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**The Commission's Quandary in EC Private law: improving the Acquis... codifying the law... focusing on good faith... (or all three)?**

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## **IMPRESSUM**

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‘Europe’s future does not lie in ideologies or institutions, or in Treaties or charters of various enumerated ‘rights’... Europe’s future lies in the political imagination; in its ability to think rather more of the ‘human’ and rather less of the ‘rights’; rather more of liberty and rather less of ‘democracy’; rather more of equality and rather less of the ‘rule of law’...’

I. Ward, *Beyond Constitutionalism. The Search for a European political imagination*, (2001) 7 *E.L.J.* 24, 39-40

## I. Introduction

Observers of the Europeanisation of Private law and initiatives aimed at the codification of the emergent body of EU Private law have been faced with contradictory developments in recent months: whilst the European Council has sought to halt the process of codification whilst supporting the goal of *acquis* modernisation,<sup>1</sup> the European Parliament has sought to reinvigorate precisely those initiatives aimed at codification.<sup>2</sup> This has left two research groups charged with elaborating, respectively, a *Common Frame of Reference* or CFR (Joint Network) and improving the *acquis communautaire* (*Acquis* Group).<sup>3</sup> Whilst the *Acquis* Group is also a member of the Joint Network, these groups operate under the auspices, respectively, of DG Health and Consumer Affairs

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1 2694<sup>th</sup> Council Meeting, Brussels 28-29 November 2005, Press Release 14155/05 (Presse 287) at 7 and 10 at 28: The Council recognised the ‘unique opportunity afforded by the proposed review and the introduction of the Unfair Commercial Practices Directive to update and modernise the consumer *acquis*’ and welcomed: ‘The Commission’s repeated reassurance that it does not intend to propose a ‘European Civil Code’ which would harmonise contract laws of Member States...’ <<http://ue.eu.int/ue> > At 28-29, inviting the Commission: ‘to come forward... with a timetable, a detailed description of the process, and proposals for updating and modernizing the Consumer *Acquis* and also to reprioritize accordingly the work on the CFR.’

2 European Parliament Resolution on European contract law and the revision of the *acquis*: the way forward, (2005/2022(INI)) *available at*: <http://www.europarl.europa.eu>. The European Parliament reiterated: ‘its conviction... that a uniform internal market cannot be fully functional without further steps towards the harmonisation of civil law.’ It went on to call ‘on the Commission to exploit straightaway the ongoing work by the research groups on the drafting of European contract law, and by the Network for a CFR, with a view to using their results firstly towards the revision of the *acquis* in the field of civil law, and subsequently towards developing a system of Community civil law.’

3 *Acquis* Group: <http://www.acquis-group.org>.

and DG Internal Market. Meanwhile, yet another dimension to this initiative is apparent in the Commission's latest 2007 Green Paper on Acquis Revision (2007 Green Paper) in which the Commission appears to suggest (1) that the project should be limited initially to the province of EC Consumer law; (2) that there are alternatives to the Joint Network and Acquis Group; (3) that an approach be adopted centred on a broad framework instrument accompanied by selective vertical action.<sup>4</sup>

These developments suggest that whilst a new 'global player' has entered private law discourse, the basic character of the Commission's initiative, even as we go into the fourth round of consultations, is by far from settled. Quite apart from the lack of clarity which accompanies the precise nature of the Optional Instrument (OI) and the Common Frame of Reference (CFR), the 'framework instrument' and 'selective vertical action', the idea of codification seems fundamentally incompatible with the goal of upholding freedom of contract. The EC legal order has always been predicated upon pragmatic *effet utile* case law, a plurality of legal sources and a competition of legal orders, rather than any legal Codes, Instruments or Frames of Reference imposed from on high. Emblematic of the confusion surrounding the initiative and highlighted in the 2007 Green Paper is the contested status of EC Consumer law, leaving even the chief architect of the Commission's initiative *Dirk Staudenmayer* in a quandary as to whether Consumer law can be included in an OI or serve as the centrepiece of the CFR.<sup>5</sup> Equally, Norbert Reich asks whether Consumer law can usefully serve as the cornerstone of EC Contract law, or will serve, rather, as the nucleus for the deeper codification of European Contract law, proving a Trojan horse in an altogether more profound exercise.<sup>6</sup> On the basis of the most recent indications from the working groups either of these scenarios seems possible, with the question of consolidation in the Consumer law acquis taking centre stage. On 18 December 2006 the *Acquis* Group presented its compendium of EC consumer law, alongside the compendium, the *Acquis*

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4 2007 Green Paper on the Consumer Acquis, COM (2006) 744 final. of 08.02.2007 available at: [http://ec.europa.eu/consumers/cons\\_int](http://ec.europa.eu/consumers/cons_int).

5 D. Staudenmayer, The Place of Consumer Law within the process on European Contract law, (2004) *J. Consumer Policy* 269 at pp.275-279.

6 N. Reich, A CFR – Ghost or Host for Integration, ZERP DP 7/06 (2006), (English version: A European Contract Law or an EU Contract Law Regulation for Consumers, (2005) 28 *J Consumer Policy* 383). N. Reich, Die Stellung des Verbraucherschutzes im "Gemeinsamen Referenzrahmen" und im "optionellen Instrument" – Trojanisches Pferd oder Kinderschreck? Droit de la consommation / Konsumentenschutzrecht / Consumer law, Liber Amicorum Bernd Stauder, (eds. L. Thevenoz & N. Reich) at 357-382 (Zürich: Schulthess, 2006).

Group has produced a 795 page comparative analysis (2006 Report).<sup>7</sup> On 8 February 2007 the Commission presented its Green Paper on the Consumer Acquis, a paper predating (COM (2006) 744 final) and hence, unsurprisingly, failing to refer to the 2006 Report.

This paper seeks an evaluation of the state of play in this ‘greater coherence’ initiative, describing the problems associated with the EC’s diverse *acquis* (Part II) in the light of the positions adopted by Council, Parliament and Commission. To this end the initiative is placed in a context characterised by polycentricity in ‘Europeanised’ private law. In the course of this analysis, the initiatives aimed at improving coherence are analysed. This propels us into a discussion of the sometimes paradoxical impact of measures of harmonisation and codification. Attention then turns to policy elaboration (Part III) and an evaluation of both the process and the current options (Part IV). Particular attention is given to the institutional dynamics of the process: the Commission’s role, the Parliament’s advocacy of codification and the Council’s rejection of a Code.

## II. The Trouble with the *Acquis*

The steadily expanding body of selective, haphazard, contradictory, uneven, diversely drafted and transposed EC secondary law bears the danger of legal fragmentation. The EC has always instrumentalised contract as a simple means to complex ends: using contract law to achieve goals in competition, free movement, consumer protection, public procurement, non-discrimination. EC Contract law is thus a functional rather than systematic body of law, developed piece by piece from the bottom-up to solve practical problems, rather than from the top down to create a coherent body of law.<sup>8</sup> Set against this background the case for a more coherence in European private law may seem irresistible.<sup>9</sup> Simultaneously, codification discourse raises important governance

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7 Available at: [http://ec.europa.eu/consumers/cons\\_int](http://ec.europa.eu/consumers/cons_int).

8 N. Reich, *cited above* note 6, at p.30: ‘EU law looks at the concept of contract from a functional side, in order to determine its sphere of application in promoting free movement, competition, or adequate standards in consumer law... The concept of contract cannot be seen in isolation but rather by its function in a particular field... It may vary from one subject to another.’

9 C. von Bar, *From Principles to Codification: Prospects for European Private law*, (2002) 8 C.J.E.L. 379. O. Lando, *Does the European Union need a Civil Code*, (2003) 49 RIW 1.

issues,<sup>10</sup> and provides a valuable insight into how policy is elaborated within the European institutional matrix.

The controversy surrounding the codification proposals is not limited to their German origins.<sup>11</sup> While no one would question the need to improve secondary law, or for greater transparency in its transposition, or an expansion of the work on comparative analysis, the elaboration of a *Civil Code* on an internal market basis would represent a more controversial step.<sup>12</sup> While Basedow has argued that creating uniform conditions for marketing across the EU, avoiding the risks associated with the application of foreign law and the reduction of transaction costs could bring codification measures within the remit of the EU's internal market competence,<sup>13</sup> this position is untenable in the light of *Tobacco Advertising*: where it was held that harmonisation measures adopted on the basis of Article 95 EC<sup>14</sup> must *genuinely* contribute to the establishment and functioning of the internal market.<sup>15</sup> *Tobacco Advertising* and the

