Economic Analysis of Law in European Legal Scholarship 1

Klaus Mathis *Editor*

Law and Economics in Europe

Foundations and Applications

Springer

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Economic Analysis of Law in European Legal Scholarship

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Foreword

"Law and Economics" is one of the growing number of "double-barrelled subjects", such as Legal Philosophy, Legal Sociology, Legal Psychology and Legal Anthropology, which connect law with other disciplines. These "double-barrelled subjects" contribute to the trend towards interdisciplinarity. The subject perspective is increasingly criticized for being too narrow. Disarming this criticism is no easy task. "Double-barrelled subjects" and interdisciplinarity call for relevant subject competence. Those who weigh in on the academic discourse in more than one discipline soon find that doubts are cast on their competence. Formal double qualifications in two or more disciplines provide legitimation, as does collaboration with experts from different disciplines.

The conference on "Law and Economics" held in April 2012 at the University of Lucerne, the papers from which are published in this volume, was a gathering of such individuals; while some hold double honours degrees, others are engaged in cross-disciplinary collaboration in law and economics. This laid the best possible foundations for making the resulting contributions to the "double-barrelled discipline" of "Legal Economics" robust to criticism. Nevertheless, the challenge was considerable, not least because the economic difficulties in many countries demand explanations from the discipline of Economics. In fact – rightly or wrongly – Economics is held jointly responsible for these difficulties. In the given circumstances, should Law have anything to do with this discipline? A resounding "yes" is the answer. Economics as a discipline, its very right to exist, its necessity, its usefulness and its further development cannot seriously be called into question.

The "Law and Economics" conference also deserves gratitude and appreciation for its commitment to the "Europeanization" of Law and Economics. It is indeed a worthwhile endeavour to loosen dependency on the US-American tradition as well as problems and solutions framed from a US perspective. The editor of this volume wants to go even further. With this publication he starts a new academic book series entiled "Economic Analysis of Law in European Legal Scholarship" (EALELS) which is dedicated to Law and Economics from an European perspective. I am confident that this new series will encourage further research in the field of European Law and Economics.

The University of Lucerne has an eminent interest in conferences of this kind. They yield a fresh view of trans-disciplinary lines of questioning and, accordingly, the possibility of differentiated answers. Of course, disciplinary competence remains indispensable for all participants and must take precedence. At the same time, however, it is increasingly important to build bridges between neighbouring disciplines, since interaction between them augurs new advances in knowledge.

"Double-barrelled disciplines" can be approached from either discipline. Therefore, the questions, methods and answers do not always coincide completely and may also diverge, depending on the strengths of the questioners and answerers.

The University of Lucerne is interested in "double-barrelled disciplines" not only in Law but in other fields, too. For instance, "Philosophy and Management" and "Philosophy and Medicine" are courses offered at our Faculty of Humanities and Social Sciences as postgraduate programmes aimed at practitioners of management and medicine, respectively. These specialists will find their vision considerably broadened by the "double-barrelled subject", resulting perhaps in a higher level of reflective skills. The University of Lucerne also offers an interdisciplinary Master's degree in "Religion – Economy – Politics", in which students with Bachelor's degrees from any of the three disciplines are taught by faculty with the requisite specializations. The students' enthusiasm is proof enough that such programmes considerably enrich disciplinary degree courses.

Returning to this volume, it is to be hoped that it will meet with broad interest and inspire specialists in both disciplines as well as interdisciplinary "Law and Economics" colleagues to explore new ideas and avenues. This would be the finest recognition for the commitment and enthusiasm of the organizers of the "Law and Economics" conference and the publishers of this volume.

Lucerne
September 2013

Prof. em. Dr. Paul Richli
President University of Lucerne

Preface

This anthology, *Law and Economics in Europe. Foundations and Applications*, arises from two conferences: the Special Workshop that took place at the 25th World Congress of Philosophy of Law and Social Philosophy (IVR) in Frankfurt a.M., from 15 to 20 August 2011, and the 1st Law and Economics conference from 20 to 21 April 2012 held at the University of Lucerne. The thematic scope of this volume spans both the theoretical and practical developments of "Law and Economics" in European countries with a Civil Law tradition. Since all of the chapters are written by authors from Europe, they reflect a specifically continental-European perspective on these themes. One of the main intentions behind the publication of this volume, therefore, is to make this point of view accessible to an English-speaking readership.

