explains that interfering with the launch of a generic drug is a conduct "at the expense of consumers, that is to say, … patients or national health insurance schemes".[6]

The evolution of the case law on the distinction between restrictions by object and effect is conclusive evidence for current purposes. The distinction is of great practical consequence because restrictions by object dispense courts from the assessment of the effects (actual or potential) of the conduct on competition. The reasoning justifying the distinction has been shallow for many years.[7]

[1] Joined Cases C-40-48/73, C-50/73, C-54-56/73, C-111/73, C-113/73 and C-114/73 [191].
[2] Joined Cases C-40-48/73, C-50/73, C-54-56/73, C-111/73, C-113/73 and C-114/73 [620]. See also Joined Cases C-209-215/78 and C-218/78 [130-133, 137, 141], T-29/92 [186].
[3] Joined Cases C-209-215/78 and C-218/78 [141].
[4] C-235/92 [154-155].
[5] T-504/93 [159].
[6] T-472/13 [171] and also [377, 380, 386, 429].
[7] T-141/89 [60], T-141/89 [141] and T-19/91 [77].

Against this background, the reasoning of the Court in *GlaxoSmithKline* might sound as recalcitrant evidence[1] for the consumer-welfare *explanans*:[2]

> [T]here is nothing in [Article 101(1) TFEU] to indicate that only those agreements which deprive consumers of certain advantages may have an anti-competitive object. Secondly, it must be borne in mind that the Court has held that, like other competition rules laid down in the Treaty, Article [101(1) TFEU] aims to protect not only the interests of competitors or of consumers, but also the structure of the market and, in so doing, competition as such … . It follows that, by requiring proof that the agreement entails disadvantages for final consumers as a prerequisite for a finding of anti-competitive object and by not finding that that agreement had such an object, the Court of First Instance committed an error of law.

It is indeed the case that the Court of Justice holds that Article 101(1) protects competitors and competition as such and not only consumers. However, the Court does not hold that only competition is protected. Additionally, this reason is meant to justify the ruling that the application of Article 101(1) does not require to prove "disadvantages for final consumers as a prerequisite for a finding of anti-competitive object". Ultimately, the argument of the Court simply rejects the necessity of finding direct consumer harm to establish a violation of Article 101(1). The decision makes thus Article 101(1) more effective than the interpretation envisaged by the Court of First Instance.

This argument is confirmed by paragraph 58 of the Opinion of AG Kokott in *T-Mobile Netherlands*, cited by the Court to make the same argument found at paragraph 63 and 64 of *GlaxoSmithKline*.[3] The Advocate General takes the view that Article 101(1)[4]

> forms part of a system designed to protect competition within the internal market from distortions …. Accordingly, [Article 101(1) TFEU], like the other competition rules of the Treaty, is not designed only or primarily to protect the immediate interests of individual competitors or consumers, but to protect the structure of the market and thus competition as such (as an institution). In this way, consumers are also indirectly protected. Because where competition as such is damaged, disadvantages for consumers are also to be feared.

In line with these considerations, the case law has recently introduced a novel account of restrictions by object.[1] This account gives reasons deeper than in previous decisions, expressed in markedly economic language:[2]

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[1] See Sauter 2015: 114.
[2] Joined Cases C-501/06, C-513/06 and C-519/06 P [63-64]. See also C-68/12 [18].
[3] C-8/08 [38-39].
[4] Opinion of Advocate General Kokott, 19 February 2009, Case C-8/08, *T-Mobile Netherlands BV and Others*, ECLI:EU:C:2009:110, [58]. Note that the citation of this paragraph is compatible with the selection criteria of the *explanandum* because the Court explicitly refers to it and it is essential to clarify a point of significant importance of the analysis.

> [I]t is established that certain collusive behaviour, such as that leading to horizontal price fixing by cartels, may be considered so likely to have negative effects, in particular on the price, quantity or quality of the goods and services, that it may be considered redundant, for the purposes of applying Article [101(1) TFEU], to prove that they have actual effects on the market … . Experience shows that such behaviour leads to falls in production and price increases, resulting in poor allocation of resources to the detriment, in particular, of consumers.

This reasoning has far-reaching implications for Minimalist Law-and-Economics. First, it proves—or at least strongly suggests—that economic insights can inform the distinction between restrictions by object and effect by introducing expert knowledge about what "behaviour [typically] leads to falls in production and price increases". Second, the reasoning is articulated in terms very friendly to economic language, as it speaks of "falls in production and price increases, resulting in poor allocation of resources". However, this poor allocation is "to the detriment, in particular, of consumers". This reasoning thus unequivocally connects the poor allocation of resources in particular to the harm to consumers.

Finally, let me direct your attention to the case law on ancillary restriction—that is, agreements that are *prima facie* restrictive of competition, but that are actually necessary to enhance it. For this test as well, the theorization of the *explanandum* is frequently shallow.[3] However, already in *Metro I*, the Court writes that, "[f]or specialist wholesalers and retailers the desire to maintain a certain price level … corresponds to the desire to preserve, in the interest of consumers, the possibility of the continued existence of this channel of distribution".[4] Notably, fitting beautifully with the consumer-welfare *explanans,* the account of a resale price maintenance clause is based on the idea that it preserves "in the interest of consumers"—not of distributors, or of having a well-functioning market—"this channel of distribution".

More recently, in two cases regarding decisions by associations of undertakings, the finding that a restraint is beneficial to consumers leads the Court to consider the restriction ancillary and thus procompetitive. First, in *Wouters*, the CJEU holds that the prohibition of partnerships between lawyers and accountants by the Bar Association of the Netherlands is compatible with Article 101(1) because it protects "the ultimate consumers … and the sound administration of justice".

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[1] However, it should be pointed out that in the same period the case law also includes examples of shallower reasoning about the distinction restriction by object or effect: C-172/14 [31-32] and C-373/14 P [26]. This observation is not particularly telling as it simply shows that the reasoning of the courts often tends to be shallower. This fact cannot reduce the significance of those cases in which courts have gone deeper.

[2] C-67/13 [51]. See also C-286/13 P [114-115], T-472/13 [341], T-208/13 [88] and C-345/14 [19].

[3] C-42/84 [19-20], C-161/84 [9], C-234/89 [23], C-250/92 [34], Joined Cases T-374/94, T-375/94, T-384/94 and T-388/94 [102], T-122/99 [62, 104], C-519/04 P [47, 51, 55], T-111/08 [79-81], C-382/12 P [89-93] (discussing at [93] the relation of this criterion with Article 101(3) and the criteria for assessing the "objective necessity of a restriction" at [111, 173]) and T-208/13 [99].

[4] C-26/76 [21].

Second, in *Consiglio nazionale dei geologi*, price restrictions by the Italian National Council of Geologists are found necessary for "ensuring that the ultimate consumers of the services in question are provided with the necessary guarantees".[1] These two decisions are momentous for current purposes because they explicitly connect the ancillary restraints doctrine to benefits to consumers and, in so doing, the concept of procompetitive conduct to the benefits to consumers.

Bearing the criteria operationalizing disagreements *i*. and *ii*. in mind, it has to be assessed whether the two competing efficiency hypotheses can score points, and if so of what quality, regarding the case law on Article 101(1). The consumer-welfare *explanantia* thrive in this *explanandum*. There is a distinctive concern for transfers detrimental to consumers (*i*.) and the protection of consumers against anticompetitive conducts has a prominent role in the reasoning of the courts which is not presented as instrumental to some other value (*ii*.). The finding that some conducts are ancillary restraints and thus procompetitive because they are justified by the preservation of a distribution method "in the interest of consumers" or by the need to protect consumers is truly a breakthrough for the consumer-welfare hypothesis. In fact, what this case law implies is that restricting price competition, or the freedom of economic organization, can be procompetitive if it benefits consumers. Among the various lines of reasoning reviewed regarding the role of the interest of consumers in the application of Article 101(1) in this section, this is—in the view of this author—the clearest one in favour of the consumer-welfare hypothesis, which therefore scores two high-quality points (*P*).

Conversely, I do not see how the total-welfare hypothesis can plausibly attempt to explain these findings. There is no toehold for claiming that the concern for consumers is instrumental to increasing total welfare. And this is particularly telling for two reasons. First, the courts could have avoided the specification that anticompetitive conduct was detrimental to consumers in virtually all the cases they decided to do it. It was thus a deliberate choice to theorize Article 101(1) in the direction of the consumer-welfare hypothesis. Second, but equally damaging for the total-welfare hypothesis, the case law on several occasions proves quite open to insights from economic theory. However, the incorporation of these insights goes hand-in-hand with the deepened theorization in the direction of consumer welfare. Trying to explain the reasons given in the *explanandum* as instrumental to total welfare would ultimately override these explicit reasons on the grounds of a vaguely articulated conceptual connection between consumer and total welfare. As discussed in Section 5.2 of Chapter 5, this type of explanatory strategy is too implausible to offer even a low-

[1] C-136/12 [56], then casting doubts on the necessity of considering "the dignity of the profession" as instrumental to that purpose.

quality explanation. Hence, the total-welfare *explanantia* regarding disagreements *i*. and *ii*. provide no plausible explanation and score two *N* points.[1]

2.2 Article 101 and disagreement iv.*:* P *v* N

We can now move to the analysis of the fitness of the the *explanandum* with the *explanantia* regarding disagreement *iv*., which concerns the role of the deadweight loss and of productive inefficiency in the application of Article 101 TFEU. This section analyses how the courts have reasoned in unusual contexts, the consequence of which is that the conduct of the undertakings is connected prominently to the concepts of deadweight loss and productive inefficiency. Disagreement *iv*. accounts for the divergent theorization of these concepts between the competing efficiency hypotheses. The relevant cases are not numerous—which is understandable—but they are revealing nonetheless.

The analysis of the sugar market in the *Sirena* judgment is very telling for current purposes.[2] In fact, in light of the common agricultural policy, "the sugar produced in the Community which can be sold on the domestic market was limited to a fixed amount". In other words, the quantities of sugar are capped. Nevertheless, the Court found the conducts anticompetitive by explaining that "the provisions of the Treaty relating to competition are … designed, inter alia, to prevent cartels allowing its members to apply unjustified prices". Thus, excessive prices are prohibited even when they do not cause a deadweight loss.

The economic context in the *VSPOB* case was very peculiar as well. The conduct under scrutiny consisted in a decision by an association of constructors determining how the tender procedure had to be launched. In finding the conduct anticompetitive, the Court of First Instance observed that,[3] "[a] further consequence of this system [of construction tenders] may be to deprive the contract awarder of the benefit of a given contractor's greater efficiency regarding calculation costs". Interestingly, the point is then explained with a numerical example leaving no doubt that the problem is that the final price is higher then what it would have been in the absence of the anticompetitive conduct. Reasons similar to those in *Sirena* and in *VSPOB* are given in *Raiffeisen Zentralbank Österreich*.[4]

[1] In this regard, please recall that, according to the polar attraction scorekeeping rule, even if there are decisions that are shallow enough to receive low quality explanations by the total welfare *explanans*, the finding that in so many other occasions there is no plausible explanation implies that this *explanans* scores no point (*N*).
[2] Joined Cases C-40-48/73, C-50/73, C-54-56/73, C-111/73, C-113/73 and C-114/73 [70, 615].
[3] T-29/92 [151] and see also [154] and [298].
[4] See T-86/95 [370].

The judgment in *Compagnie générale maritime* is instead significant for productive inefficiencies. The Court of First Instance found the following statement of reasons by the Commission appropriate:[1]

> [T]he Commission states that '[the price-fixing agreement] simply serves to ensure that prices are maintained at levels higher than they would otherwise be'. Furthermore, at recital 116, the Commission considers that '[w]here individual carriers are able to reduce their costs by organising their container fleets more efficiently than other carriers, conference price fixing for carrier haulage services prevents the more efficient lines from passing on cost savings'".

This argument is critical for current purposes. The finding that there are productive efficiencies not passed to consumers does not lead the Court to assess whether the cost savings offset the negative consequences of the higher prices. Not at all. The conduct increases prices and the gains in productive efficiency remain irrelevant because they are not passed to consumers.[2]

As a last point and for the sake of completeness, let us consider the following argument that can be advanced to explain the effect on trade test by the total-welfare hypothesis. The test, by referring to the effect on trade, is meant to reduce the application of Article 101 to those cases in which total welfare is reduced because having an "effect on trade" means "causing deadweight losses". It is clear that the argument cannot succeed. As seen, the test is simply meant to solve the conflict between the antitrust law of the EU and that of the Member States; put differently, it is simply designed to limit the reach of EU law to those cases in which the EU has an interest to intervene because the conduct of the undertakings is contrary to the internal market project.

The evidence regarding both the deadweight loss and productive inefficiency shows that the relation between prices, quantities and costs is the one envisaged by the consumer-welfare *explanans* regarding disagreement *iv.*, which therefore scores a high-quality point (*P*). On the contrary, the relation between prices, quantities and costs in the *explanandum* is incompatible with the one proposed by the total-welfare *explanans*, which therefore scores no point (*N*).

2.3 Article 101 and disagreement vi.*:* P *v* N

This section reviews the reasoning in relation to four defences to be found in the practice of Article 101 TFEU. We start with Article 101(3). Then, we focus on how the interest of workers plays a role in the first test of Article 101(3) but also outside of it. Another substantive defence to be considered is the protection granted to agreements by intellectual property rights and, in particular, by patents.

[1] Joined Cases T-259-264/02 and T-271/02 [286].
[2] As we will see below, this is not a sporadic reasoning, but is actually at the core of the application of Article 101(3).

There are also various considerations bearing on *de minimis* defences. Let us consider them in order.

Article 101(3) TFEU establishes a substantive defence against the application of Article 101(1) and (2). Arguably, it is the substantive defence with the most deeply theorized plain meaning included in the *explanandum*. Indeed, occasionally the courts refer to it as if the provision expresses clearly its normative content,[1] without any need of interpretive statements or arguments, but the case law shows that this content has been specified on various occasions.[2] According to the provision of Article 101(3), Article 101(1) is inapplicable when the conduct: 1) "contributes to improving the production or distribution of goods or to promoting technical or economic progress"; 2) "while allowing consumers a fair share of the resulting benefits"; neither 3) "impose[s] … restrictions which are not indispensable to the attainment of these objective"; nor 4) "eliminate[es] competition in respect of a substantial part of the products in question". What is important to note is that already the plain meaning of Article 101(3) strongly suggests a specific concern for consumers. The normative guidance provided by the plain meaning of Article 101(3) is important because the four conditions established by it are cumulative, so that when one is found missing, the courts typically do not engage with the others.[3] This reduces considerably the occasions the courts have to apply each one of the four conditions.

The case law offers additional reasons in this direction. First of all, the courts refer to Article 101(3) as a means for balancing the pro- and anticompetitive effects of a conduct. For example, in *M6*[4] the General Court writes that, "[i]t is only in the … framework of [Article 101(3)] that the pro and anti-competitive aspects of a restriction may be weighed". Perhaps not conclusively, expressions of this type nevertheless suggest that Article 101(3) is meant to assess whether the coordination between undertakings is a means to outperform their competition as a means to maximize consumer welfare. In fact, the first condition means that the conduct improves the organization of the means of production (or distribution). The third requires that the restrictions imposed on competition are limited to what is "indispensable" to achieve those improvements. The

[1] See, for example, Joined Cases C-209-215/78 and C-218/78 [175] and T-112/99 [74].
[2] Interestingly, the first test works very similarly to the imbalance test *ex* Article 4 Unfair Terms Directive, as we shall see below. See, for example, T-213/95 [193]: "[I]t considered that SCK's certification system did not provide real added value, either substantively or in its operation, compared with the statutory requirements". On the first condition, see C-45/85 [60 61], Joined Cases C-209-215/78 and C-218/78 [176, 182], C-42/84 [42], T-17/93 [106-110], Joined Cases T-305-307/94, T-313-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 [740], T-111/08 [228]; on the third, T-29/92 [310-312], T-17/93 [122]; on the fourth, Joined Cases C-209-215/78 and C-218/78 [187-189].
[3] C-61/80 [18], C-35/83 [41], T-29/92 [262], T-395/94 [367], C-7/95 [123], T-111/08 [236] and T-213/95 [192].
[4] T-112/99 [74]. See, also, for example, T-328/03 [69] and T-111/08 [101].

fourth adds that the competitive mechanism cannot be compromised.[1] Finally, the second condition requires that consumers receive a fair share of the benefits.

These considerations find an important confirmation in Recitals 6-8 of Regulation (EU) 330/2010. The recitals explain that vertical agreements can "improve economic efficiency within a [supply] chain" and that whether these efficiencies "will outweigh any anti-competitive effect" depends on the degree of competition on the market; finally, vertical agreements covering less than 30% of the market share[2] "generally lead to an improvement … and allow consumers a fair share of the resulting benefits". While a regulation is a subordinate source in comparison to Article 101(3), these recitals confirm the existence of a relation between the benefits to consumers and the balancing of the pro- and anticompetitive effects in the application of Article 101(3).

Let us now specifically consider the reasons given in the application of the fair share test. In *van Landewyck*,[3] the Court observes assertively that

> in the contested decision the Commission gives a[s] ground for maintaining its refusal of exemption under Article [101] (3) the fact that it has nowhere been shown that the distribution system established by the recommendation brings to direct customers of the members of FEDETAB and buyers from such customers more benefits than they would receive from normal competition which would allow the consumer a free choice.

Similarly, in *VSPOB*[4] it was found that "the system of reimbursements of calculation costs, even if conducive to overall reduction of transaction costs in the market, does not allow of that reduction to be shared fairly between contractors and contract awarders" and the decision in *Matra Hachette*[5] explains that "the exempted project will enable economies of scale to be achieved and promote intensified competition in the market, to the benefit of the European consumer".

It is clear that there is a concern operating in favour of consumers when it comes to transfers, which is intrinsic and not instrumental to the maximization of total welfare. This finding is confirmed by the observation that in the *Deere*[6] judgment the CJEU cites assertively the Court of First Instance's reformulation of the fair share test as "equitable distribution of benefits" between consumers and producers. The consumer-welfare *explanans* regarding disagreement *vi*. thus scores a high-quality point (*P*) for its explanatory power of Article 101(3).

For the total-welfare *explanans* Article 101(3) is a painful anomaly. The distributive concern in favour of consumers cannot be explained instrumentally without violating the conditions detailed

[1] This point is made particularly clear in the analysis of the relation between antitrust law and sector-specific regulation given in C-286/08 P [92].
[2] If they do not have certain clauses described in Articles 4 and 5, Regulation (EU) 330/2010.
[3] Joined Cases C-209-215/78 and C-218/78 [178]. A similar reasoning is found in T-19/91 [98]. See also T-122/99 [144].
[4] T-29/92 [298].
[5] T-17/93 [122].
[6] C-7/95 [123].

in Chapter 5, Section 5.2. A strenuous attempt to give a total-welfare explanation consists in reducing the scope of the term "consumer" in Article 101(3) to cover only the distorted consumers—that is, the consumers that bear the deadweight loss. But this argument is also doomed to fail. In fact, the citations seen above show that, if anything, it is the category of consumers operating on the market that constitutes the reference point of the Court—thus the exploited consumers, not the distorted ones. In any event, the *Asnef-Equifax* judgment[1] specifies that "[u]nder Article [101(3) TFEU], it is the beneficial nature of the effect on all consumers in the relevant markets that must be taken into consideration". On these grounds, it is appropriate to conclude that the total-welfare *explanans* regarding disagreement *vi.* does not explain the reasoning in the application of Article 101(3) and, therefore, scores an *N* point.

As anticipated, the *explanandum* includes also other defences in need of consideration. First, the interest of workers plays a role in the first test of Article 101(3) and in other substantive reasons that occasionally come into play in the application of Article 101. Second, the protection granted to agreements by intellectual property rights and by patents in particular is relevant. Third and finally, there are different types of considerations related to *de minimis* defences.

The interest of workers plays a role in the first test of Article 101(3), which is interesting to analyse in connection to the theoretical claim that conflicts between capital and labour matter instrumentally if they increase consumer welfare, and intrinsically only in terms of distributive justice.[2] In the *van Landewyck* judgment, the Court holds that "concern to safeguard employment in an unfavourable economic climate, may be taken into account under Article [101](3)". However, as it counts within the scheme of Article 101(3), all the four conditions therein must be satisfied.[3] Similar considerations are found in *Remia*,[4] whereas *LVM*[5] and *Beef Industry*[6] focus more generally on the relevance of the crisis of the sector. Unfortunately, for one reason or another,[7] in none of these cases has the Court discussed specifically the relation between these difficult market contexts and the fair share test. However, in all these cases the case law requires that the difficulties on the supply side of the market must be assessed under Article 101(3). As in *van Landewyck*, the Court stresses that the four conditions for the application of Article 101(3) are cumulative, it is justified to conclude that the normative preference in favour of consumers applies also in these circumstances. If this is the case, it is clear that the interest of workers and of the economic sector more generally

[1] C-238/05 [70].
[2] See pp. 36-37 and 154-155.
[3] Joined Cases C-209-215/78 and C-218/78 [182-187].
[4] C-42/84 [42-47].
[5] Joined Cases T-305-307/94, T-313-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 [740].
[6] C-209/07 [21].
[7] In *van Landewyck*, the conduct violated condition 3) and in *Remia* condition 4). In *LVM*, the undertakings had not applied for an exemption as required by the procedural norms in force at the time. Finally, *Beef Industry* is the answer to a preliminary reference on the concept of restriction by object.

do not have the same axiological importance of the interest of consumers. In fact, if consumers do not receive a fair share of the benefits, an anticompetitive agreement beneficial to workers or more generally to a section in difficulty will not benefit from the application of Article 101(3). It really seems that, as Hutt put it, consumers are sovereign and producers are servants.

A significant difference in the reasoning is observed in the *Suiker Unie* judgment, where Article 101 is applied in the context of the agricultural policy of the (now) European Union. Article 39 TFEU, like its predecessors on the matter, establishes as one of the goals of the common agricultural policy "to ensure a fair standard of living for the agricultural community". This distributive concern in favour of the agricultural community, however, does not exempt the anticompetitive conducts under scrutiny from the application of Article 101. The conduct is assessed under a necessity test meant to check whether there was no less restrictive way for ensuring a fair standard of living for the agricultural community.[1] Importantly, the normative grounds of this necessity test are not identified in Article 101(3), but in Article 39 TFEU.

