CHAPTER 5

Characterizing Economic and Legal Approaches to the Regulation of Market Interactions

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Abstract This chapter provides an overview of how EU private law (and national European private laws) and, more specifically, contract and consumer law do not see eye to eye with economic—and law and economics—views over those kinds of interactions. With some illustrations from ECJ case law as motivating the study, it is argued that the divergent approaches reflect a deep divide between the intellectual goals and perspectives in both disciplines. This is to be lamented, since a greater openness by legal theory and legal academics toward economic ways of looking at market interactions would greatly enrich and refine the functioning of legal systems.

Keywords Law and economics • Legal perspective on economic interactions • Influence of economic theory and empirics

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5.1 Introduction

The way in which legal notions are conceived, legal modes of thinking work, and the elements or inputs to be brought into them, influence the areas—in contemporary societies and legal systems, a large number—governed by legal rules, both in terms of determining legal outcomes and making sense of the legal solutions.

Economics as an intellectual field has experienced significant changes in the past decades. Economic theory and economic methods have greatly expanded their scope of application to cover many dimensions in the workings of societies but, more importantly for present purposes, their sophistication, realism and accuracy have increased substantially in terms of explaining the functioning and effects of economic interactions.

Game theory and information economics, empirical techniques with more structured data analysis and inference allowing more rigorous causal claims, statistical treatment of big data and behavioral analysis have joined forces in substantially transforming, and expanding, the economic understanding of how transactions and markets work.

To be honest, legal thinking has not played any meaningful role in the recent evolution of economics, not even in the (multiple) areas of common interest, although the attention paid by economists to institutional matters (including the workings of legal systems) and the recognition of their importance have substantially increased in recent years.

When one looks at the legal world, despite the radical transformation of economics and its output (both in terms of substantive knowledge and of methods), the law, legal thinking and legal practice are broadly immune to economic inputs and influence. Even legal domains directly interested in how firms interact with other firms and with consumers through contracting and markets remain, with a few exceptions—both geographical and disciplinary—largely unconcerned by those developments in economics, and by economic insights more generally. More specifically, if one thinks of the receptiveness of courts and legal scholarship, at least in the European[1] context, toward developments in economics (and law and economics), connected with game theory, information economics, econometrics and

[1] The European experience, perhaps similar to that of other legal contexts (Latin America, among others), differs from that of the US, although the true influence of Law and Economics there is a matter of debate: Garoupa and Ulen (2008, p. 1555).

empirical methods,[2] the emerging picture is one that can be characterized as cold, when not hostile (Alemanno and Sibony 2015, p. 22).

In contrast, behavioral analyses, including behavioral economics and law and economics, and specifically their fundamental approach, findings and implications for policy in various areas of interest for lawmaking and legal regulation, have been received with a warm glow by a substantial, attentive group of scholars within the European legal academia.[3] Whether this has had a deeper impact upon mainstream European legal scholarship, even the one dealing with consumer contracting, let alone on courts and legal practice, is a different matter. In fact, I fear that one should remain skeptical as to how seriously behavioral concerns, insights and, above all, modes of thinking about interactions and the role of regulatory interventions are truly making significant advances into the operations of consumer law in Europe. As has been recently observed, the Court of Justice of the European Union (the CJEU) shows a clear reluctance to explicitly refer to economic arguments (Franck 2017, p. 110).

To economically minded scholars, why, when dealing with legal dimensions of economic interactions, law and legal scholarship in Europe exhibits an ostensible disregard *vis-à-vis* economic insights appears puzzling and worthy of an attempted explanation. To be sure, economics as an academic discipline remains largely ignorant of the actual workings of the law, and tends to disregard the contributions from legal scholarship illuminating the legal and institutional foundations of societies and economies (Garoupa 2012). Even Ronald Coase (1988, pp. 158–159 and following), the father of law and economics, complained about this, and argued that it weakened the real-world appeal of economic contributions. One could even question the pretense of economics (or of some economists, at least) to dictate methods and policy advice in other areas of social science without a deeper knowledge of the subtleties and the complicated workings of those areas.[4] The law may be a prototypical example of this failed imperial expansionist campaign into a very complex area of human and social experience.

