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1. Introduction

The aim of this chapter is to explore how our ideas about economy and market shape the way in which we think about the law, as well as how ideas about the law condition our understanding of what market is and what it 'needs'. There are several reasons why explore this broad question through the prism of private law. One reason will be obvious to private lawyers: while sociologist have always underlined the immense importance of private law, and particularly contract law, for the institution of markets,[1] private law scholarship and practice has been often understood as insulated from political considerations,[2] being presumably concerned mainly with corrective justice based on rules logically deduced from first order principles of personal freedom and the will theory. But how far can these discourses be actually isolated? Secondly, and perhaps more importantly, private law plays an important role in making and correcting markets and economies: the rule of law, understood as the enforcement of contracts and protection of private property, has been portrayed as core to economic development by financial and developmental institutions such as World Bank or IMF.[3] The EU has, in contrast, attempted to constrain market forces through private law; for instance, by means of consumer law, which has become one of the core elements of its more 'social' face.[4] Ultimately, then, the question that this chapter raises is what we are actually saying when we say that we use the law, and private law in particular, as means to correct markets: what is our underlying conception of either market or the law?

The argument that I would like to advance in this chapter is that legal and economic discourses, whatever their participants would like to assume, share a set of fundamental pre-understandings as the relation between the subject of legal-political order and the social

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[1] For instance, Weber, *Economy and Society*, New Ed (University of California Press, 1992), p. 666 ff.

[2] James Gordley, *The Philosophical Origins of Modern Contract Doctrine* (Clarendon Press, 1993), 216. Similar points were raised also by P.S. Atiyah, *The Rise and Fall of Freedom of Contract*, vol. 398 (Oxford Univ Press, 1979) or D. Kennedy, 'From the Will Theory to the Principle of Private Autonomy: Lon Fuller's Consideration and Form', *Colum. L. Rev.* 100 (2000), and are still professed by E. J. Weinrib, *The Idea of Private Law* (Oxford University Press, 1995).

[3] The stress on the enforcement of contracts and protection of property as the main component of the rule of law was particularly strong in the early 90s; today the hierarchy remains: '*Rule of law captures perceptions of the extent to which agents have confidence in and abide by the rules of society, and in particular the quality of contract enforcement, property rights, the police, and the courts, as well as the likelihood of crime and violence*.' See http://info.worldbank.org/governance/wgi/pdf/rl.pdf.

[4] Daniela Caruso, '(Qu'Ils Mangent Des Contrats) Rethinking Justice in EU Contract Law', SSRN 2013.

whole – co-instituting in this way a particular kind of society in different historical periods.[5] These shared pre-understandings ensure that the law and legal discourse tend to support, rather than subvert, the tenets (if not particulars) of socio-economic organization. However, by uncovering this entanglement we unearth a potential subversive role for the law: to the extent that the law and legal discourse unsettle the shared pre-understandings as to the relation between the subject and the social whole, or, in different words, offer different imaginaries as to the role of the law in society, a far broader shift in social imaginary may ensue.

To develop this argument, this chapter relies on the concept social imaginaries,[6] that is to say, '*the ways people imagine their social existence, how they fit together with others, how things go on between them and their fellows, the expectations that are normally met, and the deeper normative notions and images that underlie these expectations*.'[7] In the first part of the chapter, I develop a theoretical account arguing that different economic, political and legal discourses converge around shared, and historically determined, pre-understandings (social imaginaries) as to what constitutes the socio-economic whole, and who and how can act on it.

I thicken this account by drawing on the transformations of private law as a response to different imaginaries of economy, politics and society in the last two centuries. I present three basic socio-economic imaginaries (the birth of political economy; the market as a political project and finally the market as means of rationalisation), and show the ways in which these imaginaries have analogues in supportive legal imaginaries, rules and practices – even if legal discourse may have been blind to its dependence on wider social imaginaries.[8]

In the second part of the chapter, I turn to European private and in particular consumer law in order to demonstrate how a new socio-economic imaginary enters and settles in European consumer law and policy. Taking as a starting the European Commission's communications on consumer policy, I illustrate how over the last 30 years different imaginaries of the market and economy have shaped the horizons in EU consumer law. Finally, in the third and last part of the chapter, I illustrate some of the important impacts of the new economic imaginary on European private and consumer law. These include both the understanding of the subject of EPL as well as the relation of the subject to the social whole.

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[5] Cornelius Castoriadis, *The Imaginary Institution of Society* (Mit Press, 1997).

[6] The interpretation of the concept in this chapter draws on both psychoanalytic and constructivist/communitarian uses of the concept, and in particular I acknowledge debt to Castoriadis; Charles Taylor, *Modern Social Imaginaries* (Duke University Press, 2004); Sheila Jasanoff and Sang-Hyun Kim, *Dreamscapes of Modernity: Sociotechnical Imaginaries and the Fabrication of Power* (University of Chicago Press, 2015) and Ngai-Ling Sum and Bob Jessop, *Towards a Cultural Political Economy: Putting Culture in Its Place in Political Economy* (Edward Elgar Publishing, 2013).

[7] Taylor, *Modern Social Imaginaries*, 23.

[8] Atiyah and Atiyah, *The Rise and Fall of Freedom of Contract*; Betty Mensch, *Freedom of Contract as Ideology* Stanford Law Review, 1981.

When it comes to the limitation of the argument, there are several. First, the articulation of three socio-economic imaginaries against the background of the transformation of private law should not be seen as an exercise in historical reconstruction, but rather as an analytical framework that allow us to theorise the relation between the law and economy in the context of European private law. Second, the historical references are based mainly on secondary literature. For periodisation, I rely on several important contributions, including that of Duncan Kennedy[9] and Christoph Schmid.[10] Third, the focus of the chapter is on the question of how stability is maintained over time, whereby the first part of the chapter articulates how the dominant imaginaries have been institutionalised in the rules of private law. A different story needs to be told about how social change is wrought: while a prelude to this topic may be found in the second part of the chapter, which discusses the penetration of new economic imaginary in consumer law policy, social change and the law is the topic of a different and more ambitious project. The last limitation is geographical: given that the focus of the chapter is on European private law, I do not deal with the broader global history of economic or legal thought, but mainly focus the West-European debate in the last 200 years.

2. Social Imaginaries: The Bridge between Law and Economy

Social imaginaries are collectively held, and often institutionalized beliefs, ideas, images and fantasies that underwrite our lived experience.[11] They represent shared pre-understandings as to what constitutes our social existence – how do economy, society, human relations, nature and politics fit together[12]- providing a basic infrastructure for meaning-making, reducing complexity, and ordering social reality.[13] Social imaginaries are historical creatures, '*creating for each historical period its singular ways of living, seeing and making its own existence'*,[14] with its own temporalities, geographies and knowledge.

