Part 7: Objectivity and Interdisciplinary Perspectives of Economics and Literature

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§ 13 Economic Analysis of Law: Inherent Component of the Legal System

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* See for a (slightly modified) German version of the article: Peter Zickgraf, 'Das rechtsökonomische Argument in der Wertungsjurisprudenz' [2021] Zeitschrift für die gesamte Privatrechtswissenschaft 482 ff.

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I. Introduction

The Economic Analysis of Law originated in the United States in the 1960s[1], building upon the intellectual foundations of legal realism.[2] The legal realists were skeptical that statutory law and legal precedents determined judicial decisions in a meaningful way[3]: 'Judicial judgments, like other judgments, doubtless, in most cases are worked out backward from conclusions tentatively formulated.'[4] In line with this view, Holmes had identified the law with a mere prediction of court decisions.[5] Moreover, legal realists had an instrumental and functional understanding of law, which regarded the law as a means to an end in order to achieve certain (policy) goals.[6] This notion is familiar to Heck's and Jhering's

1 The starting points were the articles by Ronald Coase, 'The Problem of Social Cost' (1960) 3 Journ L & Econ 1 and Guido Calabresi, 'Some Thoughts on Risk Distribution and the Law of Torts' (1961) 70 Yale L Journ 499.

2 Horst Eidenmüller, *Effizienz als Rechtsprinzip* (4th edn Mohr Siebeck 2015) 406 ff; Horst Eidenmüller, 'Rechtsanwendung, Gesetzgebung und ökonomische Analyse' (1997) 197 Archiv für die civilistische Praxis 80, 89 ff; Kristoffel Grechenig and Martin Gelter, 'Divergente Evolution des Rechtsdenkens – Von amerikanischer Rechtsökonomie und deutscher Dogmatik' (2008) 72 RabelsZ 513, 522 ff, 528 f (see also the English version: Kristoffel Grechenig and Martin Gelter, 'The Transatlantic Divergence in Legal Thought: American Law and Economics vs. German Doctrinalism', (2008) 31 Hastings Int'l & Comp L Rev 295 ff); Christian Kirchner, 'The Difficult Reception of Law and Economics in Germany' (1991) 11 Int'l Rev Law & Econ 277, 281.

3 Felix Cohen, 'Transcendental Nonsense and the Functional Approach' (1935) 35 Colum L Rev 809, 821: 'In effect, (jurisprudence) is a special branch of the science of transcendental nonsense'; *Lochner v New York*, 198 US 45, 76 (1905) (Holmes, dissenting): 'general propositions do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than any articulate major premise.'; Horst Eidenmüller (n 2) *Effizienz als Rechtsprinzip* 407 f; Kristoffel Grechenig and Martin Gelter (n 2) 525 f.

4 Jerome Frank, *Law and the Modern Mind* (Smith 1970) 109.

5 Oliver W Holmes, 'Path of the Law' (1897) 10 Harv L Rev 457, 461: 'The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.'

6 Karl Llewellyn, 'Some Realism About Realism – Responding to Dean Pound' (1931) 44 Harv L Rev 1222, 1223, 1230: 'They view rules, they view law, as means to an end; as only means to ends; as having meaning only insofar as they are means to ends.'; Holmes (n 5) 474: 'I look forward to a time when the part played by history in the explanation of dogma shall be very small, and instead of ingenious research we shall spend our energy on a study of the ends sought to be attained and the reasons for desiring them. (…) In the present state of political economy, indeed, we come again upon history on a larger scale, but there we are called on to

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'jurisprudence of interests' (*Interessenjurisprudenz*[7]).[8] Given such an understanding of the law and of legal reasoning, it is not surprising that there was a particular openness among legal realists to consider social science approaches – which Law & Economics is a part of – in determining the normative purposes of the law.[9] As a consequence, the Economic Analysis of Law was able to establish itself as a recognised theory of law in the US on this intellectual foundation.

In contrast, in continental Europe (especially in Germany), the notion of law as an independent system (*Systemdenken*) was and still is dominant.[10] Although the predominant methodological approach of the 'jurisprudence of values' (*Wertungsjurisprudenz*[11]) has long since detached itself from formalism (*Begriffsjurisprudenz*), an internal perspective is still being adopted in the process of finding solutions to legal questions, one which seeks to develop the answers primarily from the given system of legal principles.[12] In this process of legal reasoning, no pure legal positivism is being pursued, but rather the valuations of the law are inquired (meaning both the subjective valuations of the legislature and the objective values of the law itself), which then play a decisive role in the interpretation and further enhancement of the law by the courts (*Rechtsfortbildung*).[13] There are numerous studies on the historical, institutional and political

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consider and weigh the ends of legislation, the means of attaining them, and the cost. We learn that for everything we have to give up something else, and we are taught to set the advantage we gain against the other advantage we lose'; Horst Eidenmüller (n 2) *Effizienz als Rechtsprinzip* 407 ff.

7 Philipp Heck, 'Gesetzesauslegung und Interessenjurisprudenz' (1914) 112 Archiv für die civilistische Praxis 1; Rudolf von Jhering, *Der Zweck im Recht*, volume 1 (Breitkopf und Härtel 1877) passim; Karl Llewellyn, 'A Realistic Jurisprudence – The Next Step' (1930) 30 Colum L Rev 431, 454 is making reference to *Jhering*.

8 Horst Eidenmüller, (n 2) *Effizienz als Rechtsprinzip* 408; Kristoffel Grechenig and Martin Gelter (n 2) 525.

9 Kristoffel Grechenig and Martin Gelter (n 2) 514 f, 529, 549 f; Horst Eidenmüller (n 2) *Effizienz als Rechtsprinzip* 406.

10 Seminal Claus-Wilhelm Canaris, *Systemdenken und Systembegriff in der Jurisprudenz* (2nd edn Duncker & Humblot 1983); see on the historical development Kristoffel Grechenig and Martin Gelter (n 2) 514, 543 ff, 553 ff.

11 In essence, *Wertungsjurisprudenz* represents a middle ground approach between productional subjectivity and objectivity, each combined with applicational objectivity, see Philip M Bender 'Ways of Thinking about Objectivity' (§ 1), text to n 120–146.

12 Kristoffel Grechenig and Martin Gelter (n 2) 514, 543 ff, 553 ff; see also Alexander Hellgardt, *Regulierung durch Privatrecht*, (Mohr Siebeck 2016) 325 ff, 365 ff.

13 Karl Larenz, *Methodenlehre der Rechtswissenschaft*, (6th edn Springer 1991) 119 ff; Franz Bydlinski, *Juristische Methodenlehre und Rechtsbegriff* (2nd edn Springer

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background of the divergent developments in the US and Europe.[14] Therefore, these aspects shall not be the subject of this article. Rather, the focus of the present essay is to examine the theoretical consequences of this understanding of law with respect to the methodological prerequisites of an economic analysis of the law in the German legal system, which has the typical features of a continental European legal framework.

The methodological starting point of the article is the following: it needs to be substantiated that economic considerations constitute an inherent element of the current legal system in order to be of normative relevance. This undertaking is complicated by the fact that legal-economic reasoning is often regarded as non-legal,[15] and that, against this background, Law & Economics is scrutinised critically by some jurists.[16] The present essay takes the opposite view and attempts to demonstrate the manifold relevance of economic arguments within German and European law. This inquiry will lead to the following conclusion: in essence, there is no strong contrast between the 'strictly legal point of view' and the 'economic point of view'. Rather, the economic considerations of Law & Economics constitute an integral part of the European legal system(s) and can contribute significantly to its systematic, coherent and rational enhancement.

1991) 123 ff; Wolfgang Fikentscher, *Methoden des Rechts in vergleichender Darstellung*, volume III (Mohr 1976) 405 ff.

14 See Kristoffel Grechenig and Martin Gelter (n 2) 513 ff; Kenneth Glenn Dau-Schmidt and Carmen L Brun, 'Lost in Translation: The Economic Analysis of Law in the United States and Europe' (2006) 44 Colum J Transnat'l L 602 ff; Ugo Mattei and Roberto Pardolesi, 'Law and economics in civil law countries: A comparative approach' (1991) 11 Int'l Rev Law & Econ 265 ff; Christian Kirchner (n 2) 281 ff; Horst Eidenmüller (n 2) *Effizienz als Rechtsprinzip* 404 ff.

15 See Wolfgang Ernst, 'Gelehrtes Recht – Die Jurisprudenz aus der Sicht des Zivilrechtslehrers –' in Christoph Engel and Wolfgang Schön (eds), *Das Proprium der Rechtswissenschaft* (Mohr Siebeck 2007) 3, 17; Gerhard Wagner, 'Privatrechtsdogmatik und ökonomische Analyse' in Marietta Auer and others (eds), *Privatrechtsdogmatik im 21. Jahrhundert : Festschrift für Claus-Wilhelm Canaris zum 80. Geburtstag* (De Gruyter 2017) 281, 305 ('extralegal parameters'); Kristoffel Grechenig and Martin Gelter (n 2) 515, 556.

16 Karl-Heinz Fezer, 'Aspekte einer Rechtskritik an der economic analysis of law und am property rights approach' [1986] Juristenzeitung 817, 823 ('Economic legal analysis and liberal legal thinking are incompatible.'), 824 ('The economic theory of law is an aberration, which the law should guard against.'); Karl-Heinz Fezer, 'Nochmals: Kritik an der ökonomischen Analyse des Rechts' [1988] Juristenzeitung 223; Wolfgang Ernst (n 15) 17 ff, 24 ff, 29 f (open with regard to related fields of legal research outside of traditional jurisprudence); mediating Horst Eidenmüller (n 2) *Effizienz als Rechtsprinzip* passim.

