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ARTICLE

Smart Contracts, Consumer Protection, and Competing European Narratives of Private Law

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Abstract
The author makes brief Considerations on the Treatment of the Theme of the Relationship Between New Technologies and Private Law. In particular, she believes that the criticism of Lessig's statement according to which "the values of real-space sovereigns will at first lose out" is correct, adding, however, that one must monitor the evolution of new technologies. We are, in fact, at the crossroads of a technological revolution which, as jurists, we are not able to fully understand. The author also questions the position taken in the volume on the US neoliberal approach v. European solidarity approach, inviting the authors to question the difference between the narrative that sees the European system as all about ensuring solidarity and the reality about the economic thinking that informs the different disciplines. Finally, she takes a position on the relationship between ordoliberalism and consumer protection.

Keywords New Technologies; contract; Ordoliberalism; consumer protection; european solidarity approach

A. Introduction

When reading *New Private Law Theory*, the first impression is that of being confronted with a goldmine of information. The authors provide us with the lenses through which, in different cultural contexts, the object of our work—private law—has been looked at. They deal with all the main perspectives of observation. The intellectual effort invested in this volume is certainly exceptional. The result can only be of great interest to private practitioners and others. It is an educated book, and therefore, it is full of thoughtprovoking elements. The attempt of finding a single thread would be reductionist of the work, which seeks to convey, and succeeds in doing so, the idea of pluralism and complexity of approaches internal and external to the law. This complexity must be first and foremost known and digested. A complexity from which it is possible to draw an articulated theory that hinges on the interplay between the ocean of knowledge and the constitution of the legal system. A mosaic theory—the authors tell us—is characterized "by the fact that it is built from many single pieces of different colors, shapes and origins, yet the pieces that contribute to one design."[1]

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[1]Stefan Grundmann, Hans-W Micklitz & Moritz Renner, New Private Law Theory: A Pluralist Approach 2 (2021).

It is impossible here to interact with all the cultural stimuli and thus to construct, hypothetically, a different mosaic from the one constructed by the three authors. Just as it is impossible, given the space available, to verify the coherence between all the pieces of the mosaic. What can be done here is only to interact with the individual pieces, entering into a dialogue with the authors.

I shall therefore limit myself only to: First, make brief remarks on the treatment of the topic concerning the relationship between new technologies and private law; second, ask a question; and third, offer a piece of data that might strengthen one of the positions expressed by the authors.

B. Brief Remarks on the Treatment of the Relationship Between New Technologies and Private Law

I would like, first of all, to express my appreciation for the fact that the authors devoted a chapter—the sixteenth—to the relationship of law with new technologies and the effect they may have on the law of private individuals, hence, keeping faith to their promise of ambition to reconstruct a theory open to confrontation with other fields of knowledge. The chapter is, in fact, also dedicated to the plausibility of Lessig's thesis according to which "Code is Law."

The statement that "code and law may compete with each other, but it should not be forgotten that states might compete with corporations, various business groups with civil society" is very convincing.[2] One might wonder, however, whether we are not in the presence of a phenomenon that is qualitatively and quantitatively different from the others with which the law historically had to compete. There are movements, in fact, that claim to use the new technologies to undermine the existing order, to exclude the very idea of a constituted law and to have a new democracy—think, for example, of the socio-cultural, cryptoanarchic, *cypherpunk* movement. There are also authors—as will be said—who consider some of the new technologies to be an alternative to contract law.

It must be understood how successful such movements can be and whether law can still play a role in the world that lies ahead. To do this, the influence of the different technologies must be analyzed separately. Indeed, Artificial Intelligence (AI) poses different types of problems than those posed by Digital Ledger Technology (DLT). Here I will only consider Smart Contracts and DLT technologies. In the text Hans-W. Micklitz believes that Lessig is wrong in stating that, "the values of realspace sovereigns will at first lose out."[3] I believe that Micklitz's position is correct; and I would add that not only realspace but also law have not—at least not yet—lost their reason for existing.

I will try here to clarify why I believe there is still room for contract law in the world of DLT and Smart Contracts. DLT refers to computer technologies and protocols that use a shared, distributed, replicable, simultaneously accessible, architecturally decentralized register on a cryptographic basis, such that data can be recorded, validated, updated and stored both in plaintext and with further protection of an encryption in a way that makes them verifiable by each participant, while not alterable and not modifiable.