[9] D. Kennedy, 'Three Globalizations of Law and Legal Thought: 1850-2000', *The New Law and Economic Development: A Critical Appraisal* 19 (2006).

[10] Christoph U Schmid, *Die Instrumentalisierung Des Privatrechts Durch Die Europäische Union: Privatrecht Und Privatrechtskonzeptionen in Der Entwicklung Der Europäischen Integrationsverfassung*, 1. Aufl, Schriftenreihe Des Zentrums Für Europäische Rechtspolitik Der Universität Bremen (ZERP), Bd. 61 (Baden-Baden: Nomos, 2010).

[11] The reason I resort to the concept of imaginaries is at least twofold. First, having its origin in psychoanalysis, the concept builds on the recognition of the fragility of the shared, taking seriously the constitutive role of the individual imagination and leaving more space for fantasies and inconsistencies. At the same time, it is still apt to aid in the understanding as to why certain changes may be more fundamental than the others: why some lead to a new society, while the others leave us in the old world (Sum and Jessop, *Towards a Cultural Political Economy*.)

[12] For Charles Taylor, modern social imaginary stands on three pillars - the distinction between public and private spheres, the economy as a distinct sphere, and finally the idea of collective self-determination. Taylor, *Modern Social Imaginaries*.

[13] Sum and Jessop, *Towards a Cultural Political Economy*.

[14] Castoriadis, *The Imaginary Institution of Society*.

If social imaginaries present a shared basis for making sense of our social existence, they must include also imaginaries of economy, politics or law, and how they work together in the constitution of our social world. More specifically, I will argue that because economic, political and legal imaginaries find their common foundation in deeper social imaginaries, they will share similar pre-understandings at least at two different levels. First, they will share pre-understandings as to the nature of the social world, and the degree to which this world is transformable. Economic, political and legal imaginaries jointly institute the imagined boundary between the social and natural, the constructed and the given, the transformable and fixed. Second, economic, political and legal imaginaries will share similar pre-understanding as to agency in the socio-economic processes, and in particular how subjects/actors/collectivities/groups can intervene in socio-economic process to change the social whole.

An example of successful social imaginary that has set ground for the transformation of economy, politics and law is what is often referred to as neo-liberal political rationality.[15] Neoliberal imaginary has both grounded the understanding as to the appropriate social whole on which to intervene and how to do so. First, in this imaginary the social whole is mostly seen synonymous with the market (be it global, international or national). Second, the mode of intervention on this social whole is not only to optimize the functioning of existing markets, but more importantly to spread its rationalizing principles to other spheres where they were absent. Finally, in this imaginary subjects and social actors (consumers, workers, employers, trade unions etc.) have a common interest to work jointly in order to improve market functioning, achieve rationalization of social processes and improve international competitiveness.

This social imaginary has been articulated, and thus institutionalized, through various disciplinary discourses and practices. As I show in later parts of this chapter - referring to legal discourse and practice - it has found its expression in a certain understanding of the law's appropriate role on the one hand (i.e understanding law as means to facilitate and harness markets) and, on the other hand, in the way in which legal subjects have been articulated (i.e. the actors who are expected to contribute to market dynamism became the center of legal interest, and were assigned specific rights, duties, responsibilities and capacities to deliver on this goal). This is, of course, not to say that there have been no legal interventions in the EU that do not adopt a more 'interventionist' stance, such as the data protection regulation GDPR, but such interventions have remained few, and unless sufficiently institutionalized, their survival has been often under attack.[16]

[15] Mark Beeson and Ann Firth, 'Neoliberalism as a Political Rationality: Australian Public Policy since the 1980s', *Journal of Sociology* 34, no. 3 (1 December 1998): 215–31, https://doi.org/10.1177/144078339803400301.

[16] The introduction of innovation (https://ec.europa.eu/epsc/publications/strategic-notes/towards-innovation-principle-endorsed-better-regulation_en) is possibly a direct challenge to precautionary principle (https://www.politico.eu/article/consumer-protections-europe-big-business-sharks-circle/)

In what remains of the section, I articulate different transformations of private law in response to different imaginaries of economy, politics and society during the past two centuries. I will show how three different economic imaginaries have their counterparts in supportive legal imaginaries, rules and practices.

2.1. The Birth of Political Economy and Classical Legal Thought

One of the tectonic shifts that consolidated in the 18th century is the *discovery* of political economy.[17] The economy became visible as a sphere governed by a set of interdependent natural-like processes, when the 'naturality', with all its predictable law-like qualities, stemmed from modelling the social world a series of interactions between predictable (ie. rational self-interested) individuals.[18] This political economy became both the object of, and the limitation to, governmental intervention: the question of *desirability* of intervention depended in large on establishing the *possibility* of intervention: how far is economy transformable through political and legal intervention?

Among classical economists, two main answers were given to this question: on the more optimistic side, Adam Smith furthered a positive case for the market.[19] Even if he acknowledged that market processes may be sometimes disruptive, ultimately this process was a natural means to progress. The natural human propensity to self-interest and barter becomes common good in a self-regulated market.[20] Others, like Ricardo, or Malthus, took a slightly more pessimistic attitude: while market process may bring about much human suffering, foremost of the less fortunate peoples, there is little point to intervene to help them since any such change would be counter-productive.[21] If one regulates wages, it will ultimately harm the poor because it will lower employment. If one limits hours of work, it will ultimately harm those who want to work more to ensure the livelihood of their extended families. If one prohibits usury, one will see the emergence of a black market. Intervention, in fact, makes things worse; the best we can do is let the natural course of things run their course.

Both of these positions underlined the self-regulated, given or non-transformable quality of the market economy: political intervention (through the law) will either impede progress or is futile. Such naturalised views of economy were further sustained by a broader shift to 'positivisim' in social sciences, which viewed society more generally as operating on the basis

[17] In his seminar contribution, Foucault discusses the birth of political economy from Physiocrats Michel Foucault, Arnold I. Davidson, and Graham Burchell, *The Birth of Biopolitics: Lectures at the Collège de France, 1978-1979* (Springer, 2008).

[18] Ibid.

[19] Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, vol. 2 (Рипол Классик, 1817).

[20] Ibid.

