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European Private Law:  
A Plea for a Spontaneous Legal Order

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# EUROPEAN PRIVATE LAW: A PLEA FOR A SPONTANEOUS LEGAL ORDER

JAN M. SMITS<sup>1</sup>

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## I. INTRODUCTION

### **Purpose and outline of this contribution**

1. Over the last decade or so, the European legal community has witnessed a fierce debate on European private law. The purpose of this contribution is to take stock of this debate for an audience of legal scholars that do not specialise in European private law or comparative law. This approach is explained by the fact that this contribution was originally written as a ‘preadvies’ (preliminary report) for the Dutch Law Society, the organisation that unites all Dutch legal professionals, regardless whether they are lawyers, judges or scholars or exercise other legal professions. I intend to pay attention to those questions that play a role in the present discussion and intend to provide these questions with my own answers. This does not mean that I will not pay attention to the views of other authors. To the contrary: these other views will be used to contrast against my own answers. It will show that the discussion on European private law touches upon some fundamental questions about the role of law in modern society and that views on this role can differ considerably.

The reader will find that my main focus in this contribution is on the law of contract, torts and property. Of these three, contract law plays the most prominent role in the harmonisation efforts of the European Union (‘the EU’) and this is why I will take most of my examples from this area. This does not mean that what I write does not have any value for other areas of private law: often, my conclusions are rather general and are also intended to be valid for, for example, family law and company law.

This contribution is structured in the same way as its counterparts on criminal law and company law, as published in this very book: after a sketch of the existing European *acquis* in the field of private law (part II), the question is discussed whether there is a *need* for harmonisation (part III): is harmonisation really necessary to reach the goals the European Union set itself? Subsequently, the question of how to design a *future* European private law is discussed. In the field of contract law, the European Commission now follows a two-track policy: it intends to draft a ‘Common Frame of Reference’ (‘CFR’) as well as furthering the debate on the possibility of an optional code. In part IV, a number of issues will be debated; not only the practical questions as to what the contents of these two instruments should be and how they should be created, but also the more fundamental question as to whether they will really contribute to the solving of the present problems. Finally, the influence of ‘Europe’ on national private law is looked at from a critical perspective (part V).

The fact that this contribution was written for a general audience of lawyers and legal scholars explains why part II of this contribution merely contains a general description of the present *acquis*. In the later parts, the reader is led through some of the most important questions arising from the present debate. At the same time, the answers I give to these questions should also provoke discussion for the specialist. It was inevitable that in writing this contribution, I could not always explore new grounds and would have to fall back on

views expressed before, elsewhere.<sup>2</sup> I have, however, tried to travel new roads. In the end, one can summarise the main tenet of this contribution in one sentence: European integration benefits from diversity of law and the freedom of choice created by this.

## II. EUROPEAN INTEGRATION IN PRIVATE LAW: AN OVERVIEW

### Overview

2. In this part, the present efforts to come to a unified European private law are sketched. I will pay attention to three different dimensions of unification: the legal dimension, the political dimension and what I call the practical dimension. The legal dimension entails a description of the competences of the EU in the field of private law and the way in which the EU has, until now, made use of these competences (no. 3-6). The political dimension refers to the discussion on a more far-reaching integration in the field of contract law as envisaged by the European Parliament and the European Commission (no. 7). The final dimension looks at the more creeping, but no less pervasive, ways in which European integration and globalisation generally influence legal practice (8). All this leads to a conclusion on what European integration actually entails (9).

### The basis: EU-competences and private law

3. It is beyond doubt that, in civil law jurisdictions, the national legislator has a task in regulating private law. What is more, such national legislation can cover any topic. Many civil law jurisdictions even have a provision in their Constitution that explicitly imposes a duty to codify private law.<sup>3</sup> All this is different in the case of the EU.<sup>4</sup> The EU can only act in so far as there is a competence in European law (in particular in the EC Treaty<sup>5</sup>). Such a competence can only follow from one of the purposes of the EU.

Of the nine purposes of the EU listed in art. 2 of the EC Treaty, there is no doubt that the ‘development of economic activities’ throughout the Community is the most important one. This goal is attained by creating a common market and an economic and monetary union. Art. 3 of the EC Treaty subsequently makes clear that the European internal market is characterised by the abolition of obstacles to the free movement of goods, persons, services and capital. This internal market is the core of the EU; of the 2400 European directives enacted to date, 1400 are directly related to the establishment of the internal market. It is important to note that, in the European market, competition may not be distorted and yet the EU may still pursue ‘the approximation of the laws of the Member States to the extent required for the functioning of the common market.’

It follows from this that the most important competence of the EU in the field of private law is only an *indirect* competence: only in so far as national law stands in the way of the functioning of the common market is the EU competent to take measures. Whether a member state characterises this law as part of private law, administrative law or otherwise does not matter: in European eyes, law is only an *instrument* to reach a higher goal.<sup>6</sup> This led to a large amount of European legislation in the fields of, for example, competition law,

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<sup>2</sup> See e.g. J.M. Smits, *The Making of European Private Law*, Antwerp-Oxford-New York 2002 and the literature referred to below.

<sup>3</sup> Thus for example art. 107 of the Dutch Constitution and art. 34 of the French Constitution.

<sup>4</sup> In the remainder of this contribution, the term European Union (‘EU’) is also used to refer to the competences of the European Communities.

<sup>5</sup> Consolidated version of the Treaty establishing the European Community, OJ EC 2002, C 325/33.

<sup>6</sup> Cf. M. Cappelletti, M. Seccombe and J.H.H. Weiler, *Integration Through Law: Europe and the American Federal Experience: A General Introduction*, in: id. (eds.), *Integration Through Law*, vol. 1 Book 1, Berlin 1986, p. 15.

company law, insurance law and environmental law. This legislation is invariably justified with a reference (in the preamble to the European directive or regulation) to the common market. Likewise, the *acquis communautaire* in the field of private law is almost entirely based on the purpose of the common (and internal<sup>7</sup>) market (see below, no. 5).

4. Art. 3 of the EC Treaty mentions two other goals of the EU that have relevance for private law. First, it refers to consumer protection, introduced with the Treaty of Amsterdam and elaborated in art. 153 of the EC Treaty. This provision was hardly ever used as a basis for European legislation (rightly so, as seen in no. 15 below). Second, since the Treaty of Maastricht,<sup>8</sup> but certainly since the Treaty of Amsterdam<sup>9</sup> and the subsequent European Council of Tampere (1999) and the putting into place of the The Hague Program (2004), one of the explicit purposes of the EU is also the creation of an ‘area of freedom, security and justice’ for the European citizen.<sup>10</sup> This is not entirely unrelated to the EU’s economic goals: in the opinion of the EU, this area is inextricably tied to the free movement of persons: this may after all be hampered if, in a civil procedure, judicial documents cannot be transmitted from one member state to another. Thus, the EC Treaty now devotes an entire Title (art. 61-69) to ‘Visas, asylum, immigration and other policies related to free movement of persons.’ One of these other ‘policies’ concerns the field of ‘judicial cooperation in civil matters’ (art. 61 sub c, elaborated in art. 65 of the EC Treaty). This provision allows for measures in the fields of cross-border service of judicial and extra-judicial documents, cooperation in the taking of evidence, recognition and enforcement of decisions in civil and commercial matters, conflict of laws and jurisdiction and the functioning of civil proceedings.

This cooperation in judicial matters was originally (according to the Treaty of Maastricht) an intergovernmental cooperation (in the famous ‘third pillar’), but is now (since the Treaty of Amsterdam) Community law.<sup>11</sup> This implies<sup>12</sup> that – just as is the case with the decision making on the internal market – the co-decision procedure of art. 251 is followed: decisions can be taken by a majority, albeit that unanimity is still required for aspects relating to family law (art. 67). I should add that it is in itself not very special that Europe deals with judicial cooperation. After all, this was already the case before 1992, the best known example being the cooperation that led to the Treaty of 1968 on jurisdiction and enforcement of judgments.<sup>13</sup> The special thing is that, since 1999, there is a competence of the EU *itself* and measures can also be taken against the will of the individual Member States.<sup>14</sup>

### **The *acquis communautaire***

5. The question now is the extent to which the above competences were used to draft legislation in the field of contracts, torts and property. Over the last twenty years, at least

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<sup>7</sup> Downgrading the subtle distinction between the two: R. Barents and L.J. Brinkhorst, *Grondlijnen van Europees recht*, 10<sup>th</sup> ed., Deventer 2001, p. 272. In the following, I will primarily make use of the term ‘internal market’.

<sup>8</sup> Treaty on European Union, OJ EC 1992, C 224.

<sup>9</sup> Treaty of Amsterdam, OJ EC 1997, C 340.

<sup>10</sup> See P.-C. Müller-Graff (eds.), *Der Raum der Freiheit, der Sicherheit und des Rechts*, Baden-Baden 2005 and Martin Kraus-Vonjahr, *Der Aufbau eines Raums der Freiheit, der Sicherheit und des Rechts in Europa*, Frankfurt am Main 2002.

<sup>11</sup> Contrary to the cooperation in criminal law, which remained intergovernmental. See the contribution by Klip in this book.

<sup>12</sup> After a transition period of five years (now expired), in which unanimity was needed in the Council.

<sup>13</sup> EC Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 27 September 1968, now replaced by the ‘Brussels I-Regulation (Regulation 44/2001)’. Cf. art. 293 of the EC Treaty.

<sup>14</sup> There are still other competences, such as the one listed in art. 308 of the EC Treaty. For an overview: J. Basedow, *Das BGB im künftigen europäischen Privatrecht: Der hybride Kodex*, *Archiv für die civilistische Praxis* 200 (2000), p. 478.

nineteen directives on the core of private law have been issued.<sup>15</sup> Ten of them deal with contract law, two are about misleading and comparative advertising, two on transactions in the financial sphere, two on product liability, one on the return of cultural objects, one on electronic commerce and one on unfair contract practices. The influence of EU law on national private law systems has been large. Thus, of the 650 provisions in Books 3 and 6 and Title 7.1 of the new Dutch Civil Code of 1992, ten percent are the result of the implementation of European directives.

All 19 directives are based on art. 94 or 95 of the EC Treaty. These provisions refer to the general purpose of establishing the common and internal market, as envisaged in art. 3. The justification for European action thus lies in the fact that differences in national legislation may distort the functioning of the internal and common market. Most directives also have for a goal to protect consumers, but this is not primarily out of idealism *vis-à-vis* the 'weak' consumer. The primary motive is usually the avoidance of the distortion of competition. The reasoning then goes like this: if national legislation of Member States in a certain field (like consumer sale) is divergent,<sup>16</sup>

'the laws of Member States relating to the terms of contract between the seller of goods or supplier of services, on the one hand, and the consumer of them, on the other hand, show many disparities, with the result that the national markets for the sale of goods and services to consumers differ from each other and that distortions of competition may arise amongst the sellers and suppliers, notably when they sell and supply in other Member States.'

What is vital is thus the creation of similar European conditions for the *seller* (or the otherwise professionally acting party). Protection of the consumer is merely a (of course not undesired) side-effect. A third motive, to be found in some directives, is that the consumer is stimulated to engage more in trans-frontier contracting.

If one is to place the European *acquis* in the classic structure of private law, it immediately springs to mind that the European legislator has, until now, not been very active in the field of property law. Leaving aside the formation of a timeshare contract,<sup>17</sup> all that is left are a brief and (from the viewpoint of legal practice) not very influential provision on reservation of title,<sup>18</sup> a provision on the return of cultural objects<sup>19</sup> and provisions on the protection of securities in case of (in particular) credit transfers.<sup>20</sup>

In the field of tort law, there are more rules of European origin. These rules relate to not only product liability, but also wrongful conduct consisting of misleading and comparative advertising by professional parties.<sup>21</sup> Next to this, there are European provisions on the right of redress of a previous seller if the seller is liable for a lack of conformity *vis-à-*

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<sup>15</sup> Most of these directives can be found in R. Zimmermann and R. Schulze (eds.), *Basistexte zum europäischen Privatrecht*, Baden-Baden 2000, to be added with Directive 2002/47 on (...) financial collateral arrangements, OJ EC 2002, L 168/43, Directive 2002/65 on (...) distance marketing of financial services, OJ EC 2002, L 271/16 and Directive 2005/29 on unfair commercial practices (...), OJ EC 2005, L 149/22.

<sup>16</sup> Preamble to Directive 93/13 on unfair terms in consumer contracts, OJ EC 1993, L 095/29.

<sup>17</sup> Directive 94/47 on (...) timeshare, OJ EC 1994, L 280/83.

<sup>18</sup> Art. 4 of Directive 2000/35 on (...) combating late payment in commercial transactions, OJ EC 2000, L 200/35.

<sup>19</sup> Art. 5 of Directive 93/7 on (...) the return of cultural objects, OJ EC 1993, L 074/74.

<sup>20</sup> Art. 9 Directive 98/26 on (...) settlement finality in payment and securities settlement systems, OJ EC 1998, L 166/45 and Directive 2002/47 on (...) financial collateral arrangements.

<sup>21</sup> Directives 84/450 on (...) misleading advertising, OJ EC 1984, L 250/17 and 97/55 on (...) comparative advertising, OJ EC L 290/18.

*vis* the consumer<sup>22</sup> and on the (non-)liability of the internet provider.<sup>23</sup> Recently, a directive on unfair commercial practices was adopted.<sup>24</sup>

As mentioned above, most European directives deal with contract law. It is, however, characteristic that these directives do not relate to the whole of contract law, but are only applicable to *specific* aspects of *specific* contracts. The formation of some types of contracts is thus governed by rules on formalities,<sup>25</sup> representation,<sup>26</sup> the time of formation,<sup>27</sup> evidence of a declaration<sup>28</sup> and information to be provided to the consumer before and after the conclusion of the contract.<sup>29</sup> The content of the contract is co-determined by European provisions on interpretation,<sup>30</sup> unfair terms<sup>31</sup> and general conditions.<sup>32</sup> Most European rules, however, refer to performance: the EU provides rules on conformity in consumer sales,<sup>33</sup> remedies of the consumer in the case of non-performance,<sup>34</sup> commercial guarantees *vis-à-vis* the consumer,<sup>35</sup> time of performance and the interest due in cases of breach of contract.<sup>36</sup>

Over the last few years, this more or less familiar *acquis* is supplemented by measures on the ‘area of freedom, security and justice’. These measures do not primarily deal with substantive private law: they also deal with procedural law and private international law.<sup>37</sup> This is also true for the Rome Convention.<sup>38</sup> The fundamental freedoms set out in arts. 5-7 of the EC Treaty do not – other than in the case of insurance, competition and company law – have much influence on the national law of contracts, torts and property either.<sup>39</sup>

### **A characterisation of the *acquis*: four harsh words**

6. It is now time to characterise the existing *acquis*. If one does so from the perspective of the European legislator, one cannot be but critical. The deficiencies of the *acquis* were also one of the reasons why, in 2001, the European Commission started a debate about the future of European private law.