By Smart Contracts I mean computer programs that operate on the basis of DLT and whose execution automatically binds two or more parties on the basis of effects they have previously defined. Smart Contracts were first theorized by Nick Szabo in a 1994 post and three articles published in 1997 and 1998, in which the author used a vending machine as a starting point to describe the transfer of certain utilities as execution of an algorithm.[4]

[2] *See id.* at 307.

[3] *Id.*

[4] See Nick Szabo, Smart Contracts, https://www.fon.hum.uva.nl/rob/Courses/InformationInSpeech/CDROM/Literature/LOTwinterschool2006/szabo.best.vwh.net/smart.contracts.html; Nick Szabo, Formalising and Securing Relationships on Public Networks, 2 First Monday 9 (1997), https://firstmonday.org/article/view/548/469; Nick Szabo, The Idea of Smart Contracts, Satoshi Nakamoto Inst. (1997), https://nakamotoinstitute.org/the-idea-of-smart-contracts/; Nick Szabo, Secure Property Titles with Owner Authority, Satoshi Nakamoto Inst. (1998), https://nakamotoinstitute.org/secure-property-titles/.

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In the 1994 post, Szabo writes that "[a] smart contract is a computerized transaction protocol that executes the terms of a contract" and that "the general objectives of smart contract design are to execute common contract conditions."[5] The glossary used by Szabo, in the 1994 post is as follows.

> A smart contract is a computerized transaction protocol that executes the terms of a contract. The general objectives of smart contract design are to satisfy common contractual conditions (such as payment terms, liens, confidentiality, and even enforcement), minimize exceptions both malicious and accidental, and minimize the need for trusted intermediaries. Related economic goals include lowering fraud loss, arbitration and enforcement costs, and other transaction costs. Some technologies that exist today can be considered as crude smart contracts, for example POS terminals and cards, EDI, and algoric allocation of public network bandwidth.[6]

According to Szabo, then, the Smart Contract was not a contract but only a code suitable for executing a contract.[7] Szabo's Smart Contracts did not refer to DLT. Smart Contracts may, in fact, not run on DLTs. Smart Contracts were originally just thought of as algorithms that would prevent the parties from choosing whether or not to perform. In other words, as algorithms that entrusted machines with the task of assuring performance.

Today, instead, Smart Contracts are generally transaction protocols, which may concern the phase of conclusion and execution of a contract, only the execution of a contract or even the execution of protocols that have nothing to do with the contract. For example, an algorithm that adjusts the home temperature inside as the outside temperature changes is a Smart Contract. A Smart Contract is also an algorithm that executes a contract concluded in the traditional way, for example via the Internet or other communication or telecommunication tools. The telematic contract, even one that results in a transfer of a software, for example, an operation that does not require movement outside the network, is now concluded separately from the code that executes it. We therefore, have a contract concluded via the Internet and a Smart Contract for performance. Through the Smart Contract, in other words, it is possible to perform even only part of an obligation of a contract concluded in different way. Smart Contracts are therefore of various types.[8]

Here I will only consider Smart Contracts that run on DLT and enable both the conclusion and the execution of the transaction, for example, Smart Contracts that can be qualified as contracts from a legal point of view.[9]

DLT allows for disintermediation. The parties come into direct contact with each other and there is no third party to impede the performance. An operation of nonperformance which, within certain limits to be discussed in a moment, is also precluded to the parties themselves. In other words, by entrusting the conclusion of the agreement and its performance to DLT, nonperformance is

[5]Szabo, *Smart Contacts, supra* note 4.

[6]*Id.* at "Glossary."

[7]*See* Tatiana Cutts, *Smart Contracts and Consumers*, 122 W. Va. L. Rev. 2 (2019), https://ssrn.com/abstract=3354272.

[8]*See also The European Union Blockchain Observatory and Forum*, Legal and Regulatory Framework of Blockchains and Smart Contracts 22 & 25 (2019), https://www.eublockchainforum.eu/sites/default/files/reports/report_legal_v1.0.pdf

> Smart contracts can be used to do a lot of interesting things. They are used for tokenisation, and so are the engines behind cryptocurrencies and other digital assets. They can be used to code and automate business processes that can be shared and executed among multiple parties offering increased trust and reliability in the process, often with significant gains in efficiency and cost reduction. Similarly, you can use smart contracts to hard code agreements between parties involving value and other types of asset transfer, like escrow agreements or payment vs delivery or more complex agreements, and have them be very transparent and run automatically based on predetermined conditions, making it difficult or impossible for a party to back out ... Smart contracts in the larger sense of self-executing programs run on a blockchain can be used for more things than just agreements between parties.

