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Which Governance for European Private Law?

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Abstract

The paper describes the necessity to consider the role of private rule making and the increasing importance of national regulatory agencies, in the process of European legal integration. It then focuses on the legislative design and process implementation of EPL. Its departing assumption is that EPL is and will remain a multilevel system where national implementation of European legislation generates intentional and unintentional spillover effects to be 'governed' through horizontal devices.
The author underlines that the current legislative and judicial trend towards total harmonization is the wrong response to normative differentiation occurring in the process of national implementation. He analyses in particular the areas of unfair contract terms and commercial practices, providing examples of divergent implementation which can not be tackled only at legislative level, claiming that governance is a better response. He examines traditional modes of governance and then considers the applicability of new modes of governance to EPL. He makes several reform proposals; most of them do not require legislative intervention. At the legislative level, given that the competences are organised around policy areas while private law, following the national traditions, is conceptually organised around institutions, he proposes different ways to improve coordination at the Commission level, concerning legislative draft. Legislative drafting can also be improved by considering the different impacts of new legal categories in national legal systems, especially the general clauses. At the implementation level he emphasizes the role of judicial governance and the lack of coordination among national judiciaries proposing the establishment of a permanent judicial conference specialised in EPL to be coordinated with TFI and ECJ. He then proposes the institution of committees operating according to subjects (contract, property, tort) that would cut across directorates competences and would analyse the impact of European legislation on private law national systems. Finally he proposes the use of OMC, adequately redefined to evaluate the policy effects of implementation especially when it involves national regulatory agencies.

Keywords

European private law – contract – governance – judicial cooperation – open method of coordination

Table of contents

1. The definition of EPL and its multilevel dimension

2. EPL as a goal-oriented system
    2.1. Creation of internal market
    2.2. EPL and fundamental rights

3. Harmonization and differentiation within EPL: Legislative design between normative divergences and policy convergences.

4. Some brief illustrations
    4.1. Legislative strategy concerning consumer laws.

5. The review of the acquis communautaire is also a matter of good governance.
    5.1. The domain. On the rationales concerning the definition of domain for review
    5.2. Correlation between nature of legislation (principle-rule based) and levels of harmonization.
    5.3. The absence of governance design

6. Towards a relational concept of implementation. Implementation and interpretation of EPL at national level. Policy effects of divergences.

7. Improving the institutional design of EPL: New modes of governance versus complete harmonization.
    7.1. Legislative design.
    7.2. Legislative implementation
        7.2.1. Better coordination among national institutions and between them, the Commission and ECJ
    7.3. The potential role of the open method of coordination in European private law
    7.4. The creation of a European Law Institute

8. Concluding remarks

Which Governance for European Private Law?[1]

Fabrizio Cafaggi

1. The definition of EPL and its multilevel dimension

European Private Law (EPL) is a stipulative not a legislative definition[2]; the result of scholarly work, which has entered policy discussion, concerning desirability and feasibility of the harmonization process of different areas, traditionally associated to private law. This debate has concentrated for some time on the opportunity to draft a European Civil Code[3]. After extensive debate, even among European institutions, the focus has shifted onto a less demanding project, combining the rationalization of the Acquis Communautaire and the creation of a Common Frame of Reference[4].

According to the conventional view, EPL is composed by European legislation on private law matters (jus communitatis), by international private law and by the common

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[1] This essay builds on a w.p. jointly prepared with Horatia Muir Watt in the summer of 2005 for the research project on regulation and governance within the NEW GOV project. A more concise version will be published in Cafaggi, F. and H. Muir Watt (2008), *The making of European private law: governance design*, Edward Elgar. Thanks to Karen Banks, Bruno de Witte and Paolo Ponzano for useful conversations concerning some of the issues addressed in the paper. Thanks for valuable research assistance to Lukasz Gorywoda and Sophie Stalla-Bourdillon. Responsibility is my own.

[2] The expression 'private law' is not defined in the resolutions of the European Parliament see Alpa, G. (2000), 'European Community Resolutions and the Codification of 'Private Law'', *European Review of Private Law*, **2** (8), 321-334, at p. 324. On the European private law see Hesselink, Martijn Willem (2000), *The new European private law: essays on the future of private law in Europe*, The Hague, London: Kluwer Law International; Smits, J. (ed) (2001), *The contribution of mixed legal systems to European private law*, Antwerp: Intersentia; Grundmann, S. (2001), 'The Structure of European Contract Law', *European Review of Private Law*, **4**, 505-528. Cafaggi, F. (2003), 'Un diritto europeo dei contratti? Schegge introduttive', in Cafaggi F. (ed), *Quale armonizzazione per il diritto europeo dei contratti*, Padova: Cedam, pp. VII-XXXIX.

[3] Parliament Resolution of May 26, 1989, 1989 O.J. (C 158) 400 (concerning private law of the Member States); Parliament Resolution of May 6, 1994, 1994 O.J. (C 205) 518 (concerning harmonization of private law). On these resolutions see Alpa, G. (2000), 'European Community Resolutions and the Codification of 'Private Law'', *European Review of Private Law*, **2** (8), 321-334; European Parliament resolution of 15 November 2001 OJ C 140 E, 13.6.2002, p. 538; European Parliament resolution of 2 September 2003 OJ C 76 E, 25.3.2004, p. 95; European Parliament resolution on European contract law and the revision of the acquis: the way forward (2005/2022(INI)) (23.3.2006).

[4] Green Paper on the Review of the Consumer Acquis COM (2006) 744 final Brussels, 08.02.2007. Report from the Commission First Annual Progress Report on European Contract Law and the Acquis Review COM (2005) 456 final, Brussels, 23.9.2005.

legal traditions of MS (jus commune)[5]. These three bodies are quite different in terms of structure and scope. While national legal traditions, which emerged from post westphalian states, are still based on a strong division between private and public law, no matter how problematic that might be, the European legislation in private matters is regulatory in nature and grounded on the goal of creating an internal market[6]. Private international law is conventionally close to national legal traditions but has gained regulatory functions in the European context[7].

In my view at least a fourth component should be added to EPL: the bodies of contract law developed out of regulated sectors. It is composed of property, contract and civil liability rules. Contract laws in regulated markets is a particularly rich and fast evolving body of contract law. For example part of EPL is related to both consumer and business contract law developed in the field of telecommunications after the enactment of the regulatory framework in 2002, the body of contract law developed according to directives 2003/54 and 2003/55 in the electricity and gas markets, the body of contract law developed according to the MiFID Directive 2004/39 and before the ISD directive 93/22/EEC[8]. I deal with the relationship between this body and the traditional components of EPL elsewhere so that for the purpose of this essay I shall concentrate on the conventional components[9].

One of the peculiar features of EPL is multilingualism[10]. The national legal systems as well as the European legal system are multilingual. This implies that national legal

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[5] See on the boundaries of EPL Zimmerman, R. (2006), 'Comparative law and the Europeanization of private law', in Reinmann M. and R. Zimmermann, *Oxford Handbook of comparative law*, Oxford: Oxford University Press, pp. 539 ff. part.542 ff; Hartkamp, A., M. Hesselink, E. Hondius, Joustra C., E. du Perron, and M. Veldman (eds.) (2004), *Towards a European civil code*, 3 ed., The Hague: Kluwer Law International, in particular Muller Graff, P.C., 'EC Directives as a means of private law unification', pp. 77 ff. .Patti S. Diritto private e codificazione europea, Milano, 2004. With specific references to contract law, G. Alpa, Introduzione al diritto contrattuale europeo, Roma-Bari, 2007, part. pp..19 ss, S. Vogenauer and S. Weatherill (eds.), The harmonization of European contract law. Implications for European private law, business and legal practice, Oxford-Portland, Hart, 2006,

[6] On the regulatory nature of EPL see Cafagg,i F. (2006), 'Introduction' to Cafaggi F. (ed), *The Institutional framework of European private law*, Oxford: Oxford University Press, pp. 1 ff; Cafaggi, F. and H. Muir Watt (2007), 'The making of European private law: Regulation and governance design', NEWGOV w.p. 2/2007, http://www.connex-network.org/eurogov/pdf/egp-newgov-N-07-02.pdf.

[7] See Muir Watt, H. (2006), 'Integration and diversity: The conflict of laws as a regulatory tool', in Cafaggi F. (ed), *The institutional framework of European private law, Oxford*: Oxford University Press, pp. 107-148.

[8] See Micklitz, H.-W. (2005), 'The Concept of Competitive Contract Law', *Penn State International Law Review*, **23**, 549-585; Alpa, Guido (2005), 'New Perspectives in the Protection of Consumers: A General Overview and Some Criticism on Financial Services', *European Business Law Review*, **4** (16), 719-735.

[9] See Cafaggi, F. (2008), 'The regulatory function of contract law: contract law in regulated markets', in Cafaggi F. and H. Muir Watt (eds), *The regulatory function of European Private Law*, forthcoming.

[10] See Ajani, G. and M. Ebers (eds.) (2005), *Uniform terminology for European contract law*, Baden-Baden: Nomos, B. Pozzo (ed) (2005), *Ordinary language and legal language*, in particular Sacco R., Language and law, p. 6, Gémar, J. Cl. and N. Kasirer (2005), *Jurilinguistes: entre languages et droits, Jurilinguistes: between law and language*, Brussels: Bruylant; Rossi, P. (2005), *Il Diritto privato europeo nella comparazione tra sistemi giuridici nazionali. Analisi linguistica e contesti interpretative*, Torino : Giappichelli, in particular chap. IV, 'La funzione delle lingue del diritto' and chap. V, 'Il ruolo dei traduttori e le definizioni dei termini giuridici; Jacometti, V. and Pozzo B. (2006), *Le politiche linguistiche delle istituzioni comunitarie dopo l'allargamento*, Milano: Giuffrè; Ioriatti, E. (ed) (2007),

traditions, which are generally expressed in different languages, have to be combined in European law making and adjudication.

Courts and legislators have started using explicitly comparative references to other systems both within and outside Europe[11]. The European Court of Justice is itself an incredibly rich comparative laboratory where lawyers coming from different legal traditions have been shaping the most important features of EPL. Multilingualism, while enriching the available set of choices, may ultimately be very expensive[12]. It requires a well-grounded infrastructure to avoid the risk that a dominant, technocratic choice will prevail over a democratic pluralistic yet more costly environment. Also in this domain the importance of governance device will emerge as a complement legislative strategies incorporating multilingualism.

2. EPL as a goal-oriented system

The conventional approach has seen national private law systems juxtaposed to European law: the former characterized by a strong emphasis on private autonomy, especially in the area of contract law, the latter by a regulatory function aimed at correcting market failures and creating an internal market[13]. According to such a perspective there is a strong separation between EPL and national legal systems[14]. The process of harmonization thus faces the difficulty of reconciling different approaches to contract, property and civil liability. This perspective overemphasizes the differences and instrumentalizes them to reach the conclusion that complete harmonization is needed.

2.1. Creation of internal market

The first and perhaps more relevant specificity of EPL is its contribution to the creation of the internal market. The European legislation on consumer protection for example

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La traduzione del diritto comunitario europeo: riflessioni metodologiche, Padova, Cedam, D. U. Galletta and J. Ziller, Il regime linguistico della Comunità, in Trattato di diritto amministrativo diretto da M.P. Chiti e G. Greco, parte generale, Tomo II, 2 ed. 2007, p 1067 ff..

[11] See Smits, J. (2006), 'Comparative law and its influence on national legal systems', in Reinmann M. and R. Zimmermann (eds), The Oxford Handbook of comparative law, Oxford: Oxford University Press, pp. 514 ff.

[12] D. U. Galletta and J. Ziller, Il regime linguistico della Comunità, p. 1106 ff.

[13] Minority views have emphasized the opposite perspective. Namely that while private law had developed towards distributive justice, European law being oriented towards the goal of market creation has been efficiency-driven. See Barcellona, P. and C. Camardi (2002), *Le istituzioni del diritto privato contemporaneo***,** Napoli: Jovene; along similar lines Somma, A. (2003), *Temi e problemi di diritto comparato. Vol. IV (Diritto comunitario vs. diritto comune europeo)*, Torino: Giappichelli.

[14] On the historical reasons for such a perspective see Collins, H. (2006), 'The alchemy of deriving general principles of contract law from European legislation: In search of the philosopher's stone', *European Review of Contract Law*, **2**(2), 213-226. (Hereinafter, Collins, *Alchemy*). According to Collins the difference is between two types of justice: at national level private law would be characterized by individual justice (corrective) while regulation typically concerns distributive justice. See Id. p. 218 in relation to fairness in unfair contract terms law.

has often been linked to the creation of internal market by making express reference to art. 95/EC Treaty as its legal basis[15]. But market creation has also been at the core of negative integration strategy, mainly driven by the Court in ensuring compliance with the four freedoms[16]. In this realm the role of mutual recognition has been significant, yet its function relatively ambivalent[17]. The relationship between Private international law and market creation should also be emphasized[18]. Unlike the other two components, national legal systems of private law have a less clear correlation with market creation. Historically they have not been conceived of as predominantly aimed at market creation since most of them were born when national markets already existed[19]. This is not to say that a correlation between market building and national private law systems, especially contract and property law do not exist.

More recently this rationale has included references to building consumer confidence. The most recent Green papers and Communications expressly state among their goals that of building and preserving consumer confidence[20]. This goal has been translated

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[15] See For example dir. 93/13, 99/44,2005/29

[16] See Barnard, C. (2004), *The substantive law of the EU: the four freedoms*, Oxford: Oxford University Press; Baquero, J. (2002), *Between competition and free movement: the economic constitutional law of the European Community*, Oxford: Hart; Weiler, J. (1999), *The Constitution of Europe*, Cambridge: Cambridge University Press; Scharpf, F. (1999), *Governing in Europe: effective and democratic*, Oxford, New-York: Oxford University Press; Poiares Maduro, M. (1998), *We the Court*, Oxford: Hart.

[17] On the questions concerning mutual recognition see Kerber, W. and R. Van den Bergh, 'Unmasking Mutual Recognition: Current Inconsistencies and Future Chances', forthcoming.

[18] See Grundmann, S. (2004), 'Internal Market Conflict of Laws from Traditional Conflict of Laws to an Integrated Two Level Order', in Fucks A., H. Muir-Watt and E. Pataut (eds), *Les Systèmes de Lois et le Système Juridique Communautaire*, Paris: Dalloz, pp. 5-29; Idot, L. (2002), 'L'incidence de l'ordre communautaire sur le droit international privé', *Petites Affiches* 2002, pp. 27 ff; The literature on the regulatory function of PIL is growing within the EC, see for example Muir Watt, H. (2006), 'Integration and diversity: The conflict of laws as a regulatory tool', op. cit. ; various contributions in Cafaggi F. and H. Muir-Watt (eds) (2008), *The regulatory function of European Private Law*, op. cit. Since the Treaty of Amsterdam the Community's power to legislate in the field of PIL is grounded on Art. 61 of the EC Treaty which refers to Art. 65. Therefore secondary legislation and their preparatory acts in the field of PIL expressly aim at promoting the functioning of the internal market. See e.g. Recital 2 of the Council Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. This explains the statement of the ECJ in Case C-281/02, Owusu v. Jackson, [2005] ECR I-1383, according to which *"In fact it is not disputed that the Brussels Convention helps to ensure the smooth working of the internal market"*). See also the Amended proposal for a European Parliament and Council Regulation on the law applicable to non-contractual obligations ("Rome II"), COM(2006) 83 final, Recital 4; proposal for a European Parliament and Council Regulation on the law applicable to contractual obligations ("Rome I"), COM(2005) 650 final, Recital 4.

[19] Zimmermann, R. (2006), 'The German Civil code and the development of private law in Germany', Oxford U. Comparative Law Forum 1 at ouclf.juscom.org; Revet, Th. (ed) (2004), *Code civil et modèles – Des modèles du Code au Code comme modèles*, Paris : LGDJ ; Oppetit, B. (1998), *Essai sur la codification*, Paris: PUF ; Cornu, G. (1979), 'L'évolution du droit des contrats en France', *Revue Internationale de Droit Comparé.*, n° spéc. vol. 1, pp. 447 ff.

[20] On confidence building see Weatherill, Stephen (2006), 'European Private Law and the Constitutional Dimension', in Cafaggi F., *The institutional framework of European private law*, Oxford: Oxford University Press, pp. 79-106; Weatherill, S. (1996), 'The evolution of European consumer law and policy: From well-informed consumer to confident consumer?' in Micklitz W. (Ed.), *Rechtseinheit oder Rechtsvielfalt in Europa? Rolle und Funktion des Verbraucherrechts in der EG und den MOE-Staaten*, Baden- Baden: Nomos; Dickie, John (1998), 'Consumer Confidence and the EC Directive on Distance Contracts', *Journal of Consumer Policy* **2**(21), 217-229; Wilhelmsson, Thomas (2004), 'The

into different regulatory strategies within the consumer protection field but also in regulated market. For example it is at the core of the MiFID and the Lamfalussy architecture[21]. References are also made in the telecom and energy field[22]. But consumers' confidence has also been a value to be considered in the interpretation of the four freedoms. State legislation protecting investors' interests has been held in conformity with article 59[23]. Thus it is a goal both in relation to positive and negative integration.

The regulatory function of EPL. The regulatory function of private law emerges in at least two different dimensions: 1) the general rules of contract, property and civil liability, be they mandatory or default, can address market or government failures. The transformation of the regulatory state has attributed new centrality to private law devices as mechanisms for market governance 2) The huge body of private law rules concerning property, contract and civil liability developed within regulated markets (financial, banking, energy, telecom, transport etc.). This body of private law has been employed to pursue specific regulatory goals[24].

Private international law also plays a relevant regulatory function when some degree of decentralization and differentiation is allowed[25]. *In a decentralized rule making system it may promote bottom-up harmonization.* EPL has had a strong influence and expansive

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Abuse of the "Confident Consumer" as a Justification for EC Consumer Law', *Journal of Consumer Policy*, **27**(3), 317-337; Stuyck, J., E. Terryn, & T. Van Dyck (2006), Confidence through fairness? The new directive on unfair business-to-consumer commercial practices in the internal market, *Common Market Law Review*, **43**, 107–152; Incardona, Rossella and Cristina Poncibò (2007), 'The average consumer, the unfair commercial practices directive, and the cognitive revolution', *Journal of Consumer Policy*, **30**(1), 21-38. See references to confidence building in Communication from the Commission to the European Parliament and the Council, European contract law and the revision of the Acquis: the way forward COM(2004) 651 final, (2.1.1 p. 3). See references to confidence building in the Green Paper on the Review of the Consumer Acquis COM(2006) 744 final (Hereinafter, Review of the Acquis) (2.1 p. 4, 3.3 p 7, 4.4. p 9, 4.5 p. 11, p. 15, p. 21, p. 25). See references to consumer confidence building in the EU Consumer Policy strategy 2007-2013 Empowering consumers, enhancing their welfare, effectively protecting them COM(2007) 99 final.

[21] Alpa, Guido (2004), 'The Harmonisation of EC Law of Financial Markets in the Perspective of Consumer Protection', *European Business Law Review*, **3** (15), 347-365, at p. 348. Alpa, Guido (2005), 'New Perspectives in the Protection of Consumers: A General Overview and Some Criticism on Financial Services', *European Business Law Review*, **4**(16), 719-735, at p. 727. On information requirements in financial services see Ebers, Martin (2004), 'Information and Advising Requirements in the Financial Services Sector', *Electronic Journal of Comparative Law*, **2** (8), http://www.ejcl.org; Formal Mandate: Formal Request for Technical Advice on Possible Implementing Measures on the Directive on Markets in Financial Instruments (Directive 2004/39/EC), European Commission Internal Market DG, Brussels, 25 June 2004.

