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The ‚Three Lives‘ of European Private Law

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This piece has benefited largely from intense discussion with *Christian Joerges* and *Florian Rödl* who were originally foreseen as co-authors.

IMPRESSUM

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Introduction

European private law is not even 25 years old as a discipline, but its development, abrupt shifts in direction, institutional limitations and irrationalities make it a typical child of European integration. During the first decades which followed the conclusion of the Treaty of Rome, the idea that the Common Market needed a common legal infrastructure for market transactions was not widespread. Instead, the Community was dedicated to removing the most obvious obstacles to trade such as tariffs, quotas and equivalent measures, and national private laws, in particular contract laws, were similar enough so as to enable most cross-border market transactions. Only with the discovery of the consumer, not only as an economic actor but also as a market citizen, did the EC develop an interest in regulating private law from a consumer law perspective. Yet it was only after the introduction of qualified majority voting in the Single European Act of 1986 that the EC managed to enact the bulk of consumer law directives covering inter alia doorstep sales, consumer credits, package tours, timesharing rights in immovables, unfair contractual terms, guarantees in sales and distance sales. However, private law has also been affected by European measures with other political objectives such as banking, insurance and payment regulations, e.g. the 1998 Late Payment Directive aimed at protecting small and medium sized enterprises. Most recently, consumer law integration has led to the 2007 Green Paper on the Review of the Consumer Acquis¹ and the 2008 proposal for a horizontal Directive on Consumer Rights² which integrates the Unfair Terms, the Guarantee, the Doorstep and Distance Sales Directives. Whereas the consumer law directives had initially generated little case law (via references of national courts to the ECJ under Art. 234 TEC), this situation has changed since the turn of the millennium. Indeed, the ECJ is increasingly confronted with core issues of private law, and several decisions have generated a lot of controversial discussions.

Beyond consumer law, the integration of general contract law had for years remained a passion of academics who since the 1970ies had been assembled in the Lando group on European contract law and other transnational circles. The European Parliament supported these efforts in two resolutions of 1989 and 1994 which strongly recommend a European Civil Code that should deal with private law comprehensively. Following the example of the grand national codifications, it should provide a symbolic basis of a common identity of European citizens. However, this project, albeit limited to contract law as an initial step, was only introduced on the agenda of the EC in the late nineties in

1 COM (2007), 744 final.

2 COM (2008), 614 final.

the wake of the euphoric “constitutional movement” leading to the Nice Fundamental Rights Charter and the Laeken mandate to elaborate a constitutional treaty. At the 1999 Council summits of Cologne and Tampere, the Council took a positive view on a European contract law instrument and mandated the Commission to launch a preparatory process. As a first step, the Commission elaborated the 2001 White Paper on contract law where different legal policy options were presented and a consultation process launched.³ The feedback from legal science, practice, business and politics prompted the Commission in its 2003 Action Plan⁴ to call for a horizontal instrument alongside further measures of sector-specific integration in order to increase the overall coherence of European private law. To this end, a “Common Framework of Reference” (CFR) which should contain common terminology, principles and rules on core areas of private law, should be elaborated. The CFR should constitute the basis of a subsequent “optional instrument” – a seemingly harmless neologism for a European contract code which should be applicable either through the parties’ choice of law (“opt in” solution) or as a dispositive regime for transnational cases if the parties had not excluded its application (“opt out” solution). The preparatory work was then assigned to a transnational network of academic expert groups. In 2008, these published a first and provisional academic draft of the common frame of reference (DCFR), which resembles a comprehensive codification of private law at European level.⁵

Whereas the three building blocks of European private law just described - consumer law directives, ECJ jurisprudence, and the draft of a general instrument – have evolved in a relatively co-ordinated way for decades, it seems that in the recent past, particularly in aftermath of the failure of the constitutional treaty they are increasingly drifting apart, mostly due to changed preferences in the European Commission and the ECJ’s *effet utile* driven approach to private law. This disaggregation becomes apparent not only in “mutual non-consideration” but, what is worse, also in the turn away from a classic justice-based concept of private law in favour of a regulatory framework for businesses. Against this background, the present contribution sets out to explicate the “three lives of European private law” and to discuss the implications of this fragmentation for the effectiveness and legitimacy of the field in the future.

3 KOM (2001), 398 endg.

4 KOM (2003), 68 endg.

5 Principles, Definitions and Model Rules of European Private Law, ed. Study Group and Acquis Group, Sellier, 2008.

The first life – the CFR process

As mentioned, the drafting process for the Common Framework of Reference foreseen in the 2004 action plan was assigned to two networks of academic expert groups: the so-called *Study Group on a European Civil Code* (the follow up group of the Lando group directed by the Prof. Christian von Bar) working on a classic comparative law basis and the *Research Group on the Existing EC Private Law („Acquis-Group“*, directed by Prof. Hans Schulte-Nölke) aiming at developing European private law on the basis of the already existing legislative and judicial *acquis* in that field. The work of the groups was financed under the Sixth Framework Programme for Research and Development, which was instrumentalised for that purpose. The work of the groups was accompanied by a so-called stakeholder network (representing civil society) and by another network of Member State representatives.