[9]This question cannot be explored further here. *See* Marisaria Maugeri, Smart Contracts e Disciplina dei Contratti: Smart Contracts and Contract Law [Smart Contracts and Discipline of Contracts: Smart Contracts and Contract Law] (2020) (the volume contains both the Italian and English versions).

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prevented because human intervention can no longer intervene to block performance. On the subject of Smart Contracts, which run on DLT, some authors have argued that, besides the abstract possibility of qualifying Smart Contracts as contracts, it would be precisely their technical characteristics that would exclude, in whole or in part, the concrete possibility of applying the general rules. I refer, first of all, to the doctrine according to which Smart Contracts do not need law because they are themselves an alternative to contract law, which is therefore destined to disappear.[10]

According to this thesis, which takes up Lessig's idea, the "Code is Law"[11] and the "Smart Contract," could never present problems with non-execution, and, even if they were vitiated by fraud or violence or were in any case invalid, they could never lead to modifying the Blockchain database *ex post*, regardless of the cost of undermining the very functioning of the latter. The author, indeed, admits that there may be actions for compensation either with or without restitution but, first, considers that these are unlikely, given the difficulty of identifying the parties, and, second, reiterates that they could never affect the functioning of the Blockchain anyway.

The thesis cannot be accepted not only because, as I shall explain in more detail in a moment, it is not entirely true that the Smart Contract always guarantees proper performance but, above all, even if one were to accept the idea that a remedy apparatus affecting the Blockchain in a coercive manner, in addition to not being technically possible at present, it would also be completely distorted with respect to the functioning of the latter—there would be no reason to exclude remedies which would be placed outside the aforementioned Blockchain. There is, in fact, no evidence that the interests that have historically justified the existence of the disciplines on contracts have disappeared—among others, the interest in not having a circulation of wealth capable of harming the economic public order, morality or the values that are protected by mandatory rules—nor that it is impossible to use remedies other than those of the modification of the transactions recorded on the Blockchain.[12] This means, for example, that if one of the parties refuses to return what it

[10] *See* Alexander Savelyev, *Contract Law 2.0: "Smart" Contracts as the Beginning of the End of Classic Contract Law*, 21 NAT'L RSCH. UNIV. HIGHER SCH. OF ECON. RSCH. PAPER NO. WP BRP 71/LAW/2016 (2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2885241#

> Smart contracts . . . may operate without any overarching legal framework. De facto, they represent a technological alternative to the whole legal system. Apart from conclusions already mentioned above, it means that there is no need in conflict of laws provisions, since there are no collisions of various legal systems. Mathematics is universal human language. Thus, Smart contracts are truly transnational and executed uniformly regardless of the differences in national laws . . . . Whether it was concluded for mistake, as a result of fraudulent misrepresentation, coercion or threats, unfair exploitation of relationship of trust—it is completely irrelevant for its performance in contrast to classic contracts, where such circumstances serve as a basis for court interference in all the legal systems. Moreover, such consideration of such vitiating factors is in contradiction with the main feature of Blockchain-based databases of transactions: their 'single version of truth' for everyone. If such factors may serve as a basis for changing the content of such database post factum, it will undermine the trust in Blockchain and depreciate its value. Therefore, in Smart contracts there cannot be a collision between intent and its expression, what really matters is only an expression of intent represented in computer code. Such an approach can be viewed as a triumph of protection of the certainty and market. Of course, there is some residual possibility to apply relevant provisions on invalidity of contract and its consequences (damages claims, obligation to return everything received under the agreement, etc.). But this will be possible only if the party to the Smart contract is identified and within the jurisdictional reach of the enforcement authority. Anyway, such enforcement actions won't have impact on the content of Blockchain database, unless it is created on different principles than the currently known Blockchain in Bitcoin.

[11] LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE (1999); *see also* LAWRENCE LESSIG, CODE: VERSION 2.0 (2006).