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<sup>22</sup> Art. 4 of Directive 1999/44 on (...) sale of consumer goods, OJ EC 1999, L 171/12.

<sup>23</sup> Art. 6 of Directive 1999/93 on (...) electronic signatures, OJ EC L 13/12; art. 12 of Directive 2000/31 on (...) electronic commerce, OJ EC 2000, L 178/0001.

<sup>24</sup> Art. 5 of Directive 2005/29 (unfair commercial practices).

<sup>25</sup> Art. 4 of Directive 87/102 on (...) consumer credit, OJ EC 1987, L 42/48; art. 4 s. 2 of Directive 90/314 on (...) package travel, OJ EC L 158/59; art. 4 of Directive 94/47 (timeshare); art. 9 s. 1 of Directive 2000/31 (electronic commerce); art. 3 of Directive 2002/47 (financial collateral arrangements).

<sup>26</sup> Art. 9 s. 1 of Directive 2000/31 (electronic commerce).

<sup>27</sup> Art. 11 of Directive 2000/31 (electronic commerce).

<sup>28</sup> Art. 5 of Directive 1999/93 (electronic signatures).

<sup>29</sup> Art. 3-4 of Directive 90/314 (package travel); art. 3 of Directive 94/47 (timeshare); art. 4-5 of Directive 97/7 (...) on distance contracts, OJ EC L 144/19; art. 5-6 and 10 of Directive 2000/31 (electronic commerce); art. 3-5 of Directive 2002/65 (distance marketing of financial services).

<sup>30</sup> Art. 5 of Directive 93/13 (unfair terms).

<sup>31</sup> See Directive 93/13 (unfair terms).

<sup>32</sup> Inter alia art. 10 s. 3 of Directive 2000/31 (electronic commerce).

<sup>33</sup> Art. 2-3 and 5 of Directive 1999/44 (consumer sale) and art. 5 s. 2 of Directive 90/314 (package travel).

<sup>34</sup> Art. 5 of Directive 85/577 on (...) contracts negotiated away from business premises, OJ EC 1985, L 372/31; art. 4-5 of Directive 90/314 (package travel); art. 5 of Directive 94/47 (timeshare); art. 6 of Directive 97/7 (distance contracts); art. 3 of Directive 1999/44 (consumer sale); art. 6 of Directive 2002/65 (distance marketing of financial services).

<sup>35</sup> Art. 6 of Directive 1999/44 (consumer sale).

<sup>36</sup> Art. 3 of Directive 2000/35 (combating late payment).

<sup>37</sup> Insolvency-Regulation 1346/2000, Regulation 1348/2000 on judicial and extrajudicial documents, Brussels I-Regulation 44/2001, Evidence-Regulation 1206/2001, Brussels II-Regulation 2201/2003 and European enforcement order-Regulation 805/2004.

<sup>38</sup> Convention on the law applicable to contractual obligations. Rome 1980, consolidated version OJ EC 1998, C 27/34. It is envisaged to turn this treaty into an EC-regulation: see the Green Paper on the Conversion of the Rome Convention of 1980 (...) into a Community instrument and its modernization, COM (2002) 654 (01).

<sup>39</sup> See O. Remien, *Zwingendes Vertragsrecht und Grundfreiheiten des EG-Vertrags*, Tübingen 2003.

What are these deficiencies? I think that the *acquis* can be characterised by using four harsh words: the *acquis* is fragmentary, arbitrary, inconsistent and ineffective.<sup>40</sup> Allow me to elaborate these four points.

In the first place, the present *acquis* is fragmentary: the European directives only cover certain topics.<sup>41</sup> Thus, the directives on contract law only deal with specific contracts (like agency or consumer credit) and only give rules for specific aspects of these contracts (such as the duty to inform or the existence of a right of revocation). This is something that worries most lawyers and legal scholars on the European continent, as they are accustomed to a comprehensive and consistent Civil Code. They find that the existing ideal is now disrupted by law from another source. From the European perspective, the fragmented approach is undesirable because, after implementation, the European ‘fragments’ are subject to too much influence from the national law: they are entirely encapsulated within national legislation and are often no longer recognisable as European law. This is problematic because national courts are still obliged to interpret these fragments in a different way than the law of national origin, namely in the light of the wording and purpose of the directive.<sup>42</sup> It is this fragmentation that in particular led the European Parliament to call for the drafting of a European Civil Code.<sup>43</sup> This is in itself somewhat naïve, as the only way in which this type of fragmentation can be avoided is by replacing national law by a uniform law for the entire EU, regardless whether there is a trans-frontier or a purely national relationship. This can never happen as the EU-competence for such an overall code is lacking.

In the second place, it is quite arbitrary why some topics are part of the *acquis* and others are not. Why is it that consumer credit and package travel are addressed, but the normal insurance contract is not? If the purpose of the EU is to address issues that may hamper the functioning of the internal market, there is much more to regulate than is currently being done. And why would one only provide rules for the remedies of performance and termination in consumer sale and not for the remedy of damages? The reasons for this may have to do more with coincidence or the influence of pressure groups than with other, more convincing, reasons. From one perspective, the explanation for this arbitrariness is banal: some Directorate-Generals of the European Commission (there are four that can take the initiative for legislative action in the field of private law) are more active than others. This may be an *explanation*, but it is not a *justification*.

In the third place, the *acquis* is inherently inconsistent.<sup>44</sup> Sometimes, conflicting rules apply to the same situation. Consider, for example, the case of a right in to a timeshare that is sold by way of a door-to-door-contract. The consumer in such a case may have the right to revoke the contract, but the time periods for revocation differ: seven days arising from the fact that it is a door-to-door contract, but ten days given that it is a contract for a timeshare. The European Court of Justice (‘ECJ’) had to intervene to say which period prevailed.<sup>45</sup> More often than not, time periods for the revocation of a contract are not applicable at the same

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<sup>40</sup> Also see, in a somewhat different form, Smits, o.c., *Nederlands Tijdschrift voor Burgerlijk Recht* 2004, p. 490 ff.

<sup>41</sup> This is the well-known criticism of directives as ‘Inseln im Meer des nationalen Rechts’ (islands in the sea of national law): F. Rittner, *Das gemeinschaftsprivatrecht und die europäische Integration*, *Juristenzeitung* 1995, p. 851.

<sup>42</sup> See below, no. 32.

<sup>43</sup> Resolutions A2-157/89 (OJ EC 1989, C 158/400), A3-00329/94 (OJ EC 1994, C 205/518), B5-0228/2000 (OJ EC 2000, C 377/323) and C5-0471/2001 (OJ EC 2002, C 140 E/538); Cf. Resolution P5\_TA (2003) 0355, OJ EC 2004, C 076 E/95.

<sup>44</sup> Cf. Communication from the Commission to the European Parliament and the Council. A More Coherent Contract Law – An Action Plan, COM (2003) 68 final, OJ EC 2003, C 63/01, no. 16 ff.

<sup>45</sup> See ECJ 22 April 1999, case C-423/97, ECR I-2195 (Travel Vac/Sanchis). Cf. Communication from the Commission to the Council and the European Parliament on European Contract Law, COM (2001) 398 final, no. 35.

time, but still differ without good reason. Why this time period should be seven calendar days in the case of door to door sales, seven working days for distance contracts, ten days for timeshares and fourteen days in the case of distance marketing of financial services,<sup>46</sup> remains unclear.

Finally, the *acquis* is not very effective: often, it does not succeed in creating the required level playing field. One reason for this is that directives often use terms that lack a uniform European interpretation. Thus, various directives use abstract terms like ‘damage,’ ‘compensation’ or ‘fraudulent use,’ but how these terms should be interpreted in a ‘European way’ is not clear. Whether ‘damage’ also includes moral damages and is to be calculated in an abstract or more concrete way remains an open question. If an interpretation question is put before the ECJ – which can take a long time – it is likely that the ECJ interprets the term primarily in the light of the directive itself, with the consequence that various concepts of damage come co-exist together: the ECJ<sup>47</sup> has denied that a definition of a term in one directive means for the same in another directive: until now, there is no interpretation in the light of the *acquis* as a whole, only an interpretation in the light of the individual directives themselves. This does not exactly promote successful harmonisation.

Another reason for the ineffectiveness of the *acquis* is that almost all private law legislation aims at minimum harmonisation.<sup>48</sup> This implies that the Member States can establish more stringent provisions to protect consumers, going beyond the directive itself. The effect of this is that companies are still confronted with divergent legislation among the Member States and may still be deterred from doing business elsewhere. In other words: the question is whether the means of minimum harmonisation is suited to realise the purpose of promotion of the internal market – the creation of a *level playing field* for European business. Of course, consumer protection as such is promoted by it: because of these directives, the consumer can rely on a uniform minimum level of protection within the EU. It seems this problem can only be solved by giving up minimum harmonisation and there are, indeed, signs this is what the European legislator is aiming at.<sup>49</sup> I will come back to this issue (see below, no. 22).

All in all, it goes (way) too far to conclude that the *acquis* led to one European private law in the areas that it covers. As Christian Joerges states, one can say that ‘there are as many European laws as there are relatively autonomous legal discourses, organised mainly along national, linguistic and cultural lines.’<sup>50</sup> Among other things, this is what the European Commission wants to remedy by drafting a Common Frame of reference (see below, no. 7).

### **The political dimension: plans for the future**

7. Next to the European private law that is actually in existence, in form of the *acquis*, there is also an extensive *political* debate. This introductory overview would not be complete without additionally saying something on this.<sup>51</sup> It is well-known that the European Commission has

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<sup>46</sup> Art. 5 Directive 85/577; art. 6 Directive 97/7; art. 5 Directive 94/47; art. 6 Directive 2002/65. Also see J.M. Smits and R.R.R. Hardy, De toekomst van het Europees contractenrecht, Weekblad voor Privaatrecht, Notariaat en Registratie 6513 (2002), p. 830.

<sup>47</sup> ECJ 12 March 2002, case C-168/00, ECR 2002-I, 2631 (Simone Leitner/TUI Germany).

<sup>48</sup> This is the well-known policy of the European Commission ever since the White book on the completion of the internal market of 1985.

<sup>49</sup> Thus in art. 4 of Directive 2002/65 (distance marketing of financial services) and in art. 3 of Directive 2005/29 (unfair commercial practices). Also see art. 1 s. 9 of Directive 97/55 (comparative advertising).

<sup>50</sup> C. Joerges, The Challenges of Europeanization in the Realm of Private Law: A Plea for a New Legal Discipline, EUI Working Paper Law 2004/12, p. 12.

<sup>51</sup> See, for another type political dimension, M.W. Hesselink, The Politics of a European Contract Law: Who has an Interest in what Kind of Contract Law for Europe?, in: Stefan Grundmann and Jules Stuyck (eds.), An Academic Green Paper on European Contract Law, The Hague 2002, p. 181 ff.

now issued three ‘communications’ on the future of European contract law.<sup>52</sup> This has caused the debate, already initiated in 1989 by the European Parliament with a plea for a European Civil Code,<sup>53</sup> to gain momentum. The desire of the European Commission to broaden the scholarly debate on European private law to legal practice and national governments was fulfilled. One only needs to look at the more than 300 reactions to the Communication of 2001 and the Action Plan of 2003 to become convinced of this.<sup>54</sup>

The broad debate eventually led the European Commission to launch two measures.<sup>55</sup> The first consists of the improvement of the present and future *acquis* by the creation of a ‘Common Frame of Reference. According to the Commission, the CFR will provide three types of provisions. First, it will consist of definitions of legal terms like ‘contract’ and ‘damages’. Second, it will contain fundamental principles (like contractual freedom, binding force and good faith<sup>56</sup>). Most important, however, is that the CFR will also contain ‘fundamental principles and coherent model rules of contract law, drawing on the EC *acquis* and on best solutions found in Member States’ legal orders.’<sup>57</sup>

If the CFR is completed, its main aim is to serve as a ‘tool box’ for the European legislator:<sup>58</sup> it can ‘where appropriate’<sup>59</sup> make use of the CFR to draft directives or to review the existing *acquis*. Next to this, the national legislator can make use of the CFR when transposing directives or when drafting its own national law and it can be used as a source of inspiration for the ECJ and for national courts. Next to this, other functions are foreseen. Thus, arbitrators could refer to the CFR for a balanced solution in deciding a dispute. The CFR could also form part of the contracts which the European Commission itself concludes with third parties.

We should, however, be aware that the instrument is not in any way binding upon the European legislator or the Member States:<sup>60</sup> the CFR should derive its authority from the quality of its provisions. In this respect, an extensive consultation round is foreseen: when a group of academics has finished a draft in 2007, stakeholders will be consulted and the CFR will be subjected to a ‘practicability test.’<sup>61</sup> After consultation of the Member States and translation of the CFR into all languages of the EU, the Commission is to adopt the CFR in 2009.

The second measure consists in continuing the debate about an ‘optional instrument’ (a European code of contracts in some form). In its own words, the Commission does not intend ‘to propose a ‘European Civil Code’ which would harmonise contract laws of Member States.’<sup>62</sup> Yet, the CFR can serve as a basis for such an instrument.<sup>63</sup> The many questions the CFR and optional instrument raise will be discussed in part IV.

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<sup>52</sup> Communication (...) on European Contract Law, COM (2001) 398 final, OJ EC 2001, C 255/1; Communication (...): A More Coherent Contract Law – An Action Plan, COM (2003) 68 final, OJ EC 2003, C 63/01; Communication (...) on European Contract Law and the Revision of the *Acquis*: the Way Forward, COM (2004) 651 final, OJ EC 2005, C 14/6 (below: Communication 2004).

<sup>53</sup> Resolution A2-157/89, OJ EC 1989, C 158/400.

<sup>54</sup> These reactions are available through <http://europa.eu.int/comm/consumers>. On this website, one can also find an overview of recent developments.

<sup>55</sup> A third measure, the promotion of the use of European standard terms by setting up a website, was dropped later: see First Annual Progress Report on European Contract Law and the *Acquis* Review 2005, COM (2005) 456 final, p. 11.

<sup>56</sup> Communication 2004, o.c., p. 12 and Annex I, p. 16.

<sup>57</sup> Communication 2004, o.c., p. 3; Cf. p. 12.

<sup>58</sup> Communication 2004, o.c., p. 14.

<sup>59</sup> Communication 2004, o.c., p. 3.

<sup>60</sup> Communication 2004, o.c., p. 6.

<sup>61</sup> Communication 2004, o.c., p. 13.

<sup>62</sup> Communication 2004, o.c., p. 8. *Idem* the Commission in Green Paper on the Conversion of the Rome Convention of 1980 (...), COM (2002) 654 final, p. 14.

### **Creeping integration: the importance of Europeanisation and globalisation**

8. It follows from the above that the EU expects a lot from the *law* as a method of integrating national markets.<sup>64</sup> On the one hand, European law has *created* one European internal market. On the other hand, it *regulates* it by policing its negative effects. Still, the question needs to be raised whether integration of markets (and the possibly negative effects of it) are not primarily caused by factors upon which the European legislator has little influence. I want to make two remarks about this.