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II. Positive vs. Normative Economic Analysis of Law

With respect to the integration of economic findings into adjudication, a distinction must first be made between Positive and Normative Economic Analysis of Law.[17]

Positive Economic Analysis tries to explain the existing legal system, institutions and rules ('as the law is') from the perspective of economic theory;[18] it also analyses the actual consequences of legal rules, giving particular attention to the behaviour of human actors ('predict what will be').[19] In this respect, Positive Economic Analysis of Law is similar to an impact assessment (*Folgenermittlung*), which is known from conventional legal methodology.[20] Additionally, Positive Economic Analysis attempts to identify the most efficient rule for a given legal issue.[21]

In contrast, the Normative Economic Analysis of Law argues for a particular substance of the law, measuring the existing legal framework against the economic efficiency criterion.[22] It thus contains a normative

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17 See Richard Posner, *Economic Analysis of Law* (9th edn Wolters Kluwer 2014) 31; Horst Eidenmüller (n 2) *Effizienz als Rechtsprinzip* 21; Florian Faust, 'Comparative Law and Economic Analysis of Law' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (2nd edn Oxford University Press 2019) 826, 827 ff; Niels Petersen and Emanuel Towfigh, 'Ökonomik in der Rechtsiwssenschaft' in Emanuel Towfigh and Niels Petersen (eds), *Ökonomische Methoden im Recht* (2nd edn Mohr Siebeck 2017) § 1 para 6 ff; see also Gerhard Wagner (n 15) 283 ff.

18 See the definition of Richard Posner, 'Some Uses and Abuses of Economics in Law' (1979) 46 U Chi L Rev 281, 284 f; Gerhard Wagner (n 15) 283 f; Florian Faust (n 17) 827 f.

19 Richard Posner (n 18) 285; Horst Eidenmüller (n 2) *Effizienz als Rechtsprinzip* 21; Niels Petersen and Emanuel Towfigh (n 17) § 1 para 6; Claus Ott, 'Allokationseffizienz, Rechtsdogmatik und Rechtsprechung – die immanente ökonomische Rationalität des Zivilrechts' in Hans-Bernd Schäfer and Claus Ott (eds), *Allokationseffizienz in der Rechtsordnung* (Springer 1988) 25, 28 ff; Jochen Taupitz, 'Ökonomische Analyse und Haftungsrecht – Eine Zwischenbilanz' (1996) 196 Archiv für die civilistische Praxis 114, 121 f; Christian Kirchner (n 2) 287 f; Florian Faust (n 17) 828.

20 Gerhard Wagner (n 15) 309 f; see generally on the more empirical, but related, area of cost-benefit analysis: Cass Sunstein, 'The Real World of Cost-Benefit Analysis: Thirty-Six Questions (and almost as many Answers)' (2014) 114 Colum L Rev 167 ff with further references.

21 Niels Petersen and Emanuel Towfigh (n 17) § 1 para 48.

22 Richard Posner (n 18) 285; Horst Eidenmüller (n 2) *Effizienz als Rechtsprinzip* 21; Florian Faust (n 17) 830 f; see for the (compelling) broader concept of individuals' well-being: Louis Kaplow and Steven Shavell, 'Fairness versus Welfare' (2001) 114

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statement about 'what [the law] should be'.[23] Specifically, Normative Analysis examines legal rules to determine whether they meet the criteria of Pareto-efficiency[24] or Kaldor-Hicks-efficiency[25] and advocates that the legal system be oriented towards efficiency[26] (= *deontological or consequentialist objectivity*).[27]

However, the differentiation between positive and normative analysis must not obscure the fact that the two are closely related: after all, a consequential application of law (= positive analysis) is impossible without a normative evaluation of the consequences of different legal decisions (= normative analysis).[28] Indeed, an impact assessment always (at least implicitly) includes an impact evaluation (*Folgenbewertung*).[29] Nevertheless, Positive Economic Analysis of Law is much easier to integrate into legal reasoning, since it does not necessarily have a link to the efficiency criterion; rather, its findings can also be used if other legal ends are pursued instead of economic efficiency.[30]

Harv L Rev 961 ff; see for another novel approach of normative analysis beyond the preference maximization goal (ie efficiency): Hanoch Dagan and Roy Kreitner, 'Economic Analysis in Law' (2021) 38 Yale Journ Reg 566.

23 Richard Posner (n 18) 285; Claus Ott and Hans-Bernd Schäfer, 'Die ökonomische Analyse des Rechts – Irrweg oder Chance wissenschaftlicher Rechtserkenntnis?' [1988] Juristenzeitung 213, 215; Horst Eidenmüller (n 2) *Effizienz als Rechtsprinzip* 21; Niels Petersen and Emanuel Towfigh (n 17) § 1 para 8; Hanoch Dagan and Roy Kreitner (n 22) 568, 572.

24 See Richard Posner (n 17) 14; Hans-Bernd Schäfer and Claus Ott, *Lehrbuch der ökonomischen Analyse des Zivilrechts* (6th edn Springer 2020) 13 f.

25 Nicholas Kaldor, 'Welfare Propositions of economics and interpersonal comparisons of utility' (1939) 49 Econ Journ 549; John Hicks, 'The foundations of welfare economics' (1939) 49 Econ Journ 696.

26 Niels Petersen and Emanuel Towfigh (n 17) § 1 para 48.

27 See Bender (n 11) (§ 1), text to n 33–42 (deontological objectivity), 43–52 (consequentialist objectivity).

28 Claus Ott (n 19) 31; Christian Kirchner (n 2) 287; Hans-Joachim Koch and Helmut Rüßmann, *Juristische Begründungslehre* (CH Beck 1982) 230.

29 See also Christian Kirchner (n 2) 287.

30 Gerhard Wagner (n 15) 309; Christian Kirchner (n 2) 287 f.

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III. Economic Analysis and the Legislative Process

The legislator's authority to incorporate economic considerations into the law and to pursue economic policy goals – such as efficiency – is largely undisputed.[31] This applies both in a positive and in a normative sense:

In a positive sense, the legislator can use the findings of Law & Economics to obtain a clearer picture of the actual consequences of a proposed statutory rule (eg the behaviour of the parties to be affected by the new rules).[32] The analysis of the factual consequences of a legal rule should typically be unavoidable for any legislator, since one can only evaluate on the basis of such an impact assessment whether the intended legislative goals can be achieved in reality with the selected regulatory tool.[33] The fact that the economic model of human behaviour might deviate from a supposed constitutionally predetermined image of man[34] does not prohibit the use of the (positive) economic model of human behaviour by the legislator. After all, the supposed image of man of the *Grundgesetz* does not serve to explain the actual behaviour of human actors and therefore, in contrast to the economic model of behaviour, it does not represent a positive but a normative model that is not suitable as an alternative to describe human behaviour.[35]

In a normative sense, the legislator can align the legal system or individual rules with economic efficiency.[36] This is due to the fact that, according to traditional (German) constitutional understanding, the democratically

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31 Horst Eidenmüller (n 2) *Effizienz als Rechtsprinzip* 414 ff; Horst Eidenmüller, 'Rechtsanwendung, Gesetzgebung und ökonomische Analyse' (1997) 197 Archiv für die civilistische Praxis 80, 94 ff; Christian Kirchner (n 2) 286; Gerhard Wagner (n 15) 293 ff, 310; Thomas M J Möllers, *Juristische Methodenlehre* (2nd edn CH Beck 2019) § 6 para 135; critical with regard to a sole focus on the efficiency criterion Taupitz (n 19) 122 ff. However, such an exclusive relevance of the efficiency principle is not demanded at all, see the references in footnote 40.

32 Gisela Rühl, 'Ökonomische Analyse des Rechts' in Julian Krüper (ed), *Grundlagen des Rechts* (3rd edn Nomos 2017) § 11 para 17; Niels Petersen and Emanuel Towfigh (n 17) § 1 para 7, 40 ff; Gerhard Wagner (n 15) 293 ff, 310; Hanoch Dagan and Roy Kreitner (n 22) 576 ff.

33 Gisela Rühl (n 32), § 11 para 17; Niels Petersen and Emanuel Towfigh (n 17) § 1 para 7; Florian Faust (n 17) 845 f.

34 See the critique of Karl-Heinz Fezer (n 15) 822; Karl-Heinz Fezer (n 15) 224.

35 Convincing: Gisela Rühl (n 32) § 11 para 17; likewise Niels Petersen and Emanuel Towfigh (n 17) § 1, para 53.

36 Prevailing opinion, see Eidenmüller (n 2) *Effizienz als Rechtsprinzip* 414 ff, 419 ff; Christian Kirchner (n 2) 286; Gisela Rühl (n 32) § 11 para 19; Gerhard Wagner (n 15) 293 ff.

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legitimised legislature is free to choose the policy objectives to be pursued[37] (= *productional subjectivity* as the starting point).[38] At the same time, however, it follows from this view that the legislature can also pursue other regulatory goals and can explicitly decide against taking the efficiency criterion into account.[39] In this regard, the Economic Analysis of Law cannot and does not want to make a claim that economic efficiency should be considered the sole normative criterion.[40] Thus, the legislator can, but does not have to pursue efficiency as one of several competing objectives.

IV. Economic Analysis and Adjudication

While the legislature's discretion to take economic considerations into account is largely uncontroversial, the legitimacy of incorporating economic reasoning into the interpretation of the law is the subject of a lively scholarly debate. Critical voices have raised two main objections against a consideration of Law & Economics-arguments in the course of an interpretation of the law: first, it was argued that courts did not have the necessary expertise to deal with such arguments; second, the critics claimed that the

37 Bundesverfassungsgericht BVerfGE 134, 242, 292 f. = NVwZ 2014, 211, 214 para 172; BVerfGE 121, 317, 350 = NJW 2008, 2409, 2412 para 103; NJW-RR 2016, 1349, 1352 para 63 f; Gerhard Wagner (n 15) 293 f.

38 See Bender (n 11) (§ 1), text to n 120–136. However, the (German) legislator is bound by fundamental rights (art 1–19 Grundgesetz) and the principle of proportionality (art 20(3) Grundgesetz), which ultimately means that the insights of the Positive Economic Analysis of Law (ie the factual consequences of rulemaking) cannot be ignored by the legislator (= productional objectivity as a corrective device, see Bender (n 11) (§ 1), text to n 137–146).

39 Gisela Rühl (n 32), § 11 para 19.

40 See Norbert Horn, 'Zur ökonomischen Rationalität des Privatrechts – Die privatrechtstheoretische Verwertbarkeit der ‚Economic Analysis of Law'' (1976) 176 Archiv für die civilistische Praxis 307, 332 f; Claus Ott and Hans-Bernd Schäfer (n 23) 214 ff; Gerhard Wagner (n 15) 313; Hans-Bernd Schäfer and Claus Ott (n 24) 44 f; Niels Petersen and Emanuel Towfigh (n 17) § 1 para 5; Florian Faust (n 17) 831 f; Hanoch Dagan and Roy Kreitner (n 22) 572 ff. It should be pointed out, though, that the normative framework of Louis Kaplow and Steven Shavell (n 22) 968, 977 ff, 989 ff rests on individuals' well-being (which explicitly incorporates aspects of income distribution) as the sole relevant criterion. However, given the attention Kaplow and Shavell pay to distributional issues, there is no substantive disagreement between their approach and the view expressed here. Rather, the difference is only of a terminological nature.