[12] See Olaf Meyer, Stopping the Unstoppable: Termination and Unwinding of Smart Contracts, 2020 EuCML 17, 20 (2020)

> If, from the outset, there was no legal basis for performance of the contract or if such basis subsequently ceased to exist, the question arises as to how performance—that is nevertheless carried out by the computer program can subsequently be returned. In principle, this can be done in three ways. Firstly, the parties can, of course, unwind the legal contract in the old-fashioned way by refunding what they have received from the other party, be it voluntarily or with judicial coercion (1.). It would be closer to the spirit of the fully automated contract, if the termination of the contract and the mechanisms for its unwinding could also be recorded in the computer code itself and thus carried out automatically (2.). The final option, technical modifications to the smart contract in the blockchain, will only be feasible in exceptional cases (3.).

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received on the basis of an invalid agreement by creating a Smart Contract capable of executing a reverse transaction from the previous one, the judge could well order it to pay equivalent compensation in the equivalent amount.

This is not to say that contract law should not adjust, to the extent it is possible, to new phenomena by reformulating rules that appear to be distorted or not very "effective" with regard to the functioning of new technologies. It only means that it is not true that the whole of contract law has lost its meaning with respect to the model of circulation of wealth using the new technologies.[13] Let us now assess the correctness of the argument according to which Smart Contracts are contracts in the legal sense and the general rules would therefore certainly apply to them, with the exception, however, of those related to performance, because Smart Contracts would be self-executing. This would, according to this doctrine, lead to a significant alteration of the traditional function assigned to courts,[14] which is typically that of providing contract enforcement.

Indeed, those who maintain that, in the presence of Smart Contracts, there can no longer be a problem of non-performance do not take into account that the oracle—human or otherwise—may err in assessing proper performance, and that the parties, at least in Italy, are bound not only to what is provided for in the agreement but also to everything that derives therefrom according to law or, failing that, according to usage and equity.[15] This means that the proper performance of the Code may not result in the proper performance of the contract. The author of this article, however, is aware that while the first circumstance is not so unrealistic in the present world of Smart Contracts, the second seems to be more theoretical than practical, which does not mean that it should not be taken into account.

Taking the cue from, and rephrasing, the argument above, I believe we can nevertheless say that the massive use of Smart Contracts can reduce litigation, and this not only for ideological reasons—for example, adherence to the crypto-anarchist *cypherpunk* movement and the consequent lack of trust in the judicial system—but above all because conflicts linked to the non-performance of the contract, precisely because of the fact that the Smart Contract *is* self-executing, would be significantly reduced[16]. Returning to the New Private Law Theory, I think it can be said that, if at the present time one must adhere to the thesis expressed by Micklitz, one must monitor the evolution of new technologies. We are, in fact, at the crossroads of a technological revolution which, as jurists, we are not able to fully understand.

C. The Question: US Neoliberal Approach v. European Solidarity Approach?

The question I want to ask is related to a statement, which I largely agree with, found on page 452 of the chapter on "Law as a Product." The statement is as follows: "In the concept of law as a product and regulatory competition, two legal cultures are apparently clashing—the United States still dominating the understanding of law as a tool to increase economic efficiency with

[13] *See Study on Blockchains: Legal, Governance and Interoperability Aspects*, EUR. COMM'N DG COMM. NETWORK, CONTENT & TECH. 1, 133 (Feb. 24, 2020), https://op.europa.eu/en/publication-detail/-/publication/939fe2cc-5784-11ea-8b81-01aa75ed71a1/language-en ("no specific blockchain-related issues emerge in relation to contract formation and validity").

[14] *See* Kevin Werbach & Nicolas Cornell, *Contracts Ex Machina*, 67 DUKE L.J. 106 (2017)

> Contract law is a remedial institution. Its aim is not to ensure performance ex ante, but to adjudicate the grievances that may arise ex post. Smart contracts bring this core function of contract law into sharper relief, as they eliminate the act of remediation by admitting no possibility of breach. But, the needs that gave rise to contract law do not disappear. If the parties do not or cannot represent all possible outcomes of the smart contract arrangement ex ante, the results may diverge from their mutual intent. The parties' expression may also not produce legally sanctioned outcomes, as in the case of duress, unconscionability, or illegality. Promise-oriented disputes and grievances will not disappear, but their complexions will shift. In such scenarios, either the parties or the state will seek to reintroduce the machinery of contractual adjudication. Once one properly appreciates what is-and what is not-the function of contract law, it becomes evident that the reports of its death are "greatly exaggerated."