Let us look at the defence relating to intellectual property rights and in particular to patents. In the context of Article 101, these rights do not grant much of a defence—unlike the context of Article 102, as we shall see in due course. In fact, their exclusionary character does not justify agreements aimed at the limitation of the freedom to challenge in court the scope or the validity of a patent.[2] The recent decision by the General Court in *Lundbeck* makes it abundantly clear that these agreements are very likely to be harmful to consumers.[3]

Let us now move to the third type of defences, *de minimis* defences. In the *Tetra Pak* judgment,[4] the Court of First Instance states that block exemptions are justified by "considerations of administrative simplification" and by the goal of "secur[ing[legal certainty for the parties to an agreement". Even more interestingly, in *Automec*[5] the Court of First Instance explaines that

> in order to assess the Community interest in further investigation of a case, the Commission must take account of the circumstances of the case, and in particular of the legal and factual particulars set out in the complaint referred to it. The Commission should in particular balance the significance of the alleged infringement as regards the functioning of the common market, the probability of establishing the existence of the infringement and the scope of the investigation required in order to fulfil, under the best possible conditions, its task of ensuring that Articles [101 and 102] are complied with.

It is however in the analysis of whether the anticompetitive conduct may affect trade between Member States that the clearest *de minimis* defence is to be found. In fact, conducts that may have

[1] Joined Cases C-40-48/73, C-50/73, C-54-56/73, C-111/73, C-113/73 and C-114/73 [214, 223-224].
[2] C-193/83 [92] and T-472/13 [119, 386].
[3] T-472/13 [171, 341, 377, 380, 386, 429, 490, 713, 714, 719].
[4] T-51/89 [37].
[5] T-24/90 [86].

only an insignificant effect on trade escape the prohibition of Article 101 altogether.[1] The *explanandum* is not deeply theorized on why there is this exception, so that it is hard to go beyond low-quality explanations of it.

The consumer-welfare *explanans* gives high-quality explanations of both the scheme of the defence *ex* Article 101(3) and of the solution of the conflict between anticompetitive agreements and IP rights. In fact, in both instances, there is an explicit concern for the relation between the scrutinized conduct and the interest of consumers. On the contrary, the total-welfare *explanans* can explain the said defences in a way that is similar to the one discussed in Section 2.1 and which is not plausible enough to score even a low-quality point for the same reasons articulated there. With regards to the role of the interest of workers and *de minimis* defences, the explanations of both efficiency hypotheses are of low-quality. The *explanantia* articulated in Chapter 5 do explain the reasoning, but have to fill significant gaps in the *explanandum*, so that they cannot do better than scoring *p* points.

The competing *explanantia* thus receive both low-quality explanations and polar explanations. Against this background, the polar attraction scorekeeping rule implies that the high-quality explanations of the consumer-welfare *explanans* and the lack of explanation of the total-welfare one attract also the low-quality explanations both efficiency hypotheses provide. It follows that the consumer-welfare *explanans* regarding disagreement *vi*. scores a high-quality point (*P*) for its explanation of Article 101 while its total-welfare counterpart scores an *N* point.

3. Explaining Article 102 TFEU and the Related *Explanandum*

Article 102 TFEU covers a rather different set of conducts in comparison to Article 101, namely the unilateral conducts of undertakings in a dominant position that are abusive of such a position. Article 102 thus introduces a "special responsibility"[2] on dominant undertakings. Dominance is characterized as "a position of economic strength enjoyed by an undertaking that enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of the consumers".[3] In its *Intel* judgment, the General Court even stated that the "buying power" of

[1] See Joined Cases T-305-307/94, T-313-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 [741], Joined Cases T-374/94, T-375/94, T-384/94 and T-388/94 [102], C-306/96 [16], Joined Cases C-180-184/98 [94], C-226/11 [16], C-440/11 P [99], T-265/12 [142] and C-384/13 [26].

[2] See, for example, Joined Cases C-395/96 and C-396/96 [85], T-301/04 [132] and T-286/09 [90].

[3] C-85/76 [38]. See also, among others, C-27/76 [65], T-30/89 [90], Joined Cases C-395/96 and C-396/96 [34], T-340/03 [99], T-321/05 [30]. From the point of view of the upstream and downstream market agents, C-85/76 [41] describes the dominant undertaking as, "to a large extent, an unavoidable trading partner"; see also T-155/06 [269] and T-286/09 [91].

consumers "does not alter the fact that they depended on the [dominant undertaking] as an unavoidable trading partner".[1] The section confirms the superior explanatory power of the consumer-welfare hypothesis, which scores four high-quality points and a low-quality one, whereas the total-welfare hypothesis scores one low-quality point and sees its explanations rejected in the other four occasions.

The legal context of Article 102 is, however, similar to that of Article 101 in several respects. As anticipated, the *explanandum* is so similar regarding disagreements *v*. and *vii*. to justify a joint analysis. In addition, it can be observed that also the application of Article 102 is based often on a sophisticated account of the market dynamics,[2] and that the case law whether the conduct may affect trade between Member States is basically identical to that found in the application of Article 101, at least for current purposes.[3] On the grounds of this fact, this aspect of the *explanandum* is not discussed in this section because, as seen in Section 2, it is of no consequence for the comparison of the explanatory power of the competing efficiency hypotheses.

3.1 Article 102 and disagreements i. *and* ii.*: 2* P *v 2* N

Although the differences between the scope of application of Articles 101 and 102 TFEU cannot be dismissed, it is important to consider also the great similarities and the identities even between the texts of Articles 101(1) and 102(2). For current purposes, a comparison of the provisions of Article 101(1)(a) and (c) and of Article 102(2) (a) and (b) is consequential. Whereas Article 101(1)(a) prohibits to "directly or indirectly fix purchase or selling prices or any other trading condition", pursuant to Article 102(2)(a), "directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions" is an abuse. The passage from prohibiting to fix conditions to prohibiting the imposition of unfair conditions is of great theoretical interest. In essence, to apply Article 101 it is sufficient to assess the formal circumstance that the condition has been fixed. In contrast, the application of Article 102 requires the substantive analysis of the fairness of the condition. This not only confirms that fairness is central to the *explanandum*, but also suggests a higher level of theorization in the application of Article 102(2)(a) because it is a fairness test.

For current purposes, however, it is the comparison between Article 101(1)(c) and Article 102(2)(b) that is revealing. Whereas Article 101(1)(b) prohibits to "limit or control production, markets, technical development, or investment", pursuant to Article 102(2)(b), "limiting production,

[1] T-286/09 [139].
[2] See, for example, C-27/76, T-201/04, T-286/09 and T-472/13.
[3] See, for example, on the test being aimed at safeguarding the internal market project: C-22/78 [17], T-69/89 [76]; on the insignificant effect on trade: C-22/78 [19-24] (very generous to the undertaking—compare with, for example, C-7/97 [36]); on the test having the purpose of determining the scope of application of the competition law of the EU and of the Member States: Joined Cases C-6/73 and C-7/73 [31], C-22/78 [17] and T-69/89 [76].

markets or technical development to the prejudice of consumers" is an abuse. Thus, Article 102 adds to the very similar prohibition in Article 101 and explicit reference to the "prejudice to consumers". This explicit reference to the prejudice of consumers is already a strong indicator that the *explanantia* of the consumer-welfare hypothesis are likely to score high-quality points regarding disagreements *i*. and *ii*.; conversely, it suggests that the total-welfare hypothesis is likely to incur again in non-trivial difficulties. The analysis of the case law confirms these expectations.

Nevertheless, as in the application of Article 101, there are also plenty of occasions where the reasoning of the courts is shallow enough to allow for low-quality explanations from both *explanantia*.[1] For example, the scrutiny of pricing practices is sometimes meant to assess whether "the practice tends to remove or restrict the buyer's freedom to choose his sources of supply, to bar competitors from access to the market, to apply dissimilar conditions to equivalent transactions with other trading parties, or to strengthen the dominant position by distorting competition".[2] For each of these criteria, it is apparent that the explanatory power of both *explanantia* is of low quality. A thorough analysis would be therefore pointless, especially given the abundance of more deeply theorized legal materials. Like what was seen in relation to Article 101, both *explanantia* can advance low-quality explanations regarding the concern for the protection of competitors.[3]

The case law strongly supports the claim of the consumer-welfare *explanans* that the protection of consumers has intrinsic value whereas that of competitors has instrumental value only. For example, the problem of discriminating trading parties is explicitly related to the effect of this practice on their competitiveness both by the plain meaning of Article 102(2)(c) and by the case law.[4] This account introduces a clear instrumentalist concern. Additionally, consider the recurrent reason, which dates at least to the *Continental Can* judgment, that Article 102 "is not only aimed at practices which may cause damage to consumers directly, but also at those which are detrimental to them through their impact on an effective competition structure".[5] This explanation of the relation between competition and the interest of consumers has been often recited by the courts.[6] It makes the instrumental connection between competition and the interest of consumers—that is, competition as a means to the benefit of consumers—abundantly clear. Finally, note that the

[1] C-22/78 [11], C-322/81 [29, 70], C-7/82 [56], C-311/84 [25], C-62/86 [69], T-30/89 [100], T-83/91 [137], T-111/96 [138], T-203/01 [54, 60, 98, 239], C-95/04 P [144], T-301/04 [192], T-340/03 [130, 187], T-201/04 [561], C-468/06 [39], T-155/06 [214], C-549/10 P [71] and C-170/13 [45].
[2] See, for example, T-398/07 [66].
[3] Joined Cases C-6/73 and C-7/73 [25], C-62/86 [103, 115, 140], C-66/86 [42-44], T-30/89 [125], T-151/01 [119, 122], T-155/06 [241] and C-549/10 P [42] . Worthy of notice, sometimes the concern is expressed in terms of granting the equality of opportunity between competitors: C-18/88 [22], T-271/03 [198-199], T-201/04 [230] and IV/35.613 [83].
[4] Joined Cases C-40-48/73, C-50/73, C-54-56/73, C-111/73, C-113/73 and C-114/73 [502-503], C-62/86 [155], C-66/86 [42-44] and IV/35.613 [109, 125].
[5] C-6/72 [26].
[6] See Joined Cases C-6/73 and C-7/73 [32], C-85/76 [125], C-95/04 P [106], T-340/03 [266], T-201/04 [664], T-321/05 [353], adding also at [674, 804] that "competition on the merits … [is] liable to benefit consumers", T-398/07 [92] and T-286/09 [105].

explanandum is crowded with similar expressions. On many occasions, the case law refers to "consumers".[1] In others, it refers to various categories of customers[2] but, as seen in the Introduction,[3] this is of no consequence for current purposes.

Against this background, let us consider the quality of the explanations offered by the competing *explanantia*. The theorization of the competitive process found in this section is essentially the same found in Section 2.1 regarding Article 101(1) and perhaps it is even more clearly articulated. Article 102(2) shows a distributive concern in favour of consumers. Additionally, it shows that the protection of consumers has intrinsic value, whereas the protection of competitors is instrumental—a means to strengthen the competitive process, which in turn benefits consumers. The consumer-welfare *explanantia* regarding disagreements *i*. and *ii*. thus score two high-quality points (*P*) for their explanations of the reasoning in the application of Article 102. On the contrary, the concern for transfers is also here a painful anomaly for the total-welfare *explanans* regarding disagreement *i*. and no reference to total welfare can be found in the *explanandum*. On the contrary, accounting for the distributive concern in favour of consumers and the concern for their protection as instrumental towards total welfare is, for the same reasons given in Section 2.1, too fraught with obstacles to succeed. In this context, the conclusion is that, like in Section 2.1, the total-welfare hypothesis scores two *N* points regarding disagreements *i*. and *ii*.

3.2 Article 102 and disagreement iii.*:* P *v* p

[1] C-26/76 [142, 158]: holds that "protect(ing) the brand name and therefore ultimately the consumers … is commendable and lawful" and condemns both the prohibitions on resales imposed upon ripeners and the refusal to supply a distributor because "they limit markets to the prejudice of consumers"; T-301/04 [149]: the conduct "harmed innovation and competition … and ultimately consumers"; in C-468/06 [53, 56, 68]: 1) "parallel exports … necessarily bring some benefits to the final consumer of those products", 2) in a "Member State where the prices of medicines are subject to State regulation, parallel trade is liable to exert pressure on prices and, consequently, to create financial benefits not only for the social health insurance funds, but equally for the patients concerned … . At the same time, as the Commission notes, parallel trade in medicines from one Member State to another is likely to increase the choice available" and 3) "the Treaty [has the] objectives to protect consumers by means of undistorted competition and the integration of national markets"; C-468/06 [206] and T-155/06 [206]: "Article [102 TFEU] prohibits a dominant undertaking from eliminating a competitor and from strengthening its position by recourse to means other than those based on competition on the merits. The prohibition laid down in that provision is also justified by the concern not to cause harm to consumer"; COMP/38.636 [29]: the undertaking's conduct would undermine "a precondition to technical development and the development of the market in general to the benefit of consumers".

[2] T-201/04 [1088]: "the normal competitive process … would benefit users"; T-65/89 [93]: "in particular distributors … are victims of the alleged practices"; T-83/91: [170] "price differences … were applied to the detriment of packers". The dominant undertaking interferes with "the independence of small and medium sized firms" 26/76 [193] (see also Joined Cases C-40-48/73, C-50/73, C-54-56/73, C-111/73, C-113/73 and C-114/73 [397, 482]) and, conversely, puts its customers in a position of dependence Joined Cases C-40-48/73, C-50/73, C-54-56/73, C-111/73, C-113/73 and C-114/73 [161] and T-203/01 [111, 140]; squeezing the margins of downstream competitors (*i.e*. customers) is unfair T-271/03 [92, 223, 253] and T-398/07 [67].

[3] See pp. 34-35.

The *explanandum* regarding Article 102 TFEU relevant to disagreement *iii*. is of great interest and complexity.[1] Let us begin by considering in some detail the reasoning in *TeliaSonera Sverige*, where the Court, in responding to a preliminary reference, explains that[2]

> Article 102 TFEU is one of the competition rules referred to in Article 3(1)(b) TFEU which are necessary for the functioning of the internal market. … The function of those rules is precisely to prevent competition from being distorted to the detriment of the public interest, individual undertakings and consumers, thereby ensuring the well-being of the European Union (see, to that effect, Case C-94/00 Roquette Frères [2002] ECR I 9011, paragraph 42).

At paragraph 42, *Roquette Frères*[3] expresses a similar idea,[4] namely that the prevention of competition is ultimately detrimental to "economic well-being in the Community". In *TeliaSonera Sverige*, the Court then continues its reasoning by explaining that "Article 102 TFEU must be interpreted as referring not only to practices which may cause damage to consumers directly …, but also to those which are detrimental to them through their impact on competition".[5] As seen above, this reason is incompatible with a plausible total-welfare explanation. Additionally, the Court holds that a dominant undertaking does not violate Article 102 when its abusive conduct is objectively justified. The test for determining if such objective justification exists is that "it has to be determined whether the exclusionary effect arising from such a practice, which is disadvantageous for competition, may be counterbalanced, or outweighed, by advantages in terms of efficiency which also benefit the consumer".[6] As it will be made explicit in the discussion pertinent to disagreement *vi*., the concept of objective justification introduces in the scheme of Article 102 a defence similar to the one posited by Article 101(3). Finally, in other decisions, the Court has articulated the reasoning offered in paragraphs 21-24 of *TeliaSonera Sverige* differently. This is particularly clear in the *Hoffmann-La Roche* judgment,[7] where the Court formulates the following interpretive argument and statement about Article 102

> in the light of Article 3 (f) of the Treaty which provides that the activities of the Community shall include the "institution of a system ensuring that competition in the Common Market is not distorted" and Article 2 of the Treaty which gives the Community the task of promoting "throughout the Community a harmonious development of economic activities". … Article [102] therefore covers not only abuse which may directly prejudice consumers but also abuse which indirectly prejudices

[1] For this reason, and contrary to the previous section, disagreements *iii*. and *vi*. are discussed separately here.
[2] C-52/09 [21-22].
[3] C-94/00 [42]. Note that at this point the chain of reasons is interrupted because the reasoning in *Roquette Frères* does not provide further grounds for this argument.
[4] For current purposes, the significant differences between "economic well-being" and "well-being" and between "in the Community" and "of the Union" can be overlooked.
[5] C-52/09 [24].
[6] C-52/09 [76].
[7] C-85/76 [125].

them by impairing the effective competitive structure as envisaged by Article 3 (f) of the Treaty.

The *explanandum* thus reveals some internal tension, if not an inconsistence. Let us make the tension explicit. If we focus only on paragraph 21 and 22 of *TeliaSonera Sverige* and 42 of *Roquette Frères*, we see that the total-welfare *explanans* scores a high-quality point. In fact, protecting "the public interest, individual undertakings and consumers" is described as instrumental to "ensuring the well-being of the European Union" or the "economic well-being in the Community". It is clear that the total-welfare *explanans* can plausibly argue that these expressions refer to total-welfare maximization.

Conversely, the consumer-welfare hypothesis does not offer such a simple account of these statements. It was seen that the consumer-welfare *explanans* regarding disagreement *iii*. includes a complex relation between consumer and total welfare, symbiotic to the relation between commutative and distributive justice. Commutative justice in private—and in particular in market—relations allows individuals to exchange material resources in ways that are neutral to the goals of distributive justice of the community (in this case the European Union and its Member States). On the grounds of this premise, the explanation of the consumer-welfare *explanans* is that EU antitrust law contributes to the "well-being of the European Union" by ensuring that market relations are commutatively just, thereby allowing other EU and National institutions to foster distributive justice. While entirely consistent with the consumer-welfare *explanans* regarding disagreement *iii*., this explanation is clearly of low quality.

However, the *explanandum* is not composed by paragraphs 21 and 22 of *TeliaSonera Sverige* only. Once these two paragraphs are placed in the broader context of the *explanandum*, the quality of the total-welfare explanation degrades progressively. Conversely, the quality of the consumer-welfare explanation increases. Let us focus on the total-welfare *explanans* first and its relation with paragraphs 24 and 76 of *TeliaSonera Sverige*: why is there a need to specify that consumers are harmed directly and indirectly by the violations of Article 102? To be consistent with the total-welfare *explanans*, the concern ought to be for the total "well-being of the European Union". Why does the objective justification impose that the consumer must benefit from the efficiency gains? The said specification and constraint should not be there. The point is reinforced by the observation that in other instances, the Court has theorized the relation between Article 102 TFEU and the goals of the Union (and before it, the Community) differently from *TeliaSonera Sverige* and in ways that connect the prohibition of Article 102 directly to the interest of consumers and not to the "well-being of the European Union". Thus, while the total-welfare *explanans* scores a high-quality point regarding the first three paragraphs considered in this subsection, it incurs great

difficulties in explaining the other portions of the *explanandum* considered. In fact, it was already seen that the attempts to explain similar reasons given in the application of Article 101 are not successful and score an *N* point.

Conversely, the quality of the consumer-welfare explanation increases progressively. While the consumer-welfare *explanans* offers a low-quality explanation of paragraphs 21 and 22 of *TeliaSonera Sverige* and of paragraph 42 of *Roquette Frères*, it explains how they fit in the broader co-text of the decision in *TeliaSonera Sverige* and with other accounts of the relation between Article 102 and the goals of the EU.

In this context, the attribution of the points is particularly difficult, especially for the total-welfare *explanans*. In fact, the consumer-welfare *explanans* gives a low-quality explanation to part of the *explanandum* and a high-quality one for the other part. The polar attraction scorekeeping rule implies the attribution of a *P* point. This is, after all, the usual result when part of the *explanandum* is too shallow to receive a high-quality explanation. On the contrary, the total-welfare *explanans* is pulled to the two poles of the triadic scale. In fact, while it advances a high-quality explanation of part of the *explanandum*, it offers no plausible explanation for other parts of it. The application of the polar attraction rule implies that the total-welfare *explanans* scores a *p* point because offers a low-quality explanation of the reasoning in the application Article 102 with regards to disagreement *iii.*

3.3 Article 102 and disagreement iv.*:* P *v* N

The *explanandum* regarding Article 102 is usually not sufficiently theorized for attributing polar points with regards to disagreement *iv*. For example, in *United Brands*,[1] the Court holds that a price with "no reasonable relation to the economic value of the product"—with the "economic value" being the "cost of production"—is an abuse of dominant position. This reasoning does not rule out the possibility that the problem with excessive prices is only that they cause deadweight losses. Similar considerations apply to various statements about the prohibition of discriminatory prices.[2] In fact, the two *explanantia* converge on considering excessive prices and discrimination[3] sub-optimal, but they do so for different reasons. For explanatory purposes, reasons going deeper are needed.

[1] C-26/76 [250-254]. See also C-40/70 [17] and C-78/70 [19].
[2] See C-226/84 [27], condemning at [29] price discrimination based on different levels of willingness to pay between dealers and individuals; see also other cases on price discrimination C-85/76 [90], C-62/86 [155], T-30/89 [17, 100], T-65/89 [93-94], T-151/01 [119] and T-301/04 [170].
[3] Divergence about the optimality of outcomes exists only in case of perfect discrimination, which was not encountered in the *explanandum*. See pp. 84-86.

A deeper level of theorization is found in *Merci convenzionali porto di Genova*.[1] The Court first observes that a National measure increases the prices of the goods. Second, it reminds that Article 102 has "direct effect and give[s] rise for interested parties to rights which the national courts must protect". It is thus difficult to conclude that the problem with higher prices is that it reduces total welfare because the Court shows a direct concern for the protection of the "interested parties". Still, the Court does not articulate its reasoning deep enough. Low-quality explanations are still possible from both sides on the grounds of the *explanantia* regarding disagreement *ii*. and the possibility of giving an instrumental justification to the protection of the interested parties.

The situation is different for the reasoning in *BP* and *Alpha Flight Services*. In *BP*, the Court reviewed a decision of the Commission finding British Petroleum Maatschappij Nederlandand, its subsidiaries, and other companies in breach of Article 102. What makes this case of interest is that the conduct occurred during the oil crisis of the 1970s—an economic context where supply was severely constrained, to which the reaction of the Dutch legal system was the imposition of rationing and price caps. In parallel, the Member States failed to act under the framework of the now Article 122 TFEU to laying down special legislation for the exceptional oil shortage. Against this background, the Court states that the failure to act under Article 122 "cannot release the Commission from its duty to ensure in all circumstances, both in normal and special market conditions, when the competitive position of traders is particularly threatened, that the prohibition in Article [102 TFEU] is scrupulously observed".[2] This finding is remarkable because given the Dutch legislative context, which limited the quantities available and imposed a price cap, the possibility of having a deadweight loss as a consequence of the conduct the undertakings is practically excluded. In *Alpha Flight Services*,[3] the Commission holds explicitly that the condition of putting customers at competitive disadvantage does not distinguish between the case in which the customer "will … lose customers or reduce its profit margin".