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judges typically lacked the relevant information and were therefore not capable of considering the factual consequences properly.[41]

With respect to the first objection – lack of expertise – the following remarks need to be made: it is true that (European) judges typically do not have an economics degree or training in Law & Economics.[42] However, it should not be ignored in this context that the institutional framework has already changed quite a bit and will probably continue to change in favour of Law & Economics in the future:[43] after all, lectures on the Economic Analysis of Law are now offered at a number of (German) universities.[44] This means that there will be more and more judges with a basic understanding of the law's economic background in the near future. In addition, the judiciary can already draw on numerous academic publications that have dealt with various fields of German and European law from a Law & Economics perspective.[45] In this context, it is the task of legal scholars

41 Horst Eidenmüller, 'Rechtsanwendung, Gesetzgebung und ökonomische Analyse' (1997) 197 Archiv für die civilistische Praxis 80, 105 ff; Horst Eidenmüller (n 2) *Effizienz als Rechtsprinzip* 398 ff, 427 ff, 429 ff; Wolfgang Ernst (n 15), 17 f.

42 Horst Eidenmüller, 'Rechtsanwendung, Gesetzgebung und ökonomische Analyse' (1997) 197 Archiv für die civilistische Praxis 80, 103 f.

43 The same finding as here Kristoffel Grechenig and Martin Gelter (n 2) 517 f.

44 More recently, the lecture 'Economic Analysis of Law' has been offered at the Humboldt University of Berlin. The University of Hamburg is home to a research institute on 'Law and Economics' and offers the option of a concentration in 'Economic Analysis of Law'. At the Goethe University in Frankfurt am Main there is an interdisciplinary 'Institute for Law & Finance'. The University of Mannheim offers a combined Law & Economics curriculum 'Corporate Lawyer' and the University of Bayreuth similarly offers an additional degree called 'Business Lawyer'; both curricula include economics courses. At least of anecdotal interest might be the author's own studies at the Ludwig Maximilian University of Munich, where the fundamentals of the Economic Analysis of Law were taught by Prof Eidenmüller, Prof Grigoleit and Prof Klöhn in various lectures ('Analytical Methods for Lawyers', 'European and International Business Law', 'Corporate Insolvency Law', 'Corporate Law', 'Capital Markets Law').

45 Selection of monographs: Thomas Ackermann, *Der Schutz des negativen Interesses* (Mohr Siebeck 2007); Horst Eidenmüller, *Unternehmenssanierung zwischen Markt und Gesetz* (Verlag Dr. Otto Schmidt 1999); Horst Eidenmüller, *Effizienz als Rechtsprinzip* (4th edn Mohr Siebeck 2015); Holger Fleischer, *Informationsasymmetrie im Vertragsrecht* (Beck 2001); Hans-Christoph Grigoleit, *Gesellschafterhaftung für interne Einflussnahme im Recht der GmbH* (Beck 2006); Lars Klöhn, *Kapitalmarkt, Spekulation und Behavioral Finance* (Duncker & Humblot 2006); Markus Ruffner, *Die ökonomischen Grundlagen eines Rechts der Publikumsgesellschaft* (Schulthess 2000); Tobias Tröger, *Arbeitsteilung und Vertrag* (Mohr Siebeck 2012). Text books: Hans-Bernd Schäfer and Claus Ott, *Lehrbuch der ökonomischen Analyse des Zivilrechts* (5th edn Springer 2012); Michael Adams, *Ökonomische Theorie des*

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to process the findings of neighbouring disciplines (eg economics) and to translate them into conventional legal terminology and categories in order to open up access to those findings for judges and lawyers.[46]

The second objection – insufficient information of the courts – is also not convincing. The criticism asserts that the information necessary to apply the models of the Economic Analysis of Law usually is not available and does not come to light in court proceedings.[47] However, this argument does not provide a strong objection: first of all, it should be noted that problems of ascertaining the relevant facts are not specific to economic arguments.[48] In this respect, the law is frequently content with approximate solutions that converge towards the optimal solution.[49] Moreover, the potential alternative of a non-formal consideration of the factual consequences must be considered, which does not represent a more rational form of decisionmaking.[50] In comparison, Economic Analysis offers a significant advantage: it makes clear to the judge on which aspects of the case the attention is to be directed.[51] Even if the optimal result is not achieved in the individual case, in the long run the judicial decisions will come closer and closer to the economically mandated result by applying a repeated trial-error-procedure.[52] Thus, if the theoretical findings of Law & Economics are taken into account by the courts, a procedurally secured rationality of court decisions will follow despite the limited information available to judges.

Yet, it must be admitted that both objections address important problems of a practical implementation of Law & Economics into the legal system.[53] But the conclusion from this insight cannot be to completely refrain from the consideration of factual consequences using Economic Analysis. The crucial point is the following: within the framework of teleological

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Rechts (2nd edn Peter Lang 2004); Hein Kötz and Gerhard Wagner, *Deliktsrecht* (14th edn Vahlen 2020).

46 Alexander Hellgardt (n 12) 404.

47 Horst Eidenmüller (n 2) *Effizienz als Rechtsprinzip* 429 ff; see also on this Jochen Taupitz (n 19) 156 ff, 165.

48 Hans-Bernd Schäfer and Claus Ott (n 24) 230; Gerhard Wagner (n 15) 312 f.

49 Gerhard Wagner (n 15) 312 f; *Hein Kötz* 'Ziele des Haftungsrechts' in Jürgen Baur and others (eds), *Festschrift für Ernst Steindorff zum 70. Geburtstag: Am 13. März 1990* (De Gruyter 1990) 643, 649 f; Hans-Bernd Schäfer and Claus Ott (n 24) 230.

50 Claus Ott and Hans-Bernd Schäfer (n 23) 219.

51 Similar Hans-Joachim Koch and Helmut Rüßmann (n 28) 230.

52 See on tort liability: Hans-Bernd Schäfer and Claus Ott (n 24) 230 f, 237.

53 Advocates of Law & Economics also acknowledge these points, see for example Gerhard Wagner (n 15) 311.

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interpretation, the actual consequences of a specific interpretation must be taken into account anyway in order to adequately reflect the intended purpose of the law.[54] Therefore, such considerations are likely to take place in the judiciary anyway (at least implicitly).[55] Instead of a 'naive-intuitive' and concealed application of economic 'everyday theories'[56], Economic Analysis of Law can help to make the factual assumptions about the consequences of legal decisions that have been incorporated into the court decision transparent and embed them in a formal, theoretical framework which can be criticised in a rational and objective manner.[57] Therefore, Law & Economics can make a substantial contribution to a coherent interpretation and judicial enhancement of the law – in particular by further narrowing down the area of judicial discretion[58] – through a theoretical elaboration and disclosure of the relevant decisionmaking aspects.[59] It represents a major step forward on the way to a jurisprudence which is based on rationally justified and objectively verifiable conclusions (= promotion of *objectivity in adjudication*).[60]

Having made those general remarks on the methodological benefits and practical feasibility of Law & Economics reasoning within adjudication, the following sections shall be devoted to analysing the possible applications and limits of Law & Economics-arguments in the context of the interpretation (*Auslegung*) and the enhancement of the law (*Rechtsfortbildung*).

54 Gerhard Wagner (n 15) 311; Niels Petersen and Emanuel Towfigh (n 17) § 1 para 19; Marina Deckert, *Folgenorientierung in der Rechtsanwendung* (Beck 1995) 55; Gisela Rühl (n 32), § 11 para 18.

55 Gerhard Wagner (n 15) 306 ff; similar Claus Ott (n 19) 39 f, 44 ('The actual decision criteria remain largely in the dark.').

56 Gerhard Wagner (n 15) 297, 312.

57 Claus Ott (n 19) 39 f, 44; Christian Kirchner (n 2) 287 f; Horst Eidenmüller, 'Rechtsanwendung, Gesetzgebung und ökonomische Analyse' (1997) 197 Archiv für die civilistische Praxis 80, 82 f; Wagner (n 15) 297, 312; see generally on the consideration legal decisions' consequences: Hans-Joachim Koch and Helmut Rüßmann (n 28) 230.

58 The narrowing of judicial discretion is a main goal of the jurisprudence of values (*Wertungsjurisprudenz*), see Franz Bydlinski (n 13) 131, 133, 135 f.

59 Christian Kirchner (n 2) 287 f.

60 See Bender (n 11) (§ 1), text to n 120–146.

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1. Interpretation of the law

The findings of the Economic Analysis of Law can be exploited within the teleological interpretation of the law. This mode of interpretation aims at interpreting a given legal rule in accordance with its purpose (*ratio legis*). A distinction must be made in this context as to whether there is a legislative purpose (*subjective-teleological* or *historical interpretation*) or whether the purpose of the particular rule has been developed in case law and jurisprudence (*objective-teleological interpretation*).

a. Subjective-teleological interpretation

The insights of Law & Economics can be relevant in the course of subjective-teleological (also called: historical) interpretation[61] (= *productional subjectivity* combined with *applicational objectivity*).[62] In this context, the legislative intent is the crucial factor. Insofar, three different cases need to be distinguished: (i) If the legislator explicitly rejects economic considerations when enacting a particular statute, the interpreter of the law must respect this legislative intent.[63] (ii) If the legislator pursues some policy objective, neither rejecting nor incorporating economic considerations, the findings of the (Positive) Economic Analysis of Law *can* be used in the course of historical interpretation as a means to predict human behaviour, inspiring the particular interpretation of the rule which best fits the legislative intent in terms of the behavioural consequences (see aa.).[64] (iii) If the legislator (at least implicitly) incorporates economic considerations or

61 See on the differing terminology: Hans-Joachim Koch and Helmut Rüßmann (n 28) 167; Karl Larenz and Claus-Wilhelm Canaris, *Methodenlehre der Rechtswissenschaft* (3rd edn Springer 1995) 149 ff, 164; Karl Engisch, 'Einführung in das juristische Denken' (12th edn Verlag W. Kohlhammer 2018) 146; Hans Christoph Grigoleit, 'Das historische Argument in der geltendrechtlichen Privatrechtsdogmatik' (2008) 30 Zeitschrift für Neuere Rechtsgeschichte 259, 262 ff; Hans Christoph Grigoleit, 'Dogmatik – Methodik – Teleologik' in Marietta Auer and others (eds), *Privatrechtsdogmatik im 21. Jahrhundert : Festschrift für Claus-Wilhelm Canaris zum 80. Geburtstag* (De Gruyter 2017) 241, 247.