[22] Communication from the Commission to the Council and the European Parliament 'Prospects for the internal gas and electricity market', COM(2006) 841 final, Brussels, 10.1.2007 (2.6.2); Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on the Review of the EU Regulatory Framework for electronic communications networks and services, COM(2006) 334 final, Brussels, 28 June 2006 (5.5).

[23] See C-384/93, Alpine Investments, [1995] ECR I-01141, para 56.

[24] See Cafaggi, F. and H. Muir Watt (2008), *The regulatory function of European private law*, op. cit.

[25] See. Muir Watt, H. (2006), 'Integration and diversity: The conflict of laws as a regulatory tool', in Cafaggi F. (ed), *The institutional framework of European private law*, Oxford: Oxford University Press, pp. 107 ff.

role towards transnational regimes with nonmember states[26]. This expansive role has translated into the definition of a hierarchy between European private law and Private international law. The regulatory function of EPL has often prevailed over the more lax regime of the Rome Convention[27].

Unlike other perspectives that identify the regulatory function with distributive justice, I see the regulatory function as being mainly efficiency-driven[28]. This is not to say that European private law does not/should not have distributive effects, and that they should not be considered when designing rules at EU level. It simply means that regulation and distribution should be addressed in coordination, but separately. Secondly, while I believe that important differences exist between European private law and national legal systems, I read the development of private law in the majority of western European countries in the last fourth of the XX century as increasingly performing regulatory functions paralleled to the crisis of the administrative state[29]. Thus, instead of focusing on the traditional juxtaposition between the facilitative and the regulatory role of private law, the analysis should concentrate on the different regulatory features of private law at European and national level[30].

Partitioning. The influence of policy goals emerges quite clearly if we look at internal partitioning of private law systems both at European and national level. European primary law is partitioned around policy areas: consumer protection law, environmental protection law, financial markets, etc. National private law systems are organized around 'instruments': contract, property, civil liability (torts). This distinction imposes

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[26] See for example art 6(2) directive 93/13/EEC.

[27] See C-70/03 Commission v. Spain [2004] ECR I-0799, paras 32,33,34. For a comment of this decision see Marquilles, R. (2005), 'Case comment', *International Company and Commercial Law Review* 16(4), 25-26; Audit, M. (2005), 'Note sous arrêt', *Revue critique de Droit International Privé* 2005, pp. 451 ff ; Deumier, P. (2005), 'Application dans l'espace du droit communautaire de la consommation', *Revue du Droit des Contrats* 2005, pp. 857 ff ; Nourissat, C. (2005), 'Note sous arrêt', *Dalloz* 2005, somm. 608. See more generally Fallon, M. (1996), 'Le droit applicable aux clauses abusives après la transposition de la directive n° 93/13 du 5 avril 1993', *Revue Européenne de Droit de la Consommation* 1996, pp. 3-27 ; Id. (2005), 'Le principe de proximité dans le droit de l'Union européenne', in Mélanges P. Lagarde, Paris : Dalloz, pp. 241 ff ; Jayme, F. and C. Kohler (1995), 'L'interaction des règles de conflit contenues dans le droit dérivé de la Communauté européenne et des conventions de Bruxelles et de Rome', *Revue Critique de Droit International Privé* 1995, pp. 1 ff; Pataut, E. (2004), 'Lois de police et ordre juridique communautaire', in Fuchs A., H. Muir Watt, E. Pataut (ed), *Les conflits de lois et le système juridique communautaire*, Paris : Dalloz, pp. 117 ff.

[28] See Collins, *Alchemy*, cit.p. 219.

[29] See Cafaggi, F. (2008), 'The regulatory function of contract law: contract law in regulated markets', op. cit. For similar points related to civil liability see Cafaggi, F. (2006), 'A Coordinated Approach to Regulation and Civil Liability in European Law: Rethinking Institutional Complementarities', in Cafaggi F. (ed), *The institutional framework of European private law*, Oxford: Oxford University Press, pp. 191-243.

I should however differentiate between countries given that perhaps the model applies to Germany and Italy, the Netherlands and to a limited extent to France and Belgium, but would not fit with the evolution in the UK. See Atiyah, P. (1979), *The rise and fall of freedom of contract*, Oxford: Oxford University Press.

[30] Similar evolutionary arguments are made by Collins, *Alchemy*, pp. 223 ff. For a different perspective claiming the continuity of corrective justice in European private law, see Gordley, J. (2006), *The foundation of European private law*, Oxford: Oxford University Press.

relevant normative coordination problems between the two or, often, three levels[31]. It is true however, that European secondary law tries to bridge the two because it focuses on instruments: unfair contract terms, unfair trade practices, sale contracts, etc but with strong regulatory goals. This combination contributes to the multilevel harmonization but does not quite address all the frictions arising from the two approaches.

The impact of European private law on national legal systems has been different. In some cases, it has fragmented the relatively cohesive systems. In other cases, it has added new areas, broadening the domain of EPL. This has happened in at least two different ways: (1) it has contributed to the shift from public to private law, typically, this is true for contract law in regulated markets; (2) it has introduced new regimes or different liability standards. Thirdly, it has contributed to the specialization of private law: matters that under national legal systems were dealt with under general contract or property law have become specialized areas with their own principles. For example contracts in the financial markets have been separated from general contract law to become a specialized area often with specific principles that deviate from those previously developed by national legal systems.

2.2. EPL and fundamental rights

The last relevant feature of EPL is its relationship with fundamental rights[32]. The correlation has been explored recently and the case law often refers to principles in the Charter[33]. While there has been a general trend in national private law systems towards

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[31] In some MS regions or equivalent sub-state unities have legislative competences on private law matters.

[32] Barak-Erez, Daphne and Daniel Friedmann (eds) (2001), *Human Rights in Private Law*, Oxford: Hart Publishing; Vettori, G (2005), *Diritto dei contratti e "costituzione" europea*, Milano: Giuffré; Colombi Ciacchi, A. (2005), 'Non-Legislative Harmonisation of Private Law under the European Constitution: The Case of Unfair Suretyships', *European Review of Private Law* 13, 285 ff; Cherednychenko, Olha (2007), *Fundamental Rights, Contract Law and the Protection of the Weaker Party: a Comparative Analysis of the Constitutionalisation of Contract Law, with Emphasis on Risky Financial Transactions*, Doctoral thesis Utrecht University; Ead. (2006), 'EU fundamental rights, EC fundamental freedoms and private law', *European Review of Private Law* 1, 23-61; Ead. (2006), 'Fundamental rights and contract law', *European Review of Contract Law* **2**(4), 489-505; (2004), 'The Constitutionalization of Contract Law: Something New under the Sun?', *Electronic Journal of Comparative Law,* 8, http://www.ejcl.org/81/art81-3.html, 4; All the contributions in Barkhuysen T. and Lindenbergh S. (ed) (2006), *Constitutionalisation of private law*, Leiden, Boston: Martinus Nijhoff Publishers; Van Gerven, W. (2000), 'Remedies for infringement of fundamental rights', *European Public Law,* **10**(2), 262-284; Colombi Ciacchi, A. (2006), 'The constitutionalization of European contract law: judicial convergence and social justice', *European Review of Contract Law,* **2**(2), 167-180; Neuner, J. (2006), 'Protection against discrimination and European contract law', *European Review of Contract Law,* **2**(1), 35-50; Meli, M. (2006), 'Social Justice, constitutional principles and protection of the weaker contractual party', *European Review of Contract Law* **2**(2), 159-166; Lohse, Eva Julia (2007), 'Fundamental Freedoms and Private Actors – towards an 'Indirect Horizontal Effect', *European Public Law*, **13**(1), 159-190.

[33] Opinion of Advocate General Geelhoed delivered on 2 April 2003 (1) Case C-256/01 Debra Allonby v Accrington & Rossendale College and Education Lecturing Services, trading as Protocol Professional (formerly Education Lecturing Services) and Secretary of State for Education and Employment [2004] ECR I-00873.

their 'constitutionalization', patterns have been very different and still are[34]. To some extent, unlike market creation, the distinction between European and national level is here a matter of degree and the potential impact of fundamental rights for the development of European private law has yet to be fully explored.

Fundamental rights can affect harmonization in opposite directions: they can contribute to differentiation but can also enhance uniform application of EPL.

The relevance of fundamental rights as a limit to the creation of uniform rules for internal market and thus as a vehicle of differentiation is exemplified by the Schmidberger case decided by ECJ[35]. There freedom of speech was held to be the legitimate foundation of state law limiting free movement[36]. However, it can also operate in the opposite direction, for example when the equality principle is applied to different legislation that grants different rights. In the area of tenancy law, for example the non-discrimination principle may contribute to harmonize the law of contract across countries[37].

3. Harmonization and differentiation within EPL: Legislative design between normative divergences and policy convergences.

Levels of harmonization of EPL differ quite substantively. There are areas covered by complete harmonization by legislative choice (unfair B-to-C commercial practices Directive 2005/29/EC), areas that have become fully harmonized by judicial intervention (product liability Directive 374/85/EEC)[38], areas characterized by minimum harmonization, in particular those of consumer contract law (i.e. Directive 93/13/EEC on unfair contract terms) and those concerning remedies (Directive 98/27/EC). This disparity is not easily justifiable and poses additional problems to the definition of a consistent body of principles concerning consumer protection[39]. The shift

[34] The constitutional relevance of private law, especially of consumer protection appears in new constitutional texts of both old and new member states. See for example Art. 60 of the Portuguese Constitution and Art. 76 of the Polish Constitution. For the comparison of the role of fundamental rights in private law systems of France, Germany, England, Italy, Netherlands, Poland, Portugal, Spain and Sweden see Brüggemeier, G., A. Colombi Ciacchi and G. Comandé (eds) (2007), *Fundamental Rights and Private Law in the European Union. I. A Comparative Overview; II. Comparative Analyses of Selected Case Patterns*, Cambridge: Cambridge University Press, forthcoming.

[35] Case C-112/00, Eugen Schmidberger, Internationale Transporte und Planzuge v Republik Osterreich, [2003] ECR I-05659.

[36] See Case C-112/00 Schmidberger, cit. (paras. 74, 80, 81, 93).

[37] See on this point Cafaggi, F., 'Tenancy Law and European Contract Law', http://www.eui.eu/LAW/ResearchTeaching/EuropeanPrivateLaw/Projects/TenancyLawCafaggi.pdf

[38] Directive 2005/29/EC on unfair B-to-C commercial practices (UCPD), Art. 4; Directive 85/374/EEC on product liability, and see ECJ judgments of 25/4/2002, Case C-52/00 *Commission* v. *France*, [2002] ECR I-3827, para 24, and Case C-154/00 *Commission* v. *Greece*, [2002] ECR I-3879, para 20; Directive 93/13/EEC on unfair terms, Art. 8.

[39] See Review of the Acquis.

to total harmonization is grounded on the distortion of competition supposedly brought about by the exercise of powers by MS beyond minimum harmonization[40].

The level of harmonization changes even within the Acquis communautaire[41]. The range of directives enacted by the EU legislator goes from total to minimum harmonization with different intermediate degrees[42]. Harmonization has also been pursued in the field of private international law with the Rome Convention on the law applicable to contractual obligations and Regulation 44/2001 (Brussels I) and Regulation 2201/2003 (Brussels II bis)[43]. In this field the level of harmonization has not been satisfactory[44].

As I shall try to prove, there is a strong functional correlation between the level of harmonization and the necessity of a governance system. In general the lower the level of harmonization, the greater the need for a system of governance. But even when complete harmonization is chosen, as in the case of unfair trade practices, full harmonization of rules will not lead to uniform application[45]. Divergence of national legal traditions, different legal institutions, particularly judiciaries but also regulators, will affect the process of implementation[46].

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[40] Recital 3 and 4 of the Review of the Acquis.

[41] For detailed analysis of the content of the acquis communautaire in the field of contract law see all the contributions in Schulte-Nölke, H., R. Schulze together with Bernardeau L. (2002), *European Contract Law in Community Law*, Cologne: Bundesanzeiger; in Schulze R., M. Ebers, H. C. Grigoleit (ed) (2003), *Information Requirements and Formation of Contract in the Acquis Communautaire*, Tübingen: Mohr Siebeck; The EC Consumer Law Compendium under the lead of Prof. Dr. Hans Schulte-Nölke available at http://ec.europa.eu/consumers/cons_int/safe_shop/acquis/index_en.htm (Hereinafter The Compendium); See also Grundmann S. (2005), 'European Contract Law(s) of What Colour?', op. cit.; G.Alpa, Introduzione al diritto contrattuale europeo, Roma-Bari, 2007, part. pp.26 ss.

[42] Contrast the UCPD with the unfair contract terms Directive 1993/13/EEC and the sales Directive 1999/44/EC.

[43] The communitarization of PIL is underway. See the proposals "Rome I" for contractual obligations and Rome II for extra-contractual obligations. See among the vast literature on this process, Deumier, P. (2006), Proposition de règlement du Parlement européen et du Conseil sur la loi applicable aux obligations contractuelles (Rome I) COM(2005) 650 final, Revue des Contrats 2006, pp. 507 ; Burdeau, D. (2003), 'La mise en chantier des travaux de rénovation de la Convention de Rome', *Revue des Contrats* 2003, pp. 197 ff ; Lopez-Rodriguez, A. M (2004), 'The Rome Convention of 1980 and its revision at the crossroads of the European Contract Law Project', *European Review of Private Law,* **2**, 167-191 ; de Vareilles-Sommières, P. (2004), 'La responsabilité civile dans la proposition de règlement communautaire sur la loi applicable aux obligations non-contractuelles (« Rome II »)', in Fuchs A., H. Muir Watt, E. Pataut (ed), *Les conflits de lois et le système juridique communautaire*, Paris : Dalloz, pp.185 ff; Symeonides S. C. (2004), 'Tort Conflicts and Rome II: A View from Across', in Mansel H-P. et al. (eds), *Festschrift für Erik Jayme*, München: Sellier European Law Publishers, pp. 935-954, n°2.2. For a description of the increase of EC competence in the field of PIL see Boele-Woelki, K. and H. Van Ooik (2002), 'The communitarization of PIL', *Yearbook of Private International Law,* **4**, 1-36; Basedow, J. (2000), 'The communitarization of the conflict of laws under the treaty of Amsterdam', *Common Market Law Review,* **37**, 687-708.

[44] Green paper on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a community instrument and its modernization. On these questions see Muir Watt H. (2004), 'Aspects Economiques du Droit International Privé', *Recueil des cours*, **307**, 25-385; Kardner Graziano, Th. (2005), 'The law applicable to product liability: the present state of the law in Europe and current proposals for reform', *International & Comparative Law Quarterly*, **54**, 475-488.

[45] See recital 15 of Directive 2005/29/EC.

[46] On the different judiciaries from a comparative perspective see Bell, J. (2006), *Judiciaries within Europe: a comparative review*, Cambridge: Cambridge University Press; Lenaerts, K. (1990),

Other relevant changes have recently taken place in relation the principle of procedural autonomy. Increasingly the European legislator has defined the set of institutions that at national level have to administer the rules. While in the past the choice between administrative and judicial enforcement was left to MS, today more frequently it is defined at EU level[47]. The choice of forms and methods of implementation is still left to MS and this freedom has been exercised in different ways by MS to implement the Consumer Acquis. The scope of procedural autonomy has been narrowed.

Principle and rule-based legislation. The choice between principle or rule-based legislation at EU level and the use of general clauses and standards has had a great impact on the creation of a European private law system and on its features. These are two different yet related issues.

(1) The choice between principle or rule-based legislation[48]. The choice of principle based legislation at EU level leaves MS legislators wider discretion when implementing directives. While the positive function of principle-based legislation should be recognized, institutional adjustments can minimize the risks. The choice of rule based legislation at EU level reduces MS discretion but increases the costs of adaptation of European legislation to individual MS.

(2) General clauses have different scopes and functions in national legal systems[49]. They have been used for different purposes at EU level[50]. Their link with harmonization has been analyzed extensively[51]. The use of general clauses at EU level should not however prevent MS from implementing legislation by using a different technique. For

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'Constitutionalism and the many faces of federalism', *American Journal of comparative law,* 38, 205-264; Markesinis, Basil S. and Jörg Fedtke (2005), 'The Judge as Comparatist', *Tulane Law Review,* 80, 11-167; Markesinis, Basil S. (1993), 'Judge, Jurist and the Study and Use of Foreign Law', *Law Quarterly Review* 109, 622 ff; Basil S. Markesinis and Jörg Fedtke (2006), *Judicial Recourse to Foreign Law: A New Source of Inspiration?*, New York, London: Routledge-Cavendish. On the role of judiciaries for the harmonization of private law see Schmid, Christoph U. (2006), 'The ECJ as a Constitutional and a Private Law Court. A Methodological Comparison', ZERP-Diskussionspapier 4/2006.

[47] For an examination of this question in the field of consumer protection, see Cafaggi, F. and H. Micklitz (2007), 'Collective judicial and administrative enforcement in consumer protection', EUI w.p., forthcoming.

[48] EU institutions have moved away from very detailed legislation towards principle-based legislation see, for example, Council Directive 98/34/EC laying down a procedure for the provision of information in the field of technical standards and regulations. See Cafaggi, F. (2006), 'Rethinking Institutional Complementarities', op. cit.; Prechal, S. (2005), *Directives in EC law*, 2 ed., New-York: Oxford University Press (Hereinafter Prechal, *Directives*).

[49] Compare Jauffret Spinosi, C. (2006), 'Théorie et pratique de la clause générale en droit francais et dans les autres systèmes juridiques romanistes', and Schlechtriem, P. (2006), 'The functions of general clauses, exemplified by regarding Germanic and Dutch laws', in Grundmann S. and D. Mazeaud (eds.), *General clauses and standards in European contract law*, The Hague: Kluwer, pp.23 ff. and pp. 41 ff.

[50] S. Grundmann, The general clause or standard in EC Contract law directives- a survey on some important legal measures and aspects in EC law, in Grundmann S. and D. Mazeaud (eds.), *General clauses and standards in European contract law*, cit. p. 141 ff.

[51] The function of general clauses and standards as being instrumental in achieving uniformity has long been explored. See for example A. Tunc, Les standards et l'unification du droit, in Livre du centenaire de la société de législation comparée, LJDJ, 1970, p. 135

example specifying the duties in the legislative Act and leaving room to judicial interpretation of the general clause only for evolutionary purposes[52].

The use of general clauses and standards, if replicated at MS level, will leave national judges, not legislators, with wide discretion[53]. The role of ECJ to define a uniform interpretation of general clauses is debated. Some favor a central role, others promote wider differentiation by leaving the matter to national courts[54]. The ECJ, in the context of an infringement case, has stated quite conspicuously in relation to unfairness that MS, in particular legislators, have limited power to modify the scope of general clauses[55]. On the other hand the ECJ, in the context of a preliminary ruling case, declined to declare its own jurisdiction and left to MS Courts the task of defining unfairness where the contract clause has to be evaluated in relation to factual circumstances and national laws[56].

The ECJ certainly has to play a role in defining domain and scope of general clauses thereby constraining MS in the implementation process and national courts in the interpretation of national laws. However, general clauses should enable different national judicial (and regulators') interpretations to arise. They provide the necessary flexibility to adapt European legislation to national systems. They are part of the broader design of a principle-based legislation that enables different regulatory strategies and market practices to be recognized.