[15] *See* Art. 1374 C.c. [Civil Code] (It.).

[16] *See* Maugeri *supra* note 9.

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the prevailing European understanding of law as means not only of increasing economic efficiency, but also for promoting social standards. The heated debate on how best to harmonize corporate law in Europe, either through competition or through regulation, reflects the deep gulf not only in the understanding of law but also in how a society, in which law defines mandatory standards for labor, consumer and the environment, should look."[17]

There is no doubt that the European narrative, which has an influence on the imaginary, is that our model, unlike the US model, promotes social standards. The question is how much of this is true. Certainly, in Europe there are traces of greater attention to profiles, more than solidarity in the proper sense, linked to the protection of an average consumer who is not economically in difficulty, but it seems to me that there is also a development of a sectoral discipline that seems to be much more in line with the neo-liberal approaches[18] than the narrative admits. In other words, it seems to me that although there is still a difference between the neo-liberal approach across the Atlantic and the European one, the latter appears much less evident.

Without going into the details of the specific rules and apologizing in advance for the necessary simplifications, I will try to briefly explain my thinking by referring to two Directives on consumer protection: The one on consumer credit, Directive 2008/48/EC of April 23, 2008 on credit agreements for consumers, and the one on unfair terms, Council Directive 93/13/EEC of April 5, 1993.[19] I consider, in fact, that the two Directives represent two different models of intervention on private autonomy. The first is aimed primarily at imposing information obligations and the second at controlling the content of terms.

Directive 2008/48/EC of April 23, 2008 on credit agreements for consumers repealed[20] and replaced one of the first directives on consumer protection, namely Directive 87/102/EEC of December 22, 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit. Directive 2008/48/EC is inspired by a model of maximum harmonization, which should not allow Member States to introduce or maintain national rules different from those provided for in the Directive itself—even if more favorable to the consumer. This is in order to avoid distortions of competition and obstacles to the development of cross-border negotiations concerning consumer financing.

Directive 2008/48/EC imposes disclosure requirements in the pre-contractual and contractual phases—especially with regard to costs and APR—contract form requirements, withdrawal rights, creditworthiness checks and other burdens on the intermediary mainly aimed at equalizing information asymmetry.

Although there have been changes compared with the provisions of Directive 87/102/EEC, the approach remains like the original one linked to the idea that the consumer must receive adequate information on the conditions and cost of the credit and on the obligations assumed.[21]

It is interesting to note that in consumer credit laws there is a ceiling applied to the value of the transaction, above which the consumer is no longer protected. This rule is in line with studies in the economic analysis of law according to which, once a certain threshold has been exceeded, the attention that the contracting party pays to the transaction and the advice he receives are suitable for equalizing the information asymmetry.[22]

[17] *See* GRUNDMANN, MICKLITZ & RENNER, *supra* note 1, at 452.

[18] On the neo-liberal legal style see Marisaria Maugeri, *Esiste Uno Stile Giuridico Neoliberale?* [*Is There a Neoliberal Legal Style?*] in ATTI DEI SEMINARI PER FRANCESCO DENOZZA [PROCEEDINGS OF THE SEMINARSFOR FRANESCO DENOZZA] 291, (Sacchi Roberto & Toffoletto Alberto eds., 2019)

[19] *See* Council Directive 2008/48/EC, 2008 O.J. (L133) 66 (EC); Council Directive 93/13/EEC, 1993 O.J. (L95) 29 (EC).

[20] *See* Council Directive 2008/48/EC, art. 29, 2008 O.J. (L133) 66 (EC).

[21] On the discipline of consumer credit, *see* Marisaria MAUGERI & STEFANO PAGLIANTINI, IL CREDITO AI CONSUMATORI: I RIMEDI NELLA RICOSTRUZIONE DEGLI ORGANI GIUDICANTI (2013).

[22] *See* Marisaria MAUGERI, *Il controllo delle clausole abusive nei contratti fra imprese: dal modello delineato nei §§ 305 ss. del BGB a quello della CESL*, NGCC II, 109-127 (2013).

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By the 1980s, the neo-liberal theses from across the Atlantic and the studies of these currents on how to even out the information asymmetry had already spread in Europe. It is not surprising, therefore, that the Directive of those years[23] limited itself to imposing disclosure obligations and did not, or did only to a limited extent, review the content of individual clauses.

