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The Visible Hand of European Regulatory Private Law.
The Transformation of European Private Law from
Autonomy to Functionalism in Competition and
Regulation

Hans-W. Micklitz

EUROPEAN UNIVERSITY INSTITUTE
DEPARTMENT OF LAW

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Abstract

The title “The Visible Hand of European Regulatory Private Law” should make clear what I identify to be the major gap not only in political discourse but also in legal doctrine and in legal theory concerning European private law and where I hope to bring additional expertise which is so far missing. My hypothesis is that the “modernisation” of (or more cautiously changes to) private law derives from those subject matters which are at the boundaries of traditional private law. So what I will try to develop is some sort of a counter-project to the *acquis* principles and the Draft Common Frame of Reference (understood as a coherent body of European private law rules), a model which leaves room for national private legal orders, but takes into consideration the ongoing process of Europeanisation, be it via academia in the study group and the *acquis* group, via the European legislator or via soft-law building. The multi-level structure of the European Community calls for a concept that allows one to determine which norms shall be elaborated and enforced at what level and by whom. What I have in mind is a structural new-orientation of (European) private law, which takes into account the transformation of European private law from autonomy to functionalism in competition and regulation.

Keywords

Economisation – politicisation – Internal Market – governance – regulatory private law – access justice – new principles – new processes of law-making – new regulatory instruments – new modes of enforcement.

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A clarification: “Visible hand” alludes to the “invisible hand” of the market. This allusion is in no way pejorative or polemic. The visible hand has a descriptive dimension, in that the European private law I have in mind is regulatory law, i.e. the law which is adopted in order to pursue particular political purposes. The visible hand, however, also has a normative dimension. And this is the focus of the project.

1. The forgotten issues in the codification projects on European contract law

The 2001 Communication of the European Commission on European Contract Law¹ has wilfully initiated academic debate² across Europe on the feasibility of a European Code of Contract. The very same Commission has forged a research alliance, the so-called network of excellence, composed of the *acquis* group and the study group, the former working on the *acquis communautaire*, the latter pursuing a comparative law approach in line with the work of the Lando-Group.³ Both groups have been very productive. The study group has already published six comprehensive books⁴ on different contract law subjects, each closing with a codification proposal on how to regulate the respective subject at the EC level. Together with the already published Principles of European Contract Law (PECL), these form a coherent body of academic codification rules. The *acquis* group has also published its first working results.⁵ The group has developed its own principles, the *Acquis* principles, which compete with PECL. These two sets of

¹ COM (2001) 398 final.

² See Grundmann/Stuyck (eds.), 2002. In the words of Staudenmayer, 2002, pp. 249, 251 the then leading public official in DG SANCO: “It is indispensable that any such European Contract Law should be based on broad and in-depth preparatory work”.

³ Cf. the establishment of the network of researchers under the Sixth Framework Program for Research and Development (Decision No. 1513/2002/EC, OJ L 232, 29.08.2002, 1).

⁴ “Principles of European Law, Study Group on a European Civil Code”, Commercial Agency, Franchise and Distribution Contracts (eds.), Hesselink/Rutgers/Bueno Diaz/Scotton/Feldmann, 2006; Benevolent Intervention into Another’s Affairs (ed.), von Bar, 2006; Service Contracts (PEL SC) Barendrecht/Jansen/Loos/Pinna/Cascao/Gulijk, 2007; Drobnig (ed.), 2007; Lilleholt/Victorin/Fötschl/Konov/Meidell/Torum (eds.), 2008; Hondius/Heutger/Jeloschek/Sivesand/Wiewiorowska (eds.), 2008.

⁵ Contract I, Pre-contractual obligations, Conclusion of Contract, Unfair Terms, edited by Research Group on the Existing EC Private Law *Acquis* (*Acquis* Group), Principles of the Existing EC Contract Law (*Acquis* Principles) 2007; Contract II, Performance, Non-Performance, Remedies, edited by Research Group on the Existing EC Private Law *Acquis* (*Acquis* Group), Principles of the Existing EC Contract Law (*Acquis* Principles) to be published, 2008.

rules, PECL and the Acquis principles, are merged – under pressure from the European Commission and in fulfilment of the commitment accepted by the network of excellence – in the “academic” Draft Common Frame of Reference (DCFR) which is now available in the form recently presented by the two groups to the European Commission.⁶

This paper deals neither with the pros and cons of the Codification Project, nor with the use and usefulness of a Common Frame of Reference.⁷ Little imagination is required to predict that the dominant academic debate⁸ will in all probability now centre on the strengths and weaknesses of the *substance* of the various proposals, including those projects which do not form part of the network of excellence, such as the Common Core Group⁹ and further academic initiatives in the field of insurance and tort law.¹⁰ All these initiatives are very much based on the academic and political desire to develop a coherent set of genuinely European private law rules out of national private legal orders and the EC private law *acquis*. The groups, and in particular the 200 or so academics behind the projects, are far from being united in a unique perspective. The same is true at the political level. Whilst the European Commission has considerably reduced its ambitions, now focusing on the revision of the consumer *acquis*,¹¹ thereby leaving open the political future of a Common Frame of Reference, the European Parliament is still convinced of the need for a European Civil Code.¹²

The different positions can be divided into three different camps. The most ambitious consider the codification project as part of European state building. Thus, there is a strong link between a classical hierarchical understanding of a European Constitution superseding national constitutions governed by supremacy and direct effect and an orthodox¹³ understanding of a European Civil Code meant to replace national civil orders. At the other end of the spectrum are those who start from the more economic premise that a unified set of private law rules may help to eliminate barriers to trade and reduce transactions cost.¹⁴ In the middle, I would place all those who understand unification of European private law as a contribution to the European integration process with an open-textured future – leading perhaps to a constitution in the long run,

⁶ Prepared by the Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group), 2008; in that context Schulze (ed.), 2008.

⁷ See Lando, Beale, Letowska/Wiewirowska-Domagalska, Odeker, Schulte-Nölke, v. Bar, all 2007, pp. 245 et seq.; as well as Reich, 2007, p. 166.

⁸ Which has already started, see on the *acquis* principles, Jansen/Zimmermann, 2007, p. 1113, an English version Restating the *Acquis communautaire*? A critical Examination of the “Principles of the Existing EC Contract Law”, will be published in the *Modern Law Review*.

⁹ Bussani/Mattei, 1996/97, pp. 339 et seq.; for a self-critique Reimann, in Bussani/Mattei (eds.), 2007, p. 83.

¹⁰ European Centre on Tort and Insurance Law, www.ectil.org.

¹¹ COM (2006) 744 endg. and The Report on the Outcome of the Public Consultation on the Green Paper on the Review of the Consumer *Acquis* (no date, no number so far); see my comments on the Green Paper, in Wagner/Wedl, 2007, pp. 293-323.

¹² European Parliament’s Resolutions of 26 May 1989, OJ 1989, C 158/400, of 6 May 1994, OJ 1994, C 205/518 and of November 15, 2001, ZEuP, 2002; and the 2003 Commission Communication “A More Coherent European Contract Law” – An Action Plan (COM(2003) 68 final). A most outspoken supporter of the project is Diana Wallis who belongs to the academic circles travelling around Europe to discuss the pros and cons of the codification project to various ends.

¹³ See Niglia, forthcoming.

¹⁴ E.g. Wagner, 2002, p. 995.

but not a constitution which replaces national constitutions. Consequently European private law and national private legal orders stand side-by-side. Again there is a strong coincidence between European constitution building and European private legal order building. The theoretical discussion over constitutional pluralism¹⁵ corresponds to the plea for private law pluralism – though bearing different headings in the private law discourse, “Private Law and the Many Cultures of Europe”¹⁶ or “Private Law Beyond the State”.¹⁷

I have expressed elsewhere my reservations concerning the need for a European private law codification project which supersedes national private legal orders; the methodology chosen by the *acquis* group and the study group; and last, but not least, its shaky democratic legitimacy.¹⁸ The major focus of my research is on the drive for a *normative model* to give shape to private law pluralism. Thus, what I will try to develop is some sort of a counter-project (*Gegenentwurf*) to the *acquis* principles and the Draft Common Frame of Reference understood as a coherent body of European private law rules, a model which leaves room for national private legal orders, but takes into consideration the ongoing process of Europeanisation, be it via academia in the study group and the *acquis* group, via the European legislator or via soft-law building. The multi-level structure of the European Community calls for a concept that allows determination of the norms to be elaborated and enforced, at what level and by whom. So what I have in mind is a *structural new-orientation (strukturelle Neuorientierung) of (European) private law*, which takes into account the *transformation of European private law from autonomy to functionalism in competition and regulation*.¹⁹ At the end of the paper I will provide a brief sketch of what such a normative model might look like (section 5).

The title of my project “The Visible Hand²⁰ of European Regulatory Private Law” highlights what I identify as the major gap not only in the political discourse but also in legal doctrine and legal theory of European private law. It is here that I hope to provide additional expertise which is so far missing. My hypothesis is that the “modernisation” of (or more cautiously changes in) private law derive from those areas which are at the boundaries of traditional private law (*von den Rändern her*).²¹ This is exactly the transformation process of European private law which is still in the making. It has been made possible by Member States who are ready to transfer these restricted, i.e. policy-

¹⁵ Baquero-Cruz, 2007; Kumm, 2005, p. 262; Walker, in Walker/Loughlin, 2007, p. 247; Maduro, in Weiler/Wind (eds.), 2003, p. 74.

¹⁶ Wilhelmsson, 2004, p. 712; the same (ed.), 2007.

¹⁷ Michaels/Jansen, 2006, p. 843. The Max-Planck Institute in Hamburg organised a conference under this heading in July 2007. The papers are supposed to be published.

¹⁸ Micklitz, 2007, pp. 2-15; reprint in Ernst (Hrsg.), 2007, pp. 255-283; updated English version in Liber Amicorum Alpa (eds.), Andenas/Diaz Alabart/Sir Markesinis/Micklitz/Pasquino, 2007, pp. 699-728.

¹⁹ It is time to recall the early analysis of Raiser, 1960, pp. 101 et seq.; same author, 1971; as well as Bauer/Esser/Kübler/Steindorff (Hrsg.), 1974, in particular the contribution to the theory of private law, p. 517.

²⁰ Basedow, 1994, p. 423 uses the metaphor with regard to national legislators.

²¹ See already in the same direction, Kirchner, in Weyers (ed.), 1997, pp. 103, 106; also Grundmann, 2001, p. 505.

field orientated, competences to the European Community.²² So far, political and academic discourse on European private law, in particular in the study group, is backwards looking, in that the old codifications largely determine the scope and outlook of the proposed Principles of European Contract Law.²³ The *acquis* group is politically bound to a rather narrow understanding of European contract law laid down by the European Commission in the initial 2001 Communication. The only “modern” and visible element in the Communication is consumer and anti-discrimination law. Primary Community law does not play role.²⁴ Fields such as network law (telecommunication, energy, transport), private competition law (*Kartellprivatrecht*), public procurement law, intellectual property rights, fair trading law, investor protection and company law, antidiscrimination law, product safety and food safety law, standardisation of services contracts are largely set aside.²⁵ This is the visible hand of European private law that I have in mind and that I will sketch out in section 3.

However, before I begin with visible European private law and its relationship to the EC codification projects, as well as to national private law, I will try to show where the driving force of change/modernisation comes from (section 2). Member States have delegated important competences in the above-mentioned areas to the European Community, which, under the guise of the Internal Market programme, intervenes heavily in national contract law. It will be shown that the *two driving forces* in the process are *competition policy* and *industrial policy*. I have put modernisation in quotation marks because I do not want to equate of what I will term the “economisation” (*Ökonomisierung*) of European private law with postmodernism. In fact I am much more interested in the changes that result from the economisation of European private law. The Internal Market programme is, however, only one side of the coin. The other side of the coin is “governance”, here understood as “politicisation” (*Politisierung*) of European private law. I would go as far as arguing that the Internal Market programme has if not initiated then considerably fostered the rise of the governance debate.²⁶ What matters is that governance allows us to broaden the scope of analysis of visible European private law. Most of the research in European private law focuses on black letter rules as if there had never been legal realism, *Rechtssoziologie* or law in context.²⁷ Governance opens the perspective and puts emphasis on the law-

²² The European Community has no competence to regulate European private law, see for a full account of this issue the various publications of Weatherill, in Cafaggi (ed.), 2006, p. 37.

²³ In the same vain, Schulze, 2008, p. 11; consumer law has been set aside, see Micklitz, 2004, pp. 339-356. In the most important field of services, the study group has taken a rather traditional approach which is based on the distinction between “contract de moyen” et “contrat de résultat”, Service Contracts (PEL SC) Barendrecht/Jansen/Loos/Pinna/Cascao/van Gulijk, 2007, comment Micklitz, Manuscript 2007.

²⁴ Steindorff, 1996.

²⁵ There are a few exceptions where this has been claimed, see e.g. Grundmann, 2005, p. 187; Basedow, 2000, p. 17.

²⁶ So I would reject any functionalist understanding. However, there is a strong link between the New Approach to Technical Standards and Regulations and The Single European Act on the one hand (economisation) and the invention of the comitology procedure and European Governance on the other. This link is at the heart of Joerges research which ended up in his theory on deliberative supranationalism, see further references in fn. 231.

²⁷ Niglia, forthcoming, puts particular emphasis on the lacking enforcement dimension in the orthodox approach.

making process, on the development and use of new regulatory instruments, and on feasible enforcement mechanisms. Governance builds on networks rather than hierarchy, participation and mutual learning rather than command and control, iterative rather than discrete processes.²⁸ Thus, economisation (*Ökonomisierung*) and politicisation (*Politisierung*) set the frame for a deeper understanding of the transformation process in visible European private law.

Once it is clear what visible European private law means (section 3) and what the driving forces behind economisation/politicisation are (section 2), it is possible to take a hard look at the substance of visible European private law. My hypothesis is that visible European private law (the economic side) yields a new understanding of European private law in these selected areas, an understanding which must be made compatible with traditional private law. I will therefore refer to my earlier research on the concept of competitive contract law which depicts the effects of the economisation process.²⁹

Governance produces a particular process of law-making and law enforcement via new modes. Visible private law is a prominent testing ground for shaping new regulatory devices in a procedure which is distinct from traditional law-making, as well as for striking a new balance between hard enforcement via the judiciary and the executive or via new forms of soft enforcement. The governance dimension allows us to close two further gaps in the current research, as it draws attention to self- and co-regulation,³⁰ as well as to law enforcement (rights, remedies and procedure). The key question is the relationship between the two, i.e. between economisation and politicisation, be it tension and/or mutual interaction, and the role which remains for the law.

2. “Economisation / *Ökonomisierung*” (Internal Market) versus politicisation / *Politisierung* (Governance) of European private law

I consider the 1985 White Paper on the Completion of the Internal Market³¹ as the starting point for the ongoing transformation of the European Community into a new supranational polity.

The strong market-bias has somewhat superseded “*les grandes idées politiques*”, which led to the establishment of the European Economic Community and which, until the early 1990s, guided the project of the “United States of Europe”.³² The Internal Market programme has become the (sole stable and consistent) driving force behind the European integration process. This has been even more the case since the 2004 enlargement – the joining of ten (now 12) new Member States among the Middle and Eastern European States – and the failure of the European Constitution project. The so-

²⁸ de Búrca/Scott (eds.), 2006, p. 3; as well as Cafaggi/Muir Watt (eds.), to be published 2008.

²⁹ Micklitz, 2005, pp. 549-586.

³⁰ Héritier/Eckert, 2007/20.

³¹ COM (1985) 310 final.