[21] Thomas Robert Malthus, *An Essay on the Principle of Population: Or, A View of Its Past and Present Effects on Human Happiness* (Reeves & Turner, 1888).

of scientific laws akin to gravity.[22] This transformation has been accompanied by the development of specific technologies of observation and government, such as statistics, which enabled observing regularities in various populations, with regard to specific problems or times.[23]

At least four symmetries between this economic thought and discourse, on the one hand, and private and particularly contract law on the other, are observable during the 'classical' period. By observing these symmetries, then, we can infer the shared pre-understandings that make these two spheres, so to speak, work to maintain the existing social order – even if they may not be seen as linked.

First, the naturalism that spanned market thinking also spanned private law.[24] If the naturalised imaginaries of market hinged on the predictability of its operation, insofar those could be scientifically deduced from a vision of social order that hinges on the rational (and natural) behaviour of self-interested individuals, we see a similar naturalising tendency reflected in deductive character of private and contract law. Quite contrary to public law,[25] private law could have been inferred rationally from the higher natural principles such as individualism and free will,[26] by scholars or experts rather than through a political process. On the same basis the private law claimed universality, justified both by belief in the generality of such deductive exercises as well one naturalised understanding of the individual and (corrective) justice.[27]

Second, both market and private law imaginaries have had similar *subject* in mind. They both rely on the subject that is autonomous, formally free individual, who must be ready to carry the consequences of her actions in the marketplace. Such individuals were expected to deliver public benefit by looking after his own affairs (private vice, public virtue) – while he, instead of any public authority, is trusted to know his own interest best. In this sense, safeguarding individual liberty became important both as a matter of political theory, political economy and law.

We may find the third parallel in the relation between the subject and the social whole as framed in both political economy and private law. The political economy of the times was an order where innumerable interactions of individuals (micro level) gave rise to a certain

[22] Auguste Comte, *The Positive Philosophy of Auguste Comte* (Calvin Blanchard, 1855).

[23] Alain Desrosières, 'How to Make Things Which Hold Together: Social Science, Statistics and the State', in *Discourses on Society* (Springer, 1990), 195–218.

[24] Gordley, *The Philosophical Origins of Modern Contract Doctrine*, 218.

[25] Kennedy, 'Three Globalizations of Law and Legal Thought'.

[26] Atiyah, *The Rise and Fall of Freedom of Contract*.

[27] Kennedy, 'Three Globalizations of Law and Legal Thought'.

natural, spontaneous (macro) order.[28] Private law quite neatly resembles this picture. The idea of free, autonomous and responsible individuals, and their wills, were to engage in their individual dances within the institutions of property and contract law – creating thus organic society bottom up, or what ordo-liberals will later call 'private law' society.[29]

Fourth, there is a common concern with dynamism in both political economy and private law. The emergence of political economy in the 18th century is closely linked to the formation of national markets, which enabled the intensified interaction across the national territory.[30] The same goes for early civil codes, such as the *Code Civil*, which were intended as both a means of market-making and nation-making.[31] The formalism and abstractness of contract law, then, not only parallels but also enables the pursuing of market dynamism.[32] As later critics of the process of 'materialisation' make clear, any de-formalisation of contract that consider the particulars of the transaction (as it concerns persons or goods) moves us out of the domain of 'pure contract'.[33]

The underlying conception of politics behind both economic and legal imaginaries in this period is that of *futility*. The naturalized conceptions of the market require as little political intervention as possible, while the logical rules of private law are not open to politics at all. What typifies imaginaries of this time is thus a shared pre-understanding of how social change takes place. While both economic thought and private law focus on the micro level social structure – the individual – be it as a pursuer of self-interest or as the formally equal subject of private law, social change is imagined as an organic bottom up process, driven by capable individuals and technological change. The role for politics - or the law – for social change is limited at most.

2.2. Market as a Political Project: The Rise of the Social in Legal Thought

In the last quarter of 19th century, there arose an increasing political and legal confidence in Europe that the state should interfere in the operation of the 'free markets'.[34] While some early interventions had already taken place in the 19th century,[35] the emergence of

[28] Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*.

[29] S. Grundmann, 'He Concept of the Private Law Society: After 50 Years of European Buisness and European Business Law', *European Review of Private Law* 2008, no. 4 (n.d.): 553–81; N.M.P. Oliveira, 'The Private Law Society and Contract Law Application', *European Review of Contract Law* 5, no. 1 (2009): 29–40.ation}

[30] Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time*, 2nd ed. (Beacon Press, 2002).

[31] Pierre Legrand, 'Against a European Civil Code', *The Modern Law Review* 60, no. 1 (1997): 44–63.

[32] Weber, *Economy and Society*.

[33] Ibid.

[34] Atiyah, *The Rise and Fall of Freedom of Contract*; Ewan McGaughey, 'The Social Role of Private Law (Otto von Gierke, 1889)', 2016.

[35] Atiyah, *The Rise and Fall of Freedom of Contract*.

unionisation and the labour movement as agents of social change greatly intensified the degree of intervention. Even if the history of labour movements across Europe differs,[36] it can be rather safely concluded that the strengthening of the labour movement has been one of the major forces driving the expansion of the franchise and the later 'social-democratisation' of politics in Western Europe.[37]

Keynesian macroeconomics,[38] which in a very important way denaturalises markets, has been perhaps one of the most obvious embodiments of the new social imaginary. Change was the socio-economic project of the time. 'We' know how economy operates and how to intervene in it: thus, political and legal intervention could be employed in order to ensure full employment and better distribution of economic benefits.[39] The re-imagination of market was also accompanied by a shift in political discourse. The concerns with justice, equality, or substantive freedom became increasingly more important: be it in response to the threat of communism, or a genuine care for social justice, the market outcomes appeared increasingly at odds with the liberal principles of freedom or equality.[40] On the side of economic thought, marginalism, and the discovery of 'marginal utility', made clear that the large inequalities of income and wealth were possibly not only morally wrong, but also economically unproductive.[41]

The imaginary of private, and contract law also fundamentally changes. Private law is increasingly seen as both the infrastructure of market economy, which sets the ground rules for the struggle among different groups and interests, as well as an institution which is distributive in its own right.[42] By the same token, scholars came to believe that changing legal infrastructure leads inexorably to changes in the economic outcomes.[43] The most visible consequence of the denaturalisation of private law was contract law's contraction. An ever greater number of fields and institutions were carved out of contract law, including labour law, social law, tenancy protection or consumer protection, constituting separate legal sub-disciplines with different values and ideologies.[44] This process of 'neo-feudalisation' of contract law, which introduced groups back into the heart of private

[36] Sheri Berman, *The Primacy of Politics: Social Democracy and the Making of Europe's Twentieth Century* (Cambridge Univ Press, 2006).

[37] Ibid.

[38] David Laidler, 'Keynes and the Birth of Modern Macroeconomics', EPRI Working Paper Series 2-2005.