[2] For instance, a recent special issue on "Empirical Methods for the Law" was published in a European economic journal (*Journal of Institutional and Theoretical Economics*, vol. 174, 2018), and very few contributions were authored by European legal scholars.

[3] See Micklitz et al. (2018), Mathis and Tor (2016) and Alemanno and Sibony (2015).

[4] Coase (1994, p. 42), ironically, characterized this attitude with an apt historical metaphor: "At a time when the King of England claimed to be also King of France he was not always welcome in Paris".

The potential deficiencies of the economic ventures into other intellectual fields are surely relevant, but not my intended focus. I am more interested in the workings of legal systems and in how the intellectual views and tools used by courts and legal academics affect the way in which the machinery of the law influences social and economic outcomes. Thus, I will leave for others (recently, Calabresi 2016, p. 2 and following) the "economic" side of the divide or fault between economics and law.

The goal of the chapter is to present the argument that, in addition to other factors, the "essentials" of legal approaches to behavior in general make it hard for legal thinking to be receptive to economic perspectives about market behavior. Thus, legal institutions—courts, most notably—and legal scholarship are reluctant to familiarize themselves, to consider, let alone to share and use the "essentials" of economic analyses—theoretical and empirical, behavioral and nonbehavioral—that try to explain actions and choices by participants in economic interactions. The distinctive "legal" approach (as markedly contrasting with the economic) plays a large role in the perceived self-sufficiency of legal thinking about market behavior that underlies the still dominant views in European case law and literature.

5.2 Some Landmark EU Consumer Contract Cases Showing a Clear Disregard for Economic Thinking

In this section, I present a brief sample of CJEU cases turning the back toward economic input. These cases, however, provide a clear illustration about the fact that the most influential court in consumer law in Europe, when confronted by interpretive conundrums on consumer contracts, utterly disregards economic input (theoretical and empirical; behavioral and nonbehavioral alike). I want to emphasize that in these cases I do not have an issue with the disposition of the case as such by the CJEU, but with the "legalistic" approach by the Court.

A very compelling example, I believe, is *Matei*.[5] The decision by the Court concerned whether a 'risk charge' applied by a bank in the contract with the borrowers would qualify or not as an unfair term in a consumer credit contract. Specifically, the controversial issue was the application or not to the 'risk charge' of the "core term" exception of the unfairness test under art. 4 (2) of the Unfair Contract Terms Directive (UCTD).

[5] *Bogdan Matei, Ioana Ofelia Matei v. Volksbank Romania SA*, Case C-143/13.

Concerning this point, the CJEU said: "The Court has held that *contractual terms falling within the notion of the 'main subject-matter* of the contract', within the meaning of Article 4(2) of Directive 93/13, must be understood as being those *that lay down the essential obligations of the contract and, as such, characterise it*." And concluded that "*[t]he mere fact that the 'risk charge' may be regarded as representing a relatively important part of the APR* and, therefore, the income received by the lender from the credit agreements concerned *is in principle irrelevant* for the purposes of determining whether the terms providing for that charge define the 'main subject-matter' of the contract".

Matei[6] seems to imply that the "core terms" notion is a formal, abstract one referring to the legal "characterization" of the type of contract the parties have entered into, and specifically based on whether such legal description categorizes the subject matter of the term as being essential or not.

Following this premise, the fact that a certain charge in a loan is included in the annual percentage rate (APR), even as a (quantitatively, one would imagine) noticeable portion of it, is irrelevant for determining whether the charge should be considered a core term or not. The APR is a tool intended to increase the salience of various components of cost in a transaction that is in itself complex, involves various dimensions and typically includes charges that are deferred or extended over time. In complex, multidimensional consumer contracts, one would expect firms trying to decrease the number of salient components and increase non-salient ones. Enhancing salience may result in better assessment of the true costs of a credit and more desirable consumer choices.[7]

There is evidence, however, that, despite the concentration of price information in the APR figure, and the fact that the APR simplifies in a standardized way some crucial information, results remain unimpressive in terms of improving consumer awareness and welfare.