³² That was the way Europe’s future was discussed in the US after the breakdown of the Berlin wall in the early nineties. The spirit of the discourse may be paraphrased by something, like “Do they make it or not” (the foundation of a European Federal State), i.e. the United States of Europe.

called “new economic approach” (state aid,³³ competition³⁴ and consumer contracts³⁵) could have been understood as a revival and reinvigoration of the Internal Market programme, though in light of the 21st century³⁶ it has taken on a slightly different connotation. More than ever and with more vigour than ever the European Commission has used the different sectors of economic law to shape the Internal Market and make Europe fit for the globalisation process. In short, the European Commission shapes³⁷ industrial policy through state aid law, competition law and consumer law, just to mention the areas which are at stake in the project.³⁸

Private law was and is needed to give shape to the Internal Market; this is what I have termed the economisation process. However, it is not the private law one thinks of in national legal orders.³⁹ Instead, this law shows a double face: it is regulatory in the sense that it is needed to constitute the Internal Market and it is competitive as the philosophy behind the regulatory measures relies heavily on market freedoms and competition.⁴⁰ Consumer law⁴¹ serves as an example of the visible private law and its changing face. It is suggested that other areas of the visible private law also underpin the argument. The heyday of European consumer law, in particular consumer contract law, began in the early nineties in the aftermath of the Single European Act. The European Commission discovered, in reference to the most influential Sutherland report,⁴² the “confident consumer” as a *political* tool to convince Member States that mandatory standards in contract law were needed to strengthen consumer confidence in the Internal Market project.⁴³ This literally marked the birth of competitive contract law. However, the European Commission did not stop here. The policy shift from the broad codification project to the mere revision of the consumer acquis⁴⁴ demonstrates a shift in perspective. The concept of the confident consumer now becomes a *legal normative* prerogative which changes the outlook of consumer law.⁴⁵ Consumer confidence is meant to justify the development of *one* coherent body of consumer law which supplants

³³ See Kroes, Commissioner for Competition Policy, The refined economic approach in state aid law: a policy perspective, 21st September 2006.

³⁴ Ulrich (ed.), 2006.

³⁵ The very same thinking may be found in COM (2006) 744 final, Review of the Consumer Acquis; see Micklitz, in Wagner/Wedl, 2007, pp. 293-323; see for broader perspective Soper/Trentmann (eds.), 2008.

³⁶ COM (2007) 724 final, 20.11.2007.

³⁷ A prominent candidate is certainly the field of regulated markets, see later under 3.1.2.

³⁸ One could easily think of other policy areas, such as environmental policy, where the European Commission uses emission standards to urge the German car industry to engage in the production of small cars.

³⁹ See for an attempt to clarify the terminology, Michaels/Jansen, 2006, p. 843.

⁴⁰ This is somewhat overlooked by Baldus/Vogel, 2007, p. 158.

⁴¹ Micklitz/Reich, 2007.

⁴² The Internal Market after 1992: Meeting the Challenge, Report to the EEC Commission by the High Level Group on the Operation of the Internal Market.

⁴³ Telling, v. Miert, EuZW, 1990, 401. The article was written by Dr. Dieter Hofmann, then Head of Unit of what later became DG SANCO.

⁴⁴ COM (2006) 744 final, p. 7, under 3.3. Lack of Confidence.

⁴⁵ I would like to thank Pierre-Marie Dupuy who stresses the overall trend to transform policy concepts and legal concepts.

national consumer law. The concept of the confident consumer is (mis-) used⁴⁶ to lower the standards of protection – in the name of the consumer.⁴⁷

I will not argue that the Internal Market programme yielded “European Governance”. Indeed, both projects/concepts emerged at the same time and both have deeper roots. In the field of governance, these “gaps result from a structural deficit of the European Union”, i.e. the capacity of the EU to promulgate rules and its ability to enforce them.⁴⁸ As the Commission originally held executive power only in the fields of competition and agricultural law, it is not surprising that it was here that the idea was born to establish committees uniting the expertise of national and EC officials.⁴⁹ The New Approach to Technical Standards and Regulations eventually led to the adoption of “comitology”.⁵⁰ The former document and its interplay with comitology is paradigmatic in the coming together of Internal Market policy and what later became “governance”. The New Approach and “comitology” served as a blueprint for similar concepts, the Lamfalussy procedure, the Open Method of Co-ordination (OMC) and last but not least co-regulation. The Lamfalussy procedure establishes a four-step law-making and law enforcement mechanism in the field of financial services, which combines binding European standard-making at the first two levels and non-binding rule-making at the third level via national regulatory agencies, which must enforce the rules as well. The Open Method of Co-ordination reaches even one step further as the OMC has been developed in the field of social policy where the European Community holds no regulatory competences at all.⁵¹ The OMC is a non-binding regulatory mechanism which enshrines standard setting and compliance control.⁵² Co-regulation is another regulatory mechanism of the new toolkit, launched within the framework of the Internal Market programme. The overall idea is to broaden the scope for combining mandatory legislation at EC level and non-binding rules developed by private parties and/or organisations.

There is a direct link from “comitology” via “governance” to “European Constitution building”. European governance may be understood as an attempt to transform comitology into a coherent political and – to some extent – legal concept. I understand European governance mainly as a process of politicisation. It means, with regard to law and the role of the legal system in the European integration process, that the importance of law in the European integration process is decreasing whilst the impact of politics is

⁴⁶ Wilhelmsson, 2004, p. 317.

⁴⁷ A similar development may be found in competition law, where the European Commission understands the new economic approach as a means to integrate consumer welfare which allows a new understanding of the abuse of a domination position, Article 82 ET. The cartel authorities are advised to apply Art. 82 ET only if there is evidence of consumer harm. As evidence is hard to prove, the reference to consumer welfare serves as a pretext to lower the threshold of intervention. See on this issue, Eilmannsberger, paper presented at the Working Group Competition (EUI) on 11 December 2007.

⁴⁸ There is considerable discussion of the roots within the doctrine, see e.g. Joerges/Everson, in Joerges/Strath/Wagner (eds.), 2005, p. 159; de Schutter, in de Schutter/Deakin (eds.), 2005, p. 279; Dawson, working paper, MS 2007; Weimar, 2007.

⁴⁹ Vos, 1997, p. 211.

⁵⁰ Directive 99/468/EC, OJ L 184, 17.7.1999, 23.

⁵¹ See for a reconstruction of the history, Dawson, MS 2007.

⁵² See for an analysis of its constitutive elements Trubek/Trubek, 2005, p. 343.

increasing. The failure of the European Constitution makes governance more important than ever. The 2007 Treaty of Lisbon does not overcome the institutional deficiencies which became clearer as the integration process under the Internal Market programme gained pace. It pays tribute to constitutional pluralism⁵³ and enhances the role and importance of “governance”.

The effects of governance (politicisation) in European private law are less visible at first sight. There is no European Commission document in which a link is drawn between governance and private law.⁵⁴ However, this is only half the truth. The European Commission has adopted quite a number of sectoral market-related approaches, which contain strong elements of what is today termed “governance”, mainly under the Lamfalussy procedure in financial services but also under the New Approach to Technical Standards in the field of services. Another prominent field of governance is the envisaged Common Frame of Reference. Governance in private law compensates for the lack of traditional regulatory approaches in various boundary fields of private law as well as with regard to its mainland, i.e. the right of obligations.

2.1. Tensions and interactions between economisation and politicisation

“Economisation” (Internal Market bias) and “politicisation” (governance) strongly affect the existing European legal order. There are tensions as well as interactions between the two ongoing processes.

(1) Economisation (Internal Market bias): The fading appeal of “*les grandes idées*” and the strengthened market bias in the European Community are paving the way for the infiltration of an Anglo-American understanding of the role and function of law.⁵⁵ According to Wiegand, this trend is obvious in the field of banking law and economic law (*Wirtschaftsrecht*). He distinguishes: (1) new types of businesses (leasing, factoring, franchising, as well as the now incriminated Mortgage Backed Securities, the rise of American-style law firms); (2) the introduction of new legal devices, in particular in financial services,⁵⁶ such as the prohibition of insider trading and the like; and (3) the adoption of American doctrines, such as the intervention of national constitutional courts into the concept of the private legal order.⁵⁷ Be that as it may, the infiltration of these new concepts does not flow directly from the US to the Member States; it is channelled through the European Commission.

What matters is that “Americanisation” of European law does not merely describe a phenomenon; Americanisation of European law has normative implications as well. This is particularly felt in the field of private law. I will restrict my observations to just

⁵³ I agree with Baquero-Cruz, RSCAS Working Paper 2007/13 that the vision vanished before the project on the (failed) European Constitution started.

⁵⁴ See for an academic account Cafaggi, in Cafaggi/Muir-Watt (eds.), 2008, p.289; a former version has been published as EUI Working Paper 2007/26.

⁵⁵ See Wiegand, in Baums/Hopt/Horn (eds.), 2000, p. 601.

⁵⁶ There is a huge literature on the impact of US banking law, or in modern terms the law on financial services, on the shaping of European law on capital markets.

⁵⁷ Wiegand refers to the famous *Bürgschaftsurteil* of the German Constitutional Court, Bundesverfassungsgericht, 9.10.1993 – 1 BvR 587/89, 1994, p. 36.

two aspects: the changing paradigm of justice and the increasing importance of economic efficiency.

Most, not all, continental private legal orders enshrine the idea of social justice, understood as distributive justice, which has to be preserved in private law matters, both in contract and in tort law.⁵⁸ European private law has, so far, followed a different pattern of justice. It is much closer to the idea of fairness of market access (*Zugangsgerechtigkeit*/access justice⁵⁹), which may be found in the Anglo-American legal system. The process of economisation of the legal system reduces the scope of Member States' redistributive interventions to that of providing a fair chance to benefit from the Internal Market.

The second phenomenon concerns the growing dominance of the economic efficiency doctrine. Economic analysis of law⁶⁰ developed in the United States and influences legal and economic scholarship in Europe.⁶¹ Whilst the theory has been heavily criticised because of its tendency to verge on economic imperialism (and not over law alone⁶²) or because of its disregard for socio-legal realism,⁶³ the efficiency doctrine has made its way into European law and the European law-making procedure. The new economic approach opens the door to integrating the efficiency doctrine into the making and application of existing European economic law, such as state aid, competition and consumer law. European law-making is more and more dependent on the proof of potential detrimental economic effects resulting from differences in Member States' legislation. Only if the so-called "Impact Assessment" demonstrates detrimental economic effects is the European Commission likely to favour the adoption of European rules. The very same test may at the same time justify inaction, if it demonstrates that possible economic effects might harm the competitiveness of the European industry.⁶⁴ Even if the new economic approach is not realised in its pure form, i.e. in the third variant, it might help us to comprehend why the European legal order, as it stands today, resembles a common law system much more than a coherent continental legal order. The European piecemeal approach fits well with common law thinking. Quite the contrary is true of continental legal thinking, which often regards a European Constitution and a European private legal order as necessary ingredients to achieve the Internal Market.⁶⁵ The new instrument, i.e. the "Impact Assessment Procedure",⁶⁶ raises

⁵⁸ See Micklitz, MS February 2007.

⁵⁹ Rawls, 2001.

⁶⁰ Posner, 2003.

⁶¹ See e.g. with regard to Germany, Schäfer/Ott, 2005; Eidenmüller, 1995.

⁶² Radnitzky/Bernholz (eds.), 1987; in the same direction now Mestmäcker, 2007, who points to the missing legal philosophical basis of the economic analysis of law.

⁶³ Fink, 2004, p. 931.

⁶⁴ It suffices to look into the EC documents which prepare the ground for private collective enforcement in the field of competition law (Damages action of the EC antitrust rules COM (2005) 19.12.2005, 672 final) and even more so in the field of consumer law (COM (2007) 99 final, 13.3.2007 p. 11) and in particular the call for tender no. SANCO/2007/B4/004 concerning the evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union. 2/3 of the tenders deal with the question whether and to what extent the economic efficiency could be raised by collective redress mechanisms.

⁶⁵ The ongoing work in the study group and the *acquis* group provides ample evidence of these tensions.

at least two questions: first, whether the test is scientifically sound – to my knowledge nobody as ever challenged the methodology behind the guidelines – and second, whether the European Commission makes use of the results.⁶⁷

The third phenomenon concerns the future outlook of European law, i.e. the question whether European private law should be fashioned after the model of the continental civil law or the common law. Already in the first edition of his path-breaking work on the economic analysis of law, Posner came close to arguing for the implicit economic logic of the common law system.⁶⁸ It is then only one step further to claim the superiority of the common law system over the continental legal system,⁶⁹ as the World Bank did most recently in a highly controversial study.⁷⁰ There is an obvious contradiction between the academic project to codify European private law and the long-standing practice of European private law over the last decades. The codification projects follow the continental model. Common rules have to be found and should be made available to the parties and applied by the courts.⁷¹ However, these rules will, in all probability, not be adopted as a coherent legal body which replaces national orders. Thus, the set of rules will serve as the 28th legal order to which the parties may opt in.⁷² The reality of European private law as it stands today comes closer to a common law system. This is particularly true with regard to ECJ judgments taken under the Treaty and indirectly affecting the private legal order, a dimension which again is largely forgotten in the academic projects on private law codification.⁷³ It is less true with regard to the visible private law which is fully codified. However, the patchwork character of existing EC private law resembles a common law system.

(2) Politicisation (governance): The counterpart, or perhaps more appropriately the counter-reaction, to the ever stronger Internal Market programme is European governance.

⁶⁶ The Commission Impact Assessment Guidelines were first developed in 2002. The second version dates from June 15, 2005 and is available on the internet http://ec.europa.eu/governance/impact/docs/SEC2005_791_IA%20guidelines_annexes.pdf.

⁶⁷ I would seriously doubt that the European Commission follows the results. A good (or bad) example of denial or even rejection of the results of the economic impact assessment procedure is the investigation, this time undertaken by the European Parliament to assess the transborder effects of consumer credit transactions, see Micklitz/Rott, Broad economic analysis of the impact of the proposed Directive on consumer credit for Civic Consulting on behalf of the European Parliament under EP-IMCO Framework Contract Lot 4 (Consumer Protection), available on the internet at http://www.europarl.europa.eu/comparl/imco/studies/0704_consumercredit_en.pdf. The Common Position on the consumer credit directive, reached in September 2007 in no way respects the results of the impact assessment, see Rats-Dok. CONSOM 69, CODEC 583, JUSTCIV 147 vom 14.9.2007 and Rott, to be published.

⁶⁸ 1972, p. 98, here quoted after Mestmäcker, 2007, p. 19.

⁶⁹ See in this context the research undertaken by La Porta/de Silanes/Shleifer/Vishny (LLSV) in the financial markets; Siems, 2005; Deakin/Browne, 2003, p. 27.

⁷⁰ See http://www.henricapitant.org/rubrique.php3?id_rubrique=24 for further information.

⁷¹ See on this point, Trstenjak (AG at the ECJ), The Significance of the CRF for the Practices of the ECJ, speech to be given at the ERA conference on the Draft Common Frame of Reference, 6-7. March 2008.

⁷² See Schulte-Nölke, 2007, p. 332.

⁷³ See for an early account of the relationship between primary law and private law, Steindorff, 1996.

The first phenomenon is the different cultural background of the governance debate. Whereas the Internal Market programme bears a strong Anglo-American flavour, although it was developed under the French president of the European Commission Jacques Delors,⁷⁴ the governance debate reflects more continental – Franco-German – legal thinking. One might consider the interplay between the Internal Market programme and European governance as a means of striking a balance between conflicting cultures and traditions. On the surface at least there is a link between the increasing attention given to new forms of governance in the EU and the initial project to adopt a European Constitution. The latter was, at least politically, meant to complete the Internal Market programme. France and Germany were important driving forces behind the project. Even if the project failed in the end and was replaced by the Treaty of Lisbon, the long term effects on private law are evident as European private law becomes constitutionalised.⁷⁵ Constitutionalisation does not so much occur via an institutional framework which embeds the European private legal order, but via the establishment of constitutional and human rights as enshrined in the European legal order.⁷⁶ The Common Core Group has most recently completed its work on constitutionalisation of private law and the results will be published in 2008.⁷⁷

The second is the paradigm shift which results, from Internal Market to governance, from economisation to politicisation. The Internal Market bias, economisation, brings economic efficiency to the fore. In its strongest variant, private law is meant to guarantee economic efficiency. Governance raises the problem of legitimacy. How can the drift away from established law-making procedures, from traditional sets of regulatory instruments, from hard judicial and/or administrative enforcement to softer forms be given democratic legitimacy?⁷⁸ The normative side of this academic debate is, whether governance may only be democratically legitimate if basic procedural requirements, such as transparency, participation and accountability, are safeguarded and if the enforceability of these parameters is secured via individual and/or collective rights.⁷⁹ Whilst legitimacy issues have been raised mainly with regard to the New Approach and the OMC, the debate has now reached the European codification project, run via academic networks, where representation of stakeholders and democratic control via the European Parliament seems highly underdeveloped.⁸⁰

⁷⁴ The history of the famous White Paper on the Completion of the Internal Market still needs to be reconstructed. It has to be read in conjunction with the Cecchini reports SEC (88) 524 final. So one might wonder what the role of the president of the Commission has been. Did he influence the substance of the White Paper or did he “just” sell it to the public?