I take this opportunity to thank all the people who have contributed to the successful completion of this book. First of all, I thank Deborah Shannon for her usual meticulous translation of my chapter, as well as those by Ricardo Dawidowicz, Balz Hammer and Sandra Duss, and Zinon Koumbarakis. I also thank Assistant Professor Lauren Fielder, J.D., LL.M., Lynn Watkins, MLaw, Ariel Steffen, lic. phil., and Silvan Rüttimann, MLaw, for their diligent proofreading. A special thanks goes to the Swiss National Science Foundation (SNSF) as well as to the Research Commission (FoKo) and the primius programme of the Law Faculty of the University of Lucerne for financing the conference in Lucerne and supporting the publication of this anthology. Finally, I am grateful to the anonymous reviewers for their helpful comments as well as to Neil Olivier, Diana Nijenhuijzen and Corina van der Giessen at Springer Publishers for overseeing the publishing process, and to Sundarajan Chitra and her team from SPi Content Solutions for the careful typesetting.

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Klaus Mathis

Contents

Introduction

This anthology illustrates how "law and economics" is developing in Europe and what opportunities and problems – both in general and specific legal fields – are associated with this approach within the legal traditions of European countries. On the one hand, this anthology intends to explore both the methodical and philosophical foundations of the economic analysis of law. In doing so, the theories of economics (mostly the principles of microeconomics and welfare economics) will be analysed and the methods behind empirical social research will be critically reviewed. The findings of behavioural economics, which have called into question the basic assumptions of economic theory – for example the rationality or the selfishness of players – are also of great significance in this debate. On the other hand, the question of why the economic analysis of law has developed differently in Europe than in the USA will also be discussed. The lawfulness of consequence-based reasoning in law application may have played an important role in this discrepancy. Furthermore, it shall be shown in which fields of law economic-based reasoning and methods have – explicitly or implicitly – found their way into continental European law. Therefore, the main intention of the book is not to further explore economic analysis as such, but rather to focus on the implementation of economic methods in legislation and adjudication from a European perspective and to take into account the particular challenges the European legal systems face.

The economic analysis of law explores legal questions using economic methods. In doing so, it is confronted with several intersection points: on the one hand, the intersection between the two disciplines (law and economics) and, on the other hand, the intersection between Civil Law and Common Law – as law and economics, at least partially, rests on the reception of ideas from US American legal culture. A third intersection point lies between facts and norms, positive and normative theory. All of these intersections pose multifaceted challenges for the economic analysis of law. First, the interdisciplinary approach of law and economics requires a high level of in-depth knowledge of both disciplines. Furthermore, it demands the ability to reflect on a meta-level which findings from economics could reasonably be transferred into the law. The challenge faced by jurisprudence and legal philosophy, therefore, is to identify the viability of an economic approach in law and to examine

it critically. Unfortunately, in the academic world it is often hard to work in an interdisciplinary way due to the increased pressure to specialise, which can cause a grave problem for scholars researching in this field. The second intersection, between Civil Law and Common Law, poses a further challenge for European legal scholars. In the earlier days of law and economics, research within Europe consisted more or less of a plain reception of American literature. However, I am of the decisive opinion that the time has definitely come to found and cultivate our own European style of law and economics, instead of just continuing the uninspired citing of US-American literature and ideas. Finally, the intersection between facts and norms is particularly tricky for legal scholarship. The fundamental question posed here is how to incorporate the empirical findings from economics and the social sciences in general into legislation and the application of the law. Closely related to this problem is the specific question of the admissibility of consequence-based arguments in legal reasoning.

