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Regulatory Strategies on Services Contracts
in EC Law

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**EUROPEAN UNIVERSITY INSTITUTE
DEPARTMENT OF LAW**

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Abstract

The idea is to show how and by what means the European Community is attempting to realise its overall policy to establish and accomplish the Internal Market for services, and more particularly how this policy which is meant to open up markets affects the contractual relations between the supplier and the customer, whether the latter be a professional or a consumer. The European Community relies, as usual, on a piecemeal approach. Regulation of services is very much following different patterns in different areas of the economic sector. I have chosen a particularly European perspective, as the European Community has become by far the most important regulator. The paper is first and foremost meant to systemize the existing regulatory strategies applied in the field of services. As such, this paper is just a first step to provide the groundwork for ongoing research.

Keywords

European private law – service contracts under EC law

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Regulatory Strategies on Services Contracts in EC Law

Hans-W. Micklitz¹

1. Purpose and background

The idea of the paper is to show how and by what means the European Community is attempting to realise its overall policy to establish and accomplish the Internal Market for services, and more particularly how this policy which is meant to open up markets affects the contractual relations between the supplier and the customer, whether the latter be a professional or a consumer. This implies that contractual relationships at the primary market for financial services are excluded from the scope of analysis.² The European Community relies, as usual, on a piecemeal approach. There is no such thing as a uniform strategy, if one sets aside the Internal Market rhetoric. Regulation of services is very much following different patterns in different areas of the economic sector. I have chosen a particularly European perspective, as the European Community has become by far the most important regulator. Member States are more or less in a retroactive position. It is still the White Paper on the Completion of the Internal Market³ which legitimises the initiatives of the European Commission. European law defines the bottom line of the respective markets for services. National legislators have to implement the European rules. They benefit from a different degree of leeway with regard to shaping contractual relations. However, the paper does not intend to give a full picture of the Member States' regulatory strategies to confirm or to escape European boundaries. It is first and foremost meant to systemize the existing regulatory strategies applied in the field of services. As such, this paper is just a first step to provide the groundwork for ongoing research.

¹ To be published in Cafaggi/Muir Watt (eds.), 2008.

² Heinze, 1999.

³ COM (1985) 314 final, 23.7.1985.

In my analysis I rely on previous research. In the area of consumer law I draw on *Europäisches Verbraucherschutzrecht*,⁴ which I wrote, together with *Norbert Reich*, with regard to the law of Member States, based on the research done by the European Consumer Law Group.⁵ In the area of financial services I refer to a comparative research project which I have undertaken together with *Jürgen Keßler*.⁶ The project focussed on investor protection rules in the European Community, Germany, Switzerland, the United Kingdom and the United States. Again together with *Jürgen Keßler*, I investigated the effects of the EC policy to open up the telecommunications, energy and railroad markets on customers in France, Germany, Hungary, Italy, Spain, Sweden and the United Kingdom.⁷ Private law relationships between suppliers and customers were at the heart of the analysis. Last but not least, I would like to mention a study on standardisation of services which is strongly related to the so called services directive.⁸

The first two parts of the paper should be understood as taking stock of the existing and envisaged EC rules on services. It seems reasonable to distinguish between vertical regulation and horizontal regulation. The latter covers all sorts of services, the former is bound to a particular type of service. However, the study is not meant to be comprehensive, not even at the EC level,⁹ although it covers the major areas currently under discussion [see types of services vertical and horizontal classification]. The third part looks into the instruments which are used to shape particular areas of contractual relations. I here refer to *Anthony Ogus*'¹⁰ distinction between 'traditional and less traditional regulatory instruments'.

The EC regulation under review clearly shows that there is an overall tendency to combine traditional with less traditional instruments, although the latter instruments are gaining more and more importance, in terms of quantity and quality [see chapter 'Choice of instruments']. The shifting away from traditional instruments to less traditional instruments considerably broadens the set of regulators – public and private, their role and their function in shaping private law relations on services. As regards the distribution of responsibilities, of who is doing what and on what basis of legitimacy, things becomes blurred [see 'Traditional and less traditional regulators'].

The ground then is prepared to look more closely into who is using the less traditional instruments, mainly co-regulation and self-regulation, the degree to which stakeholders are involved and the possible impact of these new forms on the regulation of service contracts [see chapter 'New instruments/new actors']. The seventh part focuses on the

⁴ Reich/Micklitz, 2003. An updated English version was published under the heading of *The Basics of European Consumer Law*, 2007.

⁵ Available under www.europeanconsumerlawgroup.org.

⁶ Keßler/Micklitz, 2004.

⁷ Micklitz/Keßler in collaboration from Basler/Beuchler/Bonome-Dells, 2008.

⁸ *Services Standards: Defining the Core Elements and Their Minimum Requirements*, study commissioned by ANEC, 2007, <http://www.anec.eu/attachments/ANEC-R&T-2006-SERV-004final.pdf>

⁹ For example postal services are not included.

¹⁰ *The Regulation of Services and the Public-Private Divide*, in this volume. There is much discussion on where, how and why to draw a line between the old and the new instruments, see Trubek/Trubek, 2005. However Ogus and Trubek/Trubek come for very similar results.

substance of the public/private law regulation, firstly – conclusion of contract, formation and advice; secondly the content – affordability, quality and safety; thirdly – rights and remedies [see ‘The substance of the public/private regulation’]. The last part concludes with preliminary observations on the EC regulatory strategies on services [see ‘Preliminary observations’]. A set of charts might hopefully facilitate the understanding of the dispersed rules.

2. Type of services (vertical classification)

The European Commission mainly pursues a sector-related vertical approach. Each of the sectors has its own history. Not all sectors involve a different Directorate within the European Commission, instead the competence for the six sectors here at stake is spread over three Directorates – DG SANCO, DG TREN and DG MARKET. The latter being so important and so big in comparison at least to DG SANCO that the subdivisions which deal with financial services, network services and other services (the services directive) come close to constituting a separate Directorate.

2.1. Protective device

Consumer policy dates back to the seventies. The directives adopted already appear in the first and second consumer programme.¹¹ Two of them, on Package Tours and Time-Sharing are to be understood as a reaction to a growing new industry which yielded the need for a European wide solution. The Consumer Credit Directive is inspired by the intention to establish a European market for consumer credit. Common standards should encourage consumers to engage in price comparison and make better choices. Reality turned out to be different. It remains to be seen whether the now reached Common Position will overcome the boundaries of nationally shaped consumer credit markets. The Commission project on European Contract¹² law sets a new tone in the consumer contract law regulation.

The two Regulations on Air Passengers and Railroad Passengers fit relatively well into the picture of transborder mobility and the need for substantive protection of the economic interests of consumers and travellers. Both regulations are designed to grant the passenger basic mandatory rights, just as in consumer law directives. The addressees, however, are not consumers, but passengers, a category which covers businessmen as well as consumers. The air passenger regulation which was revised in 2004 served as a blueprint for DG TREN¹³ for shaping the railroad passenger rights. The true challenge in the field of transport is the relationship between EC rules and international conventions. The Air Passengers Rights Regulation reaches beyond the Montreal Convention, which has led two business organisations to challenge the competence of the European Community to adopt conflicting European rules. The ECJ,

¹¹ OJ C 92, 25.4.1975 and OJ C 133, 3.6.1981.

¹² See COM (2001) 398 final, 11.7.2001, OJ EC C 255, 13.9.2001, 1, also Grundmann/Stuyck (eds.), 2002. The Communication has boosted publication of articles and books on European contract law; now COM (2006) 744 final on the revision of the consumer acquis.

¹³ OJ L 46, 17.2.2004, 1.

however, confirmed the validity of the Regulation.¹⁴ Otherwise, the air transport industry would have escaped EC law, being bound only to less stringent international rules.

2.2. *Financial services*

Financial services might cover insurance contracts, investment contracts and banking contracts. The focus lies on insurance and investment directives, with a side glance to the directive on payment services.¹⁵ All these initiatives address the insured, the investor and/or the creditor, be it a consumer or a businessman. They have in common that the European Commission intends to open up markets in order to create and enhance European-wide competition between national suppliers. The insured, the investors and the creditors, regardless of whether they are consumers, shall benefit from the increased competition. They are not the primary addressee of the legislation. It is only over time and after having taken the first regulatory steps that the European Community felt the need to more directly focus on the interests of the insured, the investors and the creditors. Despite these common characteristics, each sector has its own historical particularities.

After the failure of early policy initiatives to open up the markets for insurance, the European Commission sued Germany for its rigid prior approval system of insurance contracts, for being out of line with the basic market freedoms. The ECJ's partly favourable judgment¹⁶ triggered a three step procedure, under which the European Commission managed to gradually open up the market for insurance. However, the Member States resisted any attempt to establish a common set of European rules on insurance contracts.¹⁷

The spirit in the field of financial instruments is very much the same as in the insurance market. However, the background is different. The two banking Coordination Directives¹⁸ which allow European-wide activities to operate under one single regulatory regime – the Euro-pass – are only applicable to companies which, *inter alia*, are providing investment services. The first Directive on Investment Services, 93/22/EEC, closed that gap. The Second Investment Directive (named MIFID), 2004/39/EC, pursues a two-fold aim, establishing a fully-fledged Euro-pass and improving investor protection. It is the latter aim – and the means set to implement it – which is of interest here.

In the aftermath of the Single European Act, the European Commission (re)discovered Article 86 ET as a powerful means to challenge Member States' natural monopolies in the telecommunications, energy and railway markets. The Commission managed to gradually open up the markets, however, it was confronted with the challenge of 'services publiques', or the well established concept in the Member States that the state

¹⁴ Judgment 10.6.2006, Case 344/04, International Air Transport Association, European Low Fares Airline Association v. Department for Transport, [2006] ECR I-403.