[39] Nicholas Wapshott, *Keynes Hayek: The Clash That Defined Modern Economics* (WW Norton & Company, 2011).

[40] Atiyah, *The Rise and Fall of Freedom of Contract*.

[41] Emil Kauder, *History of Marginal Utility Theory* (Princeton University Press, 2015).

[42] R.L. Hale, 'Coercion and Distribution in a Supposedly Non-Coercive State', *Political Science Quarterly* 38, no. 3 (1923): 470–494; R.L. Hale, 'Force and the State: A Comparison of Political and Economic Compulsion', *Colum. L. Rev.* 35 (1935): 149; McGaughey, 'The Social Role of Private Law (Otto von Gierke, 1889)'.

[43] Ibid.

[44] Ruth Dukes, *The Labour Constitution: The Enduring Idea of Labour Law* (Oxford Monographs on Labour La, 2014); Schmid, *Die Instrumentalisierung Des Privatrechts Durch Die Europäische Union*.

ordering, was accompanied by the processes of 'materialisation' of private law.[45] That is to say, to the extent that contract law was still concerned with the individual, it was not the abstract, formally free and equal person, but rather a socially situated individual with attendant factual or material inequalities.[46] In both economic though and policy as well as private law, the socio-economic imaginary of this period comes with an important recognition of the existence of different social groups (be it that of workers, tenants, consumers or employers) and their differing interests. This represented an essential move beyond the individual of the classical period, whereby in the social political and legal intervention were focused at the meso level of groups and collectivities.

The political imaginary of the time draws on the idea that politics is a struggle and compromise among groups with different interests. The ensuing legislative intervention into private law then aims to deliver more a more balanced infrastructure for both political and economic exchange. Ultimately, this social imaginary stands on the shared pre-understanding that social change is possible, through collective action and law, including private law. The main agents of change are groups rather than individuals.

2.3. Markets as Means of Rationalisation: Facilitative Law

The critique of the post-WW2 welfare state, built on the imaginary of the social, came from both the left and the right.[47] The New Left criticised a bloated welfare state and bureaucracy, with its disempowering, colonising effects on 'lifeworld(s)'.[48] The New Right presented the state as an intrusive, authoritarian institution, constraining market forces with economically negative consequences.[49] The economic stagnation of the end of the 70s gave some credence to the arguments of the latter group, signposting what we may call the neoliberal revolution.[50]

When it comes to the imaginary of the market economy, in the 80s one perceives a certain move toward the re-naturalisation of the market, with the narrative of 'free market' and 'shock therapy' as a signpost. This return to liberalism, in its neo-liberal variant, came however with some important novelties.[51] Above and beyond the free market, as a 'private

[45] Weber, *Economy and Society*.

[46] *Ibid*. Also Friedrich Kessler, 'Contracts of Adhesion–Some Thoughts About Freedom of Contract', *Columbia Law Review* 43, no. 5 (1943): 629–642.

[47] David Harvey, *A Brief History of Neoliberalism* (Oxford University Press, 2005).

[48] J. Habermas, 'Legitimation Problems in the Modern State', *Communication and the Evolution of Society* 178 (1979).

[49] Harvey, *A Brief History of Neoliberalism*.

[50] *Ibid*.

[51] *Ibid*.

sphere' that should be left free of governmental regulation, neoliberalism was also a broader critique of state institutions. In this imaginary, 'more market' was presented as a means of rationalisation of state institutions (government failure) and economy.[52] The idea is that the introduction of competition and market incentives will rationalise (make more efficient, cost sensitive) both public institutions (new public management) and the private sphere (touching everything from privatising industries to the flexiblisation of labour).[53]

This double imaginary of the market ensured that, despite the failures of Shock Therapy and of the Washington Consensus in the 90s, a powerful neoliberal project remained intact.[54] Perhaps markets left on their own do not really work, and some level of regulation may be necessary. Yet, viewing the market as a model for shaping social relations in order achieve increased efficiencies across the social world, is a separate political project - and one broadly endorsed by politicians across the political spectrum from cca. the 2nd half of the 90s.[55]

This new imagery of the market leads to a new transformations of private law. If the perspective of private law was a micro perspective in the 'classical' period, focused on individuals, or 'meso' in the period of the 'social', focused on groups, from the end 90s law and private law turns finally to the macro perspective of facilitating the market: private law becomes one of the instruments contributing to the well-functioning market.[56] In such a framework labour law, for instance, turns into the law of the labour market.[57] The main question behind labour law is no longer about the struggle between labour and capital, or employment relations between strong employer and weaker employee. Instead, the question becomes *'what kind of normative or regulatory framework is needed in order for labour markets to function in the interests of a range of societal goals, of which efficiency is one?'*[58] The same move to the macro perspective of the market has also been observed in consumer law, mainly dominated by the EU. Thus according to Hans Micklitz, 'consumer protection law' has been turned by the EU into 'consumer law', which was more concerned with market functioning than consumer rights and protections.[59]

[52] Colin Leys, *Market-Driven Politics: Neoliberal Democracy and the Public Interest* (Verso Books, 2001).

[53] Harvey, *A Brief History of Neoliberalism*

[54] *Ibid*.

[55] Mark Beeson and Ann Firth, 'Neoliberalism as a Political Rationality: Australian Public Policy since the 1980s', *Journal of Sociology* 34, no. 3 (1 December 1998): 215–31;. David Harvey, *A Brief History of Neoliberalism* (Oxford University Press, 2005).

[56] Marija Bartl, 'Internal Market Rationality, Private Law and the Direction of the Union: Resuscitating the Market as the Object of the Political', *European Law Journal*, 2015.

[57] Dukes, *The Labour Constitution*.

[58] Dukes, *The Labour Constitution*, p. 103.

[59] H.W. Micklitz, 'The Expulsion of the Concept of Protection from the Consumer Law and the Return of Social Elements in the Civil Law: A Bittersweet Polemic', EUI WP 2012.