The academic draft common framework of reference (DCFR) jointly published by both groups in 2008 is a compilation of principles and rules, which is in its external form practically identical to a continental style civil code. The DCFR comprises of 638 articles compiled into seven books which deal with general contract law, specific contracts and extracontractual obligations based on benevolent intervention in another's affairs, tort/ delict (though these terms are avoided) and unjustified enrichment. Yet the present DCFR edition is still provisional: In October 2009, a revised version is announced to be published which will contain comments and illustrations (following the model of the Restatements of the American Law Institute already adopted by the PECL) on the rules which will explain their comparative and/or European law background; moreover, the revised version will be supplemented by three further books on immovables, pledges and trust. The whole compendium is expected to encompass around 10.000 pages. As well as serving as a tool and a source of inspiration for research and teaching, the academic DCFR is intended to provide a model for a political CFR to be adopted by the European Commission in 2010.

Apparently at the last minute, the DCFR was endowed with a general introduction devoted to the grand principles, values and legal policy considerations on which it is based. These include freedom of contract and its restrictions, balancing of values and policy objectives, economic welfare, protection of human rights, solidarity and social responsibility. However, this introduction seems to be a façade: the principles and values contained therein are of course not only very abstract but also frequently conflicting between each other, and the DCFR makes no effort to explain the formulation of its rules on the basis of the introduction. In reality, the DCFR appears to be is a legal-technical instrument in the tradition of the grand continental codifications of the last centuries. Therefore, at least the present version may hardly be viewed as a political project bringing to

bear a welfare-oriented European social model, as called for by Mattei,⁶ Lurger⁷ and Collins and others.⁸ Contrary to the expectations of the European Parliament, even the political CFR is unlikely to constitute a symbolic bedrock for a common identity of, and solidarity among, European citizens. This legal-technical conception is democratically inadequate as rightly criticised by Hugh Collins and others; but, ironically perhaps, matches the EC tradition to guise political programmes (just think e.g. of the internal market programme) in technical terms. Sadly enough, the failure of the Constitutional Treaty has shown that the EU is not mature for grand political projects, which would include also a “societal constitution” in the form of a civil code. That notwithstanding, especially English commentators and officials reject any European private law instrument, even in a purely technical form, as they fear it could give rise to more interventionist EC legislation in future years.

Though published only a year ago, the DCFR has already triggered a huge number of comments and criticisms. Having been compiled within a very short time frame, the DCFR has been rightly criticised for containing a number of flaws in legal craftsmanship: the sections prepared by the Study Group are not always coordinated with the sections prepared by the Acquis Group; the text is not always in conformity with standing EC law; and there are many extremely open-textured formulations and clauses which seem to delegate too much discretionary powers to courts and lead to unforeseeable decisions.⁹ Yet in our view, these flaws are serious but at the present stage not decisive as they could surely be remedied in a revised version if enough time were available. This has already been shown by the discussion following its publication in which a huge number of alternatives and improvements in all covered fields were proposed.¹⁰ Moreover, the draft is accused of reflecting neither modern economic theory on market failures nor modern contract law phenomena such as information rights and network arrangements in today’s service society.¹¹ However, a coherent orientation by economic theory on market failures capable of meeting consensus throughout Europe seems to be impossible to achieve, and none

6 U. Mattei, 'Hard Code Now!', (2002) 2(1) *Global Jurist Frontiers* Article 1.

7 B. Lurger, *Grundfragen der Vereinheitlichung des Vertragsrechts in der Europäischen Union*, 2002

8 See H. Collins, *The European Civil Code*, 2007.

9 See H. Eidenmüller/ F. Faust/ Hans Ch. Grigoleit/ N. Jansen/ G. Wagner/ R. Zimmermann, *Der Gemeinsame Referenzrahmen für das Europäische Privatrecht*, JZ 2008, 529.