¹⁵ Directive 2007/64/EC, OJ L 319, 5.12.2007, 1.

¹⁶ ECJ, 4.12.1986, Case 205/85, Commission v. Germany, [1986] ECR 3755.

¹⁷ Reich, § 23.9, in Reich/Micklitz, 2003.

¹⁸ Reich, § 3.28, in Reich/Micklitz, 2003.

has to make sure that all customers have access to public goods.¹⁹ All three markets differ considerably in the degree to which the European Commission has achieved its policy objective, with telecommunications being at the forefront of developments, with energy following suit, whereas the railway market is still rather closed. The means is unbundling of the distribution and the transmission system in order to enhance competition to the benefit of the customer.

2.3. Service directive

The Services Directive does not fit into this picture. It is in the field of technical standards where the European Community experienced the failure in setting aside national barriers to free European trade by way of vertical product related regulation.

The ‘New Approach on Technical Standards and Harmonisation’²⁰ constituted a breakthrough in the EC regulatory policy the impact of which reached far beyond its limited scope that is product regulation through technical standardisation. The European Commission developed a new regulatory strategy which was designed to overcome the deadlock through a new horizontal harmonisation method. It seems as if the Services Directive is also meant to establish a common frame for the ‘harmonisation’ of the remaining services ‘*d’un seul coup*’. I have set harmonisation in quotation marks, because the Services Directive differs from all other vertical regulation on services in that it is not designed to harmonise services. Instead the Directive should be understood as a combination of the country of origin principle designed to establish freedom of services and freedom of establishment and a new approach in regulation, meant to shape the elaboration of contractual rules.

As such, in a way it might be misleading to classify the Services Directive as vertical strategy. However, the Directive has a limited scope of application which has been further narrowed down by exempting labour law and health care services in the finally adopted version.

¹⁹ Cameron (ed.), 2005.

²⁰ OJ C 136, 4.6.1985, 100.

Consumer contract law on services	Transport (air and railway)	Financial services (insurance, investment, payment)	Network services for customers	Other services in the Internal Market	Health services (separate initiative)
Credit 87/102 Common Position ²¹	Air Passenger Rights Regulation No. 261/2004, COM (2000) 365 final, ²² COM (2005) 46 ²³ and 47 ²⁴ final.	Insurance 92/49 (damage), 92/96 (life insurance)	Telecommunication 2002/19-22 and 2002/58 Now third package, COM (2007) 697 ²⁵ and (2007) 698 ²⁶	Services Directive ²⁷	No particular rules in secondary community law
Package tours 90/314	Regulation 1371/2007 ²⁸ on Railroad Passenger Rights; COM (2004) 144 final ²⁹ on rail freight services	Financial Instruments 2004/39 Implementing Directive 2006/73 ³⁰ and implementing Regulation 1287/2006 ³¹	Electricity 2003/54 and Gas 2003/55 Now third package COM (2007) 528 ³² electricity and gas COM (2007) 529 ³³		Commission starts public consultation on patient mobility ³⁴
Time Sharing 94/47		Directive on Payments services ³⁵	Third Railway Package ³⁶		

²¹ 14.9.2007, CONSOM 69 Interinstitutional File: 2002/0222 (COD).

²² 21.6.2000, http://eur-lex.europa.eu/LexUriServ/site/de/com/2000/com2000_0365de01.pdf

²³ 16.2.2006, http://ec.europa.eu/transport/air_portal/passenger_rights/doc/com_2005_046_en.pdf

²⁴ 16.2.2006, http://ec.europa.eu/transport/air_portal/passenger_rights/doc/com_2005_047_en.pdf

²⁵ COM (2007) 697 final, 13.11.2007.

²⁶ COM (2007) 698 final, 13.11.2007.

²⁷ Directive 2006/123/EC, OJ L 376, 27.12.2006, 36.

²⁸ OJ L 315, 31.12.2007, 14.

²⁹ COM (2004) 144 final, 3.3.2004 no progress since then.

³⁰ OJ L 241, 2.9.2006, 26.

³¹ OJ L 241, 2.9.2006, 1.

³² COM (2007) 528 final, 19.9.2007.

³³ COM (2007) 529 final, 19.9.2007.

³⁴ COM (2004) 301 final, 24.4.2004, Follow-up to the High-level reflection process on patient mobility and health care developments in the European Union, see now in reaction to the failed effort under the first draft of the service directive to harmonise health services, the new initiative taken by the European Commission, <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/06/1267&format=HTML&aged=0&language=DE&guiLanguage=en>

³⁵ OJ L 319, 5.12.2007, 1.

3. Types of services (horizontal classification)

The European Commission did not rely on a vertical approach alone to set common European rules on contracts for services. Two kind of strategies might be identified, both aiming at a horizontal regulation.

3.1. Consumer protection regulation on services

Usually, the four consumer directives, on Distant Selling, Distant Selling for Financial Services, E-Commerce and Unfair Terms in Consumer Contracts are put into the same box, that of consumer protection. However, contrary to the Directives on Consumer Credit, Package Tours and Time Sharing, these four directives lay down horizontal rules on consumer contracts, both for sales contracts and contracts for services. The former three deal with the modalities under which the contract is concluded, be it via direct selling strategies or via distance communication means. The doubling of the distance selling regulation turned out to be the result of hard lobbying of the financial services sector, claiming special treatment due to the particular character of these services. Directive 2002/65/EC, which was adopted five years after the Directive 97/7/EC, provides for particular rules on Financial Services. Ironically enough, the new Directives goes even further than its predecessor.³⁷ Whilst the Directive 2002/65/EC closes an important loophole, the two Directives together do not fully cover the type of services at stake here, as package tour contracts and transport contracts are exempted from the scope of application. The E-Commerce Directive 2000/31/EC is applicable across all kinds of services, regardless of whether the parties to the contract are consumers or suppliers.

Directive 93/13/EEC, designed to protect consumers, covers all sorts of consumer services, for example credit, package tour and time sharing contracts, as well as transportation, network contracts and all other types of service contracts which come under the scope of the Services Directive – provided the party to the contract is a professional *private* supplier. There has been discussion in legal doctrine regarding the degree to which the Directive as it stands covers public suppliers as well, mainly suppliers of energy and railroad transportation services.³⁸ The debate lost impetus due to the privatisation policy of the European Community in particular with regard to former natural monopolies.

³⁶ OJ L 315, 3.12.2007, 1.

³⁷ See Micklitz/Schirmbacher, 2004, p. 457-486.

³⁸ Butters, 2003; Whittaker, 2000, p. 95.

Horizontal legislation	Credit, package tour, time sharing	Transport (air and railway)	Financial services (insurance, investment, payment)	Network services for customers	Other services in the Internal Market
Distant Selling 97/77	No with regard to package tours, ³⁹ Yes with regard to time sharing contracts ⁴⁰	No ⁴¹	No	Yes	Yes
E-Commerce 2001/31	Yes	Yes	Yes	Yes	Yes
Distant Selling of Financial Services 2002/65			Yes, only applicable to these services		
Unfair Terms 93/13	Yes	As far as undertakings are privatised	Yes	As far as undertakings are privatised	As far as undertakings are privatised

3.2. *International Private Law (IPL)*

The Rome Convention was adopted in 1980.⁴² It lays down common rules for the applicable law in contracts for goods and services regardless of the addressee, although the Convention provided for particular rules on the protection of the consumer in Article 5. The Rome Convention is currently under review. The European Commission published a draft on the 15 December 2005 which is now subject to a broad discussion.

Thus far, European international private law has suffered from great inconsistencies. The first generation of consumer law directives did not contain rules on the applicable law, such as consumer credit and package tours. The younger generation, however, provided for rules which deviated from the Rome Convention – both directives on distance selling. The most recent generation of directives, however, return to the earlier approach, for example with no particular rules on the applicable law, such as the envisaged e-commerce and services directives. The first major aim of the envisaged regulation is to overcome these inconsistencies by defining one and the same rule for consumer contracts – the law of the place where the consumer is habitually resident. However, the regulation as it stands does not cover insurance contracts. Here, the

³⁹ At least in principle, but see Article 3 (2) third hyphen.

⁴⁰ Although Art 4 (1) 94/47 provides for a concluding the contract in writing, however, this can also be done by storing the contract on a durable medium, Article 5 (1) of Directive 97/7.

⁴¹ Including leasing, as decided by the ECJ in easy car, ECJ, 10.3.2005, Case 336/03, Easy Car v Office of Fair Trading, [2005] ECR 1974.

⁴² Publication of the consolidated version, OJ C 27, 26.1.1998, 34.

particular rules provided for in the insurance directives should remain. The second major aim is to put international private law rules under the jurisdiction of the ECJ by way of relying on Articles 61/67 of the ET.