In both decisions, the reasoning rejects the relevance of conditions eliminating the possibility of deadweight losses and explains that whether the customer suffers from a reduction in sales or in profits only is irrelevant. These considerations are perfectly compatible with the consumer-welfare *explanans* regarding disagreement *iii*., but do not fit with its total-welfare counterpart at all. In fact, for the consumer-welfare *explanans*, both the excessive transfers from consumers to producers and deadweight losses are undesirable (*Alpha Flight*). Accordingly, the lack of a deadweight loss (*BP*) cannot have the consequence of making the conduct lawful. On the

[1] C-179/90 [22-23].
[2] C-77/77, especially [14-15]. See also T-65/89 [94].
[3] IV/35.613 [110].

contrary, the total-welfare *explanans* is interested in the deadweight loss only, and as a consequence it cannot explain the reasons given in these two decisions.

These considerations are confirmed by the decision in *Tournier*,[1] where the Court states that a comparison of the fee levels "made on a consistent basis" may reveal that a dominant firm imposes fees "which are appreciably higher than those charged in other Member States", a finding which is "indicative of an abuse of a dominant position". The Court adds that the lack of competition might be the cause of "the heavy burden of administration and hence the high level of royalties". The inferential chain built by the Court identifies in prices that are too high the abusive conduct and then adds that the cause of these prices might be the inefficiency of the undertaking, in turn caused by the lack of competitive pressure. Thus, productive inefficiency is not the problem; rather, it is identified as the plausible cause of the problem. But the problem is that prices are too high. This is the inferential chain envisaged by the consumer-welfare *explanans*. On the contrary, the total-welfare *explanans* would have required the analysis of the price level to infer the deadweight loss or to analyse the productive inefficiency of the undertaking in depth—as an autonomous ground for finding the conduct of the undertaking undesirable.

In light of the above, once we focus our attention on the more deeply theorized judgments, it is evident that the consumer-welfare *explanans* gives a high-quality explanation and thus scores a *P* point. The evidence patently contradicts the total-welfare *explanans*, that thus scores an *N* point.

3.4 Article 102 and disagreement vi.*:* P *v* N

The last topic of this section on Article 102 is the explanatory analysis regarding disagreement *vi*., which focuses on the reasons given to apply defences against Article 102. The focus is first on the concept of objective justification and then on the defences related to existing intellectual property rights. As explained above, the defences related to the effect on trade are not discussed because the evidence, and thus the findings, are the same as regards Article 101.

The plain meaning of Article 102 shows that the general scheme of the prohibition of abuses of dominant position is *prima facie* remarkably different from that of Article 101 because there is no provision similar to Article 101(3). This omission suggests that if a conduct is found in violation of Article 102(1) the remedial system to be discussed in Section 5 applies necessarily. This is not the case. In fact, the case law shows that the scope of Article 102 has been reduced by the concept of objective justification. When a conduct would be prohibited by Article 102, but it has an objective justification, the conduct is permitted. The purpose of this defence is then the same of

[1] C-395/87 [38, 44].

Article 101(3). The possibility of an objective justification is found in the *United Brands* decision already. The Court explains that these objective justifications can relate to[1]

> differences in transport costs, taxation, customs duties, the wages of the labour force, the conditions of marketing, the differences in the parity of currencies, the density of competition [which] may eventually culminate in different retail selling price levels according to the Member States.

Similarly, in the *AKZO* judgment,[2] the dominant undertaking is blamed for maintaining, without objective justification, "as part of a plan to damage [a competitor], the prices … at an artificially low level over a prolonged period, a situation which it could survive because of its superior financial resources". An important clarification of the concept can be found in the *Intel* judgment,[3] according to which the Court would have established in *Hoffmann-La Roche* that an exclusivity rebate "constitutes an abuse of dominant position if there is no objective justification for granting it". Importantly, in *Hoffmann-La Roche*, the Court stated:[4]

> Obligations … to obtain supplies exclusively from a particular undertaking … are incompatible with the objective of undistorted competition within the Common Market, because—unless there are exceptional circumstances which may make an agreement between undertakings in the context of Article [101] and in particular of paragraph (3) of that article, permissible—they are not based on an economic transaction which justifies this burden or benefit.

Put differently, the reasons exempting anticompetitive conducts under Article 101(3) are those that make a conduct objectively justified for the purposes of Article 102. Basically, it is as if Article 101(3) were to be applied analogically to abuses of dominant position. This finding is confirmed by the definition of objective conduct given in a line of cases starting with *British Airways* and arriving at least to *Post Denmark II*. In fact, an objective justification exists when there are[5]

> advantages in terms of efficiency which also benefit the consumer … . [I]t is for the dominant undertaking to show that the efficiency gains likely to result from the conduct under consideration counteract any likely negative effects on competition and consumer welfare in the affected markets, that those gains have been, or are likely to be, brought about as a result of that conduct, that such conduct is necessary for the achievement of those gains in efficiency and that it does not eliminate effective competition, by removing all or most existing sources of actual or potential competition.

Given the close similarity between the concept of objective justification and the defence *ex* Article 101(3), the scorekeeping analysis carried out there applies also here. Actually, here it applies *a*

[1] C-27/76 [228].
[2] C-62/86 [131-140, 146].
[3] T-286/09 [81].
[4] C-85/76 [90].
[5] C-23/14 [48-49]. See also C-95/04 P [86], T-155/06 [224], C-52/09 [76]. Note that *Post Denmark II* makes the allocation of the burden of proof explicit, whereas *British Airways* was silent on the point.

fortiori because the plain meaning of Article 102 gives no grounds for such a defence, but the Court has articulated it nevertheless, and has done it in such a way that receives a high-quality explanation by the relevant consumer-welfare *explanans* and no plausible explanation by its total-welfare counterpart.

Intellectual property rights play a much more important role in the context of Article 102 than in the one of Article 101 because they are often used to justify the refusal to supply or to grant a licence by the dominant undertaking. These conducts, even if by a dominant undertaking, are not always prohibited. For current purposes, it suffices to observe that Article 102 applies when the product, service, or IP right of the dominant undertaking is indispensable to compete.[1] With its refusal, then, the dominant refuser hinders the economic activity of its customers on a "neighbouring market", in which they cannot operate because they do not have access to the dominant undertaking's indispensable good, service or IP right.[2]

Like in the case of the objective justification, the question of interest for us is the reasons given to find that the "impossibility" to compete is undesirable. In a number of occasions, the reasoning remains shallow.[3] In others, the Court elaborates on the notion that the conduct limits markets to the prejudice of consumers. In particular, it is emphasized that the victims are the potential final customers of the product that is not brought to existence and not the undertakings who are denied the opportunity to market such product.[4] In *IMS Health* the Court articulates the relation between competition and IP rights clearly:[5]

> [I]n the balancing of the interest in protection of the intellectual property right and the economic freedom of its owner against the interest in protection of free competition, the latter can prevail only where refusal to grant a licence prevents the development of the secondary market to the detriment of consumers.

Thus, what makes denying access to an essential facility unlawful is, ultimately, that it is detrimental to consumers. It is clear that this line of reasoning can receive a high-quality explanation by the consumer-welfare *explanans*. Conversely, an explanation in total-welfare terms makes the reference to the detrimental effects of the practice for consumers moot. However, as seen in Chapter 5 and in multiple occasions in this chapter already, such a line of reasoning is barred because it ends up overriding the reasons explicitly given in the *explanandum* and substituting them

[1] A more precise definition of the criterion is irrelevant for current purposes.
[2] See, for all, T-201/04 [335].
[3] C-170/13 [42], C-24/67 [71-73] (high prices), C-40/70 [5], C-53/87 [16], C-238/87 [4], C-395/87 [45] and C-102/77 [11-16] (trademark and limitation of repackaging). The essential facilities doctrine justifies the limitation of intellectual property rights to foster competition in T-504/93 [131], T-321/05 [679] and C-170/13 [49]. Challenging the validity of a patent is lawful T-170/13 [69].
[4] In T-69/89 [74], the undertaking is blamed for failing to "take consumer needs into consideration"; the decision was confirmed by Joined Cases C-241/91 P and C-242/91 P [54], observing that because "there was a potential consumer demand" the undertaking violated Article 102(2)(b).
[5] C-418/01 [48].

with others drawn from the total-welfare *explanans* that are vaguely articulated, and therefore in contrast with epistemological minimalism.

In conclusion, regarding disagreement *vi*. and Article 102, the consumer-welfare hypothesis scores a *P* point (*P*) and the total-welfare hypothesis scores an *N* point.

4. The Role of Elasticity in EU Antitrust Law and Disagreement *v.*: *p* v *N*

Chapter 5 showed that the elasticity of demand is a source of very valuable information, especially from a total-welfare perspective, because it allows us to estimate the deadweight loss in light of variations in prices and quantities (at least when quality is homogeneous). The total-welfare hypothesis thus implies that the elasticity of demand is a very valuable concept for the enforcement of competition law.

The *explanandum* reveals an uncomfortable truth for the total-welfare *explanans* regarding disagreement *v*. The elasticity of demand does play an important role in the enforcement of competition law and sometimes is measured rigorously on the grounds of sector-specific studies[1] or of the application of the test of the small but significant and non-transitory price increment.[2] However, it is used for very different purposes from the ones envisaged by the total-welfare *explanans*. The elasticity of demand is not calculated to infer the deadweight loss, but to answer the more basic question of delimiting the relevant product and geographical market.[3] And to this end, the elasticity of supply is also considered.[4]

The elasticity of demand is not used to determine the deadweight loss. The fact that the elasticity of demand is normally considered but for purposes that are different from those identified by disagreement *v*. is problematic for both *explanantia*, but obviously to different degrees. The consumer-welfare *explanans* in fact considers the deadweight loss to be only part of the reasons that justify the protection of competition. The deadweight loss represents the harm to the distorted consumers and it ignores the harm to the exploited ones. The disinterest in the distorted consumers is explained by the difficulties of identifying them and the obvious problems of opportunism that this identification might cause. In fact, it is very difficult to identify the distorted consumers. However, as we shall see in Section 5.1 in detail, the Damages Directive shows concern for the distorted consumers when Article 3(3) grants the right to the loss of profit caused to the intermediate consumers victim of an anticompetitive conduct. This right to compensation can be

[1] See, for example, C-27/76 [28] and C-53/92 P [57].
[2] See, for example, C-30/89 [46] and T-321/05 [87].
[3] See, for example, C-19/74 [5], C-322/81 [36-45], C-339/94 P [13] and T-111/08 [170].
[4] See, for example, C-322/81 [36-45] and C-339/94 P [13].

explained exactly in light of the fact that in these circumstances it is easier to identify the harm caused by the distortion of consumer behaviour. In any case, this explanation is of low quality so that the consumer-welfare *explanans* regarding disagreement *v.* of EU antitrust law is of low-quality and therefore scores a *p* point.

In contrast, for the total-welfare *explanans* that pertains to disagreement *v*., the availability of information about elasticity would imply the integration of this information in the practice of competition law. Failing to consider it beside the determination of the relevant market is thus a painful anomaly for this *explanans*. Accordingly, the total-welfare hypothesis does not explain the reasoning regarding EU antitrust law and disagreement *v*. and therefore scores an *N* point.

5. EU Antitrust Law, Remedies and Disagreement *vii*.: *P* v *N*

This section moves from the analysis of the reasons given to justify the prohibition of a conduct under Article 101 and 102 TFEU (or their inapplicability), to that of the reasons given about the appropriate sanctions for their violation. As seen in Chapter 5, sanctions are divided into four categories: fines, damages, nullity and injunctions. For expositional purposes, these four categories of sanctions are grouped in two broader categories: pecuniary and non-pecuniary sanctions. This choice is particularly appropriate in view of the fact that for the total-welfare *explanans* regarding disagreement *vii*., but not its the consumer-welfare counterpart, pecuniary sanctions have the same function—namely to deter inefficient conducts. Conversely, for the total-welfare *explanans*, the purpose of nullity and injunctions is different, whereas for the consumer-welfare *explanans* both aim at deterrence and nullity also has a restorative function.

The results of the scorekeeping analysis performed here are in line with the previous ones. The consumer-welfare hypothesis provides a high-quality explanation whereas the explanation of the total-welfare hypothesis is rejected.

5.1 Pecuniary sanctions—fines and damages

The *explanandum* that pertains to fines and damages is composed of Regulation (EC) 1/2003, the 2006 Guidelines, the Damages Directive and the case law. The section focuses on fines first.

Regulation 1/2003 is shallowly theorized in general, and particularly in relation to the function of sanctions. The Regulation does not specify why a fine is imposed. It sets criteria for the calculation of the amount of the fine, but it does not explain why it is imposed. At least, the Regulation identifies the cases in which fines can be imposed. According to Article 23(1), fines are

imposed when undertakings grossly fail to cooperate and actually obstruct the investigations of the Commission, for example by providing false information or incomplete business records. According to paragraph two, which covers the overwhelming majority of cases in the *explanandum*, fines are imposed for the violation of Articles 101 and 102 TFEU, contravention of interim measures and failure to comply with a commitment *ex* Article 9. Ultimately, fines are imposed as a response to breaches of duty. This observation suggests that the function of the fines is deterrence, but it is still very suggestive, at best. The 2006 Guidelines are more deeply theorized. At paragraph 4, they explain that

> fines should have a sufficiently deterrent effect, not only in order to sanction the undertakings concerned (specific deterrence) but also in order to deter other undertakings from engaging in, or continuing, behaviour that is contrary to Articles [101] and [102 TFEU] (general deterrence).

That deterrence is the rationale of fines is constantly stated in the case law.[1] At this point, the consumer-welfare *explanans* can provide a high-quality explanation: fines are simply meant to give reasons or incentives that are strong enough to ensure respect for the prohibitions set by Articles 101 and 102. In economic terms, we can say they are meant to make the compliance with Articles 101 and 102 incentive-compatible.[2] The total-welfare *explanans* would want fines to do more. By being set at the optimal level (from a total-welfare point of view), fines would leave undertakings free to decide whether they want to violate EU antitrust law and pay the fine and or not.

The total-welfare *explanans* may hold that "deterrence" means "optimal deterrence". As this explanation has no actual grounds in the *explanandum*, the quality of such an explanation would be low. However, the attempt does not go very far. It struggles to cross paragraph 7 of the 2006 Guidelines, which state that "[i]t is also considered appropriate to include in the fine a specific amount irrespective of the duration of the infringement, in order to deter companies from even entering into illegal practices". It then crashes when it is considered that the size and economic power of the undertaking or its recidivism justify an increase in the level of the fine.[3] All else being equal, according to the total-welfare *explanans*, it makes no sense to consider optimal or sub-optimal a fine depending on the size of the undertaking. Thus, it is apparent that the purpose of the fine is not to internalize the social costs of the anticompetitive conduct, but rather to give financial incentives that are strong enough to make respect for competition law incentive-compatible with the

[1] See, for example, T-2/89 [259], T-29/92 [385], Joined Cases T-305-307/94, T-313-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 [778], T-203/01 [254], T-241/01 [69, 85, 146], Joined Cases T-259-264/02 and T-271/02 [240], T-53/03 [336], T-340/03 [251], T-29/05 [228], T-155/06 [311], T-111/08 [317], C-549/10 P [107], T-265/12 [287], C-286/13 P [142] and C-373/14 P [86]. On periodic penalties, see C-26/76 [299] and T-201/04 [1256] (also on monitoring at [1256]).

[2] Particularly clear on this point is T-111/08 [317].

[3] C-26/76 [302], C-322/81 [111], T-201/04 [1363]; on recidivism, see, for example, T-203/01 [284, 293].

commercial strategy of undertakings. Ultimately, the expression "optimal deterrence" does not describe the *explanandum* and the relevant total-welfare *explanans* scores an *N* point about fines.

Let us move to damages awards, the other pecuniary sanction. The starting point is that, as seen, Articles 101 and 102 TFEU have direct effect and grant rights to individuals that National courts must protect. The Court has elaborated on the implications of direct effect in the *Courage* judgment. In that occasion, after having pointed out that the said articles have direct effect, the Court observes that the "full effectiveness of Article [101 TFEU] and, in particular, the practical effect of the prohibition laid down in Article [101](1) would be put at risk" in the absence of a right to compensation for the damage caused by the violation of Article 101. The next paragraph adds:

> Indeed, the existence of such a right strengthens the working of the Community competition rules and discourages agreements or practices, which are frequently covert, which are liable to restrict or distort competition. From that point of view, actions for damages … can make a significant contribution to the maintenance of effective competition in the Community.

Courage is ambiguous for our explanatory purposes.[1] The problem is ultimately that if one focuses only on paragraphs 26 and 27, the justification might seem merely instrumental. However, the situation becomes more complex when one considers that the direct effect of competition law had just been declared and that deterrence is simply one "point of view" among the relevant ones, which unfortunately the Court fails to specify.

It is perhaps bearing in mind this ambiguity that the drafters of Regulation 1/2003 wrote at Recital 7 that "National courts have an essential part to play in applying the Community competition rules. When deciding disputes between private individuals, they protect the subjective rights under Community law, for example by awarding damages to the victims of infringements". Indeed, this statement suggests that compensation is intrinsically valuable, but one is left to wonder if this is sufficient to rule out the instrumentalist interpretation of *Courage*. These rights could be instrumentally justified, after all. Thus, we are still in the realm of low-quality explanations. Recital 3 of the Damages Directive restates the content of Recital 7 of the Regulation, but also adds that

> [t]he full effectiveness of Articles 101 and 102 TFEU, and in particular the practical effect of the prohibitions laid down therein, requires that anyone—be they an individual, including consumers and undertakings, or a public authority—can claim compensation before national courts for the harm caused to them by an infringement of those provisions.

Recitals 8-10 then emphasize the detrimental effects to the internal market project of the lack of harmonization of the National laws concerning compensation before National courts for the harm caused by anticompetitive conducts. Thus, once again, the instrumentalist interpretation cannot be

[1] See also Nebbia 2008.

really excluded. However, Recital 12 is revealing for current purposes because it is unusually emphatic in explaining that the

> Directive reaffirms the *acquis communautaire* on the right to compensation for harm caused by infringements of Union competition law, particularly regarding standing and the definition of damage, as stated in the case-law of the Court of Justice and does not pre-empt any further development thereof. Anyone who has suffered harm caused by such an infringement can claim compensation for actual loss (*damnum emergens*), for gain of which that person has been deprived (loss of profit or *lucrum cessans*), plus interest, irrespective of whether those categories are established separately or in combination in national law. The payment of interest is an essential component of compensation to make good the damage sustained.

The following recital then specifies that "[w]ithout prejudice to compensation for loss of opportunity, full compensation under this Directive should not lead to overcompensation, whether by means of punitive, multiple or other damages". The same ideas are then restated in Articles 1(1) and 3. Recital 39 then defines more in detail the concept of harm:

> Harm in the form of actual loss can result from the price difference between what was actually paid and what would otherwise have been paid in the absence of the infringement. When an injured party has reduced its actual loss by passing it on, entirely or in part, to its own purchasers, the loss which has been passed on no longer constitutes harm for which the party that passed it on needs to be compensated. It is therefore in principle appropriate to allow an infringer to invoke the passing-on of actual loss as a defence against a claim for damages.

Finally, Recital 40 focuses on the relation between the pass on of the loss in the supply chain and the loss of profit: "[i]n situations where the passing-on resulted in reduced sales and thus harm in the form of a loss of profit, the right to claim compensation for such loss of profit should remain unaffected".

For current purposes, these statements are more than sufficient to form a conclusive judgment on the explanatory power of the competing *explanantia*. The general scheme of the Damages Directive is clearly designed to grant full compensation to the victims of anticompetitive conducts and at the same time rejects clearly the possibility of overcompensation. This is what the consumer-welfare hypothesis requires from a system of norms that has as its purpose the reparation of the harm made. On the contrary, the total-welfare *explanans* would have to explain the scheme of the Directive instrumentally and in terms of deterrence. However, such an explanation is incompatible with both the great emphasis on full compensation and also with the rejection of overcompensation, which could actually be greatly beneficial in terms of deterrence.

It can be concluded that for pecuniary sanctions, the consumer-welfare *explanans* regarding disagreement vii. provides and explanation of high-quality and therefore scores a *P* point, whereas the total-welfare *explanans* fails to provide an acceptable explanation and scores an *N* point.

5.2 Non-pecuniary sanctions—nullity and injunction

Article 101(2) explicitly establishes that agreements in violation of paragraph one are automatically void. The nullity applies only to the clauses in violation of antitrust law, unless they are "not severable from the agreement itself".[1] "[A]n agreement which is null and void by virtue of this provision has no effect as between the contracting parties and cannot be invoked against third parties".[2]

In the *STM* judgment,[3] the Court states that paragraph two is meant to "ensure compliance with the Treaty" and in *Brasserie de Haecht II*[4] it adds that Article 101(2) shows "the intention … to attach severe sanctions to a serious prohibition". The *explanandum* does not discuss the function of the restitution following from the nullity of the agreement. However, this gap has an institutional justification, namely that the consequences of the nullity are not harmonized under EU law.

The consumer-welfare *explanans* regarding disagreement *vii*. is comfortable with this deterrence rationale of nullity because it supports the effectiveness of Article 101, which was found to generally receive high-quality explanations by the consumer-welfare hypothesis. The competing total-welfare *explanans* instead has difficulties in explaining this provision in light of its commitment to optimal deterrence theory. In fact, even if pecuniary sanctions were set at the optimal level from a total-welfare perspective, finding an agreement anticompetitive would deprive it of its legal effects, thereby placing a significant obstacle to its performance. In other words, the total-welfare *explanans* cannot explain the cumulation between pecuniary and non-pecuniary sanctions and the general application of Article 101(2).

In comparison to Article 101(2) TFEU, Article 7(1) of Regulation 1/2003 introduces a much more general provision, which holds that

> [w]here the Commission, acting on a complaint or on its own initiative, finds that there is an infringement of Article [101] or of Article [102] of the Treaty, it may by decision require the undertakings and associations of undertakings concerned to bring such infringement to an end. For this purpose, it may impose on them any behavioural or structural remedies which are proportionate to the infringement committed and necessary to bring the infringement effectively to an end.

[1] Joined Cases C-56/64 and C-58/64 p. 343, C-56/65 p. 250, C-312/82 [11] and C-234/89 [40].
[2] T-208/13 [160], C-48/72 [26], C-319/82 [11] and C-453/99 [22].
[3] C-56/65 p. 250.
[4] C-48/72 [5]. See also C-126/97 [36] and C-453/99 [21].