Even when one is skeptical about the virtues of APR in increasing actual levels of salience for consumers in credit contracts, *Matei*'s utter disregard of the economic issues is troubling. The fact that a given charge is a major component of the APR should have a bearing—not necessarily decisive—on whether the charge was salient, and thus the consumer was reasonably

[6] Building upon a previous CJEU decision, *Arpad Kásler, Hajnalka Káslerné Rábai v. OTP Jegzálogbank Zrt*, Case C-26/13.

[7] See Bar-Gill (2008, p. 1140, 2014, p. 465).

aware of its existence and overall impact on the total cost of credit for her/him. For sure, one could conclude that, given the available evidence, and the circumstances involved, the inclusion in the APR does not make that charge "sufficiently" salient or transparent for the consumer in terms of making an informed choice. But the general finding that whether a given price component is included or not in the APR is "irrelevant" for a finding of the "core term" exemption seems ill-advised from an economic perspective, especially when coupled with the assertion that what is a core term is something that has to be determined on the basis of what general contract law deems to be an "essential obligation" for a party. It is hard to question that the categories and words of civil codes are generally less correlated with salience than the inclusion or not by a certain price component in the APR.

In *Costea*,[8] a commercial lawyer signs a credit agreement with a bank. The repayment of that loan was secured by a mortgage over a building belonging to the lawyer's firm. The credit agreement was signed by him, not only as borrower but also as representative of his law firm, since the firm was the mortgagor securing repayment the loan.

The CJEU held, in order to solve the issue of whether the contract was a consumer contract, that the fact that the loan was secured by a mortgage granted by an experienced commercial lawyer in his capacity as representative of his law firm, and involving goods belonging to that firm, is irrelevant. Although in general there are plausible (legal and economic) grounds to disregard certain pieces of information in legal decision-making, *Costea* leaves one wondering about the reasons for discarding most of the case-specific information regarding the knowledge and position of the borrower and mortgagor, an attitude that may be thought to induce a cruder and less informed solution to consumer contract cases.

Another illustration is the *Gutierrez Naranjo*[9] case. With its decision in this case, the CJEU cast its powerful vote in the controversy surrounding the saga of the Spanish litigation on mortgage floor clauses (limits to the variability of adjustable mortgage rates) inserted in many mortgage loan agreements in Spain. When interest rates in the Eurozone started to decrease, reaching historically minimum rates, many Spanish debtors saw

[8] *Horatiu Ovidiu Costea v. Volksbank Romania SA*, Case C-110/14.

[9] *Francisco Gutiérrez Naranjo v. Cajasur Banco SAU, Ana María Palacios Martínez v. Banco Bilbao Vizcaya Argentaria SA (BBVA), Banco Popular Español v Emilio Irles López and Teresa Torres Andreu*, Joined Cases C-154/15, C-307/15 and C-308/15.

how their mortgage payments decreased but only limitedly so, resulting in monthly payments higher than the ones they would have faced had they been paying their monthly dues with respect to Euribor plus the agreed spread, with no lower bound or floor.

The Spanish Supreme Court held that these were subject to a material transparency control[10] as to whether the consumer could actually understand the full legal and economic consequences of the contract, and held them as unfair. However, in attention to a number of factors, the Spanish Court opted for limiting the restitutionary effects of the finding of unfairness. When the issue was referred by several Spanish lower courts, the CJEU ruled the Spanish Supreme Court position on limited restitution as incompatible with the UCTD. In *Gutiérrez Naranjo*, the CJEU found that "Article 6(1) of Directive 93/13 must be interpreted as meaning that a contractual term held to be unfair *must be regarded, in principle, as never having existed, so that it cannot have any effect on the consumer*". Thus, the effects of a finding of unfairness are automatic, almost robot-like. Once a term is held unfair, regardless of the underlying reasons, the subject matter covered by the term and the "severity" of the unfairness, there is no room for maneuver in the consequences for the parties. No economic (either theoretical or empirical, based on rational choice or behavioral) reason can be weighed as to the consequences of unfairness. Automatic legal consequences always ensue from finding a contract term unfair.