⁷⁵ See e.g. Colombi Ciachhi, 2006, p. 167; Cherednychenko, 2008, the same author 2007, p. 1 available at www.utrechtlawreview.org/.

⁷⁶ See with regard to consumer law, Benöhr/Micklitz, in Howells/Ramsay/Wilhelmsson (eds.), to be published 2008.

⁷⁷ Colombi Ciachhi/Brüggemeier/Commandé (eds.), to be published 2008.

⁷⁸ There is a huge academic debate in this area, see more generally Weimar, 2007 as well as various publications from Joerges, inter alia with Everson, in Joerges/Strath/Wagner (eds.), 2005, pp. 159 et seq. and on the legitimacy of soft law, Senden, 2006.

⁷⁹ This is the argument I made in “The Politics of Judicial Co-operation”, p. 479 et seq.

⁸⁰ See with regard to academia Niglia, forthcoming, Micklitz, in Andenas/Diaz Alabart/Sir Markesinis/Micklitz/Pasquino, 2007, p. 699; Hesselink, 2004, pp. 675, 694-697.

The third phenomenon is the obvious difference between the “visible” politicisation process and the “invisible” economisation process. The latter goes to the substance of European law, to the legal concepts behind the application and enforcement of legal rules. This is a silent shift which is much harder to recognise than the relatively open changes brought about through governance. Politicisation produced ‘new modes’ of governance, based on Franco-German experience, in linking the strong executive powers of the European Commission – in the French-stamped philosophy of the European Commission – to self-regulatory bodies e.g. Standards Bodies so deeply anchored in the corporate structure of the German economy.⁸¹ The New Approach to Technical Standards and Regulations⁸² – which served as a starter for the Open Method of Co-ordination,⁸³ co-regulation⁸⁴ and the Lamfalussy procedure⁸⁵ – enshrines the Franco-German philosophy, in so far as it is “visible”. However, the effects of these new modes on private law relations⁸⁶ are much harder to discern, not least due to the lack of a coherent EC policy position on the role of governance in private law matters.

(3) The relationship between economisation and politicisation is fragile. Both are strongly interrelated. The following chart tries to indicate the major fields in which tensions are presumed to exist.

Tensions and Interactions

Economisation	Politicisation
Regulatory	Governance
Efficiency based	Legitimacy based
Emphasis on the judiciary (Anglo-American)	Emphasis on the executive (Franco-German)
Market model	Social model
Economic approach <ul style="list-style-type: none"> - competition law - industrial policy - country of origin 	Social approach <ul style="list-style-type: none"> - regulation - harmonisation
Fairness (<i>Zugangsgerechtigkeit</i>)	Social (distributive) justice
European Economic Constitution	European Political Constitution
Open textured private law system similar to the common law	Coherent continental legal system (codified law)
Traditional forms of regulation combined with self-regulation	New forms of governance <ul style="list-style-type: none"> - new approach, OMC - co-regulation, Lamfalussy

2.2. *Effects of economisation / politicisation on the legal system*

The Internal Market programme and new modes of governance are strongly inter-related. The new modes of governance might be regarded as the institutional side of the Internal Market Programme. Both touch upon the role and function of ‘law’ in European

⁸¹ Die Deutschland-AG, see Nörr, 1999.

⁸² OJ C 136, 4.6.1985, 1.

⁸³ See the references on http://ec.europa.eu/employment_social/social_inclusion/index_en.htm.

⁸⁴ COM (2002) 278 final, 5.6.2002 Suivi du Livre blanc sur la gouvernance européenne – Pour un usage mieux adapté des instruments.

⁸⁵ http://www.bundesbank.de/bankenaufsicht/bankenaufsicht_cebs_lamfalussy.en.php

⁸⁶ Cafaggi, Vol. 1, 2007.

integration. The Internal Market programme increased and is still increasing considerably the adoption of secondary law, in particular visible private law in the sense used here. It is therefore fair to speak of the “rise” of European law following the adoption of the Single European Act. This trend is so obvious that there is no need to discuss it. European governance has at the same time yielded new processes of law-making, new regulatory instruments and new enforcement mechanisms, and it is going to change the substance of the (private) law itself. Contract law at the European level does not primarily serve to guarantee party autonomy and mutual contractual justice; contract law is bound to market rationality.⁸⁷ It changes its face and becomes competitive contract law.⁸⁸

At the same time, however, European law is on the “decline”, due to the politicisation process resulting from new modes of governance. European law is going to lose its character as “law” in the proper sense.⁸⁹ European integration has been achieved primarily through law. The current integration process, however, seems to rely much more on new forms of governance, i.e. new forms of law other than traditional hard law. Somewhat overstated, one might speak of a paradigm shift: from integration *through* law to integration *without* law. European law (or is it Europe?) is squeezed between economisation on the one hand and politicisation on the other. Economisation affects the underlying values and concepts of the private law system, possibly leading to “A Legal Theory without Law”, as Mestmäcker⁹⁰ puts it; politicisation through new forms and new modes of governance tends to deprive the European integration process of the law as its driving force – this is the concern of Joerges.⁹¹

At least three trends might be identified which have been analysed to a greater or lesser extent by various researchers.⁹² I would like to radicalise the arguments and raise the question of what remains of law and the rule of law,⁹³ if it is not only squeezed (*gequetscht* oder *ingequetscht*) between economisation and politicisation, but squashed (*zerquetscht*). It is suggested that the role of law, i.e. the concept of law, is changing through “soft integration”:⁹⁴

(1) Legal rules are increasingly becoming policy programmes (de-juridification/*Ent-Rechtlichung*) – this comes clear in secondary EC law where directives become longer and longer, thereby losing their character as legal rules. A striking example is the so-called Services Directive 2006/123/EC,⁹⁵ which raises for the first time the question

⁸⁷ See Joerges, 1995, p. 175 and Micklitz, in Boele-Woelki/Grosheide (eds.), 2007, pp. 387-410.

⁸⁸ See Micklitz, 2005.

⁸⁹ On the different concepts of law and governance and their interrelationship, Walker/de Búrca, to be published.

⁹⁰ 2007.

⁹¹ See Joerges, 1/2007.

⁹² Again Joerges has extensively written on these effects, alone as well as together with Everson and Vos.

⁹³ In the same sense Baquero-Cruz, RSCAS Working Paper 2007/13.

⁹⁴ I borrow this term from Marek Safjan.

⁹⁵ Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, OJ L 376, 12.12.2006, 36.

whether and to what extent it can be transposed at all.⁹⁶ Similar questions arise with regard to the transposition and enforceability of the MIFID Directive 2004/39/EC.⁹⁷

(2) Law-making is no longer the subject of political controversy in an open forum. Politicisation through new forms of governance simultaneously yields a de-politicisation process (*De-Politisierungsprozess*). This becomes clear in the way in which the law-making process is organised. The internet, i.e. communication via the internet, replaces the traditional public forum. Participation is then bound to having the technical facilities to gain access and to be informed that a process of law-making is under way. M. Bach has termed this process “the vanishing of society” (*Verschwinden der Gesellschaft*).⁹⁸ Similar phenomena may be observed in the codification project, with European academia organising its own law-making process in a closed forum.⁹⁹

(3) Law enforcement is moving away from courts to public bodies that seek soft solutions (de-judicialisation/*Ent-Vergerichtlichkeit*). At least this phenomenon has not yet received the attention it deserves. The origins go back to the New Approach to Technical Standards and Regulation, which has set rule-making machinery in motion that almost entirely lacks judicial control.¹⁰⁰ It is suggested that similar results maybe exposed in the rules developed under the Open Method of Co-ordination¹⁰¹ or the Lamfalussy procedure. With regard to private law, the question is whether or not the Common Frame of Reference as an optional code will be justiciable.

Effects and counter-effects

<p>“Rise” of European (private) law</p> <ul style="list-style-type: none"> - new processes of law-making - new instruments - new enforcement mechanisms - “new” law? 	<p>“Decline” of European (private) law</p> <ul style="list-style-type: none"> - de-juridification (<i>Ent-Rechtlichkeit</i>) - de-politicisation (<i>De-Politisierung</i>) - de-judicialisation (<i>Ent-Vergerichtlichkeit</i>)
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The interplay between the rise and decline of European private law will be analysed in more detail in section 4. This, however, is not done simply to re-instate the law, that is to claim the supremacy or superiority of (European) law over economics and politics and to revert back to European integration of the 1960s when the European (Economic)

⁹⁶ The transposition of the Directive is the subject of the FIDE XXIII Congress Linz, 2008. The rapporteur is Stephan Griller. With regard to the policy character of the Directive, see the conclusion of Reich’s report on behalf of the transposition in Estonia, Freedom to Provide Services in the “Services in the Internal Market Directive” (SIMD) 2006/123/EC and its implementation in Member States (Draft supplement to the report for the FIDE XXIII Congress Linz 2008 on behalf of Estonia).

⁹⁷ OJ L 145, 30.4.2004, 1.

⁹⁸ See for a full account of the de-politicisation process through new forms of governance, Bach, in Müller/Hettlage, 2006, p. 174.

⁹⁹ I start from the premise that that what is happening here must and should be regarded as law-making, at least in the broader sense given to it under the governance design.

¹⁰⁰ See for one of the few efforts to investigate the possibility of judicial control in this area – with disastrous results, Falke/Furrer, Manuscript 1999.

¹⁰¹ There is no, and there cannot be, judicial control. However, the European Commission is using its relationships with the non-governmental organizations to push governments to take their reporting requirements seriously, see Dawson, with reference to the empirical studies undertaken by Zeitlin, in Zeitlin/Pochet (eds.), 2005; Smismans, 2006.

Community was regarded as being a product of law and governed through law.¹⁰² The point is rather to redefine the role of European law, in light of economisation and politicisation, thereby taking into consideration different legal and cultural traditions.¹⁰³

3. The “visible” hand of European private law

European private law (contract and tort law) ranks high on the agenda; sometimes one has the impression that there is no other area touched by Europeanisation.¹⁰⁴ However, the set of rules which is discussed so far falls short of what should and must be taken into account when analysing the existing EC rules, the *acquis communautaire*. Only if the now to be analysed set of visible private law rules are fully taken into account – not only with regard to black letter rules, but also with regard to the new modes that are enshrined in “governance” – will it be possible to understand the changes to the already existing European private law. A ‘modern’ private law which meets the needs of the 21st century has to focus on its transformation from autonomy to functionalism in competition and regulation. This means the fields of law where this tendency is most visible must be scrutinised.

3.1. Fields of interest – the so far neglected areas

What I am interested in are those fields of European private law where the visible hand of the European legislator can easily be identified. These fields are united by a predominant Internal Market perspective which combines the four freedoms with competition.¹⁰⁵ This does not mean that the competence on which the different pieces of visible law are based must necessarily be Article 95 ET.¹⁰⁶ The Internal Market perspective overlaps with or leaves its mark on different competence rules in the European Treaty. The only issue where the Internal Market perspective is less obvious might be anti-discrimination law. However, even here, so the argument goes, there is strong emphasis on linking anti-discrimination to market building.¹⁰⁷

I start from the premise that each field makes a unique contribution to the existing European contract law. All in all we can discover broad variations of strategies, instruments and functions. The following observations are a first attempt at stock-taking

¹⁰² Hallstein, 1972; Walker, 2005, p. 581.

¹⁰³ This too is one of the objectives of the Social Justice Study Group, 2004, p. 653; see also the special volume No. 2 2006 of European Review of Contract Law with contributions from Weatherill, Meli, Ciachchi, Somma, Rutgers, Collins, Smith, Maugeri, Marella, Sefton-Green that can be seen as a follow-up to the Manifesto.

¹⁰⁴ Again very useful, Michaels/Jansen, 2006, p. 843.

¹⁰⁵ The relationship between the market freedoms and the competition rules is a matter of its own. In the understanding here presented, the Internal Market perspective enshrines competition. So in a way this is much more the idea of an Economic Constitution which sets the frame for European regulatory private law.

¹⁰⁶ I would like to thank Bruno de Witte for pointing out the competence differences in the various fields.

¹⁰⁷ See for a re-construction of equal treatment at the EC level, Micklitz, 2005, p. 165 et seq.

in a more analytical perspective. I deliberately set aside consumer private law as this has been the central concern of the *acquis* group.

3.1.1. Antidiscrimination in private law (new “values” – enforceability)

Although labour law and anti-discrimination law (equal treatment of men and women) are subjects of their own, these fields are of prominent interest for the shaping of European private law. This is due to the fact that from the first Directives 75/117/EEC on equal pay for women and 76/207/EEC on equal access to employment, there was heavy litigation driven by the strong participation of the ECJ.¹⁰⁸ In the meanwhile, the European Community modernised and extended anti-discrimination law, by way of a whole series of Directives (2000/43/EC,¹⁰⁹ 2000/78/EC,¹¹⁰ 2002/73/EC¹¹¹, 2004/113/EC¹¹² and 2006/54/EC¹¹³), to private law, i.e. beyond labour law. Thus, secondary EC law is turning the anti-discrimination principle into a general principle of private law, supposedly, however, without changing its character as a market-bound rule directed at fair access first, to labour, and later, to the consumer market.¹¹⁴ Therefore the *acquis* group has formulated ground rules on anti-discrimination in the so-called *acquis* principles which have now made their way into the DCFR. The extensive EC litigation over the availability of appropriate remedies where EC rules have not been adhered to provides a huge field of experience on which a modern European private law can be built.

Anti-discrimination law introduces new values into the private law system – these values are not bound to particular areas of the visible law, they govern private law relations *per se*. However, these new values have to be made compatible with the different patterns of justice, with social (distributive justice) and with corrective justice. The question then is whether anti-discrimination as a concept is linked to what I have termed access justice – *Zugangsgerechtigkeit* – or whether it reaches beyond and implies distributive effects.

3.1.2. Regulated markets (“new” principles – accessibility, affordability, best practices)

(1) Network law: the privatisation (liberalisation) of former state monopolies in the sector of telecommunications, energy and transport has raised the importance of contract law.¹¹⁵ The overwhelming literature dealing with network law sets aside the contractual dimension, be it b2b or b2c.¹¹⁶ It focuses instead on the public law side, i.e. on the concept, the regulatory devices meant to open up markets and to establish a

¹⁰⁸ See Micklitz, 2005, p. 165 et seq.

¹⁰⁹ OJ L 180, 19.7.2000, 22.

¹¹⁰ OJ L 303, 2.12.2000, 16.

¹¹¹ OJ L 269, 23.9.2002, 15.

¹¹² OJ L 33, 13.12.2004, 37.

¹¹³ OJ L 204, 26.7.2006, 23.

¹¹⁴ Schiek, 2000, Schiek/Waddington/Bell, 2007.

¹¹⁵ Keßler/Micklitz, 2008, Vol. 23, 24, 25.

¹¹⁶ Paradigmatic, Cameron (ed.), 2005.

competitive structure, as well as on the availability of an appropriate decentralised enforcement structure. The regulatory role of contract law as a device in between the regulated markets to serve the overall purpose of liberalisation and privatisation belongs to the core of the project.¹¹⁷ This might be explained by the fact that the different sets of EC directives only deal to a very limited extent with private law relations. The concept of universal services implants new principles and new legal concepts in private law relations.

At the surface it seems as if the regulation of contract law remains in the hands of the Member States. However, the various committees which have been set up in these fields, and which bring together the competencies of national regulatory agencies and the European Commission, are about to fill the remaining gaps in the framework of European rules governing private relationships with all sorts of soft law rules.¹¹⁸

*The network law develops, within the boundaries of universal services, concepts and devices whose reach must be tested with regard to their potential for general application beyond the narrow subject matter. Just one example may be mentioned: despite privatisation, network industries have to guarantee the accessibility and the affordability of their services. What is at stake here is the obligation to contract (Kontrahierungszwang) and the duty to continue delivery even in cases of late payment.*¹¹⁹

(2) Insurance law (which is usually regarded as a subject of its own)¹²⁰ and capital market law (investor protection law):¹²¹ the policy in this area and the regulatory technique used – emphasis on establishing the market via public law regulations – resembles the approach chosen in the field of telecommunications, energy and transport. However, the regulatory approach is different. The EC Directive 2004/39/EC¹²² on Markets in Financial Instruments – the so-called MIFID – lays down a broad framework that serves to establish a coherent European capital market within level 1 of the Lamfalussy approach. In line with the Lamfalussy procedure, two level 2 pieces of law have been adopted: Directive 2006/73/EC¹²³ on organisational requirements and operating conditions for investment firms and the implementing Regulation 2006/1287/EC.¹²⁴ These Directives and Regulations already establish a dense network of rules, containing strong links to the contractual relations a professional or a private investor engages in with his or her investment firm. The third level rules to be developed by the national regulatory agencies are of primary interest to this research.¹²⁵

The Lamfalussy procedure is characterised by the attempt to concretise, step by step, from level 1 down to level 3, the regulatory standards to be respected. The set of rules is

¹¹⁷ A first attempt has been made by Gijrath/Smits, in Boele-Woelki/Grosheide (eds.), 2007, p. 53; Bellantuono/Boffa, *Energy Regulation and Consumers' Interests*, 2007.

