Introduction

This issue of the *International Review of Law and Economics* contains a selection of papers presented at the 16th Annual Conference of the European Association of Law and Economics (EALE). The conference was held in Castellanza, Italy, on September 16–18, 1999. The editors wish to take this opportunity to thank the Universitario Cattaneo (LIUC) in Castellanza for the organization of the conference and generous financial support. Our thanks also go to Alessandra Stabilini and Fiona Hunter, who skillfully carried out the numerous administrative tasks before and during the conference.

Approximately 40 papers were presented at the conference. In selecting the papers published in this issue of the *International Review of Law and Economics*, the editors were helped by anonymous referees, who deserve much credit for their delicate task. We hope that the readers will find the seven papers included in this volume both interesting and original. The papers cover a wide range of topics, beginning with an empirical study on the effects of self-regulation in the sector of the professions, halting for new perspectives on problems of corporate governance and financial markets, continuing with refinements of models of contract law and criminal law, and concluding with a topic of economic analysis of private law.

The issue opens with an empirical study by Edward Shinnick and Frank Stephen, entitled “Professional Cartels and Scale Fees: Chiseling on the Celtic Fringe?” Since Friedman and Kuznets (1945) economists have been highly critical of the self-regulation of the professions. It has been argued that the professions act as cartels. Academic commentators and compe-
tition authorities have argued that scale fees have been used as a means of restricting competition in markets in which professions operate. Indeed competition authorities have argued that even where such a scale of fees is merely a recommendation it will have the effect of restraining competition. This view of ‘professional cartels’ is in contrast to the general view expressed by economists (notably in microeconomics texts) that cartels are unstable and where many members are involved subject to ‘chiseling’. The present paper examines empirical evidence on the use of scale fees for conveyancing transactions in Scotland and Ireland. The data for Scotland relates to the early 1980s while that for Ireland relates to 1994. In both cases the evidence rejects the view that recommended scale fees restrict competition. Evidence is found of statistically significant variations in fees across geographical areas and thereby casts doubt on the view that recommended fees are tantamount to mandatory fees. Caution is urged in assuming that professional self-regulation automatically generates cartel-like behavior.

The second and third papers discuss topics of corporate governance. Alessandro Portolano analyses the Italian rules concerning the decision to adopt defensive tactics in the face of a hostile bid. The Italian regulation presents an enabling aspect in that it does not set ex ante the level of resistance that firms can implement. Rather, it merely sets a pro-resistance default rule. Firms can thus opt out of this regime and model a resistance policy that suits their needs. At the same time, Italian law recognizes that agency costs may plague the decision concerning whether or not to adopt defensive tactics. The law, therefore, introduces a procedural mandatory requirement of shareholders’ approval for all decisions that may obstruct a hostile takeover. This mandatory requirement applies, however, only after the launch of a hostile bid. This temporal limitation appears consistent with the need to protect managerial discretion and flexibility in the corporation’s ordinary course of business. The author posits that this regime strikes an overall efficient equilibrium in the trade-off between the costs and benefits generated by resistance. The paper also analyses the possible shortcomings of a rule that requires shareholders’ vote, that is, the possibility that under certain circumstances incumbent managers and blocholders abuse defensive tactics for entrenchment purposes. Finally, a tentative “public choice” history of the evolution of defensive tactics regulation in Italy is attempted. The picture that emerges appears to confirm the prediction that unitary systems tend to produce more efficient takeover regulation than federal systems.

The paper by Ugo Pagano investigates the replacement of public markets by private orderings. In the New Property Rights approach the degree of incompleteness of markets is taken independently of the cost of the public ordering and of their efficiency relatively to private orderings. In this approach “public markets,” similarly to a Swiss cheese, are either assumed to be nonexistent empty holes (because of infinite third party verification costs) or assumed to be smooth and efficient (because of zero third party verification costs). When one allows for positive but not infinite third party verification costs we are necessarily pushed back to the insights of Commons, Coase, Fuller and Williamson. The degree of (in)completeness of public markets becomes an endogenous economic problem and managers can be seen as agents that make “second order” specific investments to run specific relations that cannot be efficiently run by public markets. Managers and the public authorities build respectively private and public “legal equilibria” that set the working rules within which transactions can take place. Private and public legal equilibria are not only substitutes but
also complements. This complementarity is an important source of the path dependency that characterizes the development of different legal systems. The framework is applied to GM’s acquisition of Fisher Body. The author claims that, contrary to the claims of the New Property Rights approach, the advantages of the acquisition cannot be due to the incentives of private property but should be rather related to the replacement of public markets by the new private ordering set up by Alfred Sloan.