Mandatory and default rules. The implementation strategy also affects the type of rules defined by MS. The rules defined by the directives, horizontal and vertical, are

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[52] I believe that the use of general clause at EU level should not prevent MS from using per se prohibitions at national level to the extent that the scope of the directive is preserved.

[53] See generally Grundmann S. and Mazeaud D. (eds) (2006), *General clauses and standards in European contract law*, op. cit. On the va-et-vient of the Cour de Cassation interpreting the concept of "clause abusive" see Fenouillet, D. (2005), 'La Cour de cassation et la chasse aux clauses abusives: un pas en avant, deux pas en arrière!', *Revue des Contrats* 2005, pp. 718 ff. See for cases sanctioning the transposition by legislators of general clauses e.g. C-70/03, Commission v. Spain cit.; C-372/99 Commission v. Italy [2002] ECR I-819.

[54] For an analysis of this debate, mainly in relation to German scholarship see Grundmann, S. (2006), 'The general clause or standard in EC contract law Directives – A survey on some important legal measures and aspects in EC Law', in Grundmann S. and Mazeaud D. (eds), *General clauses and standards in European contract law*, op. cit. , pp. 141 ff part. pp. 155 ff. P. Rott addresses the relationship between general clauses and the principle of autonomous interpretation and concludes that they are subject to the principle; see Rott, P. (2005), 'What is the role of the ECJ in EC Private law? A comment on the ECJ judgements in Oceano Grupo, Freiburger Kommunalbauten, Leitner and Veedfals', *Hanse Law Review,* **1**, 6-17, at. p. 8 text and footnotes 10 and 11; Klauer, I (2000), 'General clauses in European private law and 'stricter' national standards: the Unfair Terms Directive, *Eurpean Review of Private Law,* **1**, 187-210.

[55] See C-70/03, Commission v. Spain, cit.

[56] See C-237/02, Freiburger Kommunnalbauten Gmbh Baugesellschaft & Co.KG v Hofstetter [2004] ECR-I 3403, paras 21 and 22. See Hesselink, M. (2006), Case note, *European Review of Contract Law,* **2**, 366-375, at p. 370, arguing that with Hofstetter ECJ has allowed to give the term unfair different meanings in different MS. Hesselink correctly emphasizes the reference to national law and traces it back to the German implementation where the test for unfairness is based in case of doubt on the degree of deviation from existing statutory rule. See Hesselink, M. (2006), op. cit. p. 374, footnote 17.

both mandatory and default[57]. Often they both have regulatory functions. For example, there are contract law rules that impose mandatory duties to inform and default rules aimed at forcing disclosure by the most informed party. At EU level, both strategies have been employed.

Is the choice between mandatory and default rules a matter for national authorities, or if a choice has been made at EU level, should national institutions be bound to comply? What is the relationship between the choice of forms and methods of implementation and that between mandatory and default rules? From a formalistic perspective, the choice at national level should reflect that made at EU level. The development of new modes of regulation however shows that default rules may have the same results as mandatory rules if well engineered. Thus wider flexibility should be granted especially if combined with coordination mechanisms as proposed in this essay.

Mandatory rules pose different questions from default rules in relation to modes of European legal integration[58]. While the implementation of the former is a matter for public institutions, legislators and regulators, default rules should also be implemented by the national legislator but can be modified by private parties, though with limitations in B-to-C relationships[59]. A mandatory uniform rule will stay uniform when implemented at MS level, a uniform default rule may become differentiated if market practices are different across the internal market and private parties exercise their rule-making power[60]. Their regulatory functions will change accordingly. The level of harmonization or differentiation of default rules will therefore mainly depend on market practices in MS. If they diverge, the deviations from the default rules will occur, conducing to differentiation. Limits to the ability of deviating from default rules have been indicated by ECJ interpreting Directive 93/13 on unfair contract terms. There ECJ has distinguished between minor and significant deviations. The latter in B-to-C relationships may represent an indication of unfairness and the clauses may be set aside accordingly[61].

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[57] The distinction between horizontal and vertical refers to the language of the Review Paper. Vertical directives are sector specific whereas horizontal directives apply to an entire field.

[58] On these questions see Cafaggi, F. (2003), 'Introduzione' to Cafaggi F. (ed), *Quale armonizzazione per il diritto europeo dei contratti?*, Padova Cedam; Id. (2008),'The regulatory function of European private law', op. cit.

[59] On the distinction between mandatory and non-mandatory rules in European contract law see Mattei, U. (1999), 'Efficiency and Equal Protection in the New European Contract Law: Mandatory, Default and Enforcement Rules', *Virginia Journal of International Law*, **39**, 537-570; Gambaro, A. Contratto e regole dispositive, Riv. Dir. Civ. 2004,I, 1 ss, Hesselink, M. (2005), 'Non-mandatory rules in European contract law', *European Review of Contract Law,* **1**, 44-86; Grundmann, S. (2005), 'European Contract Law(s) of What Colour?', *European Review of Contract Law*, 1, 184-210, at p. 189. Storme, Mathias E. (2007), 'Freedom of Contract: Mandatory and Non-Mandatory Rules in European Contract Law', *European Review of Private Law* **2** (15), 233-250; Case C-339/89 Alsthom Atlantique SA v Compagnie de construction mécanique Sulzer SA [1991] ECR I-107. For the analysis of this case see Hesselink, M. (2005), 'Non-mandatory rules in European contract law', op. cit., at p. 75. The Compendium stresses relevance of non-mandatory rules at pp. 332, 366.

[60] See Cafaggi, F. (2003), 'Introduzione' to *Quale armonizzazione per il diritto dei contratti*, op. cit.

[61] Incomplete transposition of the Directive 93/13/EEC into national law which amounts to infringement: Case C-144/99 Commission v Netherlands [2001] ECR I-03541, Case C-372/99 Commission v Italy cit. and Case C-70/03 Commission v Spain cit.; which does not amount to infringement: Case C-478/99 Commission v Sweden [2002] ECR I-04147.

Harmonized and non-harmonized rules. Procedural autonomy. The process of harmonization of EPL is constrained by the principle of proportionality and that of procedural autonomy. The former ensures among other things respect for national values and differences[62]. The latter has been interpreted as allocating the power to define procedural rules, including remedies to a certain extent, at MS level[63]. Procedural autonomy imposes coordination between European and national levels in relation to substantive rules: the standards for breach are defined at EU level while its consequences are stated at MS level without any particular coordination among MS[64].

Together with other aspects, related to the role of competition policy, the particular nature of EPL rules have generated a specific body of law which, when implemented at national level, has had quite a disruptive role in relation to non-harmonized rules[65]. For example the duty to inform consumers has had a strong impact on the definition of contract formation and on the role of pre-contractual information (from dir. 90/314/EC to dir. 97/7/EC, not to mention the legislation concerning consumer protection in regulated market such as the MiFid directive 2004/39 or the liberalization directives in the field of energy, or telecom …)[66]. Breach of these duties has been sanctioned through right of termination (right to withdraw ...), through invalidity of the contract in addition to damages[67]. These 'new' remedies have affected the dividing line between pre-contractual and contractual liability and have forced a redefinition of the formation of contracts outside consumer contracts in national legal systems[68]. This impact has first

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[62] See Craig, P. (2006), *EU Administrative law*, New-York, Oxford: Oxford University Press, pp. 707 ff; Tridimas, T. (2006), *The General principles of European Law*, Oxford: Oxford University Press, 2° ed., 2006, pp. 193 ff.

[63] On the principle of procedural autonomy and its limits see Craig, P. (2006), *EU Administrative law*, op. cit. p. 789 ff. Tridimas, T (2006), *The General principles of European Law*, op. cit., pp. 418 ff. Dougan M. (2004), *National remedies before the European Court of Justice*, Oxford, Portland: Hart; Van Gerven W., 'Of rights, remedies and procedure', *Common Market Law Review*, **37**, 501-536. In relation to issues of European contract law see C- 168/05 Mostaza Claro v. Centro Movil, Joined cases 392/04 and 422/04 I-21 Germany v. Arcor [2006] ECR I-10421.

[64] For example in the Directive 2005/29/EC, art. 1.1 MS are required to introduce sanctions for infringements that have to be effective, proportionate and dissuasive.

[65] See Case C-453/99 *Courage Ltd v Bernard Crehan* [2001] ECR I-6297.

[66] Directive 90/314/EEC on package travel, package holidays and package tours, Art. 3(1) and Article 4(1); Directive 85/577/EEC to protect the consumer in respect of contracts negotiated away from business premises, Art. 4 and Art. 5; Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees, Art. 2; Directive 97/7/EC on the protection of consumers in respect of distance contracts, Art. 4; Directive 94/47/EC on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis, Art. 4; Directive 2005/29/EC on unfair B-to-C commercial practices, Art. 7; Directive 2003/54/EC concerning common rules for the internal market in electricity, Art. 3; Directive 2003/55/EC concerning common rules for the internal market in natural gas, Art. 3; Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive), Art. 20, Art. 21, Art. 22 and Annex II; Directive 2004/39/EC on markets in financial instruments, Art. 19; Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') Art. 5 and Art. 10.

[67] See directives. 90/314/EEC (art. 4§5), 94/47/EC (art. 5), 97/7/EC (art. 6), 2004/39/EC (art. 18(2)).

[68] Howells, Geraint, Janssen André and Schulze Rainer (2005), *Information Rights and Obligations. A Challenge for Party Autonomy and Transactional Fairness*, Aldershot, Hants, England ; Burlington, VT :Ashgate; Mankowski, Peter (2005), 'Information and Formal Requirements in EC Private Law',

been on the judiciary and then on the legislative strategy concerning implementation of European law at national level.

Spillover effects. The quantitative and qualitative importance of the non-harmonized area of private law legislation over the harmonized one however affects the capability of European legislation to expand over and beyond the original domain into national legal systems[69]. Spillover effects have taken different forms[70]. There are **judicial spillovers**, where national judges apply community law to areas not legislated upon at EU level[71]. There are **legislative spillovers** where the national legislators broaden the scope of EU legislation[72]. There are **contractual spillovers** where private parties, through the use of code of conducts or other self-regulatory devices, expand EU legislation to other fields or parties[73].

Institutional responses. National legal systems have responded to these problems both with different implementation strategies, at legislative and judicial level, and with different institutional players.

At the judicial level, national Courts have had different attitudes towards the expansive nature of EPL. At times, they have been the strongest advocates of European law, endorsing discontinuity between national law created by the State and national law implementing European legislation[74]. At times they have been custodians of continuity

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European Review of Private Law, **6**(13), 779-796; Grundmann, Stefan (2002), 'Information, Party Autonomy and Economic Agents in European Contract Law', *Common Market Law Review*, **39**, 269-293; Grundmann, Stefan, Kerber Wolfgang and Stephen Weatherill (2001), *Party Autonomy and the Role of Information in the Internal Market*, Berlin, New York: Walter de Gruyter.

[69] For a more detailed analysis of the relationship between harmonized and non-harmonized rules at state level see F. Cafaggi, 'Introduzione' to *Quale armonizzazione per il diritto europeo dei contratti?*, op. cit. and Cafaggi F. and Muir Watt H. (2007), 'The making of European private law: Regulation and governance design', op. cit., part pp. 20-21.

[70] See Van Gerven, W. (2006), 'Bringing private laws closer, bringing (private) laws closer to each other at the European level', in Cafaggi F. (ed), *The institutional framework of European private law*, pp. 37 ff,; Teubner, Gunther (1998), 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Differences', *Modern Law Review*, **61**, 11-32; Joerges, Christian (2004), 'The Challenges of Europeanization in the Realm of Private Law: A Plea for a New Legal Discipline', *Duke Journal of Comparative & International Law*, **14**, 149-196, at p. 193.

[71] To take only recent examples, in the judgment of 13 September 2005 (K 38/04, (2005) 8 OTK-A) the Polish Constitutional Tribunal in the assessment of the constitutionality of certain provisions of the Polish Language Act 1999 made an explicit reference to the consumer protection policy. For the summary in English, see http://www.trybunal.gov.pl/eng/summaries/wstep_gb.htm. In a decision in the field of copyright the French Cour de cassation does not hesitate to interpret French law in the light of art. 5 of Directive 2001/29, Cass. 1re civ. 28 févr. 2006, aff. *Mulholland Drive*, JCP 2006, II, 10084, note Lucas A.; LPA, 2 août 2006, n° 153, p. 20, note Castets-Renard ; C. D. 2006, AJ p. 784, obs. Daleau J ; CCE 2006, comm. 56, note Caron C.; Propr. intell., avr. 2006, p. 179, obs. Lucas A.

[72] The most important example is provided by the modernisierung project concerning the German BGB.

[73] See for example in the field of electricity the Italian Codice commerciale di condotta that has applied consumer contract laws principles to BtoB relationships.

[74] In the field of product liability, the French Supreme Court has not hesitated to extend the range of the creditors of the *"obligation de sécurité"* beyond contractual parties before the transposition of the Directive 85/374/EEC. See for example Cass. 1re civ., 3 mars 1998, JCP 1998, II, n° 10049, rapport P. Sargos ; D. 1999, Jur. p. 36, note G. Pignarre et P. Brun.

of their national legal traditions by giving narrow interpretation and scope to EU legislation[75].

As for the legislative level, some countries, like Germany, have tried to integrate EPL into their national laws[76]. Others, like France and Italy, have produced a separate code (Code de la Consommation, Codice del consumo) to harmonize the European acquis[77]. A complementary phenomenon has been the development of sectoral codes in the field of regulated markets. Implementation of directives concerning the regulatory framework of telecommunication, electricity, gas, etc. has been pursued through the enactment of codes supplying uniform regulation within the boundaries of a regulated market[78]. In some countries the codification of consumer law has been short-lived and the process of de-codification has already taken place[79]. Poland adopted a mixed strategy: measures on unfair contract terms and product liability were incorporated into Civil Code whereas other elements of consumer acquis were transposed by means of specific statutes[80]. The open question is whether the former strategy has 'consumerized' national legal systems

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[75] Still in the field of products liability, see the decision of the Cour de Cassation Cass. civ. 1re, 3 mai 2006, 04-10994: while directly referring to art. 9 of the Directive 85/374 because of the lack of conformity of the French transposition, it remains silent on the question whether in the case at hand the type of damage suffered by the victim is recoverable. Indeed, traditionally under French law all types of damages are recoverable. See for a comment of this decision Borghetti, S. (2006), 'Le dommage réparable en matière de responsabilité des produits', *Revue des contrats* 2006, pp. 1239 ff . Generally speaking the adaptation of French law to EC law has not been an easy enterprise. See Calais-Aulois J. (2002), Menace européenne sur la jurisprudence française concernant l'obligation de sécurité du vendeur professionnel (CJCE, 25 avril 2002), Dalloz 2002, pp. 2458 ff ; In the field of contract law see the definition of consumer given by the Cour de cassation while interpreting directive 93/13/EEC, in Cass civ 1ère 15 mars 2005 n°02-12.285, D. 2005, p. 1948 obs. A. Boujeka, AJ p. 887, obs. C. Rondey; Contrats, conc., consom. 2005, comm. n° 100, obs. G. Raymond Bert D., Note sous arrêt, Petites Affiches 2005, pp. 12 ff. In addition see Cass**,** 1re civ. 1 février 2005**,** n° 03-13.779 (n° 240 F-P+B), D. 2005 p. 487, and p. 2835.

[76] With the so called Modernisierung project. See Mollers, T.M.J. (2002), 'European directives on civil law, The German approach: towards the re-codification and new foundations of civil law principles', *European Review of private law,* **6**, 777-798; D'Alfonso, G. (2003), 'The European judicial harmonisation of contractual law: observations on the German law reform and 'Europeanization' of the BGB', *European Business Law Review,* **14**, 689-726, Grundmann S. (2005), 'Germany and the Schuldrechtsmodernisierung', *European Review of Contract Law,* **1**(1), 129-148.

[77] See Alpa, Guido (2006), 'I contratti dei consumatori e la disciplina generale dei contratti e del rapporto obbligatorio', *Rivista di diritto civile*, 52(6), 351-360; Vettori, G. (ed.) (2007), *Codice del consumo*, Padova: Cedam.

[78] See for the Italian experience, Sandulli, M.A. and L. Carbone (2005), *Codificazione, semplificazione e qualità delle regole*, Milano: Giuffrè.

[79] For the Italian experience, see the so-called liberalization statutes *Bersani I and II* concerning consumer protection rules that have not been introduced in the code but constitute part of separate legislation (decreto legge n. 223 del 4 luglio 2006 e convertito dalla Legge n. 248 del 4 agosto 2006).

[80] As to the former example, see Artt. 384-385.4 (unfair contract terms) and Artt. 449.1-449.11 (product liability) of the Polish Civil Code. As to the latter example, see the Act on Tourist Services of 29 August 1997 (package travel), the Act of 2 March 2000 on the protection of certain consumer rights and liability for an unsafe product (distance and doorstep contracts and amendments to the Civil Code with respect to unfair contract terms and product liability), the Act of 13 July 2000 on the protection of purchasers in respect of the right to use buildings or dwellings during certain times each year (timesharing), the Act on prices of 5 July 2001 (price indication), the Act of 27 July 2002 on the particular conditions of consumer sale and on the amendment of the Civil Code (consumer sales), the Act of 16 February 2007 on the protection of consumers and competition (injunctions).

in particular national contract laws, while the latter has kept its law separate from general contract law, thereby crystallizing the distinction between two bodies of laws[81].

Should these choices be left to MS? Are these matters purely issues of legislative strategy or do they presuppose different, perhaps conflicting, policy choices? To what extent are these choices captured by the principle of procedural autonomy? If one concludes, as I would, that these are matters with strong policy implications yet are to be left predominantly to MS, how can the potentially conflicting policies be reconciled?[82] Is judicial interpretation at EU level sufficient or should governance devices be employed?

Private organizations. As I have argued elsewhere, an important role concerning degrees and modes of harmonization of default rules in contract law is played by private organizations, both trade and consumer associations[83]. Thus institutional responses should neither necessarily be at the legislative level nor, a fortiori, shifting the balance from default to mandatory rules. Divergences due to different businesses practices that may increase transaction costs and lower the level of trade can be accommodated by employing adequate governance devices aimed at solving conflicts among divergent practices. On a more general level it should be underlined that contract law is based on contractual practices and that the role of law is to foster efficient and fair contractual practices even if they may not necessarily be uniform. A different role is played by private organizations in the field of unfair competition law and civil liability[84].

Harmonization is strictly related to enforcement rules and practices. Together with substantive rules also remedies have been, to a limited extent, harmonized[85]. This

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[81] Picod, Y. (2006), 'Droit des contrats et droit du marché: entre harmonie et turbulences', *Revue des Contrats* 2006, pp. 1330 ff ; Mazeaud, D. (2003), 'Le nouvel ordre contractuel', *Revue des Contrats* 2003, pp. 295 ; Id. (1998), 'L'attraction du droit de la consommation', in Droit du marché et droit commun des obligations, actes du colloque publiés in *Revue Trimestrielle de Droit Immobilier* 1998, pp. 95 ff ; Beauchard, J. (1994), Remarques sur le code de la consommation, *Ecrits en hommage à G. Cornu*, Paris: PUF, pp. 14 ff; Bureau, D. (1994), 'Remarques sur la codification du droit de la consommation', *Dalloz* 1994,. pp. 291ff.