With regard to the emergence of an integrated European market, it must be remarked that the importance of national borders and distances has greatly diminished over the last few decades. This process is undoubtedly reinforced by the existence of the EU, but it would in all probability also – to some extent – have taken place without this European influence. The development of the world economy and increasing globalisation lead to a diminishing of barriers for trans-frontier business.<sup>65</sup> It could well be that such globalisation is more influential than lawyers are inclined to think. The role of international business (and law firms) should not, therefore, be underestimated.

In so far as the regulation of the market is concerned, the importance of law should not be overestimated either. The most striking consequence of Europeanisation and globalisation in the field of private law is that the conduct of companies and consumers is less and less governed by their ‘own’ national law without an equivalent legal system taking its place. In other words: globalisation leads to national law being overtaken and, in the case of transactions among companies, making place for something like a ‘*lex mercatoria*’.<sup>66</sup> This is a system which, to a large extent, is privately regulated.<sup>67</sup> But it is not only the role of the national legislator that is thus played out: companies can also circumvent European law by transferring their production from the EU to countries with child labour and other practices forbidden in Europe. Looked at in this way, non-democratically legitimated trade and industries play an important role in designing the new ‘global village’.<sup>68</sup>

### **European integration, harmonisation and unification**

9. How should we judge the European integration of private law, as described above? A judgment on the success or failure of this integration can only be given if a criterion exists for evaluation. What this criterion should be is, however, unclear. Is it the degree to which integration led to uniform law? In that case, a judgment about the European *acquis* is certainly negative: the existing method of minimum harmonisation leaves much room for divergent national implementations. Is it the extent to which the European consumer is protected? Then, the appraisal is certainly more positive. Or is it the promotion of the European internal market? Also in this respect, European law has contributed positively, even though this contribution should not be overestimated in the light of Europeanisation and globalisation generally.

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<sup>63</sup> Communication 2004, o.c., p. 6.

<sup>64</sup> Cf. C. Joerges, On the Legitimacy of Europeanising Private Law, *Ius Commune* Lecture 6, Maastricht 2003, p. 2.

<sup>65</sup> See e.g. R. Michaels, Welche Globalisierung für das Recht? Welches Recht für die Globalisierung, *Rabels Zeitschrift* 69 (2005), p. 525 ff.; G.I. Zekos, Cyberspace and Globalization, *Law, Social Justice & Global Development Journal* 2002 (1) describes globalisation as ‘growing global interconnectedness of people through the reduced effects of distances and borders, including a reduced role for the State and an increasing role for non-State actors.’

<sup>66</sup> Also see P. Zumbansen, *Transnational Law*, in: J.M. Smits (ed.), *Elgar Encyclopedia of Comparative Law*, Cheltenham 2006.

<sup>67</sup> See W. Twining, *Globalisation and legal theory*, London 2000, p. 51.

<sup>68</sup> N. Hertz, *The Silent Takeover: Global Capitalism and the Death of Democracy*, London 2001.

Before giving my own answer to the question whether European integration has been successful, it seems useful to define further the concepts of integration, harmonisation and unification. Often, these ‘utterly flexible and indeterminate’ terms<sup>69</sup> are used interchangeably. To me, integration encompasses all possible ways through which different legal systems become more uniform. Integration is thus possible through *law*, but also through other (e.g. political or economic) ways. Harmonisation is thus only one of the methods of integration, namely the one in which the approximation of national legal systems takes place through European legislation.<sup>70</sup> Such harmonisation can take place at a low level (mutual recognition of foreign judgments, as for example envisaged in the Brussels I Regulation), but can also aim at full harmonisation (meaning that the national rule is replaced by the European one). In the field of private law, harmonisation usually leaves diversity in place by only harmonising to a minimum standard. This means that the end result does not have to be identical in all European countries. Because harmonisation always takes place through directives, European law always requires national law for it to become effective; form and means come from the national law. Unification refers to the process that leads to uniform law: it is the possible result of integration or harmonisation. However, this result is seldom reached: after all, uniform law presupposes that national legal systems completely disappear and that a new, uniform, law is applied in a uniform way across all of Europe.<sup>71</sup> To me, this is utopia.

In my mind, the success of integration, harmonisation and unification of law is to be measured by the purpose that is sought. This is because integration of law can never be a goal in itself. If the aim is the promotion of the European internal market, it is yet to be seen to what extent this can be reached by each of these techniques. And in assessing the success of these techniques, it is essential that the *national* experiences with regard to European regulation are also taken into account. In other words, the success of a harmonisation measure can only be established by looking at both the extent to which the measure contributes to the goal the EU set itself *and* the effects of the measure on the national level. Harmonisation means that European and national elements within one legal system form a consistent whole and, if there is no smooth cooperation between the two, it is hard to categorise harmonisation as successful.<sup>72</sup>

The above overview of the present *acquis* now leads us back to two more fundamental questions. The first is why harmonisation of private law is actually needed (part III). The second is how the influence of the EU on national law is to be assessed (part V). Closely related to these two questions is a further one: how might one design an optimum European private law? (part IV).

### III. THE NEED FOR HARMONISATION OF PRIVATE LAW

#### Overview

10. The harmonisation of private law is often seen as a goal in itself; the idea is that differences between European countries should be avoided because differences are *bad*. Why should title to a movable object be transferred with the contract of sale in Belgium, but upon delivery in The Netherlands? Why should the victim of a traffic accident be protected less in

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<sup>69</sup> M. Boodman, *The Myth of Harmonization of Laws*, *American Journal of Comparative Law* 39 (1991), p. 699 ff.

<sup>70</sup> Cf. C. Barnard, *The Substantive Law of the EU: The Four Freedoms*, Oxford 2004, p. 506. Boodman, *o.c.*, p. 708 characterises harmonisation as ‘conceptually and methodologically indeterminate.’

<sup>71</sup> This is why unification is usually described as a process. See Cappelletti, Seccombe and Weiler, *o.c.*, p. 12.

<sup>72</sup> Cf. Boodman, *o.c.*, p. 700: ‘Harmonization (...) implies a state of consonance or accord.’

Portugal than in The Netherlands? I do not agree with this line of reasoning: in my view, there need to be real motives to get rid of differences between legal systems.

In this section, the true values of three of these motives are rated. It follows from the above that the most important goal of the EC Treaty is the promotion of the internal market. Does this internal market also require the harmonisation of private law? (no. 11-14) Closely related to this is the motive of protection of the weaker party (usually the consumer: no. 15). Finally, it is suggested that unification of private law is useful for the development of a European identity or culture (no. 16).

### **First motive: the promotion of the internal market**

11. Does harmonisation promote the development of the European internal market? There are both fundamental and practical aspects to this question. The question is fundamental because, if harmonisation does not promote the internal market, it should better, at least for this reason, not take place. Practically speaking, the answer is of great importance because, in its Tobacco judgment of 2000,<sup>73</sup> the ECJ held that art. 95 of the EC Treaty does not grant a general power to regulate the internal market. In now famous words, the ECJ held that:

‘a measure adopted on the basis of art. 95 of the Treaty must genuinely have as its object the improvement of the conditions for the establishment and functioning of the internal market. If a mere finding of disparities between national rules and of the abstract risk of obstacles to the exercise of fundamental freedoms or of distortions of competition liable to result there from were sufficient to justify the choice of art. 95 as a legal basis, judicial review of compliance with the proper legal basis might be rendered nugatory.’

Instead, there must be *actual* – or at least *probable* – obstacles to the functioning of the internal market if art. 95 is to be used as a basis. Further, the elimination of these obstacles must be the purpose of the measure. If these requirements are not met, the directive lacks a legal basis and can be set aside by the ECJ.<sup>74</sup>

12. To many proponents of harmonisation of private law, there is no doubt whatsoever that the existence of more than 25<sup>75</sup> different legal systems in Europe is an impediment to the functioning of the internal market. Their main example is the case of the businessman or businesswoman from one country (for example, Italy) who wants to conclude a contract with a party in another country (for example, The Netherlands), but is hindered from doing so by his or her deficient knowledge of Dutch law.<sup>76</sup> The European Commission puts it like this:<sup>77</sup>

‘For consumers and SMEs in particular, not knowing other contract law regimes may be a disincentive against undertaking cross-border transactions. (...) Suppliers of goods and services may even therefore regard offering their goods and services to consumers in other countries as economically unviable and refrain from doing so. (...) Moreover, disparate national law rules may lead to higher transaction costs (...). These higher transaction costs may (...) be a competitive disadvantage, for example in a

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<sup>73</sup> ECJ 5 October 2000, Case C-376/98, ECR 2000, I-8419 (Germany/European Parliament and Council).

<sup>74</sup> W.-H. Roth, *Europäischer Verbraucherschutz und das BGB*, Juristenzeitung 2001, p. 475 ff. claims that e.g. the Directive 2000/35 on combating late payment in commercial transactions does not meet the requirements set by the European Court of Justice. See below, no. 15.

<sup>75</sup> Apart from the 25 national legal systems, some countries (in particular the United Kingdom and Spain) have diversity of private law within their borders.

<sup>76</sup> See e.g. O. Lando, *Is Codification Needed in Europe?*, *European Review of Private Law* 1 (1993), p. 157.

<sup>77</sup> Communication 2001, o.c., no. 30-32; Cf. Action Plan 2003, o.c., no. 34.

situation where a foreign supplier is competing with a supplier established in the same country as the potential client.’

Even though this may sound like a plausible form of reasoning, it is not wholly satisfactory. After all, this economic argument only holds if a) contracting parties are really abhorred by a divergent private law of another country and the costs of trans-frontier contracting are really higher than those incurred in concluding a ‘national’ contract (no. 13), and b) the costs of creating a harmonised law do not weigh up against the costs related to the present legal diversity (no. 14). Moreover, any economic argument in favour of harmonisation will always have to be balanced against other arguments *against* harmonisation (no. 17).

I should add that a similar economic argument can be brought forward for harmonisation of security rights<sup>78</sup> and tort law.<sup>79</sup> Also in these areas, one can defend the argument that legal diversity leads to costs that would not have been incurred if one could have obtained a security right in one’s own country, or had one been the victim of a tort there. In the remainder of this section, I will concentrate on contract law.

13. In itself, the argument of the proponents of harmonisation – that concluding a trans-frontier contract is more costly than concluding a contract in one’s own country – is correct. It may be true that contracting parties can usually deal with the diversity of law by choosing the applicable law of the contract. However, this does not prevent national mandatory law being applied to the contract. This poses a particular problem because national consumer protection laws often contains detailed rules that deviate from general contract law,<sup>80</sup> obliging a party to take advice on law that is unfamiliar to it. Three questions need to be raised: is this problem faced to the same extent by all parties, what exactly are the costs related to trans-frontier contracting and, finally, are these costs really caused by differences in law or by other causes?

First, a distinction has to be drawn between different types of companies. Diversity of law seems primarily to be a problem for small and medium sized enterprises (SMEs). Larger companies are usually more experienced in international trade and can thus better exploit their bargaining position. In addition to this, larger companies will more often engage in bigger transactions and, in the case of such transactions, it is less burdensome to incur transaction costs. Because larger-sized parties usually dictate their own conditions, regardless of whether their contracting partners are located in their own country or elsewhere, the costs of trans-frontier contracting are not bigger.<sup>81</sup> This is different for small and medium sized companies. They do not usually make contract conditions themselves. They rely instead on default law. If they are uncertain about foreign law, they will refrain from contracting.<sup>82</sup> For SMEs, the cost of taking legal advice is therefore often disproportionate in relation to the value of the transaction.<sup>83</sup> For consumers, a similar argument applies: they will not readily contract across borders if they do not know about foreign law. Their bargaining position is even more

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<sup>78</sup> See e.g. Boodman, o.c., p. 712.

<sup>79</sup> On this: M. Faure, How Law and Economics May Contribute to the Harmonisation of Tort Law in Europe, in: R. Zimmermann (ed.), Grundstrukturen des europäischen Deliktsrechts, Baden-Baden 2003, p. 59 ff.

<sup>80</sup> Cf. Reactions to the Communication 2001, o.c., p. 7: ‘Businesses are discouraged from cross-border transactions more by differences in the details of different consumer protection regimes than by diversity in the overall level of protection afforded.’

<sup>81</sup> See C. Ott and H.-B. Schäfer, Die Vereinheitlichung des europäischen Vertragsrechts: Ökonomische Notwendigkeit oder akademisches Interesse?, in: C. Ott and H.-B. Schäfer (eds.), Vereinheitlichung und Diversität des europäischen Zivilrechts in transnationalen Wirtschaftsräumen, Tübingen 2002, p. 209.

<sup>82</sup> Ott and Schäfer, o.c., p. 213.

<sup>83</sup> Cf. D. Staudenmayer, The Commission Communication on European Contract Law: What Future for European Contract Law?, European Review of Private Law 10 (2002), p. 255 and the contributions of Gerhard Wagner and Helmut Wagner in J.M. Smits (ed.), The Need for a European Contract Law: Empirical and Legal Perspectives, Groningen 2005.

restricted because they cannot negotiate about the choice of law of the foreign seller or about other conditions of the contract.

Second, what exactly are the costs that these firms and consumers incur? In theory, these are the costs of obtaining information about what law is applicable, the contents of the applicable law and the differences with their own law. If we assume that parties now make these costs when contracting abroad (see *below*), unification would indeed reduce costs. Ideally, unification should of course then also extend to other fields than just private law. In particular, tax law and procedural law seem to be fit for unification if one follows this line of reasoning.

Will harmonisation of law indeed lead to the elimination or reduction of these costs? As long as this is a harmonisation through directives, the answer must be negative: after all, directives still allow for major differences between European legal systems. But even in a scenario of complete unification – in which national private law systems are replaced by a truly uniform European private law – it is doubtful whether the costs of trans-frontier contracting would be eradicated. It is, after all, not only the *law* that forms a barrier. I may point here to the well-known work by Macaulay and Weintraub<sup>84</sup> that shows how commercial parties are not usually interested at all in the legal design of their relationship or in the enforcement of contractual remedies. Drafting contracts is usually regarded as too expensive and laborious and does not weigh up against the small amount of cases in which a conflict arises. The importance of (contract) law should therefore not be overestimated.

This is confirmed by the reactions to the 2001 Communication. The European Commission asked businesses, practicing lawyers and consumers if they experienced difficulties through the diversity of law. The prevailing reaction of the businesses<sup>85</sup> was that the internal market may not function in an optimal way, but this has less to do with differences in private law as with language barriers, cultural differences, distances, national habits and diversity in the fields of tax law and procedural law.<sup>86</sup> *De facto* barriers are more important than the law. Also, consumers do not find diverging contract law as the most important problem. It may well be that the confidence of consumers in protection against the seller in the case of trans-frontier contracting is lower (31%) than in case of buying things in their own country (56%),<sup>87</sup> but this is – again – primarily the result of differences in language and distance.<sup>88</sup>

In my view, the question whether diversity of law is really a barrier for the internal market can only be answered by extensive empirical research on the effect of unification on trans-frontier trade. Such research is scarce. To economists, it is largely *terra incognita*: they are silent on the type of contract law that minimises transaction costs, other than that law should as much as possible serve legal certainty.<sup>89</sup> It is certain, however, that high transaction

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<sup>84</sup> S. Macaulay, Non-contractual relations in business: a preliminary study, *American Sociological Review* 28 (1963), p. 55 ff., confirmed by H. Beale and T. Dugdale, *Contracts between businessmen*, *Brit. J. of Law & Society* 2 (1975), p. 45 ff. and R.J. Weintraub, *A Survey of Contract Practice and Policy*, *Wisconsin LR* 1992, p. 1 ff.