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- 10 Constitutional implications: A. Colombi Ciacchi, Der Aktionsplan der Kommission für ein kohärenteres Vertragsrecht: Wo bleibt die Rückbindung an die Europäische Verfassung? (2004) Jb.J.ZivRWiss 151 (Stuttgart, Boorberg, 2005). S. Weatherill, Why Object to the Harmonisation of Private Law by the EC?, (2004) 5 E.R.P.L. 633. H. Schepel, The Enforcement of EC Law in Contractual Relations: Case Studies in How Not to 'Constitutionalize' Private Law, (2004) 5 E.R.P.L. 661.
- 11 G. Beitzke, Probleme der Privatrechtsangleichung in der Europäischen Wirtschaftsgemeinschaft, (1964) ZfRV 80; C. Hauschka, Grundprobleme der Privatrechtsfortbildung durch die EWG, (1990) 45 JZ 521; P. Hommelhoff, Zivilrecht unter dem Einfluss europäischer Rechtsangleichung, (1992) 192 AcP 71; P. Ulmer, Vom deutschen zum europäischen Privatrecht?, (1992) 47 JZ 1; F. Rittner, Das Gemeinschaftsprivatrecht und die europäische Integration, 50 JZ 849 (1995); E. Steindorf, EG-Vertrag und Privatrecht, (Baden-Baden, Nomos 1996), O. Remien, Ansätze für ein Europäisches Vertragsrecht, (1988) 87 ZVglRWiss 105. Generally: C. Joerges & G. Brüggemeier, Europäisierung des Vertrags- und Haftungsrechts, in Gemeinsames Privatrecht in der Europäischen Gemeinschaft (P.-C. Müller-Graff ed.) (Baden-Baden, Nomos, 1999) (Arbeitskreis Europäische Integration, Bd. 33) (2d ed. 1999, 301-360).
- 12 R. Schulze, Grundsätze des Vertragsschlusses im Acquis Communautaire (2005) GPR 56.
- 13 J. Basedow, A Common Contract Law for the Common Market, (1996) 33 C.M.L.Rev. 1169.
- 14 Article 95 EC provides: "... [T]he Council shall... *adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment of the internal market.*" (author's emphasis).
- 15 Case C-376/98, *Germany v Parliament and Council (Tobacco Advertising)*, [2000] E.C.R. I-8419, on the use of Article 95 EC at 84 'If a mere finding of disparities between national rules and of the abstract risk of obstacles to the exercise of funda-

subsequent case-law, notably *Swedish Match*, questioned EC competence to legislate in contract and consumer law, let alone in private law more generally.<sup>16</sup> Additionally, the EC aims of protecting national identity as well as the principles of subsidiarity and proportionality support the proposition that imposing any uniform private law is a task which, in the absence of a Treaty revision, is outside the Treaty's remit.

Nevertheless, in both its 2004 Communication on European Contract law (2004 Communication)<sup>17</sup> and 2005 Progress Report on European Contract law (2005 Progress Report)<sup>18</sup>, despite denying any intent to introduce a Civil Code, the Commission sought to generate support for a written, though 'flexible and efficient' EC Contract law.<sup>19</sup> Similarly paradoxical is that these 'non-Code' measures were to be developed by a consortium, the *Joint Network on European Private law* (Joint Network), led by the *Study Group on a European Civil Code* (Study Group).<sup>20</sup> The European Council preemptively rubber-stamped

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mental freedoms or of distortions of competition... were sufficient to justify the choice of Art.100a as a legal basis, judicial review of compliance with the proper legal basis might be rendered nugatory.'

16 C-210/03 *R v Secretary of State for Health (Swedish Match)*, [2000] ECR I-11893 paras. 26, 30-32, 34 and 68. S. Weatherill, Why object to the Harmonisation of Private law by the EC, (2004) 12 E.R.P.L. 633 at 646: 'the demise of the political assumption that the EC possesses a competence *carte blanche* to harmonise laws may clear the way to a more explicit and constructive focus on what really is needed of a programme of harmonisation in the modern EU... the context has altered. Centralisation is under fire. Harmonisation has become a more constitutionally contested process.' S. Weatherill, The Constitutional Competence of the EU to deliver Social Justice, (2006) 2 E.R.C.L. 136.

17 *2004 Communication on European Contract Law and the Revision of the Acquis: the way forward*, COM (2004) 651 final (Oct. 11, 2004): <http://europa.eu.int/comm/consumers>.

18 *Commission's 1<sup>st</sup> Annual Progress Report on Contract Law and Acquis Review*, COM (2005) 456 final. Available at: [http://europa.eu.int/comm/consumers/cons\\_int](http://europa.eu.int/comm/consumers/cons_int).

19 *2004 Communication*, Cited above note 17. The Commission is at once against a Code, and for non-sector-specific measures and of flexible and efficient solutions(!): Point 2.3. at 8, 1: 'The Action Plan concluded... that at this stage there were no indications that the sectoral approach followed thus far leads to problems or that it should be abandoned. It was nevertheless considered appropriate to examine whether non-sector-specific measures such as an OI may be required.' 3. 'Although it is premature to speculate about the possible outcome of the reflection, it is important to explain that it is neither the Commission's intention to propose a „European Civil Code“ ... nor should the reflections be seen as in any way calling into question the current approaches to promoting free circulation on the basis of flexible and efficient solutions.'

20 Respectively: <http://www.sgecc.net> and <http://www.elsi.uos.de>.

the central measure of the 2004 Communication, the CFR, at the Brussels' Summit in November 2004.<sup>21</sup> CFR Consultations began immediately,<sup>22</sup> and a reflection group of 160 stakeholders (CFR-Net) first met on 15 December 2004.<sup>23</sup>

Debate on the need for a Civil Code is complex: what begins as a 'simple' search for coherence tends to develop into an evermore uncertain exercise. Similarly, the inconsistent use of terminology, the complex reality of interwoven *laws of contracts* and the unresolved boundary between Contract and Private law injects imprecision into the debate. This is compounded by the Commission's desire to keep all of its options open; and the continuing lack of clarity surrounding those options; options obscured rather than clarified in the successive rounds of policy deliberation.<sup>24</sup> Meanwhile, the terms of debate are weighted: proponents of codification appeal to a positive picture of visionary coherence; whilst opponents have to make the more difficult case for the operation of a number of valid and conflicting norms. Precisely because of these difficulties, this paper begins by describing the trouble with the *acquis*.

#### A. *Pluralism, diagonal conflicts and Sui generis EC law*

The *opportuneness* of codification can be assessed by reference to the compatibility of codification with EC law as it stands. Here again, debate has been shaped by German contributions.<sup>25</sup> Initially, German *Ordoliberals* hoped EC

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21 Presidency Conclusions, European Council, Brussels II (Nov. 4-5 2004), *Area of Freedom, Security and Justice: The Hague Programme, Annex I (14292/1/04)*. Point 3.4.4., *Ensuring coherence and upgrading the quality of EU legislation*, 29. <<http://ue.eu.int/ue>>.

22 Member State experts first met on 3 December 2004, again on 31 May 2005: *Workshop of the Network of Member State Experts on European Contract Law* (Brussels, May 31, 2005): <[http://europa.eu.int/comm/consumers/cons\\_int](http://europa.eu.int/comm/consumers/cons_int)>

23 Available at: <[http://europa.eu.int/comm/consumers/cons\\_int](http://europa.eu.int/comm/consumers/cons_int)>

24 i.e. Commission's assertion that it is not bound to the findings of the reflection process: *2004 Communication*, Cited above note 17, point 3.2.1 at 12.

25 M. Franzen, *Privatrechtsangleichung durch die Europäische Gemeinschaft* (Berlin, de Gruyter, 1999); M. Gebauer, *Europäisches Schuldvertragsrecht*, (Heidelberg, Universitätsverlag C. Winter 1998); S. Grundmann, *Europäisches Schuldvertragsrecht: Das Europäische Recht der Unternehmensgeschäfte* (Berlin, de Gruyter, 1999); I. Klauer, *Die Europäisierung des Privatrechts – Der EuGH als Zivilrichter* (Baden-Baden, Nomos, 1998); B. Lurger, *Grundfragen der Vereinheitlichung des Vertragsrechts in der Europäischen Union* (Vienna, Springer, 2002); C. Joerges & G. Brüggemeier, *Europäisierung des Vertrags- und Haftungsrechts*, cited above note 3;

law would erode market-partitioning national laws through (1) an application of the four freedoms, (2) a competition of legal orders and (3) a program of *negative integration*.<sup>26</sup> From this perspective, the Treaties constituted an Economic Constitution (*Wirtschaftsverfassung*), such that elaborating any policy outside the Economic was illegitimate.<sup>27</sup> Ordoliberals were sceptical of EC law-making, this made their conversion to codification so striking.<sup>28</sup> faced with ‘creeping approximation’ *ordoliberals* decided that only codification could halt the (undesired) tide of EC law permeating the (desired) sphere of national law. Codification was seen as an instrument by which both archaic provisions of domestic law and national measures of upward derogation could be undermined.<sup>29</sup> This position ignores the Treaty revisions, while implying that all measures of upward derogation are simply illegitimate.<sup>30</sup> Yet the Court of Justice, rather than applying *ordoliberal* orthodoxy, has sought to elaborate pragmatic solutions in its case-law. In *Gaston Schul*, the Court adopting a policy of developing market conditions that *approximate* to those of a single market.<sup>31</sup> Meanwhile, integration is not simply about eliminating difference; it is about

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K. Riesenhuber, *Systeme und Prinzipien des Europäischen Vertragsrechts* (Berlin, de Gruyter, 2003).