[82] The two strategies may have opposite effects not only in relation to spillovers but also when the European legislation only covers some aspects and leaves to MS the task of filling the gaps. The same rule would have a different meaning if it became part of a civil code and a general principle of contract law or if it is part of a consumer code, separate from the Civil Code. These divergences may affect EPL's ability to pursue the regulatory goals.

[83] See Cafaggi, F. (2007), 'Self-regulation in European contract law', *European Journal of legal studies*, **1**(1), www.ejls.eu.

[84] See Cafaggi F. Contractualising standard setting in tort law, unpublished paper on file with the author

[85] On this question W. Van Gerven, Of rights, remedies and procedure, op. cit.; Rochfeld J. and C. Aubert De Vincelles (eds) (2006), *L'Acquis Communautaire –Les Sanctions de l'Inexécution du Contrat*, Paris: Economica; Dougan M. (2004), National remedies before the Court of Justice : issues of harmonisation and differentiation, op. cit. On the necessity to have a greater level of harmonization see the Green Paper on the Review of the Acquis point 4.9 and 4.10 of the Annex when a general right to damages is proposed; See also Smith, L. J. (2006), 'The eye of the storm: on the case for harmonizing principles of damages as a remedy in contract, *European Review of Contract Law* **2**, 227-249; Busnelli, F. D. (2001), 'Prospettive europee di razionalizzazione del risarcimento del danno non economico', in *Danno e responsabilità* 2001, pp. 5-11.

process has partly occurred by single provisions in the substantive directives[86] and partly by enacting horizontal directives to introduce uniform remedies[87]. Recent comparative surveys suggest that the implementation process has brought different results and confirms that the different capacities of institutional players, in that case predominantly consumer associations, may severely undermine the level of harmonization to be achieved[88].

Regulation. National regulators have come to play an ever more significant role in defining the content of general principles employed in EU legislation. The example of financial market regulators and the investment directive is illustrative. The MiFid directive (Directive 2004/39/EC) unlike its predecessor is part of the Lamfalussy architecture[89]. The divergences concerning the interpretation of the duty of loyalty of investment firms (art. 19) will be addressed and hopefully accommodated by CESR intervention at level 3[90]. The role of regulators and their European committees have thus become very relevant and, to the extent that a framework approach will be taken at EU level, will increase their contributions to the definition of detailed rules concerning contractual matters[91]. The areas of energy and telecom provide additional examples of the increasing role of regulators as producers and monitors of contract and property law, and, to a lesser extent, of civil liability.

4. Some brief illustrations

The problems of coordination between EU and MS arise at two different levels: legislative implementation, and judicial/administrative practices that take place once national legislation has been enacted.

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[86] See for example Directive 90/314/EEC (Artt. 4§5, 4§6, 4§7), Directive 97/7/EC (Artt. 7§2, 7§3), Directive 99/44/EC (Art. 3§2), Directive 85/314/EEC (Artt. 1, 9).

[87] In particular Directive 1998/27/EC on injunctions. See also Directive 2004/48/EC on the enforcement of intellectual property rights.

[88] See an analysis and evaluation of alternative means of consumer redress other than redress through ordinary judicial proceedings, Final Report, prepared by The Study Center for Consumer Law, available at http://ec.europa.eu/consumers/redress/reports_studies/comparative_report_en.pdf. See Cafaggi, F. and H. Micklitz (2007), 'Collective judicial and administrative enforcement in consumer protection', op. cit.

[89] Directive 2004/39/EC, in particular artt. 19 ff.

[90] On this question see Ferrarini G. (2005), 'Contract standards and the markets in financial Instruments Directive (MiFID). An assessment of the Lamfalussy Regulatory architecture', *European Review of Contract Law*, **1**(1), 19-43, part. pp. 35 ff. and Ferrarini G. and E. Wymeersch (2006), *Investor protection in Europe. Corporate law making, the MiFID and beyond,* Oxford: Oxford University Press, 2006, part. pp. 235 ff.. In 2002 CESR adopted the harmonized set of detailed conduct of business rules applicable to investment services provided to non-professional customers (Ref. CESR/01-014d) and to professional investors (Ref. CESR/02-098b).

[91] On the relationship between general contract law and regulated fields see Cafaggi, F. and H. Muir Watt (eds) (2008), *The regulatory function of European Private Law,* op. cit.

4.1. Legislative strategy concerning consumer laws.

Different implementation strategies or different judicial interpretations influenced by legal national traditions may reduce the ability to promote not only the regulatory goals but also the facilitative role of default rules[92]. This is particularly true for principle-based norms, but it can be extended to rule-based norms, subject to different judicial interpretation.

General clauses such us unfairness, good faith, unreasonableness, loyalty, can be implemented in different ways. Even if textually the same term is used, different meanings and functions may be generally associated to them[93].

Different interpretations of unfairness may imply that contract clauses increasing information asymmetry are considered unfair in certain MS and fair in others. Thus the regulatory function of contract law in the internal market can be undermined. If specific trade practices are considered unfair in certain MS and not in others, the objectives of ensuring fair trading may be undermined. This is not an argument against general clauses, rather it is an indication that their use in a multilevel system requires coordination mechanisms to ensure that divergences do not undermine the pursuit of goals, particularly the creation of internal market and its regulatory framework.

In this short set of illustrations, I shall focus on implementation of general clauses or standards and on spillover effects generated by EU legislation.

It should be stated at the outset that:

a) the use and scope of general clauses widely differ in MS[94];

b) the use of general clauses in EC legislation has assumed different meanings from those employed in national systems[95].

Two examples can illustrate the point: 1) the concept of unfairness in contract terms (art. 3, Directive 93/13/EEC, 2) the notion of unfair commercial practices (Directive 2005/29/EC).

1) Directive 93/13/EEC concerning unfair contract terms refers to good faith (contrast with good faith) as one element to define unfairness[96]. This provision has been implemented at State level in different ways[97]. It is important to underline that beyond

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[92] See Grundmann, S. (2006), 'General standards and principles, Clauses Générales, and Generalklauseln in European contract law- A survey', op. cit.

[93] See Grundmann S. and D. Mazeaud (2006), *General clauses and standards in European contract law*, op. cit.

[94] Grundmann, S. and D. Mazeaud (2006), *General clauses and standards in European contract law*, op. cit.

[95] For similar conclusions on these points see Grundmann, S. (2006), 'The general clause or standard in EC contract law Directives – A survey on some important legal measures and aspects in EC Law', op. cit. pp. 141 ff.s.

[96] See ex multis Whittaker, S. (2006), 'On the development of European standard contract terms', *European Review of Contract Law*, **2**(1), 51-76.

[97] A cut and paste transposition of Art. 3(1) of the Directive 93/13/EEC has admittedly only occurred in seven member states, namely Cyprus**,** Czech Republic, Hungary, Ireland, Italy, Spain and United Kingdom. The other MS in contrast have not transposed the criteria in the Directive 93/13/EEC word

the legislative text it is crucial to look at what judges and, when involved, public and private regulators have said[98].

As to legislation, unfairness has been defined differently, sometimes referring to the concept of abuse of right, sometimes to the concept of good faith, sometimes to boni mores[99]. Different scope has been attributed to the implementation as to the relationship between fairness and price control. While in the directive, unfairness was not associated to price control some MS have linked the two, allowing Courts to evaluate whether unfairness would translate into too high a price[100].

As to judicial interpretations, there are divergences across Member States concerning what an unfair term is[101]. Even when the same term (i.e.) good faith has been used in the implementing act, different meanings are attached to it by national Courts[102].

A second divergence concerns the domain of fairness control. It is clear that fairness control concerns both mandatory and default rules[103]. However for default rules courts have used different standards, often referring to the level of deviation from the default rule. Differences in judicial interpretation are also related to the relationship between fairness in market practices. In some legal systems, the distinction between the legal

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for word, but either retained the general clauses of their respective national laws or adopted principles deviating from, or even going further than prescribed in the Directive for the review of terms.

[98] Directive 93/13/EEC has been applied to B-to-C relationships in regulated markets, so that for example, unfair contract clauses in the field of energy or telecom have been scrutinized according to the general principles as applied by sector regulators in MS.

[99] In some cases the term good faith has not been used in the implementing Act. For example in Poland reference is made to *boni mores* rather than good faith (art. 385/1(1) Civil Code). In Sweden reference is made to good marketing practices. See also the case of France (art. L. 132-1 of the Consumer Code which refers to the significant imbalance between the rights and obligations of the parties). The requirement of *"good faith"* is only explicitly mentioned in eleven Member States in total, namely in Cyprus, Czech Republic, Germany, Hungary, Ireland, Italy, Latvia, Malta, Portugal, Slovenia, Spain and United Kingdom, see The Compendium, 373.

[100] An issue treated differently in the Member States is whether the fairness test encompasses the subject matter of the contract and the adequacy of price, see The Compendium, pp. 374, 388, 394.

[101] See, for example, cases on unilateral alteration of significant characteristics of the product or service. In Poland, a clause enabling the seller to alter unilaterally significant characteristics of the product or service provided may be declared unfair only if it does not specify valid reasons for the alteration (Appellate Court of Warsaw, VI ACa 548/2004, 7 January 2005). Compare decision of 11 January 2007 (RPZ 1/2007, 11 January 2007), and the Office of Fair Trading's position (Unfair contract terms guidance. Consultation on revised guidance for the Unfair Terms in Consumer Contracts Regulations 1999. Annexes, April 2007, OFT311cons, p. 141 available at http://www.oft.gov.uk/shared_oft/reports/unfair_contract_terms/oft311cons-annexes.pdf). See also cases on exemption of liability in relation to delays of air flights. Whereas in Italy it seems to be admissible to exempt liability (Giudice di pace Venezia, 01 giugno 2000, Cianchetti c. Soc. Bucintoro viaggi e altro), in Poland in three cases such an exemption clause was declared unfair (XVII Amc 118/03, 17 March 2005; XVII AmC 76/05, 21 June 2006; XVII AmC 137/05, 19 October 2006). Compare also the way in which the standard of unfairness is determined by a reference to default rules. Whereas in Italy it seems that deviation from default rules is not considered to be unfair (Cassazione civile, sez. II, 07 aprile 2005, n. 7281, Sasso c. Banca Verona; Tribunale Rimini, 21 agosto 2000, Piccioni c. Banca pop. Valconca), in Poland this is not so obvious (Appellate Court of Warsaw, VI ACa 177/2005, 22 November 2005).

[102] For a general overview see Whittaker, S. and R. Zimmerman (eds) (2000), *Good Faith in European Contract Law*, Cambridge: Cambridge University Press.

[103] See Hesselink, M. (2005), 'Non-mandatory rules in European contract law', op. cit., at p. 67.

standard and market practices has brought about the rejection of market practices as potential evidence of fairness. In other MS, Courts have held clauses to be fair because they reflected current market practices[104].

As to regulators, they are relevant in two different domains concerning unfair contract terms. When MS have chosen ex ante administrative control, the task of specifying what an unfair term is has been attributed mainly to them[105]. Even when the general regime is judicial control, since Directive 93/13/EEC applies to regulated sectors, the definition of unfair terms in these areas may strongly depend on the views of regulators[106]. Regulatory practices have not been extensively analyzed but anecdotal evidence shows that there are different interpretations of unfairness[107]. The role of European associations of national regulators in regulated markets and the rules defined in Reg. 2006/2004 are of utmost importance in ensuring that these divergences are addressed and reconciled.

2) Outside the realm of contract law, the UCPD employs the general clause of unfairness[108]. Fairness must be evaluated through the combination of a blacklist and general clauses[109]. The role of the blacklist is different from that of the grey list of unfair contract terms. Instead of the list having illustrative scope, here it is part of the legislative text and the source of rights for consumers[110]. The meaning of unfairness is defined through very general parameters, which may lead to divergent interpretations[111]. According to the general fairness test set out in article 5 UCPD "*commercial practices*

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104 Polish Competition and Consumer Protection Court declared fair a clause which entitles the seller to retain two stage payments (instalments) if the consumer rescinds the contract. The decision was justified by the fact that such a clause *"does not deviate from the accepted trade usage"* (XVII Amc 33/01, 12 September 2002).

105 For a comparison of France and UK, see Whittaker, S. (2005), 'Contractual Control and Contractual Review in England and France', *European Review of Private Law*, **6**, 757-778.

106 For example in the area of electricity see the Italian case Romano Benedetto v E.N.E.L. (Tribunale di Palermo, 20.3.1998).

107 For the analysis aiming at justification of *prima facie* unfair terms on public services grounds in water, electricity, post, telecommunications, gas, rail, bus/metro and health (hospitals) sectors see Application de la directive 93/13 aux prestations de service public/Rapp. final/1997/.

108 Art. 5.2. The problem has been addressed by the Commission in the Explanatory memorandum COM (2003) 356 final. See Micklitz, H.-W. (2006), 'Maximum Harmonisation and the Internal Market Clause', in Howells G., H.-W. Micklitz and T. Wilhemsson, *European Fair Trading law, The unfair commercial practices Directive*, Aldershot, England ; Burlington, VT : Ashgate, , 27-48, at pp. 42-43.

109 Stuyck, J., E. Terryn & T. Van Dyck (2006). 'Confidence through fairness? The new directive on unfair business-to-consumer commercial practices in the internal market', op. cit., p. 108

110 Stuyck, J., E. Terryn & T. Van Dyck (2006), 'Confidence through fairness? The new directive on unfair business-to-consumer commercial practices in the internal market', op. cit., p. 135. On the function of the grey list in the Unfair contract terms directive see case C-478/99 Commission v Kingdom of Sweden cit., paras. 11, 12, 21, 22.

111 Stuyck, J., E. Terryn & T. Van Dyck (2006), 'Confidence through fairness? The new directive on unfair business-to-consumer commercial practices in the internal market', op. cit. pp. 107 ff.; Micklitz, H.-W. (2006), 'The General Clause on Unfair Practices', in Howells G., H.-W. Micklitz and T. Wilhemsson, *European Fair Trading law, The unfair commercial practices Directive*, Aldershot, England ; Burlington, VT : Ashgate, , 83-122, at pp. 86 ff.; Radeideh, M. (2005), *Fair Trading in EC Law*, Groningen: Europa Law Publishing; Collins, H. (ed) (2004), *The forthcoming EC directive on unfair commercial practices*, The Hague, New-York: Kluwer Law International.

will be considered unfair if they are contrary to the requirement of professional diligence and materially distort or are likely to materially distort the economic behavior of the average consumer". Furthermore, a practice will be unfair when the transactional choices of consumers are affected by misleading practices including omissions and aggressive practices.

The reference to professional diligence poses some puzzling questions given that in some MS this reference is interpreted as being 'best practices', thus industry custom, while in others as a legal standard[112]. The reference to honest market practices implies a combination of customary and normative criteria that may substantially vary from country to country[113]. The differences are not only related to the relationship between market and non-market parameters[114]. Even within a pure market-based definition of unfairness consumer perceptions and preferences are influenced by the market environment and may therefore reflect very different attitudes towards commercial communications[115].

Within unfair commercial practices, there are misleading practices to be determined in relation to provisions enacted in codes of conduct[116]. Codes of conduct can vary from one industry to another and from one sector to another, further contributing to the differentiation of the definition of unfair commercial practices across industries and MS[117].

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[112] Furthermore, the relationship between the reference to professional diligence and consumer protection is unsettled.

[113] See for example the definition of professional diligence provided in the Belgian law implementing UCPD (art. 92.8). Micklitz, H.-W. (2006), 'The General Clause on Unfair Practices', op. cit., p.97 ff. part. 98.

[114] Explicit acknowledgement of the relevance of cultural factors potentially associated to national cultures is referred to in recital 18 UCPD directive. See Cases C-373/90 X (1992) ECR I-00131; C-210/96 (1998) Gut Springenheide ECR I-4657 (paras 34, 35, 37); C-220/98 [2000], Estée Lauder Cosmetics GmbH & Co. ECR I- I-00117 (paras 29-31); C-112/99 Toshiba Europe GmbH v Katun Germany GmbH. [2001] ECR I-07945 (para 41); Case C-356/04 Lidl Belgium GmbH & Co. KG v Etablissementen Franz Colruyt NV [2006] ECR I-08501 (paras 77-78). See also Cases 94/82 *De Kikvorsch* [1983] ECR I-947; C-203/90 *Gutshof-Ei* [1992] ECR I-1003; and C-313/94 *Graffione* [1996] ECR I-6039.
Compare with Cases C-362/88 *GB-INNO-BM* [1990] ECR I-667; C-238/89 *Pall* [1990] ECR I-4827; C-126/91 *Yves Rocher* [1993] ECR I-2361; C-315/92 *Verband Sozialer Wettbewerb* [1994] ECR I-317; C-456/93 *Langguth* [1995] ECR I-1737; and C-470/93 *Mars* [1995] ECR I-1923), where the ECJ has settled the issue itself rather than leaving the final decision to the national court.
For national judgments, see for example BGH Urteil 20.10.1999 in the case of Orient-Teppichmuster. For a comment of this case see Hans-Georg Koppensteiner, María Paz García Rubio, 'BGH, Urteil vom 20.10.1999 — Orient-Teppichmuster — Zur Frage der Irreführenden Gestaltung Einer Werbebeilage' (2002) *European Review of Private Law* **10**, 699-708. According to the Spanish commentator, the solution should be different in Spain.
See Micklitz, H-W. (2006), 'The General Clause on Unfair Practices', op. cit., at pp. 87-88.

[115] Kreps D. (1990), *A Course in Microeconomic Theory,* Princeton: Princeton University Press. On the role of framing for consumer perceptions and its link with culture see Tversky A. and Kahneman D. (1974), 'Judgment under Uncertainty: Heuristics and Biases', *Science, New Series*, **185**, 1124-1131. For different approaches see Sunstein, Cass (ed) (2000), *Behavioral Law and Economics*, Cambridge: Cambridge University Press.

[116] Art. 6.2 and Art. 10.

[117] Thus codes of conduct can have different definitions of unfair commercial practices. If violations of these codes are considered unfair trade practices different industries or countries may have different

The current meaning of unfair commercial practices differs substantially in each MS and the definitions provided by the directive would only partially reduce these differences[118]. Implementation of the directive shows that different legal terms have been used to define unfair commercial practices. In Belgium, unfairness has been legally translated into *"practice déloyale"*[119]. In the UK the notion of unfairness has been retained[120].

The directive leaves space for different implementation strategies and/or different interpretations that may affect the ability to pursue the regulatory objectives: the creation of internal market and the definition of its regulatory framework. The scope of complete harmonization may be undermined by the use of general clauses and open standards[121]. Only the adoption of a governance system may allow the combination of principle-based legislation and complete harmonization.

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scopes of unfairness. Stuyck, J., E. Terryn & T. Van Dyck, (2006), 'Confidence through fairness? The new directive on unfair business-to-consumer commercial practices in the internal market', op. cit., p. 138.
Compare Codes of conduct enacted by ASA in the UK and Codes of conduct enacted by the Italian self-regulatory body and the code enacted by EASA at Eu level, in particular in relation to the definition of misleading information.

