

Countervailing Power Market, Litigation, AI

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Bologna 12-01-2026

Claudette-(like)

- “An opposing exercise of power is the principal solvent of economic power, the basic defense against its exercise in economic affairs”. Ken Galbraith
- Through the market
 - self-organization and competition
- Through public interest litigation
 - two forms: compliance with the law
 - injunctions and collective redress
- Through civil society and AI?

US and EU

- US

the market (self-organisation),
the law – administrative fines and class action

- EU

regulation instead of the market
strong pre-market control, limited fines and no class action

Path dependency from the industrial to the digital age

- US

no regulation of AI ex ante, reliance on the market and ex post corrective measures through administrative fines and class actions

- EU

sophisticated ex-ante (risk) regulation

rising administrative fines

slow move towards restricted collective redress

Co-Regulation

- New Approach in the industrial age 1985
 - binding legal requirements concretised through voluntary standards mandated by the Commission
 - elaborated by national and European standardisation organisations
- New Approach in the digital age 2025
 - horizontalising
 - broadening the tools of self-regulation
 - fundamental rights as safety net

Double privatisation

- Law making
 - co-operation between the European Commission, business organisations and businesses
- Law enforcement
 - self-compliance
 - third party compliance
 - Certification bodies and auditing companies
- Public authorities
 - monitoring and surveying self- and third party compliance

Civil society

- Ex ante
 - regulatory participation without legal status
 - elaboration of standards
 - model codes, codes of practices and codes of conduct
- Ex post
 - limited to registered consumer organisations/public agencies
 - EU minimum standards on injunctions and opt-in collective redress
- Fall back
 - preliminary reference procedures to promote compliance

Back to Countervailing Power

- Space for market power
 - collective self-organisation of EU located deployers – the American way of thinking
- Public interest litigation
 - EU controlled legitimacy of civil society organisations
 - Member States' space beyond the minimum
- EU law acquis form follows function
 - surface ToS, advert, data privacy
 - subsurface breaking forms

Stock-taking

- Path-dependency under the Consumer Law Acquis
Germany – standard terms, Italy – commercial practices
resistance in national courts against the CJEU
- Preliminary reference procedure
Data privacy Noyb (None of Your Business) Schrems I-?
resistance before the CJEU against right‘ization
- Use of Claudette
Silos, confidentiality and distrust
Academic (Locarno), administrative (ECAT), NGOs (Polish)

Future

- AI in public ex post control
EU legislation machine readability
growing research projects
- AI in collective litigation
Legal tech in mass litigation (Noyb)
US in pole position (global law)
- AI self-standing
Fields – subsurface breaking legal boxes
Hackers (Teubner) academic partisanship

Conclusion

- Eben Moglen:

‘the most significant difference between political thought inside the digirati and outside it is that in the network society, anarchism (or more properly, anti-possessive individualism) is a viable political philosophy’.