10 See e.g. the edition 2008 Nr. 3 of the ECRL dedicated to the CFR.

11 See S. Grundmann, *The Structure of the DCFR – Which Approach for Today’s Contract Law?*, ERCL 4 (2008), 225.

of the recent private law codifications at national level has ever made that claim. This is so because economic theory itself is extremely controversial and in constant evolution, with the latest strand labelled “behavioural law and economics” relying on empirical experiments on human behaviour for the formulation of legal rules (these experiments often show the limited value of information to avoid bad bargains or similar mistakes). Moreover, modern phenomena such as information and formation of contracts as well as network contracts in today’s service society could still be regulated to the extent consensus can be achieved. However, also in most current national codifications they are missing without these legal systems being ineffective. From a yet more fundamental perspective, the DCFR has been criticised for being unable to capture the dynamic development of private law under democratic conditions. This argument is too radical in our view. It is of course true that the DCFR, just as any other national code, does not provide an exhaustive regulation of private law. In our view, a codification cannot achieve more than structuring the most important problems of private law – a task which the DCFR will be able to achieve at least after corrections and revisions. Its doctrinal fine-tuning, development and constant extension of to new fields emerging as a result of technical progress and/or new commercial practices may legitimately be seen as belonging to courts. It is true, though, that the actual coming into force of a European instrument in private law would require a profound reform of the architecture of its judicial implementation by European and national courts.¹²

The two crucial problems surrounding the CRF process are related to its defective design and the unclear status of a political CRF. To start with the latter, the exact legal status of the (final) CFR was controversial right from the beginning of the process. Whereas after the 2004 Action Plan the discussion focussed on the opt in vs. opt out dichotomy, it has become clear after the failure of the Constitutional Treaty that any legally binding instrument resembling a European Civil Code will not be accepted by a majority among Member States. Indeed, a hard code created on a soft law basis by academic experts without any popular legitimation would be democratically difficult to accept. Moreover, even at private international law level, the application of the CFR as a private regime chosen by the parties was debated on but finally excluded from the reform of the Rome I regulation. This would leave us with the remaining function of the CFR to act as a toolbox containing models for the revision of existing and the elaboration of new European legislation – a function which was not respected in recent Community legislation in private law as we shall see below.

12 For more thoughts on this see, Ch. Schmid, Legitimacy Conditions of a European Civil Code, EUI Working Paper, Robert Schuman Center Series, no. 14/2001 = Maastricht Journal of European and Comparative Law 8 (2001), 277-298.

The even more pressing problem attaches to the institutional design of the CFR process. The process up until now has resembled the open method of governance: politically unaccountable academic experts chosen by a small group of project pioneers have elaborated the draft in accordance with their own self made procedural rules in non-public meetings; others have had little chance to influence the process as competition was apparently undesired by the Commission. The meetings with the stakeholder networks were too few, too short and too little prepared to enable any meaningful feedback and legitimisation by civil society. At the present stage, the DCFR would not, therefore, qualify as a legitimate hard code. The need to enhance both the scientific quality and the political legitimacy of the process is rather undeniable. It would seem, however, that both aims cannot be achieved under the current institutional setting. As an alternative, a proposal voiced in 2000 before the European Parliament has received new attention in recent times: the creation of a European Law Institute on the model of the famous American counterpart institution. Such an institute would constitute an academically and politically legitimised body to which the responsibility of elaborating an enhanced draft could be delegated. It could bundle, structure and consolidate discussions, enhance the quality of the work, improve the acceptance of the results among lawyers and ensure the compatibility of draft legislation with the social, economic and political context in which private law operates. Without such an institution, the CFR process will probably not have the potential for further development. Yet these considerations may become irrelevant anyway if the European Commission were to abandon the CFR process by limiting itself to EU consumer contract law.

The second life – EU consumer contract law

As mentioned, the enactment of many directives in private, especially consumer law, which covered only selected subject matters and generated disintegrative effects on national private laws had in 2004 triggered the call for more coherence which should be achieved through a general contract law instrument. Yet in 2005, the political climate changed after the failure of the Constitutional Treaty in the French and Dutch referendums. The Commission indicated that from then, it would prioritise a revision of the consumer contract law acquis. Furthermore, leading personnel which had administered the CRF process in DG Sanco were transferred to other units. The prioritisation trend increased in the 2007 Green Paper on the revision of the consumer acquis in which the CRF process became manifestly disconnected. Initially, the consolidation of the acquis was limited to eight, later to only four directives. What is even more important, the Green Pa-

per did not refer to the DCFR which was already available unofficially at that time though it contained a questionnaire with issues for consultation with alternative rule proposals all of which had already been dealt with in the DCFR.¹³ This means that even the minimalist toolbox function of the CFR was frustrated, and the question which arises then is why the CFR had to be funded with a huge research budget in the first place.

The scission between the CFR process and the consumer acquis was confirmed in the 2008 proposal for a Consumer Rights Directive (CRD). This scission is documented not only by the complete non-consideration of the CFR, even in cases in which the CRD deviates from existing acquis incorporated in the CFR. To give but one striking example, Art. 12 CDR on the consumer's right to withdrawal in off-premises and distance contracts surprisingly no longer refers to the notification of the withdrawal right to the consumer as starting point of the withdrawal period. This is in striking contrast not only to Art. II-5:103 (2 b) and 104 DCFR but also to Art. 4 and 5 Doorstep Sales and Arts. 5 and 6 Distance Sales Directive.