An important consequence of adopting the macro perspective of the market is that it comes with an implicit perception of shared interest among various groups and classes that come to constitute the (internal) market. The discourses of competitiveness, flexibility, empowerment, dynamism and progress all aim at the better utilization of all of society's resources - ultimately to the benefit of all. The conception of the subject in private law changes as well. Markets, ever more defined in the regional or global terms, need flexible and dynamic workers, who enjoy learning and moving around. The task of labour law, with its discourses of flexibility and learning, becomes then a tool to support these human virtues.[60] Equally consumer law, in order to serve its (internal) market building role well, must aim at producing rational and circumspect consumers, who are able to shop cross-border, and contribute to better (internal) market functioning.[61]

Even if the civil law codifications of the 19th century (and their later cousins), which are in force across Europe, may present a certain resistance to this market-making instrumentalism in private law,[62] there is significant disagreement as to their relevance in the face of the 'penumbra' of contract law developing in liberalised public services, or through horizontal effects of treaty freedoms or non-discrimination principles.[63]

Finally, even the justice discourse changes in this period. Fundamental to the 'third way' conception of social justice, according to Hugh Collins, is the abandonment of a goal of relative equality among citizens, the equality of distributive outcomes.[64] Instead, the concern became social inclusion, that is, '*securing a minimum level of welfare'* for each citizen, with a particular focus on members of various disadvantaged groups, so that they all may reach the necessary minimum to participate in social life.[65]

The political imaginary of the time draws on is the politics of common interest. All individuals and groups – worker, consumers, university teachers etc. – need an economy that is competitive and well-functioning. The compromises are, however, no longer the outcomes of struggle, in either economic policy or private law, but rather the outcome of rational economic assessment of what improves (Kaldor-Hicks) market efficiency. Ultimately, this social imaginary stands on the shared pre-understanding that change comes if the entire economy performs well, rationalized at a national and regional level by introducing market principles across social institutions and, internationally, by improving its competitiveness vis-

[60] Dukes, *The Labour Constitution*.

[61] Micklitz, 'The Expulsion of the Concept of Protection from the Consumer Law and the Return of Social Elements in the Civil Law'.

[62] M.W. Hesselink, 'The Politics of a European Civil Code', *European Law Journal* 10, no. 6 (2004): 675–697.

[63] Hans-W. Micklitz, 'The Visible Hand of European Regulatory Private Law—the Transformation of European Private Law from Autonomy to Functionalism in Competition and Regulation', *Yearbook of European Law* 28, no. 1 (2009): 3–59.

[64] Hugh Collins, 'Discrimination, Equality and Social Inclusion', *The Modern Law Review* 66, no. 1 (2003): 16–43.

[65] Ibid, p. 22.

à-vis other global competitors. Notably, if the recent attempts to spread deep Free Trade Agreements, such as the TTIP, that is the FTA between the EU and the US, can be seen as attempts to expand 'market rationalizing' principles to global trade, making them more akin to national and regional modes of market regulation. However, the more recent discursive strengthening of mercantilism in international trade policy, which came with the current US administration, goes back to underscoring competition and quid-pro-quo.

3. Socio-Economic Imaginaries in European Consumer Policy

If the previous section discussed the symmetries between the economic thought and policy on the one hand, and private law discourse and rules on the other, establishing the shared pre-understandings of how economy, the law and politics coalesce, this section focuses on describing the transition from the imaginary of the market as a political project to the imaginary of the market as means of rationalisation in the EU.

The proxy used is the Communications on consumer policy of the European Commission from early 80s. Behind these policies, of course, there will have been struggles between actors with differing agendas, within and from without the European Commission, and these policies have been received differently by the disparate audiences to which they were directed. However, what these documents expose dazzlingly is the language, and the underlying imaginary, that the EU Commission used in order to achieve broader political support for its policy objectives.

When considering the interactions between market imaginaries and private law imaginaries in the EU, one must account for one specifically EU complication. The first question is how did the shift in the representations of the market transform EU consumer law? The second is what specific role, if any, has been played by an EU-specific imaginary of the *internal* market? The latter requires a deal of sensitivity to the institutional and substantive constraints under which the EU operates, for they may have considerable implications for the way the EU constructs the idea of the market.

Indeed, EU consumer protection law has always been «the law of the internal market», at least in name.[66] Given the limited competences of the EU in the field of private law, European consumer legislation has been based on the 'internal market' legal basis (today art. 114 TFEU) from its inception. Yet, what I try to show in the following lines is that the entire 'world' may change while we still safely remain under the veil of internal market.

The first steps in consumer policy were taken from the 70s. However, the first official Commission consumer programme dates to 1981:

[66] Christoph U. Schmid, 'The Instrumentalist Conception of the Acquis Communautaire in Consumer Law and Its Implications on A European Contract Law Code', *European Review of Contract Law* 1, no. 2 (July 2005): 211–27.

> *Community is primarily concerned with the need to enable the consumer to act with **full knowledge of the facts**, and to hold the **balance between market forces**. To do this, he must be able to exercise the **five basic rights**, which the preliminary programme conferred on him. They are: the right to protection of health and safety; the right to protection of economic interests; the right of redress; the right to information and education; and the right of representation (the right to be heard).*[67]

While not quite as ambitious as later communications, the 1981 Programme still imagines private law in conflictual terms, a law of interest and struggle. Consumers are expected to safeguard their interests, and, to that effect, they are equipped with consumer rights. This image corresponds to the socio-economic imaginary of the social, where it is struggle, and conflict, that 'balance' market powers.

In the 1991 Commission Consumer Programme, the first after the Single European Act, the Commission elaborates the link between the internal market and consumer policy:

> *In 1985 a programme was launched to give **a new impetus** to consumer policy. This **coincided with the publication of the White Paper on the Internal Market** and Increased consciousness of the importance of addressing consumer concerns in the concentrated preparations for the Internal Market.*[68]

The Communication goes on to articulate how these rights (similar to those from 1981) will be delivered. First, when it comes to **consumer representation**, the Commission is interested in ensuring full representation of consumers in policy making, as well as providing the support (including financing!) for the establishment of strong consumer organization, which could fight for consumers' interests. *Qua* **consumer information**, the Commission aims to provide consumers with an 'information service', focusing on delivering information from various sources. Other matters that need to be taken care of are **transparency**, including addressing concerns about biotechnology, through labelling. Finally, the Commission aims to take action in **Comparative Testing**.

While in this programme the Commission draws a clear link between the internal market and consumer protection, the imaginary of the market, and consumer interests and rights underpinning it, are still understood in terms of conflict. The Commission goes even so far as to contemplate financing the emergence of strong consumer associations, which could effectively fight for consumer interests. Additionally, the provision of information is still

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[67] See Coucil Resolution on a second programme of the European Economic Community for a consumerprotection and information policy, 19th May 1981. Available at http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31981Y0603(01)&from=EN

[68] COM (90) 98 final, Three Year Action Plan for Consumer Policy in the EEC, Available at: http://aei.pitt.edu/3712/1/3712.pdf

framed in terms of public obligations,[69] including provision of factual information coming 'from various sources' (e.g. '*Sales promotion information is not of itself a sufficient basis for decision making for significant purchases'*). Thus, while the Commission's position may be underpinned by the 'stakeholder' understanding of democracy, it is less 'managed' in comparison with what is to come later. In other words, the conflictual nature of 'common good' is still beyond doubt.