118 See Micklitz, H.-W. (2006), 'The General Clause on Unfair Practices', op. cit. There are also differences in regulation of particular trade practices. See the example of snowball systems: whereas in Cyprus, Czech Republic, Latvia, Slovak Republic and Slovenia this practice of face-to-face marketing is not regulated, in Poland snowball systems of sale have been prohibited by the Act on Combating Unfair Competition of 16 April 1993, as later amended (Article 17c); See Cees van Dam and Erika Budaite (coordinators) (2005), *Unfair Commercial Practices. An analysis of the existing national laws on unfair commercial practices between business and consumers in the new Member States with regard to the Directive on Unfair Commercial Practices*, London: British Institute of International and Comparative Law. An analysis of the existing national laws on unfair commercial practices between business and consumers in the new Member States with regard to the Directive on Unfair Commercial Practices, British Institute of International and Comparative Law, London. As for the old Member States, the national laws on multi-level-marketing systems can be divided into two groups: systems with provisions on these issues and systems where the legality of multi-level marketing is uncertain as no provisions or case-law exist; see Schulze, Reiner and Hans Schulte-Nölke (2003), 'Analysis of National Fairness Laws Aimed at Protecting Consumers in Relation to Commercial Practices', pp. 50-52.

119 Projet de loi modifiant la loi du 14 juillet 1991 sur les pratiques du commerce et sur l'information et la protection du consommateur du 12 avril 2007, Art. 19.
Compare with the Projet de loi en faveur des consommateurs, n° 3430, déposé le 8 novembre 2006, Art. 1er.

120 Draft Consumer Protection from Unfair Trading Regulation 2007, Section 3.

121 For similar conclusions concerning UCPD see Micklitz, H.-W. (2006), 'Maximum Harmonisation and the Internal Market Clause', pp. 34 ff. As to the regulation of unfair trade practices, thirteen out of the fifteen old Member States rely on a general clause to regulate fair trading. Five different legal instruments are used: bonos mores (Austria, Germany, Greece and Portugal); fair commercial practices (Belgium, Italy, Luxembourg and Spain), good marketing practices (Denmark, Finland and Sweden), unlawfulness (Netherlands) and fault (France); see Micklitz, H-W (2004), 'A General Framework Directive on Fair Trading', in Collins H. (ed), *The Forthcoming EC Directive on Unfair Commercial Practices. Contract, Consumer and Competition Law Implications*, Hague ; New York : Kluwer Law International, pp 43-89, at p. 63. As to the new Member States, the situation is the following: In Cyprus, Estonia Latvia, Lithuania, Malta and Slovenia there is no general clause on unfair commercial practices. In Hungary, the general clause on unfair competition applies to business to business, as well as to business to consumer, relations. It means the general clause on commercial practices is included in the general clause on unfair competition. In Poland, a provision which could be treated as a general clause on unfair commercial practices exists in the Constitution of 1997

The implementation of UCPD poses additional problems concerning the domain of application and the enforcement system. When identifying the scope of the Directive it clarifies that it does not apply to the violations of competitors or to contract law[122].

By limiting the scope only to consumer protection, the directive draws boundaries between consumer protection and unfair competition that many MS had abandoned while implementing the directives on deceptive and comparative advertising[123].

Two potential strategies are available for MS in relation to this scope limitation under UCPD:

a) to follow the approach taken by the directive and keep the separation between unfair competition and consumer protection;

b) to follow the previous approach and expand the scope of the directive to competitors in the implementation stage.

Analogous problems concern the effects of unfair commercial practices on contracting and the interaction with contract law[124]. The directive explicitly states that it does not affect contract law though the core of the directive is related to the ways in which unfair commercial practices affect the 'transactional decision'[125]. After the advertising directives were implemented a significant body of contract law developed in MS,

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(Article 76 which expressly stipulates that *"public authorities protect consumers, users and tenants from activities jeopardizing their health, privacy and safety and from unfair commercial practices"*). In Czech Republic, the general clause on unfair competitive conduct is set out in the § 44(1) Commercial Code, stating: 'Unfair competition is a conduct in an economic competition which is contrary to bonos mores of competition and is capable of harming other competitors or consumers.' Unlike the laws of neighbouring countries, the Czech Commercial Code does not require the violation of bonos mores in general but of the bonos mores of the competition. In the Slovak Republic, the general clause of the unfair competitive conduct is provided for in the § 44(1) Commercial Code stating *"the unfair competition is a conduct in an economic competition, which is contrary to bonos mores of the competition and is capable of harming other competitors or consumers."* See Cees van Dam and Erika Budaite (coordinators) (2005), *Unfair Commercial Practices. An analysis of the existing national laws on unfair commercial practices between business and consumers in the new Member States with regard to the Directive on Unfair Commercial Practices*, op. cit. Unfair commercial practices are not the only example where the use of general clauses may lead to differentiation at state level. See for example the field of product liability. As regards the definition of defect, compare two decisions, one issued in France and the other in the UK. CA de Toulouse du 1er décembre 2000 D., 2000, inf. Rap. P. 269, JCP éd. G., 2000.II.10429, note P. Le Tourneau, RCA, 2000, comm. 369, note L. Grynbaum, example given by J.S. Borghetti in Borghetti, J.S. (2004), *La responsabilité du fait des produits – étude de droit comparé*, Paris : LJDG, p. 545.), and A. and others v. The National Blood Authority and others, Queen's Bench Division, (2001) 3 All ER 289. However, in both cases the product is deemed to be defective.

[122] See recital 6 and article 3.

[123] Both Directives 84/450/EEC and 97/55/EC were related to consumers and competitors' protection. It was a model of legislation, which, unlike most national traditions, unified unfair competition and consumer protection law. That model has been abandoned with Directive 2005/29/EC, which leaves out competitors' protection although many references to competitors' interests are incorporated in the definition of unfair commercial practices and misleading practices. Stuyck, J., E. Terryn & T. Van Dyck (2006), 'Confidence through fairness? The new directive on unfair business-to-consumer commercial practices in the internal market', op. cit., pp. 136 ff. and p. 151.

[124] Stuyck, J., E. Terryn, & T.Van Dyck (2006), 'Confidence through fairness? The new directive on unfair business-to-consumer commercial practices in the internal market', op. cit., p. 142.

[125] See recital 9 and article 3 (2).

introducing the following general principle: an enterprise is contractually bound to the promises made in the deceptive advertisement. In case of divergence between what was promised in the advertisement and what is said in the contract the former will prevail. Thus the consumer will have a right to seek performance in accordance with the advertising and not to the language of the contract. How will the separation between the new directive on unfair commercial practices and contract affect this interaction?

Two approaches can be identified:

a) The directive imposes a separation between the two fields. Deceptive advertisements will be penalized through specific sanctions and will not affect the content of the contract to be regulated exclusively by contract law

b) MS will expand the scope of the Directive and regulate, in the implementation Act, the relationship between unfair commercial practices and contract law.

The first strategy will modify the path undertaken at MS level and will reduce the level of consumer protection by not holding the promisor liable for what was promised in the advertisement.

The second strategy will allow the consumer to be protected in those countries that have recognized the link and not in the others.

Both strategies are compatible with the implementation of the directive that should be interpreted in the following way: there is no obligation to regulate the effects on contract law, but MS can regulate the impact on contract law in ways compatible with the scope of the directive.

Further questions arise:

(1) To what extent are MS limited in expanding the scope of EU law to other fields?

(2) Does it make a difference if legislative spillovers are related to a full or minimum harmonization directive?

(1) MS are free to expand EU law in other fields as long as it does not hinder the scope of the directive. The process of Europeanization of national law is not constrained while the opposite is not true. The principle of supremacy imposes that EU law is applied. Thus if a directive separates two fields i.e. unfair competition and consumer protection or consumer protection and contract law MS can integrate them by expanding the scope of the directive. If a directive integrates or imposes coordination between two fields, MS are not free to choose and they have to modify their legal system by coordinating the fields.

(2) To what extent does this conclusion hold where, instead of minimum, total harmonization is chosen? Where a directive is aimed at full harmonization, does the scope to define a uniform level of consumer protection exclude the realization of a higher protection? Does this limitation also affect the possibility to expand the scope of the directive to other areas or is it simply limited to the substantive rules?

One answer would probably distinguish the two aspects and limit full harmonization to the substantive rules without affecting the freedom of MS to expand the scope of a directive. A functional analysis may however reach different conclusions. The scope of full harmonization may be undermined by the expansion of the domain of a full

harmonization directive to other areas if the choice is left to MS[126]. Thus, limitations may also concern the freedom of Member State to expand the domain of the directive from unfair competition to contract or torts. According to the current state of EU law I believe the first interpretation should prevail. Thus MS States should be free to expand the scope of a directive (in this case of UCPD) both in the area of unfair competition and in that of contract law.

The other issue is related to enforcement. MS can make unfair commercial practices criminal offences or leave them civil violations. How do these different enforcement strategies affect the ability to pursue the regulatory goals? If the use of criminal law adds more deterrence we should expect that the achievement of the policy goal will differ if a MS couples criminal and civil sanctions or only the latter. Analogous conclusions can be reached in relation to the different combination of injunctive relief and damages available in each MS.

UCPD provides a fourth interesting illustration for the relation with the ECJ case law concerning selling arrangements. Selling arrangements different from those regulated by UCPD and other directives such as Directive 85/577/EC concerning contracts negotiated away from business premises are lawful if not discriminatory i.e. if they do not differentiate the marketing of domestic and foreign products[127]. Differentiation of marketing practices is therefore permitted within these limits[128]. The circumstance that these differences are allowed and that national laws do not constitute an infringement of community law may however pose problems of coordination that can improve the achievement of regulatory goals without preventing MS from making different choices.

5. The review of the acquis communautaire is also a matter of good governance.

The previous examples suggest that the approach taken by the Green Paper on the Review of the Acquis is limited since the focus rests solely on the legislative strategy without addressing the governance implications. The Acquis communautaire constitutes an important area of EPL[129]. The degree of harmonization within the Acquis varies substantially. It ranges from full to minimum harmonization and from framework principle-based directives to rule-based ones. Often unclear are the grounds upon which these choices are made. These differences make it very difficult to define a uniform strategy even for the Acquis as to the way the multilevel system should be governed.

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[126] See recital 13 of the UCPD. See also Stuyck, J., E. Terryn & T. Van Dyck (2006), 'Confidence through fairness? The new directive on unfair business-to-consumer commercial practices in the internal market', op. cit., p. 135.

[127] See C-441/04, A-Punkt Schmuckhandels GesmbH v Claudia Schmidt, [2006] ECR I-2093 where the ECJ found that the Austrian prohibition of selling jewelry in private homes does not prima facie violate art. 28 and it is for the national court to evaluate whether the effects of such a prohibition are discriminatory. See paras 15 and paras 25 and 26.

[128] See C-441/04 Claudia Schmidt cit., para 30.

[129] For a comparative analysis, see The Compendium.

The review of the Acquis covers eight directives protecting consumers[130]. It is not comprehensive since both horizontal directives such as the unfair trade practices (2005/29/EC), product liability (374/85/EEC) and general product safety (2001/95/EC) but also all sector specific directives are excluded[131].

The approach stresses the link between the Review of the Acquis and the Better regulation project[132].

This functional relation with better regulation has at least three dimensions:

1) one related to legislative quality
2) one related to the level of harmonization
3) another related to substantive issues

The Review is necessary because drafting quality is poor. Several divergent rules have been adopted but no specific reasons were provided to justify such differences. But the revision will not only be a matter of better coordination among directives. More important changes concerning legislative strategies are advocated: the move from rule to principle based legislation[133]. The institutional implications of such a move are quite straightforward: there is more discretion for implementing MS and therefore a need to provide more sophisticated monitoring systems to ensure adequate implementation.

A second set of options concerns the alternative between the horizontal and the vertical approach. The vertical approach would review each Directive and then make an horizontal assessment about the different outcomes[134]. The horizontal approach would instead try to extract common concepts and principles leaving to individual directives only specific rules[135]. Given the selected directives, specificity here would not refer to sectors such as financial markets, telecom, banking or electricity rather to particular types of transactions or remedies, distance contracts, standard contract terms, injunctions etc.[136]. As we shall see there would be in both cases an open question concerning the impact of such review.

On the question of the level of harmonization the GP suggests that minimum harmonization has created too high a level of differentiation among MS and identifies three potential options to modify the current state based on minimum harmonization.

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130 See Green Paper on the review of the Consumer Acquis, Brussels 8.2.2007 COM (2006) 744 final.

131 From e-commerce to financial market, from electricity to gas, from postal services to transport, from telecom to water.

132 In general, 'better regulation' is about achieving agreed policy goals in the most effective and efficient way possible, see Better Regulation Task Force (2005), Get Connected. Effective Engagement in the EU, p. 4 available at http://www.brc.gov.uk/upload/assets/www.brc.gov.uk/getconnected.pdf. The main policy documents are: White Paper on Governance COM (2001) 428 final; Mandelkern Group on Better Regulation, Final Report, November 2001; Communication from the Commission on Impact Assessment COM (2002) 276 final; Communication from the Commission to the Council and the European Parliament, "Better Regulation for Growth and Jobs in the European Union," COM(2005) 97, {SEC(2005) 175}, 16 March 2005; European Commission, Impact Assessment Guidelines, SEC(2005) 791.

133 See Review of the Acquis p. 6 ff.

134 See Review of the Acquis p. 8.

135 See Review of the Acquis pp. 8 -9.

136 See Review of the Acquis fn 3, p. 3.

The most radical perspective is to endorse full harmonization as in the case of Unfair trade practices directive. Two intermediate solutions are the combination of minimum harmonization with mutual recognition or with country of origin[137]. It is clear the latter strategies require some involvement of Private international law principles concerning consumer law, thereby contradicting the statement that the review will not affect community rules on conflict of laws[138]. On a more conceptual level it is perhaps one of the first times that positive and negative integration techniques are combined. This proposal, regardless of its merits, suggests the necessity to revise the overall approach to harmonization of private law by looking at a different combinations of positive and negative integration.

From a substantive view point the overall regulatory strategy is unclear. While the goals of building consumer confidence and reducing market failures have been consolidated over time, a consistent strategy to revise the Acquis is still lacking. The aims of the Review point to equality of consumers' rights and remedies and predictability but the connection between these goals and the proposed changes is not straightforward[139].

While it is clear that simplification of legislation and improvement of the regulatory environment constitutes significant goals it is unclear whether the Review should achieve a higher level of consumer protection.

The Review project underlines some of the most important fallbacks of the Acquis and proposes different paths to improve the current state. The need for governance, though not as central as it should be, begins to emerge[140].

Some important weaknesses can thus undermine the review project.

1) The criteria to define the domain for review
2) The lacking correlation between the alternative principle-rule based legislation and the options concerning harmonization
3) The absence of a governance design to address a multilevel regulation system for consumer protection

5.1. The domain. On the rationales concerning the definition of domain for review

The choice of the 8 directives is somewhat arbitrary compared to the defined objectives: in particular with the achievement of a real consumer internal market. It is unclear which criteria have driven the Commission to define the legislation to be reviewed. At first sight one may speculate that only horizontal directives have been selected while sector specific consumer protection directives have been left out. But why leaving out product liability, product safety, unfair trade practices? The choice has concentrated predominantly on contract law directives. One of the main aims of the Review is to extract general concepts that can be applied to other domains as well. But why should

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137 Notice that full harmonization is not even proposed as an alternative in Annex I where under question 3 concerning the degree of harmonization only minimum harmonization combined with mutual recognition or country of origin are proposed.

138 See Review of the Acquis, p. 5

139 Review of the Acquis, p. 4.

140 See the reference to comitology in the Review of the Acquis p. 19

the definitions of consumers and professionals in the contract law directives drive a general definition to be used in the field of civil liability (product liability) and that of unfair competition law (unfair trade practices)? Is there a rationale to distinguish the definition of consumers and producers according to the specific domains? Should not a uniform concept reflect the potential horizontal instrument? Are there policy reasons to privilege these eight directives over the others while defining the general concepts and principles?

It would be desirable if the goals of the overall project were at least compatible with current European legislation not included in the Review. Coordination with sector specific areas and other horizontal directives should therefore be included[141]. While references to this potential impact are made, it is unclear whether the Acquis will be accompanied by an ex ante impact evaluation on the non-reviewed legislation or some form of ex post coordination will take place. The current text does not include any proposal for such assessment but it would be desirable if the horizontal instrument is adopted an ex ante impact evaluation on the relevant community legislation is made both in relation to the general consumer legislation but also to consumer protection in regulated market, especially given the ongoing liberalization[142].

5.2. Correlation between nature of legislation (principle-rule based) and levels of harmonization.

The issues for consultation, particularly those concerned with the general approach are defined without any reference to the potential correlation among the different questions. For example the options concerning the legislative approach, and the scope of a horizontal instrument cannot be disjoined from those concerning the degree of harmonization. A different type of harmonization will be achieved if it refers to a vertical approach, singling out each directive or using an horizontal instrument. The use of a horizontal instrument with general definition seems hard to combine with the philosophy of minimum harmonization. The coexistence of a horizontal instrument and minimum harmonization of the individual directives would redefine the meaning of harmonization by distinguishing between principles and rules. Such an approach requires perhaps more theoretical foundations.

In particular the link between the type of legislation and degree of harmonization needs to be addressed. On the one hand more principle-based legislation is advocated, the introduction of general principles concerning good faith and fair dealing are identified as potential options[143]; on the other hand full harmonization is proposed as a potential response among the possible options[144]. The introduction of principle based legislation

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[141] The indications provided by the Green paper are inadequate. An impact evaluation of the result of the review is suggested only for e-commerce and IPR while other fields such as product safety and liability, environmental protection, unfair trade practices are not even mentioned. See Review of the Acquis para 2.2, p. 5.

[142] The process of liberalization of energy, telecom, and transport should reduce the differences between general consumer protection and regulated market consumer protection. On this question see Cafaggi, F. (2008), 'The regulatory function of contract law: contract law in regulated markets', op. cit.

[143] See Review of the Acquis p. 11.

[144] See Review of the Acquis p. 10.

at European level will translate into a higher degree of discretion in the implementation of directives or in the interpretation of them by the judiciary. Different emerge more strongly when applying general principles than when using more tailored rules. The introduction of a general principle of good faith and fair dealing, given the different interpretations of good faith, confirmed by the unfair contract terms directive, would lead to wider differentiation not to full harmonization[145]. How can these two proposals be reconciled? Thus another question arises: Is the GP implicitly aiming at keeping the current balance between European and MS level in relation to power allocation, by proposing these two apparently contradictory paths? The answer to this question will probably emerge after the consultation period. The general point is that striking a different balance between rule-making techniques and levels of harmonization is possible but the different options should be all laid out on the table:

Table 1

	Principle based	Rule based
Minimum harmonization	High level of discretion for MS	High level of discretion for the non-legislated area, low level for the legislated area
Minimum combined with mutual recognition or country of origin	Medium level of discretion for MS	High level of discretion for the non-legislated area but low level for the legislated area
Total harmonization	Low level of discretion for MS	No discretion

In theory when legislation is principle-based even full harmonization leaves room for divergences in judicial interpretation. The likelihood of divergent interpretations grows if harmonization is minimum. When legislation is rule-based the divergences will be less and will concern the areas that are not legislated at EU level.

5.3. The absence of governance design

The strategy of review should be based on clearer policy options all well grounded on economic rationales. Even if a full harmonization regime were chosen this would not solve the different standards adopted in each MS according to its legal tradition. Divergences are not only and most of the time the result of different written rules, but of different institutional frameworks that affect degrees and modes of implementation. To address harmonization of rules without considering coordination of institutions may undermine the harmonization process[146]. The adoption of a horizontal instrument may

[145] On the role of general clauses and standards in European contract law see Grundmann, S. and D. Mazeaud (eds.) (2006), *General clauses and standards in European contract law*, op. cit.