The now adopted Regulation 864/2007 on Extra-Contractual Liability, the so-called Rome II regulation, has no predecessor. It does not distinguish between liability resulting from unsafe goods and liability resulting from unsafe services. The regulation shall apply in situations involving a conflict of laws to non-contractual obligations in civil and commercial matters, with limited exemptions for accountants and trustees. Particular rules are foreseen for product liability and unfair commercial practices. Directive 85/374/EEC on Product Liability, however, applies to products only. Electricity is regarded as a product. The originally intended directive on the liability for the safety of services had to be withdrawn due to the strong resistance on the part of the Member States.⁴³ It remains to be seen whether the European Commission is willing to pick up the issue again, maybe under a new regulatory device.⁴⁴

IPL rules	Time sharing	Distant selling/ unfair terms	Transport (air and railway)	Financial services (insurance, investment, payment)	Network services for customers	Other services
Draft Regulation on Rome I ⁴⁵	Particular IPR-rules in the directives, but to be replaced by the consumers habitual residence rule in Rome I	Particular IPR-rules in the directives, but to be replaced by the consumers habitual residence rule in Rome I	EC Regulations applicable on transborder contracts only, but Rome I remains important for complementary contract terms	Excluded from Rome I, particular rules on insurances to be maintained	Covered by Rome I	Covered by Rome I
Rome II Regulation ⁴⁶	Yes	Yes	Yes	Yes, but potential exceptions for particular financial services ⁴⁷	Yes	Yes, but potential exception for accountants ⁴⁸

⁴³ See with regard to the proposal COM (1990) 482 final, OJ C 12, 18.1.1991, 8 and the withdrawal COM (1994) 260 final.

⁴⁴ See Magnus/Micklitz, 2005.

⁴⁵ COM (2005) 650 final, 15.12.2005.

⁴⁶ OJ L 199, 31.12.2007, 40.

4. Choice of instruments in public/private law

The public/private law divide is not commonly accepted all over Europe. I use the distinction in a very pragmatic way. Public law and public regulatory instruments are mostly all measures which must be taken to establish a competitive European market for the respective services, for setting up single passport regulation on the basis of home country authorisations, on privatisation of former natural monopolies, for guaranteeing access to universal services, for separating the transmission system (the net) from the distribution system (the supply of services), and last but not least, on creating single contact points to enhance co-operation between agencies. Private law instruments are directly intervening into the contract for services in the various fields of interests here. It might be argued that regulatory measures regarding the protection of the consumer, the injured, the customer or the investor do not affect the legal character of contract law rules as belonging to private law.⁴⁹ It is a common characteristic of all services that the EC legislator combines public and private law means, although the emphasis is put on public law means in the way it is defined here – with the exemption of consumer law which almost entirely focuses on private law.

The differentiation becomes complicated if one looks more closely into the regulatory instruments which are used. *Traditional* instruments in the field of private law are legislative interventions in order to guarantee a certain level of justice in a supposedly unbalanced contractual relationship between a consumer or customer or investor and a supplier by way of mandatory contract law rules. With the exception of the field of services, the European legislator heavily relies on mandatory contract law rules to shape its consumer policy and to supplement its liberalisation and privatisation policy. In the field of consumer law these mandatory rules laid down minimum standards, thereby leaving it for the Member States to adopt more stringent rules. The European Commission is now striving for full harmonisation in consumer contract law, a policy which the Commission has already achieved in other fields where it has taken measures to regulate services.⁵⁰

There is a tendency in European law on services to shift away from traditional instruments towards *less traditional* instruments, as *Anthony Ogus* has put it. This category covers default rules and self-regulatory measures in consumer contract law as well as co-regulation, according to the meaning which the European Commission has

⁴⁷ Article 1 e) for non-contractual obligations arising from relationships between settlers, trustees and beneficiaries of a trust created voluntarily and evidenced in writing.

⁴⁸ Article 1 d) liability of partners, management bodies and persons responsible for carrying out the statutory audits of accounting documents of an association, a company or firm or other body corporate or incorporate, provided they are subject to specific rules of company law or other specific provisions applicable to such persons or bodies.

⁴⁹ There has been an extensive debate in Germany on whether the legal character of civil law changes when it is submitted to regulatory interventions. In particular, scholars from the University of Bremen have been involved in the debate, see Assmann/Brüggemeier/Hart/Joerges, 1980.

⁵⁰ See the Commission paper on a consumer policy strategy 2002-2006, KOM (2002) 208 endg. 7.5.2002; quite critical on this policy shift, Reich, in Reich/Thévenoz (eds.), 2006, pp. 357-382, now COM (2006) 744 final on the revision of the consumer acquis.

given to it.⁵¹ It englobes contract law-making and moulds it along the lines of the new approach in the Services Directive as well as the Lamfalussy procedure in the Directive 2004/39 on financial instruments.

At a closer look, the set of services offers a heterogeneous picture. The European Commission has undertaken numerous attempts to enhance the role and function of self-regulation in consumer law. All these efforts, however, must be regarded as a failure as the European Commission did not succeed in substantially influencing the deeply rooted cultural differences in the Member States. Those Member States which traditionally rely on self-regulatory measures could continue their way of implementing EC law, whereas those Member States with no such tradition remain largely unaffected. Two prominent examples might help to underpin these findings: regulation on unfair commercial practices⁵² and the role and importance of voluntary dispute settlement procedures.⁵³ The same is more or less true with regard to co-regulation. The European Commission did not convince Member States in the Council to test new forms of law-making and law enforcement as discussed in various documents in the aftermath of the White Paper on Governance, with the exceptions of the new approach on technical standards and harmonisation and the Lamfalussy procedure. The former has become an integral part of the Services Directive, the latter is already in action in the field of financial instruments. Both have in common that the law making process is broken down into different levels of action, where the legislator restricts itself to define a kind of broader regulatory frame, which is then completed by way of technical standardisation organisations (i.e. technical experts) or through the input of experts from the national regulators (Lamfalussy procedure).

It is certainly too early to comment on the future of the new approach in the Services Directive. The situation is somewhat different with regard to the Lamfalussy procedure. On the 10 August 2006 the European Commission adopted Directive 2006/73 and on the implementing regulation 1287/2006 which lays down detailed rules for the implementation, *inter alia*, of the contract related provisions in the Directive 2004/39 on Financial Instruments.⁵⁴ The first two levels of the Lamfalussy procedure are now completed. The consultation on the third has already been completed.⁵⁵ Reading the three pieces of law together, it is obvious that the legal requirements are still rather broad and vague. They need therefore to be concretised at the third level, which means through the regulatory experts. And it is here where the Lamfalussy procedure and the new approach fit astonishingly well together. Experts, technical or regulatory experts, define what the law is. However, the Lamfalussy procedure is much determined by way

⁵¹ Liikanen, 2000, p. 4. Le Livre blanc sur la gouvernance européenne COM (2001) 428 final and Suivi du Livre blanc sur la gouvernance européenne – Pour un usage mieux adapté des instruments, COM (2002) 278 final, 5.6.2002, Recours encadré à un mécanisme de corégulation. See for a deeper analysis Cafaggi (ed.), 2006.

⁵² See Henning-Bodewig, 2006; Howells/Micklitz/Wilhelmsson, 2006.

⁵³ See J. STUYCK, E. TERRY, V. COLAERT, T. VAN DYCK, *et al.*, *An analysis and evaluation of alternative means of consumer redress other than redress through ordinary judicial proceedings - Final Report*, Study for the European Commission, available at http://ec.europa.eu/consumers/redress/reports_studies/index_en.htm.

⁵⁴ OJ L 241, 2.9.2006, 26.

⁵⁵ http://www.cesr-eu.org/index.php?page=consultation_details&id=76

of regulatory interventions, whereas under the new approach the legislator steps back from laying down detailed rules and leaves the forum to private law makers.

	Public law	Private law	Regulatory instruments traditional	Regulatory instruments less traditional	Minimum/ full harmonisation
Consumer contract law on services	Commercial practices ⁵⁶	Commercial practices, contract law, conflict solution	Comprehensive set of mandatory private law rules Limited use of country of origin principle	Few default rules, Limited impact of self-regulation	Minimum and full
Transport		Contract law and liability	Mandatory rules on transport contracts		full
Financial services	All financial services: single passport regulation on the basis of home country authorization	Insurance: contract law rules; financial instruments services: conduct of business rules as contract law rules	Insurance: mandatory contract law on particular issues	Financial instruments: rules on conduct of business obligations to be concretised in the Lamfalussy procedure	full
Network services	Privatisation of public monopolies; guarantee of universal services; unbundling;		Mandatory rules on universal services (services publiques) in network contracts;	'Measures' outside universal services in the energy sector, ⁵⁷	full
Services	Standardised authorisation scheme for the creation	Consumer contract law exempted from the	Binding rules on information duties	Co-regulation and self regulation on	full

⁵⁶ Some Member States would understand unfair commercial practices law as public law, others like Austria and Germany as private law.

⁵⁷ Directive 2003/53/EC and Directive 2003/54 Annex A 'Measures on Consumer Protection', which means according to Article 3 (5), respectively Article 3 (3) 'at least household customers' = customers purchasing electricity or gas for their own household consumption.

	Public law	Private law	Regulatory instruments traditional	Regulatory instruments less traditional	Minimum/ full harmonisation
	of establishments; free access to and free exercise of a service activity; but country of destination retains control powers	scope; Pre-contractual information duties		the quality of services; Standardisation of services through European standardisation institutions	

5. Traditional and less traditional regulators

The shift from *traditional* to *less traditional* instruments is mirrored in the actors which now appear on the European regulatory agenda. Consequently, they might be divided into *traditional* and *less traditional regulators*. Traditionally regulation lies in the hands of the legislator and the executive. The latter might adopt not only general rules but take individual regulatory actions. In the field at hand, there are two European agencies to be mentioned, the European Railway Agency and the European Aviation Safety Agency. Both deal with safety matters and interoperability. They are not involved in the establishment or the completion of the Internal Market. So far, there is no European regulator in form of a European agency,⁵⁸ not even in the form in which it already exists with regard to pharmaceuticals, agriculture or environmental protection. This does not mean that there is no regulation at the European level outside the EC legislator. However, it is here where the new regulators show up. Their initiatives and their regulatory interventions in whatever form constitute the institutional framework of European private law.⁵⁹ In its third package on telecommunications and energy, however, the European Commission advocates for the establishment of an agency for the co-operation of regulators.⁶⁰

5.1. Various forms of co-operation between national regulators

The EC policy to establish an Internal Market for all sorts of services does not only touch upon national substantive law but also on the way in which the law is concretised, shaped, implemented and enforced – and under what responsibility. Most of the areas here under review were traditionally governed by public agencies or public administrations. This is true for transport, financial services and network services. The

⁵⁸ See Majone, 1996.