<sup>85</sup> Cf. Reactions to the Communication 2001, o.c., p. 6 ff.

<sup>86</sup> Cf. e.g. the reaction of the British government, available through <http://europa.eu.int/comm/consumers>. I still find the reaction of *Orgalime* (organising 130.000 companies in engineering industries) to be representative: 'it will of course always to some extent be easier to trade with companies and persons from your own country. This has, however, more to do with ease of communication, traditions and other factors, which are not dependent on contract law.'

<sup>87</sup> [http://europa.eu.int/comm/dgs/health\\_consumer/events/event42\\_en.html](http://europa.eu.int/comm/dgs/health_consumer/events/event42_en.html) (EOS Gallup Europe 'Consumers survey' of January 2002).

<sup>88</sup> See also the Explanatory memorandum Proposal for a Directive concerning unfair business-to-consumer commercial practices in the internal market, COM (2003) 356 final, no. 13.

<sup>89</sup> H. Wagner, *Economic Analysis of Cross-Border Legal Uncertainty: The Example of the European Union*, in: Smits (ed.), *The Need for*, o.c., p. 30 ff.

costs lead to higher prices. This results in lower investment, lower consumption and thus to a lower national income.<sup>90</sup> Psychologists (who after all deal primarily with human behaviour) should be able to investigate the influence of unification on this behaviour. Until now, they have not. The relatively new field of ‘behavioural economics’ – upon which Sunstein has undertaken pioneering work<sup>91</sup> – may offer a more fertile approach to understanding the psychological phenomena related to the effect of unification. Thus, the ‘status quo bias’ indicates that parties are inclined to prefer the status quo, even if an alternative approach may serve their interests better.<sup>92</sup> This indicates that parties may more readily choose a legal system that they know than a uniform law of a possibly higher quality. This is confirmed by experiences with the Vienna Sales Convention, which is often excluded by larger companies precisely because it leaves too much uncertainty. Moreover, in cases in which it is applicable, the Convention would not govern the entire contractual relationship anyway: national mandatory contract law and national law in other areas remain applicable.<sup>93</sup>

All in all, it is clear that it is difficult to measure the costs of legal diversity: empirical evidence that transaction costs are considerably less if law is unified simply does not exist.

14. If we now suppose that the costs of the present legal diversity are indeed considerable, does this mean that national private law should make way for a uniform European private law? In my view, the economic argument in favour of unification then still needs to be set-off against the costs which unification incurs. From an economic perspective, these comprise the costs of transition to another legal system. These transition costs are high: they include the costs of the political decision making process and the costs of putting the new legal regime into place (for example, the costs of revising contracts and educating lawyers).<sup>94</sup> These transition costs are also difficult to measure, although it is certain that they will disappear in the long run. This implies that they have to be very high to outweigh – in a purely economic perspective – the costs of legal diversity.

No matter how one assesses the economic motive, it cannot be decisive: the economic argument in favour of – or against – harmonisation must always be weighed against other arguments.

### **Second motive: the protection of the weaker party and a European Civil Code to protect ‘social values’**

15. A second motive for European harmonisation is the protection of the weaker party within the EU. Traditionally, such protection takes the form of consumer protection by way of European directives. The need for protection as a counterbalance to free market forces is not denied by many. From this perspective, European legislation is a success: if consumer protection had been left to the Member States, the uniform minimum level of protection that we have now would probably not have been attained.

In this context, it is somewhat bizarre that this consumer protection has no autonomous basis in the EC Treaty. It is, after all, generally assumed that art. 153, introduced in 1999, does not provide such a basis but only supports the internal market provision<sup>95</sup> upon which most directives are based. It should be clear what the disadvantage of this basis is: the

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<sup>90</sup> For this causal chain, see: H. Wagner, in: Smits (ed.), *The Need for*, o.c., p. 32 ff.

<sup>91</sup> C. Sunstein (ed.), *Behavioral Law and Economics*, Cambridge Mass. 2000, p. 3 ff.

<sup>92</sup> Also see H. Kerkmeester, *Uniformity of European Contract Law: An Economic Study Between Logic and Fact*, in: Smits (ed.), *The Need for*, o.c., p. 69 ff. and J.J. Rachlinski, *The Psychology of Conflicts of Laws*, in: Smits (ed.), *The Need for*, o.c., p. 93 ff.

<sup>93</sup> Cf. R.I.V.F. Bertrams, *Enige aspecten van het Weens Koopverdrag*, Lelystad 1995, p. 72.

<sup>94</sup> On this type of *path dependence*, see: J.M. Smits, *The Harmonisation of Private Law in Europe: Some Insights from Evolutionary Theory*, *Georgia J. of Int. and Comp. Law* 31 (2002), p. 79 ff.

<sup>95</sup> See e.g. Roth, o.c., *Juristenzeitung* 2001, p. 477.

protection of the consumer is made dependent on the question whether harmonisation promotes the internal market, while it was made clear above that this is doubtful. Roth<sup>96</sup> therefore even argues that some directives – he mentions door-to-door sales, unfair contract terms and consumer sales – may not meet the requirements of art. 95 as it must be interpreted following the ECJ's Tobacco-judgment. It therefore seems better to insert a separate basis for consumer protection in the EC Treaty and to base new directives on this provision.

Recently, the question was raised whether the need to protect the weaker party and to give way to the protection of 'social values' does not prompt the need for a more far-reaching 'Europeanisation' of private law. From this point of view, only a binding European code can form a counterbalance for increasing globalisation and the 'injustices' caused by it. The slogan of Ugo Mattei, 'Hard Code Now!',<sup>97</sup> was taken over by the 'Study group on social justice in European private law',<sup>98</sup> a group of authors led by Martijn Hesselink. They plead that a future European private law should, to a large extent, reflect social justice as a counterbalance for the marketplace that the EU essentially is. In their view, a European Civil Code is not so much needed in the interest of European business, but as protection *against* it.

It will shortly be seen (below, no. 22) that I cannot agree with this view. My primary objection is that a high European level of social protection should not be dictated in a centralist and paternalistic way. This is not in the interest of business, but it is also not in the interest of the European consumer – who as a consequence will be confronted with higher prices. At the same time, I consider that the EU has a responsibility for guarding a minimum level of consumer protection. In my view, however, this minimum level – primarily existing in duties to inform the consumer – is sufficient. I should add to this that, if the political wish is to enhance a uniform level of social protection for Europe, a plea for European minimum wages, European social security and European healthcare is more to the point than a plea for social justice in *private* law.<sup>99</sup>

### **Third motive: a European Civil Code to reinforce the European identity**

16. Finally, some have argued that a third motive for the harmonisation of private law lies in the desire to create a European identity: one Europe requires one private law.<sup>100</sup> The parallel with the 19<sup>th</sup> Century codifications is obvious: in the same way that these national codifications were a means to create a national identity in distinction of the identity of other peoples, a European Civil Code would be the symbol of one Europe and of solidarity among the Member States.<sup>101</sup> European integration thus becomes a 'meta value' separated from any economic motive whatsoever.<sup>102</sup> This motive is closely connected to the wish to bury, for once and for all, the hatchet among European countries and to thus deal with the trauma of the Second World War.<sup>103</sup> Incidentally, this may also explain, to some extent, why in the scholarly debate on European integration – exceptions excluded – older scholars are often in

<sup>96</sup> Roth, o.c., *Juristenzeitung* 2001, p. 478.

<sup>97</sup> U. Mattei, *Hard Code Now! A Critique and a Plea for Responsibility in the European Debate over Codification*, in: id., *The European Codification Process: Cut and Paste*, The Hague 2003, p. 107 ff.

<sup>98</sup> Study Group on Social Justice in European Private Law, *Social Justice in European Contract Law: a Manifesto*, *European Law Journal* 10 (2004), p. 653 ff.

<sup>99</sup> See Faure, in: Zimmermann (ed.), o.c., p. 68.

<sup>100</sup> See e.g. G. Alpa, *European Community Resolutions and the Codification of Private Law*, *ERPL* 2000, p. 333 and cf. T.M.J. Möllers, *The Role of Law in European Integration*, *American Journal of Comparative Law* 48 (2000), p. 679 ff.

<sup>101</sup> This solidarity is mentioned in art. 2 of the EC Treaty. See also the preamble to the European Constitution (2004), which mentions a 'common destiny' of the peoples of Europe.

<sup>102</sup> Cappelletti, Seccombe and Weiler, o.c., p. 6: 'a meta-value in itself above any mundane cost-benefit analysis.'

<sup>103</sup> See, instead of many others, Winston S. Churchill, *We must build a kind of United States of Europe*, lecture Zurich 19 September 1946, in: id., *The Sinews of Peace: Post War Speeches*, London 1948.

favour of the European codification of private law while the younger generation puts this more into perspective.

I do not think that the identity argument is very strong. To me, the core of the European identity does not lie in uniformity, but in cherishing the European plurality of languages, cultures and law. To put it in the words of Bruno Frey:<sup>104</sup>

‘the essence of Europe is its *variety*. The strength of Europe is its wide range of different ideas, cultures and policies. Diversity, and not unity, has been the crucial element of Europe’s rise in history and continues to do so. A homogenized Europe loses its *raison d’être*, and will lose its economic and political role.’

And Thomas Wilhelmsson is right to say that a uniform law for Europe would only weaken the European identity instead of reinforcing it. If there is something like a European identity, it is not a compelling reason for unification of private law. At most, it would oblige a specific type of foreign policy.<sup>105</sup> I can refer here to the American example: the United States lack a uniform private law, yet it is hard to maintain that there is no American identity.

### **My view on the need for harmonisation: a plea for free choice**

17. My plea is to take the doubts expressed above, about the need for harmonisation of private law, seriously. As long as it is uncertain if harmonisation does really promote the purpose and the functioning of the internal market, it should not be imposed from the above. The only good reason for harmonisation that is then left seems to be the protection of the weaker party on the European market.

But I do not stop with this argument *against* harmonisation. There is, after all, also an argument in favour of diversity of legal systems in Europe. This argument was originally put forward by Charles Tiebout (1924-1968).<sup>106</sup> Tiebout describes the needs of firms and consumers in terms of differing preferences. If diverse legal systems can compete with each other, more preferences can be satisfied: consumers and firms can choose the legal system which, in their view, best protects their interests. Because they can leave a jurisdiction which they do not like (‘vote with their feet’), national governments are stimulated to make their jurisdiction as attractive as possible. The introduction of uniform law would reduce this exit-opportunity and would lead to less preferences being satisfied.

Diversity of legal systems also has the advantage that innovation of existing law is much easier. Looking at other countries’ solutions to legal problems shows whether or not these solutions function. In this way, States are indeed ‘experimenting laboratories’:<sup>107</sup> the experiment elsewhere can be an enlightening or frightening example.<sup>108</sup> Thus, recognition of

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<sup>104</sup> B.S. Frey, A Europe of variety, not harmonization, in: A. Marciano and J.-M. Josselin (eds.), *The Economics of Harmonizing European Law*, Cheltenham 2002, p. 209 ff.

<sup>105</sup> T. Wilhelmsson, *The Legal, the Cultural and the Political – Conclusions from Different Perspectives on Harmonisation of European Contract Law*, *European Business Law Review* 2002, p. 546 and id., *The Ethical Pluralism of Late Modern Europe and Codification of European Contract Law*, in: Smits (ed.), *The Need for*, o.c., p. 123 ff.

<sup>106</sup> C. Tiebout, *A Pure Theory of Local Expenditures*, *J. of Political Economy* 64 (1956), p. 416 ff. Also see A. Ogus, *Competition between national legal systems: a contribution of economic analysis to comparative law*, *International and Comparative Law Quarterly* 48 (1999), p. 405 ff. and G. Wagner, *The Virtues of Diversity in European Private Law*, in: Smits (ed.), *The Need for*, o.c., p. 5 ff.

<sup>107</sup> L. Brandeis, in: *New State Ice Co. v. Liebmann*, 285 U.S. 262: ‘To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.’

<sup>108</sup> F.A. Hayek, *Der Wettbewerb als Entdeckungsverfahren*, *Kieler Vorträge N.S.* 56, Kiel 1968.

gay marriage by The Netherlands has been – and still is – an example to other countries. If European legislation had disallowed gay marriages, The Netherlands would not have been able to recognise gay marriage and no example would have been set of how to successfully incorporate this institution into existing family law. With harmonisation of family law at the European level, gay marriage would probably not have been introduced. In my view, there is no need for it either: why, for example, should the Dutch be forced to have a similar family law as the Irish?<sup>109</sup> In the field of company law, the ECJ already paved the way for a free movement of companies:<sup>110</sup> they can choose the law applicable to their company. If businessmen or women regard the limited company as a more suitable means for their company than the Dutch BV or the German GmbH, they are free to choose for the former. In considering this further, I refer to the contribution of Joe McCahery to this book.

18. My conversion to this line of thought<sup>111</sup> does not mean that I am opposed to unification of law. I just do not believe that the need for uniform law is to be established by academics or by the European legislator. *Those for whom the law exists* should decide which rules serve their interests best. For me, diversity of law is thus not necessarily the result of coincidence. It instead results from the fact that some rules are apparently more appropriate to specific countries than they are to others.<sup>112</sup> I believe that it is much too paternalistic to impose one uniform preference on everyone. Of course, I am not alone in defending this view. In The Netherlands I was, together with my Maastricht colleagues Faure and Hartlief,<sup>113</sup> accused of forming the ‘Romantic Law School of Maastricht’ given that we so often emphasise the singularity of French, German, Dutch, etc. law.<sup>114</sup> But deciding from the above what is just for everyone in Europe – as Nieuwenhuis argues – is, I consider, a violation of the freedom of choice which consumers and firms should have.

19. Now, I do not want to deny that objections can be raised against the competition of legal systems.<sup>115</sup> However, whether these objections hold water depends largely on the way in which European private law is designed. Three objections are discussed here.

The first objection is that it may be true that competition among legal systems may lead to the unification of law, but this will be at a level that is the lowest of all the systems among which competition takes place. Persons or firms moving from legal system A to legal system B, which they regard as more suited to their needs, may lead to system A aligning itself with system B in order to avoid more consumers and firms moving out. This ‘home country control principle’ would lead to a law of the lowest standard. Yet, as often as this fear for a ‘race to the bottom’ or ‘social dumping’ is expressed, there is little empirical evidence to support it.<sup>116</sup> More importantly, full competition among legal systems is not desirable either: it is precisely the purpose of minimum harmonisation to allow the ‘race’ only to take place within certain restrictions. Sometimes, the law has to be mandatory if it is to offer protection.