Council Directive 93/13/EEC of April 5, 1993 is quite different in terms of the level of intervention into the contract. This directive, considered to be the core of consumer protection in Europe, is clearly influenced by the German approach to general terms and conditions. However, unlike the German approach, the Directive only protects the consumer, for example, any natural person who, in contracts, is acting for purposes which are outside his or her personal activity, and not the professional. However, because this is a minimum harmonization directive, the Member States have remained free to extend protection to non-consumers and have in some cases made use of this option.

The Directive allows for an *ex ante* assessment of the unfairness of contract terms and especially after the numerous decisions of the Court of Justice, permits a generalized intervention *ex officio* by the judge to enforce the invalidity of such terms. Many authors consider that Directive 93/13 is intended to address the problem of consumer weakness both in terms of lack of information and market power.[24] The Court of Justice itself seems to support this view.[25]

The argument does not appear convincing, but it cannot be denied that the intervention into the parties' agreement is much stronger than under the Consumer Credit Directive. By intervening on unfair terms, the European legislator has taken over national traditions that are certainly not in line with the models of the new institutional economy across the Atlantic. It is therefore not surprising that the criticism of those interested in the economic analysis of law focuses on Directive 93/13 and, above all, on the interpretation of this directive given by the Court of Justice.[26]

If this is the case, however, the authors could perhaps be asked to question the difference between the narrative that sees the European system as all about ensuring solidarity and the reality about the economic thinking that informs the different disciplines. This is also with a view to initiating a more linear path in the introduction and interpretation of EU disciplines.

D. The Datum: *Ordoliberalism* and Consumer Protection

In the chapter on "Multilevel Governance and Economic Constitution," beginning on page 461, Hans-W. Micklitz, in reporting and criticizing Mestmäcker's thesis, asks "one might wonder whether Böhm would have declared social regulation (consumer law) to be incompatible with ordo-liberalism."

As is well known, ordoliberal thought emerged in the 1930s with the Freiburg School[27] and regained strength after the fall of Nazism. The journal Ordo, around which ordoliberal scholars gathered, was founded in 1937 and resumed publication after the war in 1948.[28] According to

[23]*See* Council Directive 87/102/EEC, 1986 O.J. (L42) 48 (EC).

[24]*See* Hugh Beale, *Inequality of Bargaining Power*, 6 Oxford J. Legal Stud. 123 (1986); Manfred Wolf, *Party Autonomy and Information in the Unfair Contract Term Directive*, *in* Party Autonomy and the Role of Information in the Internal Market 323 (Stefan Grundmann, Wolfgang Kerber & Stephen Weatherill, eds., 2001).

[25]*See* Joined Cases C-240 & C-244/98 Océano Grupo Editorial SA v. Rocio Murciano Quintero, 2000 E.C.R. I-0494; Case C-168/05, Elisa Marí Mostaza Claro v. Centro Móvil Milenium SL, 2006 E.C.R. I-10421.

[26]See Fernando Gómez Pomar, *Core Versus Non-Core Terms and Legal Controls over Consumer Contract Terms: (Bad) Lessons from Europe?* 15 Eur. Rev. Contract L. 177 (2019).

[27]Some authors point out that the main site of development of ordoliberal thought was Frankfurt and not Freiburg. *See* Josef Hien & Christian Jorges, *Dead Man Walking: Current European Interest in the Ordoliberal Tradition*, 2018/03 EUI Working Paper L. 2 (2018).

[28]*See* Alessandro Roncaglia, L'età Della Disgregazione. Storia Del Pensiero Economico Contemporaneo 206 (2019).

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some authors, the effect of this theory on the process of European integration is overestimated, given the cultural prevalence since the 1960s of other neoliberal currents and in particular those coming from the United States. According to these authors, an indirect influence of this thought would survive by being exercised through its sociological substratum, linked to European Protestant values still capable of influencing German politicians and indirectly the European Union.[29]

It is not possible here to delve into ordoliberal thought.[30] Here, I will just recall that ordoliberals rejected both state-centric approaches, *laissez faire* and the welfare state. For ordoliberals, the market "could only function well through a set of rules that had to be designed, constructed and imposed by political power. The efficient market is not *locus naturalis*, but must rather be conceived as an artificial place, whose rules of good functioning must be fixed by a responsible political power."[31] The ordoliberals believed in the market economy but, as they considered that the market could be self-destructive if left to free bargaining, tending to harden acquired positions through the creation of cartels and monopolies, they considered it necessary to have an anti-monopolistic discipline.