¹¹⁸ In the same direction Cafaggi, 2007/26, p. 44.

¹¹⁹ See for an early account Rott, 2005.

¹²⁰ See Basedow/Fock (Hrsg.), 2002, Bd. 1, 2, (shows the particularities of EC insurance law).

¹²¹ Hopt/Voigt (Hrsg.), 2005; Keßler/Micklitz, 2004.

¹²² OJ L 145, 30.4.2004, 1.

¹²³ OJ L 241, 2.9.2006, 26.

¹²⁴ OJ L 241, 2.9.2006, 1.

¹²⁵ Ferrarini, 2005, p. 19; Ferrarini/Wymeersch, 2006, p. 235.

much denser than in the field of network law, although the tasks to be fulfilled by the regulators are similar. Broad level 1 and level 2 principles such as “best practices” have to be broken down into feasible contractual rights and obligations. Best practices – this would be my theoretical starting point – cannot be separated from the broader question of the level of justice to be guaranteed via EC law.

(3) Company law: there are two dominating perspectives at the Member State level which clash in the harmonisation efforts of the European Community. There are those Member States where company law is in essence regarded as dealing with the inner organisation and the correct shaping and sharing of responsibilities; there are others where company law is seen as forming an essential part of the capital market law. Last but not least, due to the failure of the European Commission to merge the two conflicting perspectives, the ECJ has become the key actor in de-regulating national company law.¹²⁶ The possible impact of the ECJ case law, as well as the few Directives and Regulations which have been adopted to give shape to European company law, in particular Directives 77/91/EEC,¹²⁷ 78/855/EEC,¹²⁸ 82/891/EEC,¹²⁹ 89/666/EEC,¹³⁰ 89/667/EEC,¹³¹ 2001/86/EC,¹³² 2005/56/EC¹³³ and Regulations 2137/85/EC¹³⁴ and 2157/2001,¹³⁵ has not yet been analysed with regard to its possible effects on private law, e.g. on the concept of natural persons and legal persons.¹³⁶

3.1.3. Commercial practices and contract law (average consumer, contract conclusion and new devices)

(1) Commercial practices law: this is a field where the ECJ sets the tone in numerous judgments in which it tested the compatibility of national commercial practices (trading rules or marketing practices rules) with the market freedoms, in particular the concept of misleading advertising.¹³⁷ It is here that the ECJ developed the notion of the average consumer.¹³⁸ Commercial practices law is heavily regulated by secondary law,¹³⁹ most importantly, the Directive 2005/29/EC¹⁴⁰ on unfair commercial practices dealing with

¹²⁶ ECJ, 9.3.1999; Case C-317/99 Centros 1999 ECR I-1459, ECJ, 5.11.2002; Case 208/00 Überseering 2002 ECR I-9919; ECJ 30.9.2003; Case C-167/01 Inspire Art 2003 ECR I-10155.

¹²⁷ OJ L 26, 31.1.1977, 1.

¹²⁸ OJ L 295, 20.10.1978, 36.

¹²⁹ OJ L 378, 31.12.1982, 47.

¹³⁰ OJ L 395, 21.12.1989, 36.

¹³¹ OJ L 395, 30.12.1989, 40.

¹³² OJ L 294, 10.11.2001, 22.

¹³³ OJ L L 310, 25.11.2005, 1.

¹³⁴ OJ L 199, 25.7.1985, 1.

¹³⁵ OJ L 294, 10.11.2001, 1.

¹³⁶ In that sense Schulze, in Schulze (ed.), 2008, p. 20.

¹³⁷ See for an analysis of the ECJ case law, Münchener Kommentar/UWG-Heermann, EG B, 2006.

¹³⁸ The literature is no longer to overlook, see in particular the writings of Weatherill, in Weatherill/Bernitz (eds.), 2007, p. 115.

¹³⁹ See for a full account of the different Directives and Regulations, Münchener Kommentar/UWG-Micklitz, EG E-Q, 2006.

¹⁴⁰ OJ L 149, 11.6.2005, 22.

b2c relations and the Directive 2006/114/EC¹⁴¹ on misleading and comparative advertising in b2b relations. The e-commerce Directive 2000/31/EC¹⁴² and the Directive 99/44/EC¹⁴³ on consumer sales affect the terms on which the contract is concluded, the pre- and post contractual stages (disclosure of information, role of third parties) and overstep boundaries between commercial practices and private law. Some of these effects have already been taken into account by the *acquis* group.

*EC commercial practices law affects the terms on which the contract is concluded; it demonstrates how EC law leaves basic principles of national private legal orders, such as offer and acceptance, in place, whilst at the same time making them superfluous. It sets standards for the interpretation of private law relations (the average consumer), introduces new regulatory devices, such as the duty to disclose information at the pre-contractual stage and post-contractual monitoring, and reaches beyond the privity of contract law.*¹⁴⁴

(2) Intellectual property rights: intellectual property rights law is subject to control under the competition rules of the Treaty, in particular Art. 82.¹⁴⁵ More important in our context is the EC policy to extend existing intellectual property rights law and give it a European outlook coupled with appropriate legal redress mechanisms to sanction violations of property rights (Directive 2004/48/EC¹⁴⁶). The heavy expansion¹⁴⁷ of intellectual property rights simultaneously restricts the users' rights.¹⁴⁸ These exclusive rights are enforced via contract law, often via standard terms, which form part of the licence agreement concluded with the consumer frequently via the internet.¹⁴⁹

The relationship between IP rights and contract law is largely unexplored. There is ample need to look into the way in which contractual relations are shaped indirectly through IP rights and how the rights created, mainly to the benefit of the IP holder, are enforced.

3.1.4. Competition, state aids and public procurement (remedies – trilateral relations)

(1) Private competition law (*Kartellprivatrecht*)¹⁵⁰ is another neglected domain, although the *acquis* group decided to integrate this subject matter into its forthcoming work programme. Block exemptions are a well established means used by the European Commission to shape the admissibility of vertical agreements by means of competition

¹⁴¹ OJ L 376, 27.12.2006, 21.

¹⁴² OJ L 178, 17.7.2000, 1; in particular Grundmann, 2005, p. 187 emphasises the key role of that directive for European contract law, because it contains default rules as well.

¹⁴³ OJ L 171, 7.7.1999, 12.

¹⁴⁴ See Whittaker, in Weatherill/Bernitz (eds.), 2007, p. 139; Wilhelmsson/Twigg-Flesner, 2006, p. 441.

¹⁴⁵ See ECJ, 29.4.2004, Case C-418/01, IMS Health ECR 2004, I-5039.

¹⁴⁶ OJ L 195, 2.6.2004, 16.

¹⁴⁷ See for a critical analysis Hilty, in Behrens (Hrsg.), 2004, p. 139.

¹⁴⁸ See from the consumer/user perspective, Copy rights and EC consumer protection law ECLG 035/05, written by Guibault/Helberger; <http://212.3.246.142/docs/1/BNGJCMJAHCODHMBAJGKMFMFNPDB19DBYCY9DW3571KM/BEUC/docs/DLS/2005-00181-01-E.pdf>; in the same context Rott, in Hilty/Peukert (Hrsg.), 2004, p. 267.

¹⁴⁹ Kreutzer, 2006.

¹⁵⁰ Grundmann, 1999; Schumacher, 2005.

law. The diverse regulations on exclusive and selective distribution, the umbrella regulation 2790/1999,¹⁵¹ the regulation 1400/2002¹⁵² on the car sector, and the regulation 772/2004¹⁵³ on technology transfer, however, intervene indirectly in contract-making (indirectly, because the parties to the vertical agreement are free to define their contractual relations). In practice, however, the content of the rights and duties in vertical agreements is determined to a large extent by block exemptions. The parties will often literally copy the articles in the block exemptions into their contracts to avoid discrepancies between the EC rules and the contractual rights. This is particularly true with regard to “hard core restrictions”.

There are at least two lessons to learn from private competition law. First of all, the legal distinction between cartel law (block exemptions) and contract law (the shaping of the contractual relations in vertical relations) becomes blurred. Second, the block exemptions, in particular in their recently modified versions, introduce “competitive elements” into contract-making, such as cancellation rights and rights to claim compensation for investments.

(2) State aid law: state aid is regulated under Arts. 87 et seq. of the ET. The huge bulk of case law constitutes a prominent field of research in order to investigate the indirect effects of primary EC law on contractual relations.¹⁵⁴ The new economic approach has led to the adoption of the de-minimis Regulation 1998/2006.¹⁵⁵ European state aid law may be divided into a substantive and a procedural part. The terminology differs: sometimes the procedural law is dealt with under the heading of “remedies”,¹⁵⁶ sometimes it is simply termed procedural rules on state aids.¹⁵⁷ What really matters are the possible effects of illegal state aid, that is to say the question of repayment of unlawful state aid¹⁵⁸ and the possible remedies of third parties.¹⁵⁹

(3) Public procurement law: public procurement affects the market freedoms. It is heavily regulated by secondary law. As early as 1971, the EC adopted Regulation 1182/71.¹⁶⁰ The two major pieces of EC law which have determined public procurement law since their entry into force on 31st January 2006 are Directive 2004/17/EC¹⁶¹ dealing with procurement procedures dealing with entities operating in the water, energy, transport and postal services and Directive 2004/18/EC¹⁶² on the coordination for the procurement procedure on public works contracts, public supply contracts and

¹⁵¹ OJ L 336, 29.12.1999, 21.

¹⁵² Commission Regulation (EC) No 1400/2002 of 31 on the Application of Article 81(3) of the Treaty to Categories of Vertical Agreements and Concerned Practices in the Motor Vehicle Sector, 2002 OJ L 203, 1.8.2002, 30.

¹⁵³ OJ L 123, 27.4.2004, 11.

¹⁵⁴ See the list of case law in Mestmäcker/Schweitzer, 2004, p. 1177 and Beljin, in Schulze/Zuleeg (Hrsg.), 2006, § 28.

¹⁵⁵ OJ L 379, 28.12.2006, 5, thereto Nordmann, 2007, p. 752.

¹⁵⁶ Beljin, in Schulze/Zuleeg (Hrsg.), 2006, § 28.

¹⁵⁷ Mestmäcker/Schweitzer, 2004, §§ 42-47.

¹⁵⁸ Already Micklitz/Weatherill, 1997, pp. 226 et seq.

¹⁵⁹ For an early account of the issue, Gormley, in Micklitz/Reich, 1996, p. 159.

¹⁶⁰ OJ 1971 L 124, 3.6.71, 1.

¹⁶¹ OJ 2004 L 134, 30.4.2004, 1.

¹⁶² OJ L 134, 30.4.2004, 114.

public services contracts. Both are currently under revision.¹⁶³ The emphasis in academic research is on competition and the market freedoms.¹⁶⁴ Whilst the purpose of these directives is clearly to enhance competition and strengthen the market freedoms, they shape at the same time contractual relations.¹⁶⁵ This is particularly true with regard to appropriate remedies.¹⁶⁶ Most recently the ECJ held in a landmark decision that a Member State is obliged to cancel contracts which have been concluded in violation of EC procurement obligations.¹⁶⁷ This judgment challenges *pacta sunt servanda* and the protection of confidence (*Vertrauensschutz*). Again, the ECJ is using private parties to strengthen the European Economic Constitution.

Therefore state aid and public procurement affect private law relations in at least three ways: (1) contractual relations between the state and the benefiting private parties are indirectly or even directly influenced by state aid and public procurement rules, (2) remedies are vested in the hands of competitors disadvantaged by the decision taken and (3) competitors' remedies have an impact on the contractual relationship between the state and the benefiting parties.

3.1.5. Health, food safety and the regulation of services (contractual standard setting and liability)

(1) Product safety and food safety law: Directive 2001/95/EC¹⁶⁸ on product safety enhances the role of contract law as a means of shaping contractual relations.¹⁶⁹ Even more interesting are the liability rules hidden in various fields of food law,¹⁷⁰ including the Feed Hygiene Regulation 183/2005,¹⁷¹ the Food Hygiene Regulation 852/2004;¹⁷² the Regulation on Official Feed and Food Controls 882/2004¹⁷³ and the Regulation 178/2002¹⁷⁴ on Food Law.¹⁷⁵

(2) Consumer law and services: the so-called Services Directive 2006/123/EC¹⁷⁶ enhances the elaboration of “technical standards”, by the European standards bodies CEN/CENELEC as well as by National Standards Bodies, that come near to some sort

¹⁶³ COM (2007) 23 final, 241.2007.

¹⁶⁴ See Mestmäcker/Schweitzer, 2004, § 36; Noch, in Schulze/Zuleeg (Hrsg.), 2006, § 29.

¹⁶⁵ Some references may be found in Noch, in Schulze/Zuleeg (Hrsg.), 2006, § 29 Rn. 172 et seq.

¹⁶⁶ See Arrowsmith, in Micklitz/Reich (eds.), 1996, p. 125.

¹⁶⁷ ECJ, 18.7.2007, Case C-503/04 ECR 2007 I-6153; Mitrenga/Rubach-Larsen, available under the homepage <http://www.bblaw.com/Broschueren.507.0.html?&L=1>.

¹⁶⁸ OJ L 11, 15.1.2002, 4.

¹⁶⁹ See Cafaggi (ed.), 2006; Cafaggi/Muir Watt (eds.), forthcoming in 2008.

¹⁷⁰ See for an overview Basedow, in *Liber Amicorum Siehr*, 2000, p. 17.

¹⁷¹ OJ L 35, 8.2.2005, 1.

¹⁷² OJ L 139, 30.4.2004, 9, as amended.

¹⁷³ OJ L 191, 30.4.2004.

¹⁷⁴ OJ L 1.2.2002, 1.

¹⁷⁵ See Civic Consulting, Liability in the food and feed sector, p. 50; taken out of “Financial Guarantees in the Feed Sector”, SANCO/2004/D1/SI2.398887, Final Report, Berlin, 6.09.2005, European Commission, DG SANCO, still unpublished.

¹⁷⁶ OJ 376, 27.12.2006, 36.

of standard contract condition with a rather unclear legal status.¹⁷⁷ These technical standards are developed within and under the Services Directive which defines a fully harmonised framework for the regulation of services. Technical standards, however, are per definitionem non-binding. What happens if these technical standards contradict to national unfair contract terms legislation? So far it remains unclear whether the technical standards can be measured against the scope of application of Directive 93/13/EEC¹⁷⁸ on unfair contract terms.

These two fields of law – health/safety and services – are tied together by one and the same approach: (1) the way in which voluntary standards are set, that is for the most part and increasingly via standards bodies with regard to product and food safety, as well with regard to the quality of services; (2) the absence of binding European rules which lay down contractual rights and duties; (3) the compensatory function of liability rules and the role voluntary standards play as a yardstick in assessing contractual and tortious liability; and (4) the legal quality of the rules.

3.1.6. *Is generalisation possible and feasible?*

All these fields are at the heart of the Internal Market programme. They have been subject to legal measures introduced by the European Community in its efforts to establish a truly European market, which is embedded in a competitive environment. Law is used to strike down state monopolies or state restrictions (network law – electricity, gas, water, railway transport); to establish and shape sectoral competitive markets (the car market through distribution agreements, public procurement through competitive bidding); to create and strengthen intellectual property rights (licensing contracts); to re-organise the market for financial services (insurance, investment services, credit, securities); to lay down basic standards for labour and consumer protection (health protection and protection of economic interests, non-discrimination); and to establish a true European market for services.