The Consumer Agenda from 1998 moves already toward a less conflictual representation of the market. Consumers, in the changing world (globalisation and IT), need to become aware of 'inter-linkages' between their interests and the interests of other stakeholders:

> *A **new influence for consumer policy** that will have to be matched by a **new maturity on the part of consumers and their representatives**. If consumers are to play their role fully as equal stakeholders in society, they need to understand the **inter-linkages** between their **interests** and those of others (...) More specifically, as interests become more inter-linked, interactions need to be characterised by increased **cooperation**. Sometimes the respective interests of consumers and other groups will be mutually reinforcing, sometimes they will not and **tradeoffs** will have to be found. Consumers themselves can recognise and **accept such trade-offs** because they are not only consumers but **taxpayers, employees and beneficiaries of public policies too.** They can also accept that they have responsibilities and that their **immediate interests as consumers have to be reconciled with longer-term concerns for the environment and society**. EU consumer policy should therefore ensure that **consumer interests are equitably reconciled with those of other stakeholders**. This reconciliation of interests will usually be **a positive-sum game**.*[70]

Now, what is striking about this document is a clear shift toward the macro perspective of the market, and the discourse of common interest. The Commission makes consumers responsible for concerns that transcend their narrow group interests, and invites them to take seriously the interests of other stakeholders, among which also businesses, considered that they are both taxpayers and employees. Moreover, this willingness to accept trade-offs is in the direct interest of consumers, insofar such cooperation presents a 'positive-sum game'. The market enlarges the size of the pie. This new mandated cooperative attitude to be expected from consumer representatives is particularly striking given that many of those

[69] interestingly, the focus on information duties as means to overcome 'market failures' have been present from the 80s in the consumer credit directive, which was administered by the DG Market, instead of DG consumer protection. Stefan Grundmann, 'Information, Party Autonomy and Economic Agents in European Contract Law', *Common Market L. Rev.* 39 (2002).

[70] COM ((1998) 696 final, Consumer Policy Action Plan 1999-2001, available at http://aei.pitt.edu/6657/1/6657.pdf.

consumer representatives are financed by the EU.[71] Last but not least, it is in this consumer programme that we also see the birth of a famous concept of 'consumer confidence', which is to dominate the EU interventions later.[72]

Just three years later, the **2001 Green Paper** constitutes an important shift in the re-thinking of the (internal) market imaginary

> It is the cross-border movement of goods and services that allows consumers to **search out bargains** and innovative products and services and thus ensures that they **optimise their consumption decisions**. This cross-border demand **increases competitive pressure within the internal market** and allows for a more efficient and competitively priced supply of goods and services. This **virtuous circle** can only be achieved if the regulatory framework in place **encourages consumers and businesses to engage in cross-border trade**. **Different national laws** on commercial practices relating to business–consumer relations **can hinder this evolution.**[73]

In the 2001 Communication two important things occur. First, the Commission proposes a distinct internal market imaginary, re-interpreting the diversity of private laws as barrier to intra-community trade. Thus, the internal market becomes an important framework in its own right. Furthermore, the Commission introduces 'costs and benefits' language into the equation, when cost benefit analysis with its welfare economics background clearly points to a market perspective to resolve questions of consumer law.

The second crucial change is an explicit concern with subjectivities. Consumers should be encouraged to optimise their consumption decisions (become more cost rational) and thus improve overall market competitiveness in its cross-border dimension and, consequently, benefit from better prices and better services. This is presented as the natural outcome of rational consumer behaviour in competitive markets. Most importantly, regulatory frameworks should encourage consumers to behave in such a way. Ultimately, this is for consumers' benefit insofar as the 'virtuous circle' of competitiveness is in the common interest.

The more current *air du temps* is captured by the last **Consumer Agenda 2012:**

> *1. Consumer policy as an **essential contribution to Europe 2020***

[71] For one of the programs see: http://ec.europa.eu/chafea/consumers/funding/calls-for-tenders/tender-04-2018_en.htm.

[72] T. Wilhelmsson, 'The Abuse of the "Confident Consumer" as a Justification for EC Consumer Law', *Journal of Consumer Policy* 27, no. 3 (2004): 317–337.

[73] COM (2001) 531 final, 'Green Paper on European Union Consumer Protection', available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52001DC0531&from=EN

> *Consumer expenditure accounts for 56% of EU GDP and is essential to meeting the Europe 2020 objective of smart, inclusive and sustainable growth.* ***Stimulating this demand*** *can play a major role* ***in bringing the EU out of the crisis****. To make this possible, the potential of the Single Market must be realised. Data show that consumers* ***shopping online*** *across the EU have up to 16 times more products from which to choose, but* ***60% of consumers do not yet use this retail channel****. As a result of this* ***reluctance****, they do not fully benefit from the variety of choice and price differences available in the Single Market.* ***Improving consumer confidence in cross-border shopping*** *online by taking appropriate policy action could provide* ***a major boost to economic growth in Europe. Empowered and confident consumers can drive forward the European economy.***[74]

The document views consumer law and policy as a market-making tool. Consumer law is clearly linked to macro perspective of the market, and its purpose is to stimulate demand and bring about economic growth, which is obviously in the common interest. Consumers have a distinctive *responsibility* to contribute to this project and 'drive forward the EU economy', mainly through shopping online – the core internal market imaginary in recent years. 'Protection' plays a marginal role in this narrative: the language is about confidence and empowerment, which are directed toward market-making rather than with any concern for consumer protection. More recently, the Commission has even started using slogans such as 'Justice for Growth' in order to promote further initiatives of the DG Justice in the field of consumer protection.[75]

4. Socio-Economic Imaginaries and the Transformation of European Consumer Law

What are the hard law consequences of this shift in the underlying imaginary of the (internal) market for consumer protection in the EU? This an important question insofar as EU consumer policy was meant originally as a social policy - the way to get closer to citizens – thus the transformation in this arena tells a lot about the ways in which the 'social' is envisaged in the EU.[76] The questions then that we will pursue below is both who is the new subject in European consumer law as well as how should that subject relate to the social whole? In different words, how much of the previous discussion actually translates into legal provisions? Given the limited space, I will pick up some of the most important critiques that

[74] COM (2012) 225 final, 'A European Consumer Agenda - Boosting confidence and growth', available at https://ec.europa.eu/commission/sites/beta-political/files/consumer_agenda_2012_en.pdf.
[75] See EU Commission Press Release http://europa.eu/rapid/press-release_MEMO-14-153_en.htm

[76] Marco Dani, 'Rehabilitating Social Conflicts in European Public Law', *European Law Journal* 18, no. 5 (2012): 621–43.

have been mounted against EU consumer law in the last decades to illustrate what consumer lawyers find problematic.