⁵⁹ See Cafaggi, in Cafaggi (ed.), 2006, p. 1; Cafaggi, 2006, Law No. 13.

⁶⁰ COM (2007) 530 final, 19.9.2007 (energy) and COM (2007) 699 final, 13.11.2007 (telecommunications).

reasons differ according to the type of service. Natural monopolies have led the Member States to entrust particular government departments with regulatory tasks. The European Commission has been and still is fighting hard to get the Member States set up politically independent public agencies in the energy and the railway sector.⁶¹ This was less necessary in the field of financial services where the Member States, even with the support of the service sector concerned, established agencies which had to supervise the market and eliminate rogue traders. Here the European Commission could build on a stable network of national regulators. Since the adoption of the Regulation No. 2006/2004 on Consumer Protection Enforcement Co-operation, the European Commission has pushed Member States hard to establish a national consumer agency, although Austria and Germany were allowed to involve business and consumer organisations in transborder co-operation.⁶² The European Commission seems convinced that public enforcement prevails over private enforcement through business and consumer organisations. So it seems a common policy of the European Commission to build on national regulators in the completion of the Internal Market. This might partly result from the fact that EC law, at least in the form of directives, can only address and bind Member States.

The way in which co-operation between national regulators is organised differs considerably. Over time, however, the Commission's strategy is relatively easy to identify. Loosely knitted networks are gradually replaced by formal legal structures in which stakeholders no longer have any role to play.

(1) The first form is the regulatory committee which is foreseen in the Regulation 2006/2004 on Consumer Protection Enforcement Co-operation under reference to the comitology procedure.⁶³ The Regulation 2006/2004 marks an important paradigm shift in consumer policy. The 1998/27 Directive on injunctions has been understood as an attempt to more strongly involve civil society into consumer enforcement matters. The committee has not yet been set up as the Regulation only fully enters into force on 1 January 2007. It will bring together only administrations and in the long run probably national consumer agencies. The committee is mostly concerned with transborder regulatory actions.

The Regulatory Committee which will have to be established under the Services Directive is shaped along the lines of the comitology procedure. It is entrusted with wide-ranging competences in order to give shape to the rather broad requirements which are meant to simplify administrative procedures, to further develop the information requirements, to establish common criteria for defining – for the purposes of professional insurance or guarantees – what is appropriate to the nature and extent of the risk, and last but not least to the establish an alert mechanism by means of a network of Member States with the participation of the European

⁶¹ Each Member State has to set up a European Railways Committee (DERC). The Regulatory Body is a body independent from any infrastructure manager, charging body, allocation body or applicant. It is independent in its organisation, legal structure, funding and in its decision making. The legal basis for the creation and competence of the Regulatory Body can be found in Article 10.7 of Directive 2001/12/EC and in Articles 30 and 31 of Directive 2001/14/EC.

⁶² The Netherlands will establish a consumer agency by the 1 January 2007.

⁶³ See Article 19.

Commission. The rulings to be expected might very well affect contract law under the scope of the Directive.

- (2) The second form are well established committees in the financial sector which are set up along the lines of the Lamfalussy procedure. CEIOPS performs the functions of the Level 3 Committee for the insurance and occupational pensions sectors, following the extension to those sectors of the *Lamfalussy Process*, as also applied by CEBS and CESR, respectively, in the banking and capital markets sectors. This role involves advice to the European Commission on the drafting of implementation measures for framework directives and regulations on insurance and occupational pensions ('Level 2 activities'), and establishing supervisory *standards, recommendations and guidelines* to enhance convergent and effective application of the regulations and to facilitate cooperation between national supervisors ('Level 3 activities'). CESR has been involved in the elaboration of the first level two Directive 2006/73. Its recommendations have influenced the concrete shaping of the contract relevant rules.
- (3) The third form are the two committees set up in the energy sector. ERGEG is a body of independent national energy regulatory authorities, which was set up by the European Commission as an advisory group to the Commission on energy issues.⁶⁴ It shall give regulatory co-operation and co-ordination a more formal status, in order to facilitate the completion of the internal energy market. ERGEG provides a platform for co-operation between national energy regulatory authorities, and between these authorities and the Commission. ERGEG is charged with advising and assisting the Commission in consolidating the internal energy market, in particular with respect to preparing draft implementing measures in the field of electricity and gas. The objective is to help ensure a consistent application in all Member States of the Electricity (2003/54/EC) and Gas (2003/55/EC) Directives as well as the Regulation (1228/2003) on cross-border exchanges of electricity. The Decision sets a much stricter framework for co-operation between national regulators and is certainly meant to make more informal networks, such as the Florence forum, superfluous.⁶⁵
- (4) The fourth form are initiatives outside the tight regulatory framework of EC law which bring together regulators and stakeholders. The above mentioned Florence Forum has been such an initiative which forestalled the establishment of the ERGEG, thereby leaving room for an informal exchange not only between regulators. A similar role to that of ERGEG is played by the CEER. This was created in 2000, when ten national energy regulatory authorities decided to sign a *Memorandum of Understanding for the establishment of the Council of European Energy Regulators*, which lead to the establishment of a not-for-profit association. Today it has twenty six *Members*. The overall aim is to enhance co-operation among national energy regulators and with the EU institutions. CEER and the ERGEG share similar objectives. There are strong links between both bodies.
- (5) The fifth new form might become an agency for the co-operation of energy and another one for the co-operation of telecommunication regulators. These shall be

⁶⁴ European *Commissions Decision* of 11 November 2003 (203/796/EC) OJ L 296, 14.11.2003, 14.

⁶⁵ Eberlein, in Cameron (ed.), 2005, 59 et seq. under 4.75 et seq.

established for the purpose of complementing at Community level regulatory tasks performed at national level by the competent national regulatory authorities. It remains to be seen whether Member States are willing to give away regulatory powers to the Community level.

5.2. Business and consumer organisations

Traditionally, business as well as consumer organisations might have a role to play in setting up voluntary regulation, jointly or business alone with or without consumer participation. At the European level – as well as at national level – business organisations are organised sector by sector, being tied together in diverse umbrella organisation. Usually they have no direct and specialised counterpart on the consumer side. Consumer organisations have to cover a broad array of consumer issues. It is an exception to the rule if consumers manage to organise their interests in a particular business sector. If they exist, such formations are the direct result of mass incidents and do not manage to develop a stable infrastructure.⁶⁶

This is why it is not all surprising that the services are organised by sectors, each sector having its own European business organisation. The major field of activities of concern to us is the elaboration of business-wide standard contract terms and codes of conduct. Consumers are represented at the European level by BEUC which is the umbrella organisation of national consumer organisations and agencies. However, there are two exceptions to the rule and both concern enforcement matters: The International Consumer Protection Enforcement Network (ICEPEN) and the Consumer Law Enforcement Forum (CLEF), which has become the successor of the European Consumer Law Group. Whilst both forums cover consumer services (inter alia), the activities are focused on informal exchange, respectively legal training on enforcement matters.

So far the European legislator has made only two attempts to tie business and consumer organisations more closely into its regulatory concept. The Directives on Electricity and Gas encourage the building of countervailing power through ‘small and medium-seized consumers’.⁶⁷ Medium-seized consumers must be understood as small and medium-seized companies which do not produce energy and but which need energy for their own production process. The explicit reference of consumers allows for an understanding under which also final consumers in the sense of the consumer contract law directives are meant. The Services Directive is even more concrete. Here professional bodies, chambers of commerce, draft and consumer organisations are enumerated.⁶⁸

In both directives, however, the EC legislator addresses the Member States who shall in co-operation with the European Commission encourage the enlisted consumer and business organisations to take necessary measures envisaged in the directives. Such a regulatory technique does not allow for clear cut mandates. In the energy directives, the reference is found in the context of the universal services obligations, in the service

⁶⁶ Such as break down of investment firms and accidents where a large number of people were injured by one single incident etc.

⁶⁷ See Article 3 of the Directives 2003/54 and 2003/55.

⁶⁸ Article 26.

directives business and consumer organisations shall promote the quality of the services – without any further specifications.

5.3. *Standardisation institutions and academic research groups*

The standardisation institutions are in essence business organisations, as they serve the needs of business to develop technical standards for the sake and benefit of everybody. However, the new approach has dramatically changed the outlook of these bodies. The Memorandum of understanding, concluded between the European Commission and CEN/CENELEC established a fruitful co-operation which is based on mutual rights and obligations.⁶⁹ The European Commission subsidises the work of these bodies and might in return give mandates to the institutions to elaborate standards in area where the Commission pursues particular objectives, such as increasing consumer safety. The standardisation institutions turn into semi-public or semi-private bodies which are no longer tied to industry alone, but which co-operate with the European administration. The Services Directive mentions the standardisation explicitly, though again through the Member States in co-operation with the European Commission.⁷⁰

Since the adoption of the Commission's Communication on Contract Law,⁷¹ a new player has entered the scene of European regulators: *academic study groups*. Pushed into action by the European Parliament, the European Commission has been striving for a Common Frame of Reference⁷² which is to be prepared by the so called *acquis group* and the *study group* and which will soon be available in the form it has been submitted to the European Commission. The *acquis group* has, at its name indicates, the task to circumscribe and analyse the existing *acquis communautaire* in European contract law. The work is focusing on European consumer law, the Rome convention, the Brussels Convention/Regulation and product related European private law rules.⁷³ It seems as if the areas of concern here, beyond consumer contract law on services, remained outside its focus of interest. The *study group* continues the work started 20 years ago in the Lando Commission which culminated in the adoption of the European Principles of Contract Law (PECL) I-III.⁷⁴ The broad programme is based on comparative analysis.⁷⁵ One of the working groups deals with services. The results were published in 2007.⁷⁶

However, the two study groups are more than mere academic circles where interested lawyers from all over Europe unite in order to voluntarily elaborate European Principles of Contract Law, in the hope that these rules might serve as a common legal ground for

⁶⁹ See for a deeper analysis, Joerges/Falke/Micklitz/Brüggemeier, 1988.