At a fundamental level, the scission is also shown by the fact that the CRD, unlike the CFR and all other national private law instruments, deviates from the classic ethical concept of private law which pursues justice among the parties in the individual case (normally commutative, sometimes also distributive justice) as highest objective. Instead, the CRD sacrifices justice among the parties in favour of providing European businesses with a basic but uniform regulatory framework for market transactions with consumers. This harsh judgment is based less on the fact that the CRD diminishes the standard of consumer protection in many instances – not only when compared to many Member States but also to the existing European acquis. Instead, it mainly derives from the legal-technical consequences of the CRD's maximum harmonisation approach,¹⁴ which constitutes a straightjacket for private parties and Member States alike. Thereby, Member States may no longer provide for stronger consumer protection in national law but are strictly bound to the level foreseen in the Directive. The Commission has attempted to justify the need for maximum harmonisation

13 See M. Hesselink, *The Consumer Rights Directive and the CFR: two worlds apart?*, ERCL 5 (2009), 290, 294.

14 The turn to maximum harmonisation, already opted for in the 2002 financial services distance sale directive, the 2005 unfair commercial practices directive and the 2008 new consumer credit directive, is rightly viewed as a new era in European consumer law by H.-W. Micklitz and N. Reich, *Der Kommissionvorschlag vom 8.10.2008 für eine Richtlinie über "Rechte der Verbraucher", oder: "der Beginn des Ends einer Ära..."*, EuZW 2009, 279; English version: *Crónica de una muerte anunciada: The Commission Proposal for a Directive on Consumer Rights*, Common Market Law Review 46 (2009), 471.

in a 300 pages impact assessment report annexed to the draft which postulates huge efficiency losses in cross border transactions due to persisting legal divergences. As a response, the fully harmonised CRD wants to provide businesses with a single regulatory framework in order to eliminate the barriers stemming from the fragmentation of the rules and to complete the internal market in this area.¹⁵ Specifically, cross-border contracting on the basis of an identical set of standard contract terms shall be enabled.¹⁶ Contrary to the hollow propaganda aim of the Directive to enable also consumer trust and reliance through a single regulatory framework, consumers were of course far better served by a common minimum standard which could be, and actually was,¹⁷ extended by Member States to their benefit – whereas they are now subjected to a reduced standard of protection even in internal cases.

The Directive's maximum harmonisation approach conflicts with the classical concept and functioning of private law justice in various respects. To start with, private law is a complex fabric of considerations and values with different legal-ethical roots. For example, with respect to a purchased good with a malfunctioning feature which causes a damage to the buyer, under German law, one needs to consider inter alia whether the buyer was deceived by the seller about the good's feature in question, whether the buyer or both parties made an error in their assessment of the feature, whether the feature was stipulated by the contract, whether the feature may normally be expected for similar goods, whether the defect is limited to the product itself or caused a damage to a separable part of the good, whether the defect affected the consumer's health or other patrimony and/or caused any additional material or immaterial losses. Yet under the Directive only the conformity of the good with the contract (i.e. whether the feature was stipulated by the contract or may normally be expected for similar goods) is dealt with. How about, then, the legal provisions implementing the other considerations? If one takes seriously the Directive's aim of providing businesses with a single regulatory framework beyond which national law must not offer any additional protection to the consumer, they would all be pre-empted on the basis of maximum harmonisation. Under these conditions, the doctrinal fine-tuning of legal-ethical considerations of which "justice among the parties" is the outcome would no longer be feasible. For example, it may not be just to exclude the seller's liability for non-conformity according to

15 CRD, Recital 20.

16 S. Whittacker, *Unfair Contract Terms and Consumer Guarantees: the Proposal for a Directive on Consumer Rights and the Significance of 'Maximum harmonisation'*, ERCL 5 (2009), 223, 240.

17 For details see the impressive EC Consumer Law Compendium elaborated for the European Commission by H. Schulte-Nölke/ Ch. Twig-Flessner/ M. Ebers in 2008.

Art. 24 Nr. 3 CRD when not only the buyer but both parties could not reasonably have been unaware of the non-conforming feature. Similarly, it may be unjust to exclude also the liability for defective products under tort law where a buyer who was injured by the product fails to communicate the non-conformity of the product to the seller within two months according to Art. 28 Nr. 4 CRD – containing the buyer's obligation to inspect and report any non-conformity of the good, a device which was previously contained in commercial law only. However, if one allows the competing application of the CRD and tort law in these cases the aim of establishing a single regulatory framework is obviously frustrated. In this context, it should also be noted that the Directive's maximum harmonisation approach betrays not only national provisions but also other EC law sources such as the Product Liability Directive (PLD). For a malfunctioning product will often not only lack conformity with the contract but also be defective in the sense of the PLD. Ironically, though there is no express stipulation to that effect in the PLD, the ECJ has also interpreted that Directive as a maximum standard,¹⁸ which was apparently overlooked by the authors of the CRD. As a result, we are facing the logical inconsistency of two maximum standards which are of course defined by different legal requirements.