The focus of all these measures is not on private law-making in a traditional sense, i.e. establishing ground rules for a European civil society of autonomous private parties voluntarily interacting within the economy and society. The visible hand of the EC legislator emphasises realising particular sector or product/service-specific goals within the Internal Market programme. Most of the rules are vertical, in the sense that they are market- or sector-related; only consumer protection and labour law/anti-discrimination rules pursue a horizontal approach across particular markets. However, it should be clear that the five areas here under review constitute a large and important part of what private law today is all about, in b2b and b2c relations.

The overall hypothesis is that it is feasible and possible to deduce “rules” from the various fields which ideally fit together and provide a – if not coherent, then at least – full picture of the *visible* European private law. Such an approach presupposes that it is methodologically sound to deduce out of special rules in various sectors general conclusions which reach beyond the particular sector and/or area of protection

¹⁷⁷ See Micklitz, Service Standards: Defining the Core Consumer Elements and their Minimum Requirements, Study Commissioned by ANEC, the European Voice in Standardisation, 2007 available at <http://www.anec.eu/attachments/ANEC-R&T-2006-SERV-004final.pdf>.

¹⁷⁸ OJ L 95, 21.4.1993, 29.

(consumers, workers, discriminated persons).¹⁷⁹ The question remains, provided the answer is in the affirmative, whether and to what extent these “generalised rules”, which determine the transformation from autonomy to functionalism, affect traditional private law and how these two different legal systems can be made compatible.

3.2. Relationship with the European Commission Project on the Codification of European Private Law

From a European market-based perspective (the economisation of the law), it suffices to adopt the rules which are needed to establish and guarantee the workability and feasibility of particular markets (via vertical rules) or the Internal Market as such (via horizontal rules).

Thus far – at least from the standpoint of the European Commission – there has been no urgent need to establish a consistent body of European private law (European Civil Code), as suggested by the European Parliament and fostered by the European Commission through the various Communications and research programmes.¹⁸⁰ This might explain why the European Commission faces no difficulty in turning the “political” initiative of the European Parliament into a “mere academic” exercise. The bulk of the proposals, the Acquis Principles and the academic Draft Common Frame of Reference might then become some sort of a playground for researchers all over Europe. All that the European Commission might wish to get out of the codification project is guidance on how to better shape the rules which govern those fields of private law where input is needed to increase the workability of particular markets or of the Internal Market. I refrain from speculating over the *political* future of the Common Frame of Reference, over whether the European Commission will succeed in its stalling tactics tacitly supported by the majority of the Member States or whether the European Parliament strengthened by enthusiastic academics may succeed in creating a European public that underpins the plea for a genuine set of European law rules – in whatever form. The failure of the European Constitution might have further weakened the political power of the European Parliament to push the codification project further. The silent constitutionalisation process of private law via basic and human rights, even in the form given to it under the Lisbon Treaty, is much more a field of steady development by courts and academics than a device that can be instrumentalised to shape policy on the political future of the Common Frame of Reference.

The more ambitious question is whether and to what extent the “generalised rules” once they are derived from the visible private law *need a coherent body of European private law rules as a necessary supplement or whether the remaining gaps can be filled by reference to the diverse national private legal orders*. There are at least three different sets of European rules which have to be tested: the *acquis* principles, PECL and the Draft Common Frame of Reference. Very cautiously, I would assume that the *acquis*

¹⁷⁹ This is exactly what the *acquis* group and the study group did. Whilst this consequence is inherent to the work of the *acquis* group, it is less so with regard to the study group. However, the PEL SC (on Services) results from deducing general rules out of particular types of contract rules in the area of services. For earlier discussions Grundmann, 2005, pp. 187, 202 who is in favour of such an approach; however, very critical Collins, 2005, p. 213.

¹⁸⁰ The literature to the project is overwhelming, see for an overview of the different positions, Grundmann/Stuyck (eds.), 2002.

principles, due to their regulatory perspective, are nearer to what might be needed than PECL in its present form, as the *acquis* principles are largely developed out of “visible private law rules”, in particular out of consumer law, although they might have to be reconsidered in light of the fields of law which have so far been left out. The counter hypothesis is that the *acquis* principles neglect the *droit commun*.¹⁸¹ Then the only way out might be to use PECL as the supplementary body of law. However, I start from the premise that the *droit commun* does not suffice as it is too backward-looking, setting aside the transformation process private law is currently undergoing at its “boundaries”. If any, the Draft Common Frame of References might be the better choice, provided the “generalised rules” deduced from the visible private law cannot stand on their own. Whether a body of European private law is needed, besides the “generalised rules”, the relationship between European private law rules (PECL, DCFR, *Acquis* principles and the generalised rules) and the national private legal orders has to be clarified.¹⁸²

Whilst my reflections are certainly tied to the ongoing work e.g. in the *study* group¹⁸³ and the *acquis* group,¹⁸⁴ the focus of my research will be on those rules where the hands of European private law are visible (a)-(f). I will not hide a certain reluctance to use the rules developed so far by either group as long as the different initiatives exclude from their approach the visible European private law as defined above. This disclaimer applies to the work of the study group and the *acquis* group. Even if both groups were to embark upon an analysis under their respective methodological approaches of the here proposed set of rules (a)-(f), there is always a risk that the current body of rules would go unquestioned. Additional research would then lead to minor adjustments here and there but would not challenge the substance of the project as it stands – and the theoretical model behind it.

3.3. “Visible” European private law and national private law

The question remains how the visible European private law is related to national private legal orders and vice versa. I start from the premise that the two private laws, European private law and the national private laws, stand largely side by side with visible European private law. This is true even if it transpires that the “generalised rules”, to be deduced from the visible private European law, might and should be supplemented by a set of more general rules than the ones which it is suggested are enshrined in the visible European private law.

¹⁸¹ Jansen/Zimmermann, 2007, pp. 1113, 1118.

¹⁸² See under 3.3.

¹⁸³ See Mc-Guire, in Ernst (Hrsg.), 2007, p. 225, who describes the working method of the study group as well as the series of publications “Principles of European Law, Study Group on a European Civil Code”, Commercial Agency, Franchise and Distribution Contracts (eds.), Hesselink/Rutgers/Bueno Diaz/Scotton/Feldmann, 2006 and Benevolent Intervention into Another’s Affairs (ed.), von Bar, 2006; Service Contracts (PEL SC) Barendrecht/Jansen/Loos/Pinna/Cascao/van Gulijk, 2007; Drobnig (ed.), 2007; Lilleholt/Victorin/Fötschl/Konov/Meidell/Torum (eds.), 2008.

¹⁸⁴ Contract I, Pre-contractual obligations, Conclusion of Contract, Unfair Terms, edited by Research Group on the Existing EC Private Law *Acquis* (*Acquis* Group), Principles of the Existing EC Contract Law (*Acquis* Principles) 2007; Contract II, Performance, Non-Performance, Remedies, edited by Research Group on the Existing EC Private Law *Acquis* (*Acquis* Group), Principles of the Existing EC Contract Law (*Acquis* Principles) 2008.

- Regulatory EC law (the generalised rules)
- National private legal orders
- EC codification project (PECL, Acquis Principles and DCFR)

The juxtaposition of the different orders calls for an equilibrium between European private law rules and national private legal orders. However, the difficulty today seems to be that both the theoretical and the political debate bears an ideological undertone, with on the one side, those who defend the independence of the national legal orders on the basis of differing legal cultures and traditions and material (distributive) justice, and on the other side, those who claim that these differences do not matter and that unique European rules are the sole solution to the furtherance of the European integration process, and that fairness suffices. To some extent the two camps can be associated with the two major trends in European private law – politicisation and economisation. I will refrain from naming and blaming particular persons or institutions.¹⁸⁵ It is certainly true that the tone between the two camps has become sharper since the European Commission’s shift towards favouring full harmonisation of private law matters, combined with the country of origin principle. Prominent fields of conflict were the adoption of the Directive 2005/29/EC on unfair commercial practices and the revision of the Consumer Credit Directive. In both cases, the European Commission was outvoted by the Member States. Full harmonisation was accepted, but the country of origin principle was rejected, somewhat half-heartedly in unfair commercial practices law,¹⁸⁶ more forcefully in the debate over the concrete outlook of the consumer credit directive.¹⁸⁷ In its recent communication on the revision of the consumer acquis,¹⁸⁸ the European Commission is tackling the issue in a more systematic way. It has launched a general debate on the appropriate approach, however the consultation procedure re-confirms the existing state of the debate – support for targeted full harmonisation, rejection of the country of origin principle.¹⁸⁹

The discussion revolves around consumer law, but it is of paradigmatic character for the whole field of European private law, at least the visible European private law. The key question is about pre-emption, which enshrines a constitutional conflict over competences. In essence it is therefore a debate over different forms of federalism.

I start from the premise that an approach is needed, which avoids an either/or approach as well as camp thinking and overcomes the difficult decision of where to anchor the market component and material justice in private law.¹⁹⁰ The questions to be solved are the following: what are the issues that may justify full harmonisation (or in the words of the European Commission “targeted harmonisation”)? What are those that call for the

¹⁸⁵ Just to mention that I am involved in the debate. In our position paper, Norbert Reich and myself have rejected full harmonisation and the country of origin principle, 2007, p. 121.

¹⁸⁶ See Micklitz, in Howells/Micklitz/Wilhelmsson, 2006, p. 40.

¹⁸⁷ See Rott, to be published.

¹⁸⁸ See in particular COM (2006) 744 final on the Revision of the Consumer Acquis.

¹⁸⁹ Commission Staff Working Paper, Report on the Outcome of the Public Consultation on the Green Paper on the Review of the Consumer Acquis, 2007, p. 3 (unnumbered EC working paper, to be downloaded from the website of DG Sanco).

¹⁹⁰ One might also argue that the distinction is questionable, see Stehr, 2007; in particular via Corporate Social Responsibility, see Moreau/Francesconi (eds.), 2007.

country of origin principle? What are the areas where minimum harmonisation is appropriate? And where should harmonisation be rejected outright in order to leave room for competition of national private legal orders¹⁹¹ or self-regulation? All these different approaches have to be co-ordinated in a flexible federal model of multi-level Europe.

4. The analytical frame to cope with visible private law

The visible hand of European private law, in its tensions between market (economisation) and governance (politicisation and de-politicisation¹⁹²) and its interrelationship with national private legal orders, can be analysed on the basis of four categories: substance, process, instruments and enforcement. Seen through such lenses, the transformation from autonomy to functionalism in competition and regulation becomes clearer.

4.1. Substance of visible European regulatory private law

(1) Economisation of private law via the market bias: the hypothesis¹⁹³ which I have developed on the basis of a first analysis of the existing consumer law Directives as well as on the major areas of European private law in b2b relations, including the Directive 86/553/EEC¹⁹⁴ on commercial agents and the Late Payment Directive 2000/35/EC,¹⁹⁵ is that the visible European private law is governed by “seven legally binding principles – or better devices – or parameters”¹⁹⁶ which are designed to implement the Internal Market programme, such as (1) the protective instrumental device, (2) the “merging” of advertising, pre-contractual information and contract conclusion,¹⁹⁷ (3) competitive and contractual transparency, (4) standardised contract making, (5) fairness as market clearance and market access (as opposed to social justice), (6) post-contractual cancellation/rescission/termination rights and (7) effective legal redress.

These seven binding “principles/devices/parameters” are hardly compatible with existing national private legal orders. The most important change which runs through all seven “principles/devices/parameters” is the shift from social justice to access justice (*Zugangsgerechtigkeit*).¹⁹⁸ At the same time, the seven “principles/devices/parameters” clash with common law and continental legal thinking at various points. They overstep clear cut boundaries between contract law and unfair commercial practices law, in that

¹⁹¹ See in this direction now Unberath/Johnston, 2007, p. 1237.

¹⁹² Maurizio Bach argues that politicisation ends up in de-politicisation, as the relevant decisions are taken in expert committees far from any “political” control.

¹⁹³ Micklitz, 2005, p. 549, however, see the critique from Baldus/Vogel, 2007, p. 158.

¹⁹⁴ OJ L 382, 1986, 17.

¹⁹⁵ OJ L 200, 8.8.2000, 35.

¹⁹⁶ I hesitate to use the term principles as the idea of principles suggests that they serve themselves in interpreting the law.

¹⁹⁷ Howells/Janssen/Schulze, 2005; Mankowski, 2005, p. 779; Grundmann, 2002, p. 269.

¹⁹⁸ Social Justice in European Private Law, Yearbook of European Law 1999/2000, p. 167.

they unite substantive law and procedural law (rights and remedies – alien to continental law) and in that they put the respective fields of private law into one single particular perspective, that of being instrumental to the completion of the Internal Market. This is exactly what economisation of contract law is all about. The extent to which constitutionalisation of private law allows a better balance to be struck between the old national private legal orders and its economised European counterpart will have to be checked.

I am also interested in the disintegrative effects of the visible European private law that implants alien elements into national legal orders,¹⁹⁹ but I wonder whether the categorisation or classification is not one sided and in the end pejorative. I would prefer to start from the premise that what EC private law, and in particular the ECJ, is doing, might be better termed “creative destruction”.²⁰⁰ The strength of the European law derives from its underlying rationalisation logic which provides for the potential to rethink the basics of national private legal orders in a supranational environment – without necessarily providing reliable answers.²⁰¹

(2) Politicisation of the visible law – governance and substance of the rules: here, I would start from the findings of my analysis of “standards on services” as developed or being developed by European and national standards bodies.²⁰² Whilst this research dealt with governance by way of technical standardisation, it might nevertheless serve as a starting point for considering other fields of the visible private law, in particular in its governance perspective.

The existing technical standards as well as the projects under way in various fields of (consumer) services have been screened against the following parameters: (1) accessibility and affordability of services; (2) pre-contractual stage and contract conclusion; (3) content of the contract (minimum content, safety, quality, billing, payment terms); (4) rights and remedies (withdrawal, compensation and liability); (5) post-contractual stage (after sales services, complaint handling, dispute settling, collective redress, protection against insolvency); and (6) monitoring and compliance. These six parameters have been deduced from the analysis of the existing EC legal requirements with regard to particular types of services:²⁰³ consumer contract law on services, transport rules, financial services, network services (electricity, gas, telecommunications, postal services), services such as contracts with liberal professions and craftsmen.²⁰⁴

The review of EC directives and regulations on the one hand, and the technical standards on services on the other, revealed a striking difference: the EC directives and

¹⁹⁹ I think these findings belong to the today’s common sense. The different references to the ECJ under Article 234 in private law matters provide ample evidence for the existence of such disintegrative effects; see lately Schmid, 2006.

²⁰⁰ I borrow this term from Grundmann, who himself refers to Schumpeter, who made the concept of creative destruction publicly known.

²⁰¹ Micklitz, in Boele-Woelki/Grosheide (eds.), 2007, p. 387.

²⁰² Service Standards: Defining the Core Consumer Elements and their Minimum Requirements, Study Commissioned by ANEC, the European Voice in Standardisation, 2007 available at <http://www.anec.eu/attachments/ANEC-R&T-2006-SERV-004final.pdf>.

²⁰³ See also Micklitz, in Cafaggi/Muir Watt (eds.), to be published 2008.

²⁰⁴ Op. cit., pp. 107-127.

regulations focus much more on the content of the contract, on minimum obligations, and in particular on rights and remedies. The same cannot be said for technical standards. The closer the standards get to the content of the contract, the more vague they become. More particularly, the following trends are obvious:

- (1) Affordability and accessibility: No such rules exist in technical standards.
- (2) Pre-contractual stage: All rules emphasise the pre-contractual stage, in particular the transparency of the service and the comprehensive sets of information requirements.
- (3) Content: There is a world of a difference between law-making and standard-making. Few standards contain minimum requirements for the content of the contract. Technical standards, if any, focus on quality requirements and quality management which constitute a prominent field for standardising activities. A notable example is the BSI standard on billing.²⁰⁵
- (4) Remedies: Most of the standards make no reference to the concrete obligations of the service providers or the rights consumers might benefit from in case the service provider fails to execute the service properly. Sometimes liability is mentioned, mostly in conjunction with possible (not clearly) recommended insurance.
- (5) Post-contractual stage: One might have expected that the post-contractual stage would become a major field for standardisation. This is partly true, however much less so for after sales services than complaint handling and out of court dispute settlement. Contrary to the official EC policy to foster out of court dispute settlement, the standards emphasise in-house complaint handling. This goes along with the policy behind the Services Directive.
- (6) Monitoring and inspection: The concept of best practice suggests the need to organise a constant learning process, via evaluation of customer satisfaction and mechanisms for taking corrective action. There is an obvious tendency to take a harder look at the practical effects of the relevant standards, at the management of customer satisfaction via inquiries and at the need to take corrective action.