- 26 ‘Ordoliberalism’ describes the relations between the public and private in terms of an economic constitution. D.J. Gerber, *Law and Competition in Twentieth Century Europe*, (Oxford, Clarendon, 1998). W. Sauter, *The Economic Constitution of the EU*, (1998) 4 C.J.E.L. 27; D.J. Gerber, *Constitutionalizing the Economy: German Neo-liberalism, Competition law and the ‘New’ Europe*, (1994) 42 Am J. Comp. L. 25; N. Reich, *Europe’s Economic Constitution, or: A New Look at Keck*, (1999) 19 O.J.L.S. 337.
- 27 U. Immenga, *Wettbewerbspolitik contra Industriepolitik nach Maastricht*, (1994) EuZW 14.
- 28 W. Hallstein, *Angleichung des Privat- und Prozessrechts in der Europäischen Wirtschaftsgemeinschaft*, (1964) 28 *RabelsZ* 211. Original scepticism at 215: ‘With every new law... it becomes more difficult for Judge, Civil Servant, Lawyer... businessman to maintain an understanding of the law even in specific areas...’ (author’s translation).
- 29 Case 15/81, *Gaston Schul*, [1982] E.C.R. 1409, 33. Confirmed: Case 299/86, *Criminal Proceedings Against Rainer Drexel*, [1988] E.C.R. 1213, 24.
- 30 W. Sauter, *cited above* note 26, at 56. Activism: H. Rasmussen, *Between Self-Restraint and Activism: A Judicial Policy for the European Court*, (1988) 13 E.L.Rev. 28; M. Cappelletti, *Is the Court of Justice Running Wild?* (1987) 12 E.L.Rev. 199. W.P.J. Wils, *The Search for a Rule in Article 30 EEC: Much Ado About Nothing?* (1993) 18 E.L.Rev. 475.
- 31 Case 15/81, *Gaston Schul*, [1982] E.C.R. 1409, 32-34.

reconciling positions and developing a workable community of law.<sup>32</sup> The conviction that written law constitutes a golden path to legal unity is discredited by the *legal* process of European integration itself.<sup>33</sup>

Pluralistic conceptions are more helpful in assessing the potential of codification; of a law empowering citizens to challenge national laws, without placing them under allegiance duties.<sup>34</sup> Furthermore, EC private law has always been law *sui generis*; functionally oriented law, leaving much to be determined by reference to provisions of national law. Equally the Community is not all powerful, it is subject to checks and balances: here it should be recalled that in the absence of a Treaty revision, Community institutions are bound by their enumerated powers; that contract law codification remains outside the scope of those powers, and that contract law remains a genuine matter for the Member States. Moreover, primary EC law has always been predicated upon the autonomy of economic actors and a competition of legal orders; a competition which is enhanced with the need to transpose secondary law in order to ensure its *effective* application. This view of EC law is lent credence in the justifications between principles of EC and national law, drawn ‘diagonally’ from different areas. Through the case-law a matrix of diagonal conflicts can be constructed (e.g. between national unfair trading rules vs. EC competition law in *VAG Händlerbeirat*; or between national company rules vs. EC establishment rights in *Centros*, *Überseering* and *Inspire Art*).<sup>35</sup> EC law has thus emerged as a *diagonal conflicts’ law* charged with (1) ensuring the compatibility of national and EC law,<sup>36</sup> (2) managing a contested legal order.<sup>37</sup> This pragmatic understanding of EC law concludes that EC law neither sponsors unlimited regula-

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32 Cases C-267 and 268/91, *Criminal Proceedings against Keck and Mithouard*, [1993] E.C.R. I-6097.

33 H. Kötz, *Rechtsvergleichung und gemeineuropäisches Privatrecht*, in *Gemeinsames Privatrecht in der EG* (Müller-Graff ed., Baden-Baden, Nomos, 1993).

34 N. Reich, *Union Citizenship - Metaphor or Source of Rights?* (2001) 7 E.L.J. 4 at 20.

35 Exemplified: Case C-41/96, *VAG Händlerbeirat v. SYD-Consult* [1997] E.C.R. I-3123, 16 (unfair trading vs. EC competition); Case C-212/97, *Centros v. Erhvervs- og Selskabsstyrelsen* [1999] E.C.R. I-1459; Case C-208/00, *Überseering BV v. Nordic Construction Company Baumanagement GmbH* [2002] E.C.R. I-9919; Case C-167/01, *Kamer van Koophandel en Fabrieken voor Amsterdam v. Inspire Art Ltd.* [2003] E.C.R. I-10155 (company registration vs. EC establishment rights).

36 R. Wesseling, *The Commission White Paper on Modernisation of E.C. Antitrust Law: Unspoken Consequences and Incomplete Treatment of Alternative Options*, (1999) 20 E.C.L.R. 420 at 429-430.

37 Z. Bañkowski & E. Christodoulidis, *The European Union as an Essentially Contested Project*, (1998) 4 E.L.J. 341, 345-47.

tory competition nor rings the death knell of state intervention.<sup>38</sup> At least traditionally, ‘minimum harmonisation’ has been the device by which Member States have been allowed to adopt more protective rules than provided in Community secondary law.<sup>39</sup> The quality of integration lies in this competition amongst the claims of simultaneously valid legal orders. It lies in reciprocity rather than in the validity claims of a unitary law. Adopting this pluralistic conception significantly reduces the necessity of codification.

### B. *Interlegality: the character of the Acquis*

The emergent *acquis* has ‘Europeanised’ national private law since the early eighties. This ‘Europeanisation’ occurred directly, in consumer protection and company law, and indirectly, via block exemptions, in competition law,<sup>40</sup> and it occurred broadly in the EC policy fields.<sup>41</sup> Yet this is not the full picture;

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38 C. Joerges, Zur Legitimität der Europäisierung des Privatrechts: Überlegungen zu einem Recht-Fertigungs-Recht für das Mehrebenensystem der EU, *in* Rechtsverfassungsrecht 183, 212 (C. Joerges & G. Teubner eds., Baden-Baden, Nomos, 2003); English version: <<http://www.iue.it/PUB/law03-3.pdf>> *Id.* at 21. Company law cases: Case C-212/97, *Centros*, [1999] E.C.R. I-1459 and Case C-208/00, *Überseering BV*, [2002] E.C.R. I-9919; Distribution agreements: Case 161/84, *Pronuptia de Paris*, [1986] E.C.R. 353; Case C-453/99, *Courage v Crehan*, [2001] E.C.R. I-6297; Consumer Protection: Joint Cases C-240-244/98, *Grupo Editorial Océano SA*, 2000 E.C.R. I-4941; Case C-52/00, *Commission v. France*, [2002] E.C.R. I-3827; Case C-154/00, *Commission v Greece*, [2002] E.C.R. I-3879; Case C-183/00, *Sanchez v. Medicina Asturiana SA*, [2002] E.C.R. I-3901. C. Joerges, Rethinking European Law’s Supremacy, European University Institute, EUI Working Paper Law No. 2005/12. C. Joerges, On the Legitimacy of Europeanising Europe’s Private Law: Considerations on a Law of Justi(ce)-fication (*justum facere*) for the EU Multi-Level System, EUI Working Paper Law No. 2003/3, <<http://www.iue.it/PUB/law03-3.pdf>>.

39 Exemplified: Case 382/87, *Buet v. Ministère Public*, [1989] E.C.R. 1235; Case C-361/89, *Commission v. Di Pinto* [1991] E.C.R. I-1189; Case C-183/00, *Sanchez*, *cited above* note 38; Case C-71/02, *Karner v. Troostwijk*, [2004] E.C.R. I-3025.

40 Article 81(3) EC. Regulations: Reg. 1400/2002, Categories of Vertical Agreements and Concerted Practices in the Motor Vehicle Sector, (2002) O.J. L203/30; Reg. 2790/1999, Categories of Vertical Agreements and Concerted Practices, (1999) O.J. L336/21; Reg. 772/2004, Categories of Technology Transfer Agreements, (2004) O.J. L123/11; Reg. 2658/2000, Categories of Specialisation Agreements, (2000) O.J. L304/3; Reg. 2659/2000, Categories of R&D Agreements, (2000) O.J. L304/7; Reg. 358/2003, Certain Categories of Agreements in the Insurance Sector, (2003) O.J. L53/8.

41 Policy areas: Article 152 EC (health), Articles 174-176 EC (environment), Title VIII (employment), Article 157 EC (industrial policy), Title XVII (economic & social

outside the area of EC competence, national laws continue to apply, and national demarcations (*i.e.* between contract, tort and property) remain valid. Europeanisation is, rather than being dominant, an aspect of what has been termed *interlegality*, of an intersection of legal orders.<sup>42</sup> Thus, even in those areas where secondary law was passed uniform legal results were rare: EC harmonisation initiatives have always been accompanied by *fragmentation*. Thus, while regulations could fragment the law due to horse-trading in Council, EC Directives established transposition frameworks which States trumped with *upward derogation*.<sup>43</sup> Different approaches and transposition generated further inconsistencies between EC and national laws. At its extreme, minimum harmonisation left the coherence of the law in a sorrier state than before the adoption of Community measures.<sup>44</sup> Fragmentation in its international dimension was, in turn, exacerbated by the communitarisation of procedural law.<sup>45</sup> At the same time *lex mercatoria* and arbitration, by which contracting parties sought to free themselves from national law, were gaining currency. These factors mean that *polycentricity* now dominates in cross-border trade. EC law, *lex mercatoria*, the UN Vienna Convention on Contracts for the International Sale of Goods (CISG), the UNIDROIT Principles of International Commercial Contracts (UNIDROIT Principles, 2004) or the 1980 EC Rome Convention<sup>46</sup> have become important sources of private law alongside national law.

Given this fragmentation it is hardly surprising that calls for codification became popular, engendered by a variety of initiatives all of which were aimed at improving the EC regulatory environment.<sup>47</sup> Yet an awareness that codifica-

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cohesion) and Title XVIII (R&D). C. Joerges & G. Brüggemeier, *Europäisierung des Vertrags- und Haftungsrechts*, *cited above* note 11, at 312-13.

42 B. de Sousa Santos, *Law: A Map of Misreading. Towards a Post-Modern Conception of Law*, (1987) 14 J.L.S. 279, 298: "Our legal life is constituted by an intersection of different legal orders... by interlegality."

43 Via minimum harmonisation, *see* Article 137 EC (social policy), Article 176 EC (environmental protection), EC Treaty Article 153(5) (consumer protection).