The case law shows that the Commission can issue injunctions that are extremely detailed with a view to put an end to an infringement.[1] However, these explicit orders are not necessary to give effectiveness to Article 7 because[2]

> [w]hen the Commission finds in a decision that an undertaking has infringed Article [102], that undertaking is required to take, without delay, all the measures necessary to comply with that provision, even in the absence of specific measures prescribed by the Commission in that decision.

The concept of proportionality referred to in Article 7 confirms that the goal is to put an end to the infringement. In fact, proportionality limits the power of the Commission to "order only what is appropriate and necessary to bring an end to the infringement and to re-establish compliance with the rules infringed".[3] In other words, the Commission cannot take the application of competition law as an occasion to determine the commercial strategy of the addressees of the decision.

Lastly, there is a type of agreement that still needs to be considered, namely commitments *ex* Article 9. For current purposes, this type of decision by the Commission is in line with the previous findings. In fact, commitment decisions also aim to bring the infringement to an end in a proportionate way.[4] At most, their introduction among the means of enforcement available to the Commission shows that EU law is sensitive to considerations of adjudication and negotiation costs, as it allows the Commission to choose between a jurisdictional outcome and a (quasi-)negotiated one. However, the goal remains to end violations of antitrust law. Thus, commitment decisions are a means to reduce the enforcement costs of EU antitrust law.

At this point, it is clear that the rationale of these injunctions is—like that of nullity *ex* Article 101(2)—to raise the effectiveness of the prohibition of anticompetitive behaviour. Thus, these findings confirm the considerations about the competing explanations of Article 101(2). Additionally, it has to be stressed that the rationale of Articles 7 and 9 of Regulation 1/2003 has nothing to do with the comparative level of transaction and negotiation costs, as the total-welfare *explanans* regarding disagreement *vii*. would require. More fundamentally, undertakings cannot bargain with the Commission in the shadow of Articles 101 and 102 TFEU to maximize total welfare. The only options open to them are to behave competitively, or to satisfy the conditions set by Article 101(3) or by the objective justification doctrine. In fact, even in the case of commitment decisions, the goal is still that of ensuring the respect of EU antitrust law.

In light of the above, also about both types of non-pecuniary sanctions considered, the consumer-welfare *explanans* accounts for the practice comfortably, and therefore scores a *P* point.

[1] See, for example, C-62/86 [155] and T-69/89 [98].
[2] T-201/04 [1256].
[3] T-151/01 [166], T-69/89 [107], T-170/06 [98-99], T-111/08 [323] and C-441/07 P [41].
[4] T-170/06 [87, 95, 106] and C-441/07 P [34, 35].

On the contrary, the competing total-welfare *explanans* fails to account for the central features of the considered practice and therefore scores an *N* point.

As the consumer-welfare *explanans* regarding disagreement *vii*. offers a high-quality explanation also of the reasoning justifying pecuniary sanctions, it receives a *P* point about EU antitrust law. The situation of its total-welfare counterpart is the opposite: as it fails to explain the justification of all the considered sanctions, it scores an *N* point in relation to EU antitrust law.

This finding concludes the analysis of the portion of *explanandum* about EU antitrust law. In brief summary, it was found that the consumer-welfare hypothesis scores ten high-quality points and a low-quality one while the total-welfare hypothesis scores one low-quality point and in ten instances fails to provide even a low-quality explanation. These results will be commented in Chapter 8, together with the findings of the next chapter, which focuses on EU consumer law. However, once EU antitrust law is reverse engineered, it is apparent that the consumer-welfare hypothesis has soundly defeated the total-welfare one in the explanatory scorekeeping analysis.

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EU Consumer Law Reverse Engineered

1. Introduction to the Scorekeeping Analysis of EU Consumer Law

In this chapter, the explanatory scorekeeping model of inferentialist analysis developed in Chapter 5 is applied to the portion of the *explanandum* regarding EU consumer law. The goal of the analysis is twofold. First, to assess which efficiency hypothesis has superior explanatory power between the total-welfare hypothesis and its consumer-welfare opponent. Second, to do it in a way that is rigorous enough to respect the economists' commitment to epistemological minimalism. More precisely, this chapter analyses the texts of Articles 34, 36, 51 and 56 TFEU, the Unfair Commercial Practices Directive, the Consumer Rights Directive, the Product Liability Directive and the Unfair Terms Directive and the related decisions by the Court of Justice of the European Union (CJEU).

Warrantying the doctrinal claim consistently with epistemological minimalism then gives a normatively minimalist reason to prefer consumer welfare to total welfare as the maximand in the efficiency analysis of EU consumer law. The reason is that consumer welfare fits better than total welfare with legal practice. As seen in Chapter 2, reverse engineering the law is a normatively minimalist way to infer the value choices embedded in it. In sum, by reverse engineering EU consumer law, this chapter assesses the fitness with legal reasoning of the two competing efficiency hypotheses. In this regard, the consumer-welfare hypothesis is particularly promising. Consumer welfare, like total welfare, is a maximand with an economic pedigree (Chapter 3) but, contrary to total welfare, satisfies both the fairness and the wrongfulness theses (Chapter 4). Moreover, Chapter 6 has shown the superior explanatory power of the consumer-welfare hypothesis. If the doctrinal claim is warranted consistently with epistemological minimalism also in this chapter, it will follow that consumer-welfare maximization contributes significantly to the proposal of collaboration between economic and legal research advanced by Minimalist Law-and-Economics.

To anticipate the results of the scorekeeping analysis performed in this chapter, the consumer-welfare hypothesis scores seven high-quality points and two low-quality ones; in

contrast, the total-welfare hypothesis scores two low-quality points and fails to provide acceptable explanations seven times. Thus, once reverse engineered, EU consumer law supports the doctrinal claim of this dissertation.

2. Explaining EU Consumer Empowerment Law

This section focuses on EU consumer empowerment law which, as defined in Chapter 5, includes the free circulation of goods and services, the Unfair Commercial Practices Directive (UCPD), the Consumer Rights Directive (CRD) and the related case law of the CJEU. Like in Chapter 6, the consumer-welfare hypothesis has a powerful start. Its *explanantia* score three high-quality points and a low-quality one and, conversely, the total-welfare hypothesis scores a low-quality points and its explanations are rejected three times (so that it scores three *N* points).

The free circulation of goods and services are two of the fundamental freedoms granted by EU law. Their explicit addressees are the Member States, but their direct effect has long been recognized. For both freedoms, consumer protection is an implicit mandatory requirement that justifies their limitation. From a systematic point of view, it is interesting to note that, *ex* Article 57(1), the freedom to provide services is residual, in the sense that it applies when a conduct is not covered by the other freedoms. As we shall see, the finding that, for current purposes, there is no significant difference between these two freedoms confirms the strength of the analytical framework built in Chapter 5.

The Unfair Commercial Practices Directive is generally a directive of full harmonization and rests heavily on the case law of the Court regarding the image of the consumer, albeit distinguishing between average and vulnerable consumers. Unfair commercial practices fall into two broad categories, misleading and aggressive practices. The directive identifies a list of practices that are automatically unfair and a list of practices that, depending on the circumstances, could be found unfair. The Consumer Rights Directive is the newest legislative act of EU consumer protection considered in this dissertation. However, its pedigree goes way back. The directive systematizes the area of EU consumer law regarding off-premises and distance contracts and repealed the related directives.[1] Accordingly, the *explanandum* includes also cases from the 1990s and 2000s relating to these repealed directives.

[1] That is, Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council.

2.1 Consumer empowerment and disagreements i. *and* ii.*:* 2 P *v* 2 N

In relation the free circulation of goods and services, consumer protection is recognized as a mandatory requirement that can justify their limitation. The role of consumer protection as a defence is discussed in the next section. With regards to disagreements *i.* and *ii.*, the focus is on whether the protection of consumers is intrinsically valuable or instrumental to total welfare. Let us begin with the observation that the freedom to provide services is "for the benefit of both providers and recipients of services".[1] This is an interesting clarification because the text of Article 56 TFEU is worded in such a way that its addresses are the Member States. Typical statements by the Court[2] hold that: the National measure was "adopted … out of concern to protect consumers" against "the risk of making an ill-considered purchase";[3] "the prohibition … is capable of benefitting consumers";[4] "there are sufficient safeguards for the consumer";[5] "consumer protection may constitute a justification … in particular [given] the higher risk of the consumer being cheated";[6] the regulations of the "medical and dental profession … reflect in particular a concern to ensure that individuals enjoy the most effective and complete health protection possible";[7] "consumer protection is one of the objectives of the Community";[8] "fair trading and consumer protection in general are overriding requirements of public interest which may justify restrictions on the freedom to provide services".[9] In the *Commission v Germany* judgment, the Court explained that[10]

> the insurance sector is a particularly sensitive area from the point of view of the protection of the consumer both as a policy-holder and as an insured person. This is so in particular because of the specific nature of the service provided by the insurer, which is linked to future events, the occurrence of which, or at least the timing of which, is uncertain at the time when the contract is concluded. An insured person who does not obtain payment under a policy following an event giving rise to a claim may find himself in a very precarious position. Similarly, it is as a rule very difficult for a person seeking insurance to judge whether the likely future development of the insurer's financial position and the terms of the contract, usually imposed by the insurer, offer him sufficient guarantees that he will receive payment under the policy if a claimable event occurs.

[1] C-176/11 [16] and C-243/01 [55].
[2] The Court occasionally showed concern about consumers in the broad sense. This is clear for example in C-456/10 [38], where the CJEU emphasises the "various disadvantages which the retailers would encounter".
[3] C-382/87 [11-12]. See C-320/93 [16] and C-358/01 [45 and 58] on the protection of human health and life.
[4] C-456/10 [54]. See also C-470/93 [20] and C-313/94 [23].
[5] C-239/90 [20].
[6] C-441/04 [27 and 29].
[7] C-96/85 [10], finding however that the French legislation went beyond what is necessary [13-15].
[8] C-233/94 [48].
[9] Joined Cases C-34/95, C-35/95 and C-36/95 [33].
[10] C-205/84 [30]. See also C-252/83 [20].

In the heyday of the information paradigm, the Court even accepted the reasons given by the Council in its early programmes of consumer law[1] about the existence of "a close link between protecting the consumer and providing the consumer with information" so that information ultimately "improv[es] the consumer's situation by protecting his health, his safety and his economic interest".[2] The point is made particularly clear in another decision that is closely associated with the information paradigm, the *Mars* case.[3] However, the argument that matters here concerns the obligation not to increase prices in case of promotional packages:[4]

> [T]he principle of freedom of retail trade in the matter of the fixing of prices, provided for by a system of national law, and intended in particular to guarantee the consumer genuine price competition, may not justify an obstacle to intra-Community trade such as that in question in the main proceedings. The constraint imposed on the retailer not to increase his prices is in fact favourable to the consumer. It does not arise from any contractual stipulation and has the effect of protecting the consumer from being misled in any way. It does not prevent retailers from continuing to charge different prices and applies only during the short duration of the publicity campaign in question.

Recall the competing *explanantia* operationalizing the two efficiency hypotheses with regards to disagreements *i*. and *ii*. identified in Chapter 5. Bearing the in mind, it has to be assessed whether the two efficiency hypotheses can score points regarding disagreements *i*. and *ii*. and the free circulation of goods and services, and if so of what quality. In total-welfare terms, one can indeed posit that the mentioned concerns for protecting consumers are instrumental to the maximization of total welfare, but this claim is very weak. First, it is purely hypothetical, in the sense that it does not have any textual support. The total-welfare *explanans* has to constantly add elements to the *explanandum*. Consider the citation from the *ANETT* judgment: "the prohibition … is capable of benefitting consumers [and, therefore, of increasing total welfare]". Note that the part between square brackets is the one that actually does the explanatory work for the total-welfare *explanans*, not the real *explanandum*. And, in truth, it is a rather fictional explanation. It is not at all clear what the inference connecting the benefit to consumers to the increase of total welfare is. In any case, it is extremely difficult to do something similar with the citation from the *Mars* decision. The reasoning of the Court in this occasion states explicitly that "the freedom of retail price" is meant "to guarantee the consumer genuine price competition", adding also that "[t]he constraint imposed on the retailer not to increase his prices is in fact favourable to the consumer". Here the Court gives an

[1] The Court refers to: the Council Resolution of 14 April 1975 on a preliminary programme of the European Economic Community for a consumer protection and information policy, OJ C 92/1; Council Resolution of 19 May 1981 on a second programme of the European Economic Community for a consumer protection and information policy, OJ C 133/1; and Council Resolution of 23 June 1986 concerning the future orientation of the policy of the European Economic Community for the protection and promotion of consumer interests, C 167/1.
[2] C-362/88 [14-15].
[3] C-470/93 [22-24]. See, in particular, Purnhagen and van Herpen 2017.
[4] C-470/93 [20].

articulated account of the relation between competition, National law and the interest of consumers. Against this background, any attempt to explain the reasons given by the Court in total-welfare terms would be very fictional. Against this background, the total-welfare *explanantia* that pertain to disagreements *i*. and *ii*. fail to provide plausible explanations and score two *N* points.

In contrast, the consumer-welfare explanation is straightforward: the point of the mandatory requirement of consumer protection is the protection of the consumer. Indeed, the Court has actually been explicit: measures are justified out of concern for protecting consumers, they favour consumers, and they improve the situation of consumers. Their interest is the reason that justifies the mandatory requirement and their protection is not instrumental. This account is strongly grounded in the actual reasoning of the Court and it thus provides a high-quality explanation, so that the consumer-welfare hypothesis scores two *P* points.

The UCPD unambiguously and "directly protects consumer economic interests from unfair business-to-consumer commercial practices",[1] an idea which constantly is reaffirmed by the case law.[2] It is also worthy of notice that quite often the Court finds the plain meaning of the text sufficiently clear to state the purpose of the Directive. Along the same lines, Article 11(1) holds that "in the interest of consumers"[3] various entities, including competitors, shall be empowered by Member States to challenge unfair commercial practices.[4] Thus, this power is given to competitors and others, but in the interest of consumers. The protected interest is neither that of competitors, nor that of the economy as a whole.

In *Treno Sviluppo* and *UPC Magyarország* the accounts of the reasons given in the UCPD regarding the goals pursued by the directive and their relation with Article 169 TFEU are particularly clear.[5] The Court has also explained the rationale of the UCPD by reference to the weaker position of the consumer, who "must be considered to be economically weaker and less experienced in legal matters than the other party to the contract".[6] In so doing, the Court has made an important systematic connection between the UCPD and the Unfair Terms Directive where, as we shall see below, the reference to the weakness of the consumer is ubiquitous. On the grounds of these considerations, the Court has had the opportunity to clarify the meaning of the provisions of the UCPD. For example, in the *Purely Creative* decision,[7] it is explained that

> the practice [of creating false impressions regarding the victory of a prize] referred to in paragraph 31 of Annex I to the Unfair Commercial Practices Directive is considered,

[1] Recital 8, UCPD. See also Recitals 4, 6, 9, 11, 12, and 18, Articles 1 and 11.
[2] C-122/10 [21], C-288/10 [21], C-206/11 [29], C-428/11 [38-40], C-435/11 [47], C-59/12 [34], C-265/12 [22], C-281/12 [31], C-515/12 [24], C-388/13 [51, 53], C-476/14 [44], C-611/14 [25, 62], C-13/15 [25] and C-357/16 [30].
[3] See also C-388/13 [51].
[4] A comparison with the content of Article 7 of the Unfair Terms Directive is interesting.
[5] C-281/12 [31]. See also C-388/13 [51].
[6] C-59/12 [35]. See also C-388/13 [53].
[7] C-428/11 [49]. See also C-357/16 [26-30].

> pursuant to that directive, to be aggressive because the reference to a prize seeks to exploit the psychological effect created in the mind of the consumer by the perspective of having won something and to cause him to take a decision which is not always rational and which he would not have taken otherwise. It is, therefore, in order to protect the consumer that the concept of a true 'prize' should be preserved, by interpreting paragraph 31 of Annex I to that directive as meaning that a prize in respect of which the consumer is obliged to make a payment of whatever kind cannot be regarded as a 'prize'.

The concern for the consumer is then reinforced by the importance of informing them. In the *Deroo-Blanquant* judgment,[1] by way of reference to a decision about the Unfair Terms Directive,[2] the Court holds that

> the information, before concluding a contract, on the terms of the contract and the consequences of concluding it is of fundamental importance for a consumer. It is on the basis of that information in particular that the consumer decides whether he wishes to be bound by the terms previously drawn up by the seller or supplier.

The correctness of the information provided is accordingly of great importance for assessing if a practice "may satisfy the requirement of fairness laid down in the Directive".[3] The centrality of the interest of consumers is confirmed also by the general scheme of the directive. In particular,[4] financial services and immovable property "by reason of their complexity and inherent serious risks, necessitate detailed regulation, including positive obligations"[5] and therefore Member States can "go beyond [the provisions of the UCPD] to protect the economic interests of consumers". Moreover, the UCPD introduces the absolute prohibition of some practices which are both "in all circumstances unfair"[6] and the "most harmful to consumers".[7]

The analysis shows that the UCPD unambiguously enshrines a distributive concern in favour of consumers and it posits that empowering them is intrinsically, not instrumentally, valuable. The reasons given for the absolute prohibition of some practices establish a conceptual relation between fairness and harming consumers that fits very well with the translation claim made in Chapter 4. Thus, the consumer-welfare hypothesis scores high-quality points (*P*) regarding disagreements *i*. and *ii*.

In contrast, an explanation in total-welfare terms is possible only assuming an instrumental connection between consumer and total welfare. The problem is that this connection has no grounds

[1] C-310/15 [40].
[2] C-26/13 [70].
[3] Joined Cases C-261/07 and C-299/07 [66], C-310/15 [36].
[4] See also Joined Cases C-544/13 and C-545/13 [47, 81] on medical products for human use, which is however too shallow for current purposes.
[5] Recital 9, UCPD. See also C-265/12 [22].
[6] Recital 17, UCPD.
[7] C-515/12 [32].

in the text of the directive. Consequently, this connection is very vague and does not rest on observable data and thus is at odds with epistemological minimalism. This lack of rigour is a particularly pressing problem in the context of the UCPD. In the *CHS Tour Services* judgment,[1] the Court has explicitly affirmed the strength of interpretative arguments resting on the plain meaning of the central provisions of the UCPD, namely the Articles from 6 to 9:

> So far as concerns Articles 6 and 7 and Articles 8 and 9 of the directive, the Court has already held that, pursuant to those provisions, misleading or aggressive practices are prohibited where, having regard to their nature and the factual context, they cause or are likely to cause the average consumer to take a "transactional" decision that he would not have taken otherwise … . The Court did not therefore make the prohibition of such practices dependent on any criterion other than those set out in those articles.

As seen especially in the objective-justification defence in case of Article 102 TFEU, such a strict textual interpretive canon is not to be taken for granted in the *explanandum*. Yet, it has the effect of reducing the plausibility of the connection between the UCPD and total welfare further. In light of the abundant references to the consumer interest, the vague connection between total welfare and the general scheme of the directive and, finally, the strong reliance of the Court on the plain meaning of the text for both the goals pursued by the UCPD and its central provisions, it is basically a leap of faith to connect the UCPD to total welfare given its distributive concern in favour of consumers and the concern for protecting them. Under the circumstances, I find it appropriate to reject the total-welfare *explanantia* that pertain to disagreements *i*. and *ii*., so that the total-welfare hypothesis scores two *N* points.

Let us move to the second directive empowering consumers, the Consumer Rights Directive. As Recital 4 explains,

> [t]he harmonisation of certain aspects of consumer distance and off-premises contracts is necessary for the promotion of a real consumer internal market striking the right balance between a high level of consumer protection and the competitiveness of enterprises.

Accordingly, the key concepts to understand the purpose of the CRD are the harmonization of laws, a high level of consumer protection, and the competitiveness of "enterprises".[2] Similarly, Article 1 establishes that the purpose of the CRD is,[3]

> through the achievement of a high level of consumer protection, to contribute to the proper functioning of the internal market by approximating certain aspects of the laws,

[1] C-435/11 [41].

[2] From a practical point of view, an important concern regards the scope *rationae personae* of the directive. Article 1(1)(2) does not refer to "enterprises", but rather to "traders", which are defined as "any natural person or any legal person, irrespective of whether privately or publicly owned, who is acting, including through any other person acting in his name or on his behalf, for purposes relating to his trade, business, craft or profession in relation to contracts covered by this Directive".

[3] Article 1, CRD. See also Recital 65.

> regulations and administrative provisions of the Member States concerning contracts concluded between consumers and traders.

In other words, the harmonization of National consumer protection laws contributes to the better functioning of the internal market by enhancing the competitiveness of traders. This is confirmed, *inter alia*,[1] by Recitals 5, 6 and 7 and by the case law.[2] For example, in the *Bayerische Hypotheken* judgment, the Court holds that the directive "is designed to protect only consumers"[3] and it adds in *Travel Vac* that it does so by "prevent[ing] the consumer from undertaking financial obligations without being prepared for them".[4] Thus, the right to withdraw "seeks specifically to offset the disadvantage, for the consumer" and to "compensate for the imbalance between the consumer and the trader".[5] In this context, the discipline about the allocation of costs in case of withdrawal strikes "a balanced sharing of the risks between parties to distance contracts".[6] Article 14(3) is particularly interesting in this regard. Article 14 disciplines the obligations of the consumer when the right to withdraw is exercised.[7] Paragraph 3 focuses specifically on the termination of contracts[8] where the consumer has asked the performance to begin during the withdrawal period. Under these circumstances, the consumer must pay for the performance received "an amount which is in proportion to what has been provided until the time the consumer has informed the trader". This amount is calculated "on the basis of the total price agreed in the contract. [But if] the total price is excessive, the proportionate amount shall be calculated on the basis of the market value of what has been provided".[9]

These findings show that the CRD is based on an intrinsic concern for the distribution of benefits between consumers and producers—not unlike what happens in case of conflict between the free circulation of goods and services and National consumer law. Consequently, it becomes clear that consumers are seen in need of support in this regard. The right to withdraw is a means to correct an imbalance between the parties, which can vitiate the consumption decision, by letting the consumer reconsider his or herthe decision. Additionally, the CRD aims at a fair apportionment of

[1] See also Recitals 21, 34, 37, 46, 50 and 58, CRD.
[2] The idea is articulated shallowly in various decisions. See, for example, C-361/89 [17-18], C-91/92 [5, 15, 23], C-336/03 [20] and C-215/08 [44].
[3] C-45/96 [22]. At [19] it is explained that the directive "protect[s] consumers by enabling them to withdraw from a contract concluded on the initiative of the trader rather than of the customer, where the customer may have been unable to see all the implications of his act". See also C-49/11 [36].
[4] C-423/97 [57]. See also C-481/99 [27, 34, 38-39] (reaffirming the same principles and denying the inapplicability of the protection granted by the directive in case of financial contracts), C-229/04 [43] and C-412/06 [32].
[5] C-227/08 [23, 28], adding at [26] that the consumer is the weaker party.
[6] C-511/08 [57].
[7] The detailed regulation of the conditions for the exercise of the right to withdraw is at the boundary between empowerment and protection techniques of consumer policy.
[8] More precisely, contracts for the "the performance of services, or the supply of water, gas or electricity, where they are not put up for sale in a limited volume or set quantity, or of district heating".
[9] See also Recital 50, CRD.

the costs related to the exercise of the right to withdraw. In this regard, although not deeply theorized, Article 14(3) fits perfectly in the framework outlined in Chapter 4 to warrant the translation claim. If the trader takes advantage of the weakness of the consumer by charging an excessive price, this price can be reduced to the market level by courts.