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<sup>109</sup> The example is from G. Wagner, in: Smits (ed.), *The Need for*, o.c., p. 11: ‘Diversity allows “avant-garde” jurisdictions to boldly move ahead and prove to the others that it is safe to follow.’

<sup>110</sup> ECJ 9 March 1999, Case C-212/97, ECR 1999-I, 1459 (Centros).

<sup>111</sup> See e.g. Smits, o.c., *Georgia J. of Int. and Comp. Law* 31 (2002), p. 79 ff.

<sup>112</sup> Also see L.E. Ribstein and B.H. Kobayashi, *An Economic Analysis of Uniform State Laws*, *J. of Legal Studies* 25 (1996), p. 141.

<sup>113</sup> M. Faure and T. Hartlief, *Naar een harmonisatie van aansprakelijkheidsrecht in Europa?*, *Nederlands Juristenblad* 2003, p. 170 ff.; J.M. Smits, *The Good Samaritan in European Private Law*, Deventer 2000.

<sup>114</sup> J.H. Nieuwenhuis, *De romantische rechtsschool van Maastricht*, *RM Themis* 2003, p. 61 ff.

<sup>115</sup> See e.g. Smits, *The Making of European Private Law*, o.c., p. 66 ff.

<sup>116</sup> See e.g. C. Barnard, *Social dumping and the race to the bottom: some lessons for the European Union from Delaware*, *European Law Review* 25 (2000), p. 57 ff. and R. Van den Bergh, *Forced Harmonization of Contract Law in Europe: Not to be Continued*, in: Grundmann and Stuyck (eds.), o.c., p. 260. Also see Faure, in: Zimmermann (ed.), o.c., p. 49 for a ‘race-for-the-top.’

A second objection is that making a choice for another legal system is not without its own costs. The presumption of Tiebout – that persons and firms can move freely from State A to State B if State B offers a better legal system – is simply not true. There *are* costs involved in such a choice.<sup>117</sup> In addition, the question is whether the mere existence of a divergent *private* law is a decisive factor when making a choice like this. We may again be inclined to overemphasise the importance of this area of the law as compared to tax law, labour law, etc.<sup>118</sup> The solution for this problem lies in parties not having to move *physically* from one legal system to another, but simply being able to choose the applicable foreign law. This is precisely the consequence of the Centros-decision of the ECJ for company law and I do not see why it should not also apply to the field of contract law (see below, no. 23). Of course, parties then should know which legal system serves their interests best. At present, sufficient information on other legal systems is often lacking. A Dutch party does not often know about German or English law, let alone Polish or Czech law.<sup>119</sup> This is different in the United States, where there is much information available on the more than 50 jurisdictions and where all this information is in one language. In my view, the solution to this problem lies in two things: in addition to the promotion of competition between legal systems, various ‘highly informative’ optional codes should also be put in place. I will come back to this in no. 27.

A third objection is that, at present, the freedom to make a choice for a foreign legal system, necessary for successful competition, is often lacking.<sup>120</sup> In the field of contract law, the possibility of making a choice of law is restricted in particular by art. 3 s. 3 and art. 5 of the Rome Convention. Art. 3 s. 3 limits the possibility of a choice of law in cases of a purely national contract: the choice of law cannot set aside the mandatory law of a country if the contract is related to this country alone. Parties that want to set aside their own national law therefore have to themselves leave for another country. I therefore plead for a choice of law in cases which relate purely to national relationships.<sup>121</sup> Art. 5 of the Rome Convention protects the consumer that contracts in another country; it offers the protection of the law of the consumer’s own place of residence, even if a choice of law was made for the law of another country. Although some authors argue that this provision should be eliminated, since it overly restricts the choice of law of the consumer,<sup>122</sup> I still see a reason to maintain this provision: a minimum level of protection is still required.

To conclude: in my model of competitive legal systems, the need for unification of private law is primarily determined by legal practice itself; harmonisation is not imposed from the above. The possible objections against this model can be rebutted, as long as European private law is designed in a specific way. I will now debate further the ideal design of European private law by discussing the plans of the European Commission for a Common Frame of Reference and an optional code.

#### IV. DESIGNING A FUTURE EUROPEAN PRIVATE LAW: THE CFR AND OPTIONAL MODEL

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<sup>117</sup> Cf. on these ‘costs of moving’: G. Wagner, in: Smits (ed.), *The Need for*, o.c., p. 7.

<sup>118</sup> G. Wagner, o.c., p. 9: ‘to suggest that “the people” would vote a government out of office for the reason of it inaugurating an efficient contract law or leaving such inferior law in place is simply absurd.’

<sup>119</sup> Cf. R. Van den Bergh, *Regulatory Competition or harmonization of laws? Guidelines for the European regulator*, in: Marciano and Josselin (eds.), o.c., p. 33.

<sup>120</sup> Also see Van den Bergh, in: Marciano en Josselin (eds.), o.c., p. 30 ff.: ‘as long as *estoppel* and *privity* remain unclear concepts for civil law-lawyers, there will be no competition’ (my translation, JMS).

<sup>121</sup> See on this E.-M. Kieninger, *Wettbewerb der Privatrechtsordnungen im Europäischen Binnenmarkt*, Tübingen 2002, p. 284 ff.

<sup>122</sup> See e.g. C. Kirchner, *An Optional European Civil Code (OECC): Initiating a Learning Process*, in: Grundmann and Stuyck (eds.), o.c., p. 399 ff.; also see Michaels, o.c., *Rabels Zeitschrift* 1998, p. 580 ff.

## Introduction

20. Having discussed the existing *acquis* and the need for harmonisation, we can now turn to one of the most discussed questions in European private law: what is the best way forward? I do not intend to repeat the academic debate of the last decade on the best way to unify private law. Instead, my point of departure is formed by the choice of the European Commission to introduce a CFR and to further debate about an optional code in the field of contract law. These two projects raise several questions. Thus, it is not immediately clear why a CFR should be needed to solve the present problems with the *acquis* (no. 21). I prefer a less complicated way (no. 22). Another question is what the best way to design the CFR and optional code might be. In years to come, the debate will undoubtedly centre on this last question. I will therefore pay extensive attention to it (no. 23-29).

### **The CFR: is it needed to solve the present problems with the *acquis*?**

21. Opinions differ on what the exact function of the CFR is and how it should be designed. The 2004 Communication leaves space for various interpretations. On one hand, it is clear that the European Commission regards the CFR as a tool to improve the *acquis* and to make better legislation. It is also hoped that the Court of Justice will use the CFR as an instrument in interpreting EC-law.<sup>123</sup> Looked at the CFR in this way, it is primarily a type of legislative manual.<sup>124</sup> On the other hand, the Commission also regards the CFR as a basis for an optional contract code. This is confirmed by the Annex to the 2004 Communication. It contains a detailed classification of principles, definitions and rules that is reminiscent of a real national Civil Code. Some authors<sup>125</sup> therefore claim that the CFR is actually a precursor to a European Civil Code.

For a true assessment of the CFR, it is vital to establish whether it indeed only serves to improve the present and future *acquis* or if it is actually a European Civil Code in the making. There is a string of indications that suggest that the CFR tends towards the latter proposal; a CFR is not really necessary to improve the *acquis*. What is more, the question is how a CFR could help to solve the present problems with the *acquis* at all.

As indicated above (see no. 7), the most important part of the CFR will consist of ‘fundamental principles and coherent model rules of contract law, drawing on the EC *acquis* and on best solutions found in Member States’ legal orders.’<sup>126</sup> These will be model rules in a large area of contract law. Many classic subjects of contract law are covered, such as formation, formalities, validity, interpretation and contents of the contract, authority of agents, pre-contractual obligations, (non-) performance, plurality of parties, assignment of claims and prescription. However, it is not very clear how these model rules can contribute to the improvement of the *acquis*. If they are similar to the *Principles of European Contract Law* (PECL) – and this is likely,<sup>127</sup> as the ‘best solutions found in Member States’ legal orders’,<sup>128</sup> have to be distilled – they will not be in any way like the present *acquis*. After all, the PECL

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<sup>123</sup> See above, no. 7.

<sup>124</sup> Idem L.A.D. Keus, De Europeanisering van het vermogensrecht, in het bijzonder van het contractenrecht, in: G.J.M. Corstens et al (eds.), Europeanisering van het Nederlands recht (W.E. Haak-bundel), Deventer 2004, p. 194 ff.

<sup>125</sup> Manifesto, o.c., ELJ 10 (2004), p. 662; M.W. Hesselink, The Politics of a European Civil Code, ELJ 10 (2004), p. 689 and id., Naar een coherenter Europees contractenrecht?, Nederlands Juristenblad 2003, p. 2086; M.Tj. Bouwes, Harmonisatie van het burgerlijk recht door de achterdeur, Nederlands Juristenblad 2005, p. 944 ff.

<sup>126</sup> Communication 2004, o.c., p. 3.

<sup>127</sup> Also see M.W. Hesselink, Capacity and Capability in European Contract Law, European Review of Private Law 2005, p. 494.

<sup>128</sup> Communication 2004, o.c., p. 3. This is also a pretension of the PECL: see O. Lando and H. Beale (eds.), Principles of European Contract Law, Parts I and II, The Hague 2000, p. xxii.

are largely based on European legal systems, while the *acquis* is functionally oriented. If the present directives have to be brought into conformity with the (probable) provisions of the CFR, it means that they will have to be amended considerably. The subsequent question, then, is what influence the (non-binding<sup>129</sup>) CFR will have on the revision of the *acquis*: it is likely that, despite the presence of the CFR, in renegotiating the contents of the directives, they will still be very much a compromise of the various opinions in the Council of Ministers.

I am therefore inclined to agree with the governments of Germany, France and the United Kingdom,<sup>130</sup> that have said that we should not wait for the completion of the CFR in 2009 for revising the *acquis*. Such a revision is also possible without a CFR. The quality and consistency of the *acquis* can simply be enhanced by pulling the existing directives together into a single, more coherent, directive. This directive could then also contain some definitions of abstract terms, making these definitions binding for the Member States. This contrasts with the CFR, which would only contain non-binding definitions. The present structure of the CFR – including topics and types of contracts that are not covered by the existing directives at all – is far too broad to adequately and quickly solve the problems discussed in no. 6.

### **My choice: one systematised minimum directive in the area of consumer protection**

22. The less ambitious alternative which I am proposing is, therefore, a binding systematisation of the present *acquis*. Such an instrument – replacing all existing directives – is relatively easy to realise. Future European legislation can also be included in this ‘European Code on Consumer Protection.’ A choice between a vertical approach (consisting of the individual revision of existing directives) and a more horizontal approach (in which rules are drafted for each type of contract (sale, package travel, etc.))<sup>131</sup> does not then have to be made. A simple listing of definitions and a systematisation of rules (in particular on the duty to inform and rights of revocation) would suffice. Of course, if needed then the *acquis* can at the same time be revised more substantially, but I agree with Grundmann<sup>132</sup> that the presumption should be that the rules of the *acquis* remain intact *unless* it is clear that a more superior rule should be put in place. This also has the advantage that the contents of the new instrument consists primarily of the present *acquis* and is thus already politically legitimated and nationally implemented.<sup>133</sup>

How to design such an instrument? The present *acquis* is characterised by a high minimum level of consumer protection. It has already been pointed out, however, that the desired *level playing field* cannot be reached with such a minimum level of standardisation. This is why the European Commission indicated that it would like to revise its policy of minimum harmonisation.<sup>134</sup> I am opposed to this: the only way to prevent a divergent implementation by Member States is to issue a directly binding regulation.<sup>135</sup> Yet, this remedy might be worse than the disease. A regulation or maximum harmonisation would, after all, mean that Member States can no longer offer more protection than the European minimum level. Countries like The Netherlands and Germany would then probably have to scale back

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<sup>129</sup> Communication 2004, o.c., p. 6.

<sup>130</sup> See the summary of reactions to the Action Plan, available through <http://europa.eu.int/comm/consumers>.

<sup>131</sup> Thus the Commission: First Annual Progress Report on European Contract Law and the *Acquis* Review 2005, o.c., p. 10.

<sup>132</sup> S. Grundmann, European Contract Law(s) of What Colour?, *European Review of Contract Law* 1 (2005), p. 208.

<sup>133</sup> S. Grundmann, The Optional European Code on the Basis of the *Acquis Communautaire* – Starting Point and Trends, *European Law Journal* 10 (2004), p. 701 ff.

<sup>134</sup> Communication 2004, o.c., p. 3; Consumer Policy Strategy 2002-2006, COM (2002) 208, OJ EC 2002, C 11/1. Also see above, no. 6.

<sup>135</sup> *Idem* S. Leible, The Approach to European Law in Domestic Legislation, *German Law Journal* 4 (2003), p. 1266.

their consumer law. It would be wrong to prevent a national preference for a higher level of protection. To quote Easterbrook: ‘producing a level playing field by chopping down the heights, forcing all of us to live in the valleys, has nothing to recommend it.’<sup>136</sup> Indeed, why should France not be allowed to completely forbid door-to-door sales of certain products<sup>137</sup> and why should the economic development of the Czech Republic or Poland be hampered by Western-European views on what is a ‘fair’ level of protection for the consumer or for the environment? My solution is another one: a *level playing field* is best promoted by various optional codes with diverging levels of consumer protection (see no. 27).

My choice for a low minimum level of consumer protection is also inspired by the idea that it is not at all certain that consumer protection is effective. The emphasis which Europe puts on the ‘active and confident consumer’,<sup>138</sup> buying freely through the internet and across borders, is not always in conformity with legal practice and the question of whether this active consumer actually requires so much protection. Empirical research shows that the duty of a professional party to give information enhances only the position of a consumer with a high income; it does not enhance the position of those consumers that need such protection the most.<sup>139</sup> Yet the majority of European directives have, as a purpose, the restoration of information asymmetries: the ‘weaker’ party is to be brought – as much as possible – in line with the situation that it would have been in if it had it been in an equal negotiating to the professional party. But if we know little about the effect of such provisions, would it not be better to allow experiments by national legislators and to thus learn from elsewhere? Only in this way, will we see what the ‘best’ rule is.

### **Praise for the optional code**

23. In so far as (minimum) protection of the weaker party is not needed, I wholeheartedly embrace<sup>140</sup> the choice of the European Commission for an optional code (a ‘26<sup>th</sup> regime’<sup>141</sup>). This is simply because an optional legal system fits in very well with the idea of the competition of legal systems. However, the success of the code depends on its contents, legitimacy and applicability.<sup>142</sup> In this respect, there are many variations to consider. Thus, the code could contain general rules for all contracts (after the model of the PECL), but could also be limited to commercial or consumer contracts or even to just the contract of sale; it could contain only default or also mandatory law; it could apply to only trans-frontier but also to national contracts; it could deal with contract law alone, but also with other fields of private law; it could be put in a regulation or in a recommendation; it could be democratically legitimised by national parliaments, but could also be the work of academics alone; the code could be applicable in principle unless it is excluded (‘opt-out’) or could only be applicable if this is explicitly agreed upon (‘opt-in’) by the parties. It is the right combination of these

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<sup>136</sup> F.H. Easterbrook, *Federalism and European Business Law*, *Int. Rev. of Law and Economics* 14 (1994), p. 132.