62 On this permutation, see Bender (n 11) (§ 1), text to n 120–136.

63 Claus Ott (n 19) 30, 43 f; Gerhard Wagner (n 15) 313.

64 Claus Ott and Hans-Bernd Schäfer (n 23) 214, 216 f; Christian Kirchner (n 2) 286 f; Jochen Taupitz (n 19) 121 f; Hans Christoph Grigoleit (n 61) 267 f; Gerhard Wagner (n 15) 297, 311 f; Niels Petersen and Emanuel Towfigh (n 17) § 1 para 19; Florian Faust (n 17) 829 f.

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refers to efficiency considerations , the courts *must* help this 'policy of the law'[65] to become practically effective by interpreting it accordingly (see bb.).[66] This corresponds to the undisputed methodological approach of historical statutory interpretation in accordance with the intention of the legislator.[67] The obligation to take into account the intended purpose of the legislature stems from the constitutional duty of the courts to adhere to (positive) law and justice (art 20(3) *Grundgesetz*).[68]

aa. Positive Economic Analysis

Law & Economics-considerations *can* come into play if the legislator does not pursue the goal of economic efficiency but another policy objective. The Shareholder Rights Directive (Directive (EU) 2018/828) provides an example in which the regulatory objective pursued by the legislature is not efficiency (at least not explicitly) but which can be analysed against the background of the findings of Law & Economics, ie (economic) Contract Theory. Recital 28 of the Shareholder Rights Directive (Directive (EU) 2018/828) expressly recognises that remuneration represents a very important incentive mechanism for the conduct of directors:

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65 See for the term: Ernst Steindorff, 'Politik des Gesetzes als Auslegungsmaßstab im Wirtschaftsrecht', in Gotthard Paulus, Uwe Diederichsen and Claus-Wilhelm Canaris (eds), *Festschrift Larenz* (Beck 1973) 217 ff; in this particular context Horst Eidenmüller, 'Rechtsanwendung, Gesetzgebung und ökonomische Analyse' (1997) 197 Archiv für die civilistische Praxis 80, 116; see for a methodological classification of the term which simply describes the intention of the legislature: Karl *Larenz* and Claus-Wilhelm *Canaris* (n 61) 153.

66 Gerhard Wagner (n 15) 294 f; Horst Eidenmüller (n 2) *Effizienz als Rechtsprinzip* 452; Horst Eidenmüller, 'Rechtsanwendung, Gesetzgebung und ökonomische Analyse' (1997) 197 Archiv für die civilistische Praxis 80, 116 f; *Stefan Grundmann*, 'Methodenpluralismus als Aufgabe: Zur Legalität von ökonomischen und rechtsethischen Argumenten in Auslegung und Rechtsanwendung' (1997) 61 RabelsZ 423, 432, 434; Niels Petersen and Emanuel Towfigh (n 17) § 1 para 19; Thomas M J Möllers (n 31) § 6, para. 133; see for the relevance of Economic Analysis of Law in the context of subjective-teleological interpretation also Jochen Taupitz (n 19) 127.

67 See Karl Larenz and Claus-Wilhelm Canaris (n 61) 138 f, 165.

68 Horst Eidenmüller (n 2) *Effizienz als Rechtsprinzip* 452; Horst Eidenmüller, 'Rechtsanwendung, Gesetzgebung und ökonomische Analyse' (1997) 197 Archiv für die civilistische Praxis 80, 116; Alexander Hellgardt (n 12) 398 f; Karl Larenz and Claus-Wilhelm Canaris (n 61) 138 f (especially 139: 'At this point methodological and constitutional considerations intertwine.').

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> Since remuneration is one of the key instruments for companies to align their interests and those of their directors and in view of the crucial role of directors in companies, it is important that the remuneration policy of companies is determined in an appropriate manner by competent bodies within the company and that shareholders have the possibility to express their views regarding the remuneration policy of the company.

The recital makes perfectly clear that the legislator implicitly based the remuneration rules on the findings of the principal agent theory.[69] The requirements of art 9a, b Shareholder Rights Directive can therefore be interpreted as a consequence of the findings of (economic) Contract Theory and can be better understood against this background.

In this instance, a subjective-teleological/historical interpretation, which tries to realise the ends intended by the legislator as well as possible, requires that the consequences of alternative potential interpretations be considered. In the course of such an impact analysis, the economic model of human behaviour can be used (= Positive Economic Analysis) to identify the interpretation that best meets the intended regulatory purpose of the legislator.[70] One will even have to argue that an interpretation geared to the legislator's intention inevitably requires such an impact analysis.[71]

bb. Normative Economic Analysis

Looking more closely at the final case (ie the legislator has made economic considerations), two different situations must be distinguished: *first*, it is possible that the legislature chooses economic efficiency as its legislative goal; *second*, the legislature may not refer explicitly to economic efficiency. However, it is sufficient if efficiency is the implicit regulatory objective.[72] In Environmental Liability Law (*Umwelthaftungsgesetz*), for example, the Ger-

69 See the seminal article by Michael Jensen and William Meckling, 'Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure' (1976) 3 Journ. Fin. Econ. 305 ff; see also Adolf Berle and Gardiner Means, *The Modern Corporation and Private Property* (Macmillan 1932), passim.

70 Claus Ott and Hans-Bernd Schäfer (n 23) 214, 216 f; Christian Kirchner (n 2) 287 f; Jochen Taupitz (n 19) 121 f; Gerhard Wagner (n 15) 297, 311 f; Niels Petersen and Emanuel Towfigh (n 17) § 1 para 19; Hanoch Dagan and Roy Kreitner (n 22) 576 ff. This also applies if the purpose of a rule is of an objective-teleological nature.

71 Gerhard Wagner (n 15) 297, 311 f.

72 Horst Eidenmüller (n 2) *Effizienz als Rechtsprinzip* 452 ff; see also Stefan Grundmann (n 66) 434; Gisela Rühl (n 32), § 11 para 21.

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man legislator implicitly referred to the internalization of external effects by means of liability[73]:

> After all, the imposition of strict environmental liability on environmentally hazardous production processes tends to make the products and services concerned more expensive on the market: The entrepreneurs have to incorporate possible compensation payments for environmental damage in their cost accounting and try to pass these costs on to third parties via the (selling) price. In this way, environmentally hazardous production processes are pushed back and damage-preventing measures are taken where they are most cost-effective. Environmental liability law can thus contribute, via the price and market mechanism, to ensuring that scarce ecological resources are used as efficiently as possible.[74]

European capital markets law provides another illustrative example of Economic Analysis' relevance in the context of subjective-teleological interpretation. In Recital 2 of the Market Abuse Regulation (Regulation (EU) No 596/2014), the European legislator explicitly refers to the goal of an efficient financial market:

> An integrated, efficient and transparent financial market requires market integrity. The smooth functioning of securities markets and public confidence in markets are prerequisites for economic growth and wealth. Market abuse harms the integrity of financial markets and public confidence in securities and derivatives.

If one wants to enforce the prohibition of insider trading (art 14 Market Abuse Regulation) effectively in accordance with the regulatory objective of the legislator, one has to understand the legal concept of the 'insider information' (art 7 Market Abuse Regulation), which in turn requires expertise on the economic foundations of the capital market, ie an understanding of the basic concepts of modern capital market theory.[75]

b. Objective-teleological interpretation

Should the legislator not specify the ends that it is pursuing at all, the limits of subjective-teleological or historical interpretation are reached

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73 Gerhard Wagner (n 15) 295; Horst Eidenmüller (n 2) *Effizienz als Rechtsprinzip* 453.

74 Deutscher Bundestag Drucksache 11/6454, 13.

75 See on this topic from the German legal literature: Lars Klöhn, 'Wertpapierhandelsrecht diesseits und jenseits des Informationaparadigmas' (2013) 177 Zeitschrift für das gesamte Handels- und Wirtschaftsrecht 349 ff; Lars Klöhn, *Kapitalmarkt, Spekulation und Behavioral Finance* (Duncker & Humblot 2006) 23 ff.

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and only an objective-teleological interpretation can be applied. Within this objective-teleological interpretation, economic arguments can play a role, even if the legislator has not made economic considerations (= *productional objectivity* combined with *applicational objectivity*).[76] Such economic arguments are particularly relevant in the concretisation of undefined legal terms and general legal concepts (*Generalklauseln*).[77] The academic discourse was highly influenced by *Eidenmüller*, who argued that economic efficiency is a relevant factor in the objective-teleological interpretation if it presents a methodologically permitted concretisation of the law ('*zulässige Gesetzeskonkretisierung*').[78] In which cases, however, this vague standard is met has thus far remained an unaddressed question in the legal literature. The only aspect that has been clarified is that economic arguments – as objective-teleological interpretation in general – must not contradict either the wording or the intention of the legislator.[79] In order to further elaborate on the topic, it is once again useful to distinguish between Positive and Normative Economic Analysis.

aa. Positive Economic Analysis

If an objective-teleological purpose of a legal rule is already established, which does not necessarily have to coincide with economic efficiency, the economic model of human behaviour can be used in the sense of a Positive Economic Analysis to identify the interpretation that best suits the objective goal of the rule.[80] In this way, the process of legal decisionmaking can be considerably rationalised.[81] And even if the intended purpose of a rule is thus far unsettled, such an impact analysis of different conceivable statutory interpretations can be carried out. The same arguments that have already been put forward in favour of the (Positive) Economic Analysis in general also apply in this context of objective-teleological interpretation.[82]

76 On this permutation, see Bender (n 11) (§ 1), text to n 137–146.
77 Thomas M J Möllers (n 31) § 6, para. 135; similar Niels Petersen and Emanuel Towfigh (n 17) § 1 para 31 ff.
78 Horst Eidenmüller (n 2) *Effizienz als Rechtsprinzip* 452 ff; Horst Eidenmüller, 'Rechtsanwendung, Gesetzgebung und ökonomische Analyse' (1997) 197 Archiv für die civilistische Praxis 80, 117 ff; see also Stefan Grundmann (n 66) 442; Gisela Rühl (n 32), § 11 para 20.
79 Stefan Grundmann (n 66) 442; Gisela Rühl (n 32), § 11 para 20.
80 This need not be justified separately, see Stefan Grundmann (n 66) 442 f.
81 Niels Petersen and Emanuel Towfigh (n 17) § 1 para 19.
82 See above IV.