This anthology deals with these three intersection points, not just on a theoretical level, but also through the use of examples found in practice. It consists of the following four parts: Part I: Civil Law versus Common Law; Part II: Economic and Legal Thinking; Part III: The Limits of Legal Transplants; Part IV: Economic Analysis in EU Law. Part I illuminates the differences in the development and reception of the economic analysis of law in the American Common Law system and in the continental European Civil Law system. Even though the methods of economic analysis are the same – in particular the devices of the microeconomic theory – the concrete applications and the problems these pose are subject to the legal and cultural context. Part II focuses on the different ways of thinking of lawyers and economists, which clash in the economic analysis of law. The legal culture plays an important role here as well, as the respective methods of legal reasoning can be more or less compatible with economic analysis. Part III is devoted to legal transplants, which often accompany the reception of law and economics from the USA. The problems that arise from such direct adoption of foreign legal institutes – particularly from a constitutional law point of view in European countries – are discussed using concrete examples such as Class Action or lenience programmes. Finally, Part IV focuses on the role economic analysis of law plays in the European Union. Both the theory as well as concrete examples – for instance the "more economic approach" in antitrust law – are analysed.

Part I starts with the contribution, "Never the Twain Shall Meet? A Critical Perspective on Cultural Limits Between Internal Continental Dogmatism and Consequential US-Style Law and Economics Theory", by Kai Purnhagen. It discusses possible explanations for the difference in receptiveness to law and economics between the USA and Europe. The author focuses on cultural factors that have influenced both the division of approaches (during the first wave) as well as the coming closer of the theories propagated in Europe and the USA (during the subsequent second wave). Prior to World War II, the classic legal thinking and especially the non-consequentialist thinking was the prevailing view in both Europe and the USA. However, on both continents there were schools of thought which rejected classic legal thinking. Legal Realism as established by Oliver Wendell

Homes in the USA and the free law school in Europe is discussed as having a parallel impact on classic legal thinking. The first wave is described as the post–World War II era in which law and economics theory became the dominant theory in the USA while Europe was dominated by classic legal thinking. While commonly explanations for this divergence are sought in the different legal education system and the different role of courts, the author argues that cultural influences also play an important role. In the USA, the cultural influences discussed focus on two main factors: the intellectual persuasive development and the strong financial support by the Ohlin foundation. The author sees the appointment of economist Henry Simons at the University of Chicago law school as the beginning of the intellectual movement. The reception of Posner's "Economic Analysis of Law" and the subsequent debate between Calabresi and Posner, it is argued, are the factors which led to the dominance of law and economics in the USA and therefore represent the central factor in the intellectual persuasiveness of the law and economics movement. John M. Ohlin had the explicit goal to introduce free-market thinking into American law schools. By funding the founding of the law and economics Center by Henry Manne through the Ohlin foundation, he gained an ideal vehicle to reach his goals. The focus on classical legal thinking in Europe is argued to be the result of the need to digest the horrors of the Nazi-regime. According to the author, this meant that a greater level of importance was placed on constitutional law as a means to achieve and protect basic and unalienable rights for all individuals. The author does describe some slight growth of the law and economics movement by the Ordoliberal School funded by the Walter Eucken Institute. However, he does not view the theories propagated by the Ordoliberals as comparable to law and economics and makes clear that the Walter Eucken Institute did not have the same financial power as the Olin Foundation. The author describes the second wave as the beginning of a convergence of thought between the two continents and this trend appears to follow on the fall of the Berlin Wall. During this time, the USA has moved towards more classic legal thinking resulting from the "new formalism" movement that strongly challenged the law and economics movement. In Europe, however, the dying off of the World War II generation and the introduction of financial institutions which support legal scholarship in the USA is seen as the main cultural influence on the strengthening of law and economics.