⁷⁰ Article 26 (5).

⁷¹ COM (2001) 398 final. 11.7.2001, OJ EC C 255, 13.9.2001, 1.

⁷² See von Bar, 2005, pp. 10, 17; Reich, 2006.

⁷³ The working programme is not publicly available. However it may be derived from a conference held in 2005 whose results are published: Europäische Rechtsakademie Trier (2006), *Special Issue European Contract Law* with contributions from Wilhelmsson, p. 16; Schulze, p. 26; Poillot, p. 36; Howells, p. 45; Ramberg, p. 48; Pfeiffer, p. 67; Leible, p. 76; Zoll, p. 90.

⁷⁴ Lando/Beale, 2000; Lando/Clive/Prum/Zimmermann (eds.), 2003.

⁷⁵ Hesselink/Rutgers/Diaz/Scotton/Feldmann and Benevolent Intervention into Another's Affairs (ed.), 2006. All in all ten volumes are foreseen.

⁷⁶ Barendrecht/Jansen/Loos/Pinna/Cascao/van Gulijk.

the interpretation of transborder contract making in Europe. The European Commission has forged the two groups together in a so called Network of Excellence. They have a clear political mandate. It might be possible to regard the Commission's project as another variant of the new approach-type of law making: the Memorandum of Understanding being the contract concluded to establish the Network of Excellence, the mandatory requirements being the envisaged Common Frame of References and the technical standards elaborated by standardisation institutions being the set of rules to be elaborated in the tradition of the Lando-Commission by European academic research.⁷⁷ Such a link to the European Commission is missing in the European Centre on Tort and Insurance Law, which remains a purely academic exercise without political ties.

	Co-operation, committees, networks	Academic research groups and standardisation on institutions	Business organisations	Consumer organisations
Consumer contract law on services	Co-operation of national enforcement agencies (Regulation 2006/2004) ⁷⁸	Acquis group ⁷⁹ and Study group ⁸⁰	UNICE ⁸¹	BEUC ⁸² International Consumer Protection Enforcement Network (ICPEN), ⁸³ Consumer Law Enforcement Forum (CLEF) ⁸⁴
Transport	European Aviation Safety Agency ⁸⁵ European Railway Agency ⁸⁶ co-operation of enforcement bodies ⁸⁷		International Air Transport Association (IATA); ⁸⁸ Community of European Railways and Instruction Companies (CER) ⁸⁹	BEUC ⁹⁰

⁷⁷ See for further details, Micklitz (2007).

⁷⁸ OJ L 364, 9.12.2004, 1.

⁷⁹ www.acquis-group.org

⁸⁰ www.sgecc.net/overview.

⁸¹ www.unice.org.

⁸² www.beuc.org.

⁸³ www.icpen.org.

⁸⁴ www.clef.org.

⁸⁵ http://www.easa.eu.int/home/agenmeas_en.html; see Articles 13, 15, 45, 46 of Regulation 1592/2002.

⁸⁶ On the basis of the Regulation 881/2004, <http://www.era.europa.eu/>

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	Co-operation, committees, networks	Academic research groups and standardisati on institutions	Business organisations	Consumer organisations
Financial services	Committee of European Insurance and Occupational Pensions Supervisors (CEIOPS); ⁹¹ Committee on European Securities Regulators (CESR) ⁹²	Insurance ECTIL ⁹³	The European Insurance and Reinsurance Federation; ⁹⁴ European Banking Federation ⁹⁵	BEUC ⁹⁶
Network services	Informal network of agencies in energy sector (Florence Forum on Electricity and the Madrid Forum on Gas); European Regulators Group for Electricity and Gas (EREG) ⁹⁷ and Council of European Energy Regulators (CEER); ⁹⁸ European Regulators Group for Electronic Communication Networks (ERG) ⁹⁹		Euroelectric ¹⁰⁰ Promotion of <i>medium-seized</i> consumers of electricity through aggregation of representation ¹⁰¹	Florence and Madrid Forum open for consumer organisations; Promotion of <i>small</i> consumers of electricity through aggregation of representation ¹⁰²

⁸⁷ Article 31 of Regulation 1371/2007.

⁸⁸ <http://www.iata.org/index.htm>

⁸⁹ <http://www.cer.be/content/default.asp>

⁹⁰ www.beuc.org

⁹¹ <http://www.ceiops.org/> The Committee of European Insurance and Occupational Pensions Supervisors (CEIOPS) was established pursuant to the European Commission Decision 2004/6/EC of 5 November 2003, OJ L 3, 7.1.2004, 30.

⁹² <http://www.cesr-eu.org/>

⁹³ European Centre on Tort and Insurance Law, www.ectil.org.

⁹⁴ <http://www.cea.assur.org/>

⁹⁵ <http://www.fbe.be/Content/Default.asp>

⁹⁶ www.beuc.org

⁹⁷ <http://www.ergeg.org/>

⁹⁸ <http://www.ceer-eu.org/>

⁹⁹ www.erg.eu.int

¹⁰⁰ <http://www.euroelectric.org>

¹⁰¹ Article 3 (3) of Directive 2003/54/EC.

¹⁰² Article 3 (3) of Directive 2003/54/EC.

	Co-operation, committees, networks	Academic research groups and standardisation on institutions	Business organisations	Consumer organisations
Services	Co-operation and exchange of information via central contact points	CEN/CENEL EC, ISO/COPOL CO	MSts in co-op with Com shall encourage professional bodies, chambers of commerce, craft to promote the quality of services ¹⁰³	ANEC ¹⁰⁴ MSts in co-op with Com shall encourage <i>consumer organisations</i> to promote the quality of services

6. New instruments/new actors – and the effects on contracts for services

The process which will be documented is still in an infant stage. That is why an analysis can only be but preliminary. Most of the procedures have just been set up and the guidelines, recommendations and other soft regulatory instruments have been published only recently. However, some tendencies are already clearly emerging.

6.1. Differing regulatory intensities in co-regulation

Co-regulation is not a clear-cut concept. This is reflected in the various forms here under review. The Lamfalussy procedure is certainly nearest to traditional regulatory intervention, in the sense that the legislator – Parliament and Council and, later on, the executive – the Commission – holds the law-making procedure firm in its hands. The management of the third level lies in the hands of the competent committee, CESR (financial instruments) and CEIPOS (insurance and occupational pensions). Although the law-making process has not yet reached the fourth level, the Directive 2004/39 (first level) and the Directive 2006/73 as well as Regulation 1287/2006 (second level) might be paradigmatic for the way in which the competences are shared. Section 2 of Directive 2004/39 dealing with ‘Protection to ensure investor protection’ (Articles 19 et seq.) starts from a very broad concept. It lays down principles and guidelines and no or very few clear cut rules. The Directive 2006/73, which was meant to give shape to these broad principles, again remains rather broad. For example, Article 27 of Directive 2006/73 shall shape Article 19 (2) of Directive 2004/39. It reads as follows:

‘(The information) shall be accurate and in particular shall not emphasise any potential benefit of an investment service ... without also giving a fair prominent indication of the

¹⁰³ Article 26 (3) of Directive 2006/123/EC.

¹⁰⁴ www.anec.org

relevant risk. ... It shall not disguise, diminish or obscure important items, statements or warnings.'

Although the subsequent articles provide for a number of specifications with regard to particular types of information, the question remains whether such a provision is really helpful in giving shape to a ruling which is adopted by the European Parliament and the Council. It is very likely that the hard core questions will be resolved at the third and fourth level.

The new approach-type of regulation relies much more on shared responsibilities and co-operation between public regulator and private institutions. The results obtained in the field of technical standardisation are regarded as a success story.¹⁰⁵ In fact, the new approach has boosted European standard making through CEN and CENELEC to the detriment of national standardisation institutions such as AFNOR, BSI and DIN which have lost influence. Whether the adopted standards satisfy the needs of effective consumer protection against risks to their health and safety has never been systematically and comprehensively evaluated.¹⁰⁶ The Services Directive builds on the new approach type of regulation. The work within CEN/CENELEC and also ISO/COPOLCO, however, has already begun, without yet yielding many results.

The same is true with regard to the Commission project on European Contract Law. The Common Frame of Reference has been completed in 2007, at least in the form it has been presented to the European Commission. A set of Principles on European Law on Service Contracts (PELSC) has already been elaborated by the study group.¹⁰⁷ However, it has not been merged with the findings of the *acquis* group and has not been agreed by the European Commission. The principles as they stand today contain seven chapters dealing with general provisions, construction contracts, processing contracts (such as repair and maintenance), storage contracts, design contracts, information supply and medical treatment. The services at stake here are not covered. The European Commission puts more and more emphasis on the announced revision of the *consumer acquis*¹⁰⁸ and seems to postpone the political discussion of a Common Frame of Reference.¹⁰⁹

There is no traditional intervention in the field of transport contracts outside the above mentioned regulation. The European airports and the European Airlines have engaged in a voluntary commitment, however, only in reaction to the Communication of June 2000.¹¹⁰ The two documents are said – this is highlighted in the documents – to be the result of extensive consultation with consumers, European governments, the European Commission, the airlines, and the airports. The problem is that, in particular, low cost

¹⁰⁵ http://ec.europa.eu/enterprise/newapproach/index_en.htm

¹⁰⁶ As a scarce exemption to the rule, Micklitz/Schieble, 2004.