In *Gut Springheide*,[11] the CJEU crafted the EU normative notion of the "average consumer" and the defining features of such a notion. The "average consumer", created in order to assess the misleading potential of promotional materials for the sale of eggs, not only has been kept in the area of labeling and composition of food products (*Teekanne*[12]), but has now traveled to credit contracts (*Kásler*, *Matei*), and generalized to all commercial practices.

The CJEU is adamant in considering that the average consumer notion is not an empirical one, and that the conditions and features defining it in any given case result from courts exercising their own judgment to determine what the typical features of the average consumer will be. But if it is

[10] Already anticipated by the CJEU in *RWE Vertrieb AG v. Verbraucherzentrale Nordrhein-Westfalen e.V.*, Case C-92/11.

[11] *Gut Springheide GmbH and Rudolf Tusky v Oberkreisdirektor des Kreises Steinfurt*, Case C-210/96.

[12] *Bundesverband der Verbraucherzentralen und Verbraucherverbände – Verbraucherzentrale Bundesverband e.V. v Teekanne GmbH & Co. KG*, Case C-195/14.

not a statistical composite of how real individual consumers are and react, what is the average consumer? A normative aspiration? A moral claim? A backdoor to introduce a general due care standard for consumers? An *ad hoc* determination based on policy or, worse, expediency to move the unfairness threshold up or down as desired by the decision-maker? From an economic perspective, the benchmark should not be idealistic, but firmly grounded on how consumers really are and behave, not how they could or should act, based on some external normative criterion.

5.3 Contrasting Legal and Economic Mindsets for Economic Interactions

As already mentioned, the refinements in economic theory and economic empirics in recent decades have vastly transformed economics as an intellectual field. In contemporary societies, the complexity and reach of the law and legal institutions has also expanded to a considerable degree. These paths of expansion, however, have not fundamentally altered the intellectual gist either in economics or in law.

Despite the emergence of law and economics as a distinctive area of thinking over legal systems and their role in societies, and despite the more or less intense pushes of some law and economics efforts, legal thinking, at least in Europe and Latin America, has remained largely unaltered as to how the regulation of social interactions, including the market interactions over which the theoretical and empirical knowledge in economics has been accumulating and refining, should be conceived and undertaken.

The lack of influence from economic thinking is not an anecdote, or a specific oddity afflicting the CJEU and its members. The clear diffidence about economics in an area of the law squarely dealing with economic interactions is a reflection of certain features that characterize legal thinking in its traditional European manifestations. These internal factors, linked to the law's self-conception as an intellectual enterprise, are more relevant than other ideological or philosophical stances commonly raised in the face of economic knowledge.

One possible explanation (Schwartz 2011, pp. 1536–1537) for the situation (in the US) of lack of dialogue between pure contract law scholars on the one side and economists and economically trained legal scholars working in contract theory on the other is found in the joint effect of two

forces: (i) modern contract theory is intrinsically complex and sophisticated, and the translation of the substance and implications of this body of knowledge for lay readers (such as legal scholars and judges) requires an amount of effort that has discouraged economists even from trying; and (ii) the prevailing and appalling "economic illiteracy" (Schwartz 2011, p. 1537) in the traditional contract law *professoriat*.

Others (Garoupa and Ulen 2008, p. 1555) would argue that the failure of economics to exert an influence over the law is highly dependent on the success (or lack thereof) of Law and Economics as a school of thought in legal academia. For this view, in addition to certain institutional conditions (a competitive market of institutions providing legal education, essentially law schools), a key point is the existence of a sufficiently established—albeit not necessarily dominant—"legal realism" movement among legal scholars. They understand "legal realism" as the combination of two major views: skepticism about legal formalist claims of internal consistency and self-sufficiency of legal rules and categories, and an interest in "law in action", that is, the actual effects of legal rules and their implementation on actual behavior and phenomena. They argue that both a competitive academic market and legal realism are necessary prerequisites for the success of law and economics as a new strand of legal thinking. And when law and economics becomes an accepted part of legal academia, economic input would naturally flow into the understanding and regulation of market interactions by legal rules and courts with the intermediation of legal academics.