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The auxiliary function of Economic Analysis can be illustrated in the context of the so-called supplementary interpretation of contracts (*ergänzende Vertragsauslegung*)[83]: The Federal Court of Justice (*Bundesgerichtshof*) interprets § 157 of the German Civil Code (*Bürgerliches Gesetzbuch*) to the effect that 'when supplementing the content of the contract, it must be taken into account what the parties would have agreed upon in good faith as bona fide contractual partners if they had considered the case which they had not regulated in a reasonable balance of their interests'.[84] This standard is largely consistent with the approach of Law & Economics: therefore, unless the subjective intentions of the parties are different (= primacy of *productional subjectivity* combined with *applicational objectivity*)[85], the economic model of the complete contract[86] can be used, since it can be assumed that the parties would have wanted to conclude an efficient contract that maximises the welfare of both parties. In this way, the supplementary interpretation of contracts is placed on a clear theoretical-normative foundation, which enables rational and objective legal decision-making (= supplementary *productional objectivity* combined with *applicational objectivity*).[87]

The fact that Positive Economic Analysis can contribute considerably to the understanding of dogmatic figures is also shown by the example of the so-called deterrent function (*Präventionsfunktion*) of tort law liability.[88] The economic analysis of tort law has shown that tort liability provides behavioural incentives for (potential) injurers to avoid damages.[89] Different liability rules were examined with respect to their economic effects and legal solutions were identified that lead to an efficient level

83 Horst Eidenmüller, 'Rechtsanwendung, Gesetzgebung und ökonomische Analyse' (1997) 197 Archiv für die civilistische Praxis 80, 119 f.

84 Bundesgerichtshof NJW 2004, 2449; NJW 1994, 3287; NJW 1982, 2184, 2185; NJW 1953, 937.

85 On this permutation, see Bender (n 11) (§ 1), text to n 120–136.

86 Ian Ayres and Robert Gertner, 'Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules' (1989) 98 Yale L Journ 87 ff; Hans-Bernd Schäfer and Claus Ott (n 24) 479 ff.

87 On this permutation, see Bender (n 11) (§ 1), text to n 137–146.

88 Guido Calabresi, *The Costs of Accidents* (Yale University Press 1970) 68 ff; Victor Mataja, *Das Recht des Schadensersatzes vom Standpunkt der Nationalökonomie* (Duncker & Humblot 1888) 19 ff, passim; Hein Kötz (n 49) 645 ff; Jochen Taupitz (n 19) 138 ff; Gerhard Wagner, 'Prävention und Verhaltenssteuerung durch Privatrecht – Anmaßung oder legitime Aufgabe?' (2006) 206 Archiv für die civilistische Praxis 352, 451 ff; Hans-Bernd Schäfer and Claus Ott (n 24) 166 ff; Gerhard Wagner (n 15) 311 f.

89 See the references in footnote 88.

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of damages.[90] However, the latter shows particularly well that a certain degree of normative impact assessment (*Folgenbewertung*) is inherent in every form of positive impact analysis (*Folgenermittlung*).[91] Consequently, the Positive Economic Analysis of Law cannot be completely separated from the Normative Economic Analysis of Law, which will be the subject of the following discussion.

bb. Normative Economic Analysis

If one does not only wish to answer the question of the actual effects of a certain statutory interpretation, but to justify that such an interpretation, which leads to an efficient result, is preferable, one is conducting a Normative Economic Analysis. However, the statement, that a statutory interpretation in accordance with the efficiency criterion is legitimate if it presents a methodologically permitted concretisation of the law[92], leaves the relevant methodological requirements with regard to the normative authority of this interpretation completely unanswered.

The identification of the objective purpose of a legal rule with economic efficiency leads directly to the general – but largely unanswered – question on the possibility to rationally justify the (objective) purpose of a statutory rule.[93] It must not suffice in this respect that the interpreter of the law (eg a judge or legal scholar) simply determines the intended purpose herself and, as a result, places her own normative assessment into the legal rule.[94]

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90 Guido Calabresi (n 88) passim; Steven Shavell, *Economic Analysis of Accident Law* (Harvard University Press 1987) 5 ff, passim; William Landes and Richard Posner, *The Economic Structure of Tort Law* (Harvard University Press 1987) 54 ff, passim.

91 Hans-Joachim Koch and Helmut Rüßmann (n 28) 230 f; Claus Ott and Hans-Bernd Schäfer (n 23) 217.

92 Horst Eidenmüller (n 2) *Effizienz als Rechtsprinzip* 452 ff; Horst Eidenmüller, 'Rechtsanwendung, Gesetzgebung und ökonomische Analyse' (1997) 197 Archiv für die civilistische Praxis 80, 117 ff; see also Stefan Grundmann (n 66) 442; Gisela Rühl (n 32), § 11 para 20.

93 Fundamental reflections on this largely unresolved question are given by Hans Christoph Grigoleit (n 61) 264 ff.

94 Like this the (distorted) description of the objective-teleological interpretation in Klaus Friedrich Röhl and Hans Christian Röhl, *Allgemeine Rechtslehre* (3rd edn Carl Heymanns 2008) 622; pointing out this danger Thomas MJ Möllers (n 31) § 5, para. 8. Frequently, however, the wording of a rule will give a first hint to the *ratio legis* and thus put a limit to an arbitrary interpretation, see Hans-Joachim Koch and Helmut Rüßmann (n 28) 170, 222.

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Not without good reason, it was pointed out that objective(-teleological) interpretation is in reality at risk to be ideologically coloured and thus to a certain degree arbitrary.[95] Indeed, it is necessary that the interpreter of the law justifies in a comprehensible manner why a particular purpose – in the present context: economic efficiency – should be decisive for the interpretation in a normative sense. In this respect, three situations can be distinguished:

(1) Existing interpretation of the statutory rule in case law and legal scholarship

First of all, there are legal rules that have already been the subject of court rulings and legal studies. In this case, illustrative material is available that can be used to infer the purpose of the rule, the *ratio legis*, inductively from the results found earlier.[96]

In order to identify the (objective) purpose of a rule with economic efficiency, it is therefore sufficient if the *ratio legis*, according to the current state of its interpretation in the judiciary and legal scholarship, objectively incorporates such economic considerations.[97] The legal rule must therefore be capable of being objectively explained – at least in the most part – using the findings of Law & Economics.[98] In methodological terms, this represents an inductive procedure for reconstructing the relevant (economic) 'values' that give the legal rule its normative justification and determine its interpretation. Ultimately, the aim is to show that, from an objective point of view, economic considerations underlie a particular rule or legal institution and are thus an immanent part of the legal system as its *ratio legis*.

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95 Klaus Friedrich Röhl and Hans Christian Röhl (n 94) 629, 631; Thomas MJ Möllers (n 31) § 5 para. 8, § 6 para. 60, 73, 75 with further references; but see also Hans Christoph Grigoleit (n 61) 269 ff.

96 See for this method: Karl Larenz and Claus-Wilhelm Canaris (n 61) 157; see also Hans Christoph Grigoleit (n 61) 261 f. This purpose of a rule can also be called the principle underlying the rule, see Karl Larenz and Claus-Wilhelm Canaris (n 61) 157. Regularly, however, the term 'principle' is associated with a meaning that extends beyond the individual legal rule, same as here Franz Bydlinski (n 13)

97 Same as here Claus Ott (n 19) 31 ff; Stefan Grundmann (n 66) 443 ff; similar Gerhard Wagner (n 15) 306 ff.

98 However, it should be pointed out that this inductive procedure contains a certain degree of subjective-teleological interpretation, since the intentions of the historical legislator have already been incorporated into the case law and the interpretation by legal scholarship, see Franz Bydlinski (n 13) 451.

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If this can be convincingly demonstrated, the findings of the Economic Analysis of Law can certainly be used as an auxiliary tool in the context of objective-teleological interpretation.

One will even have to go further: if the objective purpose of a legal rule is supported or justified by economic considerations (in particular: efficiency), the interpreter of such a provision *must* take this into account in the course of the interpretation and may not simply ignore it. In this respect, the same methodological rules apply as in the case of subjective-teleological (or historical) interpretation. This does not mean, however, that the efficient interpretation must necessarily be chosen, since the objective-teleological interpretation is only one method of interpretation and competing legal principles – such as distributive justice – can also influence the outcome of the interpretation.[99] Yet, in this case, the burden of normative justification shifts to those who wish to give preference to other 'values' or principles over efficiency.[100]

German case law on (pre-)contractual disclosure obligations may serve as an example, as these obligations can largely be explained by the desire to reduce information costs while simultaneously conserving the desirable incentives to generate (productive) information.[101] For example, the seller's obligation to disclose disadvantageous characteristics of the sold good[102] and the rejection of an obligation to disclose general market conditions[103] are largely consistent with the findings of the Economic Analysis of Law and can be coherently enhanced on the basis of its highly differentiated solutions.[104]

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99 In this case, however, it must also be justified that the allegedly competing legal principles are underlying the individual legal rule, see also Stefan Grundmann (n 66) 443.