In light of these findings, the consumer-welfare hypothesis scores two *P* points for its fit with the CRD in relation to disagreements *i*. and *ii*. The *explanandum* shows a distributive concern in favour of consumers and their protection is presented as a goal in itself.[1] The total-welfare hypothesis, instead, can only advance the usual instrumental explanation: protecting consumers and creating the internal market are both means to the end of total-welfare maximization. Note, to begin with, that the finding that the harmonization of consumer protection is instrumental to the internal market project does not help to the total-welfare *explanans* pertaining to disagreement *ii*. to score a high-quality point. To do so, it would need a high-quality explanation of the internal market project grounded in total welfare—but the CRD does not offer it (and it cannot be found elsewhere in the *explanandum* either). More fundamentally, the point is that both the directive and the case law show a concern for the consumers where they could have expressed a concern for the effects on total welfare of the norms introduced by the directive. Thus, imposing a vague instrumental connection between the reasons explicitly given and total welfare ends up overriding with the total-welfare *explanans* the reasons given in the *explanandum* instead of explaining them. Under these circumstances, like in previous occasions, the total-welfare *explanantia* that pertain to disagreements *i*. and *ii*. are rejected and score one *N* point each.

At the end of this overview of the *explanandum* regarding consumer empowerment that is relevant to disagreements *i*. and *ii*., it is time to take stock. As the explanations of the total-welfare hypothesis have always been rejected, regarding consumer empowerment and disagreements *i*. and *ii*., it scores two *N* points. On the contrary, the explanations of its consumer-welfare challenger have always be of high quality, so that it scores two *P* points.

2.2 Consumer empowerment and disagreements iii. *and* vi.*:* p, P *v* p, N

This subsection performs the scorekeeping analysis of EU consumer empowerment law with regards to disagreements *iii.* and *vi.* As in the previous subsection, the focus is first on the fundamental freedoms, then on the Unfair Commercial Practices Directive, and finally on the Consumer Rights Directive.

[1] It is true that consumer protection has to be balanced with the goal of a better functioning internal market, but this does not change the fact that consumer protection is an end in itself. Additionally, this balancing is discussed below as it matters for disagreement *vi.*

Many values can come into play together with consumer protection as defences against the fundamental freedoms. Fair dealing is an often-cited value.[1] The reasoning of the CJEU is typically shallow, allowing the concern for fair dealing to be justified as instrumental to the maximization of both consumer and total welfare. However, "fair trading and consumer protection in general are overriding requirements of public interest".[2] This statement is interesting because it presents fair dealing as a form of consumer protection, but it is not helpful for disagreement *iii*. Other values considered in the *explanandum* are "the protection … of the general public",[3] "fiscal and custom control",[4] "the conservation of the national and historical and artistic heritage",[5] "cultural policy"[6] and "moral, religious and cultural factors".[7] Also here, the arguments of the Court are shallow enough to be accounted for both in total- and consumer- welfare terms. The explanations are based on implicit reasons and are therefore of low quality, so that both *explanantia* score a *p* point.

The analysis of the references to proportionality is more complex and matters to disagreement *vi*. Proportionality is cited first as the constraint consumer protection and other mandatory requirements have to respect to be compatible with EU law.[8] Second, proportionality is the rationale behind the concept of the reasonable consumer used by the Court to assess the compatibility of National consumer protection laws with Articles 34 and 56 TFEU.[9] As we are in the field of measures that are not fully harmonized,[10] what the Court asks is simply that the same level of consumer protection—regardless of its effects on total or consumer welfare—could not have been achieved with a less intrusive measure.[11] Indeed, this idea can be expressed in efficiency terms. Following Alexy, this relation is normally expressed in terms of Pareto efficiency, but I have argued elsewhere it is more appropriately expressed in terms of productive efficiency.[12] Be this as it may, the test assesses whether the National measure wastes some freedom of circulation, in the sense that the same level of consumer protection could be achieved with a smaller restriction of the free circulation of goods or services. The CJEU says neither whether the joint value has to be maximized nor what this value is.

[1] C-315/92 [15], C-470/93 [15], C-51/94 [27], C-313/94 [17] and C-446/07 [53]. See also C-210/96 [29], citing the protection of competitors.
[2] Joined Cases C-34/95, C-35/95 and C-36/95 [33].
[3] C-210/96 [29].
[4] C-456/10 [46].
[5] C-180/89 [19] and C-198/89 [21].
[6] C-288/89 [27].
[7] C-243/01 [63] and C-176/11 [23].
[8] See C-96/85 [13-15], C-180/89 [23-24], C-198/89 [21], C-233/94 [54], C-220/98 [26], C-313/94 [17 and 23], C-315/92 [16] and C-382/97 [11].
[9] C-358/01 [53].
[10] C-320/93 [14].
[11] C-320/93 [17]. See also the cases cited in fn 8, this page.
[12] See Esposito 2018a: 206-207.

To explain these reasons, the total-welfare hypothesis moves from the implicit premise that proportionality is about the maximization of total welfare. Indeed, this explanation has some plausibility, but similar considerations apply also to its consumer-welfare challenger. The Court never says that the trade-off between the fundamental freedoms and consumer protection ought to maximize consumer welfare. But it never says the contrary either. The quality of *explanantia* is thus low and their score a *p* point.

Moving to the Unfair Commercial Practices Directive, the *explanandum* is silent on disagreement *iii*. With regards to disagreement *vi*., it is important to note that other values inform its general scheme besides the economic interest of consumers. The directive aims also at removing obstacles to the exercise of the "internal market freedoms"[1] while protecting the "economic interests of legitimate competitors".[2] The decision in *Carrefour Hypermarchés* is illuminating in this regard:[3]

> [A]ccording to settled case-law of the Court, since comparative advertising contributes to demonstrating, in an objective manner, the advantages of various comparable goods and thus to stimulating competition between suppliers of goods and services to the consumer's advantage, the conditions to be met for such advertising must be interpreted in the sense most favourable to that advertising, while ensuring at the same time that comparative advertising is not used anticompetitively and unfairly or in a manner which affects adversely the interests of consumers.

The proportionality principle implies that—like in the case of the free circulation of goods and services—while "[i]t is appropriate to protect all consumers from unfair commercial practices", it is appropriate to "examine the effect on a notional, typical consumer".[4] Article 5(3) eases the rigour of this limitation because it establishes that if the trader can reasonably foresee that the practice affects a clearly identifiable group of particularly vulnerable consumers, then the practice will be assessed from the point of view of those vulnerable consumers.

Recital 9 offers some explanations about the exceptions to the scope of application of the UCPD set in Article 3. While some exceptions are too shallowly theorized to be significant,[5] Article 3(10) empowers Member States to introduce more stringent regulation of practices concerning trading of financial services and immovable property. As seen above, the reason for this exception is that, in these markets, consumers may need a higher level of protection.

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[1] Recitals 4 and 12, UCPD. See also cases C-611/14 [25] and C-388/13 [32], where the Court holds that "the Unfair Commercial Practices Directive seeks to ensure a high level of consumer protection by carrying out a complete harmonisation of the rules relating to unfair business-to-consumer commercial practices". This statement suggests that the harmonization of National laws is instrumental to consumer protection; thus, it is different from the normal account according to which consumer protection and the internal market are concurring goals.

[2] Recitals 6 and 8, UCPD. See also cases C-304/08 [38-40]; Case C-540/08 [21]; Case C-122/10 [21], C-288/10 [21-22] and C-515/12 [32].

[3] C-562/15 [21]

[4] Recital 18, UCPD. See also Recital 6, and C-288/10 [34].

[5] See Article 3(4)-(8), UCPD. On the latter, see also C-339/15 [27].

For the scorekeeping analysis, the passage from *Carrefour Hypermarchés* is critical. The Court articulates a relation between competition, the norms of the UCPD and the "consumer's advantage" or the "interests of consumers". This relation is readily explained in consumer-welfare terms. The general scheme of the directive rests on the claim that competition and the norms of the UCPD are means to the end of consumer welfare, albeit they can conflict. Against this background, the limitation of the test of unfairness to the effects on the average consumer can be justified by a balancing between competition and consumer protection, both seen as a means to consumer welfare. However, similarly to the distinction between restriction by object and by effect in antitrust law, this limitation does not apply to practices that are always forbidden because they are "most harmful to consumers" or target a particularly vulnerable class of consumers. Additionally, the exception to the full harmonization introduced by the UCPD is justified by Article 3(10) out of a concern for the interest of consumers.

The quality of these explanations is generally high,[1] and thus the consumer-welfare *explanans* pertaining to disagreement *vi*. scores a *P* point. The total-welfare *explanans* has patent difficulties in explaining why the UCPD cares so much about consumers and never refers to toal welfare. The situation is similar to the relation of this portion of the *explanandum* with disagreements *i.* and *ii.* Like in that case, the total-welfare *explanans* is rejected and scores an *N* point.

Let us now move to the Consumer Rights Directive. The case law is rich in insights pertaining to disagreement *vi*. but silent on disagreement *iii*. The Court moves from the premise that the protection granted to consumers is not absolute.[2] This is particularly significant for the obligations consumers have after the exercise of the right to withdraw. The rights granted to a consumer do not go "beyond what is necessary to allow him effectively to exercise his right of withdrawal".[3] Similarly, the inapplicability of withdrawal rights in some sectors is justified by the goal of avoiding "disproportionate consequences" due to the nature of the goods and services offered.[4] Additionally, in *Friz* the Court holds that the sanctions following from the withdrawal must comply with the "general principles of civil law", which aim to strike "a satisfactory balance and a fair division of the risks among the various interested parties".[5] Thus, the right to restitution following the cancellation of the partnership in a closed-end real property fund exercised after a

[1] Some doubts can be raised about the quality of the explanation about the average consumer, but the polar attraction scorekeeping rule makes the doubt inconsequential for current purposes.
[2] C-412/06 [39], C-215/08 [44] and C-166/11 [27].
[3] C-489/07 [25].
[4] C-336/03 [28].
[5] C-215/08 [48].

long time by the consumer who had not been informed of the existence of that right can be limited in light of the interests of the other partners and creditors of the fund.

The consumer-welfare *explanans* qualifies these exceptions as internal to the purposes of the regulated practice. When consumers are in need of protection, that protection must be limited to what is necessary to address the concerns under consideration. Doing otherwise would impair the normal functioning of the market mechanism, as already seen regarding the free circulation of goods and services. This line of reasoning applies also in *Friz*, where the limit to the reimbursement of the consumer is meant to ensure a fair apportionment of risk.[1] Thus, the consumer-welfare hypothesis explains these limitations, but the explanation requires a certain degree of theorization, to the effect that it can only score a *p* point.

The total-welfare hypothesis fails to score even a *p* point with regards to the Consumer Rights Directive and disagreement *vi*. First, the decision in *Friz* is explained in total-welfare terms by pointing out that giving full restitution to the plaintiff in that case would have provided wrong incentives regarding the optimal investment level,[2] thereby reducing total welfare. The claim can be true. The problem is it does not build on the reasoning of the Court. More precisely, it is sufficient to observe that the Court speaks in terms of fairness and that, in any event, from a consumer-welfare perspective, the full restitution to the consumer under the given circumstances would have made opportunistic behaviour possible and it would have harmed other consumers. Admittedly, the total-welfare *explanans* can account for the incentives given by a full compensation, but not in terms of their fairness. To do so, a framework like the one advanced by the translation claim in Chapter 4 is needed.

Second, and more fundamentally, the relevant total-welfare *explanans* has some difficulty with the idea that the content of the right to withdraw must be limited to what is necessary to "effectively … exercise [such a right]". Had the Court written that the right must be limited to what is necessary to "efficiently exercise his right" or "exercise his right compatibly the public interest", etc., the total-welfare approach could have argued that those expressions establish an instrumental connection with total welfare. Thus, the explanation is once again that EU law does protect the consumer, but only instrumentally, in so far as this increases total welfare. However, the Court identifies the limit in what is necessary to protect consumers and, as previously-considered hypothetical connections between the protection of consumers and the maximization of total

[1] In this case, it is quite clear that the consumer was behaving opportunistically. He wanted to cancel the contract eleven years after its stipulation, at a time when the fund was accumulating losses.

[2] More precisely, the consumer can opportunistically exercise the right to withdraw if the performance of the fund is deemed dissatisfactory. This legal context basically ends up forcing the other investors to insure the said consumer against negative outcomes.

welfare, also this one is rejected. Thus, the relevant total-welfare *explanans* score an *N* point also for its explanation of the Consumer Rights Directive.

It follows that, regarding EU consumer empowerment law and disagreement *iii*., both *explanantia* score *p* points, but regarding disagreement *vi*. the consumer-welfare *explanans* scores a *P* point and its total-welfare counterpart scores an *N* point.

3. Explaining EU Consumer Protection Law

This section applies the scorekeeping analysis to EU consumer protection law, which includes the Product Liability Directive (PLD), the Unfair Terms Directive (UTD), and the related case law by the CJEU. The findings of the previous section are confirmed and reinforced, even. The consumer-welfare hypothesis scores three high-quality points and a low-quality one, whereas the total-welfare hypothesis scores one low-quality point and sees its explanations rejected in the other three occasions.

The Product Liability Directive[1] approximated the law of the Member States concerning liability for defective products. The PLD is rather short and includes substantive and procedural provisions of full harmonization regarding the liability for defective products of manufacturers, other entities in the supply chain and the consumer. It is the oldest source of secondary law part of the *explanandum*. The Unfair Terms Directive[2] is a directive of minimum harmonization[3] that has been in force for almost 25 years. An interesting feature of its practice is that it is possible to see clearly a turning point in its saliency in concurrence with the financial crisis. Before 2008, only a few cases had been referred to or litigated in front of the CJEU, so that it was aptly called a "sleeping beauty" by Micklitz and Reich.[4] After 2008, the Court has decided more than forty cases on the application of the Unfair Terms Directive, mostly related to the content or the enforcement of loan agreements and other financial contracts.

3.1 Consumer protection and disagreements i. *and* ii.*: 2* P *v 2* N

Regarding the Product Liability Directive and disagreements *i*. and *ii*., Recital 6 is very significant:

> [T]o protect the physical well-being and property of the consumer, the defectiveness of the product should be determined by reference not to its fitness for use but to the lack of the safety which the public at large is entitled to expect.

[1] Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, OJ L 85/210.
[2] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ L 95/29.
[3] See Article 8, UTD, and, for example, decision C-484/08 [40].
[4] Micklitz and Reich 2014.

The point is confirmed and reaffirmed by the Court.[1] In particular, in *Boston Scientific*,[2] the Court holds that

> [w]ith regard to medical devices such as the pacemakers and implantable cardioverter defibrillators at issue in the main proceedings, it is clear that, in the light of their function and the particularly vulnerable situation of patients using such devices, the safety requirements for those devices which such patients are entitled to expect are particularly high.

The liability follows from "the abnormal potential for damage which those products might cause to the person concerned". In writing this, the CJEU cites paragraph 30 of AG Bot's opinion, where it is observed that the concept of safety which a person is entitled to expect[3]

> must be understood to refer to a product that poses risks jeopardising the safety of its user and having an abnormal, unreasonable character exceeding the normal risks inherent in its use. Accordingly, the lack of safety does not stem from the danger that may be posed by the use of the product, as a product may be dangerous even without having a safety defect, but from the abnormal potential for damage that the product could cause to the person or to the property of its user.

On these grounds, the Court concludes that all the products "belonging to a group or series" in which some have been found defective can be considered defective too.[4] Additionally, Recital 7 points out that the directive establishes a "fair apportionment of the risks inherent in modern technological production". To this end, it introduces a system of strict liability, unless some exonerating circumstances occur, that is relevant to disagreement *vi*.

In the *Novo Nordisk Pharma* judgment,[5] the Court assesses the compatibility with the allocation of the burden of proof established by Article 4 of the PLD of National legislation requiring the producer to provide information about the adverse effects of the medicine. It finds that

> such national legislation is only intended to eliminate the significant imbalance which exists between the manufacturer of the relevant product and the consumer—to the detriment of the latter—as regards access to information relating to that product, and does not change either the nature or the basic elements of the manufacturer liability system established by Directive 85/374.

Similar considerations are found in the *Dutrueux* judgment. While the conduct of a provider using a defective product in its economic activity does not fall within the scope of the PLD, National law

[1] See also Joined Cases C-503/13 and C-504/13 [37] 621/15 [23].
[2] Joined Cases C-503/13 and C-504/13 [39].
[3] Opinion of Advocate General Bot, 21 October 2014, Joined Cases C-503/13 and C-504/13, Boston Scientific Medizintechnik GmbH v AOK Sachsen-Anhalt – Die Gesundheitskasse and Betriebskrankenkasse RWE, ECLI:EU:C:2014:2306, [30].
[4] Joined Cases C-503/13 and C-504/13 [41].
[5] C-310/13 [32].

imposing no-fault liability on such a provider, in addition to that on the producer, is found compatible with EU, because it "contribute[s] to enhancing consumer protection".[1]

From the perspective of the consumer-welfare hypothesis, Recital 6 is self-explanatory. The point of the PLD is to protect the consumers against the risks of the products they buy, risks that they do not understand clearly, but for which they have expectations on the grounds of which consumption choices are made. Frustrating those expectations exposes consumers to risks they will not take precautions against—for example, by refraining from buying the product in the first place. At the same time, the protection of consumers is meant to ensure the fairness of the contractual relation. The concern for transfers between contracting parties, and the need to intervene in favour of consumers (*i.*), is presented as the reason justifying the protection of consumers. Protecting consumers is thus presented as intrinsically valuable and not as instrumental to the maximization of total welfare (*ii.*). The consumer-welfare *explanantia* provide high-quality explanations of the PLD regarding disagreements *i.* and *ii.* and score a *P* point each.[2]

To score any point in this context, the total-welfare hypothesis must advance an explanation clinging to the assumption that consumer protection maximizes total welfare. Thus, the distributive concern in favour of consumers, the choice to protect them and the reference to the fairness of the allocation of risk must be based on the implicit premise that this general scheme leads to the maximization of total welfare. A first problem with the attempt to explain these features of the PLD in these terms is that in the extensive literature on product liability, also the scholars finding product liability efficient tend to consider the consumer expectation test inferior to the risk-utility test.[3] Let us assume that, given the lack of consensus on the matter, the consumer expectation test leads to the maximization of total welfare. Even under this convenient assumption, it is still the case that the explicit distributive concern and the connection between the protection of consumers and the fair apportionment of risk cannot be accounted without violating the conditions for scoring a low-quality point. Basically, what the total-welfare hypothesis has to claim that by protecting the welfare of consumers and allocating risks fairly, the consumer expectation test maximizes total welfare. However, like in the fictional example discussed in Chapter 5 and on multiple occasions in the previous chapter, an explanation of this sort overrides the reasons explicitly given in the *explanandum*. Accordingly, the total-welfare hypothesis scores two *N* points because its *explanantia* regarding the PLD and disagreements *i.* and *ii.* are rejected.

Let us now consider the Unfair Terms Directive. The UTD was introduced, as stated in its recitals, "to facilitate the establishment of the internal market and to safeguard the citizen in his role

[1] C-495/10 [35].
[2] Accordingly, Article 12 makes product liability mandatory.
[3] See p. 243.

as consumer".[1] With regards to the relation between the contracting parties, already the Recitals stress the importance of "the strength of the bargaining positions of the parties". This rationale is then enshrined in the unfairness test of Article 3(1), establishing that "[a] contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer". The case law has reaffirmed these ideas constantly.[2] Paragraphs 39 and 40 from the order in *Banco Popular Español* are illustrative of the typical reasoning of the Court:[3]

> 39. … it is settled case-law that the system of protection introduced by the directive is based on the idea that the consumer is in a weak position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge.
> 40. As regards that weaker position, Article 6(1) of Directive 93/13 provides that unfair terms are not binding on the consumer. As is apparent from the case-law, that is a mandatory provision which aims to replace the formal balance which the contract establishes between the rights and obligations of the parties with an effective balance which re-establishes equality between them.