Secondly, a context-sensitive and cautious application and development of private law by the judiciary, which enables justice among the parties, needs to fulfil a wide range of tasks: it needs to fill legislative gaps or concretise open-textured provisions, adjust mistakes or wrong background assumptions of the legislator, develop the law to accommodate new factual problems and regulatory needs, or react to parties' attempts at circumventing certain legal provisions. At European level, it is already more than doubtful whether the ECJ would *theoretically* be able to fulfil these tasks, in particular as the social, economic and political context in which private law is embedded is often characterised by national or even regional peculiarities which cannot be addressed in a uniform way. *Practically*, as is well known, the European judiciary completely lacks the resources to administer consumer contract law for 350 million people; the average length of the preliminary reference procedure of about 2 years already now causes excessive burdens to private parties. At national level, legislators and courts are barred from fulfilling these essential functions of private law through the means of maximum harmonisation - private law will so to speak be frozen in the state of the Directive.

Specifically, developing the Directive in matters within its scope of application or resorting to national law for the purpose of gap-filling is difficult and risky for national courts as the ECJ may later find that the Directive was inter-

18 See below sub European jurisprudence.

preted in a wrong way or that its provisions were exhaustive and, therefore, the national provisions applied for the sake of (perceived) gap-filling pre-empted. For example, when Art. 7 CRD allows a commercial intermediary to state that he is acting in the name of and on behalf of a consumer so as to avoid the application of consumer law, it is doubtful whether national measures against abuses are pre-empted for or not – for example the German “quasi-seller liability” (Sachwalterhaftung) of a second hand car dealer who sells cars, in order to evade consumer protection, in the name of their previous owners who are consumers.¹⁹ Furthermore, it is not clear whether remedies for non-conformity not regulated in the Directive such as a direct claim against the producer of the non-conform good (the French *action directe*) or the English rejection right applying to non-conform goods may still be applied or are also pre-empted.²⁰ Moreover, Art. 27 Nr. 2 CRD states that the consumer may claim damages for any loss not remedied under the rules of non-conformity.²¹ However, this extremely wide formula leaves unclear the ambit of the recoverable damage (interest in case of late replacement or repair?, costs of repair the consumer has carried out himself?, immaterial damage for the inability to enjoy the sold good?) and whether more detailed liability rules need to be developed autonomously on the basis of the Directive or whether national law may be resorted to for gap-filling; in the latter case, it would again be doubtful whether national liability standards might only be objective or also fault-based. In sum, when such central issues to which hundreds of pages in commentaries on national laws are devoted are no longer settled, but need to wait 2 years for clarification by the ECJ, the quality and foreseeability of judicial decisions which are essential preconditions for private law justice would be gravely affected and national private law systems might tumble into chaos. In addition, the Directive’s core objective of providing businesses with a single regulatory framework cannot be reached in the first place with similarly vague formulas. Instead, the fragmentary texture of the Directive cannot reasonably be expected to enable a just, socially sensitive and legitimate handling of consumer contract law.

The third life: ECJ jurisprudence

With the exception of private international and international procedural law and some cases on the impact of the basic freedoms on national private law, European jurisprudence on core areas of private law took a while to get started,

19 Example from Micklitz and Reich, *op. cit.*, p. 491.

20 See Micklitz and Reich, *op. cit.*, 508ff.

21 See again Micklitz and Reich, *op. cit.*, 507f.

mainly since national implementation measures of European directives and the familiarisation of courts and practitioners with them were a slow process. For example, the first decision on the 1993 Unfair Terms Directive dates from 2000 only, but since that year the ECJ was confronted with it not less than thirteen times. As well shall see, however, treating ECJ jurisprudence on core private law as a separate third life of European private law is justified not only with respect to the quantity of judicial contributions to the field but more importantly on account of its peculiar features which set it apart from the other “two lives”.

From a purely external perspective, the ECJ has of course not turned its back on European private law in the same way as the CRD has done to the CRF. Instead, it goes without saying that the ECJ deals with European legislation brought before it, as this is precisely its job. As regards its relationship with the CFR, it is however too early as to draw any conclusions. Yet it is to be expected that the Court will at least occasionally use it when justifying its decisions, just as it has taken into consideration other important soft law sources such as, most significantly, the Nice Fundamental Rights Charter. Last but not least, single members of the Court have also already shown their interest in the CFR process.²²

However, similar to European consumer contract law, we may find a scission at a deeper level: the ECJ, too, is inclined to sacrifice the classic ethical concept of private law in favour the *effet utile* – i.e. the maximisation of collective policy goals, market integration in particular, underlying European legislation. In other words, the Court tries to maximise the practical effectiveness of EC law without adequately reflecting its systematic embeddedness in its national law environment and the overall objective of justice among the parties. This criticism may be illustrated by the Court’s instrumentalist approach to consumer protection and its support of maximum harmonisation.