100 Klaus Friedrich Röhl and Hans Christian Röhl (n 94) 648.

101 Holger Fleischer (n 45) 146 ff, 277 ff; Tobias Tröger (n 45) 279 ff.

102 Bundesgerichtshof NJW 1965, 34; Holger Fleischer (n 45) 286 ff.

103 Reichsgericht Zivilsachen 111, 223; Holger Fleischer (n 45) 325 ff.

104 See generally on (pre-)contractual disclosure obligations: Steven Shavell, 'Acquisition and Disclosure of Information Prior to Sale' (1994) 25 RAND Journ Econ 20 ff; Anthony Kronman, 'Mistake, Disclosure, Information, and the Law of Contracts' (1978) 7 Journ Leg Stud 1 ff; Jack Hirshleifer, 'The Private and Social Value of Information and the Reward to Inventive Activity' (1970) 61 Am Econ Rev 561 ff; Robert Cooter and Thomas Ulen, *Law and Economics* (6th edn Addison Wesley 2016) 354 ff; Richard Posner (n 17) 118 ff; Hein Kötz, 'Vertragliche Aufklärungspflichten: Eine rechtsökonomische Studie' in Jürgen Basedow, Klaus Hopt and Hein Kötz (eds), *Festschrift für Ulrich Drobnig zum siebzigsten Geburtstag* (Mohr Siebeck 1998) 563 ff; Hans-Bernd Schäfer and Claus Ott (n 24) 625 ff; Hans-Bernd Schäfer, 'Ökonomische Analyse von Aufklärungspflichten' in

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The advantage of relying on an objective purpose of a legal rule, which was derived inductively, is that the true decision criteria (*rationes decidendi*) are revealed. As far as this *ratio legis* is of an economic nature, Law & Economics can thus make a significant contribution to a coherent enhancement of the law on a rationally verifiable basis.

(2) Non-existent interpretation of the statutory rule in case law and legal scholarship

If the inductive method for determining the objective purpose of the norm cannot be conducted because the rule is novel, the normative relevance of efficiency can only be justified by the fact that it is regarded as a legal principle relevant to the specific legal rule in question.[105] One must therefore inquire whether economic efficiency is to be regarded as a relevant legal principle within the particular set of statutory rules, the respective legal institutions (*Rechtsinstitut*) or an even wider field of the law (such as contracts, torts, civil law, criminal law etc).[106] However, it should be pointed out that this approach sticks to the intrinsic values of the law as well, since the legal principles are in turn inductively derived from the *rationes legis* of the existing legal provisions.[107] Thus, the – possibly economic – objective purpose of a legal rule is ultimately derived from the inner system of the law.[108]

Claus Ott and Hans-Bernd Schäfer (eds), *Ökonomische Probleme des Zivilrechts* (Springer 1991) 117 ff; Holger Fleischer (n 45) 146 ff, 277 ff; Tobias Tröger (n 45) 279 ff.

105 Karl Larenz, Richtiges Recht (Beck 1979) 26; Karl Larenz and Claus-Wilhelm Canaris (n 61) 157; see also Hans Christoph Grigoleit (n 61) 264.

106 See more precisely under IV. 2.

107 Claus-Wilhelm Canaris, *Die Feststellung von Lücken im Gesetz* (2nd edn Duncker & Humblot 1983) 97 ff; Franz Bydlinski (n 13) 481 ff, 485 f, 490 f; Franz Bydlinski, *Fundamentale Rechtsgrundsätze* (Springer 1988) 124; Franz Bydlinski, System und Prinzipien des Privatrechts (Springer 1996) 68; Karl Larenz (n 105) 25 f; Karl Riesenhuber, *System und Prinzipien des Europäischen Vertragsrechts* (De Gruyter 2003) 18. See also IV. 2. A. bb.

108 See on the inner system of the law: Claus-Wilhelm Canaris (n 10) 88 ff, 91; see also Helmut Coing, *Juristische Methodenlehre* (De Gruyter 1972) 33.

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(3) Absence of legal principles

This leaves the – highly theoretical – case in which the wording, the legislative intent and the inner system of the law do not provide a clear answer for interpretation and, moreover, there is neither case-law on the provision in question, nor can a general legal principle be identified which could be used for an objective-teleological interpretation of the provision in question. In such a situation, the identification of the norm's purpose with the efficiency criterion can only be justified via rational, intersubjectively persuasive arguments.[109] Normative weight is therefore only given to such a *ratio legis* – which was taken as a premise at the outset – over time if it is subsequently approved in case law and/or legal scholarship because of the factually appropriate results obtained by its application or if it can be traced back to the 'idea of the law' (*Rechtsidee*) itself.[110] This is in fact the inverse of the above mentioned inductive process of obtaining the purpose of a particular legal rule.[111] In comparison to mere judicial discretion, however, a recourse to economic efficiency still appears to be preferable, since, at least in part, it offers an objectively verifiable method of applying the law. After all, efficiency considerations are based on a precise theoretical framework and clear assumptions. As a result, in this case there is the possibility, but not an obligation, to take efficiency considerations into account.

The latter two groups of objective-teleological interpretation are closely related to the enhancement of the law (*Rechtsfortbildung*).[112] The following section is therefore devoted to the relevance of Economic Analysis and economic considerations (especially efficiency) in that context.

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109 In such circumstances, the quality of the legal reasoning decisively influences the legitimacy of the proposed objective *ratio legis* (= objective purpose of the rule), cf generally on this: Hans Christoph Grigoleit (n 61) 247, 250, 252, 261 f; Hans Christoph Grigoleit (n 61) 264.

110 Claus-Wilhelm Canaris (n 107) 106 ff; Karl Larenz and Claus-Wilhelm Canaris (n 61) 241.

111 See above IV. 1. B. bb. (1) Similar procedures are known from the field the judicial enhancement of the law, which was sometimes carried out on the basis of a legal principle whose significance has only been recognised later, see Karl Larenz and Claus-Wilhelm Canaris (n 61) 232, 241.

112 Similar Gerhard Wagner (n 15) 304 who points to the existing continuum between (objective-)teleological interpretation and the enhancement of the law; see extensively under IV. 2.

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2. Enhancement of the law

If a legal question cannot be solved by interpreting the statutory rules, because there is a 'gap' (*Lücke*) in the law[113], the courts must enhance the law (*Rechtsfortbildung*). In the context of the enhancement *praeter legem*, which is of particular interest here, the judge in fact replaces the legislator and becomes involved in the making of new law. However, the prerequisites and limits of judicial enhancement of the law must be respected: the judge may not simply transform his own policy preferences into law via the judicial enhancement of the law[114] (= *applicational objectivity*).[115] Rather, the result found must be justified in a methodologically recognised manner.[116] In particular, the decision can be based on a legal principle inherent in the legal system.[117] In the context of the enhancement of the law, efficiency is therefore only of normative significance for the legal decision if it is recognised as a legal principle.[118] This question shall thus be investigated in the following section.

a. Legal principles

In order to improve the accessibility of the following arguments, it seems appropriate to make some general remarks on legal principles first.

aa. General features of legal principles

Principles represent the 'guiding ideas' of an existing or possible rule, without, however, being fit to be directly used for the legal assessment of

113 See on this prerequisite of judicial enhancement of the law Karl Larenz and Claus-Wilhelm Canaris (n 61) 187 ff.

114 Karl Larenz and Claus-Wilhelm Canaris (n 61) 247.

115 On applicational objectivity, see Bender (n 11) (§ 1), text to n 109–114, 120–146.

116 Bundesverfassungsgericht BverfGE 34, 269, 287; Karl Larenz and Claus-Wilhelm Canaris (n 61) 246 f; Hans-Martin Pawlowski, 'Einführung in die juristische Methodenlehre' (2nd edn Müller 2000) § 5 para 109, 126.

117 Karl Larenz and Claus-Wilhelm Canaris (n 61) 240 ff, 246; see also Wolfgang Ernst (n 15), 30.

118 Horst Eidenmüller (n 2) *Effizienz als Rechtsprinzip* 459 ff; Horst Eidenmüller, 'Rechtsanwendung, Gesetzgebung und ökonomische Analyse' (1997) 197 Archiv für die civilistische Praxis 80, 126 ff; Stefan Grundmann (n 66) 442; Gerhard Wagner (n 15) 313 f.

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a specific case.[119] Rather, the latter requires the concretisation by further sub-principles and further specific individual value-judgements.[120] Principles acquire their status because of their systemic, principal significance for a particular area of law.[121] Statements about the importance and weight of a principle are therefore quite relative: a particular legal principle can be regarded as system-shaping for a certain sub-area of law, but need not be regarded as system-shaping for private law as a whole or the entire legal system.[122] Nevertheless, legal principles are an immanent component of the legal system. As values that justify the rules of the law, the principles form the 'depth structures of the law'.[123] It is also typical of legal principles that they can conflict with each other. In that case, this conflict must be resolved in such a way that the principle with the relatively greater weight (*dimension of weight*) is given preference.[124]

bb. Two ways of establishing legal principles: inference through induction and traceability to the idea of law

Principles of law can first be derived from the specific to the general by an inductive inference.[125] In this case the normative justification of a rule must be worked out, which gives the norm its substantive legal status.[126] In other words, the uncovering of a principle requires a regression to the

119 Karl Larenz (n 105) 23; Karl Larenz and Claus-Wilhelm Canaris (n 61) 240.

120 Claus-Wilhelm Canaris (n 10) 53, 57 f; see also Karl Larenz (n 105) 24; Karl Larenz and Claus-Wilhelm Canaris (n 61) 240.

121 Claus-Wilhelm Canaris (n 10) 58; Franz Bydlinski (n 13) 451 (the 'more general evaluations that underlie entire groups of rules and legal institutions').

122 Claus-Wilhelm Canaris (n 10) 47 f, 58.

123 Klaus Friedrich Röhl and Hans Christian Röhl (n 94) 283.

124 Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1977) 26; Claus-Wilhelm Canaris (n 10) 52 f; Robert Alexy, *Theorie der Grundrechte* (Suhrkamp 1986) 79; Robert Alexy, *Recht, Vernunft, Diskurs* (Suhrkamp 1995) 183, 218; similar Karl Larenz and Claus-Wilhelm Canaris (n 61) 303; Karl Larenz, 'Wegweiser zu richterlicher Rechtsschöpfung: Eine rechtsmethodologische Untersuchung' in Festschrift für Arthur Nikisch (Mohr 1958) 275, 301 ff.

125 Claus-Wilhelm Canaris (n 107) 97 ff; Franz Bydlinski (n 13) 481 ff, 485 f, 490 f; Franz Bydlinski (n 107), *Fundamentale Rechtsgrundsätze* 124; Franz Bydlinski (n 107) *System und Prinzipien des Privatrechts* 68; Karl Larenz (n 105) 25 f; Karl Riesenhuber (n 107) 18.