4.2. New processes of “law” making – or the privatisation of law-making

The most visible sign of the emerging governance design is the changing pattern of law-making. If, however, new actors become involved in law-making or if the rules of procedure are amended, governance has to face three challenges: legitimacy, accountability and transparency.

(1) Directives and Regulations: The European Commission has since the European Single Act developed a kind of a standard procedure which it follows more or less consistently in law-making. Whilst the chronological order may differ, the substance remains nearly identical:

- (1) the European Commission seeks a political mandate from the Council, which might be enshrined in policy programmes;

²⁰⁵ BS 8463:2005 “Specification for customer billing practice”.

- (2) this mandate is transformed in a call for tender asking for advice through research studies;
- (3) the results of the studies provide the ground for a Green Paper in which the European Commission sketches a basic outline of potential options for action;
- (4) an impact assessment often undertaken by a consultancy firm provides guidance on the possible political and/or economic implications of a European regulatory activity;
- (5) on the basis of the Green Paper the Commission launches a consultation procedure²⁰⁶ via the internet, which is open to everybody, although the Commission sometimes invites particular circles to comment on the initiative;
- (6) sometimes the consultation procedure concludes with a public hearing in Brussels to which a selected number of stakeholders are invited;
- (7) the results of the consultation procedure serve as a basis for either presenting a White Paper to the public which contains clearer options for action or directly drafting a first proposal of a directive or regulation.

The process of law-making attracts attention in political and legal science. It is common ground that the new mechanism is meant to increase the output legitimization²⁰⁷ of the European Commission's activities. It is equally common ground that the European Commission is trying to organise and to finance a substitute for the absence of a European society by establishing academic networks, by seeking input from European and national lobby groups, from European and national non-governmental organisations and by consulting governments at an early stage. Most of the activities can be reconstructed via the internet. They go back to selection procedures where in principle everybody and every organisation might apply. The European Commission is not deliberately shaping its proper societal environment which surrounds the law-making process. However, it is nevertheless often hard to understand why particular groups, stakeholders and the like are consulted and others are not. This is exactly the weakness of a societal process which has to be politically organised and which does not emerge out of civil society.

My hypothesis is that the process of law-making, as characterised by the symbolic participation of stakeholders and a cacophony of viewpoints, facilitates to a large extent the European Commission's realisation of its own ideas. The participatory outlook hides the authoritarian character of the whole procedure. Consultancy firms that tend to accompany the whole law-making process are the true key players. They serve as a buffer between the European Commission and the "involved" European society. An example might illustrate what is meant. In response to its call for reactions to the Green Paper on the Consumer Acquis the European Commission received more than 300 responses.²⁰⁸ However, the European Commission did not undertake the evaluation itself, but delegated it again to a consultancy firm. Despite the disclaimer that the report

²⁰⁶ Which is again formalised: – Towards a reinforced culture of consultation and dialogue – General Principles and minimum standards of consultation of interested parties by the Commission, Communication of the Commission, COM (2002) 704, 11.12.2002.

²⁰⁷ See for the distinction between input and output legitimization, Scharpf, 1999.

²⁰⁸ See Commission Staff Working Paper, p. 3.

“does not draw political conclusions from the consultation process”,²⁰⁹ it already contains a political message in the way in which the different responses are presented and weighed. It is not very reassuring that such an important step, i.e. the evaluation of the consultation procedure, is not executed by public officials, but by paid third parties, who are under the control and supervision of the European Commission only.²¹⁰

The only counterweight to the authoritarian use of the liberty/independency left to the European Commission is then the European Parliament in the first as well as the second reading and the Member States in the Council. The latest experiences with regard to the Unfair Commercial Practice Directive and the Consumer Credit Directive show ambivalent results.²¹¹ Whereas the Member States are in their majority relatively consistent in that they reject the country of origin principle but accept targeted full harmonisation, the European Parliament’s role differed considerably in the two directives. It only got involved in the Consumer Credit Directive, but did not block the European Commission with regard to its approach on unfair commercial practices, where it restricted itself to streamlining the Commission’s proposal without substantial changes.

However, it is not possible to build a whole theory on the analysis of just two pieces of EC legislation. Other strategies are easily imaginable. Member States often use the European law-making process as a forum for issues which are deemed to be unsolvable in the national context. Once transferred to the EC level, Member States are deprived of the opportunity to influence the law-making process in the way they would like to. So what is needed is a much clearer picture of the law-making process in particular in areas where the subject matter is highly technical and complex, such as in the field of telecommunications and energy.

(2) There seems to be no standard procedure in the making of non-binding or semi-binding rules under the New Approach, the Lamfalussy procedure, the OMC, co-regulation and self-regulation. Whereas this finding is obvious with regard to self-regulation, a standard procedure could theoretically exist where the European Commission is involved in one way or the other. This is all the more true as the rules which are developed under one of these new regulatory instruments bear a ‘legal’ character, i.e. they are enshrined in some sort of a binding EC regulatory framework. Rule-making even in its new form bears a societal dimension. The key issues seen from a democratic perspective requiring legitimacy, accountability and transparency are (1)

²⁰⁹ See Commission Staff Working Paper, p. 3.

²¹⁰ One might not exclude that the European Commission influences indirectly by commenting on the evaluation work undertaken by the European Commission, see for similar experiences in the evaluation of the consumer programme, Micklitz, *Yearbook of Consumer Law 2008* (eds.), Twigg-Flesner/Parry/Howells/Nordhausen, 2007, p. 35.

²¹¹ I take these two as an example because I was personally involved in both projects at various ends. My institute prepared the first study on the feasibility of a European Fair Trading Directive, available at the homepage of DG Sanco http://ec.europa.eu/consumers/rights/studies_reports_en.htm. With regard to the Consumer Credit Directive I was involved in the preparation of the impact assessment, Micklitz/Rott, *Broad economic analysis of the impact of the proposed Directive on consumer credit for Civic Consulting on behalf of the European Parliament under EP-IMCO Framework Contract Lot 4 (Consumer Protection)*, available in the internet at http://www.europarl.europa.eu/comparl/imco/studies/0704_consumercredit_en.pdf.

access of the public or its stakeholders to the rule-making process and (2) participation of the public or its stakeholders in the rule-making process.

It is a common characteristic of all new forms of rule-making that stakeholders are not given formal legal status. The democratic gap seems obvious. Already the New Approach to Technical Standards has caused much discussion on the question of whether and to what extent consumer organisations should be legally included in the standardisation process.²¹² 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 underlines the importance of standardisation of services, it even mentions consumer organisations, but without drawing any conclusions with regard to participation rights in whatever form. The first draft of Reg. 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 negotiations in the Council.²¹³

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.

In 2004, the ERGEG published 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 end, it comes close to the "normal" consultation procedure which the European Commission initiates whenever it intends to prepare and to take action.

Although the analysis of the law in the books clearly indicates a particular understanding of the way in which these rules have to be shaped, little knowledge is available on what the law in action is.²¹⁴ Governance suggests that the new forms of rule-making also provide for broader participation of stakeholders, for the society at large, thereby providing these new rules with new legitimacy patterns. However, it is one thing to build a theory on governance and another to test the theoretical concept in the real world.

The analysis of the role of consumer organisations in the field of standard-making provides no very promising insights. Representatives from the consumer committees of National Standards Bodies and/or from ANEC have accompanied the elaboration of a number of technical standards.²¹⁵ Through their active participation the agreement

²¹² Joerges/Falke/Micklitz/Brüggemeier, 1988 and more particularly Micklitz, in Joerges, 1989, pp. 182-205.

²¹³ See www.european.consumerlawgroup.org, comments on the regulation on consumer protection cooperation, ECLG 134/2004.

²¹⁴ There is one exemption – OMC, see Zeitlin, in Zeitlin/Pochet (eds.), 2005; Smismans, 2006.

²¹⁵ See Chapter IV., II., 3. with concrete references.

between CEN and ANEC leads to palpable results. Consumer representatives have had access to the relevant documents; they are allowed to make proposals and to provide scientific advice. The minutes of the working session and meetings are not publicly available. Consultation remains confidential. However, it is hard to say whether and to what extent the consumers' voice has been taken into account in the relevant technical committees. Whether or not consumers are satisfied with the relevant standards becomes clear only after the standard has been adopted and published in the Official Journal or made accessible via the National Standards Bodies. The question then is to what extent these findings can be generalised.

4.3. *New and old regulatory instruments – mandatory, default rules and private regulation*

(1) The European Commission no longer relies exclusively on traditional regulatory means, such as regulations, directives and recommendations, to give shape to the visible private law. As is well known, the European Commission has been and still is quite innovative in tailoring particular instruments to different fields of law, in particular with regard to the regulation of services.²¹⁶

(2) The then New Approach to Technical Standards and Regulations was originally designed to regulate technical standards and to make mandatory product safety regulation superfluous. Whilst this concept failed, in that it turned out to be politically necessary to adopt a Directive on Product Safety as early as six years later (the Directive 92/59/EC,²¹⁷ which became Directive 2001/95/EC²¹⁸ in 2001), the very concept has been gradually extended to services and it might be extended to foodstuff and cosmetics (without any preparedness to counterbalance the extension of the New Approach by enlarging the scope of the Directive 2001/95/EC on general product safety to services). In the context of this analysis the most striking phenomenon is the growing importance of Standards Bodies in shaping formally speaking non-binding rights and duties in particular types of contracts, in b2b and b2c relations.

The OMC is bound to social policy and labour law. The European Commission never intended to extend the scope of the Open Method of Co-ordination to European private law, in particular to the envisaged codification project, although legal doctrine suggested testing its feasibility in the field of private law-making, in particular with regard to the ambitious codification project.²¹⁹ There is a certain parallel between the role and function of the OMC in social policy and the possible regulation of traditional private law. In both areas the European Community lacks competence. This is abundantly clear in the field of social policy; it is less clear, though commonly agreed, in the field of traditional contract law. The Community might have competence with regard to the adoption of rules on consumer protection, on regulated markets, on commercial practices, on health and safety, i.e. on regulating the boundaries of EC private law, the visible private law, but not with regard to substituting the national

²¹⁶ See for a broader account of the different strategies, Cafaggi (ed.), 2006.

²¹⁷ OJ L 228, 11.8.1992, 24.

²¹⁸ OL L 11, 15.1.2002, 4.

²¹⁹ Cafaggi, in Cafaggi (ed.), 2003, p. 183; van Gerven, in Furrer (Hrsg.), 2006, p. 437; now Cafaggi, EUI Working Paper 2007/26.

private legal orders by a European Civil Code.²²⁰ One may wonder whether and to what extent the political discussion of the Draft Common Frame of Reference will boost the importance of the Open-Method of Co-ordination in the Codification Project.

The European Commission has been, and still is, half-heartedly promoting self- and co-regulation in contract law,²²¹ in unfair commercial practices²²² and in the field of intellectual property rights.²²³ Whilst the initiative of the European Commission failed in the field of developing standard terms – the European Commission has explicitly given up the idea – it has been more successful in unfair commercial practices and, to some extent, property rights law. In its early attempts, the European Commission hoped to combine mandatory rules and voluntary rules in the field of unfair commercial practices: codes of conduct were to form an integral part of the regulatory approach and, it was believed, they would give shape to fair and non-misleading commercial practices. However, these attempts never led to a fully fledged “integrated” proposal. The final adopted version of the Directive 2005/29/EC on unfair commercial practices is restricted to the question whether and under what conditions codes of conducts may be sanctioned by the regulatory devices of the Directive.²²⁴ The Directive 2001/29/EC on Copyrights in the Information Society, on the contrary, actively promotes codes of rightholders on access to and fair use of copyrighted works.²²⁵

(3) The legal quality of the DCFR too is ambiguous. What are the legal consequences of an interinstitutional agreement between the European Commission and the European Parliament to use the ‘tools’ developed in the DCFR in the future law-making process? Will parties be allowed to choose the DCFR as the 28th legal order under the Rome Convention? Member States are reluctant, but do not fully exclude this opportunity. What happens if the parties voluntarily agree to base their contract on the DCFR? Are the rights and duties as enshrined in the DCFR subject to judicial control – and if yes, what should be the yardstick against which they are measured? An example might highlight the importance. The DCFR rules out the right of consumers to indefinitely withdraw from doorstep selling contracts in cases of lack of notification.²²⁶ This is contrary to the *Heininger*²²⁷ doctrine. Could the DCFR then be measured against existing case law?

(4) All these new regulatory instruments are of primary importance in the visible European private law. In this sense, visible private law provides a fertile ground on which to test the theory that the borderline between traditional regulation by the legislator and new forms of regulatory instruments is becoming ever more blurred.²²⁸ That is why the substance of this research is central to the debate on the interplay of

²²⁰ See the numerous writings of Weatherill, in Cafaggi (ed.), 2006, p. 37, however, Basedow, 1996, p. 1169, argues in favour of using Art. 306 as a legal basis.

²²¹ Collins, 2004, p. 787. In the meantime, the European Commission has given up the idea to develop standard contract terms through participation of stakeholders.

²²² Collins, in Collins (ed.), 2004, p. 8.

²²³ Directive 2001/29/EC, OJ L 167, 22.6.2001, 10.

²²⁴ Article 6 b) Directive 2005/29/EC, see Howells, in Howells/Micklitz/Wilhelmsson, 2006, p. 195.

²²⁵ See Article 6 (4) of Directive 2001/29/EC.

²²⁶ See Terryn, *The Right of Withdrawal*, in Schulze (ed.), 2008, p. 145.

²²⁷ ECJ, 13.12.2001, Case C-481/99 *Heininger* 2001 ECR I-9945.

²²⁸ See for a deeper analysis Calliess/Zumbansen, forthcoming.

traditional forms of regulation under the Internal Market and under the Governance paradigm. The point is not only to find out which regulatory means are appropriate, in which context, by whom they shall be elaborated, and at what level of the multi-level structure of the European Community, but in a more theoretical context, to find out what the role of law (and the rule of law) should be in the changing legal environment.

Research so far, where it is not bound to particular fields of European law or the transferability of the new instruments to other areas (including the codification project), focuses on the constitutional implications of new governance or, more relevant to the subject at hand, on the enlarged institutional framework of European private law. The former specifically considers the role and rule of law²²⁹ and comitology as a means of constitutionalising the European Community, thereby advocating a normative frame based on transparency, accountability and participation.²³⁰ The latter closely analyses the extent to which the new regulatory devices affect and influence private law.²³¹

(5) Setting aside the Open Method of Co-ordination, I would like to argue that all new regulatory devices, so far used and tested in the visible private law, are based on the regulatory concept underpinning the New Approach to Technical Standards. This is true even for the European Codification project, i.e. the way in which the DCFR has been elaborated.²³² The new regulatory devices follow an identical pattern: the European Community adopts hard law in the form of directives via general clause type rules,²³³ which are then concretised via technical standards, programme type rules, codes of conducts, charters. These new rules are the result of a de-politicised law-making process in which judicial review is fading away. The role of the European Commission is strengthened to the detriment of the European Parliament. Member States may suffer from quasi pre-emptive effects, even in areas where they remain competent under the Treaty.

That is why the vast majority of the new instruments here at stake have at least the following elements in common:

- (1) they are, in some form or other, subject to public supervision, exercised by the European Commission and/or the Member States through public, quasi public bodies or private institutions mandated by the European Commission and/or the Member States – i.e. all these instruments come under the category of co-regulation;
- (2) self-regulation in a narrow sense is not seen as a *regulatory* means, at least not by the European Commission who is behind the development of the visible European private law;
- (3) the new instruments have to cope with the multi-level procedure of the EU; they have to deal with the hierarchy of the European legal order, which is still based on supremacy;

²²⁹ See de Búrca/Scott (eds.), 2006; de Búrca, 2003, p. 814; Walker, 2005, p. 581.

²³⁰ Joerges, 2000, pp. 145-161, the same author, 2002, pp. 133-151.

²³¹ Cafaggi (ed.), 2006; Cafaggi/Muir Watt (eds.), 2008; same authors, forthcoming 2008.

²³² See with regard to European private law, Micklitz, 2007, pp. 2-15, updated English version, in Liber Amicorum Guido Alpa Private Law Beyond the National Systems (eds.), 2007, pp. 699-728.