¹⁰⁷ Available on the website of the study group http://www.sgecc.net/media/downloads/sgeccservices_contracts.pdf

¹⁰⁸ COM (2006) 744 final.

¹⁰⁹ This is certainly a reaction to meeting of the EU council in London in November 2005, see EU-Council, Resolution of 28-29 November 2005.

¹¹⁰ COM (2000) 365 final, 21.6.2000 and the p. 7 of the ECLG Paper on Protecting the Rights of Passengers and Holidaymakers (written mainly by Tonner/Schuster), see www.europeanconsumerlawgroup.org.

carriers refused to sign the document. It might well be that the European Commission will sooner or later replace these voluntary commitments by binding regulation.¹¹¹

6.2. *Self-regulation*

Outside the field of transport services, there are no major initiatives to be reported which approach contract making from a European perspective. Standard contract terms or standard contracts are still very much subject to national markets, national regulators and national law.

6.3. *Participation of stakeholders*

It is a common characteristic in all *less traditional instruments* that stakeholders are not given a formal legal status. Already the new approach on technical standards and harmonisation has caused much discussion of the question of whether and to what extent consumer organisations should be legally included in the standardisation process.¹¹² Today, ANEC has taken over the role of organising the consumer input, however, without being granted any formal legal status. The Services Directive pursues the same approach. It mentions the importance of standardisation of services, it even mentions consumer organisations, but without drawing any conclusion with regard to participation rights in whatever form. The first draft of Regulation 2006/2004 provided for the possibility of stakeholders to be heard in the hearings of the envisaged committee. However, this right did not survive the final agreements in the Council.¹¹³

The Lamfalussy procedure integrates national governments and national regulators in the law-making process, but does not deal with the role and function of stakeholders. This task has been left to committees set up in the insurance and the investment services, CESR and ERGEG. The former has set up a *Market Participants Consultative Panel*, which has an advisory function and which comprises representatives from the various business sectors. These are selected and appointed by the European Commission. The Committee chooses the appropriate voices itself. Private investors or their organisations are not regarded as market participants.

The ERGEG has published already, in 2004, Public Guidelines on ERGEG's Consultation Practices. No. 4 says: 'Regulators will, where appropriate, consult the full range of interested parties, including producers, network operators, suppliers and consumers as appropriate.' However, ERGEG has not set up a formal consultative body. Despite the harmonious language, the practical effect of these guidelines is limited. In the very end it comes near to the 'normal' consultation procedure which the European Commission initiates whenever it intends to prepare and to take action.

¹¹¹ See COM (2005), 46 final, 15.3.2005.

¹¹² Joerges/Falke/Micklitz/Brügemeier, 1988 and more particularly Micklitz, in Joerges, 1989, pp. 182-205.

¹¹³ See www.european.consumerlawgroup.org, comments on the regulation on consumer protection co-operation, ECLG 134/2004.

6.4. Impact on the law of service contracts

It is striking to see that the European Commission, although it has no stable competence to regulate contract law *per se*,¹¹⁴ has found ways and means through new or less traditional instruments to steadily increase the set of rules which affect directly or indirectly the law of service contracts. Most of the rules which are developed within the co-regulation procedures are not legally binding, with the exception of the level 2 Directive 2006/73 and Regulation 1287/2006 on investment services. The vast majority of the rules are soft, in the sense that they do not constitute binding contractual rights and obligations. This will be true for the Common Frame of Reference, although it might require a quasi-legal status,¹¹⁵ as well as the principles of European contract law to be developed by the *acquis* and by the study group and to be agreed by the European Commission. For the time being, these rules might certainly gain no more than the status of a formal recommendation.¹¹⁶ Such a value judgment applies equally to the set of propositions launched by the ERGEG and the standards which will be developed by CEN and CENELC under the Services Directive.

The soft and non-binding character does not preclude these rules from influencing the law of service contracts. The European Commission uses the less traditional instruments in a creative way to build an ever denser net of European (soft) rules which narrows the leeway for national private law regulators, both traditional and less traditional. Theoretically, Member States and the parties to a contract remain free. They may subscribe to these new set of rules or ignore them. In practice, however, these rules, as far as they result from European co-regulation, benefit from a higher repudiation and an increased legitimacy. Therefore indirect pressure for convergence might be high.

	Co-regulation	Self-regulation	Participation of stakeholders	Impact on contract law
Consumer contract law on services	Promotion of European wide elaboration of standard terms and conditions through Commission, ¹¹⁷ however, withdrawn, ¹¹⁸ Common Frame of Reference and Principles on European Contract Law (PECL)		No guidance under the Communications of the Commission, but consultation of stakeholders on a voluntary basis	Draft Rome I allows for a reference, ¹¹⁹

¹¹⁴ Weatherill, in Cafaggi (ed.), 2006, pp. 79-107.

¹¹⁵ If really the European Commission uses the CFR as a toolbox, as it indicated in its Communication, see in particular von Bar, 2005, p. 17. The annex contains a list of possible ‘tools’.

¹¹⁶ There is much discussion on the way in which such a Code of Reference could be enacted, see van Gerven, in Furrer (ed.), 2006, p. 437; Reich, 2007, p. 161.

¹¹⁷ See COM (2003), 68, final part. 81-88 and then Communication from the Commission to the European Parliament and Council. European Contract Law and the revision of the *acquis*: the way

	Co-regulation	Self-regulation	Participation of stakeholders	Impact on contract law
Transport	Airline Passenger Service Commitment; ¹²⁰ ACI Europe Airport voluntary commitment on airport services ¹²¹ Railway passenger rights, monitoring compliance with quality commitments ¹²²	Air passenger rights IATA Recommendation 1724;	On a voluntary basis	Standard contract terms
Financial services	Lamfalussy procedure in insurances and financial instruments,		Consultation within Lamfalussy 2 level; ¹²³ CESR market participants consultative panel, ¹²⁴	Regulation 1287/2006 and Directive 2006/73 ¹²⁵ (2 nd level) rules on contract related provisions (business conduct/best practice 2004/39, 3 rd level rules under preparation ¹²⁶
Network services	Measures shall include those under Annex A ¹²⁷ Charter on the Rights of Energy Consumers ¹²⁸		No particular rules foreseen at EC level; but public guidelines on ERGEG's consultation process, ¹²⁹	ERGEG launches 3 best practice propositions on transparency customer protection and the supplier switching process ¹³⁰

forward, Brussels, 11.10.2004 COM (2004) 651 final (hereinafter ECL and the revision of the acquis) 'The second measure sought to promote the development by private parties of Standard Terms and Conditions (STC) for EU wide use rather than just in one single legal order', p. 6. Wilhelmsson, 2006, pp. 49 et seq., 59, footnote 37.

¹¹⁸ See, COM (2005) 456 final, 23.9.2005, p. 11.

¹¹⁹ Artikel 3 (2) of COM (2005) 650 final, 15.12.2005.

¹²⁰ http://ec.europa.eu/transport/air_portal/passenger_rights/doc/commitment_airlines_en.pdf

¹²¹ http://ec.europa.eu/transport/air_portal/passenger_rights/doc/commitment_airports_en.pdf

¹²² Regulation 1371/2007, Art. 28.

¹²³ http://ec.europa.eu/internal_market/securities/isd/consultation/replies_en.htm

¹²⁴ <http://www.cesr-eu.org/template.php?page=groups&id=24&keymore=1&BoxId=1>

¹²⁵ OJ L 241, 2.9.2006, 1 et seq. and 26 et seq.

¹²⁶ http://www.cesr-eu.org/index.php?page=consultation_details&id=76

¹²⁷ Article 3 (5) 3 of Directives 2003/54/EC and Article 3 (3) 2003/55/EC.

¹²⁸ Towards a European Charter on the Rights of Energy Consumers COM (2007) 386 final, 5.7.2007.

	Co-regulation	Self-regulation	Participation of stakeholders	Impact on contract law
Services	<p>MSts in Co-op with the Com encourage <i>providers</i> to take action on voluntary certification quality charters;¹³¹</p> <p>Ibid. independent assessment of quality and defects of services, in particular comparative trials or testing and communication of results, <i>notably by consumer organisations</i>¹³²</p> <p>Ibid. development of voluntary European standards¹³³</p>		<p>From participation to co-operation, from providing input to state governed rules to developing voluntary rules, on which Member States and the Commission might comment</p>	<p>Direct impact through supplementing voluntary measures, mainly through technical standards elaborated by CEN/CENELEC</p> <p>Indirect impact through development of ‘best practices’ and appropriate comparative tests</p>

7. The substance of the public/private law regulation

The crucial difficulty which results from the growing number of European rules launched, issued and adopted by the various regulators is to not loose track. It requires detective skills and stubbornness to dig all the various rules out of the web. The success is worth the effort. The web reveals more and more rules. All these various regulations, directives, codes, charters, recommendations, programmes etc. will then have to be analysed. It seems as if the legal discipline is very much divided in branches, each dealing vertically with one particular field of services. I would not go as far as claiming the need to systemize all these rules. This sounds as if it is possible to deduce common rules out of this scattered picture.¹³⁴ The following survey is meant to show the existing set of rules within a common analytical framework. In this respect, it is no more than a

¹²⁹ http://www.ergeg.org/portal/page/portal/ERGEG_HOME/ERGEG_PC/ERGEGPUBLIC-CONSULTATIONPROPOSAL_APPROVED.PDF

¹³⁰ http://www.ergeg.org/portal/page/portal/ERGEG_HOME/ERGEG_DOCS/ERGEG_DOCUMENTS_NEW/CUSTOMER_FOCUS_GROUP/PR-06-08_CFG-BestPractices.doc

¹³¹ Article 26 (1) Directive 2006/123/EC.