<sup>137</sup> ECJ 16 May 1989, Case C-382/87, ECR 1989, 1235 (Buet).

<sup>138</sup> Cf. S. Weatherill, *Prospects for the development of European private law through ‘Europeanisation’ in the European court*, *European Review of Private Law* 3 (1995), p. 314.

<sup>139</sup> See the classic study by W.C. Whitford, *The Function of Disclosure Regulation in Consumer Transactions*, *Wisconsin LR 2* (1973), p. 400 ff.

<sup>140</sup> In the same vein the European Parliament: Resolution P5\_TA (2003) 0355, OJ EC 2004, C 076 E/95; the position of the European Council is less clear: it appears to only have accepted the CFR. See European Council of Brussels 4/5 november 2004, 14292/04, p. 31. For an assessment of optional regimes in company law, also see the contribution of Joe McCahery to this book.

<sup>141</sup> For this (in view of Scots and Catalan law not completely justified) term: First Annual Progress Report on European Contract Law and the *Acquis Review* 2005, o.c., p. 12.

<sup>142</sup> See on these parameters for an optional code also J.M. Smits, *Toward a Multi-Layered Contract Law for Europe*, in: Grundmann en Stuyck (eds.), o.c., p. 387 ff.

factors that decides whether the requirements for successful competition are met (see no. 19). I will now discuss these factors.

### **The limits of an optional code**

24. What are the rules to be included in the optional code? The answer to this question does not depend on the contents of the present *acquis*, as I have already reserved a place for this *acquis* in a separate consumer code. This frees the way for a more fundamental discussion about the contents of a future European private law. Let me repeat that I am driven by the aim of having the optional code competing with national legal systems. This calls for reducing the costs involved in getting to know foreign solutions.<sup>143</sup>

The first question, then, is whether the optional code should be restricted to contract law, as envisaged in the Communication of 2004. This leads to parties contracting abroad still being confronted with unknown foreign law. This is an important reason why the Vienna Sales Convention – that also offers an optional model – is often excluded by the parties. This gives rise to a need for an optional code governing the entire relationship among the parties, thus also offering rules on mandatory contract law, transfer of movables, security rights etc. Of course, it should then be made clear what the relationship is between the optional model and the relevant national law. It might thus be possible for a European security right to be created, but this could only be effective if the right is in some way accommodated in the national system and is allowed to have priority over ‘national’ rights of third parties. This is exactly why an attempt of the European Commission to introduce a European reservation of title failed: Member States considered that the introduction of such a right was a violation of their national legal system (and thus a violation of third parties’ interests).<sup>144</sup> At present, the Commission is envisioning the introduction of a 26<sup>th</sup> system for mortgage credit.<sup>145</sup> I am jubilant about this.

Another problem with an optional code is its applicability in the field of tort law. As an optional code needs to be chosen by the parties, liability law cannot, in principle, be part of it. Of course, one could argue that parties should always be able to make a choice for a liability regime of a European member state, but the core of liability law – providing rules for the relationship between tortfeasor and victim that do not know each other before the damaging event takes place – cannot be affected.<sup>146</sup>

### **The contents: ‘social justice’?**

25. Until now, I have not paid attention to the question of what type of provisions the optional code should contain. The ‘Study group on social justice in European private law’,<sup>147</sup> and its individual members Mattei<sup>148</sup> and Hesselink<sup>149</sup> recently emphasised the value of ‘social justice.’ They argue that, because of the one-sided emphasis that the EU is putting on the internal market, a ‘European’ concept of justice in contract law is missing. It may, of course,

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<sup>143</sup> Also see the contribution by McCahery on the ‘pros and cons’ of optional regimes.

<sup>144</sup> See now art. 4 of Directive 2000/35 (combating late payments), that only provides for reservation of title among the parties.

<sup>145</sup> Greenbook on mortgage credit in the EU, COM (2005) 327 final. Also see the Greenbook on financial services policy, COM (2005) 177 final.

<sup>146</sup> See N. Jansen, *Binnenmarkt, Privatrecht und europäische Identität*, Tübingen 2004, p. 16 and – with mention of exceptions – Ralf Michaels, *Private or International? Two Economic Models for Private International Law of Torts*, Duke Law School Research Paper Series no. 73 (2005), p. 26 ff.

<sup>147</sup> Manifesto, o.c., ELJ 10 (2004), p. 653 ff. Also see C.U. Schmid, *The Instrumentalist Conception of the Acquis Communautaire in Consumer Law and its Implications on a European Contract Law Code*, *European Review of Contract Law* 1 (2005), p. 211 ff.

<sup>148</sup> Mattei, *Hard Code Now!*, o.c., p. 107 ff.

<sup>149</sup> Hesselink, o.c., ELJ 10 (2004), p. 675 ff.

be true that Europe has contributed a lot to consumer protection, but their fear is that increasing European integration is going to change this. It is for this reason that a ‘social justice agenda’ should be developed.<sup>150</sup> But what is ‘social justice’?:

‘At the heart of the social justice agenda beats the concern about the distributive effects of the market order. The rules of contract law shape the distribution of wealth and power in modern societies. (...) A modern statement of the principles of the private law of contract needs to recognise its increasingly pivotal role in establishing distributive fairness in society.’<sup>151</sup>

For these authors, creating a future European private law is primarily a *political* process: the rules of contract law that account for the right mix between the free market and justice (and these are *all* contract law rules<sup>152</sup>) should therefore be determined in a democratic way. Consulting legal practice in making the CFR is then not enough: it is the European Parliament and national legislators that have to be involved.<sup>153</sup>

26. How to assess this view? In itself, it remains unclear why a ‘socially just’ private law should be realised at the European level. After all, the question is whether the interplay of European and national law should not take place in such a way that the latter will remedy the perhaps less social character of European legislation. As long as European and national law exist next to each other – and this will remain to be the case for a long time – there is no need to worry. Yet, my objections are of a more fundamental nature.

My first objection concerns the vagueness of the concept ‘social justice.’ The concept is hard to put into operation:<sup>154</sup> it refers to an ideal, but no one knows when that ideal will be reached. True, the study group realises that, because of cultural and economic differences, national legal systems each attach a different weight to social justice.<sup>155</sup> Yet this makes it even more difficult to establish what the ideal to be reached actually is. Does ‘social justice’ mean that the professional seller should always report defects in the object sold to the consumer? Does it mean that contracts lacking a ‘just price’ are void? Or that differences in income should be struck out? These questions cannot be answered by reference to the open concept of ‘social justice.’

Underlying the view of the study group is an idea of how we should regard the law and how it should develop. This idea is expressed in the sentence that ‘the rules of contract law shape the distribution of wealth and power (...).’<sup>156</sup> My second objection has to do with this idea. Is it really true that the distribution of wealth and power is the product of conscious *design*? The belief that is thus expressed in the ‘makeability’ (*Machbarkeit*) of society – the word ‘manifesto’ is a telling reference to that other document written in 1848 – is not mine. What constitutes the best rules for Europe cannot, in my view, be decided by an almighty legislator that has the power to change the existing distribution of power and riches – if this is

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<sup>150</sup> Manifesto, o.c., ELJ 10 (2004), p. 664.

<sup>151</sup> Manifesto, o.c., ELJ 10 (2004), p. 665.

<sup>152</sup> This ideology based on Critical Legal Studies was recently summarised for a European audience by D. Kennedy, The political stakes in ‘merely technical’ issues of contract law, *European Review of Private Law* 10 (2002), p. 7 ff.

<sup>153</sup> Cf. Manifesto, o.c., ELJ 10 (2004), p. 669.

<sup>154</sup> See also T. Wilhelmsson, Varieties of Welfarism in European Contract Law, ELJ 10 (2004), p. 714: ‘(...) “social justice” in contract law does not represent a coherent structure of ideas that as such could be used as a basis for a coherent assessment and development of European contract law.’

<sup>155</sup> Manifesto, o.c., p. 666. Also see R. Brownsword, G. Howells and T. Wilhelmsson (eds.), *Welfarism in Contract Law*, Dartmouth 1994.

<sup>156</sup> See above, no. 25.

what one wants to do at all. The present legal system is the result of a long process of *trial and error* through which a partly spontaneous order has come into being. I do certainly not deny that the legislator sometimes needs to intervene to protect the interests of weaker parties, but this does not mean that the entire relationship between freedom of contract and protection should be reorganised. To me, law is not primarily the result of conscious choice, but of spontaneous development. In this respect, I am influenced by the work of Nobel Prize winner Friedrich Hayek.<sup>157</sup>

My third objection is directed against the idea that contract law should serve distributive justice.<sup>158</sup> As is well-known, distributive justice requires that a political choice be made for a distribution of wealth that best reflects the collective goals of society. Traditionally, this is the domain of politics. Thus, the idea of progressive taxation is typically used as a way to realise distributive justice. Opposite distributive justice stands corrective justice: this does not require a decision on a collective social, economic or political goal, but merely corrects an unjust situation.<sup>159</sup> Tradition has it that, in private law, only this last type of justice is important.<sup>160</sup> If one starts to submit private law to the domain of distributive justice, it is made subordinate to a public goal and if this goal is not realised, private law has ‘failed’.<sup>161</sup> In my view, this is wrong. I do not think that it is the government that should decide *ex ante* what a just contract law is: this is not only paternalistic,<sup>162</sup> it also undoes the advantages of competition.<sup>163</sup> At the very most, the *result* can be assessed *ex post* on the extent to which it satisfies justice. I am then still leaving aside the argument that a redistribution of wealth through contract law is already doomed to failure because future contracting parties will in all probability not conclude contracts with the ‘weaker’ parties that need protection.<sup>164</sup>

### **The contents: diverse, highly informative legal systems next to each other**

27. I propose a different solution: not that the State should decide what a socially just private law for Europe is, but that the parties *themselves* should decide on the private law they wish to adopt. In those areas of the law where there is no need for a protective code, competition of legal systems should enable them to put this into place. However, to have an optional European model compete with existing national legal systems requires a sufficiently attractive optional system. This is possible by preventing the 26<sup>th</sup> system to suffer from a deficiency that many foreign systems have: namely that it is difficult to get to know their contents. At the same time, the optional model should be attractive to different types of contracting parties. This pleads against the adoption of a general set of principles such as the PECL: they are formulated in such a general way that they cannot survive the competition with national systems.<sup>165</sup> Contracting parties would still prefer the legal certainty of a national system.

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<sup>157</sup> F.A. Hayek, *Law, Legislation and Liberty*, London 1973-1979; *The Fatal Conceit*, London 1988.

<sup>158</sup> Thus already A. Kronman, *Contract Law and Distributive Justice*, Yale LJ 89 (1980), p. 472 ff.

<sup>159</sup> E.J. Weinrib, *The Idea of Private Law*, Cambridge Mass. 1995, p. 211 ff.

<sup>160</sup> Cf. e.g. art. 6:248 s. 2 Dutch Civil Code.

<sup>161</sup> This leads to a vanishing of the sharp distinction between private and public law: Manifesto, o.c., ELJ 10 (2004), p. 668 and M.W. Hesselink, *The New European Private Law*, The Hague 2002, p. 228 ff.

<sup>162</sup> Cf. J.R. Spencer, *Why is the harmonisation of penal law necessary?*, in: A. Klip and H. van der Wilt (eds.), *Harmonisation and harmonising measures in criminal law*, Amsterdam 2002, p. 44: ‘This set of rules is the best. So you must have it, because it will be good for you. And what is good for you is something we decide.’

<sup>163</sup> The Manifesto, o.c., ELJ 10 (2004), p. 672 still wants to leave space for competition, but the question is how to reconcile this with striving for ‘social justice’: what use is competition if we know in advance who the winner will be? See Hayek, *Der Wettbewerb als Entdeckungsverfahren*, o.c.

<sup>164</sup> C. Fried, *Contract as Promise*, Cambridge Mass. 1981, p. 106.

<sup>165</sup> Also see J.M. Smits, *Waarom harmonisering van het contractenrecht (via beginselen) onwenselijk is*, *Contracteren* 3 (2001), p. 73-74.

My plea is, therefore, to create – next to a set of rules that all contracts have in common – diverse optional models *next to each other*. If an optional system with (for example) a large role for good faith, a far going liability for breaking off negotiations and accepting a doctrine of a just price would be placed next to a system in which a contract is a contract,<sup>166</sup> it will show automatically which system is preferred by the parties. Obviously, these systems will also have to contain mandatory rules and it should be put beyond doubt that a choice of law for such a system is possible.<sup>167</sup> Moreover, a distinction should be made between commercial contracts and consumer contracts.<sup>168</sup> Subsequently, commercial contracts can be distinguished into various specific contracts (commercial sale, franchising, leasing, etc.). An optional model for the consumer contract should offer various levels of protection *above* the existing minimum. These consumer codes can then be chosen by the parties.<sup>169</sup> To improve upon the informative value of the codes in comparison with national legal systems, they will have to contain detailed rules.<sup>170</sup>

Designing several optional models next to each other (as opposed to having just one optional European code) still has another advantage. Psychological research<sup>171</sup> shows that – contrary to what the theory of rational choice suggests – parties often do not do what is best for them from the objective viewpoint. They often prefer inefficient default law over the need to draft their own, optimal, rules for the contract. Russell Korobkin therefore argues that the legislator should create several alternative status quos next to each other, thus allowing parties to avoid the ‘status quo bias’ and enabling them to choose their optimal law.<sup>172</sup> This also pleads against only one general European code. Korobkin says:<sup>173</sup>

‘The lawmaker charged with determining a tailored default term must ask not what term *most* contracting parties would have agreed to had they made provisions for a contingency – a question that does not require an inquiry into the specifics of any one transaction – but what term two *particular* parties would have agreed to had they provided for the contingency.’

I may emphasise that, in my model of competition, parties should also be able to choose for *national* legal systems. It is the European legislator that should allow this by amending art. 3 of the Rome Convention (see above, no. 19).

### **The applicability and legitimacy of the code**

28. Should the code only be applicable to trans-frontier transactions or also to purely national relationships? In my view, there is no doubt whatsoever that the code can be chosen for both types of relationships. An important reason for this is that, if the code would only be applicable to trans-frontier contracts,<sup>174</sup> there would not be enough cases to make the code a

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<sup>166</sup> Cf. G. Wagner, *The Economics of Harmonization: the Case of Contract Law*, *Common Market Law Review* 39 (2002), p. 1002.

<sup>167</sup> This requires adaptation of art. 3 s. 3 Rome Convention as it is at present disputed to what extent this provision allows a choice of law for other than national law.

<sup>168</sup> Cf. Communication 2004, o.c., p. 12-13.

<sup>169</sup> This means the contracting parties themselves. It goes without saying that national *legislators* can also draw inspiration from the contents of the optional code in designing national law: see below, no. 37.