Régis Lanneau's chapter, "To What Extent Is the Opposition Between Civil Law and Common Law Relevant for Law and Economics?", aims to answer the question to what extent the difference in legal architecture is relevant for the reception of law and economics. The author begins his analysis with the comparison between Civil and Common Law and uses the crude distinction of these two different systems as they developed historically and how the different agents of the law may apply economic theories. He then shows that the differences between these two legal structures has over time begun to blur, leading to an extension of the different agents in law who may use law and economic analyses and can no longer explain why law and economics has been received so differently, not just between Civil and Common Law systems, but also between the nations using the same legal system. His conclusion is that the Civil versus Common Law division is an insufficient

differentiation when trying to explain the varying degree that law and economics has been accepted in the different legal systems. Lanneau's theory on the difference of the reception of law and economics relies on three legal characteristics: (1) perceived instrumentality of law, (2) autonomy of legal reasoning, and (3) the perceived freedom of judges. He argues that the more the law is perceived as being a means to an end to achieve some general social purpose, the more acceptable it appears to apply economic theories and tools when trying to assess the consequences of a legal rule or institution. With regards to the autonomy, of legal reasoning, Lanneau argues that the greater the perception of autonomy the less likely economic theories will be applied, since autonomous legal reasoning sets out the requirement that the answer should be found using the law and legal arguments alone. Likewise, the greater the discretionary powers of judges the more likely economic theories will be applied, as the economic analysis and tools provide the judge with justifications for his arguments, especially in systems which promote pragmatism in judicial reasoning.

In her "Comparative Study of Legal Reasoning in Swiss and UK Courts. Illustrated by Health Care Rulings", Lynn Watkins discusses the differences between approaches the Swiss Federal Court and the UK High Court take with regards to economic analysis as applied in health care rulings. The author begins by discussing the obligation on a state to provide access to primary health care. This requires health care policymakers to not only consider clinical effectiveness of a treatment but also cost-effectiveness. The use of quality added life year (QALY) for the purpose of assessing cost-effectiveness of a given treatment is highly controversial. However, its application is standard and part of the law in the UK. In Switzerland, the legislator simply stipulates that treatments must be cost-effective, but the Court must devise its own methodological approach on how to define cost-effectiveness. Against this background, two cases – one from the UK and one from Switzerland – are analysed to see how the Courts approach economic arguments. In closing, the author discusses possible reasons for the different approaches.

Part II starts with Mariusz Golecki's chapter, "Homo Economicus Versus Homo Iuridicus. Two Views on the Coase Theorem and the Integrity of Discourse Within the Law and Economics Scholarship". He discusses the different aspects of legal discourse and compares the approaches taken in the discipline of law and economics in the USA and Europe, respectively. According to the author, the tension between the American law and economics and the European economic analysis of law is in part a reflection of the tension between the pragmatic (functional) approach and the descriptive (analytical) approach of linguistic categorization of law. The central question in this chapter is whether there has been or can be a paradigm shift from a more descriptive approach to a more functional approach to linguistic categorization. To do so, he investigates the similarities and differences between legal and economic discourse in law and economics between Europe and the USA and uses the Coase theorem as a central point of investigation. Golecki then outlines and discusses the problems surrounding the Coase theorem and the associated explanations. Through means of Halpin's direct and indirect models, the author highlights that direct modelling based on the assumption that law is subject to

the scarcity of resources which brings economics into law. While this plays an important role in the economic analysis of law in Europe, in the USA, an indirect model plays an essential role in the law and economics movement following a more methodological approach. These two different approaches are then discussed by the author, first the European approach and subsequently the US approach. He first describes the framework of the economic analysis of law as a traditional descriptive discourse using a direct model. He discusses the relationship between the law and economics model of decision-making and the institutional structures in place often reflected in the interpretation of the Coase theorem proposed in Europe. In comparison to the direct model, the author describes the indirect model-based discourse found in the USA, where at the centre of the methodical approach lies the assumption of homo economicus. Both models are based on assumptions of a particular theory of human behaviour aimed at accomplishing certain aims and therefore, subjectively, can be seen as being placed within the sphere of decision making. This is what causes a link between the two models or is the point at which the homo economicus – based approach and the homo iuridicus – based approach meet.