Given its preponderance within European private law, consumer protection might be expected to provide an overarching interpretative metaprinciple. Yet it may be shown that the Court does not pursue a coherent consumer model. This thesis may be illustrated by referring to its interpretation of consumers’ information rights.²³ Of course, there is absolutely nothing wrong with information rights in themselves. As both economic analysis and contract practice

22 See e.g. the contribution of AG V. Trstenjak, *Die Auslegung privatrechtlicher Richtlinien durch den EuGH: Ein Rechtsprechungsbericht unter Berücksichtigung des Common Frame of Reference*, *ZeuP* 2007, 145.

23 The following analysis draws on Ch. Schmid, *The Instrumentalist Conception of the Acquis Communautaire in Consumer Law and its Implications on a European Contract Law Code*, *ERCL* 1 (2005), 211.

show, information asymmetries among professional traders and consumers are a frequent type of market failure, which information rights are able to correct in many cases.²⁴ In line with this basic finding, information rights constitute the most prominent and frequent regulatory tool in European consumer law. This seems to be inspired by the model of an inadequately informed consumer who is able to take rational decisions only after adequate information. Thus, to quote but one example, in the recent *Cofidis* case,²⁵ the ECJ quashed national time limits restricting the exercise of consumer protection rights on the ground that consumers may ignore their rights completely, but needed to be protected all the same.

Conversely, as regards national information rights, these are often found inconsistent with the four market freedoms on proportionality grounds by the ECJ.²⁶ In particular, in the field of misleading advertising, national information rights requiring clear and unambiguous information are treated restrictively. In what boils down to an unrealistic assumption about market behaviour, consumers are for example supposed to recognise objectively wrong manipulative advertising statements²⁷ or foreign-language labels similar to well-known domestic products.²⁸ In this jurisprudence, we seem to face the different model of a well-informed and intelligent consumer. As a result, consumer information requirements are construed widely in *European* consumer contract law, whereas *national* consumer protection-based limitations on the basic freedoms in national unfair competition law are construed narrowly.²⁹ However, this distinction is by no means justifiable under private law justice considerations, as – in the words of Stefan Grundmann – one should not require a lower degree of attention from a consumer entering into contractual negotiations than from a consumer reading advertisements in his armchair.³⁰

24 See generally, H. Fleischer, *Informationsasymmetrie im Vertragsrecht* (München: Beck, 2000).

25 Case C-473/00 *Cofidis*, ECR 2002, I-10875.

26 On the relationship of contract law and the market freedoms, see O. Remien, *Zwingendes Vertragsrecht und Grundfreiheiten des EGV* (Tübingen: Mohr, 2003).

27 Case C-470/93, *Mars*, ECR 1995, I-1923. In this decision, the ECJ argued that a consumer would not confuse the (larger) size of a „10% more“ advertisement on a chocolate package with the actual (smaller) increase in quantity.

28 Case C-369/89, *Piagème*, ECR 1991, I-2971.

29 This finding has recently also been confirmed by H. Unberath and A. Johnston, *The Double-Headed Approach of the European Court concerning Consumer protection*, *Common Market Law Review* 44 (2007), 1237.

30 S. Grundmann, *Europäisches Schuldvertragsrecht* (Berlin; New York: De Gruyter, 1999) 270, n 106. For a similar critique, see H. Fleischer, ‘Vertragsschlußbezogene

The background of this jurisprudence seems to be that national consumer protection instruments including information obligations have been recognised as valid limitations of the basic freedoms in the famous *Cassis de Dijon*³¹ jurisprudence. Therefore, a wide recognition of national information rights would reduce the *effet utile* of the market freedoms. At the end of the day, the different treatment of national and European information rights shows that the ECJ's true concern is not a uniform model of a consumer and not even consumer protection as such, but the optimisation of Community law irrespective of its contents and objectives. Thus, a coherent vision of consumer information in particular and private law in general is sacrificed to a "schematic effect utile" concept. Obviously, such a concept prevents private law from adequately fulfilling its core task of realising justice between the parties.