44 Consumer Policy Strategy 2002-2006, (COM(2002) 208 final.) (7 May 2002) 3.1.2.2.

45 B. Heß, *Die Integrationsfunktion des Europäischen Zivilverfahrensrechts*, (2001) 21 IPRax 389 at 395: 'Disengaging Member States from Formulating Agencies' initiatives.' (author's translation):

46 CISG and UNIDROIT: <http://www.unilex.info>. Rome: <http://www.rome-convention.org>.

47 *White Paper on European Governance*, (COM (2001) 428 final.), (2001) O.J. C287/1; SLIM Initiative, *Simpler Legislation for the Internal Market*, (COM(1996)

tion could also lead to fragmentation has arisen; the balance struck between liberalisation and regulation always lending the law a patchwork quality. For example, simply instituting a twenty-seventh framework of EC contract law for optional use in cross-border trade would increase fragmentation. Were a Code or an OI allowed to operate parallel to national law parties would be faced with a broader range of contract options. Furthermore, such parallel operation would only work if a hierarchy were established between the regimes, which would preclude Member States from improving their own legislation! Finally, with intensified regulatory competition *ad hoc* approximation, or *spontaneous harmonisation* become more common, further undermining the case for codification.<sup>48</sup>

### C. Codes, conflicts and the International dimension

A third parameter in assessing the potential future scope of Europeanised Private law is supplied by practice in international trade, where three factors are increasingly influential. First, globalisation has generated new relationships between legal norms at a global as opposed to a regional level.<sup>49</sup> Second, powerful commercial forces support the trend to the ‘privatisation’ of international commercial law, to increasing resort to the *lex mercatoria* and arbitration.<sup>50</sup> Third, a countervailing trend can also be observed, raising questions concerning the extent of States’ legitimate interests.<sup>51</sup> Yet we can go further, extrapolating an additional constellation of *laws of justification* between the national, regional and global levels, a constellation flanked by the on-going debate on the utility of

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204 final.); Review of SLIM, COM (2000) 104 final; Simplifying and Improving the Regulatory Environment, (COM (2001) 726 final.).

48 A.I. Ogus, *Competition between National Legal Systems: a Contribution of Economic Analysis to Comparative Law*, (1999) 48 I.C.L.Q. 405; E. Kieninger, *Wettbewerb der Privatrechtsordnungen im Europäischen Binnenmarkt*, (Tübingen, Mohr Siebeck, 2002).

49 G. Teubner, *Breaking Frames: The Global Interplay of Legal and Social Systems*, (1997) 45 Am. J. Comp. L. 149, 159.

50 Manifested in the new *lex mercatoria*: Y. Dezalay & B. Garth, *Dealing in Virtue* (Chicago, Chicago UP, 1996) at 83. *Additionally*: *Privatisierung des Privatrechts – Rechtliche Gestaltung ohne staatlichen Zwang* (C-H. Witt, M. Casper, et. al. eds., Jb.J.ZivRWiss.) (2002, Stuttgart, Boorberg, 2003).

51 H. Muir Watt, *Choice of Law in Integrated and Interconnected Markets: A Matter of Political Economy*, (2003) 9 C.J.E.L. 383, 385. The Community is endowed with legal personality and may enter into international agreements: Articles 281 and 310 (ex 210 and 238) EC. *See* Case 22/70, *Commission v. Council*, 1971 E.C.R. 263, 15-19.

a *Global Commercial Code*.<sup>52</sup> Here, while some have argued for a need to privatize conflicts' law, to mediate disputes with conflicts' solutions, arbitration and the *lex mercatoria*, others have observed that, as economic actors continue to rely on national legal orders, there is a need to enhance national law to close the 'regulatory gap' in global trade and promote global welfare.<sup>53</sup>

Could a 'coherent' body of Europeanised Private law make a significant contribution to this wider context of commercial cross-border transactions; reducing transaction costs, increasing commercial parties' confidence and acting as a spur to trade? Here it is important to note that, even today, in commercial cross-border contracts the European Principles of Contract law (PECL) may be chosen by the parties.<sup>54</sup> In this sense the PECL can *already* influence commercial practice. Again, Article 3 of the Rome Convention guarantees freedom of contract: economic actors cannot be required to contract in a particular way across borders! Thus the PECL will only be influential if they can prove their mettle in day-to-day contract practice. In contrast to the commercial contract, the PECL do not suit the cross-border consumer contract, because of the amount of mandatory law applicable to such transactions.<sup>55</sup>

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52 While Basedow sees regionalisation as the harbinger of internationalisation, Farnsworth assesses the chances of internationalisation as slim: J. Basedow, *Worldwide Harmonisation of Private Law and Regional Economic Integration*, (2003) 8 *Unif. L. Rev.* 31 at 36: '[I]ncreased demand for regional harmonisation... will generate inter-regional conflicts... which can be accommodated by inter-regional harmonisation.' E.A. Farnsworth, *Modernisation and Harmonisation of Contract Law: an American Perspective*, (2003) 8 *Unif. L. Rev.* 97 at 106: '[T]he... contract rules in such a code would consist virtually entirely of a collection of default rules that would be available to parties to commercial transactions that did not decide to reject or modify them.'

53 Respectively: M. Whincop & M. Keyes, *Putting the 'Private' Back into Private International Law: Default Rules and the Proper Law of the Contract*, (1997) 21 *Melb. U. L. Rev.* 515, 542; R. Wai, *Transnational Liftoff and Juridical Touchdown: The Regulatory Function of Private International Law in an Era of Globalisation*, (2002) 40 *Colum. J. Transnat'l L.* 209, 264; H. Muir Watt, *cited above* note 44, at 400-01; and Dezalay & Garth, *cited above* note 43, at 313-14.

54 The European Principles (PECL) allow for their application where the parties have either opted in or not chosen a law: Article 1:101 (3) PECL provides: 'These Principles may be applied when the parties: (a) have agreed that their contract is to be governed by "general principles of law", the "lex mercatoria" or the like; or (b) have not chosen any system or rules of law to govern their contract.'

55 N. Reich, *cited above* note 6 at 7. Article 1:103 PECL on Mandatory Law provides: (1) Where the law otherwise applicable so allows, the parties may choose to have their contract governed by the Principles, with the effect that national mandatory rules are not applicable. (2) Effect should nevertheless be given to those mandatory

#### D. *Party Autonomy & Facilitative Rules vs. Codifying Mandatory Rules*

More critically, if the protection of national identities is seen as a fundamental objective of integration, and the prevailing European identity is diverse, what reason is there for requiring a unified system of contract or private law? This proposition is supported by the fact that primary EC law presupposes the autonomy of contracting parties. Surely what the principle of contractual autonomy should really allow is that the parties themselves, rather than the Commission should be free to decide on the regulatory framework and contents of their contract!<sup>56</sup> In reality autonomy is brought to life by the *facilitative* provisions of national contract law on consensus, on the effect of fraud, deception and misrepresentation, rules on non-performance, rules which are *already* reflected at the European and International levels in the non-mandatory PECL or UNIDROIT principles. Private International law *already* provides coordinating mechanisms which respect party autonomy as far as possible, whether Rome Convention (Article 3) or CISG (Article 7). What business does the EU have in intervening in these processes by creating an additional layer of facilitative law. In this vein, the Court of Justice has always underscored the freedom of contracting parties to determine the law applicable to their transactions.<sup>57</sup> Drafting a common set of facilitative rules in the name of the internal market is therefore contrary to the thrust of freedom of contract. Thus, in accordance with the selective and piecemeal method European Consumer law, and despite the proliferation of consumer directives, important aspects of the law are still left to be resolved by reference to Member State law. Thus conclusion of the contract is not defined in EC secondary law so that withdrawal periods specified in consumer directives can only be interpreted in the light of national legal provisions. Similarly, individually negotiated terms are excluded from the application of Directive 93/13/EEC on unfair terms in consumer contracts with no Community clarification of the conditions in

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rules of national, supranational and international law which, according to the relevant rules of private international law, are applicable irrespective of the law governing the contract.

56 N. Reich, *cited above* note 6, at 9: ‘Does autonomy not imply that the parties themselves choose the law they want to govern their contractual relationships? Do the fundamental freedoms as such not reveal a preference for a decentralised contract law? Protection can either be left to secondary EU legislation, or to conflict rules, or to a combination of both.’

57 Case C-339/89, *Alsthom Atlantique* [1991] ECR I-107 at 124: ‘the parties to an international contract of sale are generally free to determine the law applicable to their contractual relations and can thus avoid being subject to French law.’

which such negotiations will take place.

In contrast, as we shift to mandatory law the picture changes. Especially in the area of consumer policy where, on the basis of Article 153(3) EC, measures pursuant to Article 95 may be adopted where they aid the completion of the internal market. Whilst mere divergence in national laws will not justify EC legislative intervention, the concern here is that an uneven playing-field of national consumer laws may well impede market integration. Here Article 153(1) EC mandates a consumer policy predicated on supplying the consumer with information to promote his/her economic interests.<sup>58</sup> This can be done in a variety of ways: through pre-contractual information requirements, rules governing pre-formulated terms and guarantees, via mandatory compensation rules. Whilst *Tobacco Advertising* questioned EU competence to legislate in contract and consumer law, the Court of Justice in *Leitner* ruled not only that the Community had jurisdiction to supply protection to package-tour holiday-makers, but that the definition of compensation used in the Directive was to be lent an expansive interpretation to preclude distortions of competition.<sup>59</sup>

#### *E. Provisional conclusions*

This survey discloses some of the effects (harmonisation vs. fragmentation) and the complexity (interlegality vs. polycentricity) brought about by the increase in cross-border trade. It also underscores why the proponents of greater competition are at a disadvantage to proponents of codification (unitary vision vs. multiplicity). Rather than presenting an indisputable case, codification and *coherence* arguments inevitably result in *porous legality*. Thus whilst the relevance and legitimacy of a broad exercise in codification can be questioned, important considerations speak for the selective consolidation of measures of EC secondary law. Yet the boundaries between these initiatives cannot be easily demarcated, and spillovers and further fragmentation will inevitably attend any exercise limited to consolidation. The question which then arises is whether consolidation will prove a springboard for codification.