4.1. The Subject of European Consumer Law

A number of scholars have noted that the EU has considerably changed the concept of a 'person' in private law.[77] The first critiques concerned the case law of the Court of Justice of the EU (CJEU), and its concept of 'average consumer'.[78] This benchmark consumer, against whom the national law was tested, all too much resembled Smith's economic man, introducing a standard that struck down protections targeted at 'not so up-to-standard' consumers. Others critiqued the concept of the person In the EU more generally:

> *The combination of reducing persons to citizens, citizens to consumers, regarding the latter as instrumental to market building and moving towards horizontal and full harmonisation brings us very far away from contract law as a matter of justice*.[79]

In the 2000s, the new way of critique addresses the construction of internal market *useful* subjectivities. As Micklitz has noted, '*with a weak consumer in a need of protection, internal market is not feasible. Internal Market needs an active, informed and adroit consumer.*'[80] Consumer law targeted at this kind of consumers aims both to constitute a particular kind of subjectivity, and rationality,[81] which puts those who do not fit into the desired model at various kinds of disadvantages. Not only do they have to pay for the 'protections' they do not need, but also far less space and public funding is left for those activities they may profit from.[82]

Dealing with those not *Up-to-speed*

If weak consumers are not the main objective of the projection, what happens to those who fall below the 'standard'? The response to the previous question is particularly urgent because the liberalisation and privatisation of former public services makes these crucial services a subject of contract and consumer law. To deal with weak consumers, the has EU

[77] Schmid, *Die Instrumentalisierung Des Privatrechts Durch Die Europäische Union*.

[78] R. Incardona and C. Poncibò, 'The Average Consumer, the Unfair Commercial Practices Directive, and the Cognitive Revolution', *Journal of Consumer Policy* 30, no. 1 (2007): 21–38.

[79] M. Hesselink, 'European Contract Law: A Matter of Consumer Protection, Citizenship, or Justice?', SSRN 2006, p. 41.

[80] Micklitz, 'The Expulsion of the Concept of Protection from the Consumer Law and the Return of Social Elements in the Civil Law', 7.

[81] Marija Bartl, 'Internal Market Rationality, Private Law and the Direction of the Union: Resuscitating the Market as the Object of the Political', *European Law Journal*, 2015.

[82] Geraint Howells, 'The Potential and Limits of Consumer Empowerment by Information', *Journal of Law and Society* 32, no. 3 (2005): 349–370.; Oren Bar-Gill and Omri Ben-Shahar, 'Regulatory Techniques in Consumer Protection: A Critique of European Consumer Contract Law', *University of Chicago Institute for Law & Economics Olin Research Paper*, no. 598 (2012).

introduced a concept of 'vulnerable consumer', sometime in the mid-2000s. The concept can be found in 'regulated markets' (*In this context, each Member State shall define the concept of vulnerable customers which may refer to energy poverty*[83]), but it is also penetrating more general consumer law (the Unfair Consumer Practices Directive: *'consumers particularly vulnerable to the practice or the underlying product because of their mental or physical infirmity, age or credulity'*[84]).

Many authors have invested hopes in this concept as means to ensure a more socially minded consumer law, in particular if linked to the concept of 'affordability'.[85] Yet, this confidence may be somewhat premature, for three reasons. First, while the term features in various policy documents, it finds very little bite in practice. For instance, the third energy package, one of the most important venues where the concept can be found, defines the obligations of Member States (MS) toward vulnerable consumers as follows: define the concept of vulnerable consumer, prohibit the disconnections of vulnerable consumers in critical times, ensure the transparency of contractual terms; ensure that an independent dispute settlement mechanism is put in ensure a single point of contact for any problems consumers might face.[86] Yet, if targeted particularly at vulnerable consumers, these do not seem as particularly well targeted. The only *substantive* obligation toward vulnerable consumers is the prohibition of disconnection in critical times (itself an inspiration taken from the UK). As for the rest, providing formal rights of access, the transparency of contract terms, or contact points or dispute settlement mechanisms are all measures that are less than ideal (as the Commission itself notes) for addressing the needs of *vulnerable* consumers.[87]

Second, to the extent that the concept of affordability should play a role, it comes with little actual enforceable claims, rights or remedies for consumers. Instead, the MS are only encouraged to rely on social protection systems or energy efficiency improvements in providing protection.[88] Measures that are potentially more effective for ensuring the 'affordability' of energy supply that goes further than just 'competitive price' - such as 'social tariffs' or 'default tariffs' – are actively discouraged.[89]

4.2. The Relation of the Subject to the Social Whole

Focus on Information

[83] Directive 2005/29/EC on Unfair Business-to-Consumers Practices, Recital 7.

[84] Ibid, art 5.3.

[85] H.W. Micklitz, *Universal Services: Nucleus for a Social European Private Law* (EUI WP 2009).

[86] Bartl, 'The Affordability of Energy.'

[87] *Ibid* 3,5.

[88] Directive 2009/72/EC, Electricity Directive (Third Package). See for instance Recital 45 or the Art 3/8.

[89] Bartl, 'The Affordability of Energy'.

In European Consumer Law, very few developments mark the shift to a different socio-economic imaginary as the increased focus on 'information provision'.[90] While in the first decades of EU policy, the consumers were meant to receive information from public sources, in order to be equipped to engage with other market actors[91], the later approach turns toward the provision of information by the providers of goods or services themselves.

The shift toward the provision of information as a core instrument in EU consumer policy was justified by the double service they may perform: provision of information empowers consumers, making them aware what kind of goods or services they are purchasing.[92] At the same time, reducing information asymmetries between consumers and sellers is an important way how to improve market functioning.[93]

The enthusiasm for this governance tool holds still strong in the EU policy, despite criticisms.[94] Quite illustratively, if the last Consumer Agenda consists of sixteen pages, the policy paper 'Knowledge enhancing aspects of consumer empowerment' runs to thirty-two pages. But even in the Consumer Agenda itself, the information duties receive considerable more space than, for instance, 'vulnerable consumers'.[95]

In terms of distributional effects, this is a rather questionable choice. As a matter of general consumer policy, the information provision does a poor job in either cleaning the markets or empowering consumers.[96] Considerable amount of scholarship in behavioural psychology and behavioural economics shows this point – an issue that the Commission itself acknowledges in the "Knowledge Enhancing" policy document.[97] What is more, however, the focus on information duties is a policy with sharply negative redistributive consequences. Those less well of consumers are going to be disproportionality less able to make use of these mechanisms.[98]

Concerns for Access take prominence

Another important shift that we observe with the move toward the new socio-economic imaginary is the increased concern with *access* to markets, which takes precedence over

[90] Howells, 'The Potential and Limits of Consumer Empowerment by Information'.