[146] On these questions see Cafaggi F. (2003), *Quale armonizzazione del diritto dei contratti*, op. cit. and Id. (2006), *The institutional framework of European Private Law*, op. cit.

change the balance between European and MS laws. While despite EU supremacy national law has been the reference for the judiciary when a legal concept was missing at the EU level, the formation of a set of binding legal principles would constitute a common frame of reference for national judges. Still however the majority of legal concepts in contract, property and civil liability would be based on those of MS. The balance between the uniform body of rules coming from EU legislation and different legal traditions require more sophisticated institutional devices than those currently available within the European judiciary and outside.

Governance is needed to coordinate both vertically and horizontally different institutions contributing to the creation/implementation of European private law.

6. Towards a relational concept of implementation of European private law.

Implementation and interpretation of EPL at national level. Policy effects of divergences. Implementation of European law is a key issue for harmonization[147]. Monitoring application and detecting infringements is a crucial task for the Commission[148]. Adequate implementation and legal integration are strictly connected[149]. Degree and quality of implementation are at the core of the preoccupations concerning the institutional design of European law. Things are no different in the realm of private law. Adequate implementation is the premise to achieve the objectives pursued by European legislation[150]. Internal market, cross-border trade, consumer confidence, transparency, all depend on the effectiveness of implementation. While the choice of forms and methods is a constitutional principle, different institutional frameworks, i.e. the choice between judicial or administrative enforcement, may affect the ability to achieve a policy goal.

Thus implementation is not a purely technical matter to be solved by choosing the appropriate legislative strategy. Better law making is certainly part of the response but cannot address the entire set of questions posed by EPL. Implementation does not coincide with mere transposition of directives in national systems. Given the differences between EPL and national legal systems concerning partitioning, the different degree of the regulatory functions but also the tools employed to perform these objectives,

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147 See Commission Report on implementation of European law: Communication from the Commission to the Council and the European Parliament on the implementation of Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees including analysis of the case for introducing direct producers' liability COM (2007) 210 final.

148 On this question see Munoz, R. (2006), 'The monitoring of the application of Community Law: the need to improve the current tools and an obligation to innovate', Jean Monnet W.P. 04/06, NYU School of Law.

149 On the meaning of adequate implementation see Prechal, *Directives*, who states that adequacy should be evaluated in relation to (1) the content, (2) the nature, (3) the application and the enforcement of the measures p. 76 ff.

150 The ECJ has defined the characteristics of adequate implementation. See C-144/99 Commission v. Netherlands cit. para. 17. On these questions see Prechal, *Directives*.

implementation can not be reduced to mere compliance with European law[151]. The conceptual challenges lying behind implementation are related to the means necessary to achieve the policy goals in the realm of EPL.

Implementation and inadequate implementation in particular is mainly seen as a bilateral problem between the Commission and the individual MS. Unlike infringements, often inadequate implementation is a matter of collective choice. It depends on the different choices made by MS about methods and forms of implementation using the discretion granted by art. 249 and by the principle of procedural autonomy[152].

It is necessary, when policy goals are at stake and national interests may be divergent, to have devices that help aligning national policies[153]. For this reasons new modes of governance have arisen[154].

Distinguishing between infringements and inadequate implementation. A distinction should be made between infringements, where MS do not implement (inaction) or mistakenly implement EU law, and inadequate implementation that does not amount to infringements but may still undermine the harmonization goals. The ECJ case law on unfair contract terms may again provide a good example of the difference between infringement and preliminary ruling cases[155].

Infringements are generally assessed within a bilateral analysis. The individual MS legislation is examined in the light of European legislation. No concept of relational infringement has yet been developed[156]. In relation to infringements, the problem should be addressed by improving further the monitoring and sanctioning system by the European Commission. This monitoring should emphasize comparative analysis to be able to detect divergent applications. A specific strategy for EPL does not appear to be necessary.

I assume a broad definition of implementation, related not only to the process by which MS implement directives or regulations, when needed, but also to the 'governance' of divergences that may arise[157]. It is a relational approach to implementation. In this

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151 See De Burca, G. and J. Scott (eds), *Law and new governance in the EU and the US*, Oxford; Portland, Or.: Hart, 2006.

152 On the domain and limits of the principle see Craig, P. (2006), *EU Administrative law*, op. cit., pp.789 ff.

153 Different methods and forms of implementation may depend on pre-existing legal systems that require different degrees of adaptation. Often as we have seen they may bring about different substantive outcomes concerning the nature of unfair contract terms and commercial practices

154 This is not the only reason since often new modes of governance constitute a response to lack of formal competence or failures of the traditional community method.

155 Compare Case C-70/03, Commission v. Spain, cit. with Case C-237/02, Freiburger Kommunnalbauten Gmbh Baugesellschaft & Co.KG v Hofstetter cit.

156 By relational infringement, I mean a concept of infringement whereby the violation is assessed in comparison with what other MS have done. References to other MS implementation strategies may be included in the initial proceedings by the Commission but they generally constitute an example more than a benchmark.

157 On the ambiguity and different legal meanings attached to implementation see Craig, P. (2006), *EU Administrative Law*, op. cit., p. 103.

context implementation is the process of coordination among MS and between them and EU institutions. When divergences undermine the achievement of policies pursued by European legislation some form of consensual solution should be found among the relevant national players.

Furthermore I assume a definition that may go beyond the individual legislative Act. In many areas the problem of implementation concerns a bundle of directives and regulations. This is true for consumer law where the Green Paper poses the question of the implementation of the Acquis[158]; but it is also true for regulated sectors where there is a unified strategy concerning telecom, energy, financial services, incorporated in several bundled directives. The treaty regulates implementation of a single legislative or administrative Act and does not provide guidance for implementation of a more complex legislative body[159]. Thus, it is for the ECJ to define the principles to guide MS when it comes to the implementation of a more complex body of legislation, such as the Acquis.

This contribution focuses on a gray area where divergences are policy questions that cannot simply be solved by means of uniform interpretation by the Court or by infringement proceedings initiated by the Commission. In my view, the area of infringement is narrower and generally defined according to formal bilateral procedures while that of inadequate implementation is broader, relational and should be addressed through a more policy oriented lens.

The boundaries between implementation and interpretation. A different problem is that of conflicting interpretations of EPL. There the role of ECJ in cooperation with national courts under art. 10/EC remains fundamental[160]. The differences between interpretation and application affect the boundaries between the task of ECJ and that of national courts[161].

It is for the European Court of Justice to define the meaning of consistent interpretation of EU law to ensure supremacy but at the same time paying due consideration to the

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158 There for example the question may concern the implementation of the horizontal instrument or that of the simultaneous and correlated implementation of the revision process of the eight directives. Even if the horizontal instrument will become a framework directive, the implementation strategy should be different from that concerning a single directive because the policy goals of the horizontal instrument are different.

159 The meaning of the choice of form and methods may differ if we move from a single legislative Act to the implementation of the Acquis, but these differences have not yet been addressed.

160 See for example Case C-106/89 Marleasing SA v. La Comercial Internacionale de Alimentacion SA [1990] ECR I-4135 para. 8; Case C-456/98 Centrosteel v. Adipol [2000] ECR I-6007 Paras. 16, 17; Cases C-397-1 to C-403/01 Pfeiffer [2004] ECR I- 8835 paras. 110, 113, 118, 119.

161 ECJ has not drafted these boundaries consistently. Compare in the area of unfair contract terms Case C-237/02 Freiburger Kommunalbauten, cit. para 22 and joined cases C-240-244/98 Oceano Groupo [2000] ECR I-4941. In the area of unfair trade practices compare Case C-210/96, Gut Springenheide, cit., with Case C-239/02 Douwe Egberts [2004] ECR I-7007 and C- C-220/98 Estée Lauder cit.
On this question see Stuyck, J., E. Terryn & T. Van Dyck, (2006), 'Confidence through fairness? The new directive on unfair business-to-consumer commercial practices in the internal market', pp.138-139.

existence of different legal traditions in MS[162]. The protection of national legal traditions is part of the broader principle of article 6 EC Treaty that imposes protection of national identities[163].

The principles of autonomous and consistent interpretations have long been established in European law[164]. The principle of consistent interpretation imposes on national Courts the duty to interpret national law in the light of European law[165]. The principle of autonomous interpretation means that EC law should be interpreted independently from national interpretations[166]. Autonomy does not imply irrelevance of existing different legal traditions. Thus the principle of autonomous interpretation does not necessarily lead to a uniform interpretation. The principle allows for the possibility of differentiation if these differences are justifiable on objective grounds and do not undermine the achievement of the scope defined by the legislative act.

Solving conflicting interpretations. Conflicts among divergent interpretations of EU law in MS should generally be solved by the ECJ. The ECJ has developed different doctrines: direct effect, interpretation of national law in conformity with Community legislation, State liability by breach of national courts[167]. More often the ECJ has addressed the question of consistency between one interpretation given by national courts and the European legislation[168]. Less frequently the ECJ has addressed conflicting interpretations between different MS courts and decided which was the correct of the two. This is in part because implementation is not seen as an issue of collective action. The extent to which the ECJ should pay respect to different legal traditions when interpreting the consistency between national and community law is an

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[162] Case C-11/70 Internationale Handelsgesellschaft, [1970] ECR 1125, para 3; Case C-327/82 Ekro v Produktschap voor Vee en. Vlees [1984] ECR I-107. See also the opinion by Advocate General Jacobs in the case C-112/00, Schmidberger, cit., para. 98.

[163] On the constitutional relevance of legal tradition see Cafaggi, F. (2006), 'Introduction' to *The institutional framework of European private law*, op. cit.

[164] See C-75/63, Mrs M.K.H. Hoekstra (née Unger) v. Bestuur der Bedriifsvereniging voor Detaijhandel en Ambachten, 19/3/1964. For an analysis of these principles see Prechal, *Directives*.

[165] See C- 14/83 Von Colson [1984] ECR I-1891, para. 28.

[166] For examples of autonomous interpretation in the field of private law see the definition of consumer in, joined cases C-541/99 and C-542/99 Idealservice [2002] ECR I-9049, Cases C-240/98 to C-244/98 [2000] Oceano Grupo ECR I-4941, Case C-473/00 Cofidis SA [2002] ECR I-10875; in the field of private international law see C-29/76 LTU c/ Eurocontrol CJCE [1976] ECR I-1541; C-26/91(1992) Jakob Handte c/ TMCS ECR I-3697; C-150/77JCE [1978] Bertrand c/ Ott., ECR I-1431; C-189/87 [1988] Kalfelis c/ Bankhaus Schröder ECR I-5565. See also Rochfeld, J. (2005), 'CJCE et notions autonomes de droit contractuel', *Revue des Contrats* 2005, pp. 1001. For a study of the key concepts of the acquis commnunautaire in the field of contractual remedies see Rochfeld, J. and C. Aubert De Vincelles (eds), *L'Acquis Communautaire –Les Sanctions de l'Inexécution du Contrat*, op. cit. ; Whittaker, S. (2000), 'Unfair contract terms, public services and the construction of a European notion of contrat, *Law Quarterly Review*, **116**, 95 ff; Pozzo, B. (2003), 'Harmonization of European contract law and the need of creating a common terminology, *European Review of Private Law,* **11**, 754-767; Weatherhill, S. (2004), 'Why object to the harmonization of private law by the EC?, *European Review of Private Law,* **5**, 633-660.

[167] See Prechal, *Directives*, p. 180 ff.

[168] See for example, Case 168/00 Simone Leitner v TUI Deutschland GmbH & Co KG [2002] ECR I-02631 (Directive 90/314); but also Cases C-240/98 to C-244/98 Oceano Grupo cit.: C-541/99 to C-542/99 Idealservice cit. (Directive 93/13/EEC).

open question . In particular it is unsettled as to what is the balance ECJ should strike between supremacy of EU law and respect for different legal traditions. It is important to underline that legal traditions in private law, particularly in contract law, may incorporate values associated with the balance between individual freedom and social values[169]. For example freedom of contract plays different roles in national legal systems, and these different roles are reflected in different rules on enforceability, content regulation, remedies, etc[170].

There is an area which stands between infringement, featuring lack of or unlawful implementation, and divergent interpretations that should be made consistent by complying with the interpretation provided by the ECJ. This area is where divergences are lawful but may constitute hurdles for the regulatory functions at which the directives are aiming.

The different consequences of infringements and inadequate implementation. Unlawful implementation amounts to infringements and should be handled accordingly (i.e. art. 226 EC Treaty)[171]. Divergent interpretations may be accommodated by the use of preliminary rulings (i.e. art. 234 EC Treaty).

The problems arising out of divergences may emerge as a result of inadequate implementation or as a result of different impacts that European legislation has had on the national systems, caused by different legislative strategies. For example the integration of the consumer acquis into the civil code or the creation of a separate consumer code.

Inadequate implementation or divergent implementation of directives may trigger two sets of institutional responses: one within the current framework, another which implies the creation of a new institution.

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169 See for example in relation to remedies the importance of "execution en nature" in French law, and that of damages at Common law Fauvarque-Causson, B. (2005), 'Regards comparatistes sur l'exécution forcée en nature', *Revue des Contrats* 2005, pp. 529 ff; Bellivier F. and Sefton-Green R. (2001), 'Force obligatoire et exécution en nature du contrat en droit français et anglais, bonnes et mauvaises surprises du comparatisme', in Etudes offertes à J. Ghestin, *Le contrat au début du XXIème siècle*, Paris : LGDJ, pp. 91-112. See the Case Cass. civ. 3e, 11 mai 2005, pourvoi no 03-21136, Contrats, conc. consom. 2005, comm. no 187, obs. L. Leveneur, RDC 2006, p. 323, obs. D. Mazeaud, RTD civ. 2005, 596, obs. J. Mestre et B. Fages. For a broader overview See Di Majo, A. (2001), *La tutela civile dei diritti*, 4 ed. Milano: Giuffrè.
For a comparison of the content of duty to inform in French and English law see Sefton-Green, R. (2005), Duties to inform versus party autonomy: reversing the paradigm (from free consent to informed consent)? – A comparative account of French and English law, in Schulze R., and G. Howells, *Information Rights and Obligations – The impact on party autonomy and contractual fairness*, Aldershot, Hants, England ; Burlington, VT : Ashgate, pp. 171-188. On the inexistence of anticipatory breach in French law see Whitttaker, S. (1996), 'How does French law deal with anticipatory breach', *International and Comparative Law Quarterly*, **45**(3), pp.662-667.

170 See. Collins, H. (1995), 'European Private Law and Cultural Identity of States', *European Review of Private Law*, **3**, 353-365; D. Kennedy, Thoughts on coherence, social values and national tradition in private law, in Hesselink M. (ed.) (2006), The politics of a European civil code, The Hague: Kluwer, pp. 9 ff.

171 In the field of EPL see for example as regards Directive 85/314/EEC, C-52/00 Commission v France cit.; C-154/00 Commission v. Greece cit.; C-177/04 Commission v. France [2006] ECR I-0246; as regards Directive 93/13/EC, C-144-99 Commission v. Netherlands cit.; C-372/99 Commission v. Italy cit.

1) The creation of coordination devices to monitor implementation and to address divergent application of laws; they will contribute avoiding continuous directives' review and finessing the institutional framework that should accompany the process of Europeanisation of private law.

2) The creation of an independent European institution aimed at fostering coordination of European private law systems: i.e. a European Law Institute[172].

7. Improving the institutional design of EPL: New modes of governance versus complete harmonization.

As we have seen in the realm of unfair contract terms the meaning of unfairness varies quite significantly both in the definitions provided by the implementing Acts and in the concrete applications by national Courts. An analogous picture emerges in the field of unfair commercial practices and in many other areas of EPL from products liability to timesharing. Do these differences constitute infringements of European law? Do they simply represent inadequate implementation? Do they conform to formal requirements concerning implementation and yet may constitute hurdles to achievement of policy goals?

It should be recalled that most of the time these divergent interpretations at national level have justified the shift from minimum to complete harmonization. The recipe to address divergences has thus been a move to the upper level of complete harmonization instead of the use of governance devices. I argue that this should not be dominant let alone the exclusive response; new governance devices should be employed to correct distortion of competition and other barriers to trade created by divergence in implementation.

European private law operates in the frame of a complex multilevel system whose structure is quite complex. It should not be described by juxtaposing uniform market values at EU level and differentiated cultural and moral values at MS level. In this perspective governance would be perceived only as an institutional response to cultural differences, associated to national identities in order to make them compatible with the creation of an internal market. One of the theoretical claims of this essay is that market failures may also be related to the existence of cultural business practices which may enhance transaction costs but at the same time better reflect consumer preferences. To broaden consumer choice, allowing deeper differentiation, is to increase consumer protection[173]. These differences can contribute to the creation or consolidation of

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[172] Some scholars have proposed the creation of a European Law Institute such as Van Gerven, W. (2002), 'Codifying European private law? Yes, if', *European Law Review,* **27**(2), 156-176; Staudenmayer D. (2002), 'The Commission communication on European contract law and the future prospects', *International & Comparative Law Quaterly* **51**, 673-688.

[173] Averitt, N. W. and R. H. Lande (1997), 'Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law, *Antitrust Law Journal*, **65**, 713-756; Hadfield, Gillian K., Robert Howse, and Michael J. Trebilcock (1998), 'Information-Based Principles for Rethinking Consumer Protection Policy', *Journal of Consumer Policy*, **21**(2), 131-169. On the relationship between freedom of contract and European contract law J. Smits Diversity of contract law and the European

different market practices which should not be considered barriers to trade both in a legal and economic sense[174]. Thus a governance system is needed not only to balance market and non-market values but also to enhance market efficiency.

New modes of governance have been described in opposition to old modes, in particular to the traditional community method[175]. They build on network rather than hierarchy, participation and mutual learning rather than command and control, iterative rather than discrete processes[176]. At the core of constitutional revision is the role of law in new modes of governance[177]. In particular the different combination of hard and soft law but also and, perhaps, more importantly, the new functions that laws and institutions take within the framework of new modes of governance[178].

The different nature and scope of EPL with respect to national private law systems impose a strong level of coordination. Integrating PIL into EPL also requires institutional devices beyond pure legislative coordination. The old community method appears insufficient. Coordination should occur among institutions and policies not only among rules.

At the institutional level cooperation among institutions, ensured by art. 10/EC is achieved in different ways. Great momentum has been gained through Inter-institutional agreements[179]. Agreements to coordinate European institutions can also been used for vertical cooperation between EU and MS. Judicial coordination through preliminary rulings continues playing a significant role in relation to interpretation of primary and secondary law.

At policy level coordination takes different forms: integration and cooperation. The different devices of policy coordination, in particular the use of clauses of integration and cooperation, have recently become the focus of Commission policies[180].

This governance system should pursue several goals:

a) promoting better law making at EU and MS level;

b) fostering regulatory differentiation and competition to enhance legal innovation and mutual learning among MS;

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internal market J. Smits, (ed.) The need for a European contract law, Empirical and legal perspectives, Groningen-Amsterdam, 2005, 155 ff. .and on a more general ground G. Wagner, The virtues of diversity in European private law, ibidem p. 3 ff.

174 On the relationship between national cultures and freedoms see Barnard, C (2004), *The substantive law of the EU: the four freedoms* op. cit.

175 See Scott, J. and D. Trubeck (2002), 'Mind the gap: Law and new approaches to governance in the EU', *European Law Journal*, **8**, 1-18, De Burca and Scott, *Law and new governance in the EU and the US*,. Hart, 2006, Sabel and Zeitlin, 2007.

176 See De Burca, G. and J. Scott, *Law and new governance in the EU and the US*, op. cit. , p. 3. For a more detailed analysis in the real of private law see F. Cafaggi, F. and H. Muir Watt (2007), 'The making of European private law: Regulation and governance design', op. cit.