¹³² Article 26 (4) Directive 2006/123/EC.

¹³³ Article 26 (5) Directive 2006/123/EC.

¹³⁴ Optimistic with regard to universal services, Rott, 2005, p. 323; sceptical Schmid, 2005, p. 211; Collins, 2006, p. 213.

first stock-taking which does not go into detail, but intends rather to give a survey on the European law of service contracts.

7.1. Conclusion, formation and advice

It belongs to the standard rhetoric of the EC legislator that European law does not intervene into the rules governing the conclusion of contracts. A closer look reveals that the picture is more complicated than that. There are areas where freedom of contract is in fact zero, where suppliers are obliged to conclude a contract on the supply of public goods. But most of the rules could be read so as to focus on the pre-contractual circumstances, by way of transparency rules, of pre-contractual information duties and pre-contractual advice. This goes very much along with the concept of a competitive contract law, which I have developed elsewhere.¹³⁵ European contract law rules are said to strengthen the insured, consumers and customers' rights to receive as much information as possible in the pre-contractual stage so as to be able to compare prices and quality in order to make not only an informed but a best informed decision. European law¹³⁶ is comes close to an obligation of the supplier to disclose substantial information.¹³⁶

	Consumer contract law on services	Transport	Financial services	Network services	Services
Access	Access to consumer credit No EC rules	Particular rules on access to travel information systems ¹³⁷	Access to bank account No EC rules	Access to energy supply and public phone under the universal service doctrine	
Freedom to contract (choice)		Through establishment of competition and unbundling		Through establishment of competition and unbundling; Change of supplier free of charge ¹³⁸ Charter on the rights of Energy consumers – free choice of supplier ¹³⁹	Improved choice by way of transborder services ¹⁴⁰

¹³⁵ Micklitz, 2005, pp. 549-586.

¹³⁶ Wilhelmsson, in Schulze et al., 2003, p. 245 and now Article 7 of Directive 2005/29 puts a verdict on misleading omissions, see Howells/Micklitz/Wilhelmsson, 2006, p. 147.

¹³⁷ Regulation 1371/2007, Art. 4, 8 and 10 with Annex I.

¹³⁸ See the ERGEG proposition on switching process, fn. 129.

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	Consumer contract law on services	Transport	Financial services	Network services	Services
Transparency	Contract specific information on price and quality of service	Envisaged: air carrier right to transparency in real time; ¹⁴¹ railway ticket as prima facie evidence for contract ¹⁴²	insurance (no particular rules, but mediator); financial instruments are directed to the <i>potential</i> customer	Contract specific information on price and quality of service ¹⁴³ Charter on the rights of Energy consumers on prices, tariffs and monitoring ¹⁴⁴	Assistance for recipients by way of obtaining information through consumer organisations, ¹⁴⁵ in a clear and unambiguous manner ¹⁴⁶
Information obligations	Medium related and contract related set of information duties	in particular: right to know the identity of the air carrier ¹⁴⁷ detailed set for railroad passengers ¹⁴⁸	Damage: basic information; Life insurance: detailed set of information duties Investment services: detailed set of information duties ¹⁴⁹	contract related set of information duties Charter on the rights of Energy consumers ¹⁵⁰	Detailed set of information on request ¹⁵¹

¹³⁹ COM (2007) 386 final, 5.7.2007, p. 13.

¹⁴⁰ Services Directive 2006/123/EC, Article 20 and 21.

¹⁴¹ COM (2005) 46 final, 16.2.2006 at (47).

¹⁴² Art. 4 (2) COM (2004) 143 final, 3.3.2004.

¹⁴³ See the ERGEG proposition on price transparency process, fn. 129.

¹⁴⁴ COM (2007) 386 final, 5.7.2007, p. 12.

¹⁴⁵ Directive 2006/123/EC, Article 21 (1) c).

¹⁴⁶ Directive 2006/123/EC, Article 22 (4).

¹⁴⁷ Regulation 261/2004, ruling that entered into force on the 16 July 2006, see press release of DG TREN from 18 July 2006.

¹⁴⁸ Regulation 1371/2007, Article 4, 8 and 10 with Annex I.

¹⁴⁹ In Articles 19-24 of the Directive 2004/39 (1 level) and Articles 27 et seq. of Directive 2006/73 (2 level).

¹⁵⁰ COM (2007) 386 final, 5.7.2007, p. 11.

¹⁵¹ Directive 2006/123/EC, Article 22.

	Consumer contract law on services	Transport	Financial services	Network services	Services
Advice	Responsible lending – as information duty ¹⁵²		Insurance no rules (but mediator) Financial instruments: Know your product, know your customer, agreement in writing ¹⁵³		

7.2. Content

Outside anti-discrimination, most of the particular EC rules revolve around quality and safety of the services. Safety seems to be relevant primarily only in transport contracts and in energy supply. The big issue is the regulation of quality of the service which constitutes the major subject of co- and self-regulation. The most developed rules exist in the field of financial services. The four-level mechanism in the Lamfalussy procedure leads, however, to duplications. The Services Directive will probably produce a whole series of technical standards, which sector related or service related define quality standards. The ERGEG is now intensifying its efforts to make propositions on how to define the quality of the service. All these efforts are legally guided by broadly-termed requirements such as fairness, honesty, professional behaviour, transparency and best practice.

It will have to be shown whether the results of co-regulation and enhanced self-regulation meet these standards. A test is possible only if feasible criteria can be deduced from these broadly termed requirements which allow for an independent comparative assessment mechanisms, as Article 26 of the Services Directive puts it. The question remains whether these soft rules, which are meant to *fully* harmonise the law on the particular service in question, will gain supremacy over binding European and national consumer law rules, such as those laid down in Directive 93/13/EEC.¹⁵⁴

¹⁵² Still foreseen in the modified proposal for a Directive of the European Parliament and of the Council on credit agreements for consumers repealing Council Directive 87/102/EEC and amending Council Directive 93/13/EEC, Interinstitutional File, 2002/0222 (COD), 2.10.2006; whether or not this comprises advices is no longer clear under the Common Position, see Artt. 5 (6) and 8.

¹⁵³ Article 19 (7) of Directive 2004/39 in combination with the working document and Articles 35 et seq. of Directive 2006/73 (2 level).

¹⁵⁴ I would like to thank Norbert Reich for putting emphasis on the relationship between vertical and horizontal rules in European law, with particular regard to consumer protection.

	Consumer contract law on services	Transport	Financial services	Network services	Services
Affordability	Consumer credit? ¹⁵⁵			Energy prices, telephone tariffs ¹⁵⁶ Charter on the rights of Energy consumers – protection of vulnerable consumers ¹⁵⁷	
Anti-discrimination ¹⁵⁸					
Quality		Air carrier rules on passengers with reduced mobility; ¹⁵⁹ Envisaged transferrability of airline tickets ¹⁶⁰ and integrated ticketing ¹⁶¹ Railway passenger, similar rules; ¹⁶² Service quality standards ¹⁶³	Financial instruments: best practice and client order handling rules ¹⁶⁴	Security of supply; ¹⁶⁵ Service to be provided without interruption, EREGG launched proposition on best practices ¹⁶⁶	Procedural rules on the elaboration of quality standards for services; ¹⁶⁷ Substance of the quality charter: making it easier to assess the competence of the provider, encourage independent assessment mechanisms

¹⁵⁵ The question relates to the possible effects of scoring under which the poor pay more, see in this context the European Coalition for Responsible Lending, <http://www.responsible-credit.net/>.

¹⁵⁶ See on the existence of such a principle Rott, 2005, p. 323.

¹⁵⁷ COM (2007) 386 final, 5.7.2007, p. 15 under reference to Article 3 (5) of Directive 2003/54/EC and Article 3 (3) Directive 2003/54/EC.

¹⁵⁸ Article 1 of Directives 2000/43/EC OJ EC L 180, 19.7.2000, 22 and Article 3 (1) lit h) of 2004/113/EC OJ EC L 373, 21.12.2004, 37.

¹⁵⁹ Regulation 1107/2006, OJ L 204, 26.7.2006, 1.

¹⁶⁰ Proposed in COM (2000) 365 final, 21.6.2000, but not integrated in the 'Airline Passenger Service Commitment'.

¹⁶¹ COM (2005) 46 final, 16.2.2005 (48).

¹⁶² Regulation 1371/2007, Chapter V, Artt. 18 et seq.

¹⁶³ Regulation 1371/2007, Chapter V, Artt. 28.

¹⁶⁴ Articles 21 and 22 of Directive 2004/39, respectively Article 46 et seq. Directive 2006/73 (2 level).