In my account, however, I would like to emphasize the role of modes of thinking and conceptual apparatuses that I consider still dominant in traditional schools of European legal thinking. I concede that there is some variance in the authority that those intellectual forces have over legal systems, depending on factors that are specific to a given legal culture, and to observed practices in a given subset of legal academia.

The first of those features or properties could be labeled as the anti-realism, idealism or inward-looking bent in legal thinking. In contrast, economics could be characterized as dominated by a realist or outward-looking perspective, in the sense that economists typically conceive their task as giving an account of observed phenomena in real-world social interactions (see the contrast between Kelsen and Posner in Małecka 2017, pp. 498, 507).

The economic disciplinary outlook attempts to explain what is out there, searching for factors underlying why social interactions assume the

form they do in reality. Legal thinking, quite differently, is commonly viewed as a discipline that tries to make sense (broadly conceived) of normative propositions that may be recognized and imposed as "Law" in a given time and place. The task of the legal enterprise is to reveal the scope and meaning of those propositions, expressed either as formal legal rules adopted by legislatures and other legitimate state authorities, or in the form of doctrines and interpretations of existing legal materials developed by courts and commentators (e.g., Larenz and Canaris 1995, p. 17). Even empirically oriented legal scholars, in the end, admit that legal research is a normative endeavor, and that its task is to give advice about normative propositions to those who have to adopt, enforce or interpret them (e.g., Engel 2018, p. 18). Many lawyers (doctrinal ones at least) would inhabit the "normative reality" and not the external reality of agents interacting in the real world. In a way, Hegel's dictum ("*Was sein soll, ist in der Tat auch*") seems to be broadly shared in legal thinking, although perhaps not always consciously. Not all would endorse the belief (which would be an extreme version of legal idealism) in the internal integrity of the law and the ability to provide response to any question or issue that arises in the functioning of a legal system, but milder versions of this view would be common in many, if not most, legal cultures in Europe.

This does not imply that looking for explanations about the law is beyond the realm of legal thinking. It is not. In fact, explanatory theories abound in law and legal research, even in traditional and doctrinal legal scholarship. What is characteristic of explanatory ventures in legal thinking is that almost always the *explanandum* is not given by observations about external world events or actions (or stylized or intuitive generalizations about them), but instead by legal rules, decided cases or doctrinal interpretations (e.g., Wendel 2011, pp. 1062–1063). In economics, typically it is the external world, directly or through observations, generalizations or expectations concerning behavior, which constitutes the *explanandum* in the explanatory models or theories.

To be sure, in law and economics, sometimes the *explanandum* (or part of it at least) is also given by legal doctrines, materials or outcomes. In this sense, an economic model may be, *inter alia*, able (or conducive to) rationalize or explain legal doctrine, case law or even legislative solutions,[13] although not necessarily the internal reasons and arguments provided by courts (see Esposito 2020).

[13] Kornhauser (2018).

As to the *explanans*, explanatory inquiries in legal scholarship are commonly characterized by using hypotheses whose nature is also mostly "legal" or "internal" to the legal system. It could be argued that many elements that have become now "legal" or "internal" were borrowed in reality in the past from a varied set of disciplines: Theology, History, Philology, Philosophy (moral, political), Linguistics. And to this long and illustrious list of "external" disciplines providing inputs for explanations about legal doctrine, law and economics would simply try to add economics, in its various dimensions. It is true, however, that the inward-looking attraction remains strong, at least in certain areas or schools in legal academia.[14]

The contrasting intellectual outlooks of economics and traditional legal scholarship are almost naturally projected onto the research questions posed by one and the other in the common areas of interest. If one thinks of contracts, the dominant legal scholarship typically starts by asking questions about the meaning of the normative propositions that have validity in a given legal system to govern contracts, and the ways in which case law developed by courts and commentary by legal scholars help to ascribe one or the other meaning to the texts, or to complement the shortcomings of the latter with respect to certain situations or cases, real or imagined. The economic approach would start and proceed very differently. It would look into what contracts the parties write and what contracting practices are observed between the parties, what problems the parties are trying to address with those terms and practices and how the solutions implemented may compare with some other feasible arrangements that could be implementable. Eventually the legal system would be added to the picture, and the main questions to ask would be of the following kind: what can the law do to help the parties achieve their ends through contracting? How does the law actually perform this function?[15]

A second feature of how most participants in European legal culture perceive their task and role is linked to the notion of essentialism (or anti-instrumentalism) of law (or large portions of it, at least). As a consequence, essentialism will extend to legal rules and also to legal concepts, both those explicit in the law and those "constructed" by legal scholarship.