126 Karl Larenz (n 105) 26; also Franz Bydlinski (n 107) *System und Prinzipien des Privatrechts* 68.

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ratio legis.[127] In order to derive a principle from positive law, therefore, the teleological purposes of the norm must be examined in particular, although, in this respect, the wording, systematic considerations and the legislative materials are also important[128] (= *applicational objectivity* combined with implicit *productional subjectivity*).[129]

However, this inductive approach of establishing a legal principle is not the only methodologically legitimate way to do so: subsidiarily, legal principles can also be based on the idea of law (*Rechtsidee*) itself.[130] Those principles are concretisations of the idea of law in the form of substantive legal considerations[131] (= *applicational objectivity* combined with *productional objectivity*).[132] Since those principles, which can be traced to the idea of law, are relatively vague, ie cannot be directly applied, and the legislator is not necessarily bound by such principles (= primacy of *productional subjectivity*)[133], they must be made more specific in accordance with the valuations and values of the positive legal order.[134] Typically, a principle of this kind is a legal discovery in the context of a specific case, which is then put into concrete terms and consolidated into a principle by means of further cases.[135] The normative authority of the principle can be justified by tracing it to the idea of law (*Rechtsidee*).[136]

Now that the essential characteristics and different ways of establishing legal principles have been clarified, the question can be examined as to whether efficiency can be recognised as such a legal principle.

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127 Karl Larenz and Claus-Wilhelm Canaris (n 61) 240 f; Franz Bydlinski (n 13) 485; similar Claus-Wilhelm Canaris (n 10) 91; Karl Larenz (n 105) 26.

128 Karl Larenz and Claus-Wilhelm Canaris (n 61) 302; Franz Bydlinski (n 13) 256; Karl Riesenhuber (n 107) 18; see also Klaus Friedrich Röhl and Hans Christian Röhl (n 94) 283 (inference through systematic interpretation).

129 On that permutation, see Bender (n 11) (§ 1), text to n 120–136.

130 Claus-Wilhelm Canaris (n 107) 97, 106 ff; Karl Larenz and Claus-Wilhelm Canaris (n 61) 302; simlilar Franz Bydlinski (n 13) 486 ff and Franz Bydlinski (n 107) *System und Prinzipien des Privatrechts* 69.

131 Karl Larenz (n 124) 304; Karl Larenz and Claus-Wilhelm Canaris (n 61) 302.

132 On that permutation, see Bender (n 11) (§ 1), text to n 137–146.

133 On that possibility, see Bender (n 11) (§ 1), text in between n 139 and 140.

134 Claus-Wilhelm Canaris (n 107) 113 f; Franz Bydlinski (n 13) 488 f; Karl Riesenhuber (n 107) 18 f.

135 Claus-Wilhelm Canaris (n 107) 106 f; Karl Larenz and Claus-Wilhelm Canaris (n 61) 241, 302.

136 Claus-Wilhelm Canaris (n 107) 107 ff, 113 f.

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b. Efficiency as a legal principle

Again, *Eidenmüller* has significantly influenced the German debate and argued that efficiency can only be recognised as a legal principle if the practice of the courts (i) objectively coincides with economic considerations and (ii) this conformity is subjectively intended by the courts (so-called *identity thesis*).[137] Furthermore, although efficiency could be taken into account under these circumstances, it does not have to be taken into account (so-called *legitimation thesis*).[138]

However, even the *identity thesis* seems questionable in two ways: Firstly, in a code law system, unlike a case-law system, legal principles do not primarily and solely result from court decisions, but from those considerations and values that underlie the legal rules themselves (see aa. (1)). Of course, the state of case law also plays a decisive role in this process, but not as the primary starting point. Secondly, it is doubtful whether recognition of efficiency as a legal principle depends on the courts' awareness of efficiency as the basis for their decisions (see aa. (2)). Finally, it shall be shown that the debate has thus far completely ignored the link between efficiency and the idea of law (see bb.).

aa. Inductive Inference

(1) Positive law

According to what has previously been stated, the substantive justification of the various statutory rules, legal institutions and fields of law must be inductively elaborated in order to establish a legal principle.[139] At this point, not all civil law institutions can be examined for their underlying efficiency considerations. In any case, one should refrain from generalisations and carefully substantiate the relevance of efficiency as a legal principle for the particular field of law in question via comprehensive research.[140] In recent years, however, it has become increasingly clear that many legal institutions can be justified by efficiency considerations in a

137 Horst Eidenmüller (n 2) *Effizienz als Rechtsprinzip* 459 ff; Horst Eidenmüller, 'Rechtsanwendung, Gesetzgebung und ökonomische Analyse' (1997) 197 Archiv für die civilistische Praxis 80, 126 ff.

138 Horst Eidenmüller (n 2) *Effizienz als Rechtsprinzip* 476 ff.

139 See above IV. 2. a. bb. In this specific context Claus Ott (n 19) 31.

140 cf generally Alexander Hellgardt (n 12) 418.

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compelling way.[141] It can therefore be argued that efficiency is at least a legal principle of the law of obligations and property law.[142] Even the thesis that efficiency is a principle underlying the entire civil law seems reasonable.[143] However, there is one important caveat to be noted: the further the legal principle in question moves away from the particular rules in question, for example because it is regarded as a principle that applies to entire areas of the law, the more it must be aligned to the legal values of the specific area of law in which it is to be applied in order to avoid contradictions to the positive legal order and the legislator's intent.[144]

(2) Legal precedent

Regarding the current state of the positive law and legal system of a code law system, not only the 'law in the books', but also the 'law in action'[145], as interpreted by the courts, plays a significant role. Thus, it is recognised in general that in order to justify a legal principle, it can be argued that the principle underlies a generally accepted case law.[146] In this respect, it is methodologically quite correct that the literature also refers to the current state of case law to answer the question whether efficiency can be qualified as a legal principle.[147] First of all, it is certainly true that an objective conformity of the case law with the principle of efficiency is required.[148] This corresponds to the methodological procedure

141 See Claus Ott (n 19) 28 ff, 33 ff; see also generally Richard Posner (n 17) passim; Hans-Bernd Schäfer and Claus Ott (n 24) passim.

142 In contract law it is sometimes even regarded as the central legal principle, see Gerhard Wagner (n 15) 314 ff. Furthermore, efficiency certainly is a legal principle in areas of the law which are primarily concerned with economic activity and/or markets (eg corporate law, capital markets law, antitrust law etc).

143 Gerhard Wagner (n 15) 308, 313 f; critical Horst Eidenmüller, 'Rechtsanwendung, Gesetzgebung und ökonomische Analyse' (1997) 197 Archiv für die civilistische Praxis 80, 124.

144 Claus-Wilhelm Canaris (n 107) 108, 113 f.

145 See Roscoe Pound, 'Law in Books and Law in Action' (1910) 44 Am L Rev 12.

146 Karl Larenz and Claus-Wilhelm Canaris (n 61) 241: 'In many cases, the demonstration that they [ie the principles], although unrecognised, have already formed the basis of previous case-law, contributes to this.'

147 Horst Eidenmüller, 'Rechtsanwendung, Gesetzgebung und ökonomische Analyse' (1997) 197 Archiv für die civilistische Praxis 80, 126 ff; Horst Eidenmüller (n 2) *Effizienz als Rechtsprinzip* 459 ff, 467 ff; Claus Ott (n 19) 28 ff.

148 General opinion: Claus Ott (n 19) 28 ff, 31, 33 ff; Horst Eidenmüller (n 2) *Effizienz als Rechtsprinzip* 468 ff; Horst Eidenmüller, 'Rechtsanwendung, Gesetzge-

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of inductively deriving a legal principle from the positive legal system. It must therefore be examined whether the results of interpretation found by case law can be justified in objective terms (essentially) by efficiency considerations. The establishment of efficiency as a legal principle requires that not only an apparent coincidence of the results, but also a correlation of the underlying evaluations leading to the results can be worked out by means of comprehensive analyses.[149]

However, it seems questionable whether it is necessary that the courts also subjectively base their decisions on efficiency considerations.[150] If this strict standard was applied, it would be unlikely that efficiency could be considered a legal principle: so far, there has been no explicit reliance of judicial decisions on the Economic Analysis of Law or economic theories in Germany (at least in the core areas of civil law).[151] However some judgements do at least contain reasoning that corresponds to efficiency considerations in objective terms.[152]

Against this background, it can be attempted to show that there are often implicit and unconscious decision bases that control human behaviour and legal decisions (so-called 'cryptotypes') and that the efficiency criterion is such a cryptotype that implicitly underlies judicial decisions as an unconscious and intuitive decision maxim.[153]

Although this line of reasoning appears to be convincing, it is not necessary. Rather, it seems sufficient to draw a comparison with the methodological rules of interpretation: with respect to the interpretation of statutory law it is well recognised that, in the absence of legislative guidelines concerning the purpose of a rule, its sense is to be determined objectively

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bung und ökonomische Analyse' (1997) 197 Archiv für die civilistische Praxis 80, 126 ff; Gerhard Wagner (n 15) 306 ff, 308.

149 Horst Eidenmüller (n 2) *Effizienz als Rechtsprinzip* 470 f.

150 Ronald Dworkin, 'Hard Cases' (1975) 88 Harv L Rev 1057, 1074 f; Horst Eidenmüller, 'Rechtsanwendung, Gesetzgebung und ökonomische Analyse' (1997) 197 Archiv für die civilistische Praxis 80, 130 ff; Horst Eidenmüller (n 2) *Effizienz als Rechtsprinzip* 472 ff, 474 ff; different opinion Claus Ott (n 19) 31 ff, 40, 42 f; mediating Gerhard Wagner (n 15) 306 ff.

151 Horst Eidenmüller, 'Rechtsanwendung, Gesetzgebung und ökonomische Analyse' (1997) 197 Archiv für die civilistische Praxis 80, 101 f, 131; Horst Eidenmüller (n 2) *Effizienz als Rechtsprinzip* 467 ff; Jochen Taupitz (n 19) 120; Claus Ott (n 19) 39.

152 Hein Kötz (n 49) 650 f; Jochen Taupitz (n 18) 121; Horst Eidenmüller (n 2) *Effizienz als Rechtsprinzip* 471 f.

153 Gerhard Wagner (n 15) 306 ff with reference to Rodolfo Sacco, 'Legal Formants: A Dynamic Approach to Comparative Law (Installment II of II)' (1991) 39 Am J Comp L 343, 384 ff; similar already Claus Ott (n 19) 39 f.