The protective purpose of the Unfair Terms Directive explains also why, in the context of the unfairness review of a term, the CJEU carefully considers the consumer's "inten[t] to assert its unfair or non-binding status".[4] Note also that the unfairness scrutiny is a case-by-case analysis.[5] Accordingly, in some circumstances, consumer could be in need of an enhanced level of protection.[6] The UTD includes also a list of contractual terms that, while not being automatically unfair, are likely to be so. In some occasions, these terms have been found "unfair without having to consider all the circumstances".[7] For example, this is so for exclusive jurisdiction clauses that may

[1] Additionally, the recitals explain that, "[w]hereas sellers of goods and suppliers of services will thereby be helped in their task of selling goods and supplying services, both at home and throughout the internal market; whereas competition will thus be stimulated, so contributing to increased choice for Community citizens as consumers; … "[w]hereas in accordance with the principle laid down under the heading 'Protection of the economic interests of the consumers', as stated in those programmes: 'acquirers of goods and services should be protected against the abuse of power by the seller or supplier, in particular against one-sided standard contracts and the unfair exclusion of essential rights in contracts'." See also Article 7(1), stating that the "interest of consumers and of competitors" justify the introduction of sanctions against unfair terms in consumer contracts and the analysis in C-119/15 [27, 24], which gives explicit recognition also to the interest of competitors in the elimination of unfair terms.
[2] Joined Cases C-240/98 to C-244/98 [25, 29], C-137/08 [46, 47], C-243/08 [22], C-168/05 [25], C-484/08 [27], C-76/10 [37], C-453/10 [27], C-472/10 [33], C-618/10 [39], C-92/11 [41], C-415/11 [44], C-413/12 [48], C-470/12 [39], Joined Cases C-537/12 and C-116/13 [39-40], C-26/13 [39], C-34/13 [48], C-34/13 [77], C-143/13 [51], C-280/13 [32], C-537/13 [22], C-8/14 [17], C-96/14 [26], C-110/14 [17], C-169/14 [22], Joined Cases C-381/14 and C-385/14 [22], C-539/14 [24], C-421/14 [40], C-74/15 [24], C-119/15 [28] and C-534/15 [29].
[3] Joined Cases C-537/12 and C-116/13 [39-40].
[4] C-243/08 [33]. See also Joined Cases C-381/14 and C-385/14 [25].
[5] C-421/14 [57] and C-472/10 [22].
[6] Joined Cases C-537/12 and C-116/13 [57], C-34/13 [63], C-537/13 [23], C-110/14 [24], C-169/14 [11], C-74/15 [24] and C-534/15 [30].
[7] C-237/02 [23].

deter consumers from asserting their rights while they are beneficial to the professional[1] and for terms transferring to the consumer a tax liability addressed to the seller without proof of a price reduction.[2] These clauses have been found unfair because they are typically beneficial to professionals and detrimental to consumers.[3] In other occasions, the Court has deferred to the National court to decide on the unfairness of the term under scrutiny.[4]

These considerations lead the consumer-welfare hypothesis to score two *P* points also regarding the Unfair Terms Directive and disagreements *i.* and *ii*. In fact, the reasoning involved in the application of the UTD shows an explicit interest for the distributive effects of contractual terms in consumer contracts (*i.*) and a concern for the protection of consumers that can comfortably be considered as intrinsic (*ii.*). As the consumer-welfare *explanantia* do not require to add any further elaboration to explain the *explanandum* with regards to these two disagreements, their explanations are of high quality.

Once again, the total-welfare hypothesis provides the following explanation: protecting consumers is instrumental to the maximization of total welfare. This explanation is obviously not of high quality because it adds an implicit layer of abstraction, which finds no explicit ground in the *explanandum*. Two reasons make me doubt that this explanation is of sufficient quality to score a *p* point. First, the number of cases is significant (more than fifty) and the judgments often show a level of theoretical depth in favour of the consumer-welfare hypothesis that was not necessary to decide the case at hand. In this context, it is particularly implausible to assume that there is a teleological gap in the reasoning of the Court, a silence to be filled with the premise that protecting consumers is instrumental to the maximization of total welfare. Second, the concept of weakness is based on two sources of market failure—unequal bargaining power and level of knowledge (or information asymmetry). Yet, they are presented as reasons for protecting the consumers and re-establishing the equality between the parties and therefore the fairness of market relations. This observation points much more plausibly in the direction that the problem is that the market does not work to the benefit of consumers rather than to the maximization of total welfare. Saying otherwise overrides the reasons given in the *explanandum* with a vague connection to the total-welfare hypothesis. As already seen, explanations of this type have to be rejected. Accordingly, also with regards to the Unfair Terms Directive and disagreements *i*. and *ii*. the total-welfare hypothesis scores two *N* points.

[1] Joined Cases C-240/98 to C-244/98 [22-24]. See also C-237/02 [23], C-137/08 [55] and C-243/08 [41].
[2] C-226/12 [26, 29].
[3] From a systematic point of view, it is interesting to observe that the simplified assessment of the unfairness of these terms resembles the simplified assessment of the anticompetitive of restriction by objects in the application of Article 101(1) TFEU (see pp. 194-195).
[4] C-226/12 [28], Joined Cases C-537/12 and C-116/13 [70], C-421/14 [64-66] and C-186/16 [54-57].

On these grounds, regarding EU consumer protection law and disagreements *i.* and *ii.*, the total-welfare hypothesis scores two *N* points and its consumer-welfare challenger scores two *P* points.

3.2 Consumer protection and disagreements iii. *and* vi.*:* p, P *v* p, N

With regards to disagreement *iii*. and the Product Liability Directive, in *Commission v France* the Court, citing paragraphs from 66 to 68 of the AG Geelhoed's opinion, holds that[1]

> [a]s is apparent from the first and ninth recitals in the preamble to the Directive, th[e] interests [balanced by the Directive] include guaranteeing that competition will not be distorted, facilitating trade within the common market, consumer protection and ensuring the sound administration of justice.

It is obvious that merely stating that these four values (undistorted competition, trade in the internal market, consumer protection, administrative concerns) must be balanced falls very short of an explanation of their relation. What the Advocate General's opinion adds is that the PLD protects "the position of consumers", one of the "interests which in social terms have been shown to be vulnerable" together with that of employees and tenants.[2] Against this background,

> [w]hen the Community legislature adopted the Directive, it had to weigh consumer protection in cases of minor damage to property against the risk of overburdening the courts. The effect of its policy decision is that, in cases of minor damage to property, consumers are not entitled, as regards the burden of proof, to claim liability without fault on the part of producers for damage caused by defective products.

Both *explanantia* account for the relation between these concepts. Indeed, competition, trade and consumer protection—being central features of economic law—can be explained as instrumental to allocative efficiency; and as allocative efficiency can be about total or consumer welfare, both *explanantia* can account for the relation between competition, trade and consumer protection. The same goes for administrative costs, for the reasons highlighted in Chapter 5. However, both explanations are of low quality.

The Product Liability Directive is richer and more interesting for disagreement *vi*. The system of liability introduced by the PLD is based on the "liability without fault" of the producer, which is considered the only way to ensure "a fair apportionment of the risks inherent in modern technological production".[3] The Court has explicitly acknowledged in the *Aventis Pasteur* judgment

[1] C-52/00 [29]. See also C-154/00 [29] and C-183/00 [26] that, however, do not refer to the sound administration of justice.
[2] Opinion of Advocate General Geelhoed, 29 April 2004, C-52/00, Commission of the European Communities v French Republic, ECLI:EU:C:2004:274, [66-68].
[3] Recital 2, PLD. See also C-300/95 [24] and Joined Cases C-503/13 and C-504/13 [41-42].

that "the no-fault liability established by [the PLD] is also intended to take account of the fact that that liability represents, for the producer, a greater burden than under a traditional system of liability".[1]

However, the Product Liability Directive is not a blank check in favour of consumers. The standard of liability is that of "the lack of the safety which the public at large is entitled to expect", but it excludes "any misuse of the product not reasonable under the circumstances". Ultimately, the directive introduces a system of strict liability on the producer open to defences based on the contributory negligence of the consumer.[2] Article 7 establishes additional "exonerating circumstances". In particular, manufactures can prove that the scientific and technical knowledge made the defect undiscoverable.[3] Notably, Member States could opt-out from this defence if they "felt … [it] restrict[s] unduly the protection of the consumer".[4] Similarly, Article 16 allows Member States to limit the overall liability of a manufacturer as long as "the limit is established at a level sufficiently high to guarantee adequate protection of the consumer and the correct functioning of the common market".[5]

The relevant consumer-welfare *explanans* can account for the reference to the negligence of the consumer because in some occasions he is the cheapest cost avoider and therefore from a cost-minimization perspective—ultimately working to his benefit—ought to govern directly certain risks.[6] This is in line with having a standard of safety based on reasonable expectations. In fact, consumers can take precautions only against the risks they expect. Bearing the considerations about fairness and risk in Chapter 4 in mind, the PLD establishes a fair apportionment of risk from a neo-Aristotelian perspective. The exclusion of liability when the defect is undiscoverable and the limitation to the overall liability can be explained bearing in mind the chilling effect that might otherwise be caused. As innovation is beneficial to consumers, this is ultimately a trade-off between different dimensions of consumer welfare, not unlike what was seen in Chapter 6 regarding ancillary restraints. While I find this explanation solid, it is indeed the case that it only partially rests on the reasons given in the *explanandum*. It is thus of low quality and scores only a *p* point.

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[1] C-358/08 [42].

[2] See Articles 1, 7 and 8(2) and cases C-300/95 [24] and C-203/99 [15]. Note that here contributory negligence simply means that also the consumer is responsible because his negligence contributed to the harm, so that it does not mean that compensation is barred (like in the classical common law of torts).

[3] See C-300/95.

[4] Recital 16, PLD.

[5] Recital 17, PLD.

[6] See also the analysis in C-310/13 [32] of the German law establishing an information right that was considered compatible with the allocation of the burden of proof in Article 4 because it empowers consumers by "eliminat(ing) the significant imbalance which exists between the manufacturer of the relevant product and the consumer—to the detriment of the latter—as regards access to information relating to that product". For a fuller development of the relation between information duties and consumer law from law and behavioural economics perspectives, see Esposito 2017a (theoretical perspective) and Esposito 2018b (EU law perspective) and the literature cited therein.

For competing the total-welfare *explanandum*, instead, the situation is blurred. While the contributory negligence of the consumer makes sense from a total-welfare perspective, the strict liability of the producer is harder to accept. A first problem with this literature is that often the concept of strict liability is very simplistic as it attaches liability to the materialization of the accident.[1] The analysis of this concept of strict liability is irrelevant for current purposes because it does not require to assess whether the product was defective or not. A second problem is that this literature considers a variety of potential scenarios. In this regard, it is possible to narrow the set of relevant considerations by pointing out that, in the *explanandum,* consumers are considered in lack of knowledge about the product. Additionally, enforcement costs have been considered in the design of the PLD when the EU legislator has barred claims for damages of less than EUR 500 and when it granted to the consumer a direct action against the producer.[2] Thus, had no-fault liability been justified in those terms, this could—and arguably would—have been done explicitly.

Hylton offers an economic analysis of the concept of defect and distinguishes between a risk-utility test and a consumer expectation test. In his view, the main problem of the consumer expectation test is that it imposes liability for "unobservable risks",[3] thereby making producers liable also when the level of precaution granted minimizes the risk. From this perspective, the exclusion of liability when the defect is unobservable ought not to be optional; it ought to be a key component of the general scheme of liability for defective products. Additionally, Hylton considers separately liability for failure to warn, which is again based on a risk-utility test. He concludes that the risk-utility test is desirable when products have a "combination of observable utility, which attracts consumers, and hidden risk".[4] Faure is generically critical of the PLD, "which introduces one strict liability rule for product accidents [and] disregards all the various factual situations which make different liability rules efficient".[5]

Ultimately, the *explanandum* includes clear references to the distributive effects of no-fault liability and to the need to protect consumers and to ensure a fair apportionment of risk as justifications for the general scheme of the directive, including the defences and exceptions. And these reasons, even if the scheme of the PLD happened to be efficient in total-welfare terms, do not fit with the total-welfare hypothesis and the attempts to make them fit—as seen in many occasions

[1] The point is noted by Faure 2002: 362. See, for example, Polinksy and Rogerson 1983: 581, Schäfer and Müller 2009: 10 and Shavell 2007: 142.
[2] Articles 7(b) and 9, PLD. See also C-52/00 [30, 40]; C-154/00 [30]; C-402/03 [28-29]; C-495/10 [25].
[3] Hylton 2013: 2491-2492.
[4] Hylton 2013: 2502. In my understanding, the main difference between Hylton's conclusions and the system of the PLD are institutional. Hylton favours a system in which consumers have to prove that a better design was possible, or that a risk ought to be disclosed. Instead, the PLD establishes a system where disclosure contribute to the determination of consumer expectations. Then, if these expectations are not met and the damage occurs, the manufacturer is liable. However, these findings are not of relevance here.
[5] Faure 2002: 380-381. See, however, the more detailed economic account offered by Cavaliere 2004.

in this and the previous chapter—fails. Consequently, the total-welfare hypothesis scores another *N* point.

Let us now move to the Unfair Terms Directive and disagreement *iii*. The plain meaning of the UTD does not offer any evidence for this disagreement. However, in the case law there is an interpretive argument recurring between 2006 and 2012 and worth of in-depth consideration. For the first time in the *Mostaza Claro* judgment, the Court argues that[1]

> as the aim of the Directive is to strengthen consumer protection, it constitutes, according to Article 3(1)(t) EC, a measure which is essential to the accomplishment of the tasks entrusted to the Community and, in particular, to raising the standard of living and the quality of life in its territory (see, by analogy, concerning Article [101 TFEU], Eco Swiss, paragraph 36).

Article 3(1)(t) EC Treaty identified in consumer protection one of the policies of the European Community, while raising the standard of living and the quality of life was one of the goals to be pursued by the European Community according to Article 2 EC Treaty. Thus, the Court establishes an instrumental connection between consumer protection and, in particular, raising the standard of living and the quality of life in the EU. Consider also that at paragraph 36 of *Eco Swiss*, cited "by analogy", where the Court simply observes that[2]

> according to Article 3(g) of the EC Treaty (now, after amendment, Article 3(1)(g) EC), Article [101 TFEU] constitutes a fundamental provision which is essential for the accomplishment of the tasks entrusted to the Community and, in particular, for the functioning of the internal market.

As seen in Chapter 6 and in the analysis of the free circulation of goods and services, the function of the internal market is theorized quite deeply in the *explanandum* and is clearly better explained by the consumer-welfare hypothesis. The situation is different for paragraph 37 of *Mostaza Claro*, where the Court simply asserts the existence of the said connection between consumer protection and increasing the standard of living and the quality of life in the EU.[3]

Let us now consider how the competing *explanantia* account for reasoning of the Court in *Mostaza Claro*.[4] Admittedly, both *explanantia* do not explain the said reasoning very well, but for different reasons. The consumer-welfare *explanans* emphasises the existence of a redistributive

[1] C-168/05 [37]. See also C-243/08 [26], C-76/10 [49] and C-618/10 [67] that repeat the same idea.
[2] C-126/97 [36].
[3] In the TEU and TFEU (the treaties currently in force), the said reference to the standard of living is not found anymore either among the values (Art. 2 TEU), or the objectives of the EU (Art. 3 TEU). Note, however, that Article 3 includes various expression that could be taken to convey similar ideas to increasing the standard of living and that references to increasing the standard of living can be found in the TFEU with regard to the common agricultural policy (Artt. 37, 39, 43), the free movement of workers (Art. 46), the transportation policy (Art. 91) and state aids (Art. 107).
[4] An additional strategy could be to label paragraph 37 of *Mostaza Claro* as an *obiter dictum*. However, it is advisable not to trivialize this piece of evidence in such a way. In fact, declaring that a reason given in a previous decision is an *obiter dictum* is one of the interpretive arguments used by a court when articulating its reasoning. In the present analysis, this type of consideration belongs more to the *explanandum* than to its explanations.

concern in the goal of raising the standard of living and the quality of life. This is the case because the EC Treaty refers to the "standard" of living. This means that, for example, a proxy of this criterion would be the GDP pro capita, not the GDP pure and simple. Thus, there is a redistributive concern in the said goal, which is not about the relation between the contracting parties as contracting parties but as members of the same polity. The explanation then imposes on the reasoning of the Court that consumer protection contributes indirectly to this goal by fostering the fairness of market exchanges. As discussed in Chapter 4, the argument in support of the translation claim implies that when substantive equality is respected, and market relations are fair, the standard of living and the quality of life of consumers is not reduced. Meanwhile, other policies aim at increasing the said standard of living and the quality of life. Admittedly, the quality of this explanation is low because much of the explanatory work is done by articulating reasons not found in the *explanans*.[1] However, the explanation does not override the *explanandum* or builds upon a vague conceptual relation, so that the explanation scores a *p* point.

The total-welfare *explanans*, on the contrary, argues that Article 2 EC Treaty is a reasonable approximation of total welfare: increasing the standard of living and the quality of life in the EU actually means to increase the resources available to the residents of the EU. To argue so, the total-welfare *explanans* denies the existence of any distributive concern in the expression "standard of living". However, that the expression "standard of living" does not embody this concern is disputable. This explanation can score, at most, a *p* point.

The UTD is particularly rich regarding disagreement *vi*. In fact, the unfairness test *ex* Article 4 applies only to terms that: 1) are not individually negotiated; 2) do not relate to the "the main subject matter of the contract nor to the adequacy of the price and remuneration … in so far as these terms are in plain intelligible language" and; 3) cause "a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer". Let us consider these three elements in turn.

On point 1), the requirement that terms are not individually negotiated is never satisfied by standard forms. Additionally, the burden of proof of the negotiation rests on the professional. Given that standard forms represent the normal way to stipulate consumer contracts, this requirement implies that the terms of consumer contracts are typically subject to the fairness review. It then becomes important to understand the scope and rationale behind the exception under Article 4(2).

[1] The situation would have been different if the Court by way of analogy with *Eco Swiss* had connected consumer protection to the internal market project because in that case it would have been straight forward to build on the previous findings regarding the relation between the consumer welfare *explanans* and the internal market, the free movement of goods and competition.

Regarding point 2), Article 4(2) states that terms relating to "the main subject matter of the contract nor to the adequacy of the price and remuneration"[1] are not subject to the unfairness test "in so far as these terms are in plain intelligible language". That is to say, if the intelligibility (or transparency) test is failed, the unfairness test becomes applicable also to "the main subject matter of the contract" and "to the adequacy of the price and remuneration".[2] Regarding the stated adequacy, in the *Kásler* judgment the Court explains that[3]

> the exclusion of a review of contractual terms as to the quality/price ratio of a supply of goods or services is explained by the fact that no legal scale or criterion exists that can provide a framework for, and guide, such a review.

The introduction of the intelligibility test is based on the importance of adequate information as a means of consumer protection. In fact,[4]

> [i]nformation, before concluding a contract, on the terms of the contract and the consequences of concluding it is of fundamental importance for a consumer. It is on the basis of that information in particular that he decides whether he wishes to be bound by the terms previously drawn up by the seller or supplier.

Accordingly, "the requirement of transparency must be understood in a broad sense" because "the system of protection introduced by Directive 93/13 [is] based on the idea that the consumer is in a position of weakness *vis-à-vis* the seller or supplier, in particular as regards his level of knowledge".[5]

With regards to point 3), in the *Aziz* judgment[6] the Court clarifies that causing a significant imbalance and acting contrary to the requirement of good faith are two concurring tests. To assess whether there is a significant imbalance to the detriment of consumers,[7]

> it must in particular be considered what rules of national law would apply in the absence of an agreement by the parties in that regard. Such a comparative analysis will enable the national court to evaluate whether and, as the case may be, to what extent, the contract places the consumer in a legal situation less favourable than that provided for by the national law in force.

To establish, in addition, if the term is contrary to the requirement of good faiths, the Court has to establish "whether the seller or supplier, dealing fairly and equitably with the consumer, could

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[1] On the first notion, see C-143/13 [54]; on the second, see C-26/13 [54-55] and C-143/13 [54] (for more concrete applications of this reasoning, see C-472/10 [23] and C-26/13 [57-58]).
[2] See, for example, C-342/13 [34].
[3] C-143/13 [55].
[4] C-92/11 [44]. See also C-92/11 [53], C-226/12 [25], C-143/13 [74-77], C-342/13 [33], C-96/14 [41], Joined Cases C-154/15, C-307/15 and C-308/15 [50].
[5] C-26/13 [72]. See also C-96/14 [40], C-186/16 [44], giving the same reasons. The Court then goes more in details at [73-74]. In this regard, see also C-186/16 [45].
[6] C-415/11.
[7] C-415/11 [68]. See also C-226/12 [21-22], C-342/13 [27], Joined Cases C-537/12 and C-116/13 [65] and C-421/14 [59].

reasonably assume that the consumer would have agreed to such a term in individual contract negotiations".[1] In this regard, it has to be noted that the fairness test does not apply, pursuant to Article 1(2), to "terms which reflect mandatory statutory or regulatory provisions and the provisions or principles of international conventions to which the Member States or the Community are party". The exclusion is based on the idea that "it may legitimately be supposed that the National legislature struck a balance between all the rights and obligations of the parties";[2] as a consequence, the exclusion does not apply when the professional includes in the contract mandatory terms introduced by National law for a different type of contract.[3] Finally, the consume benchmark is that of the average consumer.[4] As seen in the context of the free circulation of goods and services, the choice of this standard comes from the balancing of the creation of the internal market and consumer protection.[5]

In synthesis, the general scheme of the Unfair Terms Directive rests on a division between elements of the contract that are better governed by the market mechanism and others that are typically better governed by a substantive control performed by courts.[6] However, when there are reasons to believe that the market mechanism is not providing its intended benefits to consumers, protection steps in. That the protection granted by the directive is meant to benefit consumers not as a means to maximize total welfare is beyond any reasonable doubt. For the consumer-welfare *explanans* that pertains to disagreement *vi.*, this means a *P* point. The total-welfare *explanans* failsd to provide even a low-quality explanation for the same reasons already given in multiple occasions in this and the previous chapter and therefore scores an *N* point.

In light of the above, for their explanation of EU consumer protection law that pertains to disagreement *iii*., both *explanantia* score a *p* point, while regarding disagreement *vi*. the consumer-welfare *explanans* scores a *P* point and the total-welfare *explanans* scores an *N* point.

4. EU Consumer Law and Disagreement *vii.*: *P* v *N*

This section carries out the scorekeeping analysis of EU consumer law with regards to disagreement *vii*. It is the final round of analysis and it confirms the general trend of the previous pages. The consumer-welfare hypothesis offers another high-quality explanation and, once again, the explanation of its total-welfare counterpart is rejected. Thus, the consumer-welfare hypothesis

[1] C-415/11 [69]. See also Joined Cases C-537/12 and C-116/13 [66], C-421/14 [60] and C-186/16 [57].
[2] C-92/11 [28] and C-280/13 [41]
[3] C-92/11 [28-30].
[4] C-143/13 [75], C-96/14 [47] (note that at paragraph 48 the Court states that it is expectable that consumers are less circumspect when concluding related contracts than when concluding the same contracts separately) and C-186/16 [47].
[5] See pp. 225 and 248.
[6] This is essentially the distinction between empowering and protecting consumers.

increases its advantage, leading to the conclusion that its *explanantia* have superior explanatory power of the portion of the *explanandum* concerning EU consumer law.