In his contribution, "Three Realistic Strategies for Explaining and Predicting Judicial Decisions", Diego Moreno-Cruz presents three strategies used to explain and predict judicial decisions. These include: (1) the economic approach, (2) the psychological approach, and (3) the naturalistic approach. The first two of these are teleological explanations or rationalizations while the third strategy is a mechanical explanation or natural causation approach. The mentioned strategies are then compared. According to Moreno-Cruz, the strategies differ in two aspects: (1) they are based on different assumptions, and (2) they are based on different theories. They are, however, compatible in four different aspects which also characterize American Legal Realism. These are: (1) causal explanation, (2) ontological and epistemological beliefs, (3) predictive-theoretical objectives and products, and (4) the personality of the judge as the determinant of the judicial decision. At the end of this chapter, the author discusses Brian Leiter's basic epistemological option. According to Leiter, one must choose between either the psychological approach or the naturalistic strategy but reject the economic approach. To make this choice, one must, (a) prefer the psychological approach to the economic approach, and (b) prefer the naturalistic approach to the economic approach. The author argues that Leiter's epistemological approach is unfounded from a pragmatic point of view. The rejection of the economic approach in favour of either the psychological approach or the naturalistic approach is unfounded because each of these strategies is different in nature and provides different results. The three strategies are complementary and, therefore, not interchangeable. In his opinion, the economic approach is an adequate strategy for explaining and predicting judicial decisions, especially in commercial disputes, due to the pragmatic utility criterion of availability. He concludes that an epistemological pragmatic decision, to either reject or prefer one approach over the other, must be based on evidence regarding predictive failures and successes. Failing the availability of such evidence, it is acceptable to recognize all three approaches as realistic, complementary, and useful strategies.

In his chapter, "Some Thoughts on Economic Reasoning in Appellate Courts and Legal Scholarship. With Norwegian Illustrations in Three Legal Dimensions", Endre Stavang shows how economic analysis of law has gained popularity and recognition within the Norwegian legal community. He describes three instances in which Norwegian courts have applied economic analysis in their reasoning and introduces three publications by Norwegian scholars within the field of law and economics to illustrate his case. The three legal cases Stavang discusses range from contract law questions to tort law and copyright infringement. In the contract law case, the example used is of an apartment sale, in which the reasoning of the court's decision clearly allocated the legal burden to the seller with a view to create incentives for the contracting parties to reduce transaction costs as a result of the ruling. In the second tort law case, economic theories of human capital and production theory were applied to recover the loss of salary and dividends as a result of a road traffic accident. Finally, the author discusses the famous copyright infringement case commonly known as the DVD-Jon case. In his opinion, this is a good example due to the inclusion of expert testimony regarding the market effects of sharing a programme on the Internet allowing individuals to circumvent the DVD Content Scrambling System. Furthermore, though sparse, the court ruling does appear to conduct a cost-benefit analysis. The first of the scholarly works from Norway the author discusses is Trine-Lise Wilhelmsen's monograph, which analyses how the Norwegian Contract Formation Act contributes to economic efficiency. The second work he discusses is Hans Christian Bugge's monograph on environmental civil liability. In this book, the "polluter pays principle" is reviewed and a detailed analysis of the law in view of the ecological goal, the economic goal and the legal goal is made. The final paper the author highlights is the work of Gunner Nordén on the legal regulation and stance of the Norwegian Central bank. These three scholarly works are used to highlight the level of ambition and openness to the interdisciplinary approach of law and economics in Norway. However, this interdisciplinary approach does raise a demarcation problem between law and economics. According to the author, economics is often already embedded in legal problems, thereby requiring legal scholars to also discuss the economics associated with their subject matter. Furthermore, the author argues that there is no need for a protectionist stance, as the professional world will naturally determine what will and will not survive. The three approaches to law and economics described by Anthony Ogus are then used as a guideline for conducting such interdisciplinary scholarship in the future. To further alleviate the worries regarding the potential problems associated with the transformation of economic reason to legal arguments, the author describes three mechanisms through which sources of law may support the socially desirable solution to legal problems; they are, (1) the prevalence of private autonomy, (2) the internalization of risk and harmful effects, and (3) the balancing of interests. The strong tradition of legal realism and pragmatism found in Norway may provide the bridge between law and economics other European jurisdictions lack.