The journal Ordo, mentioned above, was founded by a famous jurist, Franz Böhm.[32] Particularly important in Böhm's thinking is the idea of the *Privatrechtsgesellschaft*, which is considered the best form of social organization.[33] A society organized on the basis of the consent and freedom of private individuals. A society that must be characterized by two series of limits: those against the State and those against the private powers that can undermine the correct functioning of the market.[34] Thus, there is a privileged role assigned to antitrust law.

The Freiburg School jurist never claimed that the *Privatrechtsgesellschaft* should be protected against any other kind of imbalance between private parties. In other words, Böhm did not address the question of the relevance of general terms and conditions as a source of imbalance, which was

[29]*See* Hien & Jorges *supra* note 27, at 1, 6–7

> Gradually, economists close to the ordoliberal tradition have largely aligned their positions with those of Anglo-Saxon neoclassical, ordoliberalism has fallen victim to overlying American influences on German economics … Nonetheless, we find ordoliberalism traditions having indirect influence. This influence is exerted based on its sociological core: the underlying Protestant cultural values that originally constituted the foundation for ordoliberalism formed … All the key figures of the first ordoliberal generation were Protestants … The project would later distance itself from the social-Catholic, the Keysenian-welfare-state, and the neoclassical Austrian-Anglo-Saxon competition. The key figure was the Protestant theologian Dietrich Bonhöffer … The ordoliberal idea to employ the state as protector of the economic constitution reflects the Protestant continental-European views of human nature. Especially the US variants of ascetic Protestantism focus on the freedom and rights of individual. This often culminates in hostility towards the state which is alien to ordoliberals.");

see also Roncaglia, *supra* note 28, at 209

> Instead, Eucken's thought is traced back to the Catholic tradition of the time, expressed in Pope Leo XIII's *Rerum novarum* of 1891 and Pope Pius XI's *Quadragesimo anno* of 1931. Angela Merkel, at the 125th anniversary celebration of Eucken in Freiburg in January 2016, affirmed the importance of ordoliberal principles in contemporary Germany.

[30]Ordoliberal thought has been the object of much attention in recent years. On the reasons for this renewed interest see Ordoliberalism, Law and the Rule of Economics (Josef Hien & Christian Jorges eds., 2017); *see also* Marisaria Maugeri, *Il Contratto con il Consumatore Nell'UE fra Ordoliberalismo e Altri Neoliberalismi* [The Contract with Consumers in the EU Between Ordoliberalism and Other Neoliberalisms], 72 Moneta e Credito 288, 365–378 (2019).

[31]Mario Libertini, *Autorità Indipendenti, Mercati e Regole* [Independent Authorities, Markets and Rules], 1 Rivista Italiana per le Scienze Giuridiche 66 (2010); *see also* see Ordoliberalism, *supra* note 30, at 214, entry on *Competition,* in *Enc. del Dir.*, Annals III.

[32]There were three founders of Ordo: two jurists, Böhm and Großmann Doerth, and an economist, Walter Eucken.

[33]*See* Franz Böhm, *Privatrechtsgesellschaft und Marktwirtshaft* [Private Law Society and Market Economy], *in* Ordo 75 (1966).

[34]*See* Stefan Grundmann, *The Concept of the Private Law Society: After 50 Years of European and European Business Law*, 16 Eur. Rev. Priv. L. 553 (2008) (reviewing Böhm's thinking on *Privatrechtsgesellshaft*); *see also* Stefan Grundmann, *A Changing European Economic Law*, Contratto e impresa Europa, 2016 at 1 (reviewing Böhm's thinking on *Privatrechtsgesellshaft*).

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already present in the debate of the courts and jurists. Nevertheless, one of the authors of the book had already argued in the past that

> [t]he protection of the private law society against private parties has not been 'conceptualized' by Böhm himself ... This, however, does not imply that Böhm's concept could not be developed further to apply to these new problems and cases ... Antidiscrimination, consumer protection via information rules and investor protection are the areas of law which can supplement competition law as fields of regulation which are aimed at the protection of material freedom.[35]

One can only agree with the thesis expressed, in different contexts, by the two authors Stefan Grundmann and Hans-Wolfgang Micklitz.