	Consumer contract law on services	Transport	Financial services	Network services	Services
Safety		Operating ban on unsafe carriers ¹⁶⁸ Railway Safety ¹⁶⁹		Protection of health and safety ¹⁷⁰	
Payment modalities	Prohibition of advanced payment in time share contracts ¹⁷¹			Wide choice of payment modalities ¹⁷² Charter on the rights of Energy consumers ¹⁷³	
Contract terms	In commercial communication making contract terms and general conditions available ¹⁷⁴		mandatory minimum standards for non-professional clients ¹⁷⁵	Contract conditions shall be provided prior to the conclusion of the contract ¹⁷⁶	

7.3. Rights and remedies

European law puts much emphasis on rights and remedies. The reason must be found in the early days of the European Community, when the European Court of Justice turned the Treaty of Rome into a genuine legal order, granting rights to suppliers, and later

¹⁶⁵ Article 3 (3) and (7), Article 4 of Directive 2003/54 (Electricity) and in various other references; Article 3 (2) and (4), 5, 22 and 27 of Directive 2003/55 (Gas).

¹⁶⁶ http://www.ergreg.org/portal/page/portal/ERGEG_HOME/ERGEG_DOCS/ERGEG_DOCUMENTS_NEW/CUSTOMER_FOCUS_GROUP/PR-06-08_CFG-BestPractices.doc.

¹⁶⁷ Article 26 of the Services Directive 2006/123/EC.

¹⁶⁸ Regulation 2111/2005 of 14 December
http://eur-lex.europa.eu/LexUriServ/site/en/oj/2005/l_344/l_34420051227en00150022.pdf

¹⁶⁹ Directive 2004/49/EC, OJ L 164, 30.04.2004, 44.

¹⁷⁰ Articles 5, 6 and 24 of Directive 2003/54 (Electricity), Articles 3 (2), 6, 26 of Directive 2003/55 (Gas).

¹⁷¹ Article 6 of Directive 94/47.

¹⁷² Annex A d) of Directives 2003/54 and 2003/55.

¹⁷³ COM (2007) 386 final, 5.7.2007, p. 12.

¹⁷⁴ Article 10 (3) of Directive 2000/31 on e-commerce.

¹⁷⁵ Article 19 (7) of Directive 2004/39.

¹⁷⁶ Annex A a) of Directives 2003/54 and 2003/55.

consumers, which prevail over national law that conflicts with the basic freedoms.¹⁷⁷ The European legislator and the European Court of Justice have extended the concept of rights and remedies to secondary EC legislation. This is particularly true with regard to the law on service contracts. There are rights at all ends, the rights to withdraw from a contract or at least to cancel the contract in case of undue compliance belongs to the core of EC regulation. And there is a whole series of compensation rights in the field of services which far overreach the existing state of EC law with regard to products. However, European law does not sanction violations of the obligation to supply and/or to disclose information, at least not by contract law remedies.¹⁷⁸

It is one characteristic of EC contract law that it does not respect the divide between substantive law and procedural law. The different regulations, directives and soft-law instruments contain mostly rules on out-of court settlement. This policy of the European Commission fits in very well into the advocacy of less traditional instruments. The law is soft, and so is the enforcement. Collective remedies are scarce. The amazing ruling in the Directive 2004/39 has not yet found the attention it deserves.

	Consumer contract law on services	Transport	Financial services	Network services	Services
Right to withdrawal and cancellation rights	Consumer credit and time sharing (withdrawal) Cancellation (package tour, time sharing)	24 hour cooling-off period for telephone reservations under the 'Airline Passenger Service Commitment' ¹⁷⁹	Right to withdrawal in life insurance contracts; ¹⁸⁰	Cancellation right in case of price increase ¹⁸¹	
Compensation for improper information supply					
Compensation for undue performance	For non performance and pain and suffering (package tours) ¹⁸²	Air carrier: in case of delay and cancellation ¹⁸³ Railway undertaking for delays ¹⁸⁴	Liability of investment firms for tied agents ¹⁸⁵	Energy: information on compensation rights	

¹⁷⁷ Always fascinating to re-read Stein's seminal analysis of the European Court of Justice, 1981, p. 1.

¹⁷⁸ Schwintowski, in Schulze et al., 2003, p. 267.

¹⁷⁹ Article 6, http://ec.europa.eu/transport/air_portal/passenger_rights/doc/commitment_airlines_en.pdf

¹⁸⁰ Article 30 of Directive 92/96.

¹⁸¹ Annex A b) Directives 2003/54 and 2003/55.

¹⁸² Article 5 of Directive 90/314 and ECJ, 12.3.2002, Case C-168/00 *Simone Leitner* ECR 2000, I-2631.

¹⁸³ Article 7 of Regulation 261/2004.

¹⁸⁴ Article 16 of Regulation 1371/2007.

	Consumer contract law on services	Transport	Financial services	Network services	Services
Joint/subsidiary liability in trilateral contracts	Rules on combined contracts (sale and credit) credit; package tour (liability of operator); financed time sharing contracts		Triangle credit card issuer, contracting company and credit card user		
Compensation for personal injury and belongings		Air carrier liability in the case of accidents ¹⁸⁶ Railway undertakings; liability in case of accidents (also handluggage) ¹⁸⁷			Professional liability insurance and guarantees ¹⁸⁸
Insolvency	Protection against insolvency of tour operator ¹⁸⁹	Envisaged, in the event of bankruptcy of the air carrier ¹⁹⁰	Investor compensation schemes ¹⁹¹		
Complaint handling		Air carrier dispute settlement on a voluntary basis; Railway passengers: complaint handling procedure ¹⁹²	Financial instruments: promotion of dispute settlement procedures ¹⁹³	Energy: dispute settlement 98/257 Charter on the rights of Energy consumers ¹⁹⁴	Detailed rules on settlement of disputes ¹⁹⁵

¹⁸⁵ Article 23 of Directive 2004/39.

¹⁸⁶ Regulation 2027/97 as amended 889/2002.

¹⁸⁷ Article 11 of Regulation 1371/2007.

¹⁸⁸ Article 23 of the Services Directive 2006/123/EC.

¹⁸⁹ Article 7 of Directive 90/314.

¹⁹⁰ COM (2005) 46 final 16.2.2005 at (49).

¹⁹¹ Directive 97/9/EC, OJ L 84 of 26.3.1997.

¹⁹² Article 27 of Regulation 1371/2007.

¹⁹³ Article 53 of Directive 2004/39.

¹⁹⁴ COM (2007) 386 final, 5.7.2007, p. 14.

¹⁹⁵ Article 27 of the Services Directive 2006/123/EC.

	Consumer contract law on services	Transport	Financial services	Network services	Services
Collective remedies			Financial instruments: in the interests of consumers before courts and administrations by public bodies, and/or consumer and/or business organisations ¹⁹⁶	Charter on the rights of Energy consumers refers to Directive 98/27 on injunctions ¹⁹⁷	

8. Preliminary observations on the applied regulatory strategies

The overview on the different sectors of EC service regulation confirms once again the instrumental, sector related approach the European regulator applies. The European regulator, in particular the European Commission, does not care much about regulatory approaches in similar fields which are already operating. The European regulator understands each new sector as a testing ground for new tools, strategies and instruments.

This becomes particularly clear in the various forms of co-regulation. For decades the European Commission has been trying to advocate giving self-regulation a stronger place in European law. Co-regulation, broadly speaking, is nothing more than an attempt to combine mandatory legislative requirements with voluntary rule-making through business and consumer organisations. But there is no clear cut concept behind it. It seems as if the European Commission has never discussed what co-regulation really means, to what extent particular tools are appropriate with regard to specific regulatory fields only, or whether it is possible to develop common tools for similar services and how should they look like. The problem is that each new regulatory tool has long lasting consequences on the fabric of law-making once it is established.

There is not even a common policy on the types of committees which are set up, despite the comitology procedure. Since 1985, the year when the new approach was adopted, the question of whether stakeholders should be given a formal status in the development of contract related rules through codes, recommendations, guidelines or standards has been hanging in the air. The various initiatives to set up informal consultation bodies

¹⁹⁶ Article 52 para 2 of the Directive 2004/39 leaves Member States the choice between the three potential bodies acting on behalf consumers.

¹⁹⁷ COM (2007) 386 final, 5.7.2007, p. 15.

with no rights or duties yield an artificial European society, in which the European Commission selects and appoints those who may be allowed to provide advice. The open consultation procedure via the publication of communications on which in principle everybody – who knows about the communication – could comment seems a rather reduced form of public input. The legitimacy of law-making through co-regulation is still shaky and far from being resolved.

EC law as it stands today does not explicitly regulate private law matters. However, this is only half the truth. The law-making machinery which is so effectively set into motion by way of the interplay between the legislative, the regulatory agencies and the new actors entering the scene, has boosted the elaboration of all sorts of rules which affect private law on services. The sheer mass of rules and the difficulty of not losing track reminds me of law-making in international organisations. Most of these organisations have no regulatory power, a deficit they compensate by way of constantly adopting new soft law rules. It might be possible to interpret the various forms of co-regulation as a means of circumventing the lack of power within the EU. The problem today is less that there are no rules, but that there are too many rules, whose legal value, however, is – to say the least – uncertain. Most of these rules go back to mandatory though varying European general requirements which are said to fully harmonise the respective service. But is it really the policy that these new regulatory instruments should gain supremacy over binding national law with which it conflicts?

To conclude: the regulatory strategies and their impact on the law of service contracts deserves much more attention. The few rules in national civil codes do not reflect the reality in the law on contract of services. There is more research needed on what is really going in the various areas of services, how the parties interact in law-making and whether the results might receive at least output legitimation.¹⁹⁸ Last but not least, the cascade of rules has to be measured against the imperative general legislative requirements which are at the very beginning of this new law making process and which set the legal framework for the outcome at the lowest level, where agencies, committees, business and consumer organisations co-operate.

¹⁹⁸ Scharpf, 1999.

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