In his chapter, "Cultures of Administrative Law in Europe: From Weberian Bureaucracy to 'Law and Economics'", Klaus Mathis shows how economic theories

have enriched and influenced administrative jurisprudence and the culture of administrative law in Germany and Switzerland. Starting out from Weber's model of bureaucracy, he describes, and critically appraises, the influences of both the economic theory of bureaucracy and transaction cost theory on new administrative law paradigms such as New Public Management, Steering and Governance. Whereas Weber presupposed a common rationality that systematic legal systems needed to be based upon, new administrative law is based on value pluralism, governing the different values by formalizing the interactions between players instead of the formalization of values. By doing so, it switches administrative law from top-down regulation based on value monotony to process-oriented networks based on value pluralism. In modern European welfare states, state action not only has to be constitutionally correct as in liberal states, but must also be conducive to establishing distributive justice. Furthermore, in view of increasingly tight state finances, the efficiency of state activities becomes a requirement of ever-increasing importance. Even if justice and efficiency are frequently in conflict with each other, they nevertheless have one thing in common: the instrumental and consequential orientation. This entails greater instrumental programming of administrative law, in contrast to the traditional approach of conditional programming as described by the Weberian model of bureaucracy that was mirrored in reality in the liberal constitutional state. Instrumental programming, moreover, and the administration's concomitant responsibility for consequences call for insights from other disciplines in order to be able to predict and evaluate the real consequences of state action. It is therefore no coincidence that new theories of administrative law – New Public Management, New Administrative Law scholarship, and governance – have a pronounced interdisciplinary tendency and draw quite substantially on concepts and insights from the field of economics. At the same time, a change in administrative law culture can be observed: modern administrative law governs value pluralism by the formalization of interactions between players instead of the formalization of values, and traditional hierarchical regulation is supplemented by cooperative control structures such as networks. This is how modern administrative law tries to provide a framework for the various ways of life and opinions present in a multicultural and globalized society.

After these more theoretical parts, Part III is devoted to the more practical question of the limits of legal transplants one is confronted with when US-American legal institutes are adopted into European law. In their contribution, "The 'Hand Rule' as a Standard of Care in Swiss Tort Law?", Balz Hammer and Sandra Duss research the question as to whether the Hand rule can be applied in Swiss tort law as a standard of care. Before they elaborate on this concept, they point out the important differences between the legal and economic understanding of tort law. While lawyers focus more on the idea of compensation and justice, economists focus primarily on efficiency paradigms. The latter aim at assessing a tort case in such a way as to find the most cost-effective result for society as a whole, thereby maximising the social welfare. This aim is fulfilled by the application of the Hand rule, which the authors subsequently elucidate and critically assess. According to this rule, someone acts negligently if the expected cost of a damage caused by

him or her is greater than the cost of avoiding the damage. From an economic analysis of law perspective, this rule will always result in an efficient solution if both the injurer and the injured are able to take precautionary measures, as this will create an incentive for both sides to take cost-effective precautionary measures. The traditional legal standpoint counters this idea with the argument that the main purpose of tort law is to re-establish justice between the affected parties, and not in the pursuit of maximization of social welfare. Aside from the justice argument, legal authors discuss further problems – for example, the high information and administrative costs or the bounded rationality of the actors – which can occur when the Hand rule is applied. Finally, Hammer and Duss analyse a selection of cases from the Swiss Federal Court. In doing so, they ascertain that some elements of the Hand rule can be found in Swiss tort law – namely, when ruling on fault-based liability and in some instances of simple causal liability.