4.1 Consumer empowerment and disagreement vii.

The Unfair Commercial Practices Directive establishes that unfair commercial practices in consumer relations are prohibited (Article 5), but it does not take a position on sanctions. As seen, Article 11(1) simply holds that "in the interest of consumers"[1] various entities, including competitors, shall be empowered by Member States to challenge unfair commercial practices. Paragraph two adds that Member States have to determine the procedure to order the cessation or to prohibit carrying out unfair commercial practices.[2] The protection granted by National measures must, according to Article 13, be effective, proportionate and dissuasive.[3] An additional means of protection consists in interpretive techniques. The Court has established that a "non-restrictive interpretation of the concept of invitation to purchase is the only one consistent with … a high level of consumer protection".[4]

Let us look at the competing explanations. The prohibition *ex* Article 5 is introduced in the interest of consumers, which is also a guiding interpretive criterion of the UCPD. For current purposes, it is also particularly significant that Article 11(1) empowers competitors to challenge the unfairness of a commercial practice not in their own interest, but in the interest of consumers. These parts of the *explanandum* receive, like the previous two and for the same reasons, a high-quality explanation in consumer-welfare terms and no plausible explanation in total-welfare terms. The situation is different with Articles 11(2) and 13. Here the *explanandum* is clearly incompletely theorized. Both *explanantia* can advance low-quality explanations. Following the polar attribution scorekeeping rule, these low-quality explanations are attracted to the poles. Thus, concerning disagreements *vii*., the consumer-welfare *explanans* gives a high-quality explanation, while the total-welfare *explanans* does not advance any plausible explanation.

Moving to the Consumer Rights Directive, the consumer-welfare *explanans* scores a *P* point and its total-welfare counterpart an *N* point. The right to withdraw is "designed to protect consumers".[5] The purpose of consumer protection is also used to formulate interpretive arguments

[1] See also C-388/13 [51].
[2] See also C-206/11 [45] and C-388/13 [49].
[3] See also C-388/13 [57].
[4] C-122/10 [29] and Joined Cases C-544/13 and C-545/13 [54]. See also C-281/12 [36] on the concept of transactional decision. In case C-388/13 [32], the Court excluded the possibility of adding implicit conditions to the detriment of consumers. On the general duty of National courts to interpret National law "in the light of the wording and the purpose" of the UCPD, see C-428/11 [41]; on the symmetrical duty to interpret EU law autonomously, see cases C-59/12 [25], C-281/12 [26], C-515/12 [19] and C-611/14 [32-33].
[5] C-481/99 [38, 47]. See also C-227/08 [23, 26, 28].

for the defences of professionals,[1] the sanctions in case of exercise of the right to withdraw[2] and the failure to inform consumers of their right to withdraw.[3] Article 24 imposes on Member States the second-order duty to introduce sanctions that are "effective, proportionate and dissuasive" against "infringements of the national provisions adopted pursuant to th[e] Directive". The duty to interpret National law "in the light of the wording and the purpose of the directive" is a way to react to the failure to implement a directive;[4] additionally, "[i]f the result prescribed … cannot be achieved by way of interpretation", Member States have "to make good damage caused … to uphold the right of aggrieved consumers to obtain reparation".[5] Both first-order (the right to withdraw) and second-order (duty to interpret, prohibiting violations and compensating damage caused by the failure to implement) defences have a clear concern for the situation of consumers, who have to be protected both on the market and against the inertia of Member States—via both deterrence and reparation. This framework can be explained in consumer-welfare terms easily.[6] On the contrary, the total-welfare *explanans* must recur to the usual additional hypothesis that deterring certain practices and compensating consumers are the best ways in this context to maximize total welfare—which, as in previous occasions, is rejected and thus scores an *N* point.

4.2 Consumer protection and disagreement vii.

Let us now move to disagreement *vii*. and EU consumer protection law, starting with the Product Liability Directive again. In multiple occasions, both the EU legislator and the Court restate the claim that consumer protection requires "compensation for death and persona injury as well as compensation for damage to property".[7] The Court has specified that the compensation must be "full and proper".[8] Thus, compensation is seen as a means to protect consumers by making them 'whole' again after they suffered harm. The *explicandum* shows a clear distributive concern in the selection of the right remedy for the violation of the duty to provide safe products. This is exactly what the consumer-welfare *explanans* requires and therefore the point it scores is of high quality.

To score a point, the total-welfare *explanans* must argue that full compensation was chosen as a means to obtain an optimal deterrence level. The problem of this explanation is that there is no consensus in the mainstream literature on the connection between full compensation for breach of

[1] C-423/97 [43], C-336/03 [21, 28-29] and C-229/04 [43].
[2] C-423/97 [57], C-481/99 [39], C-489/07 [19, 24-26], C-215/08 [44-49] and C-511/08 [54,57].
[3] C-350/03 [100] and C-229/04 [48].
[4] C-91/92 [23-26].
[5] C-91/92 [27, 29].
[6] See pp. 176-177.
[7] Recital 9, PLD. See also cases C-203/99 [15]; C-52/00 [22]; C-154/00 [18]; C-183/00 [31] and C-127/04 [25].
[8] C-203/99 [15, 28] and Joined Cases C-503/13 and C-504/13 [46, 49].

contract and deterrence.[1] Even more fundamentally, the explanation here would have the same character of the explanation in total-welfare terms of the choice of strict liability discussed in the previous section. The explanation must hold that giving full compensation to consumers is a means to maximize total welfare. However, like in the case of the choice of strict liability, such an explanation is barred because it ends up neutralizing the reason given in the *explanandum*, namely that full compensation is a means of consumer protection.[2] It might well be that full compensation maximizes total welfare, but this has to do with the effects of, not the reasons for, compensating consumers. Given these considerations, it is appropriate to conclude that the total-welfare *explanans* that pertains to disagreement *vii*. does not offer an acceptable explanation of the PLD and therefore scores an *N* point.

The most important norm in the Unfair Terms Directive regarding disagreement *vii*. is found in Article 6(1): unfair terms are not binding on the consumer. When a term is unfair, it is inapplicable in the controversy between the consumer and the professional. The reason given in the case law is that the "imbalance between the consumer and the seller or supplier may only be corrected by positive action unconnected with the actual parties to the contract".[3] Put differently, Article 6(1) "aims to replace the formal balance which the contract establishes between the rights and obligations of the parties with an effective balance which re-establishes equality between them".[4]

The question then becomes what norm is applicable once a contractual term is found unfair. In this regard, the CJEU takes the view that "the national courts are required only to exclude the application of an unfair contractual term in order that it does not produce binding effects with regard to the consumer, without being authorised to revise its content".[5] Doing otherwise would reduce the deterrent effect of the UTD.[6] For the same reason, also the temporal effects of a decision finding a term unfair cannot be limited.[7] Additionally, a choice-of-law clause is unfair if it does not inform the consumer he "also enjoys the protection of the mandatory provisions of the law that

[1] Kaplow and Shavell 2002: 181, Katz 2015: 185.
[2] More precisely, the explanation would be that the full compensation is a means of consumer protection which is justified because it maximizes total welfare. The problem of this explanation is that it neutralizes the instrumental connection between full compensation and consumer protection.
[3] C-372/99 [14]. See also Joined Cases C-240/98 to C-244/98 [27], C-168/05 [26], C-76/10 [39], C-453/10 [28, 31], C-618/10 [41], C-470/12 [40], C-169/14 [24], Joined Cases C-381/14 and C-385/14 [23].
[4] C-137/08 [47], C-243/08 [25], C-453/10 [28], C-472/10 [34], C-618/10 [40], C-397/11 [25, 46], C-415/11 [45], C-280/13 [33, 43], C-8/14 [18], C-110/14 [19], C-169/14 [23], C-421/14 [41], C-539/14 [25], Joined Cases C-568/14 to C-570/14 [23], C-119/15 [29], Joined Cases C-154/15, C-307/15 and C-308/15 [55].
[5] C-618/10 [65], Joined Cases C-482/13, C-484/13, C-485/13 and C-487/13 [28], Joined Cases C-568/14 to C-570/14 [23], Joined Cases C-381/14 and C-385/14 [23], Joined Cases C-154/15, C-307/15 and C-308/15 [57].
[6] C-618/10 [69-70]; note that at paragraph 70, the CJEU uses the term "efficient" to identify higher "protection of consumers". See also cases Joined Cases C-482/13, C-484/13, C-485/13 and C-487/13 [31], Joined Cases C-154/15, C-307/15 and C-308/15 [60-63].
[7] Joined Cases C-154/15, C-307/15 and C-308/15 [72-74].

would be applicable in the absence of that term".[1] More problematic is deciding whether, once a term is found unfair, the contract is void as a whole.[2] In this regard, it is important to note that the CJEU has granted to National courts the power to substitute unfair terms with default provisions when doing otherwise would "require the [National] court to annul the contract in its entirety, thereby exposing the consumer to disadvantageous consequences".[3] Interestingly, this power does not have grounds in the plain meaning of the UTD and it is limited to those cases where the annulment of the entire contract would "expos[e[] the consumer to disadvantageous consequences".

Consumers can also count on at least three institutional safeguards. The first safeguard consists in various interpretive rules. The second is the power conferred to specific groups (such as consumer associations) by Article 7(2) UTD to propose preventive actions against the use of unfair terms. The third, which has led to a notable amount of case law, is the duty to investigate *ex officio* whether a term is unfair. Let us consider them in detail.

The *explanandum* about the UTD is unusually rich in considerations regarding interpretive criteria bearing on disagreement *vii*. On the one hand, there are the general criteria that impose to interpret National law in light of the non-transposed directive[4] and the UTD according to its purpose, that is the protection of consumers.[5] On the other hand, there is the specific criterion found in Article 5, which states that terms non-individually negotiated have to be interpreted *contra proferetem*.[6] This criterion does not apply in case of proceedings *ex* Article 7(2). The reason of this exclusion is that in individual proceedings "an interpretation favourable to the individual consumer concerned benefits him or her immediately"; at the same time,[7]

> in order to obtain, by way of prevention, the most favourable result for consumers as a whole, … an objective interpretation makes it possible to prohibit more frequently the use of an unintelligible or ambiguous term, which results in wider consumer protection.

Let us now consider the role, *ex* Article 7 UTD, of persons or organizations, having a legitimate interest under National law in protecting consumers. The CJEU considers that these interested entities, and consumer protection associations in particular, are not in a weaker position *vis-à-vis* professionals, eventual financial constraints notwithstanding.[8] Their initiatives pursuant to Article 7(2) have a "deterrent nature and dissuasive purpose".[9] In fact, mere compensatory remedies

[1] C-191/15 [71].
[2] By and large, the Court has attributed to National laws the management of this point. See C-453/10 [36], C-618/10 [65].
[3] C-26/13 [82-84], Joined Cases C-482/13, C-484/13, C-485/13 and C-487/13 [33].
[4] Joined Cases C-240/98 to C-244/98 [30].
[5] C-92/11 [30], Joined Cases C-381/14 and C-385/14 [29].
[6] Note that general terms and conditions are not individually negotiated (C-191/15 [63]).
[7] C-70/03 [16].
[8] C-413/12 [37, 49]. See also Joined Cases C-381/14 and C-385/14 [26].
[9] C-372/99 [15] and C-472/10 [37].

"would be incomplete and insufficient and would not constitute either an adequate or effective means of prevent[ion]" for consumers.[1]

Finally, let us look at the *ex officio* doctrine, which imposes on National courts the duty to assess the unfairness of terms in consumer contracts by their own motion. Already in the *Océano* case, the first preliminary reference about the Unfair Terms Directive, the CJEU articulates the duty of National courts to review *ex officio* the unfairness of contractual terms. The reason is that given the power granted to private bodies *ex* Article 7(2), *a fortiori* courts must act *ex officio* to both protect the individual consumer and deter the use of unfair terms in general.[2] This power-duty has been constantly reaffirmed and refined in the case law.[3] Recently, the Court has stated that considerations about "overburdening the courts" do not justify restrictions on "the exercise of subjective rights conferred by Directive 93/13".[4] This institutional safeguard is then completed by the right to seek reparation for the violation of EU law by Member States.[5]

The reasons given in the *explanandum* put the interest of the consumer clearly at the core of the general remedial scheme established by the Unfair Terms Directive. This interest guides the interpretation of the terms, the consequence of the finding of unfairness, and the allocation of the power to challenge the unfairness of terms. In this context, the consumer-welfare *explanans* scores a *P* point.

The total-welfare *explanans* can only posit an instrumental connection between these norms and the end of maximizing total welfare. Note that the quality of this explanation is particularly poor. Had total welfare been the maximand behind the UTD, interpretive criteria could have been shaped accordingly either by the Court (the general criteria) or by the legislator (Article 5). However, the reasons given explicitly point in the direction of the consumer-welfare hypothesis. Against this background, an explanation based on total welfare contradicts the reasons given in the *explanandum* similarly to what we have already seen in this section about the Product Liability Directive and in other occasions in this and in the previous chapter. This explanation has to be rejected.

Similar considerations apply also to the power granted to interested entities *ex* Article 7(2) and to the *ex officio* doctrine. Interested entities *ex* Article 7(2) are a means to increase the effectiveness of consumer protection. Importantly, these entities are considered by the CJEU not in a position of weakness *vis-à-vis* producers, so that their empowerment to bring an action is clearly

[1] C-415/11 [60]. Even more outspoken, C-169/14 [43].
[2] Joined Cases C-240/98 to C-244/98 [26-29], C-473/00 [35], C-76/10 [41] and C-472/10 [41].
[3] C-473/00 [32], C-243/08 [23], C-168/05 [27-28], C-618/10 [46-53], C-470/12 [41], C-415/11 [59], C-34/13 [66], C-49/14 [54], C-421/14 [43], C-539/14 [27, 43], Joined Cases C-568/14 to C-570/14 [24, 37].
[4] Joined Cases C-381/14 and C-385/14 [42].
[5] C-168/15 [22].

intended to rebalance the contractual inequality that is to the detriment of consumers. The same can be said for the *ex officio* doctrine, which, as seen, was originally justified by building *a fortiori* on the system of protection *ex* Article 7. The system is then completed by the right to seek compensation against the Member State that failed to comply with the *ex officio* doctrine.

The consumer-welfare hypothesis gives a high-quality explanation also of these institutional safeguards. They are means to increase the effectiveness of consumer protection either *ex ante* by prevention and deterrence, or *ex post* by giving to consumers an additional ground for seeking compensation. Accordingly, the relevant consumer-welfare *explanans* scores a *P* point.

While the consumer-welfare *explanans* can thus offer a high-quality explanation, its total-welfare counterpart can only advance the now familiar claim which presupposes that protecting consumers increases total welfare or even maximizes it. However, such explanation fails to meet the minimal criteria of quality necessary to score a low-quality point because also here it contradicts the reasons given explicitly in the *explanandum*. For example, consider that the National courts are entitled to substitute the unfair term with a default rule when the contract could not operate without that term and the result would ultimately be detrimental to the consumer. The total-welfare *explanans* can posit that this is instrumental to total-welfare maximization, but this explanation is extremely weak for two reasons. First, had the Court intended to give this reason, it could have done so. Instead, it selected the interest of the consumers as justificatory concept. Second, the explanation explicitly overrides the reason given in the *explanandum* by positing an unclear connection between the interest of consumers and total welfare. On these grounds, regarding disagreement *vii*. and EU consumer protection law, the consumer-welfare hypothesis scores a *P* point and its total-welfare counterpart scores an *N* point.

The result of the scorekeeping analysis that pertains to disagreement *vii*. and EU consumer law is that the consumer-welfare hypothesis scores a *P* point and its total-welfare counterpart scores an *N* point. This finding concludes the application of the scorekeeping analysis to EU consumer law and, therefore, to the *explanandum*. With seven *P* points and two *p* points, the consumer-welfare hypothesis beats the total-welfare one—scoring only two *p* points and seven *N* points. Once EU consumer law is reverse engineered, it is apparent that the consumer-welfare hypothesis has soundly defeated the total-welfare one in the explanatory scorekeeping analysis.

These results are discussed more in detail in the next chapter, which concludes Part III of this dissertation.

— 8 —

A Superior Hypothesis

1. Taking Stock of the Scorekeeping Analysis: Consumer Welfare is Pareto Superior

This is the last chapter of Part III of this dissertation. It is a very short chapter. Its main purpose is to discuss the results of the explanatory scorekeeping analysis carried out in Chapters 6 and 7 and to address some open questions the reader might find puzzling. More precisely, this section offers a thorough summary of the results, which show that the consumer-welfare hypothesis is Pareto superior to its total-welfare ancestor. Section 2 then focuses on some features of the seven theoretical disagreements that were not anticipated in Chapter 5. Section 3 checks the robustness of the doctrinal claim to possible changes in the rules for the attribution of the points. Section 4 concludes with a discussion of the degree of warranty of the doctrinal claim.

Once reverse engineered, both EU antitrust and consumer law warrant the doctrinal claim of this dissertation. In fact, the consumer-welfare hypothesis has performed better that its total-welfare ancestor in the scorekeeping analysis of both. Table 2 shows this clearly. Like in Table 1, the columns represent the seven disagreements. Each line represents one of the competing efficiency hypotheses regarding one of the subsets of the *explanandum* for which a point could be scored. The subsets are Article 101, Article 102, consumer empowerment and consumer protection. For example "C(101)" stands for the consumer-welfare hypothesis regarding Article 101 TFEU and "T(protection)" stands for the total-welfare hypothesis regarding EU consumer protection law. The values of the entries are the usual one belonging to the triadic scale *P, p* and *N* plus "-", standing for a subset for which no point was scored.

Table 2 shows clearly the superior performance of the consumer-welfare hypothesis. In all the subsets of the *explanandum* where a point was scored, its *explanantia* always score a point of higher or at least equal quality to those of the total-welfare hypothesis. The explanatory power of the consumer-welfare hypothesis is, in other words, Pareto[1] superior to that of its total-welfare

[1] Note that I am extending the concept of Pareto superiority from preference-satisfaction to explanatory power. Put differently, usually a state of affairs is Pareto superior to another state of affairs if at least one person is better off and no

ancestor. In fact, we can always explain the *explanandum* with the consumer-welfare hypothesis better than, or as good as, we can with the total-welfare one.

	Dis. *i*.	Dis. *ii*.	Dis. *iii*.	Dis. *iv*.	Dis. *v*.	Dis. *vi*.	Dis. *vii*.
C(101)	P	P	-	P	P	P	P
C(102)	P	P	P	P		P	
T(101)	N	N	-	N	N	N	N
T(102)	N	N	p	N		N	
C(emp)	P	P	p	-	-	P	P
C(prot)	P	P	p	-	-	P	
T(emp)	N	N	p	-	-	N	N
T(prot)	N	N	p	-	-	N	

– Table 2: Results of the scorekeeping analysis –

More can be said about the superior explanatory power of the consumer-welfare hypothesis. First, its explanatory power is not Pareto optimal because, as it does not always score high-quality points, a Pareto superior explanation is possible. This point is discussed in Section 2. Second, the consumer-welfare hypothesis is not simply Pareto superior to the total-welfare one. The results of the scorekeeping analysis are more powerful than that. However, before elaborating on this matter further, it is appropriate to check for the robustness of the scorekeeping rules, thereby postponing the considerations about the superiority of the consumer-welfare hypothesis to Section 4.

2. Remarks on the Seven Disagreements and the *Explanandum*

Table 2 shows a series of aspects of the scorekeeping analysis that require some explicit remarks. First, not only have disagreements *i*. and *ii*. always been discussed jointly, but their analysis leads

one is worse off according to their own preferences. In this chapter, instead, an *explanans* is Pareto superior to another *explanans* if it scores at least one point of higher quality and no point of lower quality according to a predetermined set of theoretical disagreements. The differences are thus remarkable. However, I find that the modified concept of Pareto superiority allows the results of the scorekeeping analysis to be expressed in a clear and convenient way.

always to the same results. This close relation might make one wonder whether it was appropriate to separate them in the first place. Second, the analysis regarding disagreement *iii*. is the one where the results are typically of low quality. Third and finally, the results regarding disagreement *vii.* of the total-welfare hypothesis are to a large extent influenced by optimal deterrence theory, which has a strong institutional component built into it. Additionally, it might be that dividing the scorekeeping analysis also regarding disagreement *vii*. would have been appropriate. Let us consider these points in order.

Whether it makes sense to distinguish disagreements *i*. and *ii*. is a reasonable reservation to raise. This is especially the case given how closely interconnected the analysis of the *explanandum* has been with regards to them. However, two reasons confirm, in my view at least, the choice of keeping them conceptually separate. The first is that they focus on distinctive aspects of legal reasoning. Disagreement *i*. is about the existence of concerns regarding the transfers from consumers to producers. Instead, disagreement *ii*. is about the intrinsic or instrumental justification of the protection granted to a market participant. The two are interconnected, no doubt. However, the analysis in the previous two chapters shows with sufficient precision that the scorekeeping analysis of these two disagreements emphasises different aspects of the *explanandum*, albeit closely related ones. The second reason is more pragmatic. In fact, even if we merge disagreements *i*. and *ii*. the main result of the analysis—namely that the consumer-welfare hypothesis is Pareto superior—does not change. What changes is simply that the number of points scored by each efficiency hypothesis is reduced by four.

With regards to disagreement *iii.*, the points scored by the competing *explanantia* are all, but for one case, of low quality. Additionally, no evidence was found regarding the Unfair Commercial Practices and Consumer Rights Directives of relevance for and disagreement *iii*. However, Table 2 does not show this because the materials about the freedoms led to the attribution of a point regarding EU consumer empowerment law. Another aspect that the table does not show is that the evidence relevant to this disagreement is smaller than that regarding the other high-level abstraction disagreements. This circumstance is explained by two reasons. On the one hand, disagreement *iii*. requires statements somehow connecting consumer and total welfare. As seen in Chapter 1, total welfare is often a source of irritation for lawyers, which makes references to it expectably rare. On the other hand, the selection of an *explanandum* composed only of EU antitrust and consumer law significantly reduces the chances of finding relevant evidence. As discussed better in the next chapter, there are indeed other areas of EU law where this evidence can be found. An example is the common agricultural policy. Indeed, the reference to it in the application of Article 101 led the

total-welfare hypothesis to provide its one and only high-quality explanation regarding disagreement *iii*.

In Chapter 5, it was acknowledged that the classification of the case law on the free circulation of goods and services as consumer empowerment instead of protection is controversial. In this regard, it was promised to discuss the issue in Chapter 8. It is time to fulfil that promise. Moving this portion of the *explanandum* from consumer empowerment to consumer protection is of no consequence for all the disagreements but the third one. As mentioned in the previous paragraph, in fact, the other materials regarding EU consumer empowerment law do not lead to the attribution of points to the competing *explanantia*. However, also this difference does not modify the overall results of the scorekeeping analysis. It would simply imply that both efficiency hypotheses lose one *p* point.