### **III. Policy Development**

In this section we review the stages of policy elaboration; from the 2001 Communication and 2005 Progress Report to the current Parliament and Council

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58 Article 153(1) EC.

59 Case C-168/00, *Simone Leitner* [2002] E.C.R. I-2631.

positions, and the Commission's latest Green Paper released on 8 February 2007.

#### A. *The 2001 Communication*

The 2001 Communication<sup>60</sup> disclosed the uncoordinated development and uneven operation of EC Contract law, starting debate on the need to consolidate or at least review the contractually relevant EC directives on the basis of four options:

- **Option I:** not to intervene but to rely on a competition of legal orders;
- **Option II:** to develop non-binding principles inspired by Lando or UNIDROIT;
- **Option III:** evaluation, improvement and consolidation of existing instruments;
- **Option IV:** to introduce (a) new legal instrument(s) to consolidate the law.

The 2001 Communication was criticised for being result-oriented. Under the guise of encouraging deliberation, the Commission's preferences were presented alongside options which could be expediently ignored or withdrawn.

#### B. *The 2003 Action Plan*

Predictably, the 2003 Action Plan<sup>61</sup> approved the 2001 Communication's Options II-IV, rejecting Option I. The Action Plan attempted to add new detail to each option:

- **CFR:** this was the most important proposal. The CFR was to improve EC law by improving coherence on questions of transposition and interpretation.<sup>62</sup> A need was also identified for an overhaul and consolidation of concepts.<sup>63</sup> It was also to identify special areas in which sectoral solu-

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60 *2001 Communication on European Contract Law*, (COM (2001) 398 final.) (13 Sep. 2001); (2001) O.J. C 255/1.

61 *2003 Communication on a More Coherent European Contract Law - An Action Plan*, (COM (2003) 68 final.) (15 Mar. 2003); (2003) O.J. C 63/1. D. Staudenmayer, *The Commission Action Plan on European Contract Law*, (2003) 11 E.R.P.L. 113.

62 *ibid.* Action Plan draws attention to *Leitner*, *cited above* note 59.

63 *ibid.* Action Plan at 32-36: CFR was to define terms and concepts frequently used in directives such as damage, conclusion, validity, non-performance, unjust enrichment, representation of foreign companies, formal demands, exclusion or limitation

tions could be advanced.<sup>64</sup>

- **Standardisation:** the intention to support the exchange of information on standard contract terms and to supply guidelines for their use.<sup>65</sup>
- **OI(s):** the Commission aims at supplying greater horizontal coherence to EC Contract law.<sup>66</sup>

The 2003 Action Plan contradicted itself; ostensibly retaining the vertical approach, while stressing the horizontal implications. This horizontal focus can be seen in the promotion of an overhaul of contract terms, in the advocacy of an examination of the interplay of contract and tort. At the same time, a range of questions were left unresolved: the form of the OIs (regulation, directive or recommendation); the relationship between the measures (CFR and OI(s)); the extent to which flexibility in the choice of law would still be available; and proportionality and legitimacy. Similarly, the liability and intellectual property issues attaching to the ‘best practice’ standard terms and conditions, as well as their availability in internal transactions, were issues left untouched.<sup>67</sup> Some of this confusion can be explained: without a legal base the proposals could not be marketed as the harbinger of a Civil Code. Further, recalling the restrictions the Court of Justice had placed in *Tobacco Advertising* on the use of Article 95 (ex 100a) EC as a legal base for measures to further the fundamental freedoms and preclude distortions of competition,<sup>68</sup> the Commission was unlikely to *begin* the exercise with an examination of the appropriate legal base.<sup>69</sup> A more Machiavellian reason for the Commission’s strategy might be that policy inertia invariably works to its advantage.

### C. *The 2004 Communication*

A new circumspection entered the debate after publication of the Action Plan. Notably, *Basedow* appealed for gradualism: to initially develop the CFR as a basis for *opt-in, sector-specific* instruments, to then convert these into *opt-out*

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of liability, etc. in order to avoid the inconsistencies that result from the divergent use of concepts in different directives.

64 *ibid.* 30-31, 41-43, 47-50, 67Financial and insurance services, transfer and reservation of title, cabotage transport, factoring, consumer protection and tort law.

65 *ibid.* at 21-23, 81-88.

66 *ibid.* at 23-24, 89-97.

67 *ibid.* at 21-23.

68 Article 95. 1. *cited above*, note 14.

69 Case C-376/98, *Tobacco Advertising*, 84 *cited above* note 15.

instruments, and, over 20-30 years, to extend them horizontally.<sup>70</sup> The 2004 Communication appears to subscribe to this: creating a three year (2005-7) research phase, followed by a drafting phase (2008-9) and culminating with adoption by 2009. The 2004 Communication fleshes out the structure of the CFR.<sup>71</sup> The main points can be summarised:

- **CFR.** Over half of the 2004 Communication is dedicated to mapping out the function, form, content and timeframe for the CFR.<sup>72</sup> The CFR's role is to improve the *acquis* by supplying definitions and model contract law rules.<sup>73</sup> While the Study Group would have placed model rules in an annex to a CFR, the Communication places them at the CFR's centre.<sup>74</sup> One of the main tasks is to test the coherence of EC law, and, where apt, to codify the relevant framework. Here consumer protection is singled out as the potential object of codification. In its survey of the consumer *acquis*,<sup>75</sup> the Communication highlights the need to combat differences arising from (1) disparate provisions of EC law; (2) disparities between national rules and EC law; (3) national measures of *upward derogation*.

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70 J. Basedow, Ein optimales Europäisches Vertragsgesetz – opt-in, opt-out, wozu überhaupt? (2004) 12 ZEuP 1 at 4: 'To the extent that case-law was developed on the basis of this (opt-in) law, willingness to extend its application would grow... What is crucial is patience and planning extending beyond the next twenty or thirty years.' (author's translation).

71 2004 Communication, Cited above note 17, at 13; M. Schmidt-Kessel, Auf dem Weg zum Gemeinsamen Referenzrahmen, (2000) 2 GPR 2, 7. 'The Commission has quite clearly underestimated the amount of preparatory work which needs to be undertaken. In this regard it is of concern that the Principles of European Contract law, the core of the CFR, have, until now, barely been tested against the *acquis*.' (author's translation).

72 *ibid.* at 2-5, on functions and nature. *Id.* at 9-13, on preparation and elaboration. *Id.* at 14-16 on structure.

73 *ibid.* at 3; *id.* at 11 ("principles and definitions ... completed by model rules, forming the bulk of the CFR").

74 *ibid.* at 3-4; M. Schmidt-Kessel, *cited above* note 71, at 4.

75 *ibid.* at 3-4. Commission citing interplay of Directives: Directive 85/577/EEC Contracts Negotiated Away from Business Premises (1985) O.J. L372/31; Directive 90/314/EEC Package Travel, Holidays and Tours (1990) O.J. L158/159; Directive 94/47/EC Certain Aspects of Contracts Relating to the Purchase of the Right to Use Immovable Properties on a Timeshare Basis (1994) O.J. L280/47; Directive 97/7/EC Distance Contracts, (1997) O.J. L144/7; Directive 98/6/EC Indication of the Prices of Products Offered to Consumers (1998) O.J. L80/27; Directive 98/27/EC Injunctions for the Protection of Consumers' Interests (1998) O.J. L166/51; Directive 99/44/EC Certain Aspects of the Sale of Consumer Goods and Associated Guarantees (1999) O.J. L171/12.

tion.<sup>76</sup> The Commission suggests that *acquis* simplification will not be restricted to dealing with inconsistencies between directives; rather, a more horizontal approach is intended. Yet uncertainty is the hallmark of the proposals, the Commission raising a catalogue of questions rather than supplying hard-and-fast answers.<sup>77</sup> In addition to consumer law, insurance contracts, contracts of sale and services, clauses relating to the retention and the transfer of title and late payments are identified as areas where harmonisation may be required. The Commission goes on to argue that the CFR will prove useful to arbitrators and in Commission practice.<sup>78</sup> While stressing the need for analysis of the interaction of contract and property law, the Commission concludes that there are no appreciable problems arising from differences between contract and tort.<sup>79</sup> On the legal nature of the CFR, the Commission foresees the initial adoption of a non-binding instrument.

- **Standardisation:** a need to supply guidelines to the relationship between standard terms and conditions and the EC competition rules and to identify further impediments to their use is identified.<sup>80</sup>
- **OI:** the Commission acknowledged the instrument's horizontal operation and attached parameters for evaluating the *opportuneness* of its adoption.<sup>81</sup>

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76 M. Schmidt-Kessel, *cited above* note 71, at 4, upward derogation as a source of obstacles: Case C-491/01, *Ex Parte British American Tobacco (Investments) and Imperial Tobacco Ltd.*, [2002] E.C.R. I-11453. More recently: Case C-210/03, *Swedish Match*, *cited above* note 16.

77 *2004 Communication*, *Cited above* note 17 at 4.

78 *ibid.* respectively at 9 and 5-6.

79 *ibid.* at 11; M. Schmidt-Kessel, *cited above* note 71, at 6; C. von Bar & U. Drobnig, The Interaction of Contract law and Tort and Property law in Europe (Munich: Sellier, 2004).

80 *ibid.* at 6-8.

81 First, an impact assessment, especially with regard to the implications of the CFR, was to be conducted before any OI measures are adopted. Second, the binding nature of the OI (opt-in or opt-out) was to be determined. Third, the legal form of the OI (regulation or recommendation) was to be decided. Fourth, the extent to which the OI was to be determined by the CFR was to be resolved. Fifth, the scope of the OI (B2B, B2C, mandatory provisions and interplay with the UN Vienna Convention (CISG)) required clarification. Sixth, further reflection on the legal base was required.