[91] See the previous section referring to Consumer policies 1981 and 1991.

[92] European Commission, 'Commission Staff Working Document : On Knowledge Enhancing Aspects of Consumer Empowerment, SWD(2012) 235 Final'.

[93] Ibid.

[94] Not only scholars and consumer associations, but also the Commission itself has recognized the limits of the information paradigm. See European Commission, 'On Knowledge Enhancing Aspects of Consumer Empowerment'.

[95] Ibid.

[96] Bar-Gill and Ben-Shahar, 'Regulatory Techniques in Consumer Protection'.

[97] European Commission, 'On Knowledge Enhancing Aspects of Consumer Empowerment'

[98] Bar-Gill and Ben-Shahar, 'Regulatory Techniques in Consumer Protection'.

other concerns, such as social justice or affordability. Access has gained prominence with the liberalisation and privatisation of formerly public utility sectors, such as telecom, gas, electricity, postal services, public transport, insofar the state can not guarantee the access anymore. [99] A similar concern with access also underpins the horizontal dimension of the principle of non-discrimination – namely ensuring a non-discriminatory access across the sale of goods, provision of services, or the labour market.[100]

An increased interest in access merges two distinct normative concerns – while in principle concerned with 'not leaving anyone behind', the concern with access is also able to contribute to the internal market commitments by increasing market dynamism. Ideally, all consumers should be 'confident consumers' reaping internal market benefits, part of the mobile workforce moving flexibly where market needs are, or learning skills that market requires.[101]

What makes the concern with access resonate with the new socio-economic imaginary is that access and access justice is essentially a procedural device, that endorses a 'hands off' approach from the market itself, particularly handy within the context of the EU.[102] As Somek observes, 'w*hat matters is that nobody is barred from availing oneself of an opportunity while it is taken for granted that the existence of the opportunity itself does not raise any questions of justice.'*[103]

Several distributional consequences stem from the concern. To the extent that it becomes a substitute for welfare state, and thus could be seen as able to substitute or override some of its redistributive policy instruments, it may present a threat to "solidaristic" understanding of private law in the EU. Equally, the concern with access may yield regressive outcomes if we taken into account the possible cross-subsidization of its relatively sophisticated beneficiaries by the less well-off consumers.[104]

[99] P. Rott, 'A New Social Contract Law for Public services?–Consequences from Regulation of Services of General Economic Interest in the EC,' (2005) 1 *European Review of Contract Law*.

[100] Micklitz, *Social Justice and Access Justice in Private Law*.

[101] H.W. Micklitz, 'Failure or Ideological Preconceptions–Thoughts on Two Grand Projects', 2010. In labour law, the question of inclusion/exclusion was one of the main justifications (also from the Left) to justify the lowering of labour protections for those with, for instance, permanent contracts.

[102] Alexander Somek, 'From Workers to Migrants, from Distributive Justice to Inclusion: Exploring the Changing Social Democratic Imagination', *European Law Journal* 18, no. 5 (2012): 711–726.

[103] A. Somek, 'From Workers to Migrants, from Distributive Justice to Inclusion'.

[104] O. Ben-Shahar, 'The Uneasy Case for Equal Access Law', (SSRN, 2013).

5. Conclusion: Rationalisation and Common Interest

Early neoliberal discourse has in many different ways re-naturalised markets: some of the most egregious examples of such thinking were Washington Consensus on the one hand[105] and Shock Therapy on the other.[106] Yet while idea that markets are self-regulating entities out there have become discredited, from the 90s there has been a growing consensus across the political spectrum as to the epistemic-normative case for the market.[107] Market became seen as a means of rationalisation of social life: improving the allocation of scarce recourses by introducing competition and incentives across private and public institutions.

This representation of market as means of rationalisation has had several important consequences in private law. First, we have seen the re-interpretation of the fields such as labour law, or consumer protection, in macro terms of the market. Such reimagining rests on the idea of common interest: there is limited need for struggle between groups (between labour and capital, between producers and consumers), insofar they are all joint in creating a virtuous circle of competitiveness, and economic growth, that would make the EU the most competitive knowledge economy in the world.

Second, if market-incentives are seen a best way of enhancing the rationality of allocation of scarce resources, the interventions should be supportive - rather than undermining – of market principles. We thus see a certain type of interventions gaining upper hand in private law: (information duties, labelling, or various procedural rights), while recourse to social security (tax) seems to be the choice in areas where the provision of services is essential.

Third, insofar markets need 'participants' to function, the private law legislation will focus both on encouraging participation and access, as well as model laws on those who are market-useful. It is the flexible worker and confident consumer – rather than weak consumer and protected employee – who are the main addressee of legislation; the weak consumers will have to be accommodated through special provisions on access or vulnerability. The competent consumers and flexible workers also carry both particular responsibilities, insofar as market regulation is dependent on their correct functioning.

Yet the responsibilities that these new subjects have are different to those of autonomous or responsible individuals of the 19th century. Classical contract law's subjects carried the responsibility for the contracts they concluded. At the same time their choices were epistemically prior to those of the 'public' when it comes to the choice of goals – they were the best judges of their own interest only. Today, however, workers and consumers are not trusted to choose the right goals and preferences. Instead they are increasingly made

[105] Andrew Lang, *World Trade Law after Neoliberalism: Reimagining the Global Economic Order* (Oxford University Press, 2011).

[106] Martin Myant, 'The Rise and Fall of Czech Capitalism', *Books*, 2003.

[107] Harvey, *A Brief History of Neoliberalism*.

responsible for market making, through switching providers and changing jobs, ensuring competitiveness and dynamism.

Finally, what seems to be of major political significance is that private law on the one hand, and market on the other, are progressively freed of conflict in the new socio-economic imaginary. Market is not any more a playground of genuine conflict between various groups, but rather a space where one is struggling against a (vulgarised) versions of 'efficiency' or part of a 'managed' conflict in Commission's stakeholder democracy. To the extent that it is still spoken of conflicts, for instance in front of the courts, the struggles are often framed as a conflict between labour vs. efficiency (*Porto de Genova, Viking*)[108], or consumer protection vs. free circulation of goods, taking ultimately capital and material conflict out of equation.

[108] Case C-179/90, *Merci convenzionali porto di Genova SpA v Siderurgica Gabrielli SpA*; Case C-438/05, *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti*.