Similar tendencies may be shown in the Court's support of a wide notion of maximum harmonisation in product liability and unfair competition law. The jurisprudence in this fields anticipates as it were the likely effects of maximum harmonisation in the ambit of the CRD. Regarding product liability law, the 1985 Directive³² does not contain a minimum harmonisation clause, though most commentators read such a clause into it on account of its framework character and the large number of gaps.³³ This is fully plausible as, just as with the CRD, the fragmentary texture of the Directive cannot reasonably be expected do justice to this complex and socially highly sensitive matter governed by different national regulatory traditions.³⁴ However, in three cases decided on 25 April 2002, the ECJ found that no minimum harmonisation principle could be read into the Directive in the light of its paramount goal of establishing uniform regulation of product liability – so as to prevent market distortions when undertakings in one State are forced to pay more to victims of dangerous prod-

Informationspflichten im Gemeinschaftsprivatrecht' (2000) *Zeitschrift für Europäisches Privatrecht* 791.

31 Case 120/78, *Rewe/Bundesmonopolverwaltung für Branntwein*, ECR 1979, 649.

32 Dir 85/374/EEC, OJEC 1985 L 210/29.

33 See G. Brüggemeier, 'Produkthaftung und Produktsicherheit' (1988) 152 *Zeitschrift für das Gesamte Handelsrecht* 511, 531, 534; G. Howells, 'Product Liability – A History of Harmonisation', in A. Hartkamp et al (eds), *Towards a European Civil Code* (Demeter: Kluwer, 3rd ed forthcoming).

34 See H. Koch, 'Internationale Produkthaftung und Grenzen der Rechtsangleichung durch die EG-Richtlinie' (1988) 152 *Zeitschrift für das Gesamte Handelsrecht* 537; the incomplete character of the directive becomes visible also in its complex interplay with product safety law, see G. Howells, 'The Relationship between Product Liability and Product Safety – Understanding a Necessary Element in the European Product Liability Through a Comparison with the US Position' (1999-2000) 39 *Washburn Law Journal* 305.

ucts than in others.³⁵ In doing so, the ECJ deprived a Spanish plaintiff, whose health had been seriously affected by the transfusion of infected blood in a public hospital, of a claim for damages against the hospital existing under a Spanish product liability statute.³⁶ The reason for this was that – unlike under Spanish law which followed US law in this respect –, the victim can only sue the producer of the defective product, but in general not another member in the commercial chain – such as the hospital which had not produced the infected blood itself in this case. Alongside the Spanish case, the ECJ convicted France and Greece in a treaty infringement procedure as they had not transposed the Directive word by word into national law, but had tried to remedy some of its apparent shortcomings such as the minimum threshold required for the restitution of damages (*Selbstbeteiligung* in German, and *franchise* or *franchigia* respectively in French and Italian).³⁷

This jurisprudence sacrifices national consumer protection without even any visible gain for European industries. Indeed, the narrow scope of application of the European Directive and its many gaps render its objective to provide European undertakings with a uniform product liability regime absolutely illusory.³⁸ As a result, the ECJ has in this case petrified a nearly 20 year old

35 The rejection of this jurisprudence seems to be quasi unanimous among European commentators: See G. Viney, ‘L’Interprétation par la CJCE de la Directive du 25 Juillet 1985 sur la Responsabilité du Fait des Produits Défectueux’ (2002) I 177 *La Semaine Juridique* 1945; J. Calais-Auloy, ‘Menace européenne sur la jurisprudence française concernant l’obligation de sécurité du vendeur professionnel’ (2002) 31 *Recueil Le Dalloz* 1458; A. Palmieri and R. Pardolesi, ‘Difetti del prodotto e del diritto privato europeo’ (2002) *Il Foro Italiano* IV 296; Ch. Joerges, *Zur Legitimität der Europäisierung des Privatrechts. Überlegungen zu einem Recht-Fertigungs-Recht für das Mehrebenensystem der EU*, EUI Working Paper LAW 2003/2 30 et seq; M.-E. Arbour, ‘Compensation for Damage Caused by Defective Drugs: European Private Law between Safety Requirements and Free-Market Values’ (2004) 10 *European Law Journal* 87.

36 Case C-183/99 *González Sánchez* [2002] ECR I-3901 (ECJ).

37 Cases C-52/00 *Commission v France* [2002] ECR I-3827 (ECJ) and C-154/00 *Commission v Greece* [2002] ECR I-3879 (ECJ).

38 See the telling comment by a leading German practitioner: J. Schmidt-Salzer and H. Hollmann, *Kommentar EG-Richtlinie Produkthaftung*, vol 1 (Heidelberg: Recht und Wirtschaft, 1986) Einl IV, 135 et seq, n 73 et seq, 79:

‘Hält man sich die Milliarden und Abermilliarden von Produkten vor Augen, die jährlich innerhalb des Gemeinsamen Marktes veräußert werden, ist bereits bei Beschränkung auf den in der Richtlinie geregelten Bereich (Personenschäden, private Sachschäden) betriebswirtschaftlich der Nachweis, daß innerhalb der Europäischen Gemeinschaft die unterschiedlichen Haftungsregeln die Warenströme beeinflussen, abwegig. Dazu sind die Unterschiede des Haftungsrechts letztlich zu gering und treten Produkthaftungsansprüche relativ viel zu selten auf. Die Beobachtung des An-

piece of legislation already infused with massive shortcomings. In doing so, it prevents Member States from adequately fulfilling their responsibility of providing industry and consumers with a socially and economically adequate and consistent product liability law.³⁹