²³³ See in particular on the role of general clauses in the broadest sense, Cafaggi, EUI Working Paper 2007/26, pp. 10 and 18; Grundmann/Mazaud, 2006.

- (4) the legal quality of these rules which are developed within a binding framework by all sorts of new institutional players often remains obscure (e.g. what happens if the new rules deviate from the binding general clauses, what happens in case the new rules come into conflict with national binding law which has not been harmonised etc).

4.4. Old and new modes of law enforcement

(1) The European Community is based on the concept of *Vollzugs-Föderalismus* with regard to public enforcement and Member States' sole competence with regard to private enforcement.²³⁴

Over time, the European Commission has compensated for this lack of regulatory competence by borrowing it instead from the subject matters in which common European standards have been developed. Subject matter-related or sector-related European rules are often accompanied by imposing requirements on Member States as to the way in which enforcement must be organised. In private law matters, the Member States are free to choose between private and public enforcement as long as the established enforcement mechanisms are effective, deterrent and proportionate. Where there are national agencies, the multi-level structure of the European Community implies the need to establish co-ordination structures which lead de facto and de jure to an ever strengthened role for the European Commission.²³⁵

The second player in re-shaping the constitutional boundaries in particular with regard to private enforcement is the European Court of Justice. As yet incomplete enforcement mechanisms are partly compensated for by judicial activism on "rights, remedies and procedures", to paraphrase a seminal paper of van Gerven.²³⁶ The Member States' competence in private enforcement is thereby more and more restricted. This is largely due to the fact that Member States' remedies and procedures quite often do not suffice to guarantee effective legal protection as required under primary²³⁷ and secondary EC law.²³⁸ The growing intervention of the ECJ into national procedural autonomy²³⁹ enhances the need to clarify which enforcement measures shall be taken at what level and by whom. This means private enforcement issues necessarily invoke the federal dimension of the EU and the way in which it should be handled.²⁴⁰

(2) Today's institutional framework on enforcement may still be understood as the interplay between private judicial enforcement and administrative enforcement, where Member States benefit from the leeway left to them under the doctrine of *Vollzugs-*

²³⁴ See now Cafaggi/Micklitz, EUI Working Paper, 2007/22.

²³⁵ See the overview in Micklitz, EUI Working Paper 2008/06.

²³⁶ 2000, p. 501.

²³⁷ Private enforcement of EC law bears a strong human rights connotation, as the ECJ uses the Human Rights Convention as a reference point for strengthening individual enforceable rights.

²³⁸ See Rott, Effektivität des Verbraucherrechtsschutzes: Rahmenfestlegungen des Gemeinschaftsrechts Studie im Auftrag der Bundesanstalt für Landwirtschaft und Ernährung, 2006, available at the homepage <http://www.ble.de/download/pdf/04HS033.pdf>.

²³⁹ See Craig, 2006, p. 789; Tridimas, 2006, p. 418; Dougan, 2004.

²⁴⁰ Now Lindholm, 2007.

Föderalismus.²⁴¹ However, the prospective policy model of EU law enforcement as promoted by the European Commission seems primarily guided by decentralised enforcement through national public agencies with residual competences granted to the European Commission. This model, which was established (or is still being established) in regulated markets, has now been extended to the area of consumer contract law.²⁴² This implies a paradigm shift away from judicial enforcement to administrative enforcement. The immediate result is a U-turn in the choice of enforcement instruments, a U-turn which finds its predecessor in comitology, as developed within the New Approach to Technical Standards and then extended to various fields of EC law, in particular the regulated markets. In consumer contract law, hard enforcement via courts might be replaced by soft enforcement through new modes of governance, through enforcement co-operation between the national public agencies, the European Commission and – to some extent – stakeholders. Soft enforcement strives to find amiable solutions.

This does not mean that the European Commission intends – it has no competence anyway – to substitute private enforcement via administrative enforcement. However, the interrelationship between the two becomes much more complex. If private and administrative enforcement stand side-by-side, the interface between the two, in particular with regard to private collective enforcement has to be rebalanced. This is even more so as the Member States become more active with regard to the establishment of collective judicial enforcement remedies.²⁴³ Competition law might become an important testing ground for national and European legislators. As a result of its decentralised enforcement strategy, the European Commission seems to foster private enforcement mechanism, by individuals – business and consumers – and perhaps even by trade and consumer organisations.²⁴⁴ Administrative enforcement via national cartel agencies and the European Commission would then have to be brought into line with private individual and collective judicial enforcement. The situation is less clear with regard to the enforcement of the visible consumer law where enforcement strategies differ widely between the Member States. Some rely on administrative enforcement via agencies, others lay enforcement in the hands of trade and consumer organisations. The recent regulatory activism of the Member States has strengthened and continues to strengthen collective redress mechanisms, not only via trade and consumer organisations, but also via public agencies. The European Commission does not seem prepared to intervene in the regulation of collective judicial enforcement at this stage, at least not beyond injunctive relief. So far it takes a backstage role, merely announcing that it will test the feasibility of developing appropriate legal rules at the EC level.²⁴⁵ For the time being these initiatives are limited to commissioning various

²⁴¹ See Cafaggi/Micklitz, EUI Working Paper 2007/22.

²⁴² See Regulation 2006/2004 on Co-operation of national authorities responsible for the enforcement of consumer law, OJ L 364, 9.12.2006, 1; thereto Kaye, in Howells/Nordhausen/Parry/Twigg-Flesner, 2006, p. 417.

²⁴³ See with regard to Member States: An analysis and evaluation of alternative means of consumer redress other than redress through ordinary judicial proceedings – Final Report, Study for the European Commission, (hereinafter Stuyck Report), available at http://ec.europa.eu/consumers/redress/reports_studies/index_en.htm and as well as Micklitz/Stadler, 2005.

²⁴⁴ With regard to competition law, see Green Paper, Damages action of the EC Antitrust rules, COM (2005) 19.12.2005, 672 final.

²⁴⁵ COM (2007) 99 final, 13.3.2007.

studies, with particular emphasis on the potential economic impact of collective compensation schemes.

(3) However, there is a further dimension to law enforcement which deserves closer investigation and which goes beyond the distinction and/or the coming together of the judiciary and the executive – the degree to which the competent enforcement entities, be they courts or public agencies, co-operate outside any tight legal framework²⁴⁶ (horizontally as between them at the national level and altogether vertically at the European level under the European Commission).²⁴⁷

In “The Politics of Judicial Co-operation”,²⁴⁸ I developed the thesis that in preliminary reference procedures European courts are striving for horizontal interpretation of European rules, whereas national courts are seeking vertical advice in order to solve a concrete case. The result is a communication gap between European courts and national courts. This highlights the need to look for ways and means of improving communication between the courts and establishing a co-operation system which allows for better decision-making. The result might be an ever stronger form of “judicial governance”.²⁴⁹

I have tested my hypothesis with regard to the interplay between EC and Member State policy-making and to some extent administrative co-operation, with similar results.²⁵⁰ The European Commission has shaped and continues to shape consumer policy programmes with a view to what is necessary and feasible to improve the role of the consumer in the Internal Market. It thereby largely neglects the needs of the Member States, at least those Member States who have developed their own consumer policy programmes. To my knowledge there is no empirical evidence available on the co-operation between national authorities and the European Commission in enforcing the visible private European law. It is suggested that similar communication difficulties may be presumed to exist. For this reason, it does not seem far-fetched to argue that new forms of co-operation between courts, as well as between public authorities, are urgently needed in the multi-level European Community.

5. Structuring the interplay of European private law and national private law – preliminary considerations on a flexible co-ordination system

The overall idea is to combine “the visible hand” and “social justice” in a reshaped conflict of law perspective.²⁵¹ The “Internal Market” that I have in mind would be a co-ordination system of different visible hands, combining aspects of efficiency with those of material justice, and not merely distributing competences between the European Community, the Member States (and private actors), but delimiting them.

²⁴⁶ Potocki, in *Liber Amicorum pour Bo Vestendorf*, préf. de José Luis Da Cruz Vilaça; études coordonnées par Baudenbacher, 2007, p. 141.

²⁴⁷ See on judicial co-operation in civil matters, Storme (ed.), 2003; Storskrubb, EUI PhD Thesis, 2007.

²⁴⁸ Micklitz, 2005.

²⁴⁹ See Frerichs, 2008.

²⁵⁰ Micklitz, 2007, pp. 35-66.

²⁵¹ In this direction Furrer, 2001; Joerges, 2005, p. 149.

5.1. *Different sets of private (contract) law rules*

This overview is meant to recall the fundamental difference between the visible private law and the Acquis principles, on the one hand, and PECL and the DCFR, on the other. The former are binding law, adopted by the European Community and implemented in the Member States. Any “generalisation” of the acquis (be it the consumer acquis or the visible hand acquis) raises the question to what extent the found “rules” are already in existence or whether they reach beyond the acquis.²⁵² It becomes equally clear that the visible hand approach is broader in the subject matter analysed and the sources of law to be considered.

At this stage, there is no intention to define the relationship between the different levels and the different bodies of law, perhaps with one exception. The DCFR or the Acquis Principles are conceptualised as a coherent body of legal rules – which could at least theoretically replace the national private legal orders. However, both the DCFR and the Acquis principles may very well serve other purposes. They may be taken into consideration when it comes to interpreting national law and/or they may guide the elaboration of ‘soft rules’ within the co-regulatory framework. Both set of rules may very well develop their own way of life, a life which might reach beyond the purpose the rules have been designed for.²⁵³

European level	Visible private law (acquis communautaire) Contract law, tort law Effective legal protection (Rechtsschutz)	Acquis principles (acquis group) Consumer contract law, antidiscrimination law	PECL I-III (study group) law of obligations, contract law	Draft Common Frame of Reference (merger of acquis principles and PECL)
Member State level	National private law largely outside civil law codifications and common law	Both either part of the civil code or codified separately	The centre of orthodox civil law codification and of common law	Role and function: body of law meant to “replace” the national legal orders and/or means of interpreting national private legal orders?
Self-regulation / co-regulation / standardisation	Co-regulation and standardisation conceptually integrated in the visible private law		To some extent taken into consideration ²⁵⁴	

5.2. *Substance of the “new”law*

The survey of the five areas constituting the mainland of the visible European private law provides a first insight into those issues which must be analysed in more detail.

²⁵² See for a careful analysis of the acquis principles, Jansen/Zimmermann, 2007, p. 1113.

²⁵³ See Reich, Why contract law in regulated markets is not part of the debate – or “self-regulation” redivivus, Paper presented at the EUI on the 31st January 2008.

²⁵⁴ E.g. Service Contracts (PEL SC) Barendrecht/Jansen/Loos/Pinna/Rui Cascao/van Gulijk, 2007.

Anti-discrimination in private law	<ul style="list-style-type: none"> ➤ new values ➤ fairness of market access ➤ freedom of contract and obligation to contract ➤ human rights dimension in private law ➤ enforceability of anti-discrimination rules
Regulated markets <ul style="list-style-type: none"> ➤ Financial services ➤ Energy ➤ Transport ➤ Telecommunications 	<ul style="list-style-type: none"> ➤ new principles ➤ accessibility and affordability ➤ best practice ➤ proceduralisation of conflicts in relational contracts (disconnection and late payment)
<ul style="list-style-type: none"> ➤ Commercial practices ➤ Intellectual property rights 	<ul style="list-style-type: none"> ➤ average consumer ➤ pre- and post-contractual duties (disclosure of information) ➤ decreased importance of when exactly the contract is concluded ➤ beyond privity in contractual relations
<ul style="list-style-type: none"> ➤ Private competition law ➤ State aid ➤ Public procurement 	<ul style="list-style-type: none"> ➤ contract shaping via competition and regulation ➤ competitive elements: right and obligation to cancel illegal contracts ➤ legal effects on trilateral contracts ➤ pacta sunt servanda and protection of confidence (<i>Vertrauensschutz</i>)
<ul style="list-style-type: none"> ➤ Product safety ➤ Food safety ➤ Regulation of (other) services 	<ul style="list-style-type: none"> ➤ contract law-making via technical standard setting ➤ lack of harmonised contract law ➤ compensatory function of tort law and product liability

5.3. Combination of old and new regulatory devices

The following chart is meant to illustrate what I mean by establishing a flexible system. There is no one-size-fits-all approach. The different regulatory instruments have to be shaped according to the context in which they apply. I have used as my starting point the seven “principles/devices/parameters” which I claim to have identified in the visible European private law. One further disclaimer is needed: this first account focuses only on the question of what is to be decided and at what level. As the structural new-orientation is meant to deal with private law as such, it remains to be checked, at a later stage, which rules should be made mandatory and which should stay default rules. However, I start from the premise that mandatory rules are needed in order to guarantee a minimum level of transaction, not only in b2c, but perhaps also to some extent in b2b.

Some remarks with regard to the different approaches might explain what is meant, what the present options are and to what extent they are feasible.

Full harmonisation: The major difficulty with full harmonisation is that it pre-empts Member States from deviating from the EC law requirements.²⁵⁵ The most recent

²⁵⁵ It suffices to recall the litigation over the maximum character of the product liability debate, Sengayen, in Yearbook of Consumer Law 2008 (eds.), Twigg-Flesner/Parry/Howells/Nordhausen, 2007, p. 447.

debates on the Unfair Commercial Practices Directive as well the intended revision of the Consumer Credit Directive showed that Member States are looking much more carefully at those areas where they agree with full harmonisation and where they disagree. It is likely that this explains the use of the new term ‘targeted harmonisation’. This issue might be taken into consideration in particular with regard to information obligations,²⁵⁶ though it may be difficult to decide what information obligations are. Grundmann²⁵⁷ understands cancellation and withdrawal rights as being part of the information paradigm. I would agree as these rights bear a strong market bias. They enhance price comparison and in the end competition. Full harmonisation, however, should not be extended to general clauses on fairness, good faith and the like, in order to leave Member States the necessary margin of appreciation.

Minimum harmonisation: This is the approach used so far in the majority of the contract law directives. The European Commission intends to change its policy, from minimum to maximum harmonisation which is at the heart of the struggle over legal pluralism. I would argue that minimum harmonisation has a crucial role to play where the different concepts of justice – distributive justice vs. fairness/*Zugangsgerechtigkeit* – matter. These are the questions which concern the substance of the contract. Here, EC rules should provide leeway in order to allow Member States to set standards that go beyond fairness/*Zugangsgerechtigkeit*. Again there is no clear cut borderline between fairness and social justice; the concepts may be better understood on a scale ranging from “less” justice to “more” justice.²⁵⁸

Maximum/minimum harmonisation and country of origin principle combined: The European Commission seems to feel that it is its duty to combine maximum harmonisation and the country of origin principle. The problem here appears to be that Member States are not willing to accept EC law-making at random, e.g. the field of targeted harmonisation might be identifiable; the area where the country of origin principle applies is not.

The other variant, linking minimum harmonisation to the country of origin principle, has never gained attention in the political forum. The option was discussed during the preparation of the Unfair Commercial Practices Directive.²⁵⁹ Such a variant would have the advantage of encouraging competition between national legal orders – above the minimum threshold. Prominent candidates are information duties, insofar as they are not fully harmonised.

Conflict of law rules: The different initiatives on the codification of European private law do not deal with tort law. The product liability Directive 85/374/EEC²⁶⁰ is of limited practical importance despite its widespread acceptance worldwide.²⁶¹ In the field

²⁵⁶ Against maximum harmonisation under a law and economics analysis, Cafaggi, EUI Working Paper 2007/26, p. 10.

²⁵⁷ Grundmann/Kerber/Weatherill (eds.) 2001, p. 3.

²⁵⁸ See Wilhelmsson, 2004, pp. 712 at 723; Stuyck, in Krämer/Micklitz/Tonner (Hrsg.), 1997, pp. 279.

²⁵⁹ Henning-Bodewig, 2001, p. 771.

²⁶⁰ OJ L 210, 7.8.1985, 29.

²⁶¹ Reimann, 2003, p. 128.

of services, European rules are completely missing.²⁶² This is why national tort law is still the major source of compensation claims.

Due to European privatisation policy (the now regulated markets) and European liberalisation policy (in the field of services), which focus on establishing competitive markets and abstain from defining contractual relations, national liability rules have gained importance. In this sense, national private law is strengthened through European privatisation and liberalisation policies. Transborder liability claims will have to be solved under the Rome II Regulation.²⁶³ Despite foreseeable weaknesses in practice, the Rome II Regulation fosters the many cultures of Europe.