#### D. *The 2005 Progress Report*

The 2003 Action Plan and the 2004 Communication were successful in directing European academic capacity into comparative legal studies. Significant research capacity has been contracted by the Commission, with the timetabling of final results for before 2009. Yet while the Commission displayed an uncommon clarity of purpose in staking out its initiative, the lead role assigned to the SGECC as well as participation in the study groups has been the object of criticism.<sup>82</sup> More significantly, the precise status of the CFR remained unclear: was it meant to represent a ‘common core’ of EC contract law? Was it to be applicable solely to the cross-border, commercial contract? Or was it to extend into and unify the fabric of the divergent domestic contract law? How was it to relate to international instruments such as the CISG? Finally, the question of the basic lack of competence to pass the type of measures conceived of remains unanswered.

The 2005 Progress Report (Report) responded at least in part to this lack of clarity. It began by confirming the timetable for the CFR. It specified that the research phase be completed by the end of 2007. More fundamentally, the Report stipulated that, rather than a grand design on the ‘common core’, the CFR was to be tested in the field of consumer protection.<sup>83</sup> As far as *Acquis Review* is concerned, the Report focuses on the findings on transposition in the consumer law areas covered by the ‘vertical’ Directives on Unit Pricing, Cross-border Injunctions, Timesharing and Distance Selling. Here a need is identified to coordinate the measures with the more ‘behavioural’, horizontal directives, such as the Unfair Commercial Practices Directive (Unit Pricing and Timesharing), and to tackle questions of uneven national transpositions (Unit Pricing). Additionally, the Report advocates dealing with the phenomena of novel contracts and aggressive sales methods (Timesharing), and to more closely define the scope of individual consumer directives. In order to combat the particularism generated by sectoral legislation, a greater horizontal coherence – in particular in consumer protection law - in the adoption of measures needs to be developed.<sup>84</sup> This combination of ‘vertical’ and ‘horizontal’ elements of the CFR is contentious; there being neither a policy nor a legal orientation appar-

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82 W. Hesselink, *The Politics of a European Civil Code*, (2004) 10 ELJ 675.

83 *See 2005 Progress Report, cited above* note 18, at 2-6.

84 Directive 98/6/EC, (unit pricing); Directive 98/27/EC, (cross-border injunctions); Directive 94/47/EC, (timesharing); Directive 97/7/EC, (distance selling) *cited above* note 75; Directive 2005/29/EC, Concerning Unfair Business to Consumer Commercial Practices; *see 2005 Progress Report, cited above* note 18, at 7-9.

ent in the Commission's position.<sup>85</sup>

Beyond the *Consumer Acquis*-based CFR the Report adopts a more circumspect language and cautious approach. The Report announces that, due to running costs, unresolved liability issues, and the reluctance of economic actors to share 'best practice' solutions, a standardisation website will not be established.<sup>86</sup> As far as the elaboration of the 'OI' is concerned the Commission again withdraws; calling for 'feasibility studies' to be conducted. Finally, the Report points to the area of Financial services as one in which such an OI could prove to be opportune.

#### *E. 2006 Battle lines: Council vs. Parliament?*

The 2005 Progress Report's findings were subsequently approved by the Council on 28-29 November 2005, which recognised the 'unique opportunity afforded by the proposed review and the introduction of the Unfair Commercial Practices Directive to update and modernise the consumer *acquis*.' With greater emphasis the Council welcomed: 'The Commission's repeated reassurance that it does not intend to propose a 'European Civil Code' which would harmonise contract laws of Member States, and that Member States' differing legal traditions will be fully taken into account.' The Council went on to emphasize the need to promote cross-border trade and to ensure a high degree of consumer protection. To these ends the Commission was invited '[t]o come forward as soon as possible with a timetable, a detailed description of the process, and proposals for updating and modernizing the Consumer *Acquis* and also to reprioritize accordingly the work on the CFR.'<sup>87</sup> This leaves the Commission's strategy resting on two initiatives: development of the CFR by the Joint Network, under the auspices of DG Health and Consumer Protection, and *Acquis* improvement by the *Acquis* Group, under the auspices of DG Internal Market.

Not to be outdone, and certainly not to be outdone by the Council, the European Parliament has re-emphasised its commitment to codification and, in its resolution of 23 March 2006, reiterated: 'its conviction, expressed in its resolutions of 26 May 1989, 6 May 1994, 15 November 2001 and 2 September 2003, that a uniform internal market cannot be fully functional without further steps towards the harmonisation of civil law.' The European Parliament went on to '(call) on the Commission to exploit straightaway the ongoing work by

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85 N. Reich, cited above note 6, at 11.

86 *2005 Progress Report*, cited above note 18, at 10-11.

87 2694th Council Meeting cited above note 1, at 28-29.

the research groups on the drafting of European contract law, and by the Network for a CFR, with a view to using their results firstly towards the revision of the *acquis* in the field of civil law, and subsequently towards developing a system of Community civil law.<sup>88</sup>

#### F. *The 2006 Consumer law Compendium*

Thus the process of consumer protection-based *Acquis* modernisation, rather than codification, has the upper-hand in the moves towards EC private law consolidation. A convincing case can be made for a sectoral European regulation in consumer protection. Moreover, such a measure, as Reich argues, could in theory be based on the legal base of Article 153 (3)(b) EC, and thus avoiding the complexity of engaging internal market competence. The well-developed area of mandatory European consumer protection, based on the information paradigm, could be codified with relative ease. Such a move could be justified on the basis of effectiveness; adoption of a Regulation avoiding the divergence introduced by measures of upward derogation and bypassing the problem of horizontal direct effect.<sup>89</sup> The harmonisation measures as are likely to follow and the initial formulation of the CFR are to be based on the consumer law provisions. Whilst the work of the joint network seems to have ground to a halt, the *acquis* group has produced the most wide-ranging research: compiling a comprehensive compendium of the *acquis* and a comparative analysis on its national implementation. On 18 December 2006 the *Acquis* Group presented its compendium of EC consumer law, which is now available from the *Acquis* Group and, via a link on the Commission's website, alongside the compendium the *Acquis* Group has produced a 795 page comparative analysis (2006 Report).<sup>90</sup>

#### G. *2007 Green Paper on the Consumer Acquis*

On 8 February 2007 the Commission presented its Green Paper on the Consumer Acquis, a paper predating (COM (2006) 744 final) and hence notable

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88 European Parliament Resolution *cited above* note 2.

89 N. Reich, *cited above* note 6, at 33: 'The Community should learn... that, in areas where protective standards are necessary and required by primary... law, such as Article 153 EC, the two-step procedure of adopting directives and then waiting for member state implementation before the consumer can invoke his/her rights, is simply insufficient.'

90 [http://ec.europa.eu/consumers/cons\\_int/safe\\_shop/acquis/index\\_en.htm](http://ec.europa.eu/consumers/cons_int/safe_shop/acquis/index_en.htm).

for failing to refer to the work of the Acquis Group (2007 Green Paper).<sup>91</sup> The 2007 Green Paper marks the opening of yet another round of consultation, following the 2001, 2003 and 2004 Communications and the 2005 Progress Report. As the 2007 Green Paper does not make as much use of the 2006 Acquis Report as it might have a crucial opportunity for communication has been missed, lending some credence to the suspicion that the Commission has a very clear idea of the policy it wishes to pursue, and thus aims to orchestrate, rather than facilitate, debate by presenting a combination of its own pre-approved positions and result-oriented questions.

This in mind, it is striking, that the 2007 Green Paper mainly presents a catalogue of 31 further questions for stakeholders to answer; 19 of the 33 pages of the 2007 Green Paper (Annex 1) are devoted to these questions. However, in many instances among the three options set to each question there can only be one correct answer and a clearly wrong answer is available in order to expedite policy discourse. Yet while appearing to encourage deliberation, the 2007 Green Paper affirms the Commission's role in the process, asserting that it is in the driving seat. The 2007 Green Paper can thus best be understood as an exercise in deliberate, rather than supranational, deliberation. The policy preference which emerges from this exercise is for the 'mixed approach' involving a 'horizontal instrument combined, where necessary, with vertical action.'<sup>92</sup> To the uninitiated this can be translated as:

- A framework directive on EC Consumer Contract law (horizontal instrument)
- Revision and improvement of the existing EC Consumer Directives (vertical action)

Of the questions presented, a number are simply non-questions. For example, who could object to the harmonisation of cooling-off periods?<sup>93</sup> Similarly, the question of whether the horizontal instrument should address only cross-border transactions is a non-question. The answer required of stakeholders is supplied by the Commission's own analysis of the position. A horizontal approach restricted to cross-border transactions would clearly not solve any of the issues arising from the revision of the Acquis but would increase the fragmentation between the legal orders (29<sup>th</sup> Regime) and the fragmentation between the ap-

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91 *2007 Green Paper on the Consumer Acquis*, (COM (2006) 744 final.) (08 Feb. 2007) available at: [http://ec.europa.eu/consumers/cons\\_int](http://ec.europa.eu/consumers/cons_int).

92 *2007 Green Paper*, cited above note 91, Option II, point 4.2 Option II: The mixed approach, page 8-9.

93 *2007 Green Paper*, cited above note 91, Section 4.8.1. Harmonisation of the length of the cooling-off periods, Question F1, pages 20-21.

proaches taken by the different EC directives. This paper will not deal with this group of questions. Another group of questions are highly specialised. For example, the question on the sales of second hand goods at public auctions<sup>94</sup> or the question of whether a horizontal instrument should regulate the transferability of the commercial guarantee.<sup>95</sup> More important are the remaining group of questions. Here focus is drawn to the three essential aspects of the 2007 Green Paper: (1) the Commission's concentration on the function of EC Consumer law; (2) the role of freedom of contract in EC private law and the Commission's perception that freedom of contract; and (3) the case made for an asymmetric norm on good faith and fairness.