The two ‘corporate governance’-papers are followed by an article on financial markets. In “Financial Intermediation in the Securities Markets: Law and Economics of Conduct of Business Regulation,” Alessio Pacces discusses the role performed by intermediaries in financial markets. In securities markets, intermediaries act as facilitators of the financial exchange. In this context, conduct of business regulation is justified on the basis of structural problems of asymmetric information affecting the relationship between securities professionals and the individual investor. In his paper, two major rules of business conduct are analyzed in the light of the kind of market imperfections they should be intended to address: the suitability and the antichurning rules. From a functional perspective, the analysis merges major insights of financial theory with a comparative discussion of the legal rules in both the US and the European Union. The Law and Economics approach leads to a much broader and more economically sound interpretation of the “churning” problem. This is related to an agency-based explanation of one of the most topical puzzles under debate in financial economics: the problem of noise trading.

The fifth paper “Effects of Legal Restrictions on Contracts in the Presence of Two Signals” is written by Claudio Signorotti. The model of Aghion and Hermalin (1990) has shown that efficient restrictions on the terms of a contract exist even in the absence of externalities and hence the issue arises of the workability of efficient intervention through contract law. In his paper Claudio Signorotti inquires which new insights may be gained when the uninformed party disposes of two signals. The existence result of the one-signal model still holds, but in the case of two signals there are possible adverse effects from enacting inefficient restrictions. The consequences of inefficient restrictions are of interest for practical purposes when the lawmaker has limited information and it is too costly to draft contract-specific restrictions.

The purpose of the paper “Economic Analysis of the Removal of Illegal Gains” by Roger Bowles, Michael Faure and Nuno Garoupa is to explore both the motivation for confiscating illegal gain and also to look at some of its legal aspects and economic effects. It is argued that the removal of illegal gain may be able to play a significant complementary role, if only by closing the gap between the maximum punishment the law will allow and fines sufficient to represent a credible deterrent. The paper develops a deterrence model and applies it to confiscation powers introduced to help combat drug trafficking.

In the seventh and last paper included in this issue, Niva Elkin-Koren and Eli Salzberger analyze unjust enrichment. Even though it is an important pillar of private law in various legal systems, unjust enrichment does not enjoy the same level of internal coherency and comprehensiveness typical of other legal categories such as contract law and tort law. The doctrine of unjust enrichment is a rather general principle that encompasses a whole set of disconnected rules sharing a common rationale. Economic analysis can play a central role in establishing a more systematic understanding of this area of law. Confusion regarding unjust
enrichment is partly attributed to a failure to distinguish between two different levels in which this doctrine functions. Using the Calabresi & Melamed distinction between entitlements and remedies the authors show that unjust enrichment can serve as a source for the allocation of legal entitlements, and as a remedy to protect legal entitlements, and that there is no analytical correlation between the two. Subsequently, Niva Elkin-Koren and Eli Salzberger try to show that while economic analysis of law should find it difficult to endorse the allocation of entitlements based on unjust enrichment sources, it, nevertheless, in many cases, ought to endorse the remedy of unjust enrichment to protect allocation of entitlements. The paper examines the ramifications of this remedy in circumstances that were not often addressed by the literature, where the beneficiary, who created a benefit, is required to transfer it to the alleged benefactor on the bases of unjust enrichment. In such circumstances, an incentive analysis should focus on the effects of a restitutive remedy on the behavior of the beneficiary. The paper shows that the unjust enrichment remedy, measuring actual profits, may carry different consequences than a liability rule or a property rule. This analysis demonstrates the virtue of unjust enrichment as an independent remedy, worthy of study in such cases as breach of contract or the protection of intellectual property.