Country of origin principle: This principle is the appropriate means to deal with differing product quality standards. There is an interesting case pending before the ECJ²⁶⁴ dealing with the question of whether Japanese comics, which have been examined according to whether they jeopardise youth in the UK, may be distributed via distance selling in Germany without having received the respective certificate from German authorities. The question is whether the prohibition of distribution is justified under German law (*Marktortregel*). AG Mengozzi rejects the application of the country of origin principle and leaves it to Germany to decide whether the comics are dangerous for young people. He therefore defends a federal approach which turns the country of origin principle upside down.

Competition of legal orders: One may wonder whether the law of obligations can remain/become a prominent field for the competition of legal orders. However, even here, EC law has already intervened, in particular with regard to contracts concluded via the internet (E-commerce Directive 2000/31/EC). Competition, however, might also arise in the interpretation of primary community law affecting private law and secondary community private law. *Johnston/Unberath*²⁶⁵ suggests a clash between a market-orientated approach to consumer protection with regard to the four freedoms and a more protection-orientated approach with regard to the diverse consumer contract law directives. It remains to be seen whether such a distinction serves a federalist approach, where the Member States retain competences for higher protection of their consumers and perhaps citizens.

Competition of legal orders exists already today with regard to accessibility of the legal system. This is largely documented by the Euro-barometer which demonstrates that there are citizens who have more confidence in foreign legal orders than their own.²⁶⁶ A good example is also the practice of English courts to allow preventive action to be brought by trade associations against the Department charged with transposing the respective EC directive, the legality of which is challenged as violating fundamental principles of primary EC law.²⁶⁷ Competition would be further enhanced by combining minimum harmonisation and country of origin principle.

²⁶² Magnus/Micklitz, 2006.

²⁶³ OJ L 149, 11.6.2005, 22.

²⁶⁴ AG Mengozzi, 13.9. 2007, Case C-244/06, *Dynamic Medien Vertriebs GmbH v. Avides Media AG*, see thereto annotation Reich, 2008.

²⁶⁵ Unberath/Johnston, 2007, p. 1237.

²⁶⁶ See references in Wilhelmsson, 2004, p. 317.

²⁶⁷ ECJ Case C-344/04, *IATA and ELFAA v. Department for Transport*, (2006) ECR I-403; see Reich 2006, p. 120 and Varney, in *Yearbook of Consumer Law* 2008, 2007, pp. 171, at 178-182.

Self-, co-regulation and standardisation: Regulatory initiatives of the European Commission to enhance self- and co-regulation in more traditional areas of European private law have largely failed. The European Commission intended to regulate unfair commercial practices via a combination of traditional harmonisation and co-regulation.²⁶⁸ However, over time co-regulation vanished from the regulatory agenda. The same is true with regard to the European codification project. The European Commission intended to give the elaboration of standard terms through stakeholders a prominent role. This project was given up, before it was really launched, for reasons which have never been revealed.

The situation might be different in the area of services, in particular with regard to regulated services, such as telecommunications, energy and transport. Here the national public agencies and the European Commission are engaged in developing soft law rules. The same is true with regard to contracts for services, where the European and National Standards Bodies are now involved due a mandate given to them in the Services Directive.

Full harmonisation	<ul style="list-style-type: none"> ➤ Pre-contractual information rules, provided they are comprehensible and available in the respective language ➤ Competitive and contractual transparency ➤ Cancellation/rescission/termination rights
Full harmonisation and country of origin principle combined	<ul style="list-style-type: none"> ➤ ?
Minimum harmonisation	<ul style="list-style-type: none"> ➤ Scope of application (<i>sedes personae</i>) ➤ Judicial/administrative control of (standardised) contract terms ➤ Remedies
Minimum harmonisation and country of origin principle combined	<ul style="list-style-type: none"> ➤ Pre-contractual information rules as far as they are not fully harmonised ➤ Cancellation/rescission/termination rights as far as they are not fully harmonised
Conflict of law rules	<ul style="list-style-type: none"> ➤ Tort law ➤ Product liability
Country of origin principle	<ul style="list-style-type: none"> ➤ Product quality (not product safety) ➤ Production standards (labour protection?)
Competition of legal orders	<ul style="list-style-type: none"> ➤ Law of obligations ➤ Legal protection (remedies, accessibility of courts) ➤ Insofar as minimum harmonisation combined to country of origin principle
Self-regulation, co-regulation, codes of conduct, standardisation	<ul style="list-style-type: none"> ➤ Standard terms ➤ Standardised contracts ➤ Contracts for services

²⁶⁸ See Münchener Kommentar/UWG-Micklitz, EG E, 2006, Rn. 10 et seq.

5.4. New processes of law/rule-making

The investigation of the new process of law- and rule-making is mostly an empirical question as practically no research – with the exception of research on the Open Method of Co-ordination²⁶⁹ – has been performed in this field. There is definitely a strong governance dimension, in that the new processes of law- and rule-making are developing outside legal procedures, be they quasi-constitutional, quasi-administrative or entirely self-organised.

The law-making procedure as developed by the European Commission may serve as a yardstick to investigate the new processes. The overall yardstick of legitimacy, transparency, accountability has to be concretised and tested in current practice. Particular emphasis must be placed on access to documents and participation in the law/rule-making procedure.

5.5. Rights, remedies, procedure and enforcement

(1) The perspective focuses on the way in which EC private law contains rights that must be properly enforced, by way of appropriate remedies, in an effective procedure by individuals, collective entities or public agencies.

European Community law does not contain a fully-fledged procedural law dealing with rights, procedure and remedies. This is the background to the doctrine of the autonomy of Member States in procedural law. However, the ECJ has developed two powerful instruments out of primary EC law in reference to human rights: the principle of effectiveness and the principle of equivalence. These are applicable not only to “procedure”, but also to “remedies”. They serve to constantly narrow down the autonomy of Member States in a field of ever growing case law. The lever to make the principles of efficiency and equivalence work is the holder of enforceable rights as derived from of primary and secondary EC law.

The interplay of national and EC rules with regard to rights, remedies and procedure gains more and more importance with regard to both procedure *and* remedies. A prime example to demonstrate the power of the efficiency doctrine in the field of “procedure” is *Claro*²⁷⁰ in which the ECJ argued that the Member States’ courts should exercise control over contract terms *ex officio*. In the field of “remedies”, examples include *Courage*²⁷¹ and *Manfredi*,²⁷² both dealing with private enforcement of competition law.

Reich has termed the interplay of national procedural law (including remedies) and the growing EC procedural law “hybridization”,²⁷³ in order to make clear than neither of the two legal orders stands alone. Hybridisation is then a “double-headed federalist approach”, where both the EU and the respective Member State bear constitutional responsibilities. Despite fundamental differences – the US legal system provides for fully fledged procedural law at the federal and the state level – research on comparing

²⁶⁹ Zeitlin, in Zeitlin/Pochet (eds.), 2005; Smismans, 2006.

²⁷⁰ ECJ, Case C-168/05, Elisa Maria Mostaza Claro v. Centro Movil Milenium SL, (2006) ECR I-10421.

²⁷¹ ECJ, Case C-453/99, (2001) ECR I-7079.

²⁷² ECJ, Case C-295/04 et al, (2006) ECR I-6619; thereto Bulst, ZEuP 2008, 178.

²⁷³ 2007, p. 705.

the EC and the EU with regard to rights, procedure and remedies provides helpful insights into the way in which the ‘federal’ structure might be shaped with regard to effective legal protection.²⁷⁴

Elements of hybridisation may equally be found in administrative enforcement, where the numerous directives dealing with privatisation of former state monopolies in particular set precedents on the way in which public authorities are to be shaped.²⁷⁵ These initiatives have spilled over to consumer safety²⁷⁶ and have now reached private law.

Hybridisation of the Double-headed Federalist Approach

	Member State level	EC level
Rights		<ul style="list-style-type: none"> ➤ Secondary law ➤ ECJ interests in rights
Remedies	<ul style="list-style-type: none"> ➤ Competence of the Member States ➤ But EC has own remedies 	<ul style="list-style-type: none"> ➤ Principle of efficiency and equivalence ➤ Sector or subject related remedies
Procedure	<ul style="list-style-type: none"> ➤ Procedural autonomy of Member States ➤ But shrinking 	<ul style="list-style-type: none"> ➤ Principle of efficiency and equivalence ➤ Sector or subject related remedies

(2) There are similar effects with regard to the distinction between judicial and administrative enforcement. The visible European private law is characterised by the coming together of administrative enforcement and judicial enforcement, to a growing extent via collective judicial enforcement. The more the European Community intervenes in the various fields of the visible private law, the more the competence balance is shifted away from Member States and towards the Community level. This does not mean that enforcement is centralised at the EC level, although the European Commission in its third package on the reform of the telecommunications²⁷⁷ and the energy markets²⁷⁸ strongly advocates for the establishment of genuine European enforcement structures in residual areas. What might be even more important is the shift from judicial enforcement to administrative enforcement. This implies an ever stronger need to co-ordinate administrative enforcement via new modes of governance.

²⁷⁴ See Lindholm, 2007, thereto Reich, to be published in Festschrift Brüggemeier.

²⁷⁵ With regard to the energy sector Cameron (ed.), 2005.

²⁷⁶ Very far reaching Directive 2001/95/EC on general product safety, see Micklitz, §§ 25, 27, in Reich/Micklitz, 2003 and Regulation 2004/2006, OJ L 364, 9.12.2006, on Co-operation in Consumer Law Enforcement; now Cafaggi, New regulatory strategies in product safety, EUI Working Paper 2008/00 forthcoming.

²⁷⁷ COM (2007) 697 and 698 final, 13.11.2007.

²⁷⁸ COM (2007) 528 and 529 final, 19.9.2007.

	Member State level	EC level
Individual enforcement	National	<ul style="list-style-type: none"> ➤ Strive for out of court settlement ➤ Complaint handling, ADR, small claims ➤ Compensation claims in cartel law?
Collective enforcement	Broad variety of national laws with regard to <ul style="list-style-type: none"> ➤ Subject (field of law) ➤ Locus standi (individuals, organisations and/or administrations) ➤ Type of collective action (representative, group action, class action) 	<ul style="list-style-type: none"> ➤ Action for injunction ➤ Collective compensation claims in cartel law under consideration ➤ Collective compensation claims in consumer law under consideration ➤ Transborder element?
Administrative enforcement	Member States remain sovereign	<ul style="list-style-type: none"> ➤ Pressure to establish independent public authorities, not only in regulated markets but in consumer contract law ➤ Impact on the choice of appropriate remedies and procedure ➤ Transborder co-operation Regulation 2006/2004

(3) It is in horizontal and vertical co-operation between the Member States' authorities and the European Commission, or the Member States' courts and the ECJ, that the changes resulting from the rise of new modes of governance are most obvious. The changes take two forms: (1) they may arrive via legislative forms of new governance (this is the saga which starts with the comitology procedure and has led to ever new forms of EC regulation co-ordinating the enforcement activities of Member States agencies); (2) they may happen outside the legislative framework via modes of co-operation, where the European Treaty and secondary legislation do not provide help. This is particularly true in the field of judicial enforcement, where judges and courts are building their own infrastructure.

Whilst these new forms of governance in judicial and in administrative enforcement, whether formally established or informally working, provide ample evidence of the new constitutional framework of the European Community, at least two issues arise which require close inspection. There seems to be agreement that the new modes of governance should meet the requirements of *transparency*, *accountability* and *participation*. These requirements have a descriptive but also a normative dimension, which brings us back to the question of legitimacy and the role (and rule) of law in governance. The point then is whether a normative frame is needed to secure respect for these three requirements in governance – or whether their respect can be guaranteed without such a normative frame.²⁷⁹ The second more complicated set of questions is

²⁷⁹ See with regard to the OMC the somewhat ambiguous results: more positive Zeitlin, in Zeitlin/Pochet (eds.), 2005; more critical Smismans, 2006.

structurally enshrined in the new modes of governance, whatever form they take. Governance nearly automatically implies cartel building, in the sense that those who participate increase their knowledge and expertise via co-operation and exchange. However, what if judges, regulators or academics, via informal co-operation, determine certain ways of applying the law, agree on definitions and key concepts, or decide cases? If there is such a risk, how can it be overcome? Are new balancing structures needed and what could be the role of stakeholders?

Old and new forms of governance

	Judicial enforcement	Administrative enforcement
Horizontal co-operation at Member State level	<ul style="list-style-type: none"> ➤ No formal structure ➤ But growing informal exchange of expertise between courts and judges subject bound and hierarchy bound ➤ Data files on national judgments 	<ul style="list-style-type: none"> ➤ No formal co-operation structures at the mere Member State level ➤ Cross-border co-operation at regional level?
Vertical co-operation between Member States' courts/agencies with the European Commission / European courts	<ul style="list-style-type: none"> ➤ Formally via the preliminary reference procedure ➤ Informally via exchange between national and European judges 	<p>New (legislative) modes of governance in regulated markets</p> <ul style="list-style-type: none"> ➤ Comitology ➤ Lamfalussy ➤ Market-bound European agencies meant to strengthen co-operation of national regulatory bodies <p>New (legislative) modes of governance in contract law</p> <ul style="list-style-type: none"> ➤ Injunctive relief ➤ As a means to foster transborder co-operation of national agencies <p>Informal co-operation outside formally established modes of governance</p> <ul style="list-style-type: none"> ➤ Depending on the sectors and the subjects
Access and participation of stakeholders	<p>Within the preliminary reference procedure largely dependent on</p> <ul style="list-style-type: none"> ➤ Whether they can directly address the ECJ ➤ On the availability of national locus standi where this is not possible <p>Within informal co-operation</p> <ul style="list-style-type: none"> ➤ Between judges ➤ Between courts 	<p>Within the established modes of new governance dependent on</p> <ul style="list-style-type: none"> ➤ Whether access and participation is legally foreseen ➤ Alternatively whether access and participation is granted without legal status <p>Outside established modes of new governance dependent on</p> <ul style="list-style-type: none"> ➤ Preparedness of regulators

6. Methodology

This paper starts from a twofold theoretical premise: that the visible European private law should be understood as a transformation process which shifts the balance from autonomy to functionalism in competition and regulation and that this process is the result of the interplay between the economisation of private law via the Internal Market and the politicisation of private law via the building of new governance structures. In German this shift is called “*Funktionswandel des Privatrechts*”.²⁸⁰ The functional change in private law is being understood ever since as a result of the structural changes in the economic and the political system throughout the 20th century. This very same process has taken and is taking place at the European level, though with a much stronger impact on the instrumental use of private law as a regulatory device to shape the Internal Market and to foster European integration.

The first step in verifying or falsifying this hypothesis is to analyse the different areas of what is termed the “visible” European private law. This cannot be done by merely analysing the documents, texts and judgments. There is much more needed in order to find out to what extent the visible European private law affects: (1) the substance of the private law; (2) the chosen new regulatory instruments; (2) the way in which the rules are elaborated, by whom, and under what procedural requirements; and (4) last but not least, how and by whom the visible private law is enforced. The hypothesis requires an empirical analysis and an analysis of the law in context via case studies and qualitative research methods.

The second step is then to find out whether the different areas of the visible European private law are governed by the same parameters/principles or whether the transformation process of private law is driven by a common philosophy which enshrines competition and regulation. What I have in mind is an approach which resembles the one chosen by the *acquis* group, but which is not limited to consumer law and anti-discrimination law. The approach would instead encompass not only secondary visible private law, but also the relevant case law developed to shape the Economic Constitution (Internal Market) and the Political Constitution (governance). It is in a way a horizontal analysis of dispersed rules in visible private law under the four analytical parameters: (1) substance of the new law; (2) the old and new regulatory instruments; (3) new processes of rule- and law-making and last but not least (4) judicial and administrative enforcement via old and new modes of governance.

The by now last step shall be to redefine the relationship between the body of visible European private law, the *acquis* principles, PECL, the Draft Common Frame of References and the national private legal orders. Here I can only repeat my credo:

“The ‘Internal Market’ (the EU multilevel system, the Economic and Political European Constitution), that I have in mind would be a co-ordination system of different visible hands which combines aspects of efficiency with those of material justice and which does not only distribute competences between the European Community, the Member States (and private actors), but delimit them.”

²⁸⁰ See in particular *Funktionswandel des Privatrechts*, Festschrift für Ludwig Raiser, 1974.

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