[14] See, for instance, the treatment of "goals or functions" and of the "*Natur der Sache*" in legal methodology, in Larenz and Canaris (1995, pp. 153 and 236).

[15] See Kornhauser and MacLeod (2013, p. 918).

Law is often conceived by lawyers in most legal professions and activities (including academia) as an inescapable, and not contingent, building block of an intrinsically (and perhaps objectively) valuable framework for the realization of certain ultimate social values.

This belief about the entire edifice of the law and its associated value and virtue is then transposed to widely accepted legal concepts and categories that cease to be seen as means to achieve an end (even an internal one to the legal edifice itself). Thus, they are not viewed as "mere tools" to achieve goals (to better understand the world, or to act upon it), but as possessing intrinsic value, linked to ultimate or inherent values of the legal system. Paraphrasing William James,[16] for part of traditional European legal culture one could say that legal theories and concepts are often viewed as answers to permanent enigmas in the law, on whose truth we can safely rest.

In economics, theories are simply instruments to provide (hopefully satisfactory) explanations about external realities. Quite differently from traditional self-conceptions in law, economics is typically conceived by the economics profession as a scholarly endeavor devoid of any intrinsic value beyond its capacity to provide useful explanations about the observed phenomena of interest to its practitioners. Its core value lies in the ability to predict outcomes and explain observed phenomena. To be sure, there is (and always has been, since economics has a distinct intellectual character) a policy side to the enterprise of economics as a discipline, but it is conceived as "added" or external to its main explanatory mission. Moreover, this policy dimension lies in providing the theoretical and empirical tools to explain and predict behavior and outcomes in the real world that could serve policymakers to take more informed decisions in the pursuit of its goals or ultimate objectives.

One would then see without surprise the reluctance by legal thinkers and scholars and, inspired by them, courts and practitioners, to replace (or even, more modestly, to contrast or to supplement) the legal notions, doctrines and categories containing and expressing intrinsic worth, with theoretical models and predictions, and with empirical evidence about outcomes that admittedly lack the intrinsic values that the legal categories allegedly possess.

With respect to the third feature I would like to emphasize, it is fair to start with the assertion that in certain areas of European legal scholarship

[16] James (1992, p. 42).

it is still a prevalent perspective—perhaps even dominant in some influential national legal cultures—that legal thinking approaches its object of interest (the law and legal institutions) through internal comprehension or interpretive individual understanding (*Verstehen*) and not through external explanation trying to discern and establish general causal claims or propositions about the validity of a hypothesis for the outcome in need of explanation (*Erklären*; Larenz and Canaris 1995, p. 25). Legal scholarship (or legal science, as certain legal cultures call it) belongs to the world of internal understanding; economics (and law and economics) belongs to that of external explanation.

In this view, as a result, methods of quantification, of searching for causal connections between externally observed phenomena and factors or variables, are seen as alien to the true enterprise of legal scholarship. Moreover, the idea that problems or debates may not have a theoretical answer (i.e., theory does not offer a determinate view of what is the best explanation among the competing ones) and only an empirical one[17] seems to be alien to predominant legal thinking, according to which empirics providing the clue to what the law should be is at odds with the deeply entrenched idea that law possesses internal values and an internal logic that is not contingent upon facts.

True, if legal scholarship has to provide advice to legal decision-makers, prediction of the outcomes over some variable of interest becomes a relevant issue, and causal inference enters legal thinking (Engel 2018, p. 7). However, for this one needs to assume that the law should care for the outcomes in the real world, which is not obvious to everyone in law and legal thinking (on consequence-based legal reasoning, see Cserne 2020).