Finally, two remarks are advisable also regarding disagreement *vii*. First, one may wonder whether it would have not been appropriate to divide the *explanandum* regarding both EU antitrust and consumer law in two subsets (pecuniary and non-pecuniary sanctions, empowerment and protection). In this regard, the main conceptual reason against this choice is that the subsets are not divided according to the same criterion. In any case, from a practical point of view, the conclusion that the consumer-welfare hypothesis is Pareto superior would be untouched by this division.

Second, let us discuss the relation between disagreement *vii*., optimal deterrence theory, and its institutional underpinnings. This is particularly important because, as discussed in Chapter 5, institutional considerations do not matter for the doctrinal claim. Thus, if optimal deterrence theory presupposes a particular institutional underpinning, it might well be that a different total-welfare *explanans* regarding disagreement *vii*. is possible, and perhaps even advisable.

Optimal deterrence theory collides with the existence of the defence *ex* Article 101(3) and the objective justification in the application of Article 102 in the general scheme of EU antitrust law. In fact, according to optimal deterrence theory, if the behaviour is anticompetitive, the sanction—set at the optimal level from a total-welfare perspective—follows, period. Defences are not contemplated. Ultimately, optimal deterrence theory transfers the choice of whether it is desirable that an undertaking behaves anticompetitively from the legal system to the undertaking itself. This is a gap in optimal deterrence theory that it would be interesting to see filled. However, such a task goes beyond the purpose of this dissertation. In any case, for the scorekeeping analysis the result about antitrust law and disagreement *vii*. would not change. The total-welfare *explanans* regarding disagreement *vii*. also fails to explain the award of damages and the norms for the application of non-pecuniary sanctions, so that only a different account of fines capable of scoring a high-quality point could lead to the attribution of a low-quality point. However, even under this new

scenario, the consumer-welfare hypothesis would still explain EU antitrust law regarding disagreement *vii*. better. These results could perhaps change under different scorekeeping rules, the topic discussed in the next section.

3. Remarks on the Scorekeeping Rules

This section first defends the polar attraction scorekeeping rule against two alternative rules: the *vincit superior* rule and the mediocrity rule. Second, the opportunity of a more arithmetic criterion of scorekeeping is considered.

The polar attraction scorekeeping rule implies that when explanations of different qualities coexist in the portion of *explanandum*, the low-quality explanations are attracted to the poles by high-quality explanations and by the lack of explanation. In the (rare) cases where polar explanations coexist, their opposite pull leads to the attribution of a low-quality point. Two possible alternative rules are the *vincit superior* rule and the mediocrity rule. The difference between the *vincit superior* rule and the polar attraction rule is that with the *vincit superior* rule when an *explanans* offers low-quality and no plausible explanation on the different parts of the same portion of the *explanandum*, the *explanans* ends up scoring a low-quality point instead of no point. The mediocrity rule is the opposite of the polar attraction rule: low-quality explanations attract polar explanations.

I think both rules are intuitively wrong from an epistemological perspective. Clearer explanations are better explanations. To see this, imagine you look at a water sample with a magnifying glass and you do not see anything strange in it. At the same time, someone else looks at the same sample at the microscope and finds it contaminated by some deadly bacteria. I think the claim "there is deadly bacteria in the water" is better not because of its content—it would be a better world if the water were not contaminated—but because it is based on a more precise, detailed and substantiated analysis of its object. Now, low-quality explanations are like the observation made with the magnifying glass. They are shallow. They fail to grasp relevant aspects of the evidence. On the contrary, when an *explanans* scores a high-quality point or does not score a point, it means that it managed to go deep enough into the *explanandum* to conclude that it found what it expected or failed to do so. Both the *vincit superior* and mediocrity rules deny, albeit to different extents, this intuitive reason. Accordingly, I confirm the appropriateness of the polar attraction scorekeeping rule and refuse to consider the practical implications of the alternative rules for assessing the explanatory power of the competing *explanantia*.

Finally, a more arithmetic framework for the scorekeeping analysis might be of interest to some readers. I do not find it useful for current purposes, but it might be useful for others, or it might make the results more appealing to a more mathematically oriented audience. A minor change would be to turn the contents of Table 2 into numbers. For example: P=1, p=0, N=-1. I find this scale plausible for the same reasons supporting the polar attraction scorekeeping rule. Accordingly, the score of the consumer-welfare hypothesis becomes 17 and that of the total-welfare one becomes -17 (out of a maximum of 25 attributable points and 20 attributed points). I leave it an open question whether this or even more quantitative approaches to the scorekeeping analysis would be desirable, or at least feasible.

4. The Warranty of the Doctrinal Claim

Section 1 has shown that according to the scorekeeping analysis the explanatory power of the consumer-welfare hypothesis with regards to the *explanandum* is Pareto superior to that of the traditional total-welfare hypothesis. Section 2 has defended some of the choices made in the subdivision of the *explanandum* and Section 3 the criteria for the attribution of points.

Against this background, it is advisable to comment on the warranty the results of this analysis offer to the doctrinal claim of this dissertation, which holds that the consumer-welfare hypothesis explains better than the traditional total-welfare one the reasons given in the practice of a significant portion of EU antitrust and consumer law. Finding that the explanatory power of consumer welfare is Pareto superior to that of total welfare obviously warrants the doctrinal claim. The implications of this result for the collaboration proposed by Minimalist Law-and-Economics are discussed in the next and last chapter.

The successful application of the scorekeeping analysis—succesful in that it led to clear results—reinforces the view that reverse engineering the law is an epistemologically minimalist way to be normatively minimalist. By considering the law as evidence, economists (in collaboration with lawyers) can act better upon those reasons that apply to them independently.

As a last note, I would like to emphasize two aspects about the claim that consumer welfare is Pareto superior. First, such a result was not necessary to warrant the doctrinal claim, but it makes it nevertheless simpler to conclude that the doctrinal claim is warranted. In fact, even if the total-welfare hypothesis were occasionally to score better points than the consumer-welfare one, it could have still been possible to warrant the doctrinal claim—this would depend on the overall results. But more fundamentally, saying that the consumer-welfare hypothesis is Pareto superior is reductive. In fact, typically, when a consumer-welfare *explanans* gives a high-quality explanation,

the explanation of its total-welfare opponent is rejected. And it is apparent that failing to give an explanation that is plausible enough to score at least a point of low-quality is a problem for an explanatory theory.

Conclusions:
The Case for Collaboration between Law and Economics and the Way Ahead

1. The Case for Collaboration between Law and Economics

The Introduction promised an affirmative answer to following research question: Is it possible to have a bilateral relationship or collaboration between legal and economic research? As the case for collaboration between law and economics proposed by Minimalist Law-and-Economics can be rested, it is now the time for the summation.

The approach articulated in this dissertation is called Minimalist Law-and-Economics because it owes much to the minimalist strategy that characterizes Sunstein's approach to judicial reasoning, deliberative democracy, libertarian paternalism and also—although Sunstein himself might not have realized it—the behavioural turn in economic research and in the economics of law.

The economics of law is indeed an important innovation of twentieth century academia. However, it has not proved very successful with legal scholars, especially outside the United States. This is particularly surprising with regards to market relations, given that they are central to the conceptual apparatus behind the economics of law. The key issue is that lawyers want fair market relations and economists efficient ones. This divergence of perspectives is problematic especially in the European Union, where the internal market remains at the centre of its integration project.

The first step of the inquiry was to frame the current state-of-the-art as a matter of interdisciplinary exchange between legal and economic research rather than one of interjurisdictional exchange between local legal communities. The unilateral direction of knowledge from economics to law characteristic of the mainstream methodology in the economics of law, which Calabresi calls Economic Analysis of Law, establishes a form of paternalistic cooperation whereby economic research aims at determining how legal scholars ought to conceive the law. This move relates to the ends of the law, but also to the structure of legal relations and the way in which arguments about the law are to be made. Unsurprisingly, this state-of-the-art irritates lawyers. For

this reason, Calabresi wishes for a different approach, which he calls Law and Economics, where the two disciplines are peers and the circulation of knowledge is bilateral. In short, legal and economic scholars collaborate. The result is a thin community, in which there is a mutual recognition of the respective comparative advantages and the will to exploit them to come up with a superior division of labour between disciplines.

The second step was to identify the comparative advantages of the two disciplines, but also those elements of each discipline that collaboration must not endanger. Lawyers expect collaboration to respect three theses: the fairness, wrongfulness and doctrinal theses. According to the fairness thesis, contractual relations ought to be fair. The wrongfulness thesis holds thay the breach of a duty is a wrong done to the holder of the correlative right. Finally, the doctrinal thesis holds that an explanation of the law ought to be based on the reasons given in its practice, at least in part. Once these conditions are satisfied, I believe that, from a legal point of view, no reasonable obstacle can be raised to the relevance of an incentive-based reasoning (the *ex-ante* perspective) aim at efficient market relations. Thus, to be of appeal to lawyers, the collaboration proposed by Minimalist Law-and-Economics must satisfy the fairness, wrongfulness, and doctrinal theses.

Economists want the law to take the *ex-ante* perspective seriously, markets to be efficient and expect research to be epistemologically and normatively minimalist. The first—and in my view, primary—obstacle for economists is the alleged opposition between the *ex-ante* perspective and fairness. This concern is based on a faulty assumption about the conceptual separation between efficiency and fairness, which has hindered the exploration of the translation strategy. Epistemological and normative minimalism are subject to a debate in economic research prompted in particular by behavioural findings and reinforced by Calabresi's argument in favour of a bilateral relationship between economic and legal research. Their relaxation makes collaboration with lawyers easier. Furthermore, it was also shown that the interplay between normative minimalism and total-welfare maximization leads economists to fall into two contradictions, one about Pareto efficiency and the other about the economist as a social engineer. Rethinking how to be normatively minimalist without falling into these contradictions is thus critical. Reverse engineering the law is a promising way to solve the social engineer contradiction because it justifies a value choice in economic analysis because the applicable law has made that choice.

Against this background, Minimalist Law-and-Economics advances three claims that, once accepted, can constitute the foundations of this desirable collaboration between legal and economic research.

1.1 The importance of the economic, translation and doctrinal claims for the proposal of collaboration

Minimalist Law-and-Economics warrants an economic, a translation, and a doctrinal claim that jointly establish the conditions for its proposal of collaboration between legal and economic research. The economic claim holds that consumer welfare is a maximand used in the efficiency analysis of market relations in alternative to total welfare. The translation claim holds that with consumer welfare as the maximand, it is possible to offer a plausible economic account of fair market relations. Finally, the doctrinal claim holds that the consumer-welfare hypothesis explains better than the traditional total-welfare one the reasons given in the practice of a significant portion of EU antitrust and consumer law.

Together, the three claims ensure to the lawyer that the fairness, wrongfulness and doctrinal theses are respected. The economic and translation claims ensure the respect of the fairness and wrongfulness theses. When the market is efficient in maximizing consumer welfare, producers and consumers are fair to each other because they exchange things of equal value. As a consequence, an inefficient allocation is a wrong done to consumers, who end up treated unfairly. The wrong is to them and not to society as a whole for the failure to pursue the maximization of total welfare. The doctrinal claim ensures that the doctrinal thesis is respected. Once these theses are respected, the lawyer can learn from the economist about the functioning of the economic system and the effects of the law in it.

The proposed collaboration is beneficial to the economist in the following ways. First of all, as the analysis showed, the normal account of contractual relations incurs in a Pareto efficiency contradiction because it rests uncomfortably with the economic analysis of market relations. From the latter perspective, exchanges being Pareto optimal is not sufficient to grant their allocative optimality. Accepting that allocative efficiency is about consumer welfare solves the said contradiction by downgrading Pareto efficiency to a mere participation constraint rather than the normative justification of what makes contracts attractive from an economic point of view.

Second, normative minimalism has not avoided a crucial disagreement regarding allocative efficiency, exposed by the economic claim of the dissertation. Allocative efficiency can be about total welfare or consumer welfare. The third and related problem is that the selection of total welfare as maximand is not really a way to avoid value choices on part of the economists. Thus, mainstream economists fall in the social engineer contradiction: they are engaged in a value-free quest advocating for total welfare.

Judging whether legal norms are desirable in light of their success in the pursuit of an end selected by the economist because economists normally select that end is exactly the type of patronizing attitude that irritates lawyers. Against this background, collaboration with legal research in the form of reverse engineering the law is an attractive alternative. Reverse engineering the law offers an argument to solve the disagreement on the meaning of "allocative efficiency" without justifying the preference for one maximand over the other with axiological arguments. The economist assumes the maximand that fits better with legal reasons because it fits with it, as long as the analysis of legal reasons is rigorous enough to be epistemologically minimalist.

This is when the doctrinal claim steps in. The doctrinal claim opposes to the traditional total-welfare hypothesis the consumer-welfare hypothesis and holds that the latter has superior explanatory power. The explanatory scorekeeping analysis used to warrant the doctrinal claim takes legal reasons seriously but analyses them on the grounds of a rigorous framework, which specifies the criteria of selection of the *explanandum*, operationalizes the disagreements between the two efficiency hypotheses, and establishes the criteria for the assessment of the quality of the explanations offered by the competing *explanantia*.

Together, the economic, translation, and doctrinal claims offer a framework that satisfies all the disciplinary *desiderata* described above and describes a division of labour which enables lawyers and economists, united in diversity, to join forces by relying on each other's strengths to improve the quality of their own research. Collaboration is therefore desirable for both economists and lawyers.

1.2 Partial acceptance of the proposal of collaboration

What would happen if someone were to disagree with the economic, translation, and doctrinal claims or more radically with the existence of benefits from the proposed collaboration? This is an important question and it deserves a detailed answer.

The most radical rejection would consist in sticking to the patronizing cooperation characteristic of the Economic Analysis of Law. At the very least, those in favour of this approach (most likely to be economists) would have to explain how they intend to solve the Pareto efficiency and social engineer contradictions. On the opposite side, lawyers uninterested in collaboration would have to explain why legal research can ignore expert-knowledge that pertains to the social practices regulated by the law and its effect upon them.

From a legal point of view, even if the economic claim were rejected, the translation and doctrinal claims would suffice to satisfy the fairness, wrongfulness and doctrinal theses.

Admittedly, rejecting the economic claim would make the collaboration less palatable to economists. However, the translation claim could be an independent reason to solve the Pareto efficiency contradiction and the doctrinal claim to solve the social engineer contradiction. In other words, economists would have reason to start assuming consumer welfare as the maximand in their welfare analyses of market relations.

With regards to the rejection of the translation claim, it is important to distinguish two types of rejection. The first is internal, the second external. The internal rejection would argue that the account of the relation between consumer-welfare maximization and fairness in the neo-Aristotelian tradition failed in showing that arguments about allocative efficiency can be translated in arguments arguments about fairness in market relations and vice versa. The external rejection would argue that the neo-Aristotelian tradition fails to give a plausible account of fair market relations.[1] The internal rejection is alarming, but the external one is put wrongly. Collaboration between the disciplines will be very difficult if legal and economic research cannot find a common ground about the central concepts used to analyse market relations. Thus, if the translation claim fails, searching for a better version of it is imperative. The external rejection is wrongly put because the translation claim does not argue for the moral plausibility of the concept of fairness of the neo-Aristotelian tradition. Minimalist Law-and-Economics is content of the modest result that a translation is possible. And this finding cannot be questioned by rejecting the account of fair market relations proposed by the neo-Aristotelian tradition on the grounds of an allegedly more attractive moral theory.

Finally, the rejection of the doctrinal claim reduces the appeal of the proposal of collaboration formulated by Minimalist Law-and-Economics in proportion to the importance one attributes to the empirical warranty of a claim. If this is the case, like with the translation claim, I hope a better way to make the doctrinal claim will be advanced in the early future.

2. The Way Ahead: Carrying Minimalist Law-and-Economics Further

Assume this dissertation succeeds in making its case for the collaboration proposed by Minimalist Law-and-Economics. What's next? This final section articulates a few lines of inquiry that can be pursued using the proposal of collaboration formulated by Minimalist Law-and-Economics as a stepping stone. They are divided in minimalist language in inquiries that go deeper, shallower and broader than the proposal advanced in this dissertation.

I see four main directions of inquiry to go deeper into theory. The first focuses on the key concepts used in private law theory to account for market relations, and in particular autonomy,

[1] See, for example, JB Murphy 2002.

promise and fiduciary relation. The debate is complex, and I will make no attempt to summarize it here.[1] What seems to be the case is that the role of consumer welfare and consumer sovereignty in this debate is clearly underexplored.[2] The second requires to take the admittedly most counter-intuitive aspect of the present research head-on, namely that that the conflict between capital and labour is only instrumental to the price minimization logic included in the neo-Aristotelian concept of fairness. To do so, there are two promising lines of inquiry. One is the concept of merit good and the distributive concerns associated to it.[3] The other is considering the relation between law and macroeconomics. It is indeed the case that the economics of law is mainly grounded in microeconomics and macroeconomics might offer important insight on the relation between the labour market and allocative efficiency.[4] This lines of inquiry seem promising to explain why the animating principles[5] of contractual relations involving capital and labour are different from those involving consumers and producers. The third focuses on a deeper integration of the neo-Aristotelian tradition into the collaboration proposed by Minimalist Law-and-Economics. The capabilities approach is grounded in Aristotle's virtues ethics and it has attractive features for lawyers and also for some economists of law.[6] And indeed, Aristotle's virtue ethics might be an important source of insight for the debate on what welfare is.

The fourth moves the inquiry from the level of ends to the level of means. At this level, the expert-knowledge of economists is of great value. Yet, to have collaboration at this level, it is important to understand the institutional choices enshrined in legal practice. Once that is established, it is possible to reflect on whether the choice makes sense in light of economic research. In this regard, I find Shapiro's "economy of trust" to be a very promising starting point.[7] With this expression, Shapiro conveys the idea of an instrumental coherence between the interpretive practices and the degree of absolute and relative trust in the different legal institutions involved. For example, if the legal system shows low absolute trust in the judiciary, which is nevertheless higher than in the legislative, the former is entitled to high discretionary powers. On the basis of the doctrinal claim of this dissertation, the allocation of normative authority among the different actors involved in an economic activity ought to be coherent with the goal of consumer-

[1] On autonomy and promise, see Dagan and Heller 2017: 19-48. On fiduciary relations, see Markovits 2014 and PB Miller 2018.
[2] A preliminary step in this direction is offered by Esposito and Grundmann 2017.
[3] Calabresi 2016: 24-89.
[4] See Listokin 2018.
[5] On this notion and its relevance for contract theory, see Dagan and Heller 2017, especially 79-87.
[6] See Deakin 2006a and 2006b, Benöhr 2013: 85-93, Claasseen and Gerbrandy 2016.
[7] Shapiro's proposal is also of great interest because it bridges the gap between the more abstract debate on theoretical disagreements and the research on legal argumentation (Canale and Tuzet 2013), which is very popular in continental Europe (Alexy 1989, Wróblewski 1992 and Chiassoni 2007) and central to the study of EU law (Benoextea 1993, Maduro 2007 and 2012, Sarmiento 2012, Sankari 2013 and Beck 2013). In particular, Shapiro offers a promising approach to explain the fact that the explicit argumentative hierarchies by legislators or courts are highly defeasible (Beck 2013: 187-233 and Dolcetti and Ratti 2013).

welfare maximization. The legal system solves the conflict over the identification of the actor in charge of determining the right course of action in light of how trustworthy, reliable and dependable the direct agents (consumers and producers) and indirect agents (legislative, administrative and judiciary bodies) are to act coherently with the said goal. A higher degree of trust in the direct agents is coherent with a low level of intrusion in the content of a contract. A mandatory right to withdraw expresses a higher degree of trust in the direct actors than banning a certain commercial practice.[1] In general terms, the higher the trust in the capacity of consumers to act in their own interest or the more independently sovereign they are,[2] the more deferential indirect actors should be to their actual preferences.[3] Conversely, the lower the degree of trust in the capacity of judicial and administrative bodies to analyse market conditions, the simpler the norm governing the interaction has to be. An illustrative example is the refusal in EU law to make the proof of the capacity of undertakings to recoup losses at a later stage a necessary condition for finding that predatory pricing violates Article 102 TFEU.[4] Ultimately, this line of inquiry connects the absolute and relative degree of trust in the capacity and motivation of the involved actors to act consistently with the goal of consumer-welfare maximization.

Going shallower into the community is important. This dissertation is a very lengthy case in favour of collaboration between economic and legal research. "Less is more" is an important element of a dissemination strategy. Following this principle, I find attractive the idea of circulating a survey among specialists in private law, economic analysis of law, micro- and welfare economics. This unusual method of inquiry would check whether the collaboration proposed by Minimalist Law-and-Economics is truly attractive for both legal and economic scholars. The questions will map the conceptual and methodological commitments of the respondents and ask them whether, upon reflection, they could subscribe to the central proposals of Minimalist Law-and-Economics.[5]

Finally, going broader is perhaps the richest and simplest extension of the proposal made by this dissertation. The conceptual framework developed in Chapter 5 can be applied basically *telle quelle* to other branches of EU law and also to the law of other jurisdictions. In Chapter 5, a series of areas of EU law of high interest for the doctrinal claim were identified already. They include other parts of EU competition and consumer law, sector-specific regulation[6] (energy, financial

[1] C-382/87 [11-15].
[2] See p. 103.
[3] Esposito 2017a.
[4] C-52/09 [102].
[5] The result of a pilot survey of students from both law and economics *curriculae* during my teaching experience at the University of Florence under the mentorship of Filippo Zatti were encouraging.
[6] Esposito and De Almeida 2018 and Esposito and Grundmann 2017 include preliminary inquiries in EU electricity law and EU financial services. Although these inquiries do not apply the explanatory scorekeeping model, the results are in line with the doctrinal claim of this dissertation.

services, telecoms, transportation), but also the economic policy of Member States and public procurement law. The areas of EU law where there is an express reference to the standard of living are of particular interest as they have been understood in Part III as occasions where distributive justice may trump fairness explictly.

A parallel way to go broader is to apply the analytical framework of Chapter 5 to an *explanandum* comprising legal materials on antitrust and consumer law from other jurisdictions. US law is a particularly salient candidate in this regard. It would be very significant if such an extension were to confirm the doctrinal claim. On the one hand, it would revive Posner's efficiency hypothesis of the common law while refining it in the process. On the other hand, it would show that many of the problems in the relation between legal and economic research come from the selective way in which economic theory is related to law. It is worth mentioning that given the innovative and controversial criteria of case selection for the *Restatement of Consumer Law*, it would be extremely topical to offer a Minimalist Law-and-Economics perspective on the cases selected as the starting point of this project.

No doubt, if the economic and legal academic communities, united in diversity, will collaborate and rely on each other's comparative advantages, the future of law and economics will be bright.

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