Ariane Morin discusses in her chapter "Efficiency and Swiss Contract Law" the role of the efficiency principle in Swiss contract law. Based on the assumption that efficiency is the basis of contract law, economic analysis of law has two functions: (1) a descriptive function, and (2) a normative function. Both of these functions can be used in either a theoretical approach or doctrinal approach. The theoretical approach, however, is not one found in Europe. In it, the principle of efficiency is considered regardless of the influence of the legislator's will. A more common approach is a doctrinal one. Here, the basis of civil contract law is the ideal of efficiency as a leading principle. This allows for both the normative and descriptive function to play an important role. The descriptive function acts as a guide for the interpretation of law, while the normative function helps to create new legal rules. The general receptiveness of a civil contract law code to economic analysis of law is dependent on context and values of the legal system into which the idea of efficiency is to be imported. After all, in the author's opinion, the idea that efficiency should be the goal of a law is nothing more than a belief. The characteristics of Swiss private law discussed are twofold. Firstly, the author describes the historical development of the Swiss Civil Code and highlights that it has always been heavily influenced by other legal systems, including Germany, France and Austria. The Swiss Civil Code has then influenced many other legal systems. As examples, the author cites the total reception of Swiss Civil Code in Turkey in 1929, as well as its strong influence in Mexico. Secondly, the flexibility of judges, which is very important for the doctrinal approach, is described. Judges are given a canon of interpretation methods they must use to find the *ratio legis* of a law. As the Swiss Civil Code is based on the idea that the code should be both popular and democratic, there is a greater focus on the textual interpretation of the law. The Swiss Civil Code concept was such that it should be easily understood by a layperson. For this reason, the law needs to be precise enough to settle an individual dispute and still be general and abstract enough to apply to all. This approach, however, means that the code is incomplete. The resulting gaps must be filled by the judges through the creation of general and abstract rules. This filling of gaps gives judges a relative degree of flexibility. However, the principle of legality requires judges to obey the choices made by the legislator in his interpretation, thus, any new rule created to fill a gap

must take into account the values and the system as a whole. Swiss contract law does not explicitly state that efficiency should be the goal. Rather, the principles of freedom of contract and good faith can run contrary to the ideal of efficiency. Only if the ideal of efficiency coincides with both of these principles, may a judge consider it in his ruling. Despite this limitation, there is some room for efficiency-orientated thinking in Swiss contract law. Firstly, efficiency may be applied by the judges in the subjective criterion if it appears that both parties clearly wanted to reach an efficient solution. Secondly, the judge must take efficiency into account when there are special legal rules to which the contract is referring to. An example is the Federal Act on Cartels.

The chapter of Ricardo Dawidowicz, "Class Action Lawsuits in Europe: A Comparative and Economic Analysis", focuses on possible structures for class action lawsuits in Europe. The author begins with an analysis of collective legal protections options in Europe in the form of collective lawsuits. These collective lawsuits have certain advantages particularly in areas of dispersed harm or in instances of mass harm. There are two possible structures of the collective lawsuits: opt-in and opt-out. Under an opt-in procedure, affected third parties must expressly confirm their intent to participate in the procedure, while in opt-out procedures, third parties must expressly declare their withdrawal. Next, the US-style class action is described and analysed. Rule 23 of the Federal Rules of Civil Procedure introduced class-action lawsuits in 1938. Its aim was to group the interests and resources of people with claims based on the same or similar causes addressed to the same person, thereby making the class action a representative lawsuit. The author then describes the effects of punitive damages, which he argues create a climate favourable to the plaintiffs. A further difference to the collective lawsuits and the class action in the US is seen in the "American Rule", whereby the losing party pays the court costs but the lawyers' fees must be paid by the parties. This is in direct contrast to the "English Rule" practiced in Europe, whereby the losing party must cover all legal expenses. A final aspect analysed is the impact contingency fees have. The author describes the relatively new instruments for collective legal protection found on a national level in Europe. Here, he describes the German "Capital Investors' Model Proceedings Act", which was implemented on a trial basis; the Group Litigation order in England which was introduced in 2000; the new code of civil procedure in Spain, which introduced a hybrid from between-group action and proceedings brought by an association within the sphere of consumer protection; and the Swedish class action, which was introduced in 2003. On the EU level, despite much debate and even quite a few proposals, there is currently no collective legal protection in place. Conducting cost-benefit analysis is generally acceptable in legislative procedure but very controversial in adjudication. In class action lawsuits, the efficiency benefits are also measured by their deterrent effect. However, the author argues that due to economies of scale, the defendant of a class action lawsuit gains an unjustified advantage as he need only clarify the question of law or fact once. According to the author, class action lawsuits are procedurally more efficient. This efficiency is due *not only* to economies of scale but also due to the lower court costs when compared to dealing with numerous individual cases.