## IV. Evaluation

### A. *Deliberate deliberation*

In this analysis the paradoxical nature of the Commission's policy, the truncation of debate, the inertia relied upon and the potentially fragmentary effect of codification have emerged as striking features. Even more subtle has been the advent of the dual-track Joint Network/*Acquis* approach, especially striking is the more recent Commission centred upgrading of the *acquis* approach in the 2007 Green Paper.

The dangers associated with the Commission's approach are attributable to its model of EC law and conception of the way in which legal orders interact. It should be recalled that, in the absence of a Treaty revision, Community institutions are bound by their enumerated powers and contract law remains outside the scope of those powers. Moreover, legal unity cannot be generated by uniform law, in fact, in a global environment we can expect diagonal conflicts to increase. Furthermore, a whole range of principles of EU law are offended by the 'non-Code/Code/*Acquis*' approach; subsidiarity and proportionality being recast as functional competences. The prognosis for the dual-track approach is unfavourable. It attempts to coordinate the multi-level EU legal order, while ignoring the interlegality of norm production and clinging to an outdated hierarchical methodology. The 'non-Code/Code' suppresses debate on the project's feasibility and evades focusing on the pragmatic development of a 'restatement'-style European *common law*. The ease with which academic capacity has been di-

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94 *ibid.*, Section 5.2. Second Hand Goods sold at public auctions, Question H2, at pp. 24-25.

95 *ibid.*, Section 5.10.2. The transferability of the commercial guarantee, Question M2, at p. 31.

rected towards serving this contentious goal is striking, especially given that even the simplest questions await resolution: why should parties select an *opt-in* instrument? Can freedom of contract be squared with an *opt-out* instrument? Can a Code be more efficient than spontaneous harmonisation?

In fact the initiative appears more questionable from stage to stage. The Council approved the CFR (4-5 November 2004) before the national experts (3 December 2004) and the CFR-Net (15 December 2004) had met. All these steps predated the establishment of the Joint Network, charged with fleshing out proposals which had already been approved by the Council. That the Commission then gazumps the 2006 Acquis Report with its own 2007 Green Paper on Acquis review rounds off this picture of Byzantine governance and can be interpreted as a reaction to the impossibility of the dual-track approach. The double paradox here is that – regardless of the extent of any written instruments as may be adopted – case-law and compatibility rules will, in any event, assume an ever greater importance and eclipse the role of written law. As Amstutz anticipates, this will lead to rearrangements in the Continental approach to law, yet ultimately also, as Farnsworth observes, to a rearrangement of the Common law approach to EC private and contract law.<sup>96</sup>

## B. *Further Fragmentation*

Though many features of the Commission's proposals remain unspecified,<sup>97</sup> other options, such as measures of differentiated integration, have yet to be debated. Clearly, if harmonisation has produced fragmentation so far, there is little reason to suppose that mandatory or voluntary harmonisation will halt this trend. Furthermore, depending on the choices made, a unique pattern will be injected into what will *remain* patchwork law. Different patchworks and patterns, though passed in the name of legal unity, produce unique cleavages in

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96 M. Amstutz, *Zwischenwelten. Zur Emergenz einer interlegalen Rechtsmethodik im europäischen Privatrecht, in Rechtsverfassungsrecht*, cited above note 38, at 237: 'much will depend on whether national legal approaches will open themselves to the evolutionary logic of relational strategy behind the *Marleasing* case-law. This in turn will depend on fundamental rearrangements in continental legal methodology which, even to this day... places written law at the center of its operations.' (author's translation). M. Amstutz, *In-between Worlds*, (2005) E.L.J. 766-784. E.A. Farnsworth, cited above note 52 at 99-100 'The UCC, along with our Restatements, has given us a system of common law that seems less startlingly different from Continental European legal systems than does English Common law.'

97 *Inter alia* as to whether they will adopt an *opt-in* or *opt-out* form, whether the measures will apply purely to the context of cross-border trade, or extend to domestic situations.

polycentric private law. Finally, the contention that coherence can be achieved through the vertical approach, or the adoption of a ‘twenty-seventh’ layer of opt-in private law can be disputed. It could be suggested that the real function of the CFR and the OI has nothing to do with the integrity of the vertical approach. In fact, it seems that the opposite is sought: CFR and OI are to act as catalysts forcing ever broader codification and rendering a full-blown Code inevitable. Seen in this light the bifurcation of initiatives between codification on the one hand (joint network/DG Health and Consumer Protection) and improving the *acquis* on the other (*Acquis* Group/DG Internal Market) can be understood as a pragmatic response to the Council’s reaction and broader criticism of codification.<sup>98</sup>

### C. *Deliberative Supranationalism vs. Deliberate Deliberation*

Faced with politicised law, the case for *deliberative supranationalism* to address the legitimacy problems of integration has long been advanced. This involves using the law as ‘an organizer and supervisor of processes’,<sup>99</sup> adopting a conflicts approach to the interfaces of EU/national law. This approach relies on the parties, rather than the law-makers, on case-law rather than written law; on non-legislative harmonisation.<sup>100</sup> This challenges the supremacy of EU law: ‘Supremacy is not properly understood if it is ascribed to some transnational body of law. European law requires the identification of rules and principles to ensure the co-existence of different constituencies’ objectives with the common concerns they share.’<sup>101</sup> This idea of Europeanisation as a process charged with the supervision of power needs to be developed. Arguably, the only way to ensure good governance depends on the transparency and quality of decision-making processes. Set in these terms, full-blown codification is questionable; it fails to respect diversity and assigns mistaken roles to legislation and the courts.

A major issue associated with supremacy is the question of the extent of the EC’s powers. The Commission has bypassed this question as if it possessed a ‘residual’ law-making capacity; consideration of the legal base being the very

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98 P. Legrand, Antivonbar, (2006) 1 J.C.L. 13.

99 C. Joerges, European Law’s Supremacy, *cited above* note 38, at 8-9 and 12; C. Joerges, Der Europäisierungprozess als Herausforderung des Privatrechts: Plädoyer für eine neue Rechts-Disziplin, ZERP-Diskussionspapier 2006/1.

100 A. Colombi Ciacchi, Non-legislative Harmonisation of Private law under the European Constitution: The Case of Unfair Suretyships, (2005) 3 E.R.P.L. 285.

101 C. Joerges, Rethinking European Law’s Supremacy, *cited above* note 38, at 18.

last point of *Annex II* of the 2004 Communication.<sup>102</sup> Similarly, proportionality concerns refer us back to the communitarisation of procedural law, which was all that the majority of economic actors ever wanted. Here the question is whether it is enough to ensure a framework for judicial cross-border cooperation rather than extensive codification.<sup>103</sup> Both deliberative supranationalism and codification can thus be seen as problematic from the perspective of competence. Is deliberative supranationalism anything more than a ragged description of the modern trend towards increasingly informal, ad hoc and disorganised decision-making? Could such intentional deliberation simply be aimed at obscuring the true extent of the democratic deficit. Notwithstanding the caveats to such deliberation, is anything substantial to be gained by substituting deliberation with unitary law? Ultimately, both approaches detract from the integrity of integration. In the context of protecting diversity minimum harmonisation was more than a means by which unanimity in Council could be avoided: it represented a compromise between integration, wider policy and respecting national identities.

#### *D. Path dependency of European Private law*

The relationship between fragmentation, competition and harmonisation should be illuminated before further steps are undertaken. Even the measure of consolidation achieved by spontaneous harmonisation can be disputed, spontaneous harmonisation being effective only in those narrow areas of functional similarity across legal systems. More generally, spontaneous harmonisation can lead to the broader diffusion of legal irritants. Yet beyond this lies the more pragmatic idea of non-legislative harmonisation; that case-law conver-

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102 Commission observes *2004 Communication*, Cited above note 17 at 21: ‘very few contributors expressed their view on that issue.’

103 Measures *europeanising* procedure: Reg. 44/2001/EC, (2001) O.J. L12/1, on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters; Reg. 1206/2001/EC, (2001) O.J. L174/1, on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters; Reg. 1348/2000/EC, (2000) O.J. L 160/37, on the service in the Member States of Judicial and Extra-judicial documents in civil or commercial matters; Reg. 1346/2000/EC, (2000) O.J. L160/1, on insolvency proceedings; Reg. 805/2004/EC, (2004) O.J. L143/15, creating a European Enforcement Order for uncontested claims; Directive 2002/8/EC, (2003) O.J. L26/41, to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes. Proposal for a Regulation creating a European order for Payment Procedure, (COM (2004) 173 final.).

gence could obviate the need for horizontal legislative measures.<sup>104</sup> Clearly the adoption of legislative measures would require a Treaty revision to allow the Commission to proceed.<sup>105</sup> At the same time, EC institutions are charged with making the case for each initiative as it is adopted. The acid test is whether the institutions can finesse their enumerated powers by packaging codification in market-integration language.

The path dependency of the Commission's vision of private law is a topic which also needs further analysis. The model behind the plan is based on the German model of legal and political integration. Predictably, the Commission officials charged with developing the CFR, the Joint Network, the Study Group and CFR-Net are dominated by German academics and lawyers. Therefore, rather than being able to influence the process in any fundamental way, the task for lawyers in the coming years will be to critically evaluate the process, the specific proposals and concrete steps taken towards the Civil Code. Here, the coherence of CFR/*Acquis* improvement proposals and their effect on the law in action will require field-by-field analysis. Meanwhile, the cross-jurisdictional equivalence of legal instruments and the practical application of the law needs attention to ensure that codification does not simply produce an ever greater fragmentation of the law.