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(objective-teleological interpretation). There is no reason to abandon those methodological rules with regard to judicial decisions. Rather, for the sake of a uniform methodological approach, it must again suffice that the interpretation does not contradict the wording and the explicit motives of the judgement.

Apart from these limitations, however, a judgement can very well be wiser than its author.[154] With regard to the inductive inference of efficiency as a legal principle from case law, it is therefore not necessary that the judges subjectively wanted to base their decision on the efficiency criterion. Rather, it is sufficient for the decisions to be objectively consistent with the efficiency criterion in order for it to be inductively derived as a legal principle from case law.

Reference has already been made to the case law on contractual disclosure obligations and the supplementary interpretation of contracts, which, from an objective point of view, largely correspond to the insights of Law & Economics.[155]

bb. Traceability to the idea of law

However, inductive inference is only one possible way of establishing a legal principle. As an alternative, it is also legitimate to initially take efficiency as a mere working hypothesis because of the substantive appropriateness of the results obtained by its application, to specify it in several cases, and to justify it as a legal principle only afterwards by tracing it back to the idea of law.[156] The legal literature has thus far not taken into account this possibility of establishing efficiency as a legal principle.

The idea of law is typically related to justice and is defined by the three fundamental legal principles of equality (*Gleichheit*), legal certainty

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154 See for the objective statutory interpretation: Josef Kohler, 'Ueber die Interpretation von Gesetzen' (1886) 13 Zeitschrift für das Privat- und Öffentliche Recht der Gegenwart 1, 40: 'the code of law can be more far-sighted than its authors'; see also Gustav Radbruch, *Rechtsphilosophie* (8th edn Koehler 1973) 207: 'The interpreter may understand the law better than its creators understood it; the law may be wiser than its authors (...)'.

155 See above IV. 1. b. aa. and IV. 1. b. bb. (1)

156 Claus-Wilhelm Canaris (n 107) 106 ff; Karl Larenz and Claus-Wilhelm Canaris (n 61) 241; similar also Franz Bydlinski (n 13) 486 ff. This corresponds to the objective-teleological interpretation in the absence of legal values and principles relevant to the case, see above IV. 1. b. bb. (3)

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(*Rechtssicherheit*) and practicability or functionality (*Zweckmäßigkeit*).[157] Of particular interest in this context is functionality.[158] After all, functionality contains a concept that can be described as the 'economic principle' in the sense that the ends sought by a rule should be pursued with the means that require the least effort.[159] In this context, *Bydlinski* has explicitly emphasised the potential value of the Economic Analysis of Law for assessing the functionality of legal rules.[160] Against this background, economic efficiency represents a formal-technical transposition of the fundamental principle of functionality that follows from the idea of law.[161] There is another aspect to the idea of law: the waste of scarce goods – more generally, inefficiency – is likely to prove unfair in a general sense and is also largely perceived as such by people.[162]

What follows from the above findings? For the purpose of the law's enhancement, efficiency can initially be taken as a mere working hypothesis and be applied provisionally.[163] However, efficiency only acquires normative weight through subsequent recognition and traceability to the idea of law in accordance with the values and considerations of the positive law.[164] Yet, the acquisition of normative weight should be possible particularly often in the case of efficiency due to its immediate proximity to the idea of law (ie functionality). If a judicial enhancement of the law is based on

157 Gustav Radbruch (n 154) 119 ff, 164 ff; Franz Bydlinski (n 13) 325 ff; slightly different Karl Larenz (n 105) 33 ff, who focuses only on legal peace and justice but rejects functionality.

158 See Gustav Radbruch (n 154) 142 ff; Franz Bydlinski (n 13) 330 ff.

159 Franz Bydlinski (n 13) 330.

160 Franz Bydlinski (n 13) 331.

161 Although, according to traditional legal understanding, there may be certain differences between the 'economic principle' of functionality (ie the ends-means relation which makes no normative statement on the ends that are to be sought) and economic efficiency (ie the normative goal of Pareto- or Kaldor/Hicks-efficiency) (see on this Horst Eidenmüller (n 2) *Effizienz als Rechtsprinzip* 55 ff), the latter legitimately adds the substantive criterion of economic (or better: social) welfare as a normative goal to the idea of law. After all, the (peaceful) functioning of society and law itself rests upon material prerequisites (similar Rudolf von Jhering (n 7) 434 ff, who identifies the purpose of the law with 'safeguarding the living conditions of society'). Against this background, the efficiency criterion is perfectly consistent with functionality and the idea of law, because it aims at preserving and fostering the economic preconditions of society and the law.

162 Stefan Grundmann (n 66) 442.

163 Similarly Gerhard Wagner (n 15) 313 f.

164 However, once efficiency is recognised as a legal principle of the field of law in question, one does not have to trace it back to the idea of law in future cases.

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efficiency, care must be taken not only to ensure that it can be traced back to the idea of law in positive terms, but also that it does not contradict the positive legal system in negative terms.[165] As long as a connection of efficiency to the idea of law has not (yet) been convincingly demonstrated in a particular field of law, there is initially only the possibility, but not the obligation, of taking efficiency into account in the course of the enhancement of the law. However, this changes once efficiency is recognised as a legal principle in the relevant area of the law.[166] Again, when compared to mere judicial discretion, a recourse to efficiency seems to be preferable since this approach at least partly offers an objectively verifiable method of justifying a legal decision with reference to one of the most fundamental legal principles (ie functionality).

c. Efficiency as the normative basis of an enhancement of the law

Finally, a few remarks are to be made on the actual enhancement of the law with reference to efficiency as the normative basis. Some argued that even if efficiency is to be recognised as a legal principle, the courts *may* merely take it into account, but *do not have to* do so (so-called *legitimation thesis*).[167] The following should be said about this view: once efficiency has been recognised as a legal principle, it *must* at least be taken into account like any other recognised legal principle. Anything else would amount to an unacceptable and unjustified discrimination against the efficiency criterion. This does not mean, however, that the individual court decision necessarily needs to be in line with efficiency. The representatives of Law & Economics themselves no longer postulate that efficiency is the only relevant normative principle.[168] Besides, it already follows from the methodological classification of efficiency as a legal principle that there can be conflicts with other principles in individual cases.[169] In the context

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165 See generally on this Franz Bydlinski (n 13) 488, 490; Claus-Wilhelm Canaris (n 107) 108, 113 f; same finding also Karl Larenz and Claus-Wilhelm Canaris (n 61) 241.

166 See on the obligation to take efficiency into account under IV. 2. c.; different opinion Horst Eidenmüller (n 2) *Effizienz als Rechtsprinzip* 476 ff.

167 Horst Eidenmüller (n 2) *Effizienz als Rechtsprinzip* 476 ff; Horst Eidenmüller, 'Rechtsanwendung, Gesetzgebung und ökonomische Analyse' (1997) 197 Archiv für die civilistische Praxis 80, 134.

168 Gerhard Wagner (n 15) 313; Hanoch Dagan and Roy Kreitner (n 22) 572 ff.

169 Ronald Dworkin (n 124) 26; Claus-Wilhelm Canaris (n 10) 52 f; Robert Alexy (n 124) *Theorie der Grundrechte* 79; Robert Alexy (n 124) *Recht, Vernunft, Diskurs*

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of resolving these conflicts, preference can easily be given to another legal principle – for example, distributive justice[170] – but such an outcome must be justified just as much as if the decision is in favour of efficiency and at the expense of other legal principles.[171] In any case, efficiency must be taken into account when deciding the case if it is a recognised legal principle in the area of law in question.

V. Conclusion

To sum things up: economic considerations are of considerable importance in a Code Law legal systems like the German and European ones. Thus, a sharp contrast between the 'strictly legal point of view'[172] and the 'economic point of view' could not be found upon closer examination.[173] The implicit incorporation of economic arguments is not surprising, considering that the Economic Analysis of Law often only formalises and specifies those arguments that have already been exchanged in jurisprudence and can thus be labelled as *economic common sense*.[174] Since the overall economic frameworks in the US and Europe are comparable at least in their basic structure, the economic considerations in the individual fields of (civil) law are likely to be largely identical. This is especially true of highly business- and market-oriented areas of law (such as corporate law, capital markets law or antitrust law). In this respect, comparative legal scholarship has already shown that, for example, the basic structure of corporate law is largely similar on both sides of the Atlantic and even

183, 218; similar Karl Larenz and Claus-Wilhelm Canaris (n 61) 303; Karl Larenz (n 124) 301 ff.

170 Critical on the efficiency criterion because of its lack to take distributional justice into account: Karl-Heinz Fezer (n 16) 823 f; see on this Claus Ott and Hans-Bernd Schäfer (n 23) 215, 219 ff. In the normative framework of Kaplow and Shavell (n 22) 968, 976 ff, 989 ff there is no such conflict, since it (correctly) includes distributional considerations; see also Hanoch Dagan and Roy Kreitner (n 22) 579 f who also argue for an inclusion of distributive justice as a normative criterion into economic analysis.

171 Even stronger in favour of the efficiency criterion Klaus Friedrich Röhl and Hans Christian Röhl (n 94) 648.

172 Wolfgang Ernst (n 15) 15 ff.

173 Gerhard Wagner (n 15) 305.

174 Gerhard Wagner (n 15) 281 f; Jeffrey Harrison, 'The Influence of Law and Economics Scholarship on Contract Law: Impressions Twenty-Five Years Later', (2012) 68 NYU Ann Surv Am L 1, 6.

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globally.[175] The reason for this similarity is probably to be found in the comparable economic issues that every legal system has to deal with.[176]

Thus, for Law & Economics in continental Europe (especially in Germany), it follows that it is relevant to the legal system in a variety of ways. The findings of the Economic Analysis of Law may be taken into account in methodological terms. Such an approach can contribute to the systematic coherence of the law by uncovering the true decision-making criteria and examining them formally and analytically for their persuasive power. The insights of Law & Economics should therefore be used by the various actors within the legal system.

175 See Reinier Kraakman and others, *The Anatomy of Corporate Law* (3rd edn Oxford University Press 2017) passim.

176 Edward Rock, 'Corporate Law Doctrine and the Legacy of American Legal Realism' (2015) 163 U Penn L Rev 2019, 2048, 2053.

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