In fact, the fact that ordoliberal thinking also contemplated a possible intervention in the relationships that today are ascribed to "consumer law" seems to be demonstrated by a fact that is not usually highlighted and that Walter Eucken himself has expressly taken a position on. With reference to uniform contracting, in fact, the author stated "*dadurch wurde die Konzentration gefördert*."[36] Precisely because it could lead to an evolution of market structures towards a monopolistic direction, it had to be regulated. This idea, despite having been refuted several times both in theory and in practice,[37] still resists in the reasoning of the ECJ.[38]

What is important for us here is that already the early ordoliberals envisaged that intervention in the contract could also take place in order to regulate the phenomenon of standardized contracting and to prevent abusive practices. There was, however, no clear awareness of the reasons for intervention. Conversely, the studies on the type of damage brought to the market by the asymmetry of information came after the formation of the ordoliberal stream of thought—Akerlof's fundamental work on the subject only dates from 1970.[39] That the ordoliberal thought, therefore, authorized a certain type of intervention in the regulation of contractual relations between private individuals, not only in the case of hypotheses typically ascribable to antitrust discipline, is a given fact. That this model of intervention could admit a solidaristic or, on the contrary, a neo-liberal type of regulation is an entirely different matter.

In general, it seems to me that the ordoliberal thinking has not been rigorous in identifying coherent criteria and rules from the point of view of market intervention. For example, it was never clear on what grounds certain types of regulation were allowed—like abuse of exploitation through unfair pricing. This probably explains why ordoliberals, depending on the parts of the discourse examined, are juxtaposed now to Mises[40] and to SPD policy.[41] I don't think we are far off the mark in saying that this line of thinking represents the strike of a compromise. A compromise that accepts to protect the process of competition and not allocative efficiency. A compromise that does not disdain to admit a typically regulatory rule such as that on the abuse of

[35]Grundmann *supra* note 34, at 580.

[36]Walter Eucken, Grundsätze der Wirtschaftspolitik [Principles of Economic Policy] 281 (Edith Eucken & Karl Hensel, eds. 1952).

[37]In Germany, for example, as early as the 1960s one of the first practitioners of the economic analysis of law showed that there was no concentration in the use of general terms and conditions *See* Helmut Kliege, *Rechtsprobleme der Allgemeinen Geschäftsbedingungen* [Legal Problems of the General Terms and Conditions], *in* Wirtschaftswissenschaftlicher Analyse Unter Besonderer Berücksichtigung der Freizeichnungsklausel [An Economic Analysis with Special Consideration of the Exemption Clauses] 120 (1966).

[38]*See* Joined Cases C-240 & C-244/98 Océano Grupo Editorial SA v. Rocio Murciano Quintero, 2000 E.C.R. I-0494; Case C-168/05, Elisa Marí Mostaza Claro v. Centro Móvil Milenium SL, 2006 E.C.R. I-10421.

[39]*See* George Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q. J. Econ. 488 (1970).

[40]*See* Carlo Lottieri, *Introduction*, *in* Il Vangelo non è Socialista. Scritti su Etica Cristiana e Libertà Economica [The Gospel is not Socialist: Writings on Christian Ethics and Economic Freedom] 24 (Wilhelm Röpke ed., 2006)

[41]*See* Frederic Marty, *Politiques Europeennes de Concurrence et Economie Sociale de Marche* [*European Competition Policy and Social Market Economy*], N.2010-30 OFCE (2010).

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exploitation through unfair pricing. A compromise, therefore, that if it could justify, from the point of view of coherence with the ordoliberal origins, Mestmäcker's opposition to Pieter Verloren van Themaat's positions on the relevance of the principle of solidarity as described by Micklitz in the book, in no way could it lead to the conclusion that some of the main European interventions for the protection of the consumer are distant from ordoliberal thought. Therefore, we repeat once again, the two authors of the volume cited above are certainly right.

European law can perhaps only be read if one accepts the evolutionary, diachronic, compromising and even incoherent vision that has characterized it and continues to characterize it. Before closing, allow me to thank the authors for an impressive piece of work, which will undoubtedly push European doctrine to a close debate.

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