A similar development has in the meantime also taken place in regard of the 2005 Unfair Commercial Practices Directive which explicitly adheres to the principle of maximum harmonisation. In the case *VTB-VAB v. Total Belgium* of 23/4/2009 the Court was confronted with a provision of Belgian unfair competition law which established a presumption of unlawfulness of combined offers of unrelated products (a certain product may only be bought or is received for free by a consumer when another product is bought). According to the schematic reasoning of the ECJ, the national rule was in flagrant violation of EC law as it fell in a matter exhaustively regulated by the Directive and as it did not respect the maximum harmonisation principle:⁴⁰

“(...) In the first place, Article 54 of the 1991 Law lays down the principle that combined offers are prohibited, notwithstanding the fact that such practices are not referred to in Annex I to the Directive. As has been pointed out in paragraph 56 of the present judgment, that annex exhaustively lists the only commercial practices which are prohibited in all circumstances and accordingly do not have to be assessed on a case-by-case basis. Thus, the Directive precludes

teils, den (unter Ausklammerung 1. der US-Schäden, 2. der gewerblichen Sachschäden und 3. der Produkt-Vermögensschäden die sog. konventionellen Produktschäden innerhalb der Betriebshaftpflichtversicherung haben, belegt eindeutig, daß es sich im Vergleich zu den Warenvolumina um eine quantité négligeable handelt (...) Die vorgenannten Beispiele belegen, daß ein Unternehmen (...) schlichtweg fahrlässig handeln würde, wenn es seinen Warenstrom-Dispositionen und -Kalkulationen die Haftungsregelungen der EG-Richtlinie zugrunde legen würde.’

Paradoxically, it seems to be exactly the ineffectiveness of the directive which has made it an attractive model for legislators worldwide, who want to boast a high consumer protection standard without effectively limiting their industries. See M. Reimann, ‘Product Liability in a Global Context: the Hollow Victory of the European Model’ (2003) *European Review of Private Law* 128.

39 It may be added that this case law also leads to a different treatment of various Member States: Art 13 of the directive explicitly allows the application of competing national liability regimes based on contract or tort. However, in the lack of legislative action, national courts for example in Germany have developed traditional tort law into a fully fledged product liability regime. As a result, those Member States which - more or less by chance - have developed a product liability regime formally still based on fault (though in practice converted into one close to liability without fault by the inversion of the burden of proof and similar judicial devices) would probably be allowed to keep it whereas others such as Spain, whose legislatures have opted for a strict liability regime, have to accept the primacy of the directive.

40 C-261/07 (*VTB-VAB v. Total Belgium*) of 23/4/2009 at no. 60ff.

the system implemented by Article 54 of the 1991 Law in so far as that article prohibits, generally and pre-emptively, combined offers without any verification of their unfairness in the light of the criteria laid down in Articles 5 to 9 of the Directive. Next, by operating in that manner, a rule of the type at issue in the main proceedings runs counter to the content of Article 4 of the Directive, which expressly prohibits Member States from maintaining or adopting more restrictive national measures, even where such measures are designed to ensure a higher level of consumer protection (...)

Admittedly, the result of this decision is much less worrying than the product liability decisions. Yet in terms of legal reasoning, the outcomes are identical: under the Court's schematic interpretation of the pre-emption doctrine, the content of national measure and its contribution to justice among the parties are irrelevant, only the occupation of the legal terrain by European measures counts. With such decisions, the Court largely contributes to an instrumentalist conception of European legislation which places the *effet utile* of market integration above all – including above justice among the parties.

Conclusion

As this contribution has demonstrated, the current disaggregation of European private law in three lives becomes apparent not only in the “mutual non-consideration” of the CFR and European consumer contract law but, what is far worse, also in the shift of European legislation and jurisprudence from a classic justice-based concept of private law to a single regulatory framework for businesses. Thus, the European system of multi level governance is complemented by an internal fragmentation of European private law, which amounts to a sort of “multi-compartment governance”. What should be the consequences of this situation? Our answer is grim: A European regime which is not able to safeguard its internal coherence and orientation towards justice as the key objective of private law does not enjoy the legitimacy to set aside and disintegrate national private laws, which still constitute more or less well functioning systems upholding justice among citizens. Instead, European private law should resort to classic justice-oriented legal instruments which do not suffer from market integration biases. An enhanced CRF institutionally legitimised by a European Law Institute could be such an instrument. Conversely, the imposition of maximum harmonisation and the subversion of national social standards as in product liability law should stop.

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