Regardless of the final shape of the Joint Network/*Acquis* improvement proposals, under no circumstances should the mere prospect of codification work to compromise or frustrate *national* initiatives aimed at simplifying and consolidating the law. In particular, as the very idea codification tends to relegate Common law to the sidelines, the more pragmatic Common law methodology should inform the debate in a much more significant way than has been the case until now.<sup>106</sup> Similarly, the project should at its outer limit be limited to the drafting of *opt-in* OIs for homogenous legal products in cross-border consumer transactions. Finally, the position of practitioners and the significance of case-law need to be better recognised in any legislative measures adopted on the basis on the CFR.

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104 A. Colombi Ciacchi, *cited above* note 100.

105 S. Weatherill, *cited above* 10at 12 commenting on *Tobacco Advertising*: 'the demise of the political assumption that the EC possesses a competence *carte blanche* to harmonize laws may clear the way to a more explicit and constructive focus on what really is needed of a programme of harmonisation in the modern European Union... the context has altered. Centralisation is under fire. Harmonisation has become a more constitutionally contested process.'

106 P. Legrand, *Antivonbar*, (2006) 1 JCL 13 at 24: 'the way in which the common law actualises itself in an authentic manner is to be destroyed in the name of the rule of technology...'

### E. *The Current Options*

The current options towards greater coherence and the harmonisation of civil law can be elaborated from the latest stages of policy formulation and the reactions and objections to the proposals tabled so far. We can group the current options in three types of measure: soft measures, sector-specific measures and horizontal measures. Again the measures can take a number of legal forms:

#### Soft measures

- Open Method of Coordination (OMC): in areas such as the creation of a Code of Private law where the EC has no competence, one obvious way to proceed is through soft law measures. OMC measures are based on Article 127 or 140 EC, which allow the Commission to encourage cooperation between the Member States.<sup>107</sup>
- Recommendation to observe the European Principles (PECL): as alluded to above, the PECL are likely to play an influential role in the consolidation process. As has also been observed, the PECL are freely electable in any case to contracting parties in cross-border transactions. Here the Commission could consider passing a Recommendation under Article 211 (ex 155) EC to encourage contracting parties to make use of the PECL.

#### Sector specific measures:

- Consumer-*acquis* improvement: piecemeal measures in particular policy fields to improve the *acquis* (i.e. in consumer law) vindicating a bottom-up approach to the initiative which begins with the existing secondary law promoting coherence in mandatory areas of EC consumer law (pre-contractual information, withdrawal rights, terms governing unfair terms and guarantees, rules on compensation and warranties.)
- Consumer Contract Regulation: a Regulation based on Article 153 (3) (b) EC, rather than the contentious internal market competence, and codifying the relatively sophisticated and essential general principles of EC consumer protection (information paradigm) requiring codification.<sup>108</sup> Resort to a Regulation could be justified on the grounds that directives have been unevenly transposed and, in the absence of horizontal

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107 Article 140(2) EC specifies that the Commission ‘act in close contact with the Member States by making studies, delivering opinions and delivering opinions and arranging consultations both on problems arising at national level and on those of concern to international organisations.’

108 N. Reich, *cited above* note 6 at 31 cites specific rules on ‘cooling-off’ periods in direct and distance marketing, unfair terms and legitimate quality expectations.

direct effect, have proved of limited utility to the plaintiff. Measures passed, under Article 153(5) EC, would be of minimum harmonisation and allow for Member State upward derogation.

- Asymmetric Consumer Contract framework instrument on good faith (2007 Green Paper): in the 2007 Green Paper the Commission appears to suggest adoption of a behavioural, asymmetric ‘good faith’ directive to be adopted for the benefit of the active EC consumer to the cost of business.
- Symmetric Consumer Contract framework instrument on good faith (2007 Green Paper): indirectly, the Commission invites debate, by promoting adoption of an asymmetric good faith standard, of a more objective and balanced norm; a symmetric good faith norm has much too recommend it.
- Selective vertical action (2007 Green Paper)

Horizontal measures: OI, CFR and Code

- Common core, cross-border, facultative CFR: Elaborating a CFR across a common core of contract law (contracts of sale, services and security interests) from best solutions drawn from the *acquis*, international instruments such as the 1980 Vienna Convention (CISG): laying down fundamental principles, key concepts and model rules, applicable to cross-border commercial transactions.
- A cross-border and domestically applicable CFR: intended to replace or supplement national laws.
- OI-Regulation(?) on common contract rules: broader formulation of more horizontally applicable rules (i.e. consumer and some commercial contracts) cast in the form of an opt-in OI (i.e. rules on contract formation), developing common characteristics from a number of directives, discarding the contradictions and consolidating the remedies.<sup>109</sup> According to the 2003 Action Plan this OI could be elaborated from the CFR, explicitly in the field of financial services, insurance and savings’ products. An OI-Regulation could be passed on the basis of Article 308 EC.

European Civil Code

- Comprehensive codification: comprehensive codification is a longer-term option which depends on a Treaty revision to expand Community competences. A Code of European Private law would displace the tradi-

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109 R. Schulze, *Grundsätze des Vertragsschlusses im Acquis Communautaire* (2005) G.P.R. 52.

tionally national, facilitative rules on establishing consensus between the parties (i.e. rules on the meeting of the minds, cancellation rights, fraud, misrepresentation and deception, remedies in the case of non-performance).

#### F. *Marking the Commission's Cards*

The objections to these measures become more intense the more they tend towards comprehensive measures of codification; at its inner limit, consumer-*Acquis* formulation offending *Tobacco Advertising*, though within the scope of *Leitner*; at its outer limit comprehensive codification offending the heterogeneous nature of *sui generis*, functional EC private law and the principle of *subsidiarity*.<sup>110</sup> Many of the options would barely justify the level of resources going into their elaboration. Passing a Recommendation encouraging contracting parties to observe PECL principles on an opt-in basis, for example, would represent a lowest common denominator solution, falling far short of the Commission strategy. Additionally, such a recommendation would not bring the contract within the purview of the European Court of Justice, PECL not being an Act of the EU under Article 234 EC.

Caution counsels against the more concrete measures of horizontal codification, at the most a case for improving the law's coherence can be made on a sector-by-sector basis, and most obviously in the area of mandatory EC Consumer law. Here a measure of consolidation recommends itself: a consolidation of mandatory consumer protection law on the basis of minimum harmonisation. Conversely, there is the ubiquitous suspicion that the emergence of such a weak measure is not what the Commission has in mind as a fitting finale. Furthermore, were a Treaty revision possible, and a comprehensive codification to be the end result, the next problem would be the ability of the Court of Justice to interpret a new and expansive body of law with binding force in the Member States. The current indication is that the Court of Justice would resist any invitation to once again don the mantle of judicial activism in the name of EC Private law integration.<sup>111</sup>

Recent developments suggest that the character of the emergent initiative is far from settled. Emblematic of the confusion surrounding the initiative is the contested status of consumer law, leaving even the initiative's erstwhile chief architect in a quandary as to whether consumer law can be included in an OI,

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110 Article 5 EC.

111 Case C-237/02, *Freiburger Kommunalbauten* [2004] ECR I-3403.

or serve as the centrepiece of the CFR.<sup>112</sup> Due to appear in March 2008, the CFR will serve less as an embryonic Civil Code but, rather, function as a ‘tool box’ from which the Commission may draw as it chooses. The Joint Network, with its impressive expertise on comparative law, is now ignominiously relegated to the task of gathering in and preparing the Commission’s tools.

The 2007 Green Paper represents the third stage in a process aimed at improving the coherence of EC private law. As the Commission concludes the steadily expanding body of selective, haphazard, contradictory, uneven, diversely drafted and transposed EC secondary law has caused significant legal fragmentation. The Community has always instrumentalised contract as a simple means to complex policy ends: using contract law to achieve goals in competition, free movement, consumer protection, public procurement and non-discrimination. European Contract law is thus a functional rather than systematic body of law, developed piecemeal from the bottom-up to solve practical problems, rather than from the top down to create a coherent body of general law.<sup>113</sup> Set against this background the case for greater coherence in EC private law is vital.<sup>114</sup>

The framework directive is the most obvious and appropriate measure for the Commission’s goals. That the emergent framework instrument pursues a clear, comprehensive and consistent approach, rather than repeating the mistakes of the past, is of central importance. Above all EC private law should not be mixed up with provisions and goals taken from other fields of law, freedom of contract should not be suppressed, while the instrument should not define hundreds of duties to inform which only ruin contractual transparency. The framework directive will only advance the cause of EC Consumer law if it meets these requirements.

A final question emerges from the ‘greater coherence’ initiative: is Europe ready for a paradigm shift with a radically new approach in EC Consumer law; laying a new emphasis on social justice? No matter how desirable such a shift

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112 D. Staudenmayer, *The Place of Consumer Law within the process on European Contract law*, (2004) *J. Consumer Policy* 269 at 275-279.

113 N. Reich, *A Common Frame of Reference (CFR) – ghost or host for integration?* ZERP Diskussionspapier 2006/7 at 30: ‘EU law looks at the concept of contract from a functional side, in order to determine its sphere of application in promoting free movement, competition, or adequate standards in consumer law... The concept of contract cannot be seen in isolation but rather by its function in a particular field... It may vary from one subject to another.’

114 C. von Bar, *From Principles to Codification: Prospects for European Private law*, (2002) 8 *C.J.E.L.* 379. See also O. Lando, *Does the European Union need a Civil Code*, (2003) 49 *RIW* 1.

may appear, the current state of EC law would not allow such a move: the Commission has neither the legislative competence nor the administrative capacity for such a departure.

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