177 See Walker, N. and G. de Burca (2007), 'Reconceiving law and new governance', EUI w.p. 2007/10, http://www.eui.eu.

178 See Walker, N. (2006), 'Constitutionalism and new governance', and Trubeck, D.M. P. Cottrell and M. Nance (2006), ''Soft law,'hard law'and Eu integration', both in G. De Burca and J. Scott, *Law and new governance in the EU and the US*, op. cit. pp15 ff. and 65 ff.

179 See contributions on interinstitutional agreements (2007), *European Law Journal*, **13**(1).

180 See Guidelines on national regional aid for 2007-2013 (4 March 2006) [2006] OJ C 54/13.

c) monitoring the evolution of EPL to verify effectiveness and consistency (by elaborating a specific methodology to apply impact regulatory assessment to EPL fields);

d) promoting better law finding to identify and compare existing judicial practices at MS level;

e) coordinating implementation of EPL at MS level through coordination of national judiciaries and regulators;

f) suggesting legislative and institutional modifications to solve conflicting implementations of EC law.

The need for governance of EPL emerges at three different levels:

1) Legislative design

2) Implementation of legislation

3) Coupling institutions with legislation to build consumer confidence and address market failures

I shall try to examine for each level which goals are pursued.

7.1. Legislative design.

Legislation needs better design and coordination. In relation to law-making two main improvements must be achieved:

a) better coordination among different Commission directorates at the stage of legislative initiative;

b) linguistic improvements in translation of legislative documents.

As to the first point several inconsistencies should be avoided if a monitoring process is to take place before the text is approved at Commission level. Inter-service coordination exists but perhaps substantive control over the impact of the new directive on an old legislative text has not been carried out appropriately[181]. To the extent that legislative texts have to be implemented in MS, coordination should occur with MS so as to verify the impact on national legal systems. This analysis would not undermine the principle of supremacy but identify ex ante potential frictions to be addressed by improving the quality of the text. Finally, coordination with Private international law systems at both the national and European level should be considered given the cross border nature of the relationships.

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[181] See The Compendium, pp. 16, 17, 18 and 745. Communication from the Commission to the European Parliament and the Council, European contract law and the revision of the acquis: the way forward COM(2004) 651 final: *"Certain specific questions also arise: […] Is there scope for merging some of the directives to reduce inconsistencies between them?"* (§2.1.1); The First Annual Progress Report on European Contract Law and the Acquis Review - 2005 COM (2005) 456 final [3.1]*;* Green Paper on the review of the consumer acquis COM (2006) 744 final (§§4.1, 4.3, Annex 1: 4.1, 4.7). In the literature see Riesenhuber, Karl (2005), 'System and Principles of EC Contract Law', *European Review of Contract Law,* **3**, 297-322. Riesenhuber analyzes inconsistencies relating to the right of withdrawal.

As to the issue of languages at least two paths are available.

First: to continue having the legislative text drafted in one language and then to translate the text into other languages. In this case the translation process should be based on a comparative glossary that ensures conceptual consistency. **This comparative glossary should be officially adopted by the Commission**.

Second: the text is simultaneously drafted in several languages that represent different legal families. Only after it is verified that these texts are consistent, translation in other languages should be pursued. The comparative glossary in this case would be a reference for the drafting and for the translation.

These proposals are not specific to EPL but certainly could avoid some of the problems of the internal structure of EPL.

The degree of harmonization has to be defined not only at the level of law-making but also in relation to the types of instruments and rules employed for implementation. The level of harmonization is not only determined by the discretion left to MS when implementing the directive but also by the use of general principles and the combination of mandatory and default rules as the analysis of the Green Paper on the Review of the Acquis shows.

In this context a more refined analysis of proportionality and subsidiarity should permit the definition of the most appropriate legislative instruments and the optimal combination between principles and detailed rules[182]. The principle of proportionality in the field of EPL requires due consideration of private autonomy[183].

The debate on harmonization of contract law has demonstrated the high level of inconsistency among directives concerned with consumer protection[184]. These inconsistencies can be cured by ensuring a stronger and more effective coordination among DGs within the Commission and by redefining the functions of impact assessment which should combine socio-economic and normative impact. It should evaluate the effects that new directives may have on existing legislation, the potential conflicts with texts but also with judicial interpretations given by Courts.

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[182] See Ziller, J. (2005), 'The Committee of the Regions and the implementation and monitoring of the principles of subsidiarity and proportionality in the light of the Constitution for Europe', Study by The EUI.

[183] On the principle of proportionality see Tridimas, T. (2006), *General principles of European law*, op. cit., p. 136 ff. Craig, P. (2006), *Eu administrative law*, op. cit. , p.655 ff.; Ziller, J. (2005), 'The Committee of the Regions and the implementation and monitoring of the principles of subsidiarity and proportionality in the light of the Constitution for Europe', op. cit.

[184] See on the inconsistencies of the acquis communautaire in the field of contract law Communication from the Commission to the European Parliament and the Council - A more coherent European contract law - An action plan, COM/2003/0068 final; Communication from the Commission to the European Parliament and the Council, European contract law and the revision of the acquis: the way forward COM(2004) 651 final; The First Annual Progress Report on European Contract Law and the Acquis Review - 2005 (COM (2005) 456 final; Green Paper on the review of the consumer acquis COM (2006) 744 final and The Compendium.

7.2. Legislative implementation

Inadequate implementation is often a major cause of divergences. (1) It may be due to linguistic divergences not adequately addressed at the implementation stage. (2) It may be caused by the impact of different legal traditions. (3) It may be associated with the incentives of national regulators and judiciaries to favor national interests over those associated with the creation of a European internal market.(4) It may be affected by the interpretation given by national interest groups, especially private organizations involved in some type of private law making[185].

Inadequate implementation is not detected because monitoring systems are still very rudimentary. The differences among national legal traditions have not been adequately considered although the legal relevance of national legal traditions has been clearly recognized.

An overall database, where national Courts' decisions would be collected under a well structured set of **comparative Guidelines,** is still missing[186]. Translation of legislative instruments is a relevant feature of a multilingual system for implementation purpose but the possibility to compare regulatory and judicial application would provide the most relevant information given the iterative nature of Europeanization of private law.

The first step is therefore **the creation of a database** that would provide sufficient information about the degree and quality of implementation of European law at national level.

As mentioned, however, implementation does not concern only European legislative drafting but the effects of these directives on the national legal systems (judicial, legislative and contractual spillovers). The process of implementation may bring about divergent applications of laws. Especially principle-based legislation, using general clauses and standards, usually more dependent upon legal traditions, may cause different regulatory outcomes.

These effects are often difficult to detect but at times they become sufficiently visible. A second type of information is therefore state-based and concerns the impact of EU legislation in each MS, both in relation to areas directly affected but also in relation to those that will be indirectly affected[187]. This information, to be collected at state level, should be conceptually organized in a uniform way so as to make possible horizontal, cross-country ex post impact evaluation. Several models have been employed in other fields to address similar problems. In some cases, as for Occupational Health and Safety, an agency has been created, with the support of National focal points[188].

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185 On the role of private law making in European contract law and the risks associated with potential divergences see Cafaggi, F. (2007), 'Self-regulation in European contract law', op. cit.

186 However, recently important progress has been made. See the Syllabus created by Ajani, Gianmaria and Martin Ebers (eds.) (2005), *Uniform Terminology for European Contract Law*, op. cit.

187 The areas of non-harmonized rules which will be affected by the harmonized rules.

188 See Commission Decision 2004/858/EC of 15 December 2004 setting up an executive agency, the Executive Agency for the Public Health Programme, for the management of Community action in the field of public health pursuant to Council Regulation (EC) No 58/2003 - OJ L 369 of 16/12/2004, p. 0073-0075 on which S. Smismans, S. (2004), 'Law, legitimacy and European governance, Functional participation in social regulation', Oxford: Oxford University Press, part. p. 268 ff.

It should be again emphasized that, unlike other fields, where the final goal of information- gathering, is to identify, compare and benchmark practices, here the premise is that most of differences should not be explained in value terms (good versus bad practices) but as the consequences of different legal traditions to be reconciled. Thus modes of comparison should be different and the guidelines, produced accordingly, will also differ from those currently employed in the field of employment or that of social and economic regulations[189].

This information should also be used when ex ante impact evaluation of new legislation is carried out. The impact regulatory assessment of EU legislation in the field of private law should improve its multilevel dimension[190].

An additional problem, related to the specific structure of the European multilevel system, is due to the different partitioning occurring at EU and MS level: while at EU level, at least the primary legislation, is organized around policy areas and so is the internal competence division of the Commission, MS have organized their private law system around instruments (property, contract, torts)[191]. As indicated before this difference produces further implementation difficulties that should be governed. This conclusion should not imply the abandonment of the project to introducing more principle-based legislation or to transform EU legislation according to the conventional categories of national private law systems.

While maintaining these two features the process of Europeanization should be accompanied with the introduction of governance devices, able to address divergences in implementation, to coordinating policies and rules at EU level with MS private law systems.

Three main proposals will be illustrated:

a) The consolidation of European judicial conferences among State Supreme Courts with the participation of a representative of CFI and ECJ to address conflicting interpretations

b) The creation of committees for the coordination of horizontal matters in the fields of private law

c) The use of the Open Method of coordination

Finally more radical proposal will be developed later concerning the creation of a European Law Institute.

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189 See Cafaggi, F. (2006), 'Introduction' to *The Institutional framework of European private law*, op. cit.

190 See Carbone, L. (2005), 'Le prospettive dell'analisi di impatto della regolazione', in Sandulli M.A. e L. Carbone, *Codificazione e semplificazione e qualità delle regole*, Milano: Giuffrè, pp.215 ff.

191 As mentioned, secondary legislation, directives and regulations already constitute a compromise between the two. Often the directives refer to contracts or property but provisions are drafted in different ways from the styles used both in codified systems and in judge made rule systems.

7.2.1. Better coordination among national institutions and between them, the Commission and ECJ

a) Improving judicial cooperation in civil matters. Judicial cooperation in civil matters is certainly a significant part of a governance design of EPL. Harmonization of procedural laws whichever form it takes will affect harmonization of substantive law. But the legal and institutional obstacles concerning a potential legal basis for harmonization are well known[192]. Complementary devices have been used; among them mutual recognition has been playing a relevant role.

Several judicial networks already exist: European Judicial Network in Civil and Commercial Matters, the European Network of councils for the Judiciary, the European network of Supreme Judicial Courts, the European Judicial training network[193].

The European Judicial Network in Civil and Commercial Matters has been established with a Council decision a in 2001[194]. The network should help with facilitating and improving judicial cooperation[195]. It is composed of Commission representatives and those of MS and operates through local focal points[196]. It should facilitate access to justice and act as a coordination mechanism, especially in relation to trans-border litigation[197]. The network has been successful in improving judicial cooperation especially in relation to conflict of laws matters[198]. The Commission expressly connects the network and the Acquis, suggesting that the focus should be practical implementation of the Acquis[199].

Improvements are necessary to ensure better coordination beyond and besides harmonization. Wider and more structural judicial coordination is needed[200]. Within the framework of judicial cooperation in civil matters can be envisaged the creation of judicial conferences of MS Supreme Courts with a member of the CFI and ECJ to solve existing interpretive conflicts in order to avoid litigation before ECJ. In addition mechanisms that facilitate aggregation of litigation in case of trans-border litigation

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192 See on the question of judicial cooperation in civil matters Storme, M. (ed) (2003), *Procedural Laws in Europe. Towards harmonization*, Maklu: Antwerp, Apeldoorn ; Leroyer A.M. et E. Jeuland (2004), *Quelle coherence pour l'éspace judiciaire europeen?*, Paris: Dalloz; Storskrubb, E. (2006), 'Judicial cooperation in civil matters- A policy area uncovered', PhD Thesis, EUI; Francioni, F. (ed) (2007), *Access to justice as a human right*, Oxford: Oxford University Press.

193 See Council Decision 2001/470/EC of 28 May 2001 establishing a European Judicial Network in civil and commercial matters OJ L 174, 27.6.2001, p. 25–31; The European Network of councils for the Judiciary Charter of 20 May 2004, available at http://www.csm.it; the European Judicial training network Charter of 6 December 2002 and the the European Judicial training network Articles of Association published in the appendixes of the Belgium Moniteur of 2 May 2006, available at http://www.ejtn.net.

194 Council decision n° 2001/470/EC.

195 See art. 3, Decision 2001/470/EC.

196 See art. 4, Decision 2001/470/EC.

197 See Recitals of Decision 2001/470/EC.

198 See Report from the Commission to the Council, the European Parliament and the European Economic and social committee on the application of Council decision 2001/470/EC establishing a European judicial network in civil and commercial matters, COM (2006) 203 Final (hereinafter Report on the judicial network), p. 5.

199 Report on the judicial network, p. 6.

200 See in this volume Taruffo.

should be defined, improving the framework provided by Directive 1998/27/EC. The Network needs to specialize and operate through sub-committees that can address specific questions arising in the main areas of civil and commercial laws. These sub-committees should have three tasks:

a) To solve specific divergences among State Supreme Courts;

b) To issue more general guidelines concerning the implementation of Directives. These guidelines should be drafted in collaboration with TFI and ECJ

c) To facilitate aggregation of trans-border litigation.

This development is fully consistent with the functions that Council decision 2001/470 attributes to the Network[201].

b) Improving SOLVIT network. SOLVIT is a network of national centers mainly concerned with problem-solving stemming from incorrect application of EU law at national level. It is a bottom-up system that allows individuals and firms, which encounter problems with national administrative practices to ask for an informal resolution. The Recommendation clarifies what is in the remit of SOLVIT by distinguishing between incorrect application and incorrect transposition. Only the former not the latter constitute in principle the task of SOLVIT[202]. The focus is on administrative practices that do not conform to European Law[203]. In practice, SOLVIT works also as coordination mechanisms to produce information exchanges concerning national administrations. While it is important to restraint SOLVIT to informal problem resolution, its ability to collect information about divergent applications of EU law may be enhanced. While it may remain a conflict resolution mechanism for divergent administrative practices it may convey information about divergent judicial practices to the judicial networks examined above.

c) EPL Committees. The creation of Regulatory committees at EU level are now quite diffused. They operate in regulated fields to coordinate States' IRAs. These committees operate within different frameworks and powers. They range from a well defined architecture such as that in the field of financial market (Lamfalussy), to an intermediate level of coordination in the field of data protection, telecom, energy and gas, to very loose coordination. Proposals to apply the Lamfalussy architecture to European private law have been suggested, focusing in particular on level 3 committees[204].

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[201] Article 10.

[202] See Commission Recommendation of 7 December 2001 on principles for using SOLVIT – the internal market problem solving network OJEC L. 331/79, 15.12.2001. *"Problems that are caused by incorrect transposition of EU rules or lack of transposition in national law are in principle not within the remit of SOLVIT because they cannot be solved within ten weeks."* See Commission Staff working document, SOLVIT 2005 Report, development and Performance of the SOLVIT network in 2005, Brussels, 4.5.2006, SEC (2006) 592, par. 5.4.

[203] See part I A and B of Recommendation 7 December 2001 2001/893/CE.

[204] On the use of the Lamfalussy architecture in the field of EPL see Cafaggi, F. and H. MuirWatt (2007), 'The making of European private law: Regulation and governance design', op. cit. In the field of unfair commercial practices see Stuyck, J., E. Terryn & T. Van Dyck (2006), 'Confidence through fairness? The new directive on unfair business-to-consumer commercial practices in the internal market', op. cit., pp. 144 ff. part. p. 146. Stuyck and others correctly suggest that the

To ensure adequate implementation of EPL, I propose the creation of regulatory committees in the field of contract, property, civil liability, human rights. Within the power to delegate implementation under art. 202.3 EC, I believe can be included the possibility for such committees to enact secondary soft law rules, whose main purpose would not be to specify primary legislation but to accompany the transposition process at MS level[205]. One of the main tasks of these committees would be to solve potential divergences in the application of EU law, outside of the domain of interpretation[206], left exclusively to the judiciary and in particular to the ECJ[207].

The creation of Committees organized around subjects like contract, tort, property, human rights would have a double advantage. First they would complement the competence system currently adopted by the Commission's Directorates. While the directorates are organized around policy competences (consumer protection, Internal market, competition, etc.) these committees would be based on instruments' competence consistently with the way national private laws in Member States are organized.

They should also coordinate single directives or horizontal instruments, such as those envisaged by the Green Paper on the Acquis with private international law, the current and the future instruments (i.e. "Rome I" and "Rome II"). Furthermore they should coordinate the horizontal instruments with the standards developed through mutual recognition and more in general the regulatory function of the Court while deciding cases concerning the freedoms.

In addition they would operate as informal 'states' agents' ensuring that implementation takes into account different legal traditions of the 27 MS consistently with the goals of EU legislation.

These committees should address implementation problems. Given the Comitology decisions they are compatible with the ordinary functions. Committees should perform according to the new decisions and the ECJ case law.

In particular they should:

1) Monitor the implementation of EPL at State level in coordination with States entities in particular the judiciaries and, to the extent necessary, the regulators[208].

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introduction of level 3 coordination may allow the use of a more flexible instrument to classify unfair trade practices than the blacklist used by UCPD.

[205] On the legitimacy of the use of soft law as implementation mechanism see Senden, L. (2004), *Soft Law in European Community Law*, Oxford: Hart Publishing; Craig, P. (2006), *EU administrative law*, op. cit.
For a specific reference in relation to the use of soft law in comitology see, for example, Directive 2000/60/EC establishing a framework for Community action in the field of water policy Art. 20 (Technical adaptations to the Directive), Art. 21 (Regulatory committee). See also Jacobsson, K. (2004), 'Between Deliberation and Discipline: Soft Governance in EU Employment Policy', in Mörth U. (ed), *Soft Law in Governance and Regulation. An Interdisciplinary Analysis*, Cheltenham, UK, Northampton, MA, USA: Edward Elgar, pp. 94 ff.

[206] Historically Comitology has been used to solve conflict among MS. See Craig, P. (2006), *EU Administrative law*, op. cit. p. 104.

[207] On the meaning of consistent interpretation and the difference with implementation see Prechal, *Directives,op. cit.*.

[208] On the relationship between EPL and contract law in regulated markets see Cafaggi, F. (2008), 'The regulatory function of contract law: contract law in regulated markets', op. cit.

2) Propose solutions that can accommodate conflicts and respect differences in national legal traditions. These solutions should be in the form of Guidelines similar to those enacted by the Commission for example in the field of competition law

3) Assist national authorities to adopting appropriate institutional solutions that reflect national legal identities but conform to goals of harmonization.

4) Assist the Commission in designing the agenda for legislative reform in the field of EPL

Thus the Committees would use either the regulatory or the advisory procedure[209]. They should operate with soft law instruments, issuing guidelines to be used by national institutions, both legislators when transposing the texts and judges and regulators while applying the national legislation.

d) Regulatory networks and EPL. I have contended that contract, property and civil liability in regulated sectors constitute integral part of EPL. This is true both in relation to the application of general directives to regulated sectors unless otherwise stated (i.e. unfair contract terms 93/13) and in relation to the sector specific provisions concerning consumer protection. Two consequences stem from the above:

i) The regulatory networks operating in specific sectors are playing and will play an important role to harmonize implementation practices at MS level. The more significant example is certainly level 3 committees in the Lamfalussy architecture, operating in the field of securities (CESR), banking (CEBS) insurance (CEIOPS). But as relevant position is played by the energy regulatory network (CEER) and by the telecom network (ERG). They will have to address questions concerning divergent interpretation of contract law principles such as the best execution principle in art. 21 MiFID or principle of non-discrimination in the Universal service directive.

ii) Cooperation of administrative consumer authorities is relevant for the harmonization of practices[210].