<sup>170</sup> The suggestion by G. De Geest, *Towards Extremely Detailed International Standard Codes*, Working Paper CIAV Utrecht 2001, to draft a very detailed European Civil Code is therefore not as bizarre as it is sometimes assumed.

<sup>171</sup> R. Korobkin, *Behavioral Economics, Contract Formation, and Contract Law*, in: Sunstein (ed.), o.c., p. 137 ff.

<sup>172</sup> Korobkin, in: Sunstein (ed.), o.c., p. 138; Cf. Kerkmeester, in: Smits (ed.), *The Need for*, o.c., p. 69 ff.

<sup>173</sup> Korobkin, in: Sunstein (ed.), o.c., p. 140.

<sup>174</sup> In the same vein: U. Drobnig, *A Subsidiary Plea: A European Contract Law for Intra-European Border-Crossing Contracts*, in: Grundmann and Stuyck (eds.), o.c., p. 343 ff.

sufficiently certain legal instrument. The code would then be comparable to the Vienna Sales Convention (on which no more than ten cases are decided each year in most countries).<sup>175</sup>

The desire to create legal systems that are as informative as possible also provides the answer to the question whether the code should be applicable through ‘opt-in’ or ‘opt-out’. If the code is applicable *unless* it is excluded, it is of more importance that the code is drafted for as many contracts and types of parties as possible because parties should then be able to rely on the code as reflecting their best interests. This is an argument for an ‘opt-in’-code. Moreover, in practical terms, an ‘opt-out’-code would mean a replacement of existing national law<sup>176</sup> and therefore invokes the question whether the EU is competent at all to issue such an instrument.

29. This emphasis on market-actors *choosing* themselves what law is to govern their relationship still has another advantage. It is that we do not need to discuss the legitimacy of the European code. Some authors rightly raised the question of how a CFR or European code of contracts could be legitimised.<sup>177</sup> At the national level, it is ‘the reciprocally informed and controlling influences of legislation, adjudication and practice, science and the public’<sup>178</sup> that ensure that private law is accepted. But how might one guarantee this at the European level? Does the consultation process as envisaged by the European Commission suffice?<sup>179</sup>

There are two views on this. On one hand, one can look at a code as a scholarly product, deriving its legitimacy from its high quality.<sup>180</sup> This is not only the view of the European Commission, but also of Von Bar and others.<sup>181</sup> They place themselves in the tradition of Windscheid and other well-known German scholars:<sup>182</sup> the code imposes its legitimacy because it is *dogmatically* correct. On the other hand, there is the view that a code needs *political* legitimisation. This is the viewpoint of the ‘manifesto’: Europeanisation and globalisation led to ‘non-governance’ (because of the waning influence of democratically legitimated national governments). This should be faced by (at least) a European private law that is legitimated by the European Parliament.<sup>183</sup> Only in this way can one avoid the suggestion that the code is introduced through the backdoor, in a merely technical and non-political exercise.<sup>184</sup>

Which view to endorse? I would say that, in the latter view, the European Civil Code is seen too much as resembling a binding national code.<sup>185</sup> If the EU were indeed to impose a European Civil Code from the above, a democratic legitimisation would certainly be required. But in that case of an optional code, the legitimacy primarily lies in the *choice* made by the

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<sup>175</sup> See S. Grundmann and W. Kerber, European System of Contract Laws – a Map for Combining the Advantages of Centralised and Decentralised Rule-Making, in: Grundmann en Stuyck (eds.), o.c., p. 312.

<sup>176</sup> Cf. Grundmann and Kerber, o.c., in: Grundmann en Stuyck (eds.), o.c., p. 311.

<sup>177</sup> Manifesto, o.c., ELJ 2004, p. 653 ff.; also see Ugo Mattei, The Issue of European Civil Codification and Legal Scholarship: Biases, Strategies and Developments, Hastings International and Comparative Law Review 21 (1998), p. 883 ff.

<sup>178</sup> C. Joerges, The Science of Private Law and the Nation State, in: F. Snyder (ed.), The Europeanisation of Law: The Legal Effects of European Integration, Oxford 2000, p. 82.

<sup>179</sup> See above, no. 7.

<sup>180</sup> Cf. Joerges, o.c., EUI Working Paper Law 2004/12, p. 11.

<sup>181</sup> C. Von Bar, O. Lando and S. Swann, Joint Response of the Commission on European Contract Law and the Study Group on a European Civil Code (2001), (available through <http://europa.eu.int/comm/consumers>), no. 63: ‘an impartial formulation of principles in the light of detailed comparative research.’

<sup>182</sup> Thus Joerges, o.c., EUI Working Paper Law 2004/12, p. 10.

<sup>183</sup> Manifesto, o.c., ELJ 10 (2004), p. 669 and cf. Hesselink, o.c., ELJ 10 (2004), p. 692.

<sup>184</sup> Mattei, o.c., Hastings International and Comparative Law Review 21 (1998), p. 898: ‘avoiding political choices in the name of neutrality is itself a political choice in favour of the strongest market actor.’

<sup>185</sup> This is an example of ‘methodological nationalism’: see Michaels, o.c., *Rabels Zeitschrift* 69 (2005), p. 525 ff.

parties themselves. Besides, it seems inevitable that European integration leads to a certain loss of democracy: if competences which were previously exclusively national are transferred to a higher level, the citizen will indeed be involved less in the decision making process.<sup>186</sup>

### **Conclusion: a multi-layered European private law**

30. The conclusion should be clear: an ideal future European private law cannot consist of one instrument alone, but should have a layered structure. Dealing with the present problems of the European *acquis* requires another approach than finding the ‘best solutions’ for the optional code. Whereas the first is best served by one general minimum directive, the second requires a differentiation in different types of contracts and parties. I do not think that it is a fruitful approach to try to bring the two together under one roof, in a CFR.

## **V. INFLUENCE ON NATIONAL LAW**

### **Overview**

31. I now turn to the last question to be discussed in this contribution: what is the influence of European law on the national law of contract, tort and property? By raising this question, I turn away from the future that I have just discussed and I try to assess the present situation.<sup>187</sup> First, a short sketch of the influence of (in particular) European directives (no. 32-33) is given. Then, I discuss the possible strategies of civil law-legislators *vis-à-vis* European legislation (no. 34-36).

### **Erosion of a coherent system**

32. The private law of the countries of the European continent has been regarded as a coherent and national system since at least the codifications of the 19<sup>th</sup> Century. It is coherent because it does not contain a loose collection of rules, standards, concepts and principles, but instead forms a consistent whole. On the basis of this consistent whole, new cases can be decided and these cases in turn become part of the system as well.<sup>188</sup> Except for systematic purity, such consistency serves the purpose of equal justice (and therefore of legal certainty): only if rules and principles are applied in a uniform way, can like cases be treated alike. Moreover, the system is not only coherent, but it is also national in nature: all actors involved in the development of the system (legislator, courts and legal scholars) are located in the same country. In such a system, the jurist can indeed strive for internal consistency. As soon as those outside the national legal actors come into play, however, the pretension of a coherent and complete national system can no longer be fulfilled.<sup>189</sup> It is useful to investigate how European legislation in this way disturbs the coherence of the national system.<sup>190</sup> I believe that this is the case for three reasons.

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<sup>186</sup> Cappelletti, Seccombe and Weiler, o.c., p. 7 already mentioned a ‘tension between integration and democracy.’

<sup>187</sup> The (large) influence of Europeanisation on legal science is not discussed.

<sup>188</sup> Cf. R. Dworkin, *Law’s Empire*, London 1986, p. 211: ‘law as integrity’ means we should think of the law as a coherent set of principles about justice and fairness. Cf. generally Jaap Hage, *Law and Coherence*, *Ratio Iuris* 17 (2004), p. 87 ff.

<sup>189</sup> Cf. R. Zimmermann, *Codification: History and Present Significance of an Idea*, *European Review of Private Law* 3 (1995), p. 95 ff. and P. Legrand, *Against a European Civil Code*, *Modern Law Review* 60 (1997), p. 45 ff.: a Civil Code as a ‘self-contained and self-referential system.’

<sup>190</sup> See also J.M. Smits, *The Europeanisation of National Legal Systems: Some Consequences for Legal Thinking in Civil Law Countries*, in: M. Van Hoecke (ed.), *Epistemology and Methodology of Comparative Law*, Oxford 2004, p. 229 ff.

First, European legislation is difficult to incorporate into national legal systems because – as said before – it is functionally oriented. While national civil law offers general rules, directives only provide rules for specific themes such as duties of disclosure, rights of revocation and certain types of unlawful conduct. This implies that cases which systematically resort to the general rules of the Civil Code have their own European rules as well. These fragments of European law are out of tune: there is no problem if there is a European directive for certain types of food (sausages), but not for other types (peppers). However, as soon as a directive only provides rules for contract remedies, but not for the formation of contracts, this is regarded as a violation of the coherent system that traditionally regulates all topics.<sup>191</sup> Given that the national legislator does not want to give up its power, we in the end have two legislators dealing with the same topic. Teubner<sup>192</sup> coined the term ‘legal irritants’: the rule of European origin is not so much assimilated into the national legal order, but instead disorders the national legal system.

Second, directives often contain very detailed rules, exploiting terms that deviate from national legal terminology.<sup>193</sup> The European legislator consciously makes use of neutral terms such as the ‘right to withdraw’ and ‘reduction of the price’.<sup>194</sup> Subsequently, these terms have to be implemented into national legislation. This would still be relatively easy if a member state was free to transpose a directive in the way it wants and could sometimes even refrain from implementing the directive because national law could be interpreted in accordance with the directive. Yet the legislator often lacks this freedom: according to the ECJ, the consumer should be able to immediately recognise its ‘European’ rights. This means that there is a duty for the Member States’ legislators to meticulously implement the provisions of directives: according to the ECJ, a court interpreting existing national law in line with a directive in the field of consumer protection cannot achieve the clarity and precision needed to meet the requirement of legal certainty.<sup>195</sup> Thus, if European law allows a right to price reduction in cases of non-conformity in consumer sales, it is not sufficient that the national court allows partial termination: the legislator must explicitly enact that there is a right to reduction of the price (now laid down, in The Netherlands, in art. 7:22 of the Dutch Civil Code). This duty to implement detailed provisions reinforces the disruption of the national system: what actually already follows from the system of national law, still needs to be explicitly codified.

Third, the unity of the national legal order is affected by the way in which implemented European law is to be interpreted. As is well-known, implemented law needs to be interpreted ‘in the light of the wording and the purpose of the directive.’<sup>196</sup> The purpose of the legislator, as ascertained from legislative history and the system of the directive – so important in interpreting national law – is far less important. This is quite explainable: the way in which the provision was drafted and the system of the directive (if existent at all) are often very difficult to distil. In this respect, there is an obvious parallel with the *exclusionary rule* of English law. In English law, the legislative history could, as a matter of principle, not be consulted as ‘the rules by which the citizen is to be bound, should be ascertainable by him

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<sup>191</sup> Cf. W.-H. Roth, Transposing ‘Pointillist’ EC Guidelines into Systematic National Codes – Problems and Consequences, *European Review of Private Law* 2002, p. 769.

<sup>192</sup> G. Teubner, Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences, *Modern Law Review* 61 (1998), p. 12: ‘Legal irritants cannot be domesticated; they are not transformed from something alien into something familiar.’

<sup>193</sup> Roth, o.c., *European Review of Private Law* 2002, p. 761 ff. calls them pointillist: they suffer from ‘Detailversessenheit’ (Roth, o.c., *JZ* 2001, p. 485).

<sup>194</sup> Art. 6 Directive 97/7 (distance contracts) and art. 3 Directive 1999/44 (consumer sale).

<sup>195</sup> ECJ 10 May 2001, Case C-144/99, ECR 2001, I-3541 (Commission/Netherlands).

<sup>196</sup> ECJ 10 April 1984, Case C-14/83, ECR 1984, 1891 (Von Colson and Kamann/Nordrhein-Westfalen).

(...) by reference to identifiable sources that are publicly accessible.’<sup>197</sup> The legal certainty which *civil law* countries seek to establish through systematisation, the Court of Justice finds in a foremost textual and teleological interpretation of directives.

An example of the conceptual divergence<sup>198</sup> caused by these different methods of interpretation is evidenced by the interpretation of the term ‘consumer sale’ in art. 7:5 of the Dutch Civil Code. In Dutch law, it is generally held that the interpretation of such a term needs to be done in a subjective way: if the seller did not know – nor had to know – that the buyer bought a thing for private purposes (because it legitimately thought that the buyer bought in a professional capacity), the buyer is still protected as a consumer.<sup>199</sup> This seems to be different to the way in which the European term ‘consumer’ would be interpreted. Then, the objective approach is adopted.<sup>200</sup> Thus, a similar term in the Dutch Civil Code (and equally the German or French Codes) begets two different meanings. There are many more examples of this phenomenon. There are, for example, also two types of interpretation of contracts *contra proferentem* in Dutch law: if there is doubt about how to interpret a contract clause on which there have been no separate negotiations, interpretation of this clause *must* take place in favour of the consumer (the ‘European’ rule), while this interpretation *contra proferentem* is not required for other contracts (the ‘Dutch’ rule).<sup>201</sup> There are also diverging concepts of (non-)conformity for the (European) consumer sale and the (Dutch) ‘normal’ contract of sale.<sup>202</sup> In the future, these types of divergence will only increase. In the end, it seems unavoidable that the ECJ will provide ‘European’ interpretations of all implemented European rules and that these interpretations will necessarily differ from the national ones.<sup>203</sup>

### **Multilevel lawmaking: an everlasting task**

33. The functional orientation and detailed character of the *acquis*, as well as the duty to implement national law in line with the various directives, have led to a process of erosion of national legal systems. Private law has come to exist more and more in different layers of law *next* to each other and *overlapping* with each other. In this respect, political scientists have coined the term *multilevel governance*.<sup>204</sup> European integration inevitably leads to rules of the European and national legislator that overlap. As long as European and national law do not completely merge – which is just yet not conceivable – courts and legislators have to learn to deal with this lawmaking on various levels. Private law will increasingly be a building ground where there are two architects, one in each European national capital and one in Brussels.<sup>205</sup>

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<sup>197</sup> Fothergill v. Monarch Airlines Ltd., [1981] AC 251, 279 per Diplock LJ. See, also on the change of this position after Pepper v. Hart, [1993] 1 All ER 42, Stefan Vogenauer, Die Auslegung von Gesetzen in England und auf dem Kontinent, Tübingen 2001.

<sup>198</sup> Roth, o.c., Juristenzeitung 2001, p. 482 mentions ‘Begriffssinseln’ and ‘Begriffsspaltungen.’

<sup>199</sup> See (critically) Asser-Hijma 5-I, Koop en ruil, 6<sup>th</sup> ed., Deventer 2001, no. 77 ff.

<sup>200</sup> See e.g., in the context of (now) art. 15 Brussels I-Regulation, ECJ 20 January 2005, Case C-464/01 (Gruber/Bay Wa).