In economics, in contrast, and especially in recent years, there is an emphasis on using data (from real-world interactions, natural experiments, field experiments or laboratory experiments) to answer questions about the causal effects of certain factors or variables. Correspondingly, data analysis and statistical inference loom very large in the economic profession. As a consequence, empirical methods often hold the key to resolving

[17] I am aware of the Is/Ought dilemma, and I do not claim that a reliable bridge between empirical findings and normative conclusions always (or even often) exists. But not rarely, both in law and in law and economics, the research question does not lie with ultimate goals or normative justifications for an action or policy, but merely on how to best achieve a shared or undisputed normative goal.

debates about conflicting predictions and implications from otherwise well-conceived and executed theoretical models.

In sum, deeply held conceptions in Europe as to the nature and role of legal thinking and the entire enterprise of the legal system may—and in my view they do—lead one to look into economic concepts, arguments and evidence to help the functioning of the laws and legal institutions dealing with economic interactions and markets. The cases examined in Sect. 5.2 should not be perceived as isolated instances of short-sighted decisions on how to regulate market interactions, but the reflection of an important, deeper, perhaps structural, lack of receptiveness of standard European legal thinking toward realist, instrumentalist and empiricist views of complex systems (such as the law).

5.4 Conclusions

The lack of resonance of the contributions—both theoretical and empirical—from economics in the European legal community, case law and practice is, I believe, a very unfortunate situation. Economists often lack the deep knowledge of legal issues to formulate good questions about the functioning of law and the social and economic relevance of legal rules and institutions. In turn, lawyers, who do possess such knowledge, often lack proper tools to answer deep questions about the functioning of law and how it affects firms, consumers and society at large.

In my years as a legal scholar, I have come to observe, and now hold as a firm belief, that legal scholarship and the entire endeavor behind legal systems would significantly improve with the intelligent and discerning use of the contributions from economics. But deeply—almost sacredly among some—held convictions in the European legal community seem to raise significant obstacles for such a development. And until these beliefs significantly lose appeal, it is hard to anticipate that economic input, despite its intellectual allure, will become a major factor in shaping legal thinking and legal policy over market interactions, at least among courts and legal scholarship in connection with major legal areas such as contract and consumer law, tort law, administrative law and several others.

Obviously, the more “refined” and more “institution-attentive” economic contributions become, the easier is their way into legal thinking, and the higher the chances that the legal community will be responsive to their findings. I do not deny that much can be improved in this respect in

order to make economic input not only more "user-friendly" for non-economists, but also more targeted to the relevant questions in law.

However, I fear that these intellectual obstacles in the dominant legal mindset are likely to prove resilient even *vis-à-vis* more sophisticated and more legally alert and conscious economic contributions to understand the role and effects of legal systems in governing social and economic interactions.

For instance, the clear advances over the relatively unsophisticated views of price theory in the 1960s and early 1970s[18] have not made significant progress in European legal academia. Even the warm welcome to behavioral economics in influential tenets of the European legal academia may be explained, perhaps, by a—however misguided—view[19] that behavioral economics is largely a refutation of standard microeconomics and game theory: in reality, it is for the most part a refinement of the existing approach by scholars who consider themselves professional economists.[20]

For this (sad) state of affairs in European legal systems to change for the better, the initial push needs to come from legal scholarship.

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[18] A period in which the three major agents in economic interactions (consumers, firms and the government) were treated almost as black boxes beyond analysis: consumer tastes are given, firms exist to maximize profits, and governments are benevolent agents of citizens and the common good: Sandler (2001, p. 95).

[19] Alemanno and Sibony (2015, pp. 22–23). Critically on this view, Esposito (2015, p. 257). For different reasons, others are critical with the use of behavioral economics to explain legally relevant behavior and legal institutions (Leeson 2019, p. 30) or advise caution to legal scholars in order not to misuse behavioral economics (Zeiler 2019, p. 22).

[20] This is the prevalent view among many of the most representative behavioral economists themselves: Laibson and List (2015, p. 385).

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