These coordination mechanisms are in place. The governance design is and should remain sector specific. It is however important when thinking about the institutional design of EPL to acknowledge their role and place.

e) Information providers. Addressing asymmetric information in consumer market: coupling institutional and legislative reforms.

I have shown that there is no necessary trade-off between search costs and consumer choice. The goal of a higher level of consumer protection is that of expanding consumers' choices. This goal can be achieved through legislative reforms that address asymmetric information by (a) imposing new duties to inform (b) give best informed contractual parties incentives to inform the other party through penalty default rules (c)

[209] See Recitals 7 and 8 Decision 1999/468.

[210] See Regulation (EC) No 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (the Regulation on consumer protection cooperation), Recitals 3, 6, 7, Art. 17(1).

give both parties incentives to generate new information about quality and safety of services and products even when those information will mainly represent public goods.

However legislative reform is not the only tool and if uncoupled with governance devices may be quite ineffective. Thus to broaden consumer choices search costs should be reduced while enhancing available options. Comparability of prices and contractual conditions are often part of a set of duties imposed on enterprises to ensure effective competition in regulated markets[211].

Three paths have been followed:

a) to impose on private enterprises the duty to provide comparative information about equivalent product and services[212];

b) to create a public database (funded also through firms' fees but managed by a non-profit organization) through which the available options become easily accessible;

c) to ensure accountability of for profit service providers.

These different patterns should all be carried out. They can easily complement each other. Private supply of comparative information that reduces search costs should be promoted. This can either be done by the same enterprises which sell the final product or by independent for profit service providers.

In addition the creation of not for profit organizations that collect information concerning comparable products and services focusing on cross-border transactions should be promoted at EU level.

7.3 The potential role of the open method of coordination in European private law

Among new modes of governance, an important role is played by the open method of coordination (OMC)[213]. It is described as a policy delivery method with distinct features

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[211] See references to energy and telecom: Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC, Recital 24, 25, Art. 3(3), Art. 28(1); Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive)", Recitals 26, 31, Art. 11(3), Art. 17(2), Art. 22(1), Art. 22(2).

[212] For the insurance see Directive 2002/83/EC concerning life assurance Art. 36.

[213] See Sabel, C. and M. Dorf. (1998), 'A constitution of democratic experimentalism', *Columbia Law Review*, **98**, 267-473; Sabel, C. and J. Zeitlin. (2003), 'Active welfare, experimental governance, pragmatic constitutionalism: The new transformation of Europe', presented at the International Conference of the Hellenic Presidency of the EU, 'The Modernisation of the European Social Model and EU Policies and Instruments', Ioannina, Greece; Trubeck, D. and L. Trubeck. (2005), 'Hard and soft law in the construction of social Europe: the role of the open method of co-ordination', *European Law Journal,* **11**, 343-364; De Burca, G. and J. Scott. (2006), *New governance, law and constitutionalism*, New-gov w.p., LTFIa/D3a; Borras, S. and K. Jacobsson. (2004), 'The open method of coordination and new governance patterns in the EU', *Journal of European Public Policy,* **11**, 185-208; Zeitlin, J. and P. Pochet (2005), *The Open Method of Co-ordination in action. The European employment and social inclusion strategies*, Bruxelles, P.I.E. – Peter Lang S.A; Sabel, Charles F., and Jonathan Zeitlin (2007), 'Learning from Difference: The New Architecture of Experimentalist Governance in the European Union', *European Governance Papers (EUROGOV)* No. C-07-02, http://www.connex-network.org/eurogov/pdf/egp-connex-C-07-02.pdf; Schmitter, P.

from other methods such as direct and indirect administration, shared administration, and agencies[214]. The OMC was introduced by the Treaty of Amsterdam in relation to employment policies[215]. With the Lisbon strategy, its application has expanded to several fields[216].

Proposals to apply the OMC to EPL have been made in the past in the context of addressing problems arising from lack of competence, but even more importantly to accommodate the goal of harmonization with that of preserving legal diversity, in its institutional and cultural forms[217]. It is important to underline that those proposals were aimed at reinforcing the weakest mode of the European chain: monitoring the process of implementation of European private law and governing differences at MS level – not only those in existing laws amenable to harmonization, but also, and perhaps more importantly, those stemming from the use of directives harmonizing different fields (e.g. coordination across policies)[218]. Given the nature of EPL and, in particular, the significance of private law-making by individual or collective actors, it is clear that major adjustments should be made to the current OMC methodologies, especially in relation to the relatively weak involvement of private actors.

The OMC enables common objectives to be agreed upon, while leaving the choice of means to individual MS or other entities responsible for the achievement of policy goals. The OMC has contributed to the elaboration of monitoring methods, benchmarking and adjustments, all of which are required in the area of EPL[219]. Some criticisms have been directed toward its openness to private actors and its top-down nature; while other critics have addressed effectiveness, especially in relation to the sanctioning system. Deeper critiques concern its compatibility with the rule of law[220].

(2007), 'Can the European Union be legitimized by Governance?', *European Journal of Legal Studies*, 1(1), http://www.ejls.eu; de la Porte, C. (2007), 'Good Governance via the OMC? The cases of Employment and Social Inclusion, European Journal of Legal Studies', 1(1), http://www.ejls.eu.

214 See Craig, P. (2006), *Eu Administrative law*, op. cit., p. 191.

215 See art. Art. 129 EC al. 1 and art. 137(2) (a) EC.

216 The general features of OMC are described in the Conclusions of the Presidency para 37.

217 See Cafaggi, F. (2003),'Una governance per il diritto europeo dei contratti', in Cafaggi F. (ed), *Una armonizzazione per il diritto europeo dei contratti?*, Padova: Cedam, pp. 183 ff.; Cafaggi, F. (2006), 'Introduction' to *The Institutional framework of European private law,* op. cit.; Van Gerven, W. (2006), 'Bringing private laws closer, bringing (private) laws closer to each other at the European level', op. cit., p. 63; Reich, N. (2006), 'A common frame of reference (CFR) Ghost or host for integration?', ZERP Diskussionpapier7 /2006. In those contributions, the different potential uses of OMC in relation to both law-making and monitoring were highlighted. As to the first, the OMC could be used in areas where no competence is available. As to the second, the OMC could be used to monitor and govern differences coming from transpositions of directives in legal systems with different institutional frameworks and different legal cultures.

218 Cafaggi, F. (2003), '*Una governance per il diritto europeo dei contratti'*, op. cit.

219 Van Gerven, W. (2006), 'Bringing private laws closer, bringing (private) laws closer to each other at the European level', op. cit., p. 63.

220 See Scheuerman, W. (2004), 'Democratic experimentalism or capitalist synchronisation? Critical reflections on directly-deliberative poliarchy', *Canadian Journal of Law and Jurisprudence,* **17**, 101-128; Joerges C. and M. Everson. (2005), 'The European turn to governance and unanswered questions of legitimacy: two examples and counterintuitive suggestions', in Joerges C., B. Strath, and P. Wagner (eds), *The economy as polity: the political constitution of contemporary capitalism,* London: UCL Press, pp. 159 ff .

It is important to locate this debate (which is somewhat biased due to the use of OMC in areas of social policies) to areas where competences of EU are circumscribed and the opportunity to proceed through social dialogue is generally recognized. While the competence factor in social policies is comparable to the competence issues in EPL, social dialogue and participatory instruments for the creation of private law rules do not occupy the same role which they assumed in employment policies. Furthermore, the use of soft law in EPL, though not completely unknown, is not yet as diffused[221].

When debating the effectiveness of OMC vis-à-vis the community method in relation to EPL, OMC and social dialogue should be kept separate. OMC experience can be used in the area of private law without necessarily transplanting the full OMC architecture employed in the field of employment policies.

The debate regarding an Optional Instrument in European contract law again shows some potential similarity with OMC devices. The Optional Instrument would not be binding and would serve the purpose of offering additional possibilities to those provided by national legal systems and by national and transnational private organizations. In the Commission *Action plan,* and the more recent Communication on the way forward, the CFR has become the focus of analysis. How this CFR should be elaborated and which architecture should be associated with its employment is yet to be determined[222]. In addition, the questions concerning governance, though alluded to, are never directly tackled.

Growing attention is paid to the interaction between OMC and fundamental rights[223]. Such a development is very relevant to EPL since in many areas fundamental rights play a significant role in shaping contract, property and civil liability[224]. The OMC may therefore evolve as one of the instruments through which fundamental rights can affect the development of national private law systems. In this area, traditional judicial supervision of MS compliance with fundamental rights can be complemented with the use of OMC, ensuring that implementation of directives is in accordance with fundamental rights policies.

The main question concerning the applicability of OMC methodology to EPL relates to compliance. The OMC methodology is aimed at ensuring compliance with guidelines adopted by MS. The question of compliance is generally addressed in formal ways in

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221 See Cafaggi, F. (2006), ' Rethinking private regulation', in Cafaggi F. (ed.), *Reframing self-regulation in European private law*, Kluwer Law International.

222 On these questions see Staudenmayer, D. (2006), 'European contract law- What does it mean and what it does not mean?', in Weatherill S. and S. Vogenauer (eds), *The harmonization of contract law*, Oxford: Hart, pp. 235 ff; Hesselink, M. (2006), 'Introduction' to Hesslink M. (ed), *The politics of a European civil code*, The Hague: Kluwer, pp. 3ff; Id. (2006), 'A technical CFR or a political code ?', in *The politics of a European civil code*, Hesselink M. (ed), The Hague: Kluwer, pp. 143 ff; Hesselink M. (2006), 'The ideal of codification and the dynamics of Europeanisation: the Dutch experience', Centre for the Study of European Contract Law, w.p. 2006/01.

223 De Schutter, O. (2005), 'The implementation of fundamental rights through the open method of coordination', in de Schutter O. and S. Deakin (eds), *Social rights and market forces: is the open method of coordination of employment and social policies the future of social Europe?*, Brussels: Bruylant, pp. 279 ff.

224 While the role of fundamental rights has long been acknowledged in continental legal systems, particularly Germany and Italy, recent developments in the UK with the enactment of the Human rights Act 1998 have deepened their influence on substantive private law.

the field of private law. Compliance by MS with European legislation is evaluated by reference to the existence and content of the implementing act. If a directive has not been implemented or has been implemented in violation of some of the principles herein, an infringement proceeding would result[225].

Changes introduced by the so called 'new approach' have modified the issue of compliance. Risks that greater divergence may result from the increase of MS' discretion associated with framework directives are significant. Broader discretion should translate into more flexibility, without undermining the final goal of harmonization. Such higher discretion for MS regarding modes of implementation of hard law devices should modify the compliance analysis from formal to functional. In adopting such a perspective, the use of methodologies comparable to those of OMC may be important in addressing the gray area between infringements and diverging interpretations.

More recently, the growing use of Recommendations and soft law more generally has posed the question of compliance in a different fashion. Different devices have been used to ensure that the principles set out in Recommendations are translated into a formal piece of national legislation. The most common combination occurring also outside the realm of OMC is soft law at EU level and hard law at national level. For example this combination typically occurs in relation to the activity of Committees of national regulators deciding common policies at EU level through MoU or Guidelines to be implemented at national level through hard law subject to judicial review.

The perspective adopted in this essay suggests that compliance is broader than lack of infringements and should be ensured through coordination process that involve public and private actors at different levels of law-making and law finding.

7.4. The creation of a European Law Institute

The proposals to improve the institutional framework of European private law suggest that in the long run the creation of a specialized entity is needed. The plethora of institutional players that affect the creation of EPL requires an ad hoc institution that would ensure coordination among MS and between them and European Institutions. While the Commission will certainly continue to be the major player in policy design and the monitor of implementation, the field of EPL requires specific tasks that should be performed separately. The existence of different legal traditions with their specificity suggests that institutional arrangements to coordinate the multilevel system of law-making and law finding are of utmost importance. The area of EPL is strongly influenced by the activity of private actors and organizations, law firms, trade and consumer associations, which actively contribute to the creation of new rules. The creation of a European Law Institute sponsored by MS and EU institutions is thus a medium term goal. What can be learned from the American experience of the American Law Institute?[226] . Many of the features of the ALI should ideally be applied to the ELI.

ELI should be an independent body, with a governance structure involving representatives of the legal professions: lawyers and judges and notaries. It should be

[225] In relation to contract law see among others Case C-144/99 Commission v Netherlands cit.

[226] See for a detailed analysis Liebman, L., in this book.

open and accountable not only to internal constituencies but also to the public. The typical requirements associated to administrative proceedings should therefore apply also to ELI: transparency, openness, accountability, independent evaluation, etc. A federal structure would probably suit better the tasks with at least macro-regions representatives. Although at the beginning a relatively high degree of centralization might be needed to avoid fragmentation. It is important that many existing organizations operating at European and international level in the law making area will cooperate with ELI but keep their own roles and functions.

It should advise the Commission and the Member States on issues concerning legal reform. It should operate together with other existing organizations to propose Principles, Model Laws, and Restatements. It can contribute to promote European professional legal education.

Clearly the differences with the US context are significant both in relation to the origin of ALI which dates back to 1924 and to the current context[227]. In the US a community of legal professions exists. It is organized partly at State level and partly at the federal level but shares basic common values and a single legal tradition but for Louisiana. In the US there is only one language which has contributed to the European context and a common legal tradition has yet to be developed. One of the main functions of ELI should be the promotion of a more cohesive legal community to foster social and institutional dialogue among the legal professions.

ELI should clearly be a multilingual institution that contributes to improve the linguistic quality of rule-making. The multilingual identity of the European Community requires a more complex apparatus than that used by ALI in the US. Other experiences such as the Canadian and particularly that of Quebec could help devising new tools.

8. Concluding remarks

European private law is a multilevel system made out of different components at EU, national and regional level. It was predominantly based on a minimum harmonization strategy at EU level complemented by national legislations. Recently there has been a development towards complete harmonization to reduce divergences among MS. Such a strategy has been pursued by focusing on rules without adequately addressing the role of institutions both in old Member States but perhaps more importantly in the new MS.

This essay argues that such a strategy is unsatisfactory and that divergences may be the source of mutual learning, the expression of different citizens' preferences and reflect different legal traditions that should not been eliminated. The separation between rules and institutions produces counterproductive effects on the process of European legal integration. A strategy that follows separate paths to harmonize rules and institutions is bound to fail. The key policy question is the coordination between harmonization of rules, policies and institutions in a highly differentiated frame where different legal traditions and values are respected and combined. A shift from legislation to governance

[227] For a more detailed analysis see L. Liebman, in this volume

is advocated. Instead of full harmonization, new modes of governance should be employed to harmonize divergences that may undermine the creation of an internal market. A double set of solutions has been described: one de lege lata and one de lege ferenda.

De jure condito. Comparative law can provide a useful methodology to assess the impact of uniform rules in different legal systems and devise more sophisticated legal translation tools to fit the existing different legal and institutional traditions[228]. But legal families even in a revised perspective that overcomes the old fashioned juxtapositions are hardly sufficient to host a complete harmonization strategy. The main question is not consistency between the common and civil law traditions. MS represent today a much more nuanced set of differences. Institutional divergences should be the premise not the constraint over the harmonization process. The objective of a common integrated market where European private law should play a relevant regulatory function cannot be pursued with a single uniform strategy. The level of complexity generated by different starting points requires the introduction of new governance devices but also new types of legislative acts that have different implementation degrees. New MS require a specialized set of institutions that cannot be purely transposed from those developed in old Member States.Following the experience concerning employment policies, targets of harmonization and legal integration should be pursued in the field of European private law considering the possible evolution of the institutional systems. Legislation can thus be staged so that the final goals are pursued through multiple steps. The choice between minimum and total harmonization should be redefined accordingly.

Integration of EPL in the light of the enlargement process requires a combined strategy: some higher level of coordination through a common set of institutions across the 27 MS to ensure the achievements of policy goals together a with differentiated strategy that adjusts to very different institutional frameworks in MS. Regional processes of private law harmonization and coordination should accompany the European uniform strategy. An intermediate dimension that can build on institutional similarities should be introduced. Macro-regions can devise institutions to develop common standards that could be further integrated in the long run. Existing models such as those developed by Nordic countries or the Benelux can be introduced on a wider scale.

The issue of compliance with European legislative acts concerning private law needs to be re-thought in the light of the multilevel structure of EPL. Firstly, compliance should not simply be measured in relation to the formal conformity of national implementing acts, but in relation to the goals to be achieved. If we take the example of information regulation through duties to inform, compliance analysis should not be limited to controlling the formal transposition of directives, but should be expanded to consider the effectiveness and adequacy of the adopted instruments to increasing consumer awareness and welfare while reducing market failures due to asymmetric information. Such a transformation should imply the use of qualitative indicators concerning the efficacy of the new measures in relation to consumers' ability to enter into contractual relationships and to choose among them. Analogous policy indicators can be used to identify the degree of unsafe products present in the market, unfair contract terms and unfair trade practices. Some impact evaluation analysis has been employed in the field

[228] Reinmann, M. and R. Zimmermann (2007), *Oxford Handbook of comparative law*, Oxford: Oxford University Press Handbook of Comparative Law.

of product liability but remains lacking for consumer contract law. The link between compliance and impact analysis should therefore be strengthened.

The creation of a EPL is a process in which MS reciprocal learning about different solutions is crucial[229] This learning is concerned with legal regimes associated with policies. As comparative methodology shows, in addition to learning leading to imitation, if the specific practice is considered an improvement, learning can also enhance coordination if the practices must remain different because they reflect divergent preferences or attitudes[230]. Mutual learning is for instance crucial for the use of private international law and its regulatory functions by different State Supreme Courts. Strengthening judicial networks and creating new committees to improve coordination with Member States have been suggested as complementary strategies to be pursued within the current legal framework. Further elaborations have suggested the use of an open method of coordination or approximation. The use of the OMC methodology is most appropriate when the existing differences cannot and should not be harmonized through a legislative intervention but a coordinated set of actions specifying goals and benchmarks. OMC can also be employed in areas in which harmonization will not take place, but which are highly influenced by the harmonization process, for example in the context of specific contracts such as tenancy law. Differences between the fields of current application of OMC and areas of EPL should be highlighted. Unlike the suggestions previously made, the use of OMC in the field of EPL implies major changes in national perspectives: the recognition that private law is functional to policies aimed at reducing market failures that can be monitored over time. It would be a cultural transformation that would improve further the coordination between the two levels.

De jure condendum. The governance of EPL in the long run may however require specialized institutions. The necessity of a European Law Institute is emerging. Its governance and activity should parallel the work on harmonization currently under way. It should coordinate the implementation of EPL at national level, it should contribute to monitoring, to detecting divergences, to assess distortions, and to proposing adjustments. It should represent the national legal and economic institutions, in particular European legal professions, fostering the creation of a more cohesive European legal community.

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[229] Cafaggi, F. (2003), 'Una governance per il diritto europeo dei contratti', in Cafaggi F. (ed), *Una armonizzazione per il diritto europeo dei contratti?*, Padova: Cedam, pp. 183 ff,.

[230] See on these questions Graziadei, M. (2007), 'Comparative law as the study of transplants and receptions', in Reinmann M. and R. Zimmermann, *Oxford Handbook of comparative law*, Oxford: Oxford University Press, pp. 442 ff.