<sup>201</sup> See art. 5 Directive 93/13 (unfair terms), art. 6:238 s. 2 Dutch Civil Code and Hoge Raad 18 October 2002, Nederlandse Jurisprudentie 2003, 258.

<sup>202</sup> Art. 7:17 and 7:18 Dutch Civil Code.

<sup>203</sup> Including ‘superegatory’ law: if a rule derives from a directive and is more widely applicable than the directive meant, the rule still needs to be interpreted in a coherent and uniform way. Cf. ECJ 17 July 1997, Case C-28/95, ECR I-4161 (Leur-Bloem).

<sup>204</sup> See for a definition G. Marks et al, Competencies, Cracks and Conflicts: Regional Mobilisation in the European Union, Comparative Political Studies 29 (1996), p. 167: ‘overlapping competencies among multiple levels of governments and the interaction of political actors across those levels.’

<sup>205</sup> See for this metaphor Roth, o.c., Juristenzeitung 2001, p. 488.

One need not judge this development negatively. It may be true that the remark of Philippe Malaurie ‘*Je ne connais pas le droit européen et je ne l’aime pas*’<sup>206</sup> does reflect what many national lawyers think, yet it is more fertile to try to accommodate European law as well as possible within the national legal order. For national courts, this means that they have to learn to deal with rules in different ways, dependent on the origin of the rule.<sup>207</sup> It is the task of the legislator to optimally coordinate the co-existence of the two different types of legal systems. I will now discuss the various strategies which a national legislator can follow in this respect. In doing so, I will pay special attention to the situation in The Netherlands.

### **Implementation strategies: the Dutch legislator**

34. How can the national legislator implement European directives into national law?<sup>208</sup> The legislator needs to make two fundamental choices. First, it needs to decide *where* it wants to implement European law: within or outside the Civil Code. Second, the question is whether the European directive is to be incorporated into the national legal system in a consistent way or to be simply inserted *as it is* – with the risk of creating inconsistencies between the implemented European provisions and the original national law. Both questions do not coincide: it is, after all, conceivable that European directives are systematised outside of the Civil Code.<sup>209</sup>

The Dutch legislator made a fundamental choice that it would effect systematic implementation inside the Civil Code. Recently, the Dutch Minister of Justice explained that, if the national legal system is to remain well organised, European directives should be incorporated into national legislation in the place that they are most related to.<sup>210</sup> In the view of the Minister, this is possible because of the ‘open character’ of the Civil Code. It can thereby absorb new European developments. Implementation inside the Civil Code allows one to scrutinise the consequences of the directive for national law, including ‘where national law, in view of the coherence of the national legal system, is to be adjusted in a more far reaching way than the directive would possibly oblige it to.’ Only by giving directives such a greater field of application than strictly necessary could a ‘coherent system’ come into being.<sup>211</sup> The solution to implement directives outside of the Civil Code would lead to ‘patchwork’ policies and ‘a poorly organised whole of separate statutes, having for a consequence inner inconsistencies and untraceable and obscure provisions.’<sup>212</sup>

Indeed, wherever possible, the Dutch legislator implemented the almost twenty private law directives inside the Civil Code. In doing so, it often made use of the technique of ‘supererogatory implementation’:<sup>213</sup> situations that do not fall within the scope of the directive were brought under it in order to keep the system pure. Thus, provisions which the European legislator only wanted to have effect for consumer contracts, were given a more extensive application and now also cover other types of contracts. This is, for example, the case with the duty to use plain intelligible language when drafting unfair contract terms and the concept of

<sup>206</sup> See Hélène Gaudemet-Tallon, *Droit privé et droit communautaire: quelques réflexions*, *Revue du Marché commun et de l’Union européenne* 2000, p. 228.

<sup>207</sup> See also A. Flessner, *Juristische Methode und europäisches Privatrecht*, *Juristenzeitung* 2002, p. 14 ff. and S. Vogenauer, *Eine gemeineuropäische Methodenlehre des Rechts – Plädoyer und Programm*, *Zeitschrift für europäisches Privatrecht* 2005, p. 234 ff.

<sup>208</sup> See on this Roth, o.c., *Juristenzeitung* 2001, p. 484 ff. and id., o.c., *ERPL* 2002, p. 761 ff.

<sup>209</sup> Another possibility is an unsystematic codification in the Civil Code itself.

<sup>210</sup> *Handelingen EK* 1 maart 2005, EK 17-759 ff.

<sup>211</sup> *Handelingen EK* 2005, 17-760 and 17-768.

<sup>212</sup> *Handelingen EK* 2005, p. 17-760.

<sup>213</sup> For this term: Leibler, o.c., *German Law Journal* 4 (2003), p. 1268: the national norm implementing a directive covers not only cases within the scope of the directive but also cases not covered by it. Also see Wissink, o.c., p. 256, who uses the term ‘spontaan doorharmoniseren,’ and Roth, o.c., *Juristenzeitung* 2001, p. 482 (‘überschießende Umsetzung’ or ‘spin-off effect’: Roth, o.c., *European Review of Private Law* 2002, p. 770).

non-conformity in consumer sales.<sup>214</sup> This is also a well-known technique in Germany, where the directive on the sale of consumer goods was, for example, also made applicable to B2B and C2C contracts (see § 433 ff. BGB).

35. What to think of this strategy? It has two obvious advantages. Not only does it seem to create a consistent whole, but it also leads to the national Civil Code retaining its role as the major codification of private law. This is exactly the reason why, in 2002, Germany made a u-turn.<sup>215</sup> and chose to incorporate all existing implementation statutes into the BGB rather than following its former practice of implementing nearly all European directives into domestic law by passing separate statutes. The earlier practice had begun to result in ‘decodification’.<sup>216</sup>

But there are also important flaws to this approach. One of these is that the systematic broadening of the field of application of the Civil Code sometimes leads to undesirable results. A nice example of this is provided by the recent rejection by the First Chamber of Dutch Parliament of the bill that implemented the directive on financial collateral arrangements.<sup>217</sup> Although the directive is restricted to big financial institutions, the Dutch government decided to broaden its field of application to all companies in order to remedy the dispersed character of the directive; it was considered that the Dutch law should offer what the directive is lacking (namely a coherent regulation for all companies). For the First Chamber of Dutch Parliament, this was a bridge too far: the mere argument that the field of application had to be broadened for *systematic* reasons – without any substantive reason being given – did not convince the Chamber. A new draft now follows the more limited approach of the directive.<sup>218</sup>

There is still another reason why the Dutch policy on implementation can be criticised. The question is whether the broadening of the scope of directives does really enhance consistency. This is because, even after supererogatory implementation, two of the three reasons for disturbance of the coherent system remain intact: the detailed character of the European provisions and the way in which these provisions have to be interpreted. Willem van Boom<sup>219</sup> is right to observe that, with the fundamental choice for implementation inside the Civil Code, the Code has become like a sandcastle: European law is an incoming tide that cannot be held back<sup>220</sup> and this castle is therefore doomed to disappear, no matter how hard the national legislator tries to prevent this from happening.

In my view, all this means that the Dutch legislator follows too complex a means of implementing EU law. Apart from the two objections already mentioned, implementation inside the Civil Code leads to a very complicated Code that needs permanent updating and within which it is often unclear which provisions are of European origin. Not without reason, a member of the Dutch Parliament once remarked:<sup>221</sup> ‘The Dutch government always wants to show its fellow European Member States how able it is, having for a consequence that in

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<sup>214</sup> See art. 4 s. 2 of Directive 93/13 (unfair terms) and art. 2 s. 2 of Directive 1999/44 (consumer sale).

<sup>215</sup> Entwurf eines Gesetzes zur Modernisierung des Schuldrechts: Begründung, BT-Drucks. 14/6040 (2001), p. 79: ‘das Bürgerliche Gesetzbuch als zentrale Zivilrechtskodifikation.’ The Produkthaftungsgesetz 1989 is however still in force.

<sup>216</sup> Leible, o.c., German Law Journal 4 (2003), p. 1273 and T.M.J. Möllers, European Directives on Civil Law: The German Approach, European Review of Private Law 2002, p. 777 ff.

<sup>217</sup> Draft Uitvoering van Richtlijn 2002/74 betreffende financiëlezekerheidsvereenkomsten, EK 2003-2004, 28874.

<sup>218</sup> TK 2004-2005, 30138.

<sup>219</sup> W.H. van Boom, Algemene en bijzondere regelingen in het vermogensrecht, RM Themis 2003, p. 299. Also see J.B.M. Vranken, Algemeen deel: een vervolg, Deventer 2005, no. 75.

<sup>220</sup> Cf. Denning, in: Bulmer Ltd. v. Bollinger SA, [1974] Ch. 401, at 418.

<sup>221</sup> Thus member of Dutch Parliament Rabbinge, Handelingen EK 2005, p. 17-750.

many cases the objective of the directive is imperilled and putting legislation into place takes a long time.’

### **Implementation strategies: implementation outside of the Code**

36. This raises the question of whether a different type of implementation should be preferred. Implementation of European law outside of the Civil Code has long been the strategy of Germany and is still the prevailing way of implementation in (for example) France, Spain and Austria. These countries inserted the greater part of European directives into a separate code.<sup>222</sup> Italy has also implemented such European initiatives largely outside the Codice Civile,<sup>223</sup> whereas the United Kingdom has of course no other option than to do this.

This approach has several advantages.<sup>224</sup> Because the detailed and functionally different European provisions do not have to be incorporated into the national Code, there is no reason to broaden the scope of application of the directive. The style of the Code is not thwarted. Permanent modification and renumbering are not needed either. In addition, it is immediately clear which rules are of European origin, thereby allowing the court to apply the different method of interpretation required by the ECJ.<sup>225</sup>

In response to these advantages, it cannot be denied that there is one major disadvantage of implementation outside the Code: this may lead to a poorly organised whole, with loose and inconsistent legislation.<sup>226</sup> However, this fear would only come true if – as in the French *Code de la Consommation* – European directives are put next to each other without any systematisation whatsoever. Would it therefore not be better to systematise European provisions in a separate ‘national European’ code? Antinomies between the national Civil Code and the collection of European rules will remain, but these are inevitable in view of the individual character of European law: if one is confronted with the choice between rubbing out anomalies inside the Civil Code (which is an exercise that will necessarily be in vain) or openly showing what the inconsistencies are, I prefer the latter.

I do not wish to conceal that there are other arguments that *do* plead against implementation outside of the Civil Code. One of these is that a separate codification of the European *acquis* would look very much like a consumer code. But such a code, if its title is not to raise false expectations,<sup>227</sup> should contain all legislation that is relevant to the consumer and thus should repeat a large part of the Civil Code (or even of national case law). Such a redoubling is undesirable. Moreover, a consumer code could not contain the European directives that do not specifically protect the consumer (such as those on combating late payment in commercial transactions and on electronic commerce).

This makes clear what the dilemma is. European private law can never be implemented in an entirely satisfactory way. In view of the individual character of European law, a coherent implementation inside the Civil Code is never fully possible, whereas implementation outside the Code would damage the idea of the Civil Code as a complete and consistent whole. Is there a way out?

### **My choice: a separate Book inside the Civil Code**

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<sup>222</sup> See the Code de la Consommation, the Ley general para la defensa de los consumidores y usuarios and the Konsumentenschutzgesetz.

<sup>223</sup> Except for the directives on unfair contract terms (art. 1469-bis ff.), commercial agents (art. 1742 ff.) and consumer sale (art. 1519-bis ff. Codice Civile).

<sup>224</sup> Also see Roth, o.c., *European Review of Private Law* 2002, p. 773 and id., o.c., *Juristenzeitung* 2001, p. 484 ff.

<sup>225</sup> ECJ 10 May 2001, Case C-144/99, ECR 2001, I-3541 (Commission/Netherlands).

<sup>226</sup> See above, no. 34.

<sup>227</sup> See Roth, o.c., *Juristenzeitung* 2001, p. 486 ff., also for other arguments.

37. Is it possible to implement European private law inside the Civil Code and at the same time preclude the disadvantages of the present method of implementation? This would mean that the Code can still fulfil its role as a complete codification of private law, yet without the style of the Code being thwarted or without the risk of conceptual divergence. Permanent adaptation or renumbering would not be needed either.

The only way to realise this seems to be to devote a separate part of the national Civil Code to European legislation. The drafting of a separate Book containing ‘national’ (implemented) European private law would enable the national legislator to systematise European law to its own ends. If all civil law countries would implement the *acquis* in this way, there is still no *level playing field*, but it would certainly enhance the ability to recognise different national implementations. In this respect, the CFR can certainly play a role as a source of inspiration, but I expect more from the drafting of various European (consumer) - codes, each offering a different level of protection: this allows national legislators to choose from a set menu (see above, no. 27).

My plea, therefore, is that not so much the European, but the *national* legislator strives for a codification of European private law. The core of this codification is formed by the implementation of the proposed general minimum directive in the field of consumer protection, but it can be harnessed and systematised in the extent desired by the national legislator. The systematisation will undoubtedly have to be relatively simple if it is to allow new directives to be implemented in an easy way. The now prevailing method is too time-consuming and often leads to a failure of Member States to implement directives in time. This is also one of the reasons why Germany held back on implementing the European provisions within the BGB: there had to be a critical mass before it could be structured.<sup>228</sup> Structuring is what the Germans did when, in 2000, they introduced not only definitions of consumer and commercial party (§ 13 and 14 BGB), but also a general time limit for revocation of contracts of two weeks (§ 355 (1) BGB).<sup>229</sup> In Germany, it is likely that future directives will, again, first be implemented outside the BGB.<sup>230</sup> The introduction of a separate Book on European private law would allow Member States to simply implement directives inside the Civil Code without being forced to immediately systematise their provisions.

## V. SYNOPSIS

### Final remarks

38. I started this contribution with a promise to pay attention to some important questions arising from the debate on European private law and to provide these questions with answers. In doing so, I consciously choose to contrast *my* answers with those of others. My view is aptly summarised by the title of this contribution: I am inspired by the idea that European integration benefits from diversity of law and the freedom of choice flowing from this. But I am not blind to the flaws of competition of legal systems. Therefore, such competition should only take place above a minimum level of protection for the European citizen. We should also acknowledge that a choice for another legal system than one’s own cannot take place in an optimal way if information about other legal systems is lacking. My plea, therefore, is for a remedy to the present deficiencies in competition and to thus enhance a spontaneous legal order. Finally, I call upon the Dutch legislator not to keep on trying to systematically

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<sup>228</sup> Cf. Roth, o.c., *European Review of Private Law* 2002, p. 773.

<sup>229</sup> See also Leible, o.c., *German Law Journal* 4 (2003), p. 1255 ff.

<sup>230</sup> As already happened with the Directive on financial collateral arrangements: Gesetz zur Umsetzung der Richtlinie 2002/47/EG (...) vom 5 April 2004, BGBl. 2004, I, nr. 15, p. 502 ff. (although most amendments are in the Hypothekengesetz).

implement the *acquis* inside the present structure of the Dutch Civil Code: for the reasons set out